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REPORTS

OF CASES RELATING TO

MARITIME LAW:

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom.

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28th Feb. 1913. Held, that the words *force majeure* covered the delay occasioned by the consequential results of the coal strike and also breakdown of machinery, but did not include the other matters claimed. (K.B. Div. Ct.) *Matsoukis* v. *Priestman and Co.* 68

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CARRIAGE OF GOODS.

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2. *Charter-party—Demurrage—Strike—Charterer's refusal to load.*—The terms of a charter-party provided (*inter alia*) that the charterer should load a cargo within a period of ninety-six running hours after notice of readiness to receive cargo, and to pay demurrage if the ship was delayed beyond her loading time. The parties mutually exempted each other from liability for time lost through strikes preventing or delaying the working, loading, or shipping of the cargo. A strike of engineers was in progress when the steamer arrived at the port of loading and notice of readiness to load was received, and the shipowners refused to sign on engineers at the terms they were demanding. On the day after notice of readiness to load was given, the charterer asked the shipowners to give him an assurance that the engineers would be signed on and that the ship would sail as soon as possible, which the shipowners declined to give. When the shipowners received a full complement of engineers fifteen days after the ship was ready to receive the cargo, the charterer commenced loading. In an action by the shipowners to recover demurrage in respect of the detention of the ship for 413 hours beyond her loading time: Held, that the charterer was liable, as the existence of a strike which might affect the time of sailing did not prevent the cargo from being loaded, nor excuse the charterer from his obligation to load within the period provided by the charter-party. (Bailhache, J.) *Ropner and Co.* v. *Ronnebeck* 47

3. *Charter-party—"Thirds" or sharing system—Owner and master—Loss of cargo through unseaworthiness of vessel—Liability of owner—Position of master.*—A ketch was owned by two co-owners, and worked on the basis that the master took two-thirds of the gross freights, out of which he paid the mate and the crew, the provisions, and expenses of the voyage. The owners took one-third of the gross freights, subject to deductions for port dues. The owners provided for the upkeep and insurance of the vessel. The ketch loaded a cargo under a charter-party made by the master, which cargo was lost, as was alleged by the owners thereof, through the unseaworthiness of the vessel. An action was accordingly brought by the owners of the cargo against one of the co-owners of the ketch. It was decided by Pickford J. (12 Asp. Mar. Law Cas. 501; 110 L. T. Rep. 776) that the allegation of the plaintiffs that the ketch was unseaworthy at the time when she sailed was well-founded; and that the condition of the ketch was not due to the loading berth at which she was moored being defective or dangerous. But Pickford J. decided that the contract of charter-party was made by the master personally; and that the defendant was therefore not liable. The plaintiffs appealed. Held, that the findings of Pickford, J. in favour of the plaintiffs on the issues of unseaworthiness and condition of the vessel were abundantly supported by the evidence, and could not therefore be disturbed by the Court of Appeal. But held, that there was a contract of charter-party between the plaintiffs and the defendant, although there was no reference therein nor in the bill of lading to the "owner" of the vessel; that the master was not bailee of the vessel, but was the agent or servant of the owner; and that the real control of the vessel rested with the defendant, and not with the master. *Bernard* v. *Aaron* (9 Jur. N. S. 470) distinguished. *Steel* v. *Lester* (37 L. T. Rep. 642; 3 C. P. Div. 121) applied. Decision of Pickford, J. (12 Asp. p. 501) on this point reversed. (Ct. of App.) *Associated Portland Cement Manufacturers* (1900) *Limited* v. *Ashton* 40

4. *Freight—Assignment — Disbursements — Legal and equitable assignment—Practice at port of Cardiff.*—The plaintiffs, H. and Co., carrying on business at Cardiff as ship's brokers and agents, sued the defendants for 317*l.* 3*s.* 4*d.* as freight payable for the carriage of goods from Riga to Cardiff per the steamship *C.*, a German ship, for which the plaintiffs were acting as agents, the defendants being the consignees of a portion of the cargo. The ship arrived at Cardiff on the 20th July 1914. The freight could not be ascertained until the cargo had been measured, and the plaintiffs, following the practice of the port of Cardiff, took the master of the *C.* a document in the following terms, which was signed by the master: "Cardiff, 20th July 1914.—Dear Sirs,—I hereby authorise Messrs H. and Co., Cardiff, to

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collect the freight due to my steamer the steamship *C.* on the cargo of timber from Riga on my steamer." On the strength of that document the plaintiffs made disbursements on behalf of the ship and collected some of the freight, some of which they remitted to Germany, after which a balance was still due to the plaintiffs in respect of disbursements. The plaintiffs gave the defendants due notice of the master's letter, which they relied upon as an assignment. Held, that the document was not an assignment at all; but if it were it was at most an equitable assignment, and, as the assignees had not been joined, the plaintiffs were not entitled to recover. (Bailhache, J.) *H. G. Harper and Co.* v. *John Bland and Co. Limited* 49

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6. *Charter-party — Marine insurance — War risk "for charterer's account"—Charterer's duty to insure.*—The plaintiffs were the owners of a Dutch steamship, which was chartered by the defendants under a charter-party which provided (*inter alia*) that the owners were to pay and provide for insurance, that the charter-party was not to be construed as a demise of the ship, and that the owners were to remain responsible for insurance. The charter-party also contained the following written clause: "War risk, if any required, for the charterers' account. It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy." On the 21st Sept. 1914, while on a voyage from Portland, Oregon, to Ireland with a cargo of wheat, the ship was sunk by a German cruiser. In an action by the plaintiffs to recover damages for the defendants' failure to insure the steamer against war risks after having been requested by the plaintiffs to do so: Held, that the defendants were liable, as the business meaning of the words "charterers' account" were that the charterers were bound to provide and pay for a war risk policy. (Bailhache, J.) *Holland Gulf Stoomvaart Maatschappij* v. *Watson, Munro, and Co. Limited.* (See No. 17 below.) 92

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7. *Contract—C.i.f.—Tender of bill of lading with or without policy of insurance after outbreak of war—Buyer not bound to accept.*—Certain beans were sold under a c.i.f. contract before the outbreak of war between Germany and England to be shipped in a German bottom from China to Naples. The sellers and buyers were English firms. The price was to include freight as per bill of lading and insurance—payment net cash in London on arrival of goods at port of discharge in exchange for bill of lading and policies; but payment to be made in no case later than three months from date of bill of lading. The beans were shipped before the war, after which the vessel took refuge in a neutral port. The sellers sought to recover (in one case) on a tender of the German bill of lading, and (in another case) on a tender of a German bill of lading and a German policy of insurance. Held, that after the outbreak of war the tender of the above documents was in neither case good tender. (Scrutton, J.) *Arnhold, Karberg, and Co.* v. *Blythe, Greene, Jourdain, and Co. Limited; Theodor Schneider and Co. v. Burgett and Newsam.* (See No. 13 below.) 94

8. *Bill of lading—Express contract of liability for unseaworthiness — Limitation of time for making claims—Whether limitation applies in case of unseaworthiness — Transhipment of goods.*—The indorsees of bills of lading sued shipowners for breach of contract and for damages for injury to goods carried. The goods were shipped upon one ship at one place, and later at another transhipped into another ship. The first ship arrived on the 13th April 1912, and the second on the 23rd April. The goods were damaged by the unseaworthiness of the first ship. Clause 3 of the bill of lading provided for possible transhipment of the goods. Clause 12 provided as follows: "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." Clause 14 provided contractually for liability for unseaworthiness. No claim was made in respect of the goods shipped within the time limited by clause 12. Bailhache, J. held that as the first ship was unseaworthy the time limitation clause did not apply. Held, by the Court of Appeal, that as there was an express and not an implied contract in the bill of lading for liability for unseaworthiness clause 12 applied, and the shipowner was protected by it as regards the goods arriving by the first ship, which was the steamer indicated in the clause. But held by Pickford and Bankes, L.JJ. that the shipowner had not protected himself by clear and unambiguous words as regards the goods arriving by the second ship, to which ship part of the goods had been transhipped from the first, and there was consequently no answer to the claim of the indorsees in respect of the goods which arrived by the second. *Tattersall* v. *National Steamship Company* (5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297) and *Morris* v. *Oceanic Steam Navigation Company Limited* (16 Times L. Rep. 533) discussed. Order of Bailhache, J. varied. (Ct. of App.) *Bank of Australasia* v. *Clan Line Steamers Limited* 99

9. *Charter-party—Loss of time—Prevention of efficient working—Cesser of hire.*—A charter-party contained the following clause: "In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than forty-eight running hours, the payment of hire shall cease until she be again in an efficient state to resume her service." On

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the construction of the clause: Held, that for losses of time of less than forty-eight hours no claim for cesser of hire could be made; but where, from any of the causes named in the charter-party, there were losses of time exceeding forty-eight hours, the charterer was entitled to cesser of hire for the whole of the time so lost. Decision of Bailhache, J. (12 Asp. Mar. Law Cas. 515; 111 L. T. Rep. 410; (1914) 3 K. B. 156) affirmed. (Ct. of App.) *Meade, King, Robinson, and Co.* v. *Jacobs and Co. and others* 105

10. *Trading with the enemy—C.i.f. contract—Buyers and sellers carrying on business in England—Tender of documents after outbreak of war—Goods to deliver at Hamburg—Seller not entitled to force acceptance of documents involving trading with the enemy.*—The claimants, who were English merchants of Liverpool, in May 1914 sold certain Chilian honey to the respondents who were also English merchants at Liverpool, to be shipped on a German-owned steamer and delivered at Hamburg, terms c.i.f. cash in Liverpool against documents. The honey was shipped on the 28th June and the shipment was declared on the 28th July; but the ship was interned at a neutral port shortly after the outbreak of war. On the 4th Aug. war was declared with Germany, and on the 5th Aug. a proclamation was issued prohibiting trading with the enemy, and on the same day the shipping documents were tendered. The respondents having refused payment on the documents: Held, that the buyers were justified in refusing the tender of the documents on the ground that the delivery of the documents, including the bill of lading, which was the document of title to the goods, and the payment of the price by the buyers, would have been a carrying out of the contract, when a dealing with goods constituting a trading therein forbidden by the proclamation, and that the contract of sale had become dissolved by the war, because its further performance by either party would involve illegal acts. Decision of Atkin, J. (12 Asp. Mar. Law Cas. 591; 112 L. T. Rep. 298; (1915) 1 K. B. 365) affirmed. (Ct. of App.) *Duncan Fox and Co.* v. *Schrempft and Bonke*... 131

11. *Demurrage—Strike clause, construction and effect of—Delay.*—The appellants chartered the steamer *G.* to carry a cargo of coal, of which they were the consignees, from B. Dock to V. C. in the Argentine. By clause 8 of the charter-party the cargo was to be taken from alongside by the consignees at the port of discharge free of expense and risk to the steamer at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided the steamer could deliver at that rate. If the steamer were longer detained the consignees were to pay demurrage at the rate therein specified, "time to commence when the steamer is ready to unload and written notice given whether in berth or not. In case of strikes, lock-outs, civil commotions or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging such time is not to count unless the steamer is already on demurrage." The steamer arrived at V. C. and notice of readiness to discharge was given on the 12th Jan. 1912. At the date of her arrival there was a strike of engine drivers and stokers at the port, which continued until the 15th Feb. 1912, but there was a partial resumption of the work of discharging coal-laden steamers at the port between the 27th Jan. and the 15th Feb., and during that period there were discharged from the various steamers in the port delayed by the strike 6269 tons of coal=6¼ normal days' work, the normal rate of discharge from the four berths in the port being 1000 tons per day. The *G.* did not get into berth till the 1st March, and completed her discharge on the 23rd March. Held, that the words "such time" in clause 8 of the charter-party meant the time for which the discharging was actually prevented or delayed by the strike, and had no application to delay in getting a berth in consequence of a strike having delayed the discharging of other ships; and that the 6¼ could be counted by the owner as lay days. *London and Northern Steamship Company Limited* v. *Central Argentine Railway Limited* (12 Asp. Mar. Law Cas. 303; 108 L. T. Rep. 527) approved. Decision of Court of Appeal affirmed. (H. of L.) *Central Argentine Railway Limited* v. *Marwood* 153

12. *Charter-party—Sale of vessel after date of charter-party—Tender of vessel—Refusal of charterers to load—Effect of sale.*—On the 15th Sept. 1913, a vessel which formerly belonged to the claimants was chartered by the respondents to proceed to Odessa and load wheat or other grain for Rotterdam or Hamburg. While the vessel was discharging, before proceeding to Odessa, she was sold by the claimants, who duly notified the charterers of the sale. She was duly tendered for loading at Odessa, but the respondents refused to provide a cargo. In arbitration proceedings it was found as a fact that the claimants were ready and willing to perform their contract, and that they had duly tendered the vessel. On a case stated: Held, that there being a finding that both vendors and purchasers were ready and willing to perform all the obligations under the contract, the original owners were not precluded from carrying out the contract by the mere transfer of the ship with the benefit of the charter-party. Decision of Atkin, J. (13 Asp. Mar. Law Cas. 1; 112 L. T. Rep. 294; (1915) 1 K. B. 307) affirmed. (Ct. of App.) *Fratelli Sorrentino* v. *Buerger* 164

13. *Contract—C.i.f.—Tender of bill of lading with or without policy of insurance after outbreak of war—Buyers not bound to accept.*—Certain goods were sold under a c.i.f. contract before the outbreak of war between Germany and this country to be shipped in a German ship from China to Naples. The sellers and buyers were both English firms. The price was to include freight as per bill of lading and insurance, payment net cash in London on arrival of goods at port of discharge in exchange for bill of lading and policies; but payment to be made in no case later than three months from date of bill of lading. The goods were shipped before the war, after which the vessel took refuge in a neutral port. The sellers sought to recover (in one case) on a tender of a German bill of lading and an English policy of insurance and (in another case) on a tender of a German bill of lading and German policy of insurance. Held, that the documents were not such as the sellers were entitled to tender to obtain payment of the price of the cargoes shipped, the documents at the date of the tender not being valid and effective; and that therefore the sellers were not entitled to recover payment of the goods against the documents. Decision of Scrutton, J. (13 Asp. Mar. Law Cas. 94; 113 L. T. Rep. 185) affirmed. (Ct. of App.) *Arnhold Karberg and Co.* v. *Blythe, Green, Jourdain, and Co. Limited; Theodor Schneider and Co.* v. *Burgett and Newsam* 235

14. *Contract—Charter-party—Delivery of documents after outbreak of war—Goods in English ship captured by enemy—Whether documents properly tendered.*—The question of the validity of documents tendered depends upon their validity at the date of tender and not upon the question whether or not they comply with the contract and declaration. By a contract dated the 23rd June 1914 the plaintiffs sold to the defendants certain Manchurian Soya bean oil

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c.i.f. from Eastern ports to Antwerp. There were two ships concerned, the *G.*, an English ship, in respect of which the cargo was declared on the 3rd July, and the *U. R.*, a German vessel, the cargo in which was declared on the 31st July. At the outbreak of war the latter ship became the ship of an alien enemy. The relative bills of lading and insurance policy were never tendered, but the date of their tender was taken to be the 18th Aug. As to the *G.*, she and her cargo were seized by the enemy on the high seas and taken to Hamburg, so that at the time when the documents were tendered to the buyers the contract had become impossible owing to the seizure. Held, that, so far as the cargo on the German vessel was concerned, the tender of documents was bad; that as to the goods on board the English ship the tender of the documents was a good tender inasmuch as the performance of the contract between buyer and seller would not at the time have been illegal. There was no illegality in calling on the buyer to deliver at Antwerp, because if he could have got his ship to Antwerp it would have been perfectly legal. The buyers were therefore liable. (K. B. Div.) *Weis and Co. Limited* v. *Credit Colonial et Commercial* 242

15. *Charter-party — Time charter — Restraint of princes—Whether charterers relieved from hire —Whether commercial object of voyage frustrated.*—The commercial frustration of an adventure by delay means the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so ordinately postponed as that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time when they made the contract, and for the accomplishment of which object or objects the contract was made. In June 1914 a ship was chartered for two Baltic rounds. Having left Hull, laden with coal, she was sub-chartered for a voyage from Finland to Blyth, Northumberland. The hire of the steamship was paid by the charterers to the owners in advance up to the 14th Aug. On the 2nd Aug. the vessel was detained by the Russian Government, war having broken out on the 1st Aug. between Russia and Germany. On the 14th Aug. the owners directed the captain to remain in port at Kotka, and on the 28th Aug. the British Consul at the same place was directed to repatriate the crew, which was done. The charter-party contained a clause providing in what events payment of hire was to cease, but did not include restraint of princes, rulers, and people, although that was in the general exceptions clause. The hire was paid up to but not since the 14th Aug. 1914. Disputes having been referred, arbitrators, by a first award, found that in the circumstances no time hire was due, but subject to the opinion of the court as to the meaning of the words "restraint of princes," &c., in the charter-party. By a second award the arbitrators found that at no time between the 14th Aug. and the 20th Oct. 1914 was there any reasonable probability of the vessel proceeding on her chartered voyage, and that no voyage could have been undertaken between those dates which would not have involved risk of capture, and that the commercial adventure had been frustrated. Held, that the charterers were liable for hire; that the telegram of the owners directing repatriation of the crew did not amount to a withdrawal of the ship; that even if the vessel was detained by "restraint" that did not excuse payment of hire; and that in finding "frustration" as a fact the arbitrators had misdirected themselves, inasmuch as delay due to a cause contemplated and provided for by the charter-party, even though the delay itself is protracted beyond what might have been expected, does not amount to frustration of the adventure. (K. B. Div.) *Admiral Shipping Company Limited* v. *Weidner, Hopkins, and Co.* (See No. 49 below.) 246

16. *Charter-party—"Penalty for non-performance"—Limitation of liability—Construction.*—A charter-party contained the following clause: "Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight." Held, that this constituted a penalty clause and not a limitation of liability. (K. B. Div.) *Wall* v. *Rederiaktiebolaget Luggude* 271

17. *Charter-party—Marine insurance—War risk "for charterers' account"—Duty to insure.*—The plaintiffs were the owners of a steamship that was chartered by the defendants under a charter-party which provided (*inter alia*) that the owners were to pay and provide for insurance; that the charter-party was not to be construed as a demise of the ship; and that the owners were to remain responsible for insurance. The charter-party also contained the following written clause: "War risk, if any required, for charterers' account. It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy." On the 21st Sept. 1914, while on a voyage, the steamship was sunk by a German cruiser. The plaintiffs brought an action to recover damages for the defendants' failure to insure the steamer against war risk after having been requested by the plaintiffs so to do. Held, that on the true construction of the charter-party the charterers were to bear the costs of the insurance; but that the insurance was to be effected by the owners and not by the charterers. Decision of Bailhache, J. (*ante*, p. 92; 113 L. T. Rep. 178) reversed. (Ct. of App.) *Holland Gulf Stoomvaart Mattschappij* v. *Watson, Munro, and Co.* 279

18. *Time charter-party—Oil tank steamer—Period of charter unexpired—Ship requisitioned by Government as transport for troops—Structural alterations to adapt her for that purpose—Whether contract determined by act of Government.*—By a charter-party dated in May 1912 the owners of a ship designed to carry cargoes of oil in bulk agreed to let and the charterers agreed to hire the ship for the period of sixty calendar months commencing from the day at which the ship should be placed at the disposal of the charterers—which period would expire in Dec. 1917—to be employed in lawful trades for voyages between certain specified ports for the carriage of refined petroleum and (or) crude oil and (or) its products, as the charterers or their agents should direct. The charterers were to pay as freight a fixed sum of 1750*l.* per month. Under certain restrictions the carriage of other suitable cargo than oil was to be allowed. Power was conferred on the charterers to underlet the ship on Admiralty or other service, but without prejudice to the charter-party. There was an exception of (amongst other things) "restraints of princes, rulers, and people." The ship was requisitioned by the Government in Dec. 1914, and was for some time employed in carrying water. In Feb. 1915 she was altered by the Government to adapt her for the transport of troops. The charterers had paid and were willing to continue to pay the stipulated freight. In these circumstances the question arose whether the charterers were entitled to treat the contract as subsisting or whether the owners were right in contending that it was put at an end. Held, that the adventure on the part of the owners was that the ship should earn the freight for the entire term of the charter, the adventure

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on the part of the charterers being that they should have the use of the ship; that the adventure on the part of the owners had not been frustrated; and that it could not therefore be said that the entire adventure had been frustrated. Held, also, that the event which had happened was within the meaning of the exception "restraint of princes, rulers, and people." Decision of Atkin, J. affirmed. (Ct. of App.) Re *Arbitration between F. A. Tamplin Steamship Company Limited and Anglo-Mexican Petroleum Produce Company Limited.* (See No. 40 below.) 284

19. *Charter-party—Withdrawal by owners before expiration of term—Subsequent issue of writ for hire due—Whether withdrawal waived.*—A vessel was chartered in June 1914 for five months, at so much per month, payable in advance. On the 13th Aug., a month's hire being due and unpaid, the owners telegraphed to the charterers, saying that they withdrew the steamer pursuant to a clause in the charter-party. Half an hour later they issued a writ in an action to recover the month's hire. Arbitrators found as a fact that the ship was properly withdrawn, but they reserved for the opinion of the court the question whether the notice of withdrawal, if properly given, was withdrawn or waived by the subsequent conduct of the owners in issuing the writ. Held, that in the circumstances of the case the notice of withdrawal had been properly given, and that it had not been withdrawn by the subsequent conduct of the owners. (K. B. Div.) *Wulfsberg and Co.* v. *Owners of Steamship Weardale.* (See No. 29 below.) 296

20. *Charter-party—Exception of "restraint of princes"—Reasonable anticipation of restraint—Breach by shipowner—Liability—Measure of damages.*—A breach of contract is not excused by reasonable anticipation of the happening of an event which, if it happens, will excuse the performance of the contract. A charter-party excepted "arrests and restraints of princes." The shipowners refused to provide a ship which by the charter-party they had agreed to provide on the ground that there was reasonable apprehension that if they fulfilled the charter the ship would be seized by the King's enemies. Held, that the shipowners were guilty of a breach of the charter-party. The plaintiffs chartered a vessel from the defendants to enable them to fulfil a contract by which they agreed to buy a cargo of sulphate of ammonia from a Belgian firm. The defendants having failed to perform the charter, the plaintiffs were forced to repudiate the contract of sale and purchase, and as a result of arbitration paid the Belgian firm 4500*l.* In an action by the plaintiffs against the defendants for damages for breach of the charter: Held, that the plaintiffs could not recover from the defendants the 4500*l.*, such damage being too remote. The estimated profit of the venture, to carry out which the plaintiffs chartered the defendants' vessel, was 3800*l.* The defendants failed to provide their vessel in breach of the charter-party. In an action by the plaintiffs against the defendants for damages for the breach the defendants contended that, assuming there had been a breach, the plaintiffs had suffered no loss thereby, since, if the defendants had performed their part of the charter and provided a vessel, the vessel with the plaintiffs' cargo on board would inevitably have fallen into the hands of the King's enemies. Held, that the plaintiffs were entitled to recover the 3800*l.* from the defendants, since, although the arguments of the defendants might have been true, the vessel and its cargo would have been insured by the plaintiffs for a sum sufficient to cover the cost of the goods, the freight, the cost of insurance, and a reasonable sum for profit (which would not have been less than 3800*l.*), and that they would have had a claim on their underwriters as for a total loss. (K. B. Div.) *Mitsui and Co.* v. *Watts, Watts, and Co.* (See Nos. 31 and 52 below.) 300

21. *Bill of lading inconsistent with charter-party—Prevalence of bill of lading—"Perils of the sea."*—By a charter-party dated the 28th May 1913 the plaintiffs chartered the steamship *K.*, belonging to the defendants, to proceed to Grindstone Island, New Brunswick, and there load a cargo of timber and therewith proceed to certain ports (including Manchester) as ordered. Freight was to be payable on measurement of quantity delivered as ascertained at port of discharge, and all responsibility of the charterers under the charter was to cease as soon as the cargo was alongside. The mutual exceptions included "perils of the sea." The captain or his agent was empowered to sign bills of lading which, it was agreed, should be "conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The plaintiffs gave instructions that the vessel when loaded should proceed to Manchester. The *K.* was loaded from lighters, the contents of which was checked by surveyors as it left the shore. Owing to rough weather, a quantity of the timber fell between the lighter and the ship and was lost, but despite this the master of the vessel signed a bill of lading in this form: "Shipped in good order and well conditioned on board the steamship *Kylestrome*" the quantities of timber contained in the surveyors' reports. The result was that on arrival at Manchester the cargo was found to be short. In an action by the plaintiffs for damages for short delivery the defendants contended that the timber was lost through perils of the sea, since by the charter-party, the terms of which must be incorporated in the bill of lading, the responsibility of the charterer ceased as soon as the cargo was alongside, whereby the responsibility of the defendants commenced and the exception of "perils of the sea" came into operation. Held, that the words in the bill of lading, "shipped . . . on board the steamship *Kylestrome*," were inconsistent with the provisions in the charter-party that the cargo was only to be delivered alongside, and must prevail; that, in consequence, the exception of "perils of the sea" never came into operation, and the plaintiffs were therefore entitled to succeed. (K. B. Div.) *Crossfield and Co.* v. *Kyle Shipping Company.* (See No. 28 below.) 327

22. *Coaling contract—Exception of "Interference by war"—Necessity of suppliers to procure coal—Increased freights—Scarcity of ships—Refusal by suppliers to supply coal—Breach of contract—Liabilty.*—On the 5th Dec. 1914 a coaling contract was entered into between the plaintiffs, the owners of a line of steamships, and the defendants, a coaling company, by which it was agreed that the plaintiffs should take all the bunker coal they wanted at (*inter alia*) Algiers from the defendants, and that the defendants should supply all the coal normally needed by the plaintiffs at that port. The form of contract utilised was one in use before the outbreak of the war, and contained a clause allowing the defendants to cancel the contract if either Great Britain or France became engaged in war with any other Power. A slip, however, was pasted on the contract, which provided that, "notwithstanding the war clause in the contract, it is understood that the depots will supply during the present hostilities . . . and should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of the coals, this contract is subject to cancelment by suppliers." In Feb. 1915 the defendants refused to supply one of the plaintiffs' ships with coal at Algiers,

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and the plaintiffs were thereby put to expense in obtaining coal elsewhere. In an action by the plaintiffs for breach of contract the defendants contended that they were protected from liability by the exception clause in the contract and the added slip. It appeared that between Dec. 1914 and Feb. 1915 there was a great rise in freights between Cardiff and Algiers. The judge held that the word "supply" in the slip meant supply to the defendants at Cardiff, and not to the plaintiffs at Algiers, and was satisfied that if the defendants carried out the contract they would have had difficulty in chartering a vessel between these places at more than double the freights prevalent when the contract was made. Held, that since, to fulfil their contract, the defendants would not only have been put to extra expense, but would have had difficulty in obtaining ships, there was "interference" within the meaning of the slip, and that, therefore, the defendants were excused from liability. (K. B. Div.) *Scheepvaart Mattschappij Gylsen* v. *North African Coaling Company* 339

23. *Charter-party—Construction of—Cancellation if ship "commandeered."*—The plaintiffs were time charterers of a Greek steamer. The charter-party contained the following clause: "32 Should steamer be commandeered by the Greek Government this charter shall be cancelled." Whilst the steamer was at Marseilles discharging a cargo of coal for the charterers, on the 25th Sept. 1915, a notice was served upon her captain by the Greek Consul-General ordering him to proceed immediately to the Piræus, pursuant to an order of the Royal Greek Government. On the 27th Sept. the defendant gave to the plaintiffs formal notice of cancellation of the charter-party pursuant to clause 32. On the 11th Oct., and while the steamer was still at Marseilles, the Greek Government withdrew their notice of the 25th Sept. and released the ship. Held, that the defendant's vessel had been effectively commandeered by the Greek Government, which had taken control of the vessel, and that the charter-party was therefore cancelled. (Ct. of App.) *Capel and Co.* v. *Soulidi* 361

24. *Charter-party — Lay days — Completion of loading before expiration of lay days—Acceptance of dispatch money—Failure to free ship as soon as possible—Whether charterers liable in damages.*—By a charter-party dated the 1st Feb. 1915 a steamer was to be loaded at an Argentine port and to proceed therefrom as ordered by the charterers to a European port as port of discharge. Dispatch money at the rate of 15*l.* per day was payable for all time saved in loading, and the charterers had the right to keep the steamer for twenty-four hours after completion of loading for the purpose of settling accounts. The steamer was loaded nineteen days before the expiration of the lay or loading days, and in respect of the nineteen days the charterers received dispatch money. Owing to delay by the charterers in deciding as to the port of call, the steamer was kept waiting for the bills of lading and orders for three days. The shipowners claimed damages in respect of this delay, and in arbitration proceedings were awarded 300*l.*, being damages at the rate of 150*l.* for two days. Held, that, the loading time granted to the charterers not having been exceeded, the shipowners were not entitled to claim for demurrage or detention, but only to a return of the dispatch money as money paid for a consideration which had failed. (K. B. Div.) *Owners of Steamship Nolisement* v. *Bunge and Born.* (See No. 47 below.) 364

25. *Contract — Indemnity—Warehouseman—Issue of clean warrants—Lighterage—Damage to cargo in possession of lighterman—Warehouseman's liability to purchasers under warrants—Right to indemnity.*—In Nov. 1914 the defendants, who were grain merchants, had a cargo of wheat in the steamship *G.*, discharging in the S. Dock, London. The plaintiffs, who were wharfingers, carrying on business in the port of London, agreed to store the wheat. A lighterman was employed to lighter the wheat, and the defendants requested the plaintiffs to issue clean warrants for the wheat, making them deliverable to the defendants or their assigns by indorsement, so that they might sell the wheat. The plaintiffs duly made out the warrants, and the defendants sold the wheat to W. and Co., who came to take delivery of the wheat towards the end of Jan. 1915, when it was discovered that, owing to a leaky barge and exposure to the weather, some of the wheat was unsound, having become damaged before the delivery to the plaintiffs. The plaintiffs in consequence became liable on their warrants in damages to W. and Co. Scrutton, J. found that the lighterman was the agent of the defendants. In an action by the plaintiffs against the defendants claiming an indemnity: Held, that the plaintiffs having issued the warrants at the request of the defendants, there was an implied contract by the defendants to indemnify the plaintiffs for the loss, and the defendants were therefore liable. Decision of Scrutton, J. affirmed. (Ct. of App.) *Groves and Sons* v. *Webb and Kenward* 386

26. *Carriage by direct route—Liberty to call at intermediate port—Exception of King's enemies—Deviation to intermediate port not usually visited by owners' ships—Destruction by enemy vessel—Liability of owners.*—In Nov. 1914 the defendants, a steamship company, contracted to carry a cargo of wool from New Zealand to London in their steamship. The bills of lading provided for "Direct service between New Zealand and London," and contained these two clauses: "Clause 1. With liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies." Clause 3. "The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat and reship and forward the same at the owner's expense, but at merchant's risk." The exception clause excepted the "King's enemies." Besides the wool the steamship carried a quantity of frozen meat for delivery at Havre. The vessel kept a direct course from New Zealand to London until she reached the Casquets, when she turned and made for Havre, which was not one of the usual ports visited by the defendants' steamships. Before reaching Havre she was sunk by a German submarine. The plaintiffs, who were indorsees and holders of the bills of lading under which the wool was shipped, brought an action against the defendants claiming damages for breach of contract. Held (1) that clause 3 of the bills of lading did not avail the defendants, since it only applied when transhipment of the cargo from the *T.* to another vessel had taken place, and, even if that were not so, the bills of lading would be ambiguous (*Elderslie Steamship Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93); (2) that the provisions of clause 1 did not constitute a defence to the plaintiffs' claim, since, assuming that Havre was an intermediate port within the meaning of the clause, when the route and ports of call of a line of steamships had become stereotyped

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mere general words in the owners' own bill of lading giving liberty to call at intermediate ports would not justify their calling at some entirely fresh intermediate port; (3) that after deviation the defendants were only common carriers and were not protected by the common law exception of the King's enemies, since in deviating they were breaking their contract with the plaintiffs and not fulfilling it; and (4) that it was unnecessary for the plaintiffs in order to substantiate their claim to show that the natural and probable result of deviating to Havre was that the *T.* would be sunk by hostile craft. The plaintiffs were, therefore, entitled to judgment. (K. B. Div.) *James Morrison and Co. Limited* v. *Shaw, Savill, and Albion Company Limited.* (See No. 46 below.) 400

27. *Demurrage—Certain rate at port of loading—Restricted liability of charterers—"Same rate to apply at port of discharge"—Liability of charterers not thereby restricted at port of discharge—"Working days of twenty-four hours each."*—By a charter-party dated the 13th April 1915 the plaintiffs chartered their vessel, the *O.*, to an American export company to carry a cargo of 6350 tons of grain from Newport News to Avonmouth. By a contract of sale the ownership of the cargo passed to the defendants. The charter-party and the bill of lading (which was to complete and supervene the charter-party) provided that the vessel should "be loaded according to berth terms, and with customary berth dispatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage [at a certain rate] . . . provided that such detention shall occur by default of charterers or their agents, and same rate of demurrage to apply at port of discharge," and further, that she should discharge at Avonmouth, "in accordance with the rules of the Bristol Channel and West of England Corn Trade Association." It was also provided that the steamer might discharge at all hours when the customs authorities would allow her to do so, provided that any extra expense in working at night or on Sundays should be borne by the party ordering the work. The rules of the Bristol Channel and West of England Corn Trade Association provided that a steamer carrying a cargo of 6350 tons should be allowed eight "working days of twenty-four hours each" (Sundays excluded) to discharge. The *O.* arrived off Avonmouth at 8.15 a.m. on Tuesday, the 6th July, and by the terms of the charter-party and bill of lading the lay days began at that time. The discharge was finished at 5 p.m. on the 23rd July. The plaintiffs claimed demurrage in respect of eight days nine hours, alleging that (allowing for exclusion of Sunday, the 11th July) the lay days ended at 8.15 a.m. on the 15th July. Held, (1) that the provision that the same rate of demurrage should apply at the port of discharge as at the port of shipment did not necessarily imply that the liability of the charterers was restricted at the port of discharge as at the port of shipment; and (2) that "a working day of twenty-four hours" meant a period of twenty-four hours commencing at the time when the ship was ready to discharge, excluding Sundays and certain other excepted days. Judgment was therefore entered for the plaintiffs. (Scrutton, J.) *Orpheus Steam Shipping Company* v. *Bovill and Sons* 404

28. *Bill of lading—Bill of lading "conclusive evidence of quantity delivered to ship as stated therein"—Statement in bill of lading that goods were "shipped on board"—Short delivery—Estoppel—Authority of master—"Perils of the sea."*—By a charter-party dated the 28th May 1913 the steamship *K.*, belonging

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to the defendants, was chartered to proceed to Grindstone Island, New Brunswick, and there load a cargo of timber and therewith proceed to certain ports (including Manchester) as ordered. Freight was to be payable on measurement of quantity delivered as ascertained at port of discharge, and all responsibility of the charterers under the charter was to cease as soon as the cargo was alongside. The exceptions included "perils of the sea." The captain or his agent was empowered to sign bills of lading which, it was agreed, should be "conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The charterers gave instructions that the vessel when loaded should proceed to Manchester. The *K.* was loaded from lighters, the contents of which was checked by surveyors as they left the shore. Owing to rough weather, a quantity of the timber fell between the lighters and the ship and was lost, but despite this the master of the vessel signed a bill of lading in this form: "Shipped, in good order and well conditioned, on board the steamship *Kylestrome*" the quantities of timber contained in the surveyors' reports. The result was that on arrival at Manchester the cargo was found to be short. In an action by the plaintiffs, who were indorsees of the bill of lading, for damages for short delivery the defendants contended that the timber was lost through perils of the sea, since by the charter-party, the terms of which must be incorporated in the bill of lading, the responsibility of the charterer ceased as soon as the cargo was alongside, whereby the responsibility of the defendants commenced and the exception of "perils of the sea" came into operation. Held, that the defendants were bound by the statements in the bill of lading that the whole of the timber had been shipped on board, and could not give evidence that certain portions of the timber had been lost after they had been put into lighters, but before they had been received on board. Lishman *v.* Christie (6 Asp. Mar. Law Cas. 186; 57 L. T. Rep. 552; 19 Q. B. Div. 333) followed. Judgment of Bailhache, J. (*ante*, p. 327; 114 L. T. Rep. 743) affirmed. (Ct. of App.) *Crossfield and Co.* v. *Kyle Shipping Company* 410

29. *Charter-party—Withdrawal by owners before expiration of term—Subsequent issue of writ for hire due—Whether withdrawal waived.*—A vessel was chartered in June 1914 for five months at so much per month, payable in advance. On the 13th Aug., a month's hire being due and unpaid, the owners telegraphed to the charterers, saying that they withdrew the steamer pursuant to a clause in the charter-party. Half an hour later they issued a writ in an action to recover the month's hire. Arbitrators found as a fact that the ship was properly withdrawn, but they reserved for the opinion of the court the question whether the notice of withdrawal, if properly given, was withdrawn or waived by the subsequent conduct of the owners in issuing the writ. Held, on the facts, that notice of the withdrawal of the steamer from the service of the charterers had been properly given by the owners, and that the subsequent conduct of the owners did not constitute a waiver of that notice. Decision of Bailhache, J. (reported *ante*, p. 296; 114 L. T. Rep. 371) affirmed. (Ct. of App.) *Wulfsberg and Co.* v. *Owners of Steamship Weardale* 416

30. *Contract—Provision of ship—Exception of "public enemies and restraint of princes"—Outbreak of war—Failure to provide ship—Liability of contractor.*—In 1913 the defendants, steamship owners, contracted to provide a steamship (to be nominated) in Aug.-Sept. 1915 to carry phosphate from Florida to Delfzyl, in

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Holland, up the river Ems. The exceptions clause included "public enemies and restraint of princes." In Aug.-Sept. 1915, during the continuance of a state of war between Great Britain and Germany, the Germans had assumed full control of the fairways of the Ems. All vessels bound for Delfzyl were boarded by them and compelled to take a German pilot. The ship's papers were overhauled or liable to be overhauled, and the channel was mined. Feights had risen since 1913 from about 13s. 6d. to three or four times as much. The defendants in these circumstances refused to tender a vessel, maintaining that they need only nominate one of their own vessels and, having done so, to rely upon the exceptions clause in the contract as they were prevented from performing the contract by "public enemies and restraint of princes." The plaintiffs, in an action for breach of the contract, argued that the exceptions clause did not come into operation until a steamer was nominated. Held, that as the defendants contracted not as owners, but as contractors, it was not sufficient for them merely to nominate one of their own vessels and not to try to procure another steamer in the market; but that, on the other hand, it was not necessary that a steamer should have been nominated for the exceptions clause to come into operation, since such a conclusion would leave the defendants without excuse if the operation of the exception were such that it was impossible to procure any steamer which could, or would, undertake the voyage. The German control of the Ems shut out from the market not only the defendants' own steamers, but also the ships of Great Britain and her allies, amounting probably to more than three-quarters of the tonnage available but for the excepted peril. Neutral shipowners would have been very reluctant of getting their ships under German control when proceeding under an English charter-party, and the cargo would probably have been seized by the Germans with the result that no freight would have been earned. The rate of insurance (if insurance had been possible) would have been extremely high. The defendants would have had to prepay the freight, or pay the premium, or run the risk themselves, or to have paid the shipowner such a freight as would have enabled him to cover the risk or induce him to run it. Held, that, even leaving out of consideration the general and enormous rise in freights, it would be wholly unreasonable to expect the defendants to pay large sums of money or to run big risks, or both, in order to deprive themselves of the protection of an exception inserted in the contract on their behalf. Dictum of Esher, M.R. in Crawford and Rowat *v.* Wilson, Sons, and Co. (1. Com. Cas. 277, at p. 280) applied. (Bailhache, J.) *Phosphate Mining Company and Coronet Phosphate Company* v. *Rankin, Gilmour, and Co.* 418

31. *Charter-party—Exception of "restraint of princes"—Reasonable anticipation of restraint—Breach by shipowner—Liability—Measure of damages.*—The plaintiffs chartered a vessel from the defendants, who were shipowners, to enable them to fulfil a contract by which they agreed to buy a cargo of sulphate of ammonia from a Belgian firm. The charter-party excepted "arrests and restraints of princes," and provided that the penalty for non-performance should be proved damages not exceeding the estimated amount of freight. The defendants refused to provide a ship which by the charter-party they had agreed to provide, upon the ground that there was reasonable apprehension that if they fulfilled the charter the ship would be seized by the King's enemies. In these circumstances the plaintiffs were compelled to repudiate their contract with their sellers, and paid them, as the result of arbitration proceedings, 4500*l.* for so doing. In an action by the plaintiffs against the defendants for damages for breach of the charter: Held, that the defendants were guilty of a breach of the charter-party by not sending a vessel to load, but that as regards the amount of damages the proper amount to fix was the difference between the price which would have been realised by the sale of the goods in Japan at or about the time the vessel should under ordinary circumstances have arrived and the cost of the goods at the port of loading at the time of shipment together with the cost of freight and insurance, and that the penalty clause had no reference to general damages. (Ct. of App.) *Mitsui and Co. Limited* v. *Watts, Watts, and Co. Limited.* (See No. 52 below.) ... 427

32. *Charter-party — Restraint of princes — Admiralty requisition—Liability of charterers for hire—Withdrawal of vessel.*—A charter-party contained an exception clause which included restraint of princes, and also provided that the owners might withdraw the vessel for non-payment of hire. During the currency of the charter-party the vessel was requisitioned by the Admiralty for a period of about six months, for which period the charterers refused to pay the hire. The owners threatened to withdraw the vessel, whereupon the plaintiffs (the charterers) brought an action claiming an injunction to restrain the defendants from withdrawing the vessel, in which the owners counterclaimed for hire during the period of the requisition. Held, that the owners were not entitled to withdraw the vessel, but the plaintiffs were liable to pay the charter-party hire to the owners during the period of the requisition, they receiving the hire paid by the Admiralty. (Sankey, J.) *Modern Transport Company Limited* v. *Duneric Steamship Company Limited.* (See No. 41 below.) 434

33. *Contract—Sale—Two buyers purchase two parcels from same cargo—Parcel intended for one buyer delivered to lighter of other buyer—Innocent mistake—Title to goods—Sale of Goods Act* 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 18, 62 (4).—From a cargo of oats in bulk while in transit 500 quarters were sold to D. and 500 quarters to S. Both parties instructed the same lighterman to take delivery of their respective parcels of oats on their behalf. The lighterman, intending to take delivery of the parcel sold to S., sent a lighter to the vessel. The lighter was loaded, but, through a misunderstanding, the clerk on the vessel prepared documents which showed that he intended to make delivery of the oats to the lighterman on behalf, not of S., but of D., and believed that he was so doing. Subsequently, another lighter was sent by the lighterman, who now intended to take delivery of the parcel sold to D., and the same misunderstanding occurred, documents being handed over which demonstrated the intention of the clerk to make delivery to S. and not to D. The last lighter became jammed and sunk, and the oats were damaged. The result of these two mistakes was that the unharmed parcel came into the possession of S., although the documents relating thereto showed an intention that they should be delivered to D. In an action for wrongful detention of the oats: Held, that in these circumstances the property in the undamaged goods had passed to the plaintiff D., who was entitled to judgment. (Atkin, J.) *Denny* v. *Skelton* 437

34. *Charter-party—Option of cancelling in the event of war—Risk of seizure, capture by rulers or Governments—Voyage contemplated involving risk—Submarines and mines—Refusal of*

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owner to proceed—Subsequent agreement for extra hire—Arbitration.—By a charter-party dated the 5th Aug. 1912 a vessel was chartered for five years within the limits of the European trade. By clause 24 it was provided: "That no voyage be undertaken and no goods, documents, or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers of Governments." In June 1915 the vessel was at Leith fixed to load coals for Rouen, but the owner refused to allow her to proceed on the voyage owing to the risk of German submarines. Eventually the vessel was allowed to sail in consideration of extra hire money being paid, and in an arbitration it was decided that the owner was justified in refusing to allow the vessel to proceed. The vessel having completed this voyage and two other voyages upon similar terms, arbitration proceedings took place, and the umpire found that the voyages involved the risk of the vessel being attacked and sunk by German submarines, and he awarded that the owner was justified in refusing to allow the vessel to proceed on the voyages inasmuch as they involved risk of seizure or capture by rulers or Governments. A case having been stated for the opinion of the court: Held, that the risk of being attacked and sunk by German submarines was a risk of "seizure or capture" by rulers or Governments within the meaning of clause 24 of the charter-party, and that the shipowner was justified in refusing to allow his vessel to proceed upon voyages involving that risk. (Scrutton, J.) Re *An Arbitration between O. T. Tonnevold and Finn Fris* 439

35. *Insurance (marine)—"Held covered"—Insurance of motor-car for voyage—Shipment of car on deck—Liability of underwriter.*—A motor-car, which it was proposed to ship from England to Italy, was insured against general risks of breakage and damage during the voyage. The policy of insurance contained a "held covered" clause "at a premium to be arranged in case of omission or error in the description of the interest." The motor-car was carried on deck and was found to be badly damaged on arrival. In an action by the owner against the shipping agents for shipping the car in an improper manner and failing to protect it adequately by insurance: Held, that a motor-car carried on the deck of a vessel was outside the insurance policy, and that the defendants were liable. (Rowlatt, J.) *Hood* v. *West End Motor Car Packing Company* 441

NOTE.—Since affirmed by C. A.

36. *Charter-party—Reference to arbitration of disputes "as to meaning and intentions of the charter"—Extent of clause.*—A charter-party provided that "any disputes arising between the owner and the charterers as to the meaning and intentions of the charter should be referred to arbitration." Held, that this phrase did not mean merely that there should be submitted to the arbitrators questions of construction as to the rights of the parties arising upon the words of the charter-party, but included the application of the charter to the facts which had arisen involving the determination of what facts had arisen, but did not entitle the arbitrator to award damages. (Rowlatt, J.) *Richards* v. *John Payne and Co.* 446

37. *Charter-party—Discharge with customary dispatch—Discharge of certain quantity of cargo per day—Payment of demurrage where delay occasioned through fault of charterers—Fixed time charter-party.*—By clause 10 of a charter-party the cargo was to be discharged with the customary steamer dispatch of the port and in the ordinary working hours. By clause 11 demurrage was to be payable at the rate of 90*l.* per day where the delay was occasioned through "any fault of the charterer or merchant." By clause 20, as amended by agreement between the parties, the steamer was to be discharged at the rate of 100 standards of timber per weather working day. Held, that the effect of clause 20 was to quantify by agreement what in its absence would be achieved by the application of clause 10, which resulted in the combination of the two becoming a fixed lay day discharging clause. Held, also, that, where clause 20 operated, the words "through any fault of the charterer or merchant" became inapplicable. (Rowlatt, J.) *Baird and Co.* v. *Price, Walker, and Co.* 448

38. *Delivery ex ship to railway—Deposit in carriers' warehouse—Destruction by fire—Liability of carriers.*—The plaintiffs directed the defendants—the owners of a line of steamships which were carrying certain goods for delivery to the plaintiffs—to "deliver ex ship to the railway company to our order." The contract contained a clause protecting the defendants from liability for damage to goods by fire. On arrival the goods were not taken direct to the railway station, but were placed in the defendants' warehouse adjoining the quay. Here a fire broke out, and the goods were destroyed. The plaintiffs brought an action for breach of contract and duty in handling the goods, contending that, in view of the instructions sent to the defendants, the goods should never have been put into the warehouse, and that, as they had been so dealt with, the defendants were liable for their loss and could not avail themselves of the protection afforded by the terms of the contract. Held, that the expression "ex ship" did not exclude the taking of goods into warehouse for the purpose of dispatching them by cart to a railway, and that in this case, the removal of the goods into the warehouse being justifiable, the defendants were entitled to avail themselves of the protection afforded by the contract. (Rowlatt, J.) *Eastern Counties Farmers' Co-operative Association* v. *Newhouse and Co.* 449

39. *Principal and agent—Instructions to agent—Warranty of authority—Ambiguity—Hire of ship—Whether principal bound by agent's contract founded on his interpretation of instructions.*—The plaintiffs brought an action against the defendants for breach of warranty of authority to charter to the plaintiffs a ship belonging to one A. The authority relied upon was given to the defendants by A., a shipowner at Naples, who sent a telegram to the defendants in the following words: "You authorise fix steamer prompt loading 3000 tons coal Newport Cagliari Mersina or Palermo twenty shillings. If cannot better wire immediately." A. refused to let a ship and repudiated the charter, his reason being that his authority to the defendants was to hire a ship and not to let one. Rowlatt, J. held that if the telegram was ambiguous the defendants had acted *bonâ fide* and reasonably in interpreting it as they had done; that the shipowner would have been responsible to the plaintiffs for the interpretation which his agents had *bonâ fide* and reasonably placed upon ambiguous instructions; but that the actual charter-party entered into was outside the authority in whatever way it was read, and that therefore the plaintiffs were entitled to judgment. Ireland *v.* Livingston (1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 E. & I. App. 395) considered. Loring *v.* Davis (54 L. T. Rep. 899; 32 Ch. Div. 625, at p. 631) applied. The defendants appealed. Held, that the decision of Rowlatt J. was right. (Ct. of App.) *Weigall and Co.* v. *Runciman and Co. and others* 463

40. *Time charter-party—Oil tank steamer—Period of charter unexpired—Requisition by British*

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Government—Structural alterations to adapt her for use as transport—Restraint of princes—Frustration of adventure—Effect on contract.—By a charter-party, dated in May 1912, the owners of a ship designed to carry cargoes of oil in bulk agreed to let and the charterers agreed to hire the ship for a period of sixty calendar months—which period would expire in Dec. 1917—to be employed in lawful trades for voyages between certain specified ports for the carriage of refined petroleum and (or) crude oil and (or) its products as the charterers or their agents should direct. The charterers were to pay as freight a fixed sum per month. Under certain restrictions the carriage of other suitable cargo than oil was to be allowed. Power was conferred on the charterers to underlet the ship on Admiralty or other service, but without prejudice to the charter-party. The charter also contained the usual exception of restraint of princes. The ship was requisitioned by the Government in Dec. 1914 and again in Feb. 1915, when she was altered to fit her for the transport of troops. The charterers had paid and were willing to continue to pay the stipulated freight. In these circumstances the owners (the appellants) claimed they were entitled to treat the contract as at an end. Held (Viscount Haldane and Lord Atkinson dissenting), that under the circumstances this charter-party was not determined when the steamer was requisitioned, and that the requisition did not suspend it or affect the rights of the owners or charterers under it. Query: Does the doctrine of frustration apply to a time charter? Decision of the Court of Appeal (13 Asp. Mar. Law Cas. 284; 114 L. T. Rep. 259; (1916) 1 K. B. 485) affirmed. (H. of L.) Re *Arbitration between F. A. Tamplin Steamship Company Limited and Anglo-Mexican Petroleum Products Company Limited* 467

41. *Charter-party—Ship requisitioned by the Admiralty—Restraint of princes—Whether hire payable during requisition — Arbitration — Whether contract subsisting—Nonpayment of hire—Notice to withdraw ship—Whether owners entitled to withdraw vessel—Liability of charterers for hire.*—The plaintiffs were time charterers of the steamship *D.*, and their claim was to restrain the defendants, the owners, from withdrawing the ship from their service. The defendants counter-claimed for hire during a period when the ship was requisitioned by the Admiralty. The charter-party contained exception clauses which included restraint of princes, and also provided that the owners might withdraw the ship for nonpayment of hire. There was a cesser clause prescribing the events upon which the hire should cease or be suspended, which did not include requisition by the Admiralty. During the currency of the charter-party the ship was requisitioned by the Admiralty for the period of about six months, for which period the charterers refused to pay the hire. The parties went to arbitration on the question whether the contract was still subsisting; and, during the arbitration proceedings, the defendants gave notice to withdraw the ship. Sankey, J. held that the defendants were not entitled to withdraw the ship, but that the plaintiffs were liable to pay the hire to the defendants during the period of the requisition by the Admiralty. The plaintiffs appealed and the defendants gave notice of cross-appeal. Held, that the appeal of the charterers and the cross-appeal of the shipowners failed. The charterers' contention was that there had been an entire failure of consideration, and that they could not be liable for hire as they had not had the use of the ship, for which alone they were liable to pay hire, during the requisition by the Admiralty. That contention, however, had been disposed of by the decision of the House of

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Lords in *F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (13 Asp. Mar. Law Cas. 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397), and the charterers in the present case had been rightly held liable to pay the chartered hire for the time during which the ship was under requisition. As regards the cross-appeal, the shipowners were not entitled to ignore the arbitration proceedings and, pending those proceedings, serve notice of withdrawal of the ship. The position was such as to lead the charterers to believe that any right to require payment of the hire or to withdraw the ship was suspended until it had been determined in the arbitration what the respective rights of the parties were—whether the time charter was still subsisting and whether the charterers remained liable to pay the hire. Decisions of Sankey, J. (13 Asp. Mar. Law Cas. 434; 115 L. T. Rep. 265; (1915) 1 K. B. 726) affirmed. *F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (*sup.*) applied. (Ct. of App.) *Modern Transport Company Limited* v. *Duneric Steamship Company Limited* 490

42. *Charter-party—Employment between "safe ports"—What constitutes a "safe port."*—The word "safe" when used in connection with the word "port" in a charter-party implies that the port must be both physically and politically safe, and the action either of nature or war may render a port unsafe. In each case it is a question of fact and a question of degree. (Sankey, J.) *Palace Shipping Company Limited* v. *Gans Steamship Line* 494

43. *Charter-party — Sub-charter — Sub-charterer's breach—Cancellation—Measure of damages.*—A ship was chartered by the plaintiffs for a voyage to a port in Chile under the terms of a charter-party dated the 1st July 1912, which provided (*inter alia*) that freight should be payable at the rate of 21*s.* per ton, and that the plaintiffs should have the option of cancelling the charter-party if the ship should not be ready for stiffening before the 15th Sept. 1913. The plaintiffs re-chartered the ship to the defendants by a charter-party dated the 2nd May 1913 for a voyage to the same port in Chile, the rate of freight being 28*s.* 6*d.* per ton. The defendants, in breach of their contract, refused to load the ship at a time when the market rate of freight had fallen to 17*s.* per ton. In an action by the plaintiffs to recover the difference between 17*s.* and 28*s.* 6*d.* per ton: Held, that they were only entitled to recover the difference between 21*s.* and 28*s.* 6*d.* (Rowlatt, J.) *Andrew Weir and Co.* v. *Dobell and Co.* 496

44. *Charter-party—Charter of vessel for an illegal voyage of which the owners are ignorant—Rights of the owners.*—The shipment of goods upon an illegal voyage, *i.e.*, a voyage that cannot be performed without violating the law of the flag of the country or the law of the place where the goods are to be carried to, being a voyage which would involve the ship in consequences either of forfeiture or delay, is analogous to the shipment of dangerous goods which may involve the destruction of the ship. The shipper undertakes that he will not ship goods which involve the risk of unusual danger or delay to the ship which the owner does not know of, or might not reasonably know of, without communicating to the owner the facts which are within his knowledge indicating that there is such a risk. (Atkin, J.) *Mitchell, Cotts and Co.* v. *Steel Brothers and Co. Limited* 497

45. *Charter-party—Lay days—Demurrage—Loading and discharge at a certain rate "Reversible"—Custom of port.*—Under a charter-party the appellants chartered a ship

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belonging to the respondents to carry a cargo of pit-props from the Baltic to Newport, Mon., the cargo "to be loaded at the rate of 125 fathoms daily and discharged at the rate of 125 fathoms daily reversible with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted." The agreed rate was equivalent to thirteen days for loading and discharging respectively. At the port of loading the ship was loaded in nine days and, by arrangement between the master and the shipper, four days' dispatch money was deducted from freight and thirteen days were stated in the bill of lading to have been used. According to the custom of the port at Newport, Monmouth, the discharge of Baltic pit-props is suspended during wet weather and during the half of each Saturday. The ship began discharging on the 19th July, but owing to wet weather did not complete doing so until midday on the 9th Aug., and the shipowners contended that the thirteen days available for discharge expired on the 2nd Aug. and that the ship was on demurrage six and a half days, and to this contention the Court of Session gave effect. Held, that as the intention was to have a fixed number of lay days, and these could not be affected by the custom of the port, the charterers could not except Saturday afternoons or wet days; but the effect of the word "reversible" was to entitle them to add the four days saved in loading to the days available for discharge as the shipper had no authority to "sell" the four days, and that in the circumstances the charterers were not barred from disputing the statement in the bill of lading that thirteen days had been "used for loading." The ship was accordingly only on demurrage for half a day. Decision of the Court of Session (1916, S. C. 223; 53 S. L. R. 28) reversed. (H. of L.) *Love and Stewart* v. *Rowtor Steamship Company Limited* 500

46. *Carriage by direct route—Liberty to call at intermediate port—Exception of King's enemies—Deviation to intermediate port not usually visited by owners' ships—Destruction by enemy vessel—Liability of owners.*—In Nov. 1914 the defendants, a steamship company, contracted to carry a cargo of wool from New Zealand to London in their steamship the *T.* The bills of lading provided for "direct service between New Zealand and London," and contained these two clauses: Clause 1. "With liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on passengers, cargo, coal, or other supplies." Clause 3. "The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat and reship and forward the same at the owner's expense, but at merchant's risk." The exception clause excepted the "King's enemies." Besides the wool the *T.* carried a quantity of frozen meat for delivery at Havre. The vessel kept a direct course from New Zealand to London until she reached the Casquets, when she turned and made for Havre, which was not one of the usual ports visited by the defendants' steamships. When a few miles from Havre she was sunk by a German submarine. The plaintiffs, who were indorsees and holders of the bills of lading under which the wool was shipped, brought an action against the defendants

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claiming damages for breach of contract. Held, that Havre was not an intermediate port within the meaning of the bills of lading on the voyage of this vessel from New Zealand to London, and that in making for that port she was deviating from her voyage and the defendants thereby lost the benefits of the exceptions in the bill of lading. And, further, that, inasmuch as the defendants by deviating were breaking their contract as carriers, they were liable for the loss occasioned by the King's enemies. Decision of Bailhache, J. (13 Asp. Mar. Law Cas. 400; 114 L. T. Rep. 746; (1916) 1 K. B. 747) affirmed. (Ct. of App.) *James Morrison and Co. Limited* v. *Shaw, Savill, and Albion Company Limited* 504

47. *Charter-party—Lay days—Completion of loading before expiration of lay days—Acceptance of dispatch money—Failure to free ship as soon as possible—Whether charterers liable in damages.*—By a charter-party dated the 1st Feb. 1915 a steamer was to be loaded at an Argentine port and to proceed therefrom as ordered by the charterers to a European port as port of discharge. Dispatch money at the rate of 15*l.* per day was payable for all time saved in loading, and the charterers had the right to keep the steamer for twenty-four hours after completion of loading, for the purpose of settling accounts. The steamer was loaded nineteen days before the expiration of the lay or loading days, and in respect of the nineteen days the charterers received dispatch money. Owing to delay by the charterers in deciding as to the port of call, the steamer was kept waiting for the bills of lading and orders for three days. The shipowners claimed damages in respect of this delay, and in arbitration proceedings were awarded 300*l.*, being damages at the rate of 150*l.* for two days. Held, that the charterers were entitled to dispatch money for the days saved in loading, but that, when the loading was completed, they were not entitled to detain the ship, even if the lay days had not expired, and that the damages for detention, not being provided for by the charter-party, were at large, and the arbitrator had power to award the shipowners 300*l.* as such damages. Decision of Atkin, J. (13 Asp. Mar. Law Cas. 364; 114 L. T. Rep. 850; (1916) 1 K. B. 805) reversed. (Ct. of App.) *Owners of Steamship Nolisement* v. *Bunge and Born* 524

48. *Indemnity—Implied request by shipowners to charterers to unload cargo—Accident happening to charterers' servant while unloading—Compensation paid by charterers to workman's dependants—Implied undertaking by shipowners to indemnify—Liabilty of shipowners.*—The plaintiffs, who were the charterers of a ship from the defendants, the shipowners, gratuitously removed some hatch beams on behalf of and at the implied request of the shipowners. While the beams were being removed by the plaintiffs' servants, one of the plaintiffs' servants engaged in the work was accidentally killed. The plaintiffs paid to his dependants compensation in accordance with the Workmen's Compensation Act 1906. The plaintiffs claimed to recover the sum paid as compensation from the defendants on the ground that the defendants had impliedly undertaken to indemnify the plaintiffs for loss or damage occasioned by the discharge of the cargo. Held, that there was no evidence of an implied undertaking by the defendants to indemnify the plaintiffs. The accident was not the direct or natural consequence of doing the discharging of the cargo, but was a consequence of the manner in which the discharging was done. The proposition of Tindal, C.J. in *Toplis* v. *Grane* (5 Bing. N. C. 636), cited by Brett, J. in Dugdale *v.* Lovering (32 L. T. Rep., at

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p. 158; L. Rep. 10 C. P., at p. 200), considered. Decision of Ridley, J. reversed. (Ct. of App.) *William Cory and Sons Limited* v. *Lambton and Hetton Collieries Limited* 530

49. *Charter-party—"Baltic round"—Outbreak of war—Ship detained indefinitely in Baltic port—Restraint of princes—Whether commercial object of voyage frustrated—Proviso for cessation of hire—Cancellation clause.*—In the first-named case shipowners by a charter-party, which was headed "time charter," let the steamship *D.* to charterers for "one Baltic round," the charterers to pay hire at a certain rate per month in advance until redelivery (unless lost) at a coal port in the United Kingdom. Arrests and restraints of princes were mutually excepted. In the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter-party, there was an option to the charterers to cancel the charter or insure the steamer for full value against war risks. The *D.* came on hire on the 4th July 1914, and the charterers paid the first month's hire. The *D.* was loading a cargo for sub-charterers at a Baltic port when the war broke out. She was not allowed by the Russian authorities to leave the Baltic, and was uninsurable against war risks. On the 5th Aug., when the *D.* was partly loaded and the sub-charterers had received bills of lading from the master, the charterers purported to exercise their option to cancel the charter-party. In Nov. 1914 the shipowners sued to recover the hire of the vessel to the 4th Nov. 1914. In the second-named case the charter-party was the same in form, and the facts were very similar, except that the ship was chartered for two "Baltic rounds," and the charterers did not purport to cancel the charter-party. On an arbitration the arbitrators found that there had been a frustration of the commercial adventure, and that therefore no hire was due from the charterers. Held, that the cancellation clause was not applicable in the circumstances; that the commercial adventure of a Baltic round had been contemplated by both the shipowners and the charterers; that the delay resulting from the outbreak of war being of indefinite duration had frustrated the commercial adventure; and that the contract having been determined the shipowners could not recover the hire. Judgments of Sankey, J. (infra; (1916) 1 K. B. 675) and of Bailhache, J. (13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171; (1916) 1 K. B. 429) reversed. (Ct. of App.) *Scottish Navigation Company Limited* v. *W. A. Souter and Co.*; *Admiral Shipping Company Limited* v. *Weilner, Hopkins, and Co.* 539

50. *Bill of lading—General ship—Restowage of cargo at intermediate port—Damage to cargo on quay during restowage—Liability of shipowners.*—The plaintiffs were shippers of certain mining machinery on board the defendants' steamship from London to Buenos Aires *viâ* Newport. A cylinder, part of this machinery, was accidentally injured on the quay at Newport during restowage operations there. The defendants admitted the accident, but relied upon an exception contained in the bill of lading which excepted breakage, even though occasioned by the negligence of the shipowners' servants. The plaintiffs contended that the shipowners had no right, having once stowed their goods in one hold, to remove them from the ship in order to restow them in another hold and to deposit them on the quay for this purpose, and that, as the defendants were acting in breach of their contract of carriage when the accident occurred, they were not protected by the exception. Held, that the defendants were

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protected by the exception of the bill of lading. Where a general ship loads cargo at various ports which is intended to be discharged at different places, the cargo could not always be taken on board in such order that the last loaded shall be the first to be discharged; the proper stowage of the cargo and the necessary readjustment of weight to preserve the proper trim of the ship may necessitate changes in stowage from time to time, and in the present case these were necessarily incidental to the voyage of the ship. The defendants, therefore, in removing and restowing the cargo were not acting in breach of the contract of carriage. (Ct. of App.) *Bruce Marriott and Co.* v. *Houlder Line Limited* 550

51. *Contract—Written contract to send rubber entirely by sea route—Goods sent partly by land—Temporary usage—Evidence—Varying written contract—Admissibility of evidence.*—By a contract in writing dated March 1916 certain sellers sold to the buyers 25 tons of rubber, to be shipped during March and April 1916 by a vessel or vessels from the East to New York direct and (or) indirect, with liberty to call and (or) tranship at other ports, any question regarding quality to be settled by arbitration, such arbitration to be . . . held within six weeks after the arrival of the vessel. The rubber was sent by the sellers from Singapore by sea to Seattle, and was to be forwarded thence by rail to New York on through bills of lading. The buyers objected to this method of sending the rubber. Arbitrators found that there was at the date of the contract such a course of business established as would make it within the contemplation of the parties that the goods might be sent by the route adopted, and they awarded that the sellers' tender was a good tender. Held, that by the written contract, which was clear and unambiguous in its terms, the rubber was to be carried by sea throughout, and that evidence of a temporary usage in a particular trade to forward the goods partly by sea and partly by land was not admissible to vary the written contract. The tender, therefore, was bad, and the buyers were not bound to accept the goods. (Lush, J.) *Sutro and Co.* v. *Heilbut, Symonds, and Co.* 576

NOTE.—Since affirmed by C. A.

52. *Charter-party—Exception of "restraint of princes"—Reasonable anticipation of restraint—Actual restraint in existence—Breach by shipowner—Measure of damages—Penalty clause—Limitation of liability.*—The plaintiffs chartered a vessel from the defendants, who were shipowners, to proceed to M. and to load and carry to Japan a cargo of sulphate of ammonia which the plaintiffs had bought. The charter-party excepted "arrests and restraints of princes." The defendants refused to provide a ship which by the charter-party they agreed to provide, on the ground that there was reasonable apprehension that if they fulfilled the charter the ship would be seized by the King's enemies. In these circumstances the plaintiffs were compelled to repudiate their contract with their sellers, and paid them, as the result of arbitration proceedings, 4500*l.* for so doing. In an action by the plaintiffs against the defendants for damages for breach of charter, Bailhache, J. held that the shipowners were guilty of a breach of the charter-party, and that the plaintiffs could not recover from them 4500*l.*, such damage being too remote, but that they were entitled to recover 3800*l.*, the amount of profit they would have insured. This amount was the difference between the price at which they had purchased the goods and the market price of the goods in Japan on the date at which the goods might have been expected to arrive. The Court of Appeal were agreed that the

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defendants were guilty of a breach of charter-party in not sending a vessel to load, but that as regards the amount of damage the proper amount to fix was the difference between the price which would have been realised by the sale of the goods in Japan at or about the time the vessel should, under ordinary circumstances, have arrived, and the cost price of the goods at the port of loading at the time of the shipment, together with the cost of freight and insurance. Held, that the mere apprehension of seizure was insufficient to justify the defendants' failure to supply a steamer, as to make the exception operative there must be such a declaration of war as to cause an actual restraint of princes. But on the main point, the measure of damages, their Lordships were of opinion that Bailhache, J. had proceeded on a right basis, and his order would be restored, subject to correcting the omission to deduct the amount of insurance premium, which, taking the premium to be 6 per cent., would reduce the amount of damages to 800*l*. Decision of the Court of Appeal (13 Asp. Mar. Law Cas. 427; 115 L. T. Rep. 248; (1916) 2 K. B. 816) set aside and judgment of Bailhache, J. (13 Asp. Mar. Law Cas. 300; 114 L. T. Rep. 326) restored with a modification. (H. of L.) *Watts, Watts, and Co. Limited* v. *Mitsui and Co. Limited* 580

53. *Damage to cargo—Seaworthiness—Fitness to carry cargo—Contract of carriage—Improper stowage—Excepted peril.*—Chocolate was put on board a steamship for carriage from Genoa to London. The chocolate was shipped in good condition, but was delivered in a damaged state owing to the chocolate having been stowed in a hold in which cheeses were stowed. The consignees of the chocolate brought an action to recover the damage they had sustained. The shipowners pleaded as a defence an exception in the bill of lading relieving them from liability for negligent stowage. The consignees by their reply alleged that the shipowners could not rely on the exception, as the ship was unfit to carry the chocolate when the ship was loaded or when the voyage began. Held, affirming the decision of Bargrave Deane, J., that the ship was not unseaworthy; that the damage was caused by improper stowage; and that the respondents were protected by the exception in the bill of lading and were entitled to rely on the exception. (Ct. of App.) *The Thorsa* 592

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CHARTER-PARTY.

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COLLISION.

1. *Collision during salvage—Regulations for Preventing Collisions at Sea, art.* 29—*Appeal on matters of fact—Concurrent findings in courts below—Jurisdiction on appeal to review conclusions resting upon probabilities.*—The rule that concurrent findings should not be disturbed on appeal does not apply where on appeal there is tolerably clear evidence which satisfies the court that the findings are erroneous. The principle is especially applicable to a case in which the conclusion sought to be set aside rests upon the consideration of probabilities. A vessel, while rendering assistance to another, was rammed by the latter. She sank and all her hands with one exception were lost. In the court of first instance both vessels were held to blame, but the Court of Appeal reversed that decision and held that the salving vessel was alone to blame. The owners of the salving vessel appealed. Held, that this case was not a true example of concurrent findings in the courts below; that there was jurisdiction to review the concurrent finding in the courts below; and that on the facts the vessel which was being salved, but which sank the salving ship, was alone to blame. Rule laid down by Lords Herschell and Watson in *The P. Caland* v. *Glamorgan Shipping Company* (7 Asp. Mar. Law Cas. 83, 206, 317; 68 L. T. Rep. 469; (1893) A. C. 207), as to concurrent finding, considered. (H. of L.) *Owners of the Steamship Hatfield* v. *Owners of the Steamship Glasgow; The Glasgow* 33

2. *Defence of compulsory pilotage—Collision without compulsory pilotage area, but where pilot was necessarily on board—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 633.—The appellants, the owners of the steamship *B.*, brought an action of damages against the respondents, the owners of the steamship *F.*, in respect of a collision which occurred near Princes Pier, Greenock. Among other defences, the respondents set up the defence of compulsory pilotage under the Merchant Shipping Act 1894, s. 633, which provides that a shipowner shall not be answerable "for any loss or damage caused by the default or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law." At the time of the collision the river pilot, although he had not reached the official "river Clyde," was directing the navigation of the *F.* The appellants' contention was that the part of the river at which the collision occurred was not a part where, by law, the employment of a licensed pilot was compulsory. The sheriff-substitute held that the defence of compulsory pilotage was not open to the respondents, but his decision was reversed by the First Division by a majority (the Lord President and Lord Mackenzie, Lord Skerrington dissenting). Held, that upon the true construction of sect. 633 of the Act of 1894 the word "district" did not cover an area outside the limits of the river as defined by sect. 75 of the Clyde Navigation Act 1858, that the pilotage outside these limits was not rendered compulsory by law by the operation of the by-law, and that

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there was no legal compulsion at common law so as to prevent the relation of master and servant from being established between the master and the pilot. Decision of the First Division of the Court of Session (reported 52 S. L. R. 244) reversed, and that the defence of compulsory pilotage could not be sustained. *General Steam Navigation Company* v. *British and Colonial Steam Navigation* (3 Asp. Mar. Law Cas. O. S. 168, 237; 20 L. T. Rep. 581; L. Rep. 4 Ex. 238) and *The Charlton* (8 Asp. Mar. Law Cas. 29; 73 L. T. Rep. 49) discussed. (H. of L.) *Steamship Beechgrove Company Limited* v. *Aktieselskabet Fjord of Kristiana*... 188

3. *Both vessels to blame—Apportionment of damages—Maritime Conventions Act* 1911 (1 *& 2 Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1.—To judge of the degree of a ship's culpability under sect. 1, sub-sect. 1, of the Maritime Conventions Act 1911: Regard must be had to the relative positions of the two vessels, the view which each had of the other, the signals which passed between them, and the opportunity each had of avoiding the consequences of the other's errors: Faults in navigation which do not contribute to the collision are not to be taken into consideration; Where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half and half; The word "river" in Tees Conservancy By-laws does not include the buoyed channel outside the river mouth, and there is no analogy between this buoyed channel and certain waterways which have been declared to be narrow channels. Query as to the duty of vessels approaching at a considerable distance to blow whistle signals, and the effect of the omission to do so having regard to the above section. At the hearing of a suit in the Admiralty Court for damages caused by collision the judge found both vessels were to blame, but that one was much more to blame than the other, and he apportioned the liability at four-fifths and one-fifth. The Court of Appeal, in construing sect. 1, sub-sect. 1 of the Maritime Conventions Act 1911, were of opinion that the fault to the degree of which the liability was to be apportioned must be read as meaning fault causing or contributing to the collision, and being of opinion that there was no evidence on which the blame could be with any certainty apportioned, directed that the liability should be apportioned equally. Held, after consideration, that the decision of the Court of Appeal was right. Decision of Court of Appeal affirmed. (H. of L.) *The Peter Benoit* 203

4. *Submarine sunk by liner—Liner alone to blame—Cause of action for loss of life of seaman apart from statute—Pensions and grants to relatives of deceased officers and seamen.*—A submarine having been sunk through the negligent navigation of a steamship and all but one of her crew drowned, the Commissioners of the Admiralty brought an action against the steamship owners to recover the damage they had sustained. They included in their claim a number of items, one of which was a sum representing the capitalised amount of pensions and grants paid or payable by them to the relatives of the crew who were drowned. At the reference the assistant registrar disallowed this item of claim on the ground that loss or damage suffered by the plaintiffs due to the loss of life of the crew of the submarine was not recoverable in civil action. This decision of the assistant registrar was upheld by the President and subsequently by the Court of Appeal, who expressed themselves bound to follow the ruling of Lord Ellenborough in Baker *v.* Bolton (1808, 1 Camp. 493) that "in a civil court the death of a human being could not be complained of as an injury." Held, (1) that, whether or not the common law ought originally to have been differently interpreted than as interpreted by Lord Ellenborough in Baker *v.* Bolton (sup.), it was too late to disturb it; and (2) that the damages claimed were in no way recoverable, because, being money which the Admiralty Commissioners were not legally required to pay to the relatives of the deceased men, such damage was too remote. Decision of the Court of Appeal (12 Asp. Mar. Law Cas. 536; 111 L. T. Rep. 623; (1914) P. 167) affirmed (H. of L.) *The Amerika* 558

5. *Examination steamer proceeding to speak another steamship—Crossing rule—Regulations for Preventing Collisions at Sea* 1897, *arts.* 19, 21, 29.—An examination steamer in the Bristol Channel, on a course of N.W., sighted a steamship four points on her port bow and proceeded towards her to speak her. The other steamship was on a course of about E. by N. It was in the ordinary course the duty of the vessel on the E. by N. course to port and pass under the stern of the examination vessel. Instead of doing so, she kept her course and speed as she expected the examination steamer to round to on her starboard side. The examination steamer hard-a-ported and increased her speed to get across the course of the steamship she was approaching. Held, that both vessels were to blame, the steamship on the E. by N. course for not complying with the crossing rule as there was no special circumstance which excused her departure from it, and the examination steamer for altering her course and speed; but that, as the steamship on the E. by N. course was primarily to blame, the loss would be apportioned, the steamship on the E. by N. course to bear three-fourths and the examination steamer one-fourth of it. (Adm. Div.) *The Fancy* 603

6. *Compulsory pilotage—Exempt ship—Merchant Shipping Act* 1894 (57 *& 58 Vict. c.* 60), *ss.* 603, 625—*Pilotage Act* 1913 (2 *& 3 Geo.* 5, *c.* 31), *ss.* 10, 14, 15—*Defence of the Realm Consolidation Act* 1914 (5 *Geo.* 5, *c.* 8)—*Defence of the Realm Regulations* 1914, *No.* 39—*Notice to mariners, 27th March* 1915—*Liability of owners of vessel for damage—Vessel being conducted.*—In a damage action the owners of a Swedish steamship pleaded that their vessel was in charge of a compulsory pilot, and that if there was any negligence in the navigation of the vessel it was solely that of the pilot, for whose negligence they were not responsible. The pilot was found alone to blame. Under the provisions of the Merchant Shipping Act 1894 the Swedish vessel was an exempt ship, although she was navigating in a compulsory pilotage district. Under the Defence of the Realm Regulations all ships, other than certain British ships, while navigating from Gravesend to London Bridge have to be conducted by pilots licensed by the London Trinity House. Held, that, though the Swedish vessel was an exempt ship under the Merchant Shipping Act 1894, yet the order issued under the Defence of the Realm Regulations 1914 made pilotage for the vessel compulsory; and that the owners were not responsible for the damage caused by the collision. (Adm. Div.) *The Nord* 606

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words—Liability of dock owner.—The plaintiffs, owners of a steamship, claimed against the defendants, owners of a graving dock at Hull, damages for the defendants' alleged breach of a contract for reward in and about the dry-docking of the steamship. She suffered damage by reason of the unevenness of the block caps on which she rested. The unevenness was found to be due to the defendants' want of care. There were no statutory provisions relating to the defendants' rights and liabilities as dry-dock owners. The steamship required painting, and the defendants let the dock for that purpose and did not do the painting themselves. She entered the dock under a contract with the defendants, by virtue of which dock dues were charged, and there were also charges for pumping and the use of blocks, shores, &c., which the defendants contracted to supply, the blocks being of the usual kind. Clause 9 of the defendants' regulations was as follows: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Held, that the defendants were exempted from liability by the terms of the above clause, which were so general that they would cover even a fundamental obligation, and that they were therefore not liable for negligence in providing uneven block caps. Decision of Bailhache, J. (111 L. T. Rep. 41) affirmed. (Ct. of App.) *Pyman Steamship Company Limited* v. *Hull and Barnsley Railway Company* 64

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1. *Right to register a ship as a British ship—Ship owned by a limited company registered in England—Principal place of business of the company—Control of company in Germany—Forfeiture of ship—Position of British shareholders in the company owning the forfeited ship—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 1, 9, 76—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 51.—A ship owned by a limited company was registered as a British ship. A doubt having arisen as to whether the ship was rightly registered as a British ship, inquiry was made by the Registrar of Shipping at the port of registry of the ship under sect. 51 of the Merchant Shipping Act 1906 as to whether the ship was rightly registered. It appeared that the business of the company was controlled by a German, who was a naturalised British subject, and who had resided in Hamburg for some considerable time before and after the outbreak of war. Proceedings were then instituted, asking for the forfeiture of the ship. Bargrave Deane, J. declared the ship to be forfeited to the Crown, and subsequently allowed the British shareholders to intervene in the proceedings to protect their interests, but refused to order that when the ship was sold they should be granted an amount out of the sum realised by the sale proportionate to their interest in the company. The company and the British shareholders appealed.

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Held, by the Court of Appeal, affirming the decision of Bargrave Deane, J. that the ship was rightly forfeited to the Crown, as the general superintendence of the business was carried on in Hamburg and the company was controlled from Hamburg. Held, further, that the British shareholders were not entitled to intervene in the proceedings, and that the court had no power to order any payment to be made to them when the ship was sold. (Ct. of App.) *The Polzeath* 595

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GOODS, BRITISH, ON ENEMY SHIP.
See *Marine Insurance*, No. 13.

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LOAD, REFUSAL TO.
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MARINE INSURANCE.

1. *Policy—Insurance against risk of seizure and detention—Actual total loss—Constructive total loss—Particular average loss—Marine Insurance Act* 1906 (6 *Edw. 7, c.* 41), *ss.* 57 (1), 60.—By sect. 60 of the Marine Insurance Act 1906, the test of "unlikelihood of recovery" has been substituted for "uncertainty of recovery" in cases relating to constructive total loss. A neutral ship belonging to the plaintiffs was chartered to carry a cargo of coal from the United Kingdom to Constantinople. She was insured with the defendant against capture, seizure, and detention. While on the voyage war broke out between Greece and Turkey, and the ship was stopped by the Greeks off Tenedos, who took her to Lemnos and removed the cargo. The plaintiffs gave the defendant notice of abandonment, and six weeks after the Greeks released the ship. An action was brought by the plaintiffs on the policy for an actual or a constructive total loss, or, alternatively, damages for a particular average loss. Held, that, while on the date of the commencement of the action the recovery of the ship by the owners was quite uncertain, it could not be shown that the balance of probabilities had been proved so clearly against her recovery that it could be said that there was "unlikelihood of recovery" within the meaning of the Marine Insurance Act 1906; and that this being so the plaintiffs had failed to make out their case. Decision of Pickford, J. (12 Asp. Mar. Law Cas. 449; 109 L. T. Rep. 901) affirmed. (Ct. of App.) *Polurrian Steamship Company* v. *Young* 59

2. *Reinsurance—Constructive total loss—Compromise between insured and insurers of original policy—Benefit of compromise to reinsurers.*—The plaintiffs insured a ship against total and (or) constructive total loss only, and reinsured risk with the defendants, the policy of reinsurance not containing the usual clause "to pay as may be paid thereon." The ship stranded, and notice of abandonment was given by her owner, who alleged that she was a constructive total loss. The plaintiffs refused to accept the notice of abandonment, and the owner brought an action against them which was compromised by the plaintiffs paying the owner 66 per cent. of the loss. The defendants were invited to agree to the compromise, but declined on the ground that there had been no constructive total loss in fact. In an action by the plaintiffs against the defendants on the policy of reinsurance, Bailhache, J. held that there was a constructive total loss in fact; that the defendants were disentitled to the benefit of the compromise, and were liable to the plaintiffs for the full amount of the reinsurance, subject to the benefit of any rights they might have had in respect of the abandonment of the ship if no compromise had been effected. Held, that a contract of reinsurance is a contract of indemnity only, and that the defendants were entitled to the benefit of the compromise made by the plaintiffs with the owners; the plaintiffs therefore could only recover from the defendants the 66 per cent. of the loss which they had paid to the owner, and not the full amount of the reinsurance. The plaintiffs, however, were entitled to add to their claim against the defendants a proper proportion of the expense of obtaining the compromise. *Uzielli* v. *Boston Marine Insurance Company* (5 Asp. Mar. Law Cas. 405; 52 L. T. Rep. 787; 15 Q. B. Div. 11) discussed. Judgment of Bailhache, J. (12 Asp. Mar. Law Cas. 575; 111 L. T. Rep. 1079; (1914) 3 K. B. 835) reversed. (Ct. of App.) *British Dominions General Insurance Company Limited* v. *Duder and others* 84

3. *Marine insurance—Policy—Collision—Damage—Collision caused to third ship by backwash—Liability.*—Where there is a clause in a policy of marine insurance providing that "if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured," this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of the costs which the assured shall thereby incur or be compelled to pay. . . ." As a matter of law and as a matter of the true construction of the clause, an assured may become liable to pay damages in consequence of a collision between his ship and another ship although the damage is not immediately and directly caused by the impact between the two colliding vessels. A collision occurring between the steamship *C.* and the steamship *R.*, the impetus thus given to the *R.*, plus the backwash from the *C.*'s propellor, drove the *R.* into the steamship *G.*, causing damage which the owners of the *C.* were held liable to pay. In an action on the policy: Held, that the collision with the *G.* was in consequence of the collision between the *R.* and the *C.*, and that the *C.* by this collision caused the *R.* to come into contact with the *G.*; and that the defendants were liable on the policy. Decision of Bailhache, J. (12 Asp. Mar. Law Cas. 544; 111 L. T. Rep. 812; (1914) 3 K. B. 827) affirmed. (Ct. of App.) *William France, Fenwick, and Co. Limited* v. *Merchants' Marine Insurance Company Limited* 106

4. *Marine insurance — Material fact — Innocent mistake as to materiality—Concealment.*—A policy of marine insurance contained the following clause: "In the event of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged." In an action to recover a loss under the policy: Held, that, if the assured honestly believed that the correct definition was not a material matter for disclosure to underwriters, the fact that the assured knew that the "interest insured," which must be taken to mean "subject-matter insured," was not correctly defined, did not deprive him of the benefit of the clause. Decision of Bailhache, J. (reported 12 Asp. Mar. Law Cas. 546; 111 L. T. Rep. 839; (1914) 3 K. B. 1131) affirmed. (Ct. of App.) *Hewitt Brothers* v. *Wilson* 111

5. *Policy—"Restraint of princes"—State of war—Construction—Total loss—Whether "restraint*

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involves use of physical force—Restraint by Government of assured—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.—The words "arrests, restraints, and detainments of kings and princes" imply some interference of a fortuitous character, some interference out of the ordinary course of events by governing authorities who have the force of the State behind them to compel submission to their authoritative decrees. The plaintiffs, who were British merchants, in July 1914 shipped certain linseed on the British steamers *A.* and *O.* in the River Plate for carriage to Hamburg. They had sold the linseed to German merchants at a price covering cost, freight, and insurance, but upon terms by which the property was left in the plaintiffs until delivery. They insured the linseed with the defendants, a British company, from ports in the River Plate to Hamburg, and it was agreed that the subject-matter of the policy was linseed valued at 33,000*l.*, and the perils insured against included "arrests, restraints, and detainments of all kings, princes," &c. War was declared by Great Britain on Germany on the 4th Aug., and proclamations forbidding trading with the enemy were issued on the 5th Aug. and the 9th Sept. The *A.* when in the Channel received a signal from a French cruiser that she should go to Liverpool for security, and the *O.*, on the suggestion of the Admiralty, was diverted by her owners to Glasgow. The plaintiffs having given notice of abandonment and claimed for a total loss: Held (Swinfen Eady, L.J. dissenting), that (1) the word "restraint" in the policy did not necessarily involve the use of physical force; (2) "restraint of princes" included a restraint imposed by the British Government on British subjects, provided it was imposed for a cause other than a violation of law; (3) the inability of the ships to proceed with the voyages after the existence of a state of war had become known was caused by a "restraint of princes" within the meaning of the policy; (4) the rule of law in accordance with the impossibility of goods shipped reaching their destination is to be treated as a constructive total loss of the goods has not been altered by the Marine Insurance Act 1906; (5) there was therefore a constructive total loss of the goods by a peril insured against, and the plaintiffs were entitled to recover on the policy. Decision of Bailhache, J. affirmed. (Ct. of App.) *Sanday and Co.* v. *British and Foreign Marine Insurance Limited.* (See No. 12 below.) 116

6. *Policy—Valued policy—Total loss—Subrogation.*—A ship was insured for an agreed value of 45,000*l.* She was sunk in collision. The underwriters paid as for a total loss. In a collision action both ships were held to blame. The owners of the insured ship were held to be entitled to recover five-twelfths of their loss, the other ship recovering the remaining seven-twelfths. The value of the insured ship was taken at its actual value at the time of the loss, and the shipowners were paid five-twelfths of that value—namely, 65,000*l.* The underwriters claimed to be subrogated to the rights of the assured in respect of the sum recovered. Held, that as the amount recovered by the assured did not exceed the amount paid by the underwriters, the latter were entitled to recover from the assured the whole of the amount recovered by the assured in the collision action, in spite of the fact that it was based upon a higher value than the agreed value. (Scrutton, J.) *Thames and Mersey Marine Insurance Company Limited* v. *British and Chilian Steamship Company Limited.* (See No. 10 below.) 135

7. *General average—Collision with pier—Knowledge that collision would take place—Reasonable and prudent act—Contribution.*—The owners of a steamship claimed from the cargo owners contribution in general average in

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respect of two items of alleged general average sacrifice and expenditure. On the 6th Nov. 1912 the ship was bound for certain docks, and on proceeding up the river she grounded within a short distance of the docks. The following morning she floated, and was carried by the tide to about a mile above the entrance to the docks, where she became stranded. She was seriously damaged, and there was imminent danger to both ship and cargo. On the 7th Nov. she was got off by means of tugs. She had no steam available, and only her hand steering gear to work with. There was a pilot on board, and the intention was formed at first to take her down the river to a mud flat for the greater safety of the ship and cargo. When she had been towed about half a mile she was found to be making water, and it was then decided to take her into dock, which necessitated her being taken between two piers. The ebb tide was running very strongly, and it was contemplated by the master and pilot that she would strike the lower pier and do damage. In considering the choice between going to the mud flat and hitting the pier, the master and pilot both formed the opinion that the latter would be the lesser of two evils. She struck the pier with her starboard bow, and damaged herself and the pier. Held, that in the circumstances of the present case what was done was a general average act; and that the plaintiffs were entitled to contribution, not only for damage to the ship, but also for the damage for which she was liable by reason of damage to the pier. Decision of Bailhache, J. affirmed. (Ct. of App.) *Austin Friars Steam Shipping Company* v. *Spillers and Bakers Limited* 162

8. *Winding-up of company—Total loss—Claim for—Marine or fire policy—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 1, 3, 65, 66—*Assurance Companies Act* 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1 (*b*), 17, 28, *sub-ss.* 2, 3, *sched.* 6.—In April 1912 the applicants insured a steamship for twelve months with an insurance company, and in June 1912 a winding-up order was made against the company. Shortly afterwards the steamship was totally destroyed by fire. The policy of insurance covered risk of loss by fire and general average and salvage charges resulting from fire, the company not purporting to carry on the business of marine insurance. Held, that the policy was a fire insurance policy within sect 1, sub-sect. (*b*), of the Assurance Companies Act 1909, and was not excluded from the operation of that Act by sect. 28, sub-sect. 3, thereof. Decision of Astbury, J. affirmed. (Ct. of App.) Re *United London and Scottish Insurance Company Limited; Newport Navigation Company's Claim* 170

9. *Time policy—"Perils of the sea"—Institute time clauses—"Inchmaree" clause—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *sect.* 30; *sched.* 1, *r.* 12.—The plaintiffs took out a policy of marine insurance with the defendants on their ship which covered (*inter alia*) perils of the seas. The policy included the conditions of the Institute time clauses as attached, clause 3 of which provided as follows: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions." Clause 7 provided: "This insurance also specially to cover (subject to the free and the average warranty) loss of or damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any defect in the machinery or hull . . ." While the ship was lying in the dock a boiler, which was being lifted by a floating crane in order that it might be lifted into a hold, fell, owing to the pin of a shackle breaking, and damaged the ship. In an action under the policy: Held (1) that the loss was

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not caused by a peril of the sea, and the language of the policy itself showed that the scope of the clause was limited to such perils or perils *ejusdem generis*, and (2) that neither clause 3 nor clause 7 of the Institute Time Clauses extended the *genus* of the risk insured against. Decision of the Court of Appeal, reported 12 Asp. Mar. Law Cas. 555; 111 L. T. Rep. 1027; (1914) 3 K. B. 1262, affirmed. (H. of L.) *Stott* (*Baltic*) *Steamers Line* v. *Marten and others* 200

10. *Policy—Valued policy—Total loss—Subrogation—Right of paying underwriters to be subrogated.*—The plantiffs insured the defendants' ship *H.* for one year from the 20th May 1912 for 45,000*l.* against ordinary sea perils by a policy dated the 6th June 1912 in which the *H.* was valued at 45,000*l.* During the currency of the policy the *H.* came into collision with the *E.* and was totally lost. A collision action was brought by the shipowners, and both vessels were held to blame and the blame was apportioned, the owners of the *H.* having to pay seven-twelfths and the owners of the *E.* five-twelfths of the damage. The registrar of the Admiralty Court took the value of the ship as at the 15th Nov. 1912, the end of the current season, and fixed it at 65,000*l.* He took the loss of hire up to the same date and assessed it at 2000*l.* The shipowners appealed, and the President held that the value of the ship should be taken in Nov. 1917, and the hire assessed to that date, which was the date of the expiry of the charter-party under which the *H.* was chartered, and remitted the report to the registrar for reconsideration of the figures on that basis. On coming before the registrar the parties compromised, and agreed on a lump sum of 67,000*l.* for the two items under consideration, being the same total as the registrar had awarded without apportioning it. The owners of the *E.* had no interest in the apportionment. Five-twelfths of the 67,000*l.* was accordingly paid, being some 26,900*l.* The underwriters, who had paid for a total loss of the *H.*, then claimed to be subrogated to the payment received for the loss of that ship from the owners of the *E.* Held, that the underwriters were entitled to recover to the extent to which they had paid in respect of the subject-matter insured any sum which the defendants had received in respect of the loss of the same subject-matter, although that sum was based on a larger value than the insured value. Decision of Scrutton, J. (*ante*, p. 135; 113 L. T. Rep. 173; (1915) 2 K. B. 214) affirmed. (Ct. of App.) *Thames and Mersey Marine Insurance Company Limited* v. *British and Chilian Steam ship Company Limited* 221

11. *Floating policy—Declaration as to interest—Warranty—Commonwealth Marine Insurance Act* (*No.* 11 *of* 1909), *ss.* 35, 39.—The respondents effected a contract of marine insurance in Western Australia with the appellants, by which they insured all shipment of goods between a large number of ports against usual marine risks. The contract, which was treated as a floating policy throughout the proceedings, contained this clause: "Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches." The respondents sued to recover a total loss of a shipment of goods as to which they had made a declaration of interest, but not as soon as possible after the vessel sailed. There was, however, no suggestion that the delay arose from want of good faith on their part. Held, allowing the appeal, that the condition as to the making of declarations amounted to a promissory warranty within sect. 39 of the Commonwealth Marine Insurance Act 1909 (which is similar in terms to sect. 33 of the

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Marine Insurance Act 1906), and as it affected the question of reinsurance it constituted a substantive condition of the contract, the failure of the respondents to comply with it disentitled them to recover in respect of the loss. (Priv. Co.) *Union Insurance Society of Canton* v. *George Wills and Co.* 233

12. *Policy—Constructive total loss of goods—Restraint of princes—State of war—Frustration of contemplated adventure—Restraint by Government of assured—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 26, 60, 91 (2).—The plaintiffs, who were British merchants, in July 1914 shipped merchandise for sale in Germany on two British vessels in the River Plate for carriage to Hamburg. They had insured the goods on both vessels by identical voyage policies in the ordinary form, and the perils insured against included restraint of princes. War was declared by Great Britain on Germany on the 4th Aug., and proclamations forbidding trading with the enemy were issued on the 5th Aug. and on the 9th Sept. One of the two vessels, when in the Channel, received a signal from a French cruiser that she should go to Liverpool for safety, and the other, on the suggestion of the Admiralty, was diverted by her owners to Glasgow. The cargo owners warehoused their goods, and gave notice of abandonment, claiming on a constructive total loss. By sect. 60 (1) of the Marine Insurance Act 1906 "there is a constructive total loss when the subject-matter insured is reasonably abandoned on account of the actual total loss appearing to be unavoidable." By rule 10 of the rules for construction of policy in the schedule to the Act "the term 'arrests, &c., of kings, princes, and people' refers to political or executive acts and does not include a loss caused by ordinary judicial process." Held (1) that the old rule that on an insurance of goods under a marine policy at and from the port of loading to the port of destination the frustration of the adventure by an insured peril was a loss recoverable against the underwriters had not been altered by the Marine Insurance Act 1906, and therefore the detention of the goods for an indefinite time in the warehouses still entitled the plaintiffs, on giving notice of abandonment, to recover as for a constructive total loss; and (2) that the destruction of the adventure was directly caused by His Majesty's declaration of war, which was a restraint of kings, princes, and people within the meaning of the policies. Decision of the Court of Appeal (*ante*, p. 116; 113 L. T. Rep. 407; (1915) 2 K. B. 781) affirmed. (H. of L.) *British and Foreign Marine Insurance Company Limited* v. *Samuel Sanday and Co.* 289

13. *Perils — "Men-of-war" — "Restraints of princes"—"Enemies"—British goods on enemy vessel—Ship putting into neutral port to avoid capture—Legality of further performance of contract on outbreak of war—Loss of venture—Whether proximately due to perils insured against.*—In June 1914 the plaintiffs sold certain goods to a German firm, the property not to pass until the goods arrived at the port of destination. The goods were loaded on the German steamship *K.* for a voyage from Calcutta to Hamburg. While the *K.* was on her voyage, war broke out between Great Britain and Germany. The master of the *K.* thereupon put into Messina. The plaintiffs gave notice of abandonment to the defendants, the insurers, on the 1st Sept. and again on the 15th Dec. Bailhache, J. found that the voyage from Messina to Hamburg could not be continued, that the master had no intention of prosecuting the voyage until after the war, and that the voyage was practically abandoned when the vessel put into Messina. The policy of insurance covered the usual perils, including "men-of-war . . . enemies . . . takings at sea,

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arrests, restraints, and detainments of all kings, princes, and people . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises." The plaintiffs' claim was for a total loss under the policy. Held, that there was no loss by the perils insured against. The ship was never in peril of capture, for her commander resolved not to incur that risk; the loss was not due to "enemies," for the refusal of the commander to deliver up the goods at the port of refuge was not a peril from "enemies" within the meaning of the policy; nor was there a loss due to "restraints of princes." *British and Foreign Marine Insurance Company* v. *Samuel Sanday and Co.* (*ante*, p. 289; 114 L. T. Rep. 521; (1916) A. C. 650) distinguished. Judgment of Bailhache, J. affirmed. (Ct. of App.) *Becker, Gray, and Co.* v. *London Assurance Corporation* 318

NOTE.—Since affirmed by H. of L.

14. *Perils of the sea—Exception of "consequences of hostilities"—Vessel torpedoed—Removal into harbour—Transfer to outer berth—Grounding—Loss—Liability of insurer.*—The plaintiffs insured their vessel, the *I.*, with the defendants against ordinary marine perils. The policy contained an exception clause by which "consequences of hostilities" were excepted from its scope. The *I.* was torpedoed near Havre. Although the vessel was badly damaged, the incoming water was kept under by the pumps, and she contrived to get into Havre Harbour. Bad weather during the night caused her to bump, and the harbour authorities, fearing she would sink in the inner berth which she then occupied, directed her removal to an outer berth. When the tide fell the vessel grounded, and the additional strain caused her to make more water. Subsequent tides caused further damage, and the vessel ultimately became a total loss. In an action on the policy: Held, that the vessel was lost as a "consequence of hostilities" and not through ordinary perils of the sea, and that, therefore, the defendants were not liable under the policy. (Rowlatt, J.) *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society* 426

NOTE.—Since affirmed by C. A. and H. of L.

15. *Insurance of vessel against all perils—Exception of loss as result of hostilities—Unexplained loss of vessel during time of war—Liability of underwriter.*—By a policy of insurance a vessel was insured against all perils of the sea for twelve months. Loss in consequence of hostilities and warlike operations was excepted. During the currency of the policy, and during the continuance of a state of war between England and Germany, the vessel in fair weather commenced a voyage from Hull to the Tyne. After leaving the mouth of the Humber she was never seen again. In an action by the assured upon the policy in respect of her total loss: Held, that, in these circumstances, the vessel must be presumed to have been lost by being torpedoed or by striking a floating mine, and not by ordinary perils of the sea, and that the defendant was accordingly entitled to judgment. (Bailhache, J.) *Macbeth and Co.* v. *King* 442

16. *War risks—Extinction of lights—Loss of vessel—Remoteness of cause—Liability of insurer.*—A vessel was insured against war risks, "including extinction of lights." While off the coast of Normandy, on a voyage from Rouen to Bristol, she went on the rocks at the Cap de la Hague, where, owing to war, the light in the lighthouse had been extinguished. The master was not attempting to steer by the light, but said in evidence that had it been alight he would have seen it when he deviated from the course he had set and so managed to save the vessel. The learned judge was not satisfied

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that the master, in the weather existing at the time of the accident, could have seen the light had it been there. Held, upon these facts, that the owners of the vessel could not recover on the policy as the extinction of the Cap de la Hague light was too remote a cause of the loss of the vessel. (Rowlatt, J.) *Le Quellec et Fils* v. *Thomson* 445

See *Carriage of Goods*, Nos. 6, 17, 35—*Sale of Goods*, No. 10.

MARINE INSURANCE ACT, 1906.

SECTS. 1, 3, 65, 66: See *Marine Insurance*, No. 8; SECTS. 26, 60, 91 (2): See *Marine Insurance*, No. 12; SECT. 30, SCHED. 1, R. 12: See *Marine Insurance*, No. 9; SECTS. 57 (1), 60: See *Marine Insurance*, No. 1; SECT. 60: See *Marine Insurance*, No. 5.

MARITIME CONVENTIONS ACT, 1911, S. 1, SUB-S. 1.

See *Collision*, No. 3.

MASTER.

See *Carriage of Goods*, No. 3.

MATERIAL FACT.

See *Marine Insurance*, No. 4.

"MEN OF WAR."

See *Marine Insurance*, No. 13.

"MERCHANT SHIP."

See *Prize*, No. 19.

MERCHANT SHIPPING ACT 1894.

SECT. 1: See *Prize*, No. 44; SECTS. 1, 9, 76: See *Forfeiture*, No. 1; SECTS. 113, 114: See *Seaman*, No. 1; SECTS. 114, 742: See *Seaman*, No. 4; SECTS. 143, 158: See *Seaman*, No. 2; SECT. 156: See *Salvage*, No. 1; SECT. 225, SUB-SECT. 1 (*b*): See *Seaman*, No. 3; SECT. 502: See *Carriage of Goods*, No. 5; SECT. 557: See *Salvage*, Nos. 2, 3; SECTS. 603, 625: See *Collision*, No. 6; SECT. 633: See *Collision*, No. 2.

MERCHANT SHIPPING ACT 1906.

SECT. 28: See *Seaman*, No. 4; SECT. 51: See *Forfeiture*, No. 1.

MILITARY HOSPITAL SHIP.

See *Prize*, No. 35.

MINED AREA, PILOTAGE THROUGH.

See *Pilotage*, No. 1.

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See *Sale of Goods*, No. 3.

NAVAL PRIZE ACT 1864, S. 42.

See *Prize*, Nos. 45, 51.

NAVIRE DE COMMERCE.

See *Prize*, No. 54.

NEGLIGENCE.

See *Dock*, No. 1.

NEUTRAL BANKERS.

See *Prize*, Nos. 5, 7, 16.

NEUTRAL CARGO.

See *Prize*, No. 25.

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See *Prize*, No. 34.

NEUTRAL COMMERCIAL DOMICIL.

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NEUTRAL CONSIGNORS.
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NEUTRAL PARTNER.
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NEUTRAL SHIP.
See *Prize*, Nos. 9, 14, 17, 20, 23, 24, 36, 37, 38, 39, 46, 48, 50.

NEUTRAL TERRITORIAL WATERS.
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See *Prize*, Nos. 26, 27, 31

"ON BOARD."
See *Prize*, No. 45.

"ON LAND."
See *Prize*, Nos. 2, 15.

ONUS OF PROOF.
See *Carriage of Goods*, No. 5—*Prize*, No. 55.

ORDERS IN COUNCIL.
Oct. 29, 1914: See *Prize*, No. 17; March 2, 1915: See *Prize*, Nos. 45, 51; March 11, 1915: See *Prize*, Nos. 49, 50.

ORDERS IN COUNCIL, VALIDITY OF.
See *Prize Court*, Nos. 12, 23, 25, 38.

"OWING TO CIRCUMSTANCES BEYOND IT'S CONTROL."
See *Prize*, No. 31.

OWNER AND MASTER.
See *Carriage of Goods*, No. 3.

PARCELS POST, GOODS DISPATCHED BY
See *Prize*, No. 49.

PARTICULAR AVERAGE.
See *Marine Insurance*, No. 1.

PARTNERS.
See *Prize*, No. 18.

PARTNERS, ENEMY SUBJECTS.
See *Prize*, No. 52.

PASS TO DESTINATION.
See *Prize*, No. 28.

PASSING OF GOODS.
See *Carriage of Goods*, Nos. 33, 43, 52—*Prize*, No. 49.

"PENALTY FOR NON-PERFORMANCE."
See *Carriage of Goods*, No. 16.

PENSIONS AND GRANTS.
See *Collision*, No. 4.

"PERILS OF THE SEA."
See *Carriage of Goods*, Nos. 21, 28—*Marine Insurance*, Nos. 9, 14.

PIER, COLLISION WITH.
See *Marine Insurance*, No. 7.

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PILOTAGE.

1. *Compulsory pilotage through mined area—Remuneration of pilot—Liability of shipowner.*—In consequence of the war between Great Britain and Germany, certain coast defences became necessary on the east coast of England, among them being the establishment of a mine-field in the Humber. The scheme of this mine-field was confided to certain pilots, and the Admiralty directed that vessels using the Humber should be piloted through the mine-field. The Humber Conservancy Board were requested to provide the pilots, for whose services charges were made. The defendant used the Humber for the passage of his vessels and took pilots aboard in compliance with the Admiralty order, but refused to pay pilotage fees on the ground that the regulation directing him to take pilots on board was *ultra vires* the Admiralty and void. Held, that, apart from any statutory authority, the Admiralty had power to take the steps which they had taken, and that the defendant must pay for the pilotage services rendered to him. (Atkin, J.) *Humber Conservancy Board* v. *Grant* 421

2. *Queensland—Compulsory pilotage—Negligence of pilot—Government not liable.*—Under the statutes of Queensland relating to navigation and pilotage, a duty is imposed upon the Government of that State to license and appoint duly qualified pilots. A firm of shipowners claimed damages from the defendant as the nominal representative of the Government of Queensland for the stranding of their vessel while compulsorily in charge of a duly licensed and appointed pilot, by whose negligence the stranding was caused. Held, that the defendant was entitled to judgment as the statutes imposed no duty upon the Government to pilot the plaintiffs' ship, and it was not liable for the negligence of such a pilot, who was not alleged to have been improperly licensed. The duty of the Government is merely to provide qualified pilots. Decision of the Full Court of the Supreme Court of Queensland reversed. (Priv. Co.) *Fowles* v. *Eastern and Australian Steamship Company Limited* 477

See *Collision*, Nos. 2, 6.

PILOTAGE ACT 1913, sects. 10, 14, 15.
See *Collision*, No. 6.

PLEDGE.
See *Prize*, Nos. 7, 16, 41.

POLICY.
See *Carriage of Goods*, No. 7—*Marine Insurance*, Nos. 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13.

PORT.

1. *London—Port rates—Exemption—Goods imported for transhipment only—Goods imported for conveyance by sea to any other port coastwise—Transhipment of goods in Port of London for Rochester—Port of London Act* 1908 (6 *Edw.* 7, *c.* 68), *s.* 13—*Port of London (Port Rates on Goods) Provisional Order Act* 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c. c.*), *schedule*, *s.* 9.—By sect. 13, sub-sect. 1, of the Port of London Act 1908: "All goods imported from ports beyond the sea or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port" shall be liable to port rates. By sect. 13, sub-sect. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point." By sect. 9 of the Provisional Order confirmed by the Port of London (Port Rates on Goods) Provisional Order Act 1910: "No port rates shall be charged by the

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Authority on transhipment of goods, which expression wherever used in this order means and includes goods imported for transhipment only" and "for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, whether beyond the seas or coastwise." Goods were imported from beyond the seas into the Port of London for transhipment only, and were duly certified by the owners as being for transhipment. They were conveyed by a sailing barge down the Thames to Rochester on the Medway. Held, that the goods were exempted from port rates as they were goods imported for transhipment only within sect. 9 of the Provisional Order. Decision of Court of Appeal (12 Asp. Mar. Law Cas. 548; 111 L. T. Rep. 1019; (1914) 3 K. B. 1201) affirmed. (H. of L.) *Port of London Authority* v. *British Oil and Cake Mills Limited* 156

"PORT."

See *Prize*, Nos. 4, 28.

PORT OF LONDON ACT 1908, SECT. 13.

See *Port*, No. 1.

PORT RATES.

See *Port*, No. 1.

POSTPONEMENT OF PAYMENTS ACT 1914.

See *Sale of Goods*, No. 3.

PRACTICE.

See *Prize*, Nos. 8, 33, 35, 53.

PRESUMPTION.

See *Principal and Agent*, No. 1.

PREVALENCE OF BILL OF LADING.

See *Carriage of Goods*, No. 21.

"PREVENTION" WITHIN MEANING OF SUSPENSION CLAUSE.

See *Sale of Goods*, No. 6.

PRINCIPAL AND AGENT.

1. *Foreign principal—Contract—Personal liability of agent—Presumption—Agent's authority to pledge principal's credit.*—Where an agent in England contracts on behalf of a foreign principal he is presumed to contract personally unless the contrary intention plainly appears on the evidence or on the documents or in the surrounding circumstances. If there is no such evidence the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such a way as to establish privity of contract between such principal and the other party, and that he is personally liable on the contract. Held, in the circumstances of this particular case, that the defendants acted as agents and were known to the plaintiffs to be acting as agents, and were therefore not liable. (Sankey, J.) (Commercial Ct.) *Harper and Sons* v. *Keller, Bryant, and Co.* 98

See *Carriage of Goods*, No. 39.

PRIVATE YACHT.

See *Prize*, No. 19, 54.

PRIZE.

1. *Enemy ships—Transfer on eve of war—Transfer in transitu—German company and English company—English company composed of alien enemy shareholders*—Bona fides—*No valid transfer—Declaration of London, arts.* 55, 56, 57 *—Seizure in British ports—Order for detention.*

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—Two sailing vessels on the high seas at the time of the outbreak of hostilities between Germany and Russia—the 1st Aug. 1914—belonging to a German company and flying the German flag, were offered for sale whilst at sea by the German company to an English company whose shareholders were mainly Germans, the German company itself being the holder of nine-tenths of the shares, and the offer was accepted. On the 5th Aug. 1914, the day after the declaration of war between Great Britain and Germany, both vessels were seized and detained as prizes by the Collectors of Customs in the English ports at which they had arrived. Held, that at the time of seizure the two vessels were entitled to fly the German flag; that the flag determined their nationality; that the alleged transfers *in transitu* were, under the circumstances, invalid, as purporting to change the ownership of the vessels as against captors, whether imminent or actual belligerents; and that the vessels were therefore subject to detention in accordance with the decision in *The Chile* (12 Asp. Mar. Law Cas. 598; (1914) P. 212). *Quære*, whether a registered company nominally British, although consisting entirely of enemy shareholders, is able to be the owner of a British ship. (Prize Ct.) *The Tommi; The Rothersand* 5

2. *British ship—Enemy cargo—Cargo shipped before outbreak of war—Ship in British port—Cargo transferred to quay—Seizure—Right of condemnation—"In port"—Meaning of term—Charges—Demurrage.*—A cargo of petroleum oil in bulk, owned by a German company, was shipped on board a British vessel which sailed from a neutral port for a German destination before the outbreak of hostilities between Great Britain and Germany. Whilst on its voyage the ship was directed to proceed to a British port, where the oil was discharged into the tanks of a British company owning the wharf. When the greater portion of the oil had been discharged, the officer of the Customs gave notice to the master of the vessel that the whole of the cargo of oil was placed under detention, not only that which was still in the vessel, but also that which had already been pumped into the tanks. The Crown claimed the whole as prize and asked for the condemnation of the oil. The cargo owners objected on the ground that the tanks were "on land" and not "in port," and that the matter was not within the jurisdiction of the Prize Court. Held, that the tanks were, in effect, oil warehouses, and that warehouses were included in the definition of a "port"; that the whole of the oil, whether in the tanks or on board the ship, was maritime prize as the property of the enemy; and that the Prize Court had authority to condemn it as such. Held, also, that as the company owning the oil was registered, and had its principal place of business in Germany, it must be treated as an alien enemy even though the majority of the shareholders were the subjects of neutral or allied countries. (Prize Ct.) *The Roumanian.* (See No. 15 below.) 8

3. *British ship—Enemy goods—Interruption of voyage — Seizure of goods — Condemnation—Claim for freight—Allowance of part of freight —Principle to be applied—Calculation of amount to be allowed—Rule to be followed.*—Where cargo, the property of an alien enemy, is seized on board a British vessel and condemned as lawful prize, the shipowners are entitled to claim from the Crown such a sum as is fair and reasonable under all the circumstances. This amount is to be ascertained by reference to the registrar and merchants, and in fixing the amount regard must be had to the rate of freight agreed upon, the extent to which the voyage had been made, the costs incurred before the date of the seizure, and the benefit

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accruing to the cargo from the actual carriage. In the absence of any special circumstances, no sum is to be allowed for delay or inconvenience arising to the ship and the shipowners from any diversion during the contemplated voyage or from any detention for the purposes of the capture. (Prize Ct.) *The Juno* 15

4. *Alien enemy—Right of alien enemy to appear in Prize Court—Practice—Owner of captured vessel—Capture "in port"—Capture on "high seas"—Capture in territorial waters—Condemnation—Detention—Hague Conference* 1907 *—Convention VI.*—The question of the right of an enemy owner of a ship or a cargo to appear in a Prize Court is not a matter of international law, but, under the Prize Court Rules 1914, is to be provided for according to the practice to be settled by the judge of the Prize Court. Accordingly the President sitting in Prize directed that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claims before the Prize Court, the grounds of such claim being stated in the affidavit to lead to appearance which is required to be filed under Order III., r. 5, of the Prize Court Rules 1914. A German sailing vessel, owned by her master, was captured in the Firth of Forth shortly after the outbreak of war between Great Britain and Germany. She was taken into Leith. On behalf of the Crown it was contended that the capture took place "at sea." On behalf of the owner it was contended that the capture took place "in port" or in territorial waters, and that therefore she was not liable to condemnation, but only to detention. Held, that the word "port" as used in the Hague Conventions did not mean the "fiscal port," which might cover a considerable area and include several ports, but referred only to a place where ships were in the habit of coming to load or to unload, to embark or disembark, and that as the capture took place in the Firth of Forth it was not a case of capture "in port"; and that it was immaterial whether the capture took place in the territorial waters of Great Britain or not: and that as the vessel was seized upon the high seas, she was properly liable to condemnation as prize and not simply to detention. (Prize Ct.) *The Mowe* 17

5. *British ship—Cargo shipped by neutrals before declaration of war—Cargo consigned to German merchants—War declared whilst cargo at sea—Documents of title not taken up by alien enemies—Money advanced by neutral bankers—Property in goods at time of capture—Right of seizure and condemnation—Principles to be applied.*—In June 1914 an American firm contracted to sell a cargo of wheat to a German firm, carrying on business in Germany. The wheat was to be shipped in July 1914 under a c.i.f. contract, and it was, in fact, shipped on a British vessel which left the United States before the declaration of or of imminence of, war between Great Britain and Germany. The bill of lading was given in favour of F., from whom the American firm bought the wheat in order to fulfil their contract with the German firm, and was made out to the order of D. or his assigns. The bill of lading was indorsed generally. The American firm then paid F. and obtained the bill of lading from him, but did not indorse it in favour of the buyers. The sellers afterwards obtained the certificates of insurance, and drew a bill of exchange on the buyers which was discounted with an American bank, with whom were deposited the bill of lading and other documents to be delivered up to the buyers through a Berlin bank on payment of the amount due on the bill of exchange. The buyers were notified of everything that had been done, but after the outbreak of war they refused to accept the bill. Whilst on her voyage the ship was ordered to proceed to a British port instead of to her original destination, and the cargo was eventually seized as enemy property. Held, that although enemy goods on a British ship are liable to seizure in port and to condemnation as prize in time of war, yet where the goods have been shipped during peace without any anticipation of the imminence of the outbreak of war, and where neither the property or the goods has passed to the enemy nor the documents of title representing the same have been taken up by the enemy, and where money has been advanced on the faith of these documents by a neutral banker, the same are not subject to condemnation by the Prize Court. The liability to seizure of enemy goods on British ships discussed. (Prize Ct.) *The Miramichi* 21

6. *Enemy ship—Signalling apparatus fitted to ship—Apparatus the property of neutral company—Part of ship—"Goods"—Declaration of Paris—Limited powers of Prize Court—Discretion of Crown.*—Submarine signalling apparatus fitted to a ship is a part of the ship itself, and if the ship is one owned by the enemy the apparatus is liable to be condemned along with the ship. It is immaterial that the apparatus is the property of a neutral, and only leased to the owner of the ship. The neutral owner who desires to put in a claim under such circumstances has no right in the Prize Court, and must rely entirely upon the discretion and the clemency of the Crown. (Prize Ct.) *The Schlesien* 26

7. *Enemy ship—British ship—Enemy cargoes—Neutral bankers—Advances against cargoes—Seizure of ships and cargoes—Claims by bankers as pledgees—Condemnation.*—If the legal property in goods captured at sea on a ship, whether British or enemy, is at the time of the capture in an enemy subject, such goods are lawful prize and will be condemned in spite of any claims made by persons who assert that they are pledgees or are otherwise entitled to any rights in them. The Prize Court cannot regard the rights of pledgees in any shape or form. (Prize Ct.) *The Odessa; The Cape Corso.* (See No. 16 below.) 27

8. *Ship—Cargo—Seizure of cargo—Sale—Claim for freight—Proceedings in King's Bench Division—Jurisdiction of Prize Court—Transfer of case—Practice.*—Where the cargo of a ship has once been seized as prize, even though the cargo is subsequently released, the jurisdiction to determine as to the rights of the shipowner to receive freight and also the amount of the freight, if he is entitled to receive any at all, is in the Prize Court and not in the common law courts of the country. (Prize Ct.) *The Corsican Prince* 29

9. *Trading with enemy—Goods of ally—Consignment to enemy—Contract of sale at date prior to outbreak of war—Neutral vessel—Dispatch from neutral port—Date of departure after the outbreak of war—Liability to seizure and condemnation—General principles to be applied—Obligations as to trading binding Confederate States.*—When war breaks out between States the following rules apply, according to international law, to trading: First, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, unless it is expressly allowed or licensed by the head of the State. Secondly, where a belligerent State has allies, the cities of all the allied States are under the same obligations to each of the allied States as its own subjects would be to a single belligerent State as regards commercial intercourse with the enemy. Thirdly, where such illegal intercourse is proved between allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to

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capture by any allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts. Fourthly, when such intercourse in fact takes place, the property of the persons engaged in it is confiscable, whether they were acting honestly and with *bona fides* or not. Prior to the outbreak of war between Great Britain and her allies and Germany and Austria, a French company contracted to sell certain goods to a German firm. The goods were shipped from a neutral State in a neutral vessel. War broke out whilst the ship was being loaded. She afterwards sailed with the goods on board for Antwerp and Newcastle. The French company later on directed her to Swansea. From certain correspondence it appeared that attempts were made by the English representative of the French company to deliver the cargo to the German company if they accepted delivery in England. The goods were seized as prize at Swansea, and later sold. It was admitted that at the time of seizure the property in the goods was still in the French company. Held, that although the French company had acted honestly and *bona fide* in the transaction, what they had done constituted trading with the enemy after the outbreak of war, and as they were citizens of a State in alliance with Great Britain the goods were confiscable under the above-named principles of international law in the same manner as those of a British citizen would have been under similar circumstances. (Prize Ct.) *The Panariellos.* (See No. 39 below.) 52

10. *British ship—Cargo—Goods the property of a company domiciled in England—Enemy shareholders and directors—Management of company during war—Status of company—Principles to be applied when cargo claimed as prize.*—Certain goods were sent from England to Australia on sale or return before the outbreak of war between Great Britain and Germany, and were sent back from Australia to England after the commencement of hostilities. They were seized in the Port of London as prize. The Crown claimed them as enemy goods. The sellers were a company incorporated in this country in May 1912. All the directors of the company were aliens residing in Germany, and the whole of the shareholders were either alien enemies or persons residing in Germany. On the day before war broke out the secretary of the company, who was a German, left England, having purported to appoint one of the employees as manager. Held, that the goods were at the time of seizure the property of an English company, and that although the company was so constituted that all its directors were enemy subjects resident in Germany and all its shareholders were either enemy subjects or aliens resident in Germany, the goods were not enemy property, and therefore not subject to condemnation as prize. The goods were released to the manager of the English company with a direction that he should not deliver them or their proceeds to any enemy shareholders or use them or apply their proceeds for the benefit of any such shareholders during the war. (Prize Ct.) *The Poona* 57

11. *British ship—Cargo—Consignment to alien enemies—Ship diverted during voyage—Outbreak of hostilities—Seizure of cargo—Sale—Release—Claim for proceeds of sale—Claim for freight—Jurisdiction of common law courts—Jurisdiction of Prize Court—Construction of charter-party and bill of lading—"Blockade and interdicted port" clause—Equitable adjustment.*—Certain goods, the property of a Russian bank, were shipped in a British vessel at a Russian port before the outbreak of war between England and Germany, and were consigned to German merchants at Hamburg. Whilst the vessel was on her voyage hostilities began, and by the order of the British authorities she was diverted from her original destination and directed to proceed to a British port, where the goods were seized as prize and afterward sold by order of the court. The proceeds were paid into court. The marshal gave an undertaking to the shipowners to pay to them the proper amount of freight and charges. The cargo was subsequently released to the Russian bank upon their giving an undertaking to indemnify the marshal against all claims for freight and charges in respect of the same. The bank subsequently applied for payment of the proceeds of the cargo in full without any deduction for freight or charges. Held, that although according to the common law the contract of affreightment came to an end immediately it became illegal because of the war to carry the cargo to its original destination, and that in a court of common law no freight can be recovered under such a contract when it has been so determined, the same rule does not apply when the cargo has been seized as prize. The Prize Court, proceeding on the principle of "even and equitable adjustment," will award a certain amount to the shipowners under special circumstances for freight and charges, such amount to be ascertained by the registrar and merchants. (Prize Ct.) *The Iolo* 141

12. *Order in Council—Validity—Binding Effect upon Prize Court—Prize Court Rules—Order XXIX.*—By Order XXIX. of the Prize Court Rules, as authorised by an Order in Council, it is provided that: "Where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given . . . the ship shall be released and delivered to the Crown." By Order I. of the Prize Court Rules: "Unless the contrary intention appears, the provisions of these rules relative to ships shall extend and apply, *mutatis mutandis*, to goods." A Swedish vessel carrying copper, which was absolute contraband of war, was seized and brought into a British port. A writ was issued that the ship and her cargo should be condemned and confiscated. Before any adjudication as to these claims had taken place, the Procurator-General on behalf of the War Department took out a summons that the Crown should be entitled to requisition the copper, leaving the question of the right to the same, or the proceeds of the sale thereof, to be decided later on. Held, that Order XXIX. was binding upon the Prize Court, that it did not contravene the law of nations, and that it was not *ultra vires.* (Prize Ct.) *The Zamora.* (See No. 25 below.) 144

13. *Prize—British ship—Goods shipped at foreign port—Shipment prior to outbreak of war—Goods consigned to enemy subject at enemy port—Goods* in transitu—*Sale by enemy subject to neutral—Sale completed before outbreak of war—Imminence of war—Contemplation of war—Validity of sale*—Bona fides—*Right of capture of goods.*—Where upon the facts of the case it appears that goods consigned to an enemy subject at an enemy port, and shipped before the outbreak of hostilities, are sold *bona fide* to a neutral purchaser during the period of their transit, neither the vendor nor the purchaser having the war itself in contemplation, the transaction of sale is complete and the goods are not subject to capture at sea by the armed vessels of the country which is at war with the vendor's country. (Prize Ct.) *The Southfield* ... 150

14. *Neutral vessels—Contraband goods—Absolute and conditional contraband—Neutral consignors—Ostensible destination of cargoes—Neutral country—Real destination of cargoes—Enemy country—Goods consigned "to order"—No*

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consignee named — Continuous voyage — Continuous transportation—Goods intended for enemy—Evidence—False papers—Tests for condemnation or release.—Four vessels, the property of neutral owners, under time charters to neutral merchants, started on voyages from New York to Copenhagen in October and November, 1914, laden with large cargoes of lard, hog, and neat products, oil stocks, wheat and other foodstuffs, rubber and hides. They were captured and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable under the circumstances, with the exception of one cargo of rubber, which was seized as absolute contraband. On the evidence before the Prize Court, when the Crown asked for the condemnation of the cargoes, it was found that the major portion of the goods were not intended to be incorporated in the common stock of Denmark, but that the same were intended for Germany as their ultimate destination. Held, that as the doctrine of continuous voyage and transportation, both as regards carriage by sea and land, was a part of international law at the time of the commencement of the war in August, 1914, and was applicable to conditional as well as to absolute contraband, all goods which were intended for the use of the German Government, although nominally having Copenhagen as their port of destination, must be condemned as lawful prize. In arriving at its decision in any particular case, the Prize Court is not limited or governed by the strict rules of evidence which bind the municipal courts of the country; it is entitled to rely upon well-known facts which have come to light in other cases, or as matters of public reputation. Strict evidence is often very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents. (Prize Ct.) *The Kim, The Alfred Nobel, The Björnsterjne Björnson, The Fridland* 178

NOTE.—Since affirmed by Priv. Co.

15. *British ship—Enemy cargo—Cargo shipped before outbreak of war—Part cargo discharged into oil tanks on wharf—Tanks owned by British company—"In port"—Meaning of term discussed—Liability to seizure of enemy cargo.*—A cargo of petroleum oil in bulk owned by a German company was shipped on board a British ship which sailed from a neutral port for a German destination before the outbreak of hostilities between Great Britain and Germany. While on its voyage the ship was ordered to proceed to a British port, where the oil was discharged into tanks of a British company owning the wharf. When the greater portion of the oil had been discharged, the officer of Customs gave notice to the master of the vessel that the whole of the cargo of oil was placed under detention, not only that which was still in the vessel, but also that which had already been pumped into the tanks. The Crown claimed the whole as prize and asked for the condemnation of the oil. The cargo owners objected on the ground that the tanks were "on land" and not "in port," and that the matter was not within the jurisdiction of the Prize Court, and claimed the release of the oil to them, or, alternatively, that it should be sold and the proceeds handed to them at the end of the war. Held, that the whole cargo had rightly been condemned as droits of Admiralty. Decision of Evans, P. (13 Asp. Mar. Law Cas. 8; 112 L. T. Rep. 164; (1915) P. 26) affirmed. (Priv. Co.) *The Roumanian*... 208

16. *Enemy cargoes—Cargo shipped in enemy ship—Cargo shipped in British ship—Neutral bankers advance against cargoes—Rights as pledgees under bills of lading—Seizure and condemnation—Bounty of Crown—Civil List Acts.*—Enemy goods on board both British ships at the commencement of hostilities are alike the proper subject of maritime prize. If the legal property in goods captured at sea on a ship, whether British or enemy, is at the time of the capture in an enemy subject, such goods are lawful prize and will be condemned in spite of any claim made by persons who assert that they are pledgees or are otherwise entitled to any rights in them. The Prize Court cannot recognise the claim of pledgees in such circumstances in any shape or form. The power of bounty by way of redress or hardship still exists in the Crown, and has not been affected by the Civil List Acts. Decision of Evans, P. (reported in the case of *The Odessa*, 13 Asp. Mar. Law Cas. 27; 112 L. T. Rep. 473; (1915) P. 52, which decision was followed by the learned judge in the case of *The Woolston*) affirmed. (Priv. Co.) *The Odessa; The Woolston* 215

17. *Neutral sailing ship—Cargo—Contraband—Order in Council of the 29th Oct. 1914—Property of enemy—Condemnation—Compensation—Art. 43 of Declaration of London—Shipowners' claim for freight—Loss by delay—Contribution to alleged general average loss.*—By the Declaration of London Order in Council, No. 2, 1914, dated the 29th Oct. 1914, it was declared that during the present hostilities the convention known as the Declaration of London should, subject to certain additions and modifications therein specified, be adopted and put in force by His Majesty's Government. Art. 43 of the Declaration of London, which provides (*inter alia*) that if a vessel is encountered at sea while unaware of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation, which was not excepted by the terms of the Order in Council. By the said order chrome ore was declared to be absolute contraband. Under the terms of a contract entered into in 1913 between an English company and a German company, the former shipped certain chrome ore in June 1914 from a foreign port on a Norwegian sailing vessel chartered by the German company. The bills of lading were made out in favour of the English company, the sellers, or order, the port of delivery being Rotterdam. The buyers paid to the sellers, at the date of sailing, in accordance with the terms of the contract, 50 per cent. of the purchase price of the chrome ore, together with a sum of 1000*l.* advanced by the sellers for the ship. On the voyage the vessel put into Pernambuco, in Sept. 1914, where the master first heard of the outbreak of war, and acting upon instructions received by cable he changed the course of the vessel from Rotterdam to Gothenburg, in Sweden, *viâ* the North of Scotland. The vessel was captured in Nov. 1914 by a British cruiser, and taken to Glasgow. At the date of the seizure of the vessel the master was unaware of the Order in Council of the 29th Oct. 1914. In the prize proceedings for the condemnation of the cargo, two claims were put in, one by the English company, the sellers, and another by a Swedish company, which alleged that the chrome ore had been purchased by them from the German company. No claim was made on behalf of the German company. The shipowners also put in a claim for freight, for remuneration for the use of the ship or loss by delay, and for contribution from the cargo to alleged general average loss. Held, that, on the facts of the case, the cargo was the property of the German company, the same having passed to them from the English company; that the German company were not the agents of the Swedish company; and that as the German company had put in no claim the question of compensation did not arise. *Quære*, whether in any case art. 43 of the Declaration of London applies under any circumstances to prevent the condemnation of contraband pro-

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perty of the enemy without compensation. Held, also, that the shipowners were entitled to freight, the amount to be ascertained by a reference to the registrar and merchants, that they were not entitled to any compensation for the use of the ship or loss by delay, and that they were entitled to a contribution from the cargo to general average loss provided they could establish a claim to the same. (Prize Ct.) *The Sorfareren* 223

NOTE.—Since affirmed by Priv. Co.

18. *Neutral commercial domicil—English and German partners—Partnership established in Shanghai—Firm registered at German Consulate—Goods of firm—Consignment to Germany—Seizure at sea—British ship—Claim as prize—Status of firm—Condemnation of share of German partners—Conditions under which share of English partners liable to condemnation.*—A partnership firm composed of British and German partners, and registered at the German Consulate at Shanghai, cannot acquire a neutral commercial domicil, but is on the same footing as a German firm established in Germany. The goods of such a firm are liable to condemnation as prize if captured at sea on board a British vessel, but the shares of the English partners in the goods will be released if satisfactory evidence is given showing that the English partners broke off their connection with the partnership business as soon as possible after the outbreak of war. (Prize Ct.) *The Eumæus* 228

19. *Enemy ship—Private yacht of alien enemy—Outbreak of war—Seizure in port—Hague Convention* 1907—*Convention VI., art.* 1—"*Merchant ship*"—*Non-applicability of Convention to private yacht—Condemnation—Repairs to yacht after seizure—Indulgence of Crown—Position of Germany as to Hague Convention.*—Owing to the acts of Germany since the outbreak of war, in violation of the terms of the Hague Convention to which she was a party, it is doubtful whether she can demand their observance by any of her belligerent enemies. By the Hague Convention 1907, No. VI., it is stated (*inter alia*), in art. 1, that it is desirable that any merchant ship belonging to one of the belligerent Powers which is in an enemy port at the commencement of hostilities should be allowed a certain number of days, if necessary, to depart to its port of destination, or to any other port indicated to it. A racing yacht, the private property of a German subject, was in a British port at the time of the outbreak of the war between England and Germany on the 4th Aug. 1914. It was seized and an order for detention was made. After the seizure, leave was given for certain repairs to be executed upon it to prevent the deterioration in value of the vessel; but it was expressly stipulated that the contractors were to have no lien or claim as against the marshal in respect of the costs of such repairs. The Crown subsequently asked for the condemnation of the yacht, and claims were then put in against the Crown for the sums expended in repairs. Held, that a racing yacht was not a merchant ship so as to be entitled to the privileges accorded by the Hague Convention 1907, No. VI., art. 1, and was therefore lawful prize as having been seized in a British port after the declaration of hostilities. Held, also, that apart from any indulgence on the part of the Crown, there was no legal claim for the sums expended in repairs to the yacht subsequently to the date of seizure. (Prize Ct.) *The Germania.* (See No. 54 below.) 230

20. *Neutral ship—Capture by belligerent—Recapture by other belligerent—Salvage—Right to claim same—Rule as to salvage on recapture of neutral ship—Exception to rule—Conduct and character of captor—Right to destroy—Promise to release*—Bona fides—*German naval code.*—Although it is a general rule of the law of nations that no salvage is due for the recapture of neutral ships, there is an exception to this rule, that is, salvage is payable if the ship when recaptured was practically liable to be confiscated or destroyed by the enemy captor, whether rightfully or wrongfully. The *P.*, a neutral ship laden with coal which was the property of British subjects, was captured by a German cruiser shortly after the outbreak of war in 1914. A large quantity of the coal was taken by the cruiser, the crew of the *P.* were made prisoners, a German prize crew was put on board, threats were made to destroy the *P.* by the Germans, and the ship was compelled to accompany the German cruiser wherever required. About five weeks after the date of the capture the *P.* was recaptured by a British cruiser, and a claim was put in for salvage remuneration by the captain, officers, and crew of the British cruiser. The shipowners resisted the claim on the ground that the *P.* had never been in presumptive peril. Held, that, having regard to the fact that the commander of the German warship was "entitled" under German law to destroy the captured vessel and the likelihood that he would have done so, the opinion of the court was that the recapture of the ship both saved the ship from condemnation if brought before a Prize Court and from almost certain risk of destruction on the high seas if she was not. Held, consequently, that restitution to her Greek owners on recapture should have been upon payment of reasonable salvage. Award 7333*l.*, or one-sixth of the value of the salved property. (Prize Ct.) *The Pontoporos* ... 303

21. *British ship—Enemy cargo—Cargo shipped before outbreak of war—Discharge in British port before outbreak of war—Storage in bonded warehouse in port—Declaration of war—Seizure of cargo—"In port"—Right of condemnation.*—A cargo of goods, the property of a Turkish merchant, were shipped from a Turkish port and landed in London prior to the declaration of war between Great Britain and Turkey. The goods were conveyed in a British ship and, after landing, were stored in a bonded warehouse at the port of London, where they still were at the date of the outbreak of hostilities. Held, that the goods were liable to seizure and condemnation as prize in accordance with the principles laid down in *The Roumanian* (*ante*, p. 208; 114 L. T. Rep. 3; (1916) A. C. 124). (Prize Ct.) *The Eden Hall* 306

22. *German ship—Entry into British port prior to outbreak of hostilities—Entry as a place of refuge—Not in furtherance of commercial enterprise—Detention—Subsequent release—Order to leave port—Outbreak of war—Seizure—Condemnation—Hague Convention* 1907, *No. VI., arts.* 1 *and* 2, *and Preamble.*—By the preamble of the sixth Hague Convention 1907, the contracting parties stated that they had come to certain agreements on the ground, as therein stated, that they were "anxious to ensure the security of international commerce against the surprise of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities," and accordingly arts. 1 and 2 of the Convention were drawn up. By the first of these articles it is stipulated (*inter alia*) that an enemy merchant ship which is in a port of a belligerent at the date of the outbreak should be allowed a reasonable number of days of grace in which to depart, and by the second it is provided that if owing to circumstances beyond her control the vessel cannot depart within that period, she may not be confiscated but merely detained. A German liner bound from Philadelphia to Hamburg, hearing

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of the outbreak of war between France and Germany, put into F. on the 3rd Aug. 1914, in order to avoid possible capture by French cruisers. On the morning of the 4th Aug. 1914 the master was told that his vessel would be detained, but later in the day she was released and ordered to leave the port. She made no attempt to depart, and on the morning of the 5th Aug., war having broken out between Great Britain and Germany in the meantime, she was seized as prize. Held, even assuming that the Hague Convention was binding upon Great Britain as far as Germany was concerned, that the vessel did not enter and was not in the port of F. in pursuance of a commercial enterprise, that ample opportunity had been given to her to depart, and that arts. 1 and 2 of the Convention did not protect her from condemnation as prize. (Prize Ct.) *The Prinz Adalbert; The Kronprinzessin Cecilie* 307

NOTE.—Since reversed by Priv. Co.

23. *International law—Reprisals—Neutral ship—Cargo, not contraband, with enemy destination—Ship ordered to British port—Unloading—Detention—Compensation for detention—Order in Council of the 11th March* 1915—*Validity.*—Art. 3 of the Order in Council of the 11th March 1915—reprisals restricting German commerce—is valid by international law, and the owner of a neutral ship which is detained in a British or an allied port, having been ordered thither for the purpose of discharging goods on board other than contraband which are the property of the enemy or intended for an enemy destination, has no legal right to compensation for the detention of the ship through such discharge. The Order in Council does not impose any unreasonable inconvenience on neutrals considering the special circumstances of the case. (Prize Ct.) *The Stigstad* 310

24. *Neutral ship — Contraband cargo — Cargo intended for enemy destination—Enemy agent on board vessel—Question of fact whether neutral ship becomes enemy vessel—Frustration of adventure—Sale of cargo to persons other than enemies—Return voyage—Capture—Right of condemnation.*—Whether a neutral vessel is or is not acting in such a manner as to be held to be an enemy vessel is a question to be decided upon the special facts of each case. If a neutral vessel carries contraband goods, even though her papers are false, and the goods are intended for an enemy destination, and the original intention to carry and deliver the contraband goods to the enemy has been frustrated and abandoned, and the goods themselves have been sold and delivered to other buyers before the vessel has been seized, the vessel is freed from any liability to condemnation as prize. (Prize Ct.) *The Alwina* ... 311

NOTE.—Since affirmed by Priv. Co.

25. *Neutral cargo — Contraband — Requisition before condemnation — Order in Council — Validity—Prize Court Rules* 1915—*Order XXIX., rr.* 1, 2, 5.—By Order XXIX. of the Prize Court Rules, as authorised by an Order in Council, it is provided that: "Where it is made to appear to the judge on application of the proper officer of the Crown that it is desirable to requisition on behalf of His Majesty's ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given . . . the ship shall be released and delivered to the Crown." By Order I. of the Prize Court Rules: "Unless the contrary intention appears, the provisions of these rules relative to ships shall extend and apply *mutatis mutandis*, to goods. A Swedish vessel carrying copper, which was absolute contraband of war, was seized and brought into a British port. A writ was issued that the ship and her cargo should be condemned and confiscated.

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Before any adjudication as to these claims had taken place the Procurator-General, on behalf of the War Department, took out a summons that the Crown should be entitled to requisition the copper, leaving the question of the right to the same, or the proceeds of the sale thereof, to be decided at some later date. Held, that Order XXIX., r. 1, as an imperative direction to the court, is not binding; that there was no inherent power in the Prize Court to sell or realise the property in its custody pending decision in such a case as this; that a belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations: First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security; secondly, there must be a real question to be tried, so that it would be improper to order an immediate release; and, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable; and that in the present case there was insufficient evidence before the President to justify his making an order appealed from. The order was therefore set aside. As the copper had been used up by the War Department no order for its restitution could be made, and there must be a declaration instead and leave granted the claimants, in the event of their ultimately succeeding in the proceedings for condemnation, to apply to the court below for damages, if any, as they might have suffered by reason of the order, and what had been done under it. In a proper case both damages and costs can be awarded against the Crown or the officer representing the Crown in the proceedings. Decision of Evans, P. (13 Asp. Mar. Law Cas. 144; 113 L. T. Rep. 649; (1916) P. 27) reversed. (Priv. Co.) *The Zamora* 330

26. *Merchant ship in enemy port—Use of the Suez Canal port as port of refuge—Commencement of hostilities—Permission to leave—No offer of pass—Attitude of Germany—Reciprocal obligations—Detention—Sixth Hague Convention of* 1907, *art.* 1, 2, 5—*Form of Order.*—By art. 1 of the Sixth Hague Convention 1907: "When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to the port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war, and has entered a port belonging to the enemy whilst still ignorant that hostilities have broken out." By art. 2: "A merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port within the period contemplated in the preceding article or which was not allowed to leave may not be confiscated. The belligerent may merely detain it on condition of restoring it after the war, without payment of compensation, or he may requisition it on payment of compensation." The *G.*, a German ship, arrived at Port Said on the 5th Aug. 1914 in ignorance that war had been declared between Great Britain and Germany. From her arrival to the 14th Aug. she was not free to leave, but on the latter date she was informed that she was free to proceed if she liked. Matters so remained until the 13th Oct. She never asked for a pass. She was never offered one. On the 13th Oct. the

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Egyptian Government by arrangement with the British Government put a crew on board her, and on the 16th she was conducted out to sea, where she was seized by a British cruiser as prize. War was not declared between Great Britain and Turkey until the 5th Nov. 1914, and Egypt had not then been declared a British protectorate. The Egyptian Prize Court held that the *G.* was entitled to detention in lieu of confiscation, and that in accordance with art. 2 (*sup.*) she should be detained during the war and restored to her owners at the conclusion of hostilities. Held, that Egyptian ports must be treated as enemy ports, and that, assuming the Hague Convention applied and the Order in Council of the 4th Aug. 1914 extended to Egypt and was operative at the time the vessel was taken as prize, the failure of Germany to concur in recognising art. 1 left the question whether art. 2 or any part of it was obligatory, or whether, if the course referred to in art. 1 as "desirable" was not taken, art. 2 had any application to an enemy ship in an enemy port at the outbreak of hostilities, or had subsequently without knowledge of the war entered it, was one of international law involving a reciprocal obligation performable only at the end of the war. The British Government was entitled in such circumstances to seize and detain the ship during the war, and the proper order was one merely for the detention of the ship, leaving the ultimate rights of the parties to be determined after the war. (Priv. Co.) *The Gutenfels; The Barenfels; The Derfflinger* 346

27. *Ship in enemy port at outbreak of hostilities—Refusal of offer of pass—Liability to confiscation—Hague Conference* 1907, *Convention VI., arts.* 1, 2.—If a merchant ship in an enemy port at the outbreak of hostilities rejects the offer of a pass and elects to remain in that port, she is not protected by arts. 1 and 2 of the Hague Conference 1907, Convention VI., from condemnation and confiscation as prize. Decision of the Supreme Court for Egypt (in Prize) affirmed. (Priv. Co.) *The Achaia* 349

28. *Enemy merchant ship in enemy port—Outbreak of war—Capture "in port" or "at sea"—Meaning of "port"—Capture in open roadstead—Hague Peace Conference* 1907, *Convention VI., arts.* 1, 2.—By art. 1 of the Sixth Hague Convention 1907: "When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass direct to the port of destination or any other port indicated to it. . . ." By art. 2: "A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated," but may be detained. Held, that these articles applied only to vessels within a "port" in the ordinary mercantile sense of the word, and did not apply to a vessel captured while lying in an open roadstead at the commencement of hostilities, although at a place within the limits of the fiscal port. Decision of Sir S. T. Evans affirmed. (Priv. Co.) *The Belgia* 350

29. *Ship entering enemy port after declaration of war with knowledge, but under leave to proceed on voyage—Boarding at sea—Leave to proceed on voyage—Detention—Liability to confiscation — Hague Peace Conference* 1907, *Convention VI., arts.* 1 *and* 2.—A merchant ship belonging to a belligerent Power was stopped by a British warship at sea and was informed

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of the outbreak of hostilities. She was, however, allowed to proceed on her voyage apparently under a misapprehension that some period of grace had been allowed her. She proceeded to the port of Suez, regarding it as a neutral port, with the intention of remaining there. Held, that she was not protected by arts. 1 and 2 of the Sixth Hague Convention 1907, and was liable to condemnation. Decision of the Supreme Court for Egypt (in Prize) reversed. (Priv. Co.) *The Marquis Bacquehem* 351

30. *Enemy ship—Port of refuge—Suez Canal port—Rejection of safe conduct pass—Seizure—Suez Canal Convention* 1888, *arts.* 1 *and* 4—*Question of international convention—Right of enemy owners to be heard.*—Art. 4 of the Suez Canal Convention of 1888, confirmed by the subsequent Anglo-French Agreement of 1904, contains the following provisions: "The Maritime Canal remaining open in time of war as a free passage even to the ships of war of belligerents, according to the terms of art. 1 of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of three miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers." Held, that the Convention had no application to enemy ships which were using the Canal ports of access, not for the purpose of passing through the Suez Canal, but as a neutral port in which to seclude themselves for an indefinite time in order to defeat belligerents' rights of capture. Held, further, that as the alleged immunity from capture was based on international conventions, the enemy owners were entitled to be heard. Practice laid down in *The Möwe* (*ante*, p. 17; 112 L. T. Rep. 261; (1915) P. 1) followed. (Priv. Co.) *The Pindos; The Helgoland; The Rostock* 353

31. *Enemy merchant ship—Offer of pass to neutral port—Conditions—Failure to use—"Force majeure"—Ship detained "owing to circumstances beyond its control"—Hague Conference* 1907, *Convention VI., arts.* 1 *and* 2.—A merchant ship in an enemy port is not entitled to receive an unconditional pass under art. 1 of the Hague Convention VI., and reasonable conditions attached to the offer of the pass do not invalidate it; and the expression "*force majeure*" in art. 2 of the same Convention has reference to circumstances which render the ship unable to leave the port within the days of grace allowed her, and cannot be construed to include the circumstance that the master has not been provided with sufficient money by the owners to continue the voyage. Decision of the Supreme Court for Egypt (in Prize) affirmed. (Priv. Co.) *The Concadoro* ... 355

32. *Goods of enemy firm—Goods shipped before the outbreak of war—Rights of neutral partner—Protection of his share—Conditions under which share is protected from confiscation.*—A neutral subject was a partner in an enemy firm which had its headquarters in Germany. Goods which were the property of the firm were shipped from America before the outbreak of the war and were consigned to a German port. During the voyage, hostilities having commenced in the meantime, the goods were seized as prize. Upon the Crown claiming condemnation of the goods, the neutral asserted that he was entitled to his share in the same. Held, that a neutral partner does not lose his right to have his share in the partnership property protected from confiscation merely because he allows the delivery of the goods to proceed in the ordinary course, provided that he does nothing actively after the commencement of hostilities to further or to facilitate the delivery of the

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goods to the enemy house. (Prize Ct.) *The Anglo-Mexican* 367

NOTE.—Since reversed by Priv. Co.

33. *Practice—Decree condemning cargo*—Bonâ fide *claims by third parties who had no opportunity of being heard—Rehearing—Jurisdiction of court to set aside its own judgments.*—Where substantial injustice would otherwise result, the court has an inherent power to set aside its own judgments of condemnation so as to let in *bonâ fide* claims by third parties who had not in fact been heard and who had had no opportunity of appearing. But such power is discretionary and should not be exercised except where there would be substantial injustice if the decree were allowed to stand and where the application for relief had been promptly made. So held, remitting the summons to the Prize Court, with leave to the appellants to amend it and to file the proper evidence in support thereof. (Priv. Co.) *The Bolivar* 369

34. *Cargo—Shipment of cargo before outbreak of war—Goods the produce of enemy soil—Neutral claimants — Company domiciled in neutral country—Branch office in enemy country—Domicil—Effect of Turkish Capitulations.*—A Greek company, having its head offices at Athens, carried on a branch business in Asia Minor, where it owned certain vineyards. Before the outbreak of hostilities between Great Britain and Turkey a cargo of sultanas, the produce of the vineyards, was shipped by the company in a British vessel, and consigned to the order of the company at Liverpool. At the last-named port the goods were seized as enemy property and claimed as prize by the Crown. Held, that, although the Greek company was neutral, the goods claimed were the produce of land owned or held by the claimants in an enemy country and were liable to confiscation and condemnation, even though the goods were shipped before the outbreak of war, and that the effect of the Turkish Capitulation as to the holding of land in the Turkish Empire by persons of foreign nationality was irrevelant. (Prize Ct.) *The Asturian* 375

35. *Military hospital ship—Evidence pointing to user for other purposes—Claim of protection under the Hague Convention—Appeal involving question of fact only—Practice—Hague Conference* 1907, *Convention* 10, *arts.* 1 *and* 8.—By the provisions of Convention 10 of the Hague Convention 1907 it is provided: Art. 1. Military hospital ships—that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers—shall be respected and cannot be captured. Art. 8. The protection to which hospital ships are entitled ceases if they are used to commit acts harmful to the enemy. The presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection. Held, on the evidence that the German ship *O.*, which claimed to be a military hospital ship, had been made use of to commit acts harmful to the enemy, and therefore had forfeited protection under the Hague Convention and had rightly been condemned as lawful prize. An appeal from a decision of the Prize Court on a question of fact must be treated as a rehearing in the same way as an appeal to the Court of Appeal from a judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the judge, but the Appeal Court attaches great weight to the fact that the judge below has heard the witnesses and practically acts on the opinion of the judge as to the credibility of the witnesses before him and the weight to be attached to their evidence. Without laying down an absolute rule that the mere sending by a hospital ship of a wireless message

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in secret code will of itself forfeit her right to protection and subject her to capture and condemnation, if such messages are sent a clear and satisfactory record of them should be kept, so that when the right to search is exercised there may be reasonable evidence of the messages and of the necessity—if there can be any on the part of the hospital ship—for sending them in secret code. *Semble*, that the principle of the Prize Court condemning the spoliation of ships' papers is specially applicable to vessels claiming to be hospital ships. Decision of Sir Samuel Evans, P. affirmed. (Priv. Co.) *The Ophelia* 377

36. *Neutral ship—Capture—Unneutral service—Capture in neutral territorial waters—Validity of capture — Restitution — Right to demand restitution—Hague Conference* 1907, *Convention XIII.*—It is an established rule of international law that a capture within the territoral waters of a neutral is, as between enemy belligerents, rightful for all purposes, and it is only by the neutral State concerned that the legal validity of the capture can be questioned. Neither an enemy, nor a neutral acting the part of an enemy, as, for instance, by being guilty of unneutral service, can demand the restitution of captured property on the sole ground of its capture within neutral waters. This rule of international law has been in no way modified by Convention XIII. of the Hague Conference 1907. (Prize Ct.) *The Bangor* 397

37. *Neutral ship—Cargo—Cargo lawful at commencement of voyage—Cargo declared conditional contraband before voyage completed—Seizure—Consideration—Claim for freight—Claim for demurrage.*—A neutral vessel started from a neutral port for a neutral destination after the outbreak of war. Part of her cargo consisted of goods which were declared conditional contraband after her departure. The vessel was stopped on her way and sent into a British port for examination. Later on, but after the date of the order making the particular cargo conditional contraband, the cargo was seized as prize, on the assumption that it was ultimately intended for delivery to the enemy. The vessel was delayed a considerable time, but was ultimately released, and the shipowners put in a claim for freight and demurrage. Held, that the cargo was a proper subject for condemnation, but that the shipowners were entitled to a certain amount for freight, to be settled by the registrar and merchants, though not to anything for demurrage, which was an unfortunate incident of a state of war. (Prize Ct.) *The Katwijk* 399

38. *Neutral vessel—Carriage of contraband—Liability to confiscation of vessel and cargo—Old rule—Relaxation—Practice of maritime States—Art.* 40 *of Declaration of London—Adoption of article by Order in Council—Validity—Rule of international law as to contraband since* 1908.—Although there is no formal instrument binding as an international convention, the attitude and the action of the more important maritime States before and since the holding of the International Naval Conference at London in 1908-9 have resulted in the establishment of a rule of international law that neutral vessels carrying to an enemy port contraband which by value, weight, volume, or freight value forms more than one-half of the cargo are subject to confiscation and to condemnation. (Prize Ct.) *The Hakan* 479

NOTE.—Since affirmed by Priv. Co.

39. *Trading with the enemy—Goods of ally—Consignment to enemy—Contract of sale at date prior to outbreak of war—Neutral vessel—Dispatch from neutral port after date of outbreak of hostilities—Liability to seizure and condemnation—General principles to be applied—*

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Obligations as to trading binding confederate States.—On the outbreak of a war in which a belligerent has allies, the citizens of each of the allied States are under the same obligations to each other allied State as its own subjects would be to a single belligerent State with relation to intercourse with the enemy. Prior to the outbreak of war between Great Britain and her allies and Germany and Austria, a French company contracted to sell certain goods to a German firm. The goods were shipped from a neutral State in a neutral vessel. War broke out while the ship was being loaded. She afterwards sailed with the goods on board for Antwerp and Newcastle. The French company later on directed her to Swansea, where the goods were seized and sold. It was admitted that at the time of seizure the property in the goods was still in the French company. Held, that although the French company had acted honestly and *bonâ fide* in the transaction, what they had done constituted a trading with the enemy after the outbreak of war. They had failed to discharge the onus of establishing that the transaction had been abandoned before the seizure of the goods, which were therefore confiscable as those of a British citizen would have been under similar circumstances. Decision of Evans, P., reported 13 Asp. Mar. Law Cas. 52; 112 L. T. Rep. 777, affirmed. (Priv. Co.) *The Panariellos* 484

40. *General jurisdiction where there has been a seizure in prize—Cargo—Release—Action for freight in King's Bench Division—Subsequent motion in Prize Court—Order directing payment of a sum in lieu of freight—Order in effect varying contractual relations of parties—Order* ultra vires.—The general jurisdiction which attaches in every case where there has been a seizure in prize includes the power to deal with all incidental matters, including questions of freight and compensation in lieu of freight, but does not include power to make an order which in effect varies the contractual relations of the parties. Decision of the President reversed. (Priv. Co.) *The St. Helena* 488

41. *Enemy goods—Enemy pledgor of goods—Default of pledgor—Contract of sale by pledgees—Right of pledgor to redeem—Loss of right—Release to purchaser.*—Before the outbreak of war in Aug. 1914, a firm of enemy subjects contracted to sell to a British firm a certain quantity of vegetable tallow. The tallow was shipped in a British steamship at Hankow, and the steamship started for Liverpool before the declaration of hostilities. The vendors of the tallow pledged the same, also before the outbreak of war, to a firm of Japanese bankers, who were indorsees and holders of the bills of lading, both at the time of shipment of the goods and of their arrival at Liverpool. The steamship did not arrive at Liverpool until after the outbreak of the war, and thereupon the consignees declined to take delivery of the tallow, as being the goods of enemy subjects. The Japanese bankers, owing to the refusal of the purchasers to take delivery of the goods, entered into a contract to sell the tallow to a British firm. The tallow was afterwards seized by the Customs officers as being enemy property. Held, that the enemy pledgors had lost their right to redeem the tallow when the contract of sale was made, and that by such contract they had ceased to be owners of the same. The tallow, therefore, was no longer enemy property and was not liable to seizure. (Prize Ct.) *The Ningchow* 509

42. *Austrian goods on German ship—Seizure of ship after declaration of war with Germany, but before declaration of war with Austria—Continuous seizure—Writ issued against goods before outbreak of war—Writ issued after outbreak of war—Crown in possession of goods—Jurisdiction of court—Hague Conference* 1907 *—Convention VI., arts.* 1, 2, 3, 4.—After the outbreak of war between Great Britain and Germany, a German ship, laden with a cargo which was the property of Austrian subjects, was captured on the high seas and brought into a British port. A writ was issued against the cargo on the day before hostilities broke out between Great Britain and Austria. Subsequently, after the outbreak of war between the last-named countries, a second writ was issued, the cargo being all the time in the custody of the Crown authorities. Later on, before the case was heard, the goods were sold and the proceeds paid into court. Held, that the goods or their proceeds were liable to condemnation as enemy property, as Germany had refused to accede to the protective articles of the Sixth Hague Convention. (Prize Ct.) *The* Schlesien *(Claim of Alois Schweiger and Co.)* ..... 51[illegible]

43. *Cargo—Neutral goods—War risks—Insurance—Seizure of goods before outbreak of hostilities—Transfer of property in goods to enemy—Payment of insurance by enemy underwriters—Condemnation.*—A certain cargo was shipped in a British vessel before the war from a neutral country by a neutral firm to their own order, and under an option the same was to be delivered to a German firm at a German port, and this German firm were to act as the shippers' agents for sale. The goods were insured against war risks by enemy underwriters. At the time of the seizure the property in the goods was still in the shippers. The shippers' German agents claimed against the underwriters for a total loss, which claim was paid in full, and the underwriters became the owners of the goods, there thus being a transfer of ownership from neutrals to enemies. The cargo was sold and the proceeds paid into court. In a suit for the condemnation of the cargo or its proceeds as prize and droits of Admiralty, the shippers put in a claim, doing so at the instigation of the German underwriters, that the cargo was at the time of seizure and still remained their property. Held, that the cargo was enemy property and must be condemned. (Prize Ct.) *The Palm Branch* 512

44. *British ship—Registration—Real ownership—Enemy corporation—Control of British company by enemy corporation—Seizure of ship as prize—Seizure in British port—Condemnation or detention—Merchant Shipping Act* 1894 (57 *&* 58 *Vict., c.* 60), *s.* 1.—In ascertaining whether a vessel is or is not enemy property, the Prize Court must consider the whole of the circumstances connected with its registration, management, and employment. If, therefore, a vessel flying the British flag is registered in the name of a British company, which company is bound to an alien enemy corporation in such a manner as to show that the ownership of the British company is simply nominal, whilst that of the enemy corporation is real, the vessel will be treated as enemy property, and either condemned or ordered to be detained in the same manner as any other enemy vessel. The *T.* was a steamship, registered as a British ship, and nominally owned by a British company; but in reality the British company was under an agreement entirely controlled by a German corporation, which appointed the directors and found their qualification shares, owned the entire share capital of the company in the person of its nominees, gave all instructions as to the working of the company, and received the whole of the profits earned by the vessel. For some time after the outbreak of war the vessel was used by the Admiralty, but was eventually seized as prize at Southampton.

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Held, that, under the whole circumstances of the case, the *T.* was really owned by the German corporation, and not by the British company in whose name she was registered, and must therefore be held to be a German vessel; but that, as she was in port at Southampton at the outbreak of war, the order to be made against her was one of detention, under the Sixth Convention of the Hague Conference 1907, and not of condemnation. (Prize Ct.) *The St. Tudno* 516

45. *Prize bounty—Enemy warship—Destruction—Number of crew—"On board"—Meaning of phrase—Amount of prize bounty to be divided—Naval Prize Act* 1864 (27 & 28 *Vict., c.* 25), *s.* 42—*Order in Council the 2nd March* 1915.—By the combined effect of sect. 42 of the Naval Prize Act 1864 (27 & 28 Vict., c. 25) and the Order in Council, dated the 2nd March 1915, a prize bounty is payable amongst such of the officers and men of any of His Majesty's warships as are actually present at the taking or the destroying of any of the armed vessels of the enemy, calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement. The Australian cruiser *S.* encountered and destroyed the enemy cruiser *E.* at a time when certain members of the crew of the *E.* were not on the vessel, but were engaged in operations of a warlike character, and in attendance upon the ship. Held, that in calculating the amount of the prize bounty to be distributed the whole ship's complement was to be taken into consideration, and not merely the number actually on the vessel. So long as the members of the crew are engaged on work which is ancillary to the main object of the enemy vessel they are "on board" within the meaning of sect. 42 of the Naval Prize Act 1864. (Prize Ct.) *The Sydney* 521

46. *Neutral vessel—Cargo—Contraband goods—Voyage to neutral port—Ultimate enemy destination of cargo—"Continuous voyage"—Knowledge of shipowner—Whether such knowledge necessary—Liability of vessel to condemnation.*—A neutral vessel carrying contraband cargo, which cargo by value, weight, volume, or freight forms more than one-half of the whole, is subject to confiscation and to condemnation as good and lawful prize, even when bound to a neutral port, if such cargo is destined ultimately for an enemy country, either by transhipment or land transit. There is no need for the captors to prove that the shipowner was aware of the ultimate destination of the contraband cargo. The principle laid down in *The Hakan* (13 Asp. Mar. Law Cas. 479; 115 L. T. Rep. 389; (1916) P. 266) applied and extended. (Prize Ct.) *The Maracaibo* 522

47. *Requisition of goods by Crown—Order of Prize Court—Refusal of special leave to appeal—Reasons for withholding leave.*—On the hearing of a petition presented by the claimant for special leave to appeal from an order of the President of the Prize Court in chambers refusing an adjournment and giving leave to requisition for the use of the Crown certain copper: Held, that, as the goods were urgently required for the prosecution of the war and it was impossible to say that there was no reasonable cause for suspicion or that the goods ought to be released without further investigation, special leave would be refused, but, while so deciding, their Lordships desired to express no opinion as to whether the applicant could in the circumstances have appealed as of right. Rule as explained in *The Zamora* (13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77) applied. (Priv. Co.) *The Canton* 565

48. *International law—Neutral vessels—Contraband goods—Freight—Claim by neutral shipowners.*—By international law the owners of neutral ships are not entitled to any freight in respect of the carriage of contraband goods, except as a matter of grace or as a matter of discretion. (Prize Ct.) *The Jeanne, The Vera, The Forsvik, The Albania* 567

49. *International law—Reprisals—Goods of enemy origin—Ownership—Transfer to neutrals—Passing of property in goods during continuance of war—Goods dispatched by parcel post—Seizure on neutral vessel—Detention—Order in Council of the 11th March* 1915—*Reprisals Order, art.* 4.—Where goods are sent from a belligerent country to a neutral country during the progress of the war, or *vice versâ*, they are to be regarded, as far as the rights of a belligerent captor are concerned, as enemy property so long as they are in transit. It is immaterial what are the terms of the contract between the vendor and the purchaser as to the passing of the property in the goods, and it makes no difference in the general principle of international law that there is a transit by land through a neutral country at one end or other of the journey. A number of firms in America ordered goods from various firms in Austria and Germany. Some of the goods were ordered before the outbreak of war, and some after hostilities had commenced. A certain portion of the goods had also been paid for before the war. Towards the end of 1915 a number of packages was sent from Germany and Austria to America *viâ* Copenhagen, the same being forwarded by parcel post on board a Danish vessel. By virtue of the provisions of the Reprisals Order in Council of the 11th March 1915, the vessel was diverted on its journey to a British port, where the parcel packets were seized and the goods detained as being of enemy origin and enemy character. Held, that the goods were of enemy origin and enemy character, and that an order for their detention—or the proceeds of the goods if sold—until the conclusion of peace must be made. (Prize Ct.) *The United States* 568

50. *International law—Reprisals—German Government bonds—Seizure in mails on board neutral ship—"Goods" or "commodities"—Meaning of terms—Order in Council of the 11th March* 1915—*Reprisals Order, art.* 4.—Certain German Government bonds sent by a banking company in Berlin to a firm in Copenhagen were forwarded by registered post by the Copenhagen firm to a bank in Chicago on a Danish ship bound from that port to the United States. The vessel was, during its voyage, ordered to proceed to a British port, where the mail was overhauled and the bonds seized under the Reprisals Order in Council of the 11th March 1915. Held, that the bonds were "goods" or "commodities" and liable to detention under the order, as being of enemy origin, until the conclusion of peace, when they would be dealt with as the court might direct. (Prize Ct.) *The Frederik VIII.* 570

51. *Prize bounty—Distribution—Destruction of enemy warships—Action—Presence of applicants in action—Principles to be applied—Naval Prize Act* 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of the 2nd March* 1915.—By the combined effect of sect. 42 of the Naval Prize Act 1864 (27 & 28 Vict. c. 25) and the Order in Council dated the 2nd March 1915, a prize bounty is payable amongst such of the officers and men of His Majesty's warships as are actually present at the taking or destroying of any of the armed vessels of the enemy, calculated at the rate of 5*l.* for each person on board the enemy's ships at the beginning of the engagement. It is a question of fact to be decided by the court whether a warship was or was not "actually present" at the taking or destroying of an armed ship, or of armed

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ships, of the enemy. Upon the finding by the court that H.M.S. *Canopus* did not in any sense take part in the chase of the enemy or in the subsequent naval engagement of the Falkland Islands, that she was detached for other duties outside the engagement, and that she was not present in any sense when the enemy ships were destroyed: Held, that her commander, officers, and crew were not entitled to any share in the prize bounty awarded under the Naval Prize Act 1864 and the Order in Council of March 1915. (Prize Ct.) Re *Battle of the Falkland Islands;* Ex parte *H.M.S.* Canopus 572

52. *International law — Domicil — Commercial domicil—Partnership firm in neutral country—Members of partnership enemy subjects—No partner resident in neutral country—Property in goods shipped by firm in neutral country—Passing of property—Seizure—Condemnation as enemy property.*—In order that a person may acquire a commercial domicil in any country, residence in that country is an essential condition of the acquisition of such domicil. Even a subject of a belligerent country may acquire a commercial domicil so as to protect his property at sea during a state of war if he fulfils the above necessary condition. If, however, he is not resident in the neutral country, though he carries on business there through agents, any goods which are his property and are being carried in a British ship during the progress of hostilities are liable to condemnation. A partnership firm which carried on business in A., a neutral country, was composed exclusively of persons of German nationality. None of the members resided in A., and the business was carried on by agents. The firm consigned certain goods to a German house before the outbreak of war on a British ship. During the voyage, and after the declaration of war, the vessel was diverted to an English port and the goods were seized as enemy property. On an application being made by the Crown for their condemnation as prize, the consignors put in a claim on the ground that the goods were the property of a firm which had a commercial domicil in a neutral country, and were therefore not liable to be confiscated. Held, that, as all the partners of the firm were enemy subjects, and as none of the partners resided in the neutral country so as to possess a commercial domicil, the goods were enemy property and must be condemned as such. (Prize Ct.) *The Hypatia* 574

53. *Claim to goods—Security for costs—Prize Court Rules* 1914, *Order XVIII., r.* 2.—Order XVIII., r. 2, of the Prize Court Rules 1914 provides that: "Any person instituting a proceeding, other than a cause for condemnation, and making a claim, and being ordinarily resident outside the jurisdiction of the court, may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction of the court, and the proceedings may be stayed until the order is complied with." Rule 3 of the same order provides that: "In any cause in which security for costs is required, the security shall be of such amount and be given at such times and in such manner or form, as by bond, payment into court, or otherwise, as the judge shall direct." Held, that the discretion of a judge in prize matters conferred by the above rules was a judicial discretion, and that in the case before the board there was no evidence that it had been exercised otherwise. The appeal therefore failed. Principles that should guide the judge's discretion when deciding the question of security for costs considered and explained. (Priv. Co.) *The Stanton* (*Cargo ex*) 586

54. *Enemy ship—Private yacht of alien enemy—Outbreak of war—Seizure in port—Days of grace* Navire de commerce—*Sixth Hague Convention* 1907, *art.* 1.—Held, that a racing yacht, the private property of a German subject, which was in a British port at the time of the outbreak of the war between Great Britain and Germany, was not *un navire de commerce*, and therefore was not entitled to protection in respect of days of grace, &c., conferred on a merchant ship by the Sixth Hague Convention 1907, art. 1. Decision of the President, reported 13 Asp. Mar. Law Cas. 230; 113 L. T. Rep. 1167; (1916) P. 5, affirmed. (Priv. Co.) *The Germania* 588

55. *Cargo—Whether destined for enemy—Onus of proof.*—The Commercial Court for Malta (in Prize) found that a cargo of wheat seized as prize was on its way to an enemy destination and made an order that it should be condemned. At the hearing, the captors adduced no evidence in contradiction of the claimants' case, but subjected the whole of the transactions to the closest scrutiny, and suggested that in truth the wheat was on its way to an enemy destination. Held, that, as the documents produced by the claimants were genuine and regular in form, in the absence of evidence to refute them they were deserving of credit. The decision below was based on assumptions that were mere conjectures and were therefore inadmissible, whereas the claimants' evidence discharged such burthen as rested on them and sufficed to establish their claim on the facts so proved. Decision appealed from reversed. (Priv. Co.) *The Eleftherios K. Venizelos* (*Part Cargo ex*) ... 589

56. *Goods afloat—Shipment prior to outbreak of war—Apprehension of war—Transfer in fraud of belligerent—Capture by allied belligerent—Rights of captor.*—Where upon the facts of the case it appears that the transfer of goods at sea was induced by apprehension on the part of the transferor of war being declared between the State to which he owed allegiance and another State, such transfer is deemed to be in fraud of the belligerent rights of the latter State if war is subsequently declared. But there is no such presumption in the case of an allied belligerent State, which State neither the vendor nor purchaser at the time of the transfer contemplated would declare war with the vendor's country. Principles upon which a transfer of goods consigned to an enemy subject at an enemy port, made in apprehension of hostilities, is deemed to be made in fraud of captors considered. Decision in *The Southfield* (13 Asp. Mar. Law Cas. 150; 113 L. T. Rep. 655) approved and followed. (Priv. Co.) *The Daksa* (*Cargo ex*) 591

PRIZE BOUNTY.
See *Prize*, Nos. 45, 51.

PRIZE COURT RULES.
ORDER XVIII., R. 2: See *Prize*, No. 53; ORDER XXIX.: See *Prize*, No. 12; ORDER XXIX., RR. 1, 2, 5: See *Prize*, No. 25.

PROCEED, REFUSAL TO.
See *Carriage of Goods*, No. 34.

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PROCLAMATION OF THE 3RD AUGUST 1914 (TRANSPORTS AND AUXILIARIES).
See *Salvage*, No. 2.

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REGULATIONS FOR PREVENTING COLLISIONS AT SEA.
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RESALE.
See *Sale of Goods*, No. 5.

RESTITUTION ON RECAPTURE.
See *Prize*, No. 20.

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"REVERSIBLE" TERMS.
See *Carriage of Goods*, No. 45.

SAFE CONDUCT PASS, REJECTION OF.
See *Prize*, No. 30.

"SAFE PORT."
See *Carriage of Goods*, No. 42.

SAIL, REFUSAL TO.
See *Seaman*, No. 3.

SALE OF GOODS.

1. *Purchase of goods for shipment abroad—Transit—Transit in stages—Stoppage* in transitu *—Interception of goods by purchaser—Right of unpaid vendors.*—*Semble*, where goods are consigned so as to involve a transit by several stages, and are intercepted at the end of one of the stages by the buyer, the transit may be regarded as ended and the right of the seller to stop lost where the goods cannot be set in motion again without further orders from the buyer. (Bailhache, J.) *Reddall* v. *Union Castle Mail Steamship Company Limited* 51

2. *Contract—Appropriation of cargo to buyers—Arbitration clause—"All disputes from time to time arising out of this contract"—Award—Finding of arbitrator as to custom of trade—Whether conclusive or conditional—Jurisdiction of arbitrators.*—In connection with a contract for the sale of goods a dispute had arisen between the parties as to whether a certain tender was a good tender or not. That question was referred to arbitration under the clause in the contract and an award was duly made. That was carried to the board of appeal and they stated a special case for the opinion of the court. Certain questions were put to the court, and the material one was whether under the terms of a certain contract there could be a valid tender or appropriation of a cargo shipped on board the *C.* to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Divisional Court answered those questions in the negative; (12 Asp. Mar. Law Cas. 570; 111 L. T. Rep. 1107). Thereupon the matter went back to the board of appeal and they made an award in which they stated that, while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law, apart from the custom of the trade," they nevertheless found that there was a long-established and well-recognised custom of the trade by which, in the circumstances of this contract, there was an appropriation of the cargo to the buyers. On a motion to the court by the buyers to set aside the award: Held, that the arbitrators had no jurisdiction to find conclusively the existence of a trade custom. The motion to see aside the award must therefore stand adjourned, both parties to be at liberty to file further affidavits on the question as to the existence of the alleged custom. Decision of the Divisional Court (Horridge and Rowlatt, JJ.) affirmed. *Hutcheson* v. *Eaton* (51 L. T. Rep. 846; 13 Q. B. Div. 861) and *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.* (99 L. T. Rep. 680; (1908) 2 K. B. 907) discussed and followed. (Ct. of App.) *Olympia Oil and Cake Company Limited* v. *Produce Brokers Company Limited* 71

3. *C.i.f. contract — Payment against shipping documents—Moratorium—Effect of—Postponement of Payments Act* 1914 (4 & 5 *Geo.* 5, *c.* 11). —The moratorium provided by the proclamation under the Postponement of Payments Act 1914 has no application to a c.i.f. contract. (Sankey, J.) *Happe* v. *Manasseh* 91

4. *Contract of sale—Provision of suspension of deliveries "in case of war"—Rise in freights—Liability of shippers.*—Sellers in Spain agreed to deliver iron ore to buyers in Middlesbrough, the contract of sale (which was made after the commencement of the war) containing the provision that: "In case of war . . . the supply of minerals now contracted for may be wholly or partially suspended during the continuation thereof." The sellers possessed a fleet of steamers. Owing to the course of events in the war freights rose very considerably, and the sellers then contended that they were entitled under the above provision in the contract of sale to "suspend wholly or partially" further deliveries. Held, that the sellers were not entitled to suspend, since the sole effect of the contract of sale was to prevent them taking advantage in the rise of freights, but not to prevent them from fulfilling the contract. Per Bailhache, J.: The only prevention of this nature on which the sellers could insist would be such an increased cost of carrying out their contract due to the war as made it commercially

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impossible. A rise in freights due to an excepted cause can amount to prevention of the fulfilment of a contract to deliver oversea goods if it be indicative of a great scarcity in ships. The extent to which the rise in freights must be indicative of a scarcity in ships before it amounts to a prevention is a question of fact in each particular case. Where sellers would have to give away their goods, and, further, to make a loss on the goods delivered, such a scarcity of tonnage due to the war is indicated as will amount to commercial prevention. (K. B. Div.) *Bolckow, Vaughan, and Co.* v. *Compania Minera de Sierra Menera.* (See No. 11 below.) 342

5. *Contract—Resale—Custom—Buyers to accept original shipper's appropriation—Reasonableness of custom.*—In connection with a contract for the sale of goods a dispute had arisen between the parties as to whether a certain tender was a good tender or not. The question was referred to arbitration under a clause in the contract, and an award was duly made. That was carried to the Board of Appeal, and they stated a special case for the opinion of the court. Certain questions were put to the court, and the material one was whether under the terms of a certain contract there could be a valid tender or appropriation of a cargo shipped on board the *C.* to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Divisional Court answered those questions in the negative: (12 Asp. Mar. Law Cas. 570; 111 L. T. Rep. 1107). Thereupon the matter went back to the Board of Appeal, and they made an award in which they stated that while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law, apart from the custom of the trade," they nevertheless found that by a long-established and well-recognised custom of the trade in cases of resales buyers under the form of contract impliedly agree (1) that they will accept the original shipper's appropriation passed on without delay if valid at the time of being made by the original shipper; and (2) that sellers shall be under no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though that appropriation at the time of being passed on might, apart from the custom and implied agreement, be invalid; and they found that there was a valid appropriation to the buyers under this contract. On a motion by the buyers to set aside the award on the ground that it was bad on the face of it or wrong in point of law, they contended (1) that the custom was unreasonable, and (2) that it was not applicable to the contract in question, the contract not being a "resale," and the original shipper's appropriation not being valid, as the goods were lost before that appropriation was made. Held (dismissing the motion), that the custom being one which honest and fair-minded men would adopt was reasonable; and that the buyers' other contentions could not be established, the special case, by which alone (if at all) they could be established, not forming part of the award. *Olympia Oil and Cake Company Limited* v. *Produce Brokers Company Limited* 393

6. *Contract—Sale—No liability if shipment and delivery prevented by war—Increased freights owing to war—Impossibility of profit—Refusal of seller to deliver—Liability.*—By a written contract dated Dec. 1914 defendants agreed to sell and the plaintiffs agreed to buy iron pyrites as produced at certain mines in Portugal to the amount of about 6000 tons per year for three years. Delivery was to be c.i.f. at Manchester. The contract contained this clause: "If war, epidemics, quarantine, strikes of men, accidents, diminution of output at the mine, or any

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other cause over which the sellers have no control should prevent them from shipping or exporting the ore from the river Guadiana, Portugal, or delivering under normal conditions, the obligation to ship and (or) deliver under this contract shall be partially or entirely suspended during the continuance of such impediment, and for a reasonable time afterwards to allow the sellers time to prepare to recommence shipments." Owing to the continuance of the European war freights rose to such an extent that the defendants found that they could no longer carry out the contract except at a loss. They thereupon gave notice to the plaintiffs that the "conditions of delivering pyrites under our contract with you have become abnormal, and therefore we must claim relief," and refused to make any deliveries at the contract price. The plaintiffs therefore brought this action, in which they claimed damages for the breach of contract of sale. The learned judge found that there was never any difficulty in effecting shipment in Portugal, that the words "under normal conditions" in the suspension clause referred to "shipping and delivery," and that "delivery" was "delivery at Manchester." Held, (1) that "prevention" within the meaning of the suspension clause was physical or legal prevention, and not economic unprofitableness; (2) that a provision enabling the defendants to take advantage of a fall in the freight market, but to repudiate the contract if freights rose, must, to avail them, be in clearer language than that used in the suspension clause; (3) that the clause applied to shipping and delivery which were required to be effected under normal conditions, did not apply to the intermediate transit; and (4) that it was doubtful what the term "normal conditions" meant in a contract made during a war. Judgment was therefore entered for the plaintiffs. (Scrutton, J.) *Blythe and Co.* v. *Richards, Turpin, and Co.* 407

7. *Contract—Shipments—Payment against documents on arrival of steamer—Refusal of buyers to take up documents—Breach of contract—Competency of sellers to recover price of goods—Sale of Goods Act* 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 17, 19, 49 (2).—By a contract of sale the defendants agreed to buy from the plaintiffs certain shipments of sheepskins. Payment was to be "net cash against documents on arrival of the steamer." On the arrival of the third shipment the defendants refused to take up the documents. In an action by the plaintiffs for breach of contract, the learned judge was of opinion that the defendants had in these circumstances been guilty of breach of contract. The plaintiffs in the action claimed the price of the goods, and on this point: Held, that the price of the goods was not recoverable since it was not a sum payable to the plaintiffs on a day certain irrespective of delivery, and since the property in the goods had not passed to the defendants. (Atkin, J.) *Stein Forbes and Co.* v. *County Tailoring Company* 422

8. *Contract — "Subject to safe arrival"—Failure to deliver—Goods never in seller's hands—Liability of seller.*—J. contracted to deliver to B. goods at a certain price ex Liverpool "subject to safe arrival." The goods were never delivered because J. never had them to ship. In an action for breach of contract where J. sought to protect himself by the clause "subject to safe arrival" on the ground that the goods had never "arrived" safely or at all: Held, that the clause referred to the danger to which the goods must be subjected in course of transit and protected J. if any accident occurred during transit, but that J. was under an obligation to ship the goods, and judgment must therefore be entered for B. (Bailhache, J.) *Barnett and Co.* v. *Javeri and Co.* 424

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9. *Stoppage* in transitu—*Liability of unpaid vendor for freight—Sale of Goods Act* 1893, *ss.* 44, 45, 46, 47, 48, 61.—A notice of stoppage given during the transit and persisted in upon arrival of the goods involves an obligation upon the vendor to discharge the shipowner's lien for freight. If the vendor repudiates the obligation and so conducts himself as to prevent the shipowner completing his voyage and earning his freight, an action can be maintained by the shipowner against the vendor for damages for the breach of the obligation created by the notice to take actual possession of the goods upon arrival and to discharge the shipowner's lien for the freight in respect of the goods. By a contract of carriage entered into by the plaintiffs, who were shipowners, with the Construction Company, the plaintiffs carried in the autumn of 1913 by their steamers certain parcels of railway material from England to C., a small island owned by the plaintiffs in the Gulf of Tutoya, in Brazil. The ultimate destination of the goods was P., a place which was sixty miles up the river and could only be reached by lighters at certain states of the tide. Tutoya was the end of the ocean transit. The defendants, who were the vendors of the goods to the Construction Company, were not parties to the contract of affreightment with the plaintiffs. The Construction Company being in financial difficulties, the defendants, as unpaid vendors of the goods, exercised their right of stoppage *in transitu* by giving due notice to the plaintiffs before the steamers arrived at the port of destination. By the contract of carriage freight was payable before the departure of the steamers, and the plaintiffs had a lien upon the goods for unpaid freight. Upon the arrival of the steamers at Tutoya the plaintiffs landed the goods in question upon the island of C. and notified the defendants accordingly, but the defendants repudiated all responsibility in respect of the goods. At the time of the trial the goods were still at C., and no duty had been paid on them, nor had the plaintiffs received their freight. Held, that the plaintiffs were entitled to treat the voyage as completed when the goods were landed at C., and to recover as damages for the breach of the obligation the full amount of freight which they would have earned had the voyage been completed. (Ct. of App.) *Booth Steamship Company Limited* v. *Cargo Fleet Iron Company Limited* 451

10. *C.i.f. contract—Contract made during time of peace—Declaration of war—Obligation of seller to give notice of sea transit to buyer to enable him to insure against war risks—Sale of Goods Act* 1893, *s.* 32 (3).—Sect. 32 (3) of the Sale of Goods Act 1893 provides that: "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit." In May 1914 buyers agreed to buy from sellers goods at a price c.i.f. Smyrna, shipment from Calcutta so as to arrive at Smyrna by Sept. 1914. The sellers took out a f.c. and s. policy insuring the goods. On the 20th July the goods were shipped on board a British ship, the *W.* On the 4th Aug. war broke out between Great Britain and Germany, and on the 13th Aug. the *W.* was sunk with her cargo. Advice of the shipment was not sent by the sellers to the buyers in time for them to insure the goods against war risks. Held, that sect. 32 (3) did not apply to the case because it did not apply to a c.i.f. contract in normal circumstances (*e.g.*, in time of peace), since such a contract provided for all the insurance which was customary, and the intervention of new circumstances (*e.g.*, a state of war) did not impose a new obligation on the seller, since the application of the section must be considered as at the time of the making of the contract. (Rowlatt, J.) *Law and Bonar Limited* v. *British American Tobacco Company Limited* 499

11. *Contract of sale—Provision for suspension of deliveries "in case of war"—War—Rise in freights—"Restraint of princes"—Frustration of adventure—Liability of sellers.*—Sellers in Spain agreed to deliver iron ore to buyers in Middlesbrough, the contract of sale (which was made after the outbreak of the war in 1914) providing that: "In case of strikes, combinations of workmen, accidents, war, or any unavoidable total or partial stoppage of works or mines, the supplies of minerals now contracted for may be wholly or partially suspended during the continuance thereof, and the time for delivery extended proportionately. In the case of partial stoppage of works or mines the deliveries to be *pro rata* with other then existing engagements." Owing to the course of events during the war, freights rose very considerably, and the sellers contended that, the character of the war having largely been changed since the making of the contract, they were entitled under the above provision to "suspend wholly or partially" further deliveries. Held, that the words of the provision should be read as if they were "In case of strikes, combinations of workmen, accidents, war, or any other unavoidable cause occasioning total or partial stoppage of works or mines," and that there was no exception on which the sellers could rely as excusing them from the performance of the contract. Held, further, that a mere rise in the rate of freights was not alone a sufficient excuse for non-delivery, and the doctrine of "frustration of an adventure" had no application to the case. Decision of Bailhache, J. (*ante*, p. 342; 114 L. T. Rep. 758) affirmed. In the second-named appeal the contract, dated the 14th Dec. 1914, provided that: "In the event of a European war, restraint of princes or Governments, civil commotion, accidents, strikes, imminent hostilities preventing the carrying out of this contract, and all other causes . . . beyond the personal control of the seller, the contract to be suspended during that period at the sellers' option." Held, on similar facts, that the sellers were not prevented from fulfilling their contract by any of the excepted perils. Decision of Bailhache, J. affirmed. (Ct. of App.) *Bolckow, Vaughan, and Co. Limited* v. *Compania Minera de Sierra Menera; North-Eastern Steel Company Limited* v. *Same* 533

See *Carriage of Goods*, Nos. 33, 51.

SALE OF GOODS ACT 1893.

SECTS. 16, 17, 19, 49 (2): See *Sale of Goods*, No. 7; SECT. 32 (3): See *Sale of Goods*, No. 10; SECTS. 44, 45, 46, 47, 48, 61: See *Sale of Goods*, No. 9.

SALE, EFFECT OF.

See *Carriage of Goods*, No. 12.

SALE, VALIDITY OF.

See *Prize*, No. 13.

SALVAGE.

1. *Tugowners' claim against cargo owners—Towage contract—Agreement by tugowners with shipowners not to claim salvage—Protection of seamen against abandonment of right to salvage—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 156.—Where salvage services (which must be voluntary) supervene upon towage

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services (which are under contract), the two kinds of services cannot co-exist during the same space of time. There must be a moment when towage ceases and salvage begins. If the tug remains at her post of duty there may come a moment when salvage would end and towage would be resumed. During the intervening time the towage contract, in so far as the actual work of towing is concerned, is suspended. Tugowners contracted with the owners of a ship carrying cargo for a towage on the terms of "No cure, no pay; no salvage charges." In the course of the towage the tug rendered salvage services to the ship and cargo: Held, by the Court of Appeal, affirming the judgment of the President, that the owners, master, and crew of the tug were not precluded from maintaining an action for salvage remuneration against the owners of the cargo. *Query*, whether there is any good answer in law to a salvage claim by the master and crew of a tug against a ship and her freight where tugowners are precluded from claiming salvage from ship and freight owing to their contract with the shipowners. The protection afforded to seamen under the Merchant Shipping Act 1894 in respect of their right to salvage considered. (Ct. of App.) *The Leon Blum* 273

2. *Action* in rem—*Requisitioned ship—Exemption from arrest—Motion by Crown to stay proceedings—Costs—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Proclamation of the 3rd Aug.* 1914 (*Transport and Auxiliaries*).—An action was instituted for salvage services rendered by a tug to a ship requisitioned by the Admiralty and her freight, and the owners of the ship and her freight entered an appearance as defendants and gave the usual undertaking in lieu of bail. Under the powers conferred by the Royal Proclamation (Transports and Auxiliaries) of the 3rd Aug. 1914, the ship had become a ship belonging to His Majesty within the meaning of sect. 557 of the Merchant Shipping Act 1894. Upon an application by the Crown that the writ and all subsequent proceedings in the action be set aside, or that the proceedings against the ship and her freight be stayed so long as she remained in the service of the Crown. Held, that no proceedings ought to be taken with a view to arresting the ship so long as she was in the service of the Crown and under requisition, and that there would be no order as to costs as the application had been made directly on behalf of the Crown. (Ct. of App.) *The Broadmayne* 356

3. *Services rendered by ship requisitioned by Admiralty—King's ship—Claim by owners of ship—Whether consent of Admiralty necessary—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 557 (1)—*Voluntariness.*—The plaintiffs were the owners of a steam tug which had been requisitioned by the Admiralty on terms whereby the owners were to pay the wages of the crew, to provide for all stores and necessary equipment of the vessel, and to take marine risks, and the Admiralty were to accept war risks on the vessel and crew and to provide coal. Whilst thus under requisition the tug rendered salvage services to a ship belonging to the defendants, and a claim was made against the defendants by the owners, master, and crew of the tug in respect of these services. Held, that the tug could not be regarded as a King's ship when rendering the salvage services, and was not prevented by sect. 557 of the Merchant Shipping Act 1894 from claiming ordinary salvage remuneration by the fact that she was hired to the Admiralty, nor did the master and crew require the consent of the Admiralty to the prosecution of their claim. Per Pickford, L.J.: The test of voluntariness is only

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applicable as between the salvor and salved. (Ct. of App.) *The Sarpen* 370

See *Collision*, No. 1—*Prize*, No. 20.

SCARCITY OF SHIPS.

See *Carriage of Goods*, No. 22.

SEA ROUTE CARRIAGE.

See *Carriage of Goods*, No. 51.

SEA TRANSIT, NOTICE OF—INSURANCE.

See *Sale of Goods*, No. 10.

SEAMAN.

1. *Wages—Outbreak of war—War risks—Agreement for extra remuneration—Right to recover—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 114.—The risks of war not being contemplated by seamen when they undertake a commercial voyage, they are entitled, when there is a reasonable belief of risk from mines or of capture on the voyage home, to refuse to put to sea. A contract, therefore, made by the master of the ship to pay them extra wages to incur such risks is binding on the owners. (Coleridge, J.) *Liston and others* v. *Owners of Steamship Carpathian* 70

2. *War—Detention in enemy port—Loss of ship—Claim for wages—Internment of crew—Hague Conventions* 1907, *No. VI.—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 143, 158.—A British ship, owned by the appellant during a voyage, for which the respondent's husband, who was a British seaman, had signed articles, was in a German port when war was declared between the United Kingdom and the German Empire and was detained by the German authorities, but no proceedings for her confiscation were known to have been instituted. Her officers and crew were at first kept prisoners on board, and subsequently, on the 2nd Nov. 1914, were taken ashore as prisoners, and later, from the 8th Nov. 1914, were interned at Ruhleben. The ship and crew were still detained and imprisoned when the respondent brought her action claiming an allotment of wages made her by her husband. Held (Lord Parmoor dissenting), that the shipowner was not liable to pay wages to the crew after the 2nd Nov. 1914, as from that date it was impossible for them to render any services contemplated by the contract of service. Decision of the Court of Appeal reversed. (H. of L.) *Horlock* v. *Beal* 250

3. *Merchant shipping—Refusal to sail—Disobedience to lawful commands—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), s 225, *sub-s.* 1 (*b*).—The respondents were nine seamen who signed articles as members of the crew of a steamship. The crew at the time of signing articles consisted of sixteen members, but afterwards the owners transferred the second mate to another ship, and thus reduced the crew to fifteen. On being formally requested by the master, the appellant, to go to sea the respondents refused, giving as the reason that there were not sufficient men to man the lifeboats or to keep a proper look-out. On an information for wilful disobedience to lawful commands within the meaning of sect. 225 (1) (*b*) of the Merchant Shipping Act 1894, the magistrate dismissed the information on the ground that the commands of the appellant were unreasonable, as the perils of the voyage were increased by the reduction of the crew. Held, that as the magistrate had found as a fact that the commands of the appellant were unreasonable, the respondents were not guilty of wilful disobedience to a lawful command, and his decision must be affirmed. (K. B. Div.) *O'Reilly* (app.) v. *Dryman and others* (resps.) 293

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4. *Agreement—Rate of wages—Special stipulation as to bonus—Nature of bonus—"Wages"—"Emoluments"—Stipulation as to forfeiture of bonus—Legality—Desertion of seaman—Delivery account—Payment of amount due to "proper officer"—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 114, 742—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 28.—By sect. 28 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48) it is provided (*inter alia*) that the master of a British ship shall, within forty-eight hours of the termination of the voyage at the port where the voyage terminates, deliver to the "proper officer"—as defined by subsect. 11 of the said section—the amount due on account of wages as shown in the delivery account, and subject to any deductions allowed under the section, to any seaman belonging to the ship who has been left behind out of the British Islands during the course of the voyage. The appellant was the master of the British ship *O.*, which started on a voyage to Australia and back in Feb. 1916 and terminated its voyage at T. in June 1916. Among the members of the crew was one F., and it was a special term of the agreement made in accordance with sect. 114 of the Merchant Shipping Act 1894 that all members of the crew, with the exception of certain classes of the crew to which F. did not belong, were to be paid a 15 per cent. war bonus over and above the rates appearing against their names on the articles for the voyage or during the period of the war, whichever terminated first, but "in cases of desertion and/or being paid off abroad the above bonuses will be forfeited." F. deserted at Sydney, and on the return of the ship to England the appellant paid to the proper officer—namely, the Superintendent of Mercantile Marine at T.—the proportion of the wages due up to the time of desertion, after deductions, but paid no part of the bonus, as it was contended that the bonus was not wages, but consideration for the performances of an entire contract, which contract had been broken by F., and that under the above term F. had forfeited any right to any share in such bonus. An information was laid by the respondent, the proper officer, against the appellant, for failing to comply with the provisions of sect. 28 of the Act of 1906, and the justices held that the sum stipulated for as a bonus in the agreement was "wages" within the meaning of the Merchant Shipping Acts of 1894 and 1906, and that as such wages it could not be forfeited by agreement between the master and the seamen. The justices accordingly convicted the appellant. Held, on appeal, that the decision of the justices was correct. (K. B. Div. Ct.) *Shelford v. Mosey* 554

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SEIZURE AT SEA.
See *Prize*, No. 18.

SEIZURE IN PORT.
See *Prize*, No. 19.

SEIZURE IN PRIZE—GENERAL JURISDICTION.
See *Prize*, No. 40.

SHANGHAI.
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See *Sale of Goods*, No. 6.

SHIPMENT ON DECK.
See *Carriage of Goods*, No. 35.

"SHIPPED ON BOARD."
See *Carriage of Goods*, No. 28.

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See *Carriage of Goods*, No. 28.

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TENDER OF VESSEL.
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See *Alien Enemy*, No. 1.

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"WORKING DAY OF TWENTY-FOUR HOURS."
See *Carriage of Goods*, No. 27.

WORKMAN.

1. *Employer and workman — Compensation — "Accident arising out of and in the course of the employment"—No agreement by master to provide food in articles—Seaman returning to ship at night after purchasing food on shore—Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.—A fireman of a coasting vessel went ashore, with leave, to buy provisions for himself. The night was rough and dark, and while he was on shore the ship was moved away from steps by the pier to another part of the harbour. While endeavouring to return to the ship in the evening, he got to the steps by the pier, and nothing more was known except that his body was found washed up on the beach at a place where, had he fallen into the sea off the steps, it probably would have been taken by the tide. His contract of service was contained in a printed document issued by the Board of Trade, but the Board of Trade scale of provisions was struck out, and the words "Crew to provide their own provisions" substituted. Held, that the accident did not arise out of his employment, as there was no contractual obligation on the deceased to go ashore to buy provisions, and that in going ashore he was not absent from the ship in pursuance of any duty owed to his employer, and in the absence of such duty no liability would arise under the provisions of the Workmen's Compensation Act. Decision of the Court of Appeal (31 C. C. C. Rep. 455; 110 L. T. Rep. 520; (1914) 2 K. B. 39) affirmed. (H. of L.) *Parker* v. *Owners of Ship Black Rock* 137

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REPORTS

OF

Cases Argued before and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, Nov. 16, 1914.

(Before ATKIN, J.)

FRATELLI SORRENTINO *v.* BUERGER. (*a*)

Charter-party—Sale of vessel after date of charter-party—Tender of vessel—Refusal of charterers to load—Whether charter-party affected by sale.

On the 15th Sept. 1913, *a vessel which formerly belonged to the claimants was chartered by the respondents to proceed to Odessa and load wheat or other grain for Rotterdam or Hamburg. While the vessel was discharging, before proceeding to Odessa, she was sold by the claimants, who duly notified the charterers of the sale. She was duly tendered for loading at Odessa, but the respondents, the charterers, refused to provide a cargo. In arbitration proceedings it was found as a fact that the claimants were ready and willing to perform their contract, and that they had duly tendered the vessel. On a case stated: Held, that while a party to a contract cannot so assign it as to make the assignee solely liable, he may arrange for another person to discharge the burden of the contract, provided it does not involve the doing of something which requires special performance by him, and that, inasmuch as the provision of a ship did not require any personal skill on the part of the original owners, they were entitled to sue upon it, although they were only ready to perform it vicariously through the new owners of the vessel.*

AWARD in the form of a special case stated by an umpire.

1. Whereas by a berth contract dated the 15th of September, one thousand nine hundred and thirteen, and made between Fratelli Sorrentino (therein described as the owners of the steamship *Rosalia*) and Elias Buerger and S. Teper (thereinafter and hereinafter described as the charterers), it was agreed that the said steamship *Rosalia* should proceed as ordered to Odessa, Nicolaiff, Theodosia, or Novorossisk, one port only, and there load as ordered, from one or more shippers, a full and complete cargo of wheat, (and or) grain, (and or) seed, for Rotterdam, Weser, or Hamburg, as ordered on signing bills of lading. Freight was to be paid at the rate mentioned in the berth contract.

2. By clause 4 of the said berth contract it was provided that orders for the loading port were to be given at Constantinople within ten running hours of the dispatch of the captain's telegram notifying the charterers of his arrival, and that if the orders were not given by the charterers within the said ten running hours the steamer was to proceed to Odessa Roads for orders, which were to be given within six running hours of arrival, Sundays only excepted.

3. By clause 5 of the said berth contract it was stipulated that the charterers were not bound to load before the 1st Oct. then next (new style), and that they were to have the option of cancelling the contract if the steamer did not arrive at the port of loading and was not ready as mentioned in the berth contract on or before 6 p.m. on the 25th October then next (new style).

4. By clause 21 of the said berth contract it was agreed that in the event of any dispute arising under the contract such dispute should be referred to two arbitrators in London, one to be appointed by each of the parties to the berth contract with power to the arbitrators in case of disagreement to appoint an umpire whose award should be final.

5. And whereas disputes did arise the said Fratelli Sorrentino duly appointed Mr. C. W. Gordon as their arbitrator, and the charterers duly appointed Mr. F. W. Temperley as arbitrator on their behalf, and the said two arbitrators having been unable to agree duly appointed me, the undersigned Charles Thomas Glanville as umpire.

6. And whereas on the hearing of the said reference both parties applied to me to state a case for the opinion of the court upon certain questions of law arising.

7. Now I, the said Charles Thomas Glanville, having taken upon myself the burden of the said reference, and having duly considered the evidence put before me do hereby make my award in the form of a special case for the opinion of the court as follows:—

8. A true copy of the berth contract above referred to and dated the 15th September 1913 is hereto annexed and may be referred to as part of this award.

9. On the 25th September 1913 whilst the steamship *Rosalia* was discharging a cargo of coal at Venice the said Fratelli Sorrentino entered into a contract for the sale of the said vessel to the Societa Anonima di Navigazione Adriatica (hereinafter called the Adriatica) an Italian company domiciled in Venice. The said contract contained the following clauses:—"The sellers declare that the steamer is chartered from the Black Sea to Rotterdam at 12*s.* per unit, 12*s.* 3*d.* for Weser, 12*s.* 6*d.* for Hamburg with the 25th Oct. cancelling as per berth contract which will be handed over in a few days. . . ." "The buyers declare that they accept fully the execution of the

(*a*) Reported by W. V. BALL, Esq., Barrister-at-Law.

charter-party for the Black Sea voyage to one of the ports as ordered on signing B/L for their entire risk and advantage, undertaking every obligation relating thereto." The berth contract or charter-party so referred to is the one now in question.

10. The said contract also provided for opening up for examination by the Adriatica of the engines, boilers, and double bottom of the said steamship, and the Adriatica were to declare within twenty-four hours of the opening of the last double bottom cell whether they accepted the steamer or not, and if they did accept her, the steamer thereupon became the absolute property of the buyers.

11. On the 4th Oct. the *Rosalia* was taken over by the Adriatica after the completion of the discharge of her coal cargo at Venice.

12. At Venice the steamer had her boilers cleaned and repaired, and certain repairs were effected to her engines, which occupied her six and a half days after the completion of the discharge. Such repairs were necessary in order to put the vessel in a seaworthy condition for the intended voyage. I find as a fact if and so far as it may be material that this delay was not more than a reasonable delay for the effecting of ordinary overhaul and repairs to a steamship in the ordinary course of business, and there was no unreasonable delay in the vessel proceeding from Venice to fulfil the said berth contract.

13. On the 11th Oct. the vessel sailed from Venice for Constantinople with a view to fulfilling the berth contract in question, and her departure was duly telegraphed to the charterers.

14. On the 11th Oct. Messrs. Jackson Brothers and Cory, the brokers acting in London on behalf of Fratelli Sorrentino, sent to Messrs. H. L. Wilbourn and Co., the representatives of the charterers in London, a letter, of which the following is a true copy: "Under instructions from Messrs. Fratelli Sorrentino, we hereby beg to inform you that they have sold their steamship *Rosalia* to Messrs. The Societa Adriatica de Navigazione, and this latter firm will carry out the terms of the charter-party with you dated 15th Sept. 1913, which please note."

15. On the 13th Oct. Messrs. H. L. Wilbourn and Co. wrote to Messrs. Jackson Brothers and Cory a letter in the following terms: "We are duly in receipt of your letter of the 11th inst., and in reply thereto would say it seems to us that Messrs. Fratelli Sorrentino have made no effort so far to perform their contract, and have now put it out of their power so to do, and our friends, Messrs. Buerger and Teper, do not propose to enter into fresh arrangements as to this vessel. Apart from this, perhaps you can inform us the cause of the extraordinary delay of the steamship at Venice. We have been expecting for some time past to hear her reported as passing Constantinople."

16. On the contents of the last-mentioned letter being communicated to Fratelli Sorrentino and the Adriatica, both of these parties protested against the charterers' statements in the letter above set out and insisted on the contract should be fulfilled.

17. On the 15th Oct. the charterers' agents in London wrote to Messrs. Jackson Brothers and Cory that they considered that the contract was at an end, and the charterers claimed damages therefor and for the breach of the contract on the part of the owners to proceed with usual dispatch, and on the same day the charterers offered to load the vessel on the berth contract at a reduction of three shillings per unit in the freight, which amount approximated roughly to the fall that had occurred in the Russian freight market between the date of the berth contract and the 15th Oct.

18. The last-mentioned offer was not accepted, and on the 19th Oct. the vessel arrived at Constantinople, and the master duly cabled to the charterers for orders, and having received no reply within the time allowed by clause 4 of the berth contract, proceeded to Odessa Roads and applied to the charterers' agents for orders there, and receiving no orders within the time limited by the berth contract, the captain made a formal protest against the charterers and informed the Adriatica, who then chartered the vessel for other employment.

19. I find as a fact that the said vessel was duly tendered under the said berth contract; that Fratelli Sorrentino and the Adriatica were always ready and willing to do all things necessary on their part towards the fulfilment of the said contract, and the said vessel was not loaded solely by reason of the charterers' refusal to load her.

20. Subject to the opinion of the court on any question of law, I find that the charterers were guilty of a breach of the berth contract in refusing to load the vessel as above set out.

21. I find that the damages which arose from the said breach of contract amounted to 1012*l.* 14*s.* 3*d.*

22. If and so far as it may be material I find as a fact that apart from any question of responsibility under the sale contract to the Adriatica the said Fratelli Sorrentino have not suffered any pecuniary loss by reason of the breach of contract, the said loss having up to the present fallen on the Adriatica, for whose benefit and by whose sanction and approval the arbitration proceedings were brought by Fratelli Sorrentino.

23. I further find as a fact that the charterers suffered no damages by the delay at Venice by the vessel executing repairs there as above stated.

24. The following points were raised by the charterers before me as raising questions of law on which they desired the opinion of the court should be taken. (i.) That by the sale of the said steamship Fratelli Sorrentino put it out of their power to and were not able to perform the contract. (ii.) That by reason of the alleged assignment by Fratelli Sorrentino to the Adriatica of the berth note, the rights of Fratelli Sorrentino under the berth note ceased. (iii.) That Fratelli Sorrentino did not prove any damage, and that they have suffered none in fact. (iv.) That as to the claim made on the ground that Fratelli Sorrentino may be liable to the Adriatica for damages in consequence of the charterers' refusal to carry out the contract: (*a*) That under the contract of sale Fratelli Sorrentino are not liable to the Adriatica for damages in this connection; (*b*) the charterers cannot be held liable in damages for a prospective claim; and (*c*) that such damages are in any event too remote. (v.) That with regard to the statement that Fratelli Sorrentino were claiming as trustees for and on behalf of the Adriatica, the charterers contended that they could not do this, they contended that the Adriatica had no claim because there was no assignment of the berth contract, and that if there were an assignment no notice was ever given of the assignment, and that if there were an assignment and notice that the berth contract was not assignable so as to bind the charterers without their assent. (vi.) The charterers also denied that any claim could be made by Fratelli Sorrentino as trustees for the Adriatica, because there was no contract between the Adriatica and the charterers, and no submission to arbitrate between them, and that the umpire had no jurisdiction to try any dispute between the Adriatica and the charterers.

25. As desired I have put the whole of these points before the court for the decision of any question of law arising thereon, having stated above my findings of fact.

26. Subject to the opinion of the court on any questions of law that may arise, I award that the said Fratelli Sorrentino recover from the charterers the said sum of 1012*l.* 14*s.* 3*d.* damages as above found, subject to Fratelli Sorrentino producing to the charterers an order by the Adriatica to pay the amount of the said award by the said Adriatica or their agents or a discharge by the Adriatica for the amount.

27. I further award and direct that the charterers do pay the fees and expenses of this reference and award, amounting to 138*l.* 12s. 6d., and that they also pay the costs of the said Fratelli Sorrentino upon the said reference, which I assess at 42*l.* If the said fees, expenses, and costs are paid in the first instance by the said Fratelli Sorrentino, they shall be entitled to recover same from the charterers.

28. If the court should be of the opinion that my award in par. 26 is wrong and that the award should have been in favour of the charterers, then (subject to any direction of the court to the contrary) I direct that the said arbitrators' and umpires' fees and expenses and the costs of the charterers on the reference, which last-mentioned costs I assess at 42*l.*, shall be borne and paid by Fratelli Sorrentino, and, if they shall be paid in the first instance by the charterers, that the charterers shall be entitled to recover the said amount from Fratelli Sorrentino.

As witness my hand this third day of July 1914.

R. A. Wright for the former owners of the vessel.—The main contention put forward by the respondents before the arbitrator was that by selling the vessel the former owners have put it out of their power to complete and fulfil their contract, and that they cannot therefore sue for its breach. The respondents must show that there is a principle of law which invalidates the findings of fact. A party to a contract can perform it vicariously if it is not of an intimate personal character. Consequently the owners were entitled to say that the ship would carry out the work through the Adriatica. [ATKIN, J.—Is it contended that the assignees should perform, or that Fratelli Sorrentino are still the parties to the contract?] The umpire has found that Fratelli Sorrentino were ready and willing to perform and duly tendered the vessel. Hence any claim must be made in their name, but their rights are enforceable for the benefit of the Adriatica. [ATKIN, J.—Do you suggest privity between the Adriatica and the charterers?] No. Only an equitable right. It has never before been suggested that the assignment of a ship did not affect a current charter-party. The death of a shipowner does not affect the charterer. [ATKIN, J.—Is there a contract that the owner will remain owner?] No. Reconstruction of shipping companies is a matter of everyday occurrence, but that does not invalidate the pending charter-parties. In *British Waggon Company* v. *Lea* (42 L. T. Rep. 437; 5 Q. B. Div. 149) waggons were let out by the plaintiffs, who covenanted to keep them in repair. The company being wound-up voluntarily, those who bought from the liquidators took over the liabilities. It was held that the purchasers could recover rent. If the shipowner, without selling the ship, has made a contract with a competent captain to run it on the voyage, no objection could have been taken. [ATKIN, J.—That case seems to deal with the liability of the assignor and to establish that he can still sue.] *Tolhurst* v. *Associated Portland Cement Company Limited* (87 L. T. Rep. 465; (1902) 2 K. B. 660) and the *British Waggon Company* case (*sup.*) raise all the points suggested by the respondents. A contractor who assigns the property and rights does not get rid of his obligations to the original contractor, nor does he abandon his rights and can enforce them in his own name. Readiness and willingness has never been found as a fact. [ATKIN, J.—In a contract affecting a charter-party may not the question of skill come in?] No.

Mackinnon, K.C. (*Roche*, K.C. with him) for the respondents, the charterers).—To formulate a principle is difficult. Can one who has promised to do certain work perform that work by a servant? *Tolhurst* v. *Associated Portland Cement Company* (*sup.*) is difficult to understand, and it can be explained by saying that there was an implied contract to assent to a novation. That is an extreme case. In par. 9 of the case the owners set out the charter, and declare that they accept it fully. In effect they abrogated their right to effect a novation. He referred to

Brandt v. *Dunlop*, 93 L. T. Rep. 495; (1905) A. C. 461.

The notice to the charterers, taken in conjunction with the contract with the Adriatica amounted to a statement that they were no longer responsible for the contract. The second point is that assignment cannot be allowed because the personal element comes in. *Primâ facie*, if a man promises to do a thing, he promises to do it himself. He referred to

Anson on Contracts, 13th edit., p. 232;
Kemp v. *Baerselman*, 47 L. T. Rep. 454; (1906) 2 K. B. 604;
Splidt v. *Bowles*, 1808, 10 East. 275;
Scrutton on Charter-Parties, art. 17;
Dimech v. *Corlett*, 12 Moo., P. C. 199.

There are elements in the personality of the shipowner. If the principle of assignment contended for is admitted it would be competent for every owner to sell his steamer against the charterer to a wholly incompetent manager. According to this charter-party the steamer must arrive in a seaworthy condition. Again, the credit of the captain and the owners is to some extent involved. Various payments, too, have to be made by the owners, while advances to the extent of 700*l.*, or thereabouts, may have to be made by the captain. Finally, the personal element is introduced by the penalty clause.

R. A. Wright in reply.—The main proposition has not been controverted. There is no principle of law which says that the umpire was wrong in his finding of fact. He referred to

Wentworth v. *Cock*, 10 A. & E. 42;
Keith v. *Burrows*, 3 Asp. Mar. Law Cas. 481; 37 L. T. Rep. 291; 2 App. Cas. 646.

ATKIN, J.—In this case a question is raised as to what is the effect upon a charter-party of a sale by the owner of the ship at a date between the date of the charter-party and the date of the completion of the charter-party, the sale being a sale with the benefit of the charter-party to the purchasers. It certainly appears to be a very remarkable fact that there is no direct authority upon the point. I have no doubt that this is so, because I am satisfied, knowing as I do the learned counsel who are before me, that if there were any such authority it would have been cited to me. Therefore I have got to deal with this point upon general principles.

The facts as they appear in the case are that a contract of charter-party, or berth note, was entered into on the 15th Sept. between the claimants in the case, Messrs. Fratelli Sorrentino, and the charterers, Messrs. Buerger and

Teper, that the ship *Rosalia*, which was then at or due at Venice to be discharged, should proceed to Odessa and then load a cargo of wheat for Rotterdam or Hamburg. While the ship was discharging at Venice, Messrs. Fratelli Sorrentino entered into a contract for the sale of the vessel to an Italian company; and it was provided in the contract of sale as follows: "The sellers declare that the steamer is chartered from the Black Sea to Rotterdam at the rates of freight given—with the 25th Oct. cancelling as per charter-party, which will be handed over in a few days, and they also declare that the whole crew is regularly insured with the Italian Maritime Syndicate until the end of this year, and the steamer with the Mutua Marittima Nazionale until the 18th Oct. next. The buyers declare that they accept fully the execution of the charter-party for the Black Sea voyage to one of the ports as ordered on signing bill of lading for their entire risk and advantage, undertaking every obligation relating thereto." It appears that the ship was taken over on the 4th Oct., and on the 11th Oct. she set off on her voyage to Odessa. On the 11th Oct. this notice was given by the brokers, the representatives of the charterers. [His Lordship read the letters set out in pars. 14 and 15 of the case, and continued:] In fact the ship did arrive at Odessa, and the charterers did refuse to take up the vessel, freights having fallen in the meantime.

I have to determine what the effect of that transaction of sale is on the charter-party. It appears to me that the law is clear that, under ordinary circumstances, a contracting party cannot assign a contract so as to relieve himself of the burdens of it. He cannot substitute for himself, against the consent of the other contracting party, a person who is to be under the same obligation to perform the contract. On the other hand, he can in most contracts, or in a great many contracts I will say, enter into an arrangement by which some other person may perform for him as far as he is concerned, the obligations of the contract; and the other party will remain obliged to accept the performance, if it is performance in accordance with the terms of the contract. But he will have the responsibility of his original contracting party for any breach that may happen, and he is not obliged to look to the person who is provided by the first person in any way to perform the obligations to him or be responsible for them.

I think those principles are plainly set out in the judgment of the late Master of the Rolls, then Sir Richard Henn Collins, in the case of *Tolhurst* v. *Associated Portland Cement Manufacturers* (*sup*). There are some contracts which a man has got to perform himself, which he cannot perform through an agent or through any person whom he, by any arrangement he likes to make, chooses to provide for that purpose. Such contracts are contracts which require in some special degree a personal performance by the contracting party. Such typical contracts would be a contract to paint a picture, write a play or a book. There are, of course, other contracts of a similar kind which can be mentioned. Here, as I understand the case, the original owners, Fratelli Sorrentino, do not suggest that there has been a novation, so that the obligation to perform the charter was imposed upon the purchasers. The claim for non-performance of the contract is made by them, and the argument that was adduced to me was adduced to me upon the footing that they remain liable to the charterers for the performance of the contract. At the present moment I am inclined to think that if they had sought to put upon the charterers the obligation to have the charter-party performed by the purchasers and purchasers only, the charterers would be justified in saying that that was a repudiation of the owner's obligation under the charter-party. That view has not been put forward, and is not what I have got to decide.

I have got to decide the question whether, merely by the sale of the vessel, together with the obligation taken by the purchasers that they would undertake every obligation relating thereto, the original owners have precluded themselves from suing upon this contract. In my opinion they have not I do not regard this contract as a contract involving a special personal obligation on the part of the shipowners. Obligations, no doubt, have got to be performed. The contract in fact is a contract that the steamer shall proceed to a port, and shall receive there from the shippers a cargo, and shall convey the cargo at that port on being paid freight at a certain rate. There are certain subsidiary provisions as to adjusting the payments that may arise between the parties, and a provision expressed, or if not expressed would be implied, that the steamer should be a seaworthy steamer. It appears to me that it is not a contract in which it could be said to be of the essence of the contract that the original owners should remain owners until the end of the contract. The cases that have been cited where a person was allowed to assign a contract in the sense that though he had required performance to be given by somebody else the contract was still in existence, are the cases of the *British Waggon Company* v. *Lee* (*sup.*) and *Tolhurst* v. *Associated Portland Cement Manufacturers* (*sup.*). In the *British Waggon* case, the waggon company, who had let coal merchants' waggons for a lump sum at a yearly rent, had agreed to keep these waggons in repair. The original contracting party had in terms sold that contract to a different company, and had at the same time assigned their repairing stations, their means of repair, to the new company. Nevertheless it was held that that was a clause of the contract which they could perform by somebody with whom they had entered into a contract; and that the original party was still bound by the contract, and bound to accept that performance, and that the original company still remained liable upon the contract. It appears to me that that is a much stronger case than the case of a charter-party. I certainly should be surprised to think that our law was of such a nature that a shipowner, who had once entered into a binding engagement for his ship, whether by a voyage, charter-party, or a time charter-party, was precluded from disposing of that ship, except at the risk of having the engagement declared at an end on the assumption that he had precluded himself from performing the contract. That is not my idea at all of what is in the contemplation of charterers or of shipowners.

I do not think that it is necessary to deal with the case of *Tolhurst* (*sup.*) in the House of Lords. It may be that it goes further and suggests that

in the cases I have referred to, where the contract is not one that is of a specially personal character, the obligations, as well as the benefits of the contract can be assigned. I myself doubt very much whether that is the decision, but I do not think that the decision in the House of Lords went further than the decision in the Court of Appeal, except in so far as it said as a matter of procedure that the original contracting party who was claiming the benefit in that case need not be joined as party in the action. But in this case, which proceeds upon the footing that the original contracting party is suing, I have no difficulty myself in coming to the conclusion that he is right.

It is said by Mr. Mackinnon that it may very well be in the case where there was an assignment of a ship that the obligations would be performed by someone very much less able to carry out the obligations. Of course that may be so; but it does not appear to me that considerations of that kind are in the contemplation of the parties. One knows that if the obligations are not carried out and if the ship were not sent there, the charterer would have his remedy. In this particular case it is found that all the obligations of the charter-party would have been carried out, in other words, that both the vendor and purchaser were ready and willing to perform the obligations under the contract.

Taking it, therefore, as being a claim by the original shipowner against the charterers, I think that they were not precluded from performing the contract merely by the transfer of the ship with the benefit of the charter-party, and that the award of the arbitrator in this case ought to stand.

Solicitors for the shipowners, *Parker, Garrett, and Co.*

Solicitors for the charterers, *W.* and *W. Stocken.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Oct. 12 *and* 15, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE TOMMI; THE ROTHERSAND. (a)

Enemy ships—Transfer on eve of war—Transfer in transitu—German company and English company—English company composed of alien enemy shareholders — Bona fides — *No valid transfer—Declaration of London, arts.* 55, 56, 57 —*Seizure in British ports—Order for detention.*

Two sailing vessels on the high seas at the time of the outbreak of hostilities between Germany and Russia—the 1*st Aug.* 1914—*belonging to a German company and flying the German flag, were offered for sale whilst at sea by the German company to an English company whose shareholders were mainly Germans, the German company itself being the holder of nine-tenths of the shares, and the offer was accepted. On the* 5*th Aug.* 1914, *the day after the declaration of war between Great Britain and Germany, both vessels were seized and detained as prizes by the Collectors of Customs in the English ports at which they had arrived.*

Held, that at the time of seizure the two vessels were entitled to fly the German flag; that the flag determined their nationality; that the alleged transfers in transitu *were, under the circumstances, invalid, as purporting to change the ownership of the vessels as against captors, whether imminent or actual belligerents; and that the vessels were therefore subject to detention in accordance with the decision in* The Chile (12 *Asp. Mar. Law Cas.* 598; (1914) *P.* 212).

Quære, whether a registered company nominally British, although consisting entirely of enemy shareholders, is able to be the owner of a British ship.

THESE were two cases in which two sailing vessels, alleged to be owned by an English registered company, were seized in British ports, at Gravesend and Kirkcaldy respectively, by the Collectors of Customs on the 5th Aug. 1914, the day after the declaration of war between Great Britain and Germany. Both vessels, which were the property of a German company, left German ports in the month of July 1914, and on the 1st Aug., when war was declared between Germany and Russia, communications took place between the German Company and the Norddeutsche Kraftfutter Gesellschaft, and the English company, the Sugar Fodder Company Limited, purporting to transfer the property in the vessels from the German to the English company. In the English company there was not a single British shareholder, and of the 5001 shares taken up, 4500 were held by the German company.

Butler Aspinall, K.C. and *Rayner Goddard* for the Crown in the case of the *Tommi*.

Bateson, K.C. and *Rayner Goddard* for the Crown in the case of the *Rothersand*.

Laing, K.C. and *Arthur Pritchard* for the Sugar Fodder Company Limited, claiming damages for demurrage and all losses, costs, charges, and expenses incurred by reason of the detention of the vessels.

The facts and the arguments are sufficiently set out in the judgment, and the following cases were cited with respect to the national character of vessels:

The Vigilantia, Roscoe's English Prize Cases, vol. 1, 31; 1 Ch. Rob. 1;
The Vrow Elizabeth, Roscoe, vol. 1, 409; 5 Ch. Rob. 4;
The Belvidere, Roscoe, vol. 2, 183; 1 Dods. 353;
The Aina (No. 1), Roscoe, vol. 2, 247; Spinks, 8;
The Caroline, Spinks, 252;
The Baltica, Roscoe, vol. 2, 628; 11 Moo. P. C. C. 141.

The following are the articles of the Declaration of London referred to by the learned President:

55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted. Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

56. The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void, unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There, however, is an absolute presumption that a transfer is void—(1) If the transfer has been made during a voyage or in a blockaded port. (2) If a right to repurchase or recover the vessel is reserved to the vendor. (3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.

57. Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. The case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of, and is in nowise affected by, this rule.

Oct. 15.—The PRESIDENT.—In each of these cases a claim is made as to the ownership of the vessels in question by the Sugar Fodder Company Limited, the vessels having been seized in British ports immediately after the outbreak of hostilities between Great Britain and Germany. The ships were owned by a German company, the Norddeutsche Kraftfutter Gesellschaft, and some time in the month of July of the present year they left German ports. Both vessels were on the high seas on the 1st Aug., when war was declared between Germany and Russia, and it was on that date that the alleged transfer took place from the German company to the Sugar Fodder Company. It is said that the ships were sold *bonâ fide*, and that a sufficient transfer took place from the original owners to the alleged new owners whilst the ships were in transit. It is necessary, therefore, to inquire into the whole of the circumstances of this alleged transfer.

The first thing that the court knows of the negotiations between the parties is derived from the letter of the 31st July, a letter written by the English company to the German company, in which it is stated that "if the *Tommi* should not arrive in time, we are going to land 100 tons at our wharf so that we may make sure of this 100 tons should there be a European war. . . . If your sailing vessels in case of war should be in this country, we think it would be advisable if the Sugar Fodder Company bought the same so that they should not be captured by any other nation." On the 1st Aug. there is another letter written by the English company to the German company, in which this passage occurs: "The *Tommi*, we now see, left Cuxhaven on the 28th ult. Should the *Tommi* arrive here and war have broken out, we will take the *Tommi* as well as the *Rothersand* over for our account, but we are not quite certain whether this transaction will stand good, as both vessels are registered at Hamburg." That letter shows very plainly that the writer of it had a very clear appreciation of what the law was or was likely to be. On the same day, after the letter of the 1st Aug. was written, the following telegram was received by the English company from the German company: "Aug. 1, 1914—We sell you *Tommi* for 30,000 marks and *Rothersand* for 35,000 marks. Wire acceptance." I do not know whether that is an offer to sell or a direction from a director in Hamburg to the director in this country, saying, "You must take it that this company sells whether you like it or not, and your company buys the *Tommi* for 30,000 and the *Rothersand* for 35,000 marks, and you must wire acceptance." Whatever may be the proper reading of that telegram, an acceptance was, in fact, sent immediately on the 1st Aug. by Mr. Gunther, acting on behalf of the English company.

On the 1st Aug., as I have already said, war broke out between Germany and Russia. The transactions between the two companies took place upon that day, and it is obvious that in any event they took place when war was imminent. War was not declared between this country and Germany until the 4th Aug., and therefore on the 1st Aug. Great Britain was a neutral country. I have grave doubts myself whether there was not an apprehension in the mind of Mr. Gunther, and I have graver doubt whether there was not an apprehension in the mind of Mr. Schrader in Hamburg as to the imminence of war between Germany and this country at the time. However, I do not think that it is necessary for the purpose of deciding the matter to show that they had the possibility of war between this country and Germany in their minds. The transfer which is alleged to have taken place was a transfer to defeat the right of an imminent belligerent. Russia, or any other belligerent, would have had the right to capture these vessels at sea if they had remained German. The question is whether such a transfer can be made so as to defeat the right of belligerents at that time, because that is the test which has to be applied. Of course, if England became a belligerent, she had the right to seize these ships in port as belonging to a State at war with her.

There are three heads under which the case can be considered: First, whatever may be the result properly to be attributed to this alleged transfer, it is said that the vessels were sailing under the German flag on the 5th Aug., and that therefore the German flag proves their nationality, and that they must therefore be taken to be German and subject to seizure by this country on the 5th Aug. It is perfectly clear that if a ship does sail under a particular flag, unless there are very special reasons, she enjoys the protection of the country whose flag she flies, and she is regarded as belonging to the State whose flag she carries. Mr. Laing says that there is a distinction to be drawn in considering this part of the case between a capture at sea and seizure in port. It does not matter in the slightest degree whether the flag was actually flying and hoisted at the mast. The question is, what flag the vessel was entitled to fly, and in my view there is no distinction upon this part of the case between a ship captured at sea and a ship seized in port. The law, as it is understood, which says that the nationality of a ship depends upon the flag, was adopted in the Declaration of London by the parties thereto, as is shown by art. 57, to which there is an interesting note written by M. Renault. The flag which these vessels were entitled to fly at the time of their seizure was the German flag, and they could not at that time, if they ever could during the war, supposing the transfer was valid, have the

right to fly the British flag. Therefore, if there was no other point in the case, I think the fact that the vessels were flying the German flag is enough to entitle them to be regarded as the subject of capture.

The second question is whether this transfer was valid, and I have come to the conclusion, clearly, for the purpose of the Prize Court, that it was not a valid transfer at all. If it was necessary to decide—and I do not think that it is—that the transfer was incomplete, that is a sufficient answer; but if it was necessary I could not bring myself to believe it was a *bonâ fide* transfer of the ownership. It was hardly more than this. "We understand you over there, and you understand us over here; our companies are mutually connected. We in Germany own nine-tenths of the shares in the British company; if war breaks out, whoever the belligerent is, let these ships be called British ships." I think that that is the real substance of the transaction. Apart from that, much more is needed to transfer a vessel in transit when war has been declared or even when war is imminent than was done in this particular case. Naturally, these matters have often been considered in Prize Courts, but it is enough for me to say that the principles are fully explained in two cases, one dealing with the cargo and the other with the ship itself—namely, *The Jan Frederick* (Roscoe's English Prize Cases, vol. 1, 434; 5 Ch. Rob. 128) and *The Baltica* (Roscoe, vol. 2, 628; 11 Moo. P. C. C. 141).

If I have stated the correct principles which ought to be applied, I need not go into the details of the case to point out that nothing was arranged as to when the purchase money was to be paid, as to when the completion was to take place, or that it is not shown that any satisfactory arrangement was made by the British company that they and not the person who is said to have bought the vessels, namely, Mr. Gunther, should become the purchasers. Apart from the Declaration of London (arts. 55 and 56), and whatever alteration the Declaration may make in the law, it cannot be said that the artificial periods of time for the transfer of vessels agreed upon by the various nations can be found in any decision of any particular Prize Court belonging to any country. They are convenient, but I refer to arts. 55 and 56 to show (1) that the basis of the whole thing must be that the transfer was not made to avoid the consequences to which the enemy vessel supposed to be transferred might be exposed by the action of any belligerent, and (2) that in any event, even after a lapse of time like thirty days, the transaction must have been completed, not merely by letters or telegrams passing, but by the execution of the formal documents necessary to complete the title. In this case there is an absence of any such documents. I have come to the conclusion, therefore, without any doubt that this alleged transfer was not valid, and that these ships remain, for all purposes connected with the Prize Court, German ships.

As the point has been argued by Mr. Laing, I will just notice in passing that the provisions as to when property passes, which are very difficult to determine when dealing with municipal law, are not regarded as being anything like conclusive—indeed, are hardly looked upon at all—when a Prize Court is determining what was the character of a vessel at a particular time. It is quite clear in many cases that both the ships and the cargoes of ships which might very well be said to pass under municipal law would be subject to seizure and capture under prize law. These technicalities have not been allowed to bind decisions in the Prize Courts. They have been treated rather as a gossamer to be brushed aside, and the Prize Court regards the essentials of any transaction and tries to arrive at the realities of the case.

The third branch of the case is this—the two companies, English and German, were most intimately connected. It must not be assumed, even supposing that I was in favour of Mr. Laing on the first two points, that I should decide in this case, even if the English company became the purchasers, that these vessels were immune from seizure. The English company consists of six shareholders only. One of them was Mr. Rudolph Schrader, the director in Germany, who affected to sell the ships. The German company owns 4500 out of the 5001 shares of the English company—that is nine out of every ten shares are owned by the German company, and there is not a single shareholder in the English company of British nationality. In fact they are all citizens of the German Empire. The policy of our municipal law is that no foreign subject may own any share in a British ship. That is provided by the Merchant Shipping Act of 1894. It is no doubt the case that a company registered in this country under the Companies Acts is a separate entity (see *Salomon* v. *Salomon and Co.*, 75 L. T. Rep. 426; (1897) A. C. 22), and such a company may own a ship. Whether a company consisting entirely of aliens can own a British ship is a question which probably has never arisen and has never, therefore, been decided. I am not sitting here dealing with municipal law, and therefore I am not called upon to decide that question, but I do not want it to be assumed that the Prize Court could not say, looking at the realities of this thing, that even if the transfer had been completed and if the shareholders in the British company became the purchasers, these vessels ought to be regarded as German ships. I am not deciding this question, but as the matter has been discussed I have thought it desirable to say what I have done. In the result the claim of this company must be rejected, and I make an order for the detention of these ships, the *Tommi* and the *Rothersand*, as in the case of *The Chile* (12 Asp. Mar. Law Cas. 598; (1914) P. 212).

[The learned President, on the application of Mr. Bateson, made an order that the freight of the *Rothersand* in the hands of the Collector of Customs should be paid into Court.]

Solicitor for the Crown, *Treasury Solicitor.*

Solicitor for the Sugar Fodder Company Limited, *W. R. J. Hickman.*

Nov. 23, 24, *and Dec.* 7, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE ROUMANIAN. (*a*)

British ship—Enemy cargo—Cargo shipped before outbreak of war—Ship in British port—Cargo transferred to quay—Seizure—Right of condemnation—"In port"—Meaning of term—Charges—Demurrage.

A cargo of petroleum oil in bulk, owned by a German company, was shipped on board a British vessel which sailed from a neutral port for a German destination before the outbreak of hostilities between Great Britain and Germany. Whilst on its voyage the ship was directed to proceed to a British port, where the oil was discharged into the tanks of a British company owning the wharf. When the greater portion of the oil had been discharged, the officer of the Customs gave notice to the master of the vessel that the whole of the cargo of oil was placed under detention, not only that which was still in the vessel, but also that which had already been pumped into the tanks. The Crown claimed the whole as prize and asked for the condemnation of the oil. The cargo owners objected on the ground that the tanks were "on land" and not "in port," and that the matter was not within the jurisdiction of the Prize Court.

Held, that the tanks were, in effect, oil warehouses, and that warehouses were included in the definition of a "port"; that the whole of the oil, whether in the tanks or on board the ship, was maritime prize as the property of the enemy; and that the Prize Court had authority to condemn it as such.

Held, also, that as the company owning the oil was registered and had its principal place of business in Germany, it must be treated as an alien enemy even though the majority of the shareholders were the subjects of neutral or allied countries.

THIS was a case in which the Crown asked for the condemnation of the cargo, the property of an alien enemy, carried in the British ship the *Roumanian*, which was loaded at a neutral port before the outbreak of war between Great Britain and Germany.

The cargo consisted of 6264 tons of petroleum and was shipped in the *Roumanian* at Port Arthur, Texas, in the United States of America, in July 1914. The oil was the property of the Europäische Petroleum Union of Bremen, in Germany, and but for the outbreak of hostilities it would have been landed at Hamburg. On the 14th Aug., however, the *Roumanian* called at Dartmouth for orders, and thence she proceeded to Purfleet instead of to Hamburg. On her arrival at Purfleet the oil was pumped into the tanks of the British Petroleum Company as wharfingers, and whilst the pumping process was proceeding and before the whole of the oil had been taken from the vessel, it was seized by the Customs authorities and claimed as lawful prize. The owners resisted the claim on the ground that the seizure was made on land and not either in port or on the high seas. Other claims were put forward by the Petroleum Steamship Company, the owners of the *Roumanian*, for freight, demurrage, and other matters which are noted in the judgment, and by the British Petroleum Company for their charges as wharfingers.

The *Attorney-General* (Sir J. Simon, K.C.) and *T. Mathew* for the Crown.—There was no doubt that this oil was enemy property. The Europäische Petroleum Union was clearly a German company, and it was immaterial that the majority of the shareholders should be the subjects of a neutral country. It was the nationality of the company and not of the individuals composing the same that had to be considered. Then, as enemy property, it was liable to seizure. Whilst the oil was on board the vessel no question could arise as to this point. It was suggested that because the greater portion had been transferred to the shore there was a difference. This was incorrect. The wharf and the quay with the water go to make up the port. To hold otherwise would make it possible for enemy goods, when a vessel was in port, to be thrown on to the quay and thus to escape the jurisdiction of the Prize Court. See

Le Caux v. *Eden*, 2 Doug. 594;
The Rebeckah, Roscoe's English Prize Cases, vol. 1, 118; 1 Ch. Rob. 227;
Foreman v. *Free Fishers of Whitstable*, 21 L. T. Rep. 804; L. Rep. 4 H. L. 266.

As to the claims for freight and wharfingers' charges, the Crown would pay those without admitting their legal liability to do so. Almost the whole of the shares in the British Petroleum Company and the Petroleum Steamship Company were held by the Europäische Petroleum Union, but the Crown was prepared to treat both of them as British companies. As to demurrage, although the *Roumanian* was delayed six days at Dartmouth, it was to her advantage that she called there and received fresh orders instead of endeavouring to proceed direct to Hamburg. This was a claim which the Crown could not admit.

Maurice Hill, K.C., *Balloch*, and *Dunlop* for claimants.—The Crown should make some allowance on the ground of demurrage, as what happened was really the usage of the vessel as a warehouse for the captor. Expenses of this character were always allowed. See

The Hoop, Roscoe's English Prize Cases, vol. 1, 104; 1 Ch. Rob. 196;
The Juno, Roscoe, vol. 1, 202; 2 Ch. Rob. 120;
The Bremen Flugge, Roscoe, vol. 1, 356; 4 Ch. Rob. 90;
The Henrick and Maria, Roscoe, vol. 1, 339; 4 Ch. Rob. 43;
The Vryheid, Roscoe, vol. 1, 13; H. & M. 188.

As to the claim for condemnation, a very clear distinction was to be made between enemy goods on land and those on water, and a hard-and-fast line should be drawn. Nearly the whole of the oil had passed into the possession of the British Petroleum Company before any action at all was taken by the Customs authorities. The cargo was almost completely on land. The Prize Court, therefore, had no jurisdiction over it. They cited

The Ooster Ems, 1 Ch. Rob. 284n.;
The Two Friends, Roscoe, vol. 1, 130; 1 Ch. Rob. 271;
The Hoffnung (*No.* 3), Roscoe, vol. 1, 583; 6 Ch. Rob. 383;
The Charlotte, Roscoe, vol. 1, 585n.; 6 Ch. Rob. 386n.;

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Brown v. *U. S. A.*, 8 Cranch, 110;
Lindo v. *Rodney*, 2 Doug. 613n.;
The Banda and Kirwee Booty, 14 L. T. Rep. 293; L. Rep. 1 A. & E. 109.

T. Mathew in reply.

Cur. adv. vult.

Dec. 7.—THE PRESIDENT.—The question in this case concerns the cargo of the steamship *Roumanian*, which consisted of 6264 tons of refined petroleum oil in bulk. It was shipped on the *Roumanian* at Port Arthur, Texas. The commercial documents are in evidence. Without going into detail, it is sufficient to say that the shipment took place before the outbreak of the war, and that the cargo of oil was destined for Hamburg. At all times material for this decision the oil was the property of a German company. At all material times, therefore, the oil was the property of enemy subjects. As enemy property it is claimed by the Crown as having been seized on behalf of the Crown as lawful prize.

On the other hand, the German company owners claim that it could not lawfully be so seized; and, alternatively, that a portion of the oil which had already been discharged into oil tanks on shore could not lawfully be so seized. There are other claims by the owners of the steamship for freight and other charges and expenses, and also by the proprietors of the tanks for charges and expenses due to them as wharfingers. These latter claims have to some extent been dealt with by consent, and will be disposed of at the end of this judgment.

The main question arises upon the claim put forward by the owners of the oil. Three limited companies come into the history of the case. I will for convenience sake now describe them, and afterwards refer to them by shorter titles. They are:—

(1) The Europäische Petroleum Union Gesellschaft M.B.H. of Bremen. Neutral bodies and subjects are shareholders to a considerable extent in this company. It is a corporate body duly incorporated under the laws of Germany, and as such entered an appearance in these proceedings. There was some discussion in argument as to its constitution, but it was not really denied that it was a German company. It clearly is. This company I shall hereafter refer to as "the German company." They were the owners of the cargo of oil.

(2) The Petroleum Steamship Company Limited. This company was an English company incorporated under the Companies Acts 1908 and 1913. The vast majority of the shares were owned by the German company, but there were also English shareholders and English directors, and its business was carried on in this country. This company I shall hereafter refer to as "the steamship company." They were the owners of the steamship *Roumanian*.

(3) The British Petroleum Company Limited. The same remarks apply as in the case of the second company. This was also an English company, and is hereafter referred to as "the tank company." They were wharfingers, and the owners of the tanks into which some of the oil had been discharged.

The material facts are substantially undisputed. I will state them shortly. While the *Roumanian* was on her voyage on the high seas, the secretary of Lloyd's wrote to the managers for the steamship company that the Lords Commissioners of the Admiralty had suggested that in the national interest the *Roumanian*, which, according to Lloyd's records, was then on her way to Hamburg, should be diverted to a port of the United Kingdom. When the vessel had reached the English Channel her master (Mr. Ross), on or about the 14th Aug., received instructions from her owners through Lloyd's signal station at Prawle Point to proceed to Dartmouth for orders. The vessel was accordingly put into Dartmouth, arriving there apparently on the 14th Aug. There she remained for several days, when she was ordered to proceed to London. She arrived at Purfleet on the 21st Aug., and was moored at the tank company's wharf at noon of that day. The discharge of the oil into the tanks of the tank company by means of pumps and connecting pipes was immediately begun.

Information has in such cases to be given, and was in this case given, by the shipbrokers to the Custom House officer of the arrival of the steamship, in order that the oil may be tested for the purpose of ascertaining whether the particular oil is subject to duty or not. The Custom House officer does not release oil cargo until he has tested it and ascertained whether duty is payable on it or not. The officer visited the steamer at Purfleet on the 21st Aug. about 4 p.m. Some of the oil had already been discharged. He tested a sample taken from one of the ship's tanks with the specific gravity instrument. It was somewhere near the dutiable line, so he took away a sample to be tested in the laboratory of the Custom House. He again went to the vessel at 3.30 p.m. on the next day and took another sample, this time from the discharging pipe. He did not receive the test note from the Custom House analyst until the 24th Aug. Meantime, on the 22nd Aug. (about 7 p.m.), a letter was delivered on board the steamer from the Custom House officer at Gravesend, of which the following is a copy: "Custom House, Gravesend, 22.8.14.—To the Master, *S.S. Roumanian*, Purfleet.—Sir.—I have to inform you that your cargo, consisting of about 6264 tons of refined petroleum oil, is placed under detention.—Your obedient servant, H. BURRELL, senr."

This was the seizure, by one of the special war staff of the Customs on behalf of the Crown, of the cargo as prize. At this time, in round figures, 4800 tons had been discharged from the vessel into the tanks, and 1400 tons still remained in the vessel. To complete the story, the test note afterwards given on the 24th Aug. showed that the oil was of a quality admitted free of duty. The Customs officer first referred to deposed that until the cargo is certified free of duty it is still regarded as being in the charge of the Customs, and an offence against the revenue laws would have been committed if any delivery had taken place before.

As to the quantity of 1400 tons which remained in the ship, it is quite clear that, by international law, it was confiscable as prize on board a ship which arrived in port after the outbreak of hostilities. In the claim the German owners invoke the Hague Convention No. VI. But the Hague Convention is not applicable at all in this case. If the case is regarded as analogous to that of an

enemy cargo on board an enemy ship under arts. 3 and 4 of the Convention, in any event German subjects could not found any claim under those articles, because Germany declined to agree to them and is not a party to them.

But the main and important question contested between the Crown and the claimants was whether the 4800 tons already discharged and in the tanks of the tank company were confiscable as prize and droits of Admiralty. The broad foundation of the argument for the German company was that this oil was on land, and that enemy property on land cannot be seized as prize. The tanks were contiguous to the tank company's wharf where the ship was moored, and were used in conjunction with the wharf for dealing with oil cargoes. Their distance from the wharf was between 100 and 150 yards.

This important question may be approached from two aspects. In the first place, was the oil in the tanks on land as this phrase has been used in international law; or was it still in port for the purpose of applying the principles of seizure of enemy property in port? Secondly, even if in strictness it was on land, was it in the circumstances of this case immune from seizure and free from confiscation in a Court of Prize? Before dealing particularly with these two questions, it would be helpful to look at the whole subject more generally. According to the practice of former times and according to the views held by some of the most revered and authoritative international jurists, all enemy property on land as well as on sea and in ports, creeks, and rivers could be captured and confiscated. But from time to time, by special treaties, and subsequently by the mitigation of rules considered to operate harshly on enemy owners of private properties, capture of such properties on land has been avoided and has fallen into desuetude.

The present position is well stated in Hall's International Law (6th edit., p. 435), where it is said: "Upon the whole, although, subject to the qualification made with reference to territorial waters (*i.e.*, excepting property entering territorial waters after the commencement of the war, see p. 431), the seizure by a belligerent of property within his jurisdiction would be entirely opposed to the drift of modern opinion and practice, the contrary usage, so far as personal property is concerned, was until lately too partial in its application, and has covered a larger field for too short a time to enable appropriation to be forbidden on the ground of custom as a matter of strict law; and as it is sanctioned by the general legal rule, a special rule of immunity can be established by custom alone. For the present, therefore, it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith; but the absence of any instance of confiscation in the more recent European wars, no less than the common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse."

It ought, however, to be borne in mind—which, indeed, is often forgotten—that a potent factor and a beneficent object in the mitigation of the severity of land seizure was the desirability of saving from confiscation the property of citizens of an enemy State which was already in the belligerent country at the outbreak of war. A beginning was made by exempting moneys lent by individuals of an enemy State to a belligerent State. Then real and immovable property was made an exception, at first from absolute confiscation, and later from sequestration of its income. Then came treaties allowing time for the withdrawal of mercantile property from a belligerent country at the outbreak of war.

Hall, in the work to which I have already referred (see p. 434), speaks of this advance and the reasons for it as follows:—"The custom which has become general of allowing the subjects of a hostile State to reside within the territory of a belligerent during good behaviour brings with it as a necessary consequence the security of their property within the jurisdiction, other than that coming into territorial waters, and indirectly therefore it has done much to foster a usage of non-confiscation; but as it is not itself strictly obligatory, it cannot confer an obligatory force, and the treaties which contain stipulations in the matter, though numerous, are far from binding all civilised countries even to allow time for the withdrawal of mercantile property."

I have before had occasion to refer to a note by Mr. Dana in his edition of Wheaton (8th edition, 1866). It not only deals admirably with the distinction between seizure on land and capture at sea, but it also gives prominence to the reasons why "maritime merchandise" and "cargoes" should be differently regarded, without, as I think, making a qualification that the "merchandise" or "cargoes" must be actually afloat at the time of the seizure. However this may be, I make no apology for citing the passage, as containing considerations worthy of being noted in connection with the present case. It is as follows:—"Note 171.—Distinction between Enemy's Property at Sea and on Land.—War is the exercise of force by bodies politic for the purpose of coercion. Modern civilisation has recognised certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the Power with which we are war. If the hostile Power has an interest in the property which is available to him for the purposes of war, that fact makes it *primâ facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property, from things almost sacred to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be open to the military; and the moral dangers attending searches and captures in households and among non-combatants. But, on the high seas, these reasons do not apply. Strictly

personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field, and it is the usual object of revenue to the Power under whose Government the owner resides. The matter may then be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile Power has some interest for purposes of war, is *primâ facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the *primâ facie* right of capture. To merchandise at sea these objections apply with so little force that the *primâ facie* right of capture remains": (Dana's Wheaton, p. 451).

We start accordingly in considering the present case with the broad proposition that all enemy property—ships and cargoes—may after the outbreak of war be captured *jure belli* on the sea or in rivers, ports, and harbours of this country. There are other captures which can be made, but these do not concern the present case. All such captures are tried in the Prize Court, and can only be condemned in this court. In days gone by, constant contests and quarrels were waged between the common law courts and the Court of Admiralty as to the jurisdiction claimed by the latter to deal with causes civil and marine in ports, harbours, rivers, or creeks within the body of a county which the common law courts asserted could only be tried at law. But the jurisdiction and exclusive jurisdiction of the Court of Admiralty in Prize was never doubted. "The nature of the ground of the action—prize or not prize—not only authorises the Prize Court, but excludes the common law": (per Lord Mansfield in *Lindo* v. *Rodney*, *ubi sup.*). These functions of the Prize Court have now been allotted to this division of the High Court, and contests between the various divisions can no longer occur.

It was considered, however, that the Judicature Acts did not render unnecessary the commission which had been issued by the Crown at the beginning of each war; and accordingly a commission was issued at the beginning of the present war, in, I think, the same operative terms as the old commissions. By this commission the court is "authorised and required to take cognisance of and judicially to proceed upon all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods that are or shall be taken, and to hear and determine the same; and according to the course of Admiralty and the law of nations, and the statutes, rules, and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels, and goods as shall belong to the German Empire or to the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories, or dominions of the said German Empire, which shall be brought before you for trial and condemnation." A separate commission was issued in reference to Austria-Hungary.

As Lord Mansfield said in *Lindo* v. *Rodney* (*ubi sup.*), "The commission does not say—upon the sea. It does not say—goods in the ship. 'Reprisals' is the most general word that can be used"; and he proceeded: "In causes civil and marine, to give jurisdiction to the Court of Admiralty (by which he meant the ordinary jurisdiction of the court), the libel must allege the cause of suit to be done upon the high sea, and, therefore, if that had been the intention of the commission, or the rule of law, it would certainly have been so expressed in the commission."

Now, in this case the steamship *Roumanian*, from the moment of the outbreak of war, carried an enemy cargo. This cargo as such was subject to capture or seizure as prize, either on the high seas, or after the arrival of the vessel in port. The vessel was not bound to come into a port of this country. But she was in a dilemma. Her cargo was destined for and consigned to the port of Hamburg by the joint operation of the charter-party and the bill of lading. To deliver the cargo at Hamburg was forbidden; that would be trading and having intercourse with the enemy. To remain at sea was not practicable. If she proceeded to any other country's port, or, indeed, wherever she proceeded at sea, she was liable to be captured by a German cruiser. If that had happened, she might have been taken to Hamburg, and the German company might have secured their cargo; and the enemy State might capture the vessel herself into the bargain. Of course, those responsible for the vessel were quite right in diverting her into a port of this country.

Now, examine the consequences relating to the cargo and its owners. As the vessel came, and properly came, into a British port she could not help bringing the oil laden in her into the port too, unless she previously pumped it into the sea. She was not bound to do that. Apart from the labour and waste of it, she might have looked forward in hope to securing her freight out of the cargo.

But, if I may personify the cargo for a moment, I would ask, what right of entry had it into this country? What right had it to expect protection in this country at someone's care and expense, for the sake of its owners? Its owners could not have ordered its delivery to anyone here on their behalf; no one could have accepted its delivery for them, as that would be against the law. It may be that the shipowners could have exercised their lien for freight by selling it, or part of it, if it had not been seized, but they do not purport to do so. It was delivered—no, that is an ambiguous term—4800 tons of it were pumped into the tanks; and there it was, subject to some kind of tacit understanding as to the lien for freight. It was a sort of *nullius bona*.

It came into the port as maritime merchandise of the enemy, subject to seizure, and in my opinion the whole of it remained such until it was actually formally seized on behalf of the Crown on the 22nd Aug. I cannot see how or by what process the portion of it which was at one

end of the pipe in the tanks on shore had ceased to be seizable enemy cargo any more than the portion remaining in the ship at the other end had. In my opinion, the view that one part was seized in port and the other on land and not in port would be pedantic and erroneous.

But, in deference to the arguments upon the points raised, I must deal with them, and with the cases cited, to which a few other cases will be added. It was strenuously argued, as to the 4800 tons, that the seizure was on land as distinguished from in port and therefore that this court had no jurisdiction over it as prize. The word "port" may bear different meanings in different connections. In relation to enemy goods—by their nature the subject of naval prize when at sea after the commencement of the war—I think the word "port" has a meaning extended beyond the part of the port covered with water in which a ship carrying the goods would be afloat. Indeed, counsel for the German owners conceded that a wharf alongside would come within the "port" in this sense, although it would be strictly "on land." I fail to see what difference the 100 yards from the edge of the wharf ought to make.

Sir Matthew Hale, in his De Portibus Maris, describes "ports" and "creeks" as follows: "A port is a haven, and somewhat more. First.—It is a place for arriving and unlading of ships or vessels. Second.—It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shown. Third.—It hath a *ville* or city or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lye, and a good shore where they may well unlade; something that is artificial, as keys and wharfs and cranes and warehouses and houses of common receipt; and something that is civil, viz., privileges and franchises, *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority. . . . A creek is of two kinds, viz., creeks of the sea, and creeks of ports. The former sort are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages and have shore of either side of them. The latter, viz., creeks of ports, are by kind of civil denomination such. They are such, that though possibly for their extent and situation they might be ports, yet they are either members of or dependent upon other ports. And it began thus. The King could not conveniently have a customer and comptroller in every port or haven. But these custom officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that where these custom officers were placed": (Hargrave's Law Tracts, pp. 46, 47, 48).

It will be observed that "warehouses" are expressly included in the definition of port. And the tank company's tanks in the present case could not be placed in a category higher than, or different from, warehouses. The tanks are oil warehouses. *The Ooster Eems* (*ubi sup.*) and *The Two Friends* (*ubi sup.*) were referred to. The facts in this case were quite different. Of *The Ooster Eems* (*ubi sup.*) Lord Stowell said in *The Two Friends* (*ubi sup.*) "that those goods had never been taken on the high seas, they had only passed in the way of civil bailment on delivery into civil hands, and were afterwards arrested on shore as prize." And in *The Two Friends* (*ubi sup.*) Lord Stowell would not accede to the argument that the goods, being on shore, were out of the jurisdiction of the Court of Admiralty in prize. The concluding paragraph of his judgment is as follows: "But the present case is radically bottomed in prize; and, if so, all the consequences of prize will follow. If the goods are removed before proceedings are commenced, they are still liable to be called in by a monition. A different way has been taken in this case by a personal monition, as more convenient to the parties proceeded against. On the whole, I am of opinion that the English seamen are entitled to redress here; that these goods being matter of prize, even that part which had been landed, are subject to the jurisdiction of this court, and I shall therefore overrule the protest."

That was a case of salvage on recapture when part of the salved cargo had been landed before the suit was instituted. Nothing in these cases, in my opinion, precludes the claim of the Crown in the present case.

Counsel for the German company also cited *The Hoffnung* (*No.* 3) (*ubi sup.*) and *The Charlotte*, note to the same case (*ubi sup.*). The former was a case where, before seizure at the outbreak of hostilities, a part of the cargo had already been sold, and had been applied to the reparation of the vessel also before the seizure. The decision was that the captors could not claim average against the ship on account of the cargo so sold and applied. In the latter case the court held that the proceeds of part of the cargo already sold and delivered before it was even subject to seizure were not amenable to the jurisdiction of the Prize Court. It does not seem to me that either of these decisions can assist the claim of the German owners in the present case.

The other authority referred to was the well-known case of *Brown* v. *United States* (*ubi sup.*). In the District Court it was tried before Story, J., and is there reported as *The Cargo of the Ship Emulous* (1 Gallison, 563). Story, J. also sat in the Supreme Court on the appeal, and was one of the dissenting judges. It is an interesting and illuminating case. The subject-matter was some timber which had been British property carried on an American ship, and which had been landed and put into a salt water creek (which was not navigable, although the tide ebbed and flowed there), some twelve months before the seizure. About five months after it was landed it had been sold to the claimant Brown. It was in that position at the commencement of hostilities between the United States and Great Britain, and was seized afterwards.

The ultimate and actual decision was that the property was on land, and was found on land at the commencement of hostilities, and that therefore it could not be condemned as enemy property without a legislative Act of Congress authorising its confiscation. Of course, the decision is not binding on this court. It would be open to this court, if it deemed fit, to accept the guidance of the judgment of Story, J., who was so great an

authority on Prize Law, even in preference to that of the very eminent Chief Justice.

But I refrain from attempting to weigh the judgments. I only desire to emphasise the fact that the ground of the decision was that the property was not only found in fact to be seized on land, but especially that it was found within the territory of the belligerent at the commencement of hostilitities, and, further, to call attention to what Story, J. conceived to be conceded by the Supreme Court if the property in question had been brought to where it was after war had broken out. At p. 151 (8 Cranch) this learned judge said: "The opinion of my brethren seems to admit that the effect of hostilities is to confer all the rights which war confers; and it seems tacitly to concede that by virtue of the declaration of war the executive would have a right to seize enemies' property which should actually come within our territory during the war." And at p. 154 again, he said that he understood the opinion of the court to proceed upon the tacit acknowledgment that the executive might seize and confiscate property (and I think he intended to include the property in question) if it had come into the country since the war.

I have now dealt with the cases which were cited. There are a few others to which I think it well to call attention. One, called "1253 bags of rice, and 103 casks of rice," arising in the course of the American Civil War, was heard in prize in the District Court of New York: (Blatchford's Prize Cases, 1861-1865, p. 211). As I have just been dealing with the case of *Brown* v. *United States* (*ubi sup.*), I will first take from the judgment of Betts, J. a passage to show what he considered to be the effect of that decision: "The declaration upon the merits in *Brown* v. *United States* (*ubi sup.*) went upon the principle that the enemy property there seized was landed in this country before the war commenced between England and the United States, and that it was not liable to capture as prize in the absence of positive law authorising its seizure. The majority of the court who adopted that doctrine did not controvert the declaration of the Circuit Court, declaring the suit to be of a prize character, nor the historical and juridical fact that the practice of the United States courts is governed by the rules of Admiralty law disclosed in the English reports. It is very clear that in England the prize jurisdiction does not depend upon locality, but upon the subject-matter."

The part of the case before Betts, J., which, though not strictly relevant, may help to throw some light upon the case now before me, is that which dealt with the "103 casks of rice." This cargo was not water-borne when seized, but was found stored in a warehouse in the enemy's country, and captured there by launches of a United States vessel. "The question specially presented was whether the seizure on land was in law a maritime capture." It was held in that case, dependent, no doubt, upon its particular facts, that it was.

Another case is *The Thalia*, in the Supreme Court of Prize in Japan: (Russian and Japanese Prize Cases 1904-1905, vol. 2, p. 116). There a vessel belonging to Russian citizens was in itself a sort of cargo, because it had been laden upon another vessel, and so conveyed to a place near a dry dock in Japan to undergo repairs. It was placed on dry land near the repairing dock, and was there before the outbreak of hostilities. It was held to be, by reason of its character, a maritime prize and subject to capture and confiscation.

I now finally desire to refer to some cases in this country, which are not reported. They are noted in a most valuable and elaborate report in MS., which was drawn up by Mr. Rothery, a former registrar of the Court of Admiralty during the Crimean War, and presented to one of our public departments in 1857. It represents two or three years' labour, and shows scrupulous care and great skill and learning. Its chief object was to ascertain how and to what extent captors had been rewarded for prizes taken. I could wish it were accessible in print to those interested in these subjects. That, also, is the opinion of Mr. Roscoe, the registrar, through whose kindness I have become acquainted with it. In perusing it I have come across the following cases of interest bearing upon the question now before the court.

One related to a seizure effected at Ramsgate. The following is the extract from the MS. Report: "It is that of the French vessel *Marie Anne* (Warrant No. 97). It appears from the King's Proctor's report in this case bearing date the 26th Feb. 1805 (Treasury No. 1028) that on the breaking out of hostilities with France on the 16th May 1803, John Friend, of Ramsgate, in the county of Kent, shipbuilder, having obtained information that a ship called the *Marie Anne* (then under repair in his own yard at Ramsgate) and certain parts of the cargo thereof, which had been landed and deposited in warehouses, were French property, seized the said ship and goods, as being the property of His Majesty's enemies, and with great difficulty obtained the papers and documents belonging to the ship and cargo from the merchants, in whose hands the same had been deposited, and took the master and other necessary witnesses to Deal and caused them to undergo their examinations before the proper commissioners there, in order that the said ship and goods might be legally brought to adjudication. The result of these proceedings was that the ship and cargo were condemned as droits of Admiralty, and after payment of all expenses realised the sum of 2667*l.* 1*s.* 8*d.* Upon an application being subsequently made for a grant the King's Proctor reported that a grant of 400*l.* would be a liberal reward to Mr. John Friend for his services." Accordingly a grant to that extent was made, thus giving the seizer somewhat less than one-sixth of the proceeds.

This is a case directly in point, as the cargo seized had been landed and deposited in warehouses.

The next case is *The Berlin Johannes* (Warrant No. 77). The extract is as follows: "It appears from the warrant in this case that the marshal of the Admiralty had received information that the *Berlin Johannes* then lying in the River Thames, which had arrived from Rotterdam with a cargo of Geneva, was enemy's property. He accordingly seized her, but at that time the greater part of the cargo had been discharged. Proceedings were commenced in the Court of Admiralty, when it transpired that the ship had formerly belonged to British subjects, and was accordingly restored to them on payment to the

marshal of one-sixth part of the value, that being the usual proportion paid to non-combatant persons in case of recapture. The cargo, however, proved to be enemy's property and was accordingly condemned as droits of Admiralty, and on being sold realised the sum of 504*l.* 9*s.* 7*d.* This warrant grants to the marshal one-sixth of the proceeds 'as an encouragement for his vigilance and attention.' "

I have tried, but not yet succeeded, to obtain the original papers in this case in order to see whether the part of the cargo which had been discharged was condemned. I see no reason to doubt that it was, because if any distinction was made between the part discharged and the part not discharged, that would almost certainly have been mentioned in the report.

The next case is that of *The Venus* (Warrants Nos. 220 and 221). The extract from the report is as follows: "It appears from the warrants in this case that William Davies, the master of the British vessel *Venus*, whilst bound on a voyage to Hamburg with a cargo, which he had taken on board at Genoa and other ports, received information that war had broken out between France and England, and he accordingly put into the port of Plymouth, not only for the safety of his own vessel, but also to ascertain the nature of the cargo which he had on board, and which he believed to be French. He accordingly communicated his suspicions to George Eastlake, the receiver of Admiralty droits at Plymouth, who ordered the same to be seized. The result was that the ship and a considerable part of the cargo were restored, but the remainder of the cargo, proving to be enemy's property, was condemned as droits of Admiralty, and realised the sum of 531*l.* 18*s.* 8*d.* after payment of all expenses. On an application, the Crown granted fifty guineas as a reward to the master of the *Venus* in consideration of his conduct in the matter, and 100 guineas to Mr. Eastlake in consideration of his having seized the ship and cargo at his own risk. The two grants together were between a third and a fourth of the net proceeds."

I have set out this case because, in the action of the master in bringing his vessel into a British port, there is a close resemblance to the course of events resulting in the *Roumanian* being diverted to Dartmouth and Purfleet; and also because it shows that enemy cargoes in British vessels were condemned. Counsel for the claimants intimated that he would have argued that in such a case the goods were not confiscable, but for the fact that I have in previous cases in this court decided the contrary.

There is one other matter to which I wish to refer before stating my conclusions. It may be suggested that even if the oil in the tanks were confiscable as enemy property on land, it is not the subject of prize within the jurisdiction of the Prize Court. While I think it is, I cannot see what advantage would accrue to the German company, especially in these days when all the divisions are parts of one High Court, if the questions arising were admitted (if they could be admitted) to be decided in a common law or other court in this country. To adopt a metaphor employed by Lord Stowell, it would be but to make a change of postures on an uneasy bed.

Applying what appears to me to be the principles of the law of nations to the facts of the present case, I have after full consideration come to the conclusion that the whole of the oil cargo of the *Roumanian* was maritime prize, subject to seizure as and where it was, both on board and in the tanks; that the case falls within the jurisdiction of this court; that the portion in the tanks was seizable even if they have to be regarded strictly as being on land as distinguished from the port; but also that the tanks were within the port; and that all the oil was seized, and lawfully seized, by the Customs officers on behalf of the Crown, and must be condemned to the Crown as prize in the Crown's rights to droits of Admiralty. I decide, therefore, against the claim of the German company, and decree condemnation of the whole cargo.

There remain the money claims of the shipping company and of the tank company. The legal liability of the captors for freight is not to be decided in this case, but the Attorney-General for the Crown, without admitting liability, has assented to the payment of what is determined to be reasonable.

(1) As to the claim for freight, by consent the Crown will pay what is decided by the registrar and merchants to be the reasonable amount to be determined on the principle of *pro rata itineris*. The question of amount is accordingly referred to the registrar and merchants.

(2) As to the charges for landing and storing in the tanks, the Crown also assent to payment, either to the shipping company or to the tank company (whichever may be entitled), of the proper sums to be ascertained also by reference to the registrar and merchants.

(3) The claims for demurrage at Dartmouth and for coal consumed are disallowed.

(4) The Port of London dues are to be paid by the captors.

(5) The claim for inspecting cargo is assented to by the Crown and is allowed.

(6) The claim for interest is disallowed.

(7) The claims for insurance stand over. Liberty to the claimants to apply in respect of them.

As to the suggestion made by the Attorney-General that the amount of the claims which are allowed should not be paid over till further order, I see no reason why the amounts when ascertained should not be at once paid to the claimants, upon the understanding, or upon a guaranteed undertaking if applied for by the Crown, that no part of the money should be handed over to enemy subjects. There will be liberty to the Crown to apply as to this.

Leave to appeal to the Privy Council will be granted, but I shall refuse to restrain the Crown from selling the oil pending the hearing of the appeal.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Ince, Colt, Ince,* and *Roscoe.*

Nov. 30 *and Dec.* 14, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE JUNO. (*a*)

British ship—Enemy goods—Interruption of voyage—Seizure of goods—Condemnation—Claim for freight—Allowance of part of freight—Principle to be applied—Calculation of amount to be allowed—Rule to be followed.

Where cargo, the property of an alien enemy, is seized on board a British vessel and condemned as lawful prize, the shipowners are entitled to claim from the Crown such a sum as is fair and reasonable under all the circumstances. This amount is to be ascertained by reference to the registrar and merchants, and in fixing the amount regard must be had to the rate of freight agreed upon, the extent to which the voyage has been made, the costs incurred before the date of the seizure, and the benefit accruing to the cargo from the actual carriage. In the absence of any special circumstances, no sum is to be allowed for delay or inconvenience arising to the ship and the shipowners from any diversion during the contemplated voyage or from any detention for the purposes of the capture.

THIS was a case in which a claim was made by the Bristol Steam Navigation Company, the owners of the steamship *Juno*, a British ship, with respect to freight due upon a contract to carry certain goods from Bristol to Amsterdam, the goods being destined ulimately for alien enemies in Germany. The *Juno*, after leaving Bristol, put in at Swansea and the goods were there seized and afterwards condemned. The company also claimed for other expenses and losses arising out of the seizure.

Bateson, K.C. and *Balloch* for the Crown.

Dunlop for the claimants.

The learned President condemned the goods as prize, and reserved judgment as to the freight and the other claims raised.

The facts and the arguments sufficiently appear in the judgment.

Cur. adv. vult.

Dec. 14.—The PRESIDENT.—The steamship *Juno* is a British vessel. It belongs to the claimants, the Bristol Steam Navigation Company Limited. On the 28th July 1914 certain cargoes consisting of (1) red earth; (2) tin alloy; (3) strontium ore, were shipped on board the *Juno* at Bristol. The cargoes were destined ultimately for various places in Germany, but the sea voyage destination in each case was Amsterdam. After leaving Bristol the vessel called at Swansea to load other cargo. She finished her loading there on the 1st Aug., and was then ready to proceed on her voyage. Her owners, however, decided to delay her departure owing to fear of complications on the Continent.

While the vessel still lay at Swansea, the cargo of red earth was seized as enemy goods on the 20th Aug., and the cargoes of tin alloy and strontium ore on the 24th Aug. In these proceedings I have already condemned these cargoes as lawful prize. Thereupon the steamship company, as owners of the vessel, claimed the freight due in respect of the goods, and other expenses and losses resulting from the seizure. This claim is the matter remaining for adjudication. The claim as originally put forward has been amended. I accept the final affidavit of Mr. Taylor, the manager of the company (sworn on the 25th Nov. last), in proof of the arrangements and circumstances under which the goods were shipped, and therefore I need not discuss various questions which were argued as to the contracts of affreightment and bills of lading. The claim as amended is set out in par. 10 of the affidavit.

The company claim the full freight as having become due on shipment. Alternatively, they claim the full sum, because, "although the goods were only carried from Bristol to Swansea, the detention of the ship at Swansea, owing to having the goods on board, cost the company more than if the *Juno* had performed the voyage in the ordinary course." They also claim extra costs of discharging and shifting the goods at Swansea. Various reported cases were referred to in argument which related to claims by captors of ships for freight against owners of cargoes; and to claims by shipowners for freight against captors or seizers of cargoes. These were all cases of neutral vessels. In none of them were British ships concerned, and counsel for the claimants said he had not been able to find any cases relating to British vessels dealing with the same subject. The position of the sea-carrying commerce of this country was very different 100 years and fifty years ago from that of our own day. I have only come across one case reported in the English Prize Court affecting a British vessel in which somewhat similar questions arose; but that was a case between the owners of a ship captured, and afterwards recaptured, and the owners of cargo, and not between shipowners and captors. The case is that of *The Friends* (Roscoe's English Prize Cases, vol. 2, 48; Edw. 246). I have considered all the other cases. It would be wrong to say that their consideration has not been helpful. Nevertheless, they are not decisions on the points now before me.

The questions which I have to determine in the present case are *primæ impressionis*; they come before the court for decision for the first time, so far as I am aware. While there are no rules of law or decisions to bind or to guide the court, the problems can, I think, be solved without great difficulty by a rational application of fair and equitable considerations. The Prize Court has always claimed to exercise equitable jurisdiction, using that term in its broadest sense and not in its more technical Chancery meaning.

Counsel for the claimants contended that they were entitled to the full freight for two reasons: (1) because by the contracts the freights were due on shipment; and (2) because, as in the case of neutral ships in former days, capture was said to be regarded as delivery, and full freight was given to neutral shipowners, and so it should now be given to British shipowners.

For the Crown it was contended that no freight should be allowed, or, if any, not the whole freight, because an incapacity attached to the ship in the present case, as she was prevented by law from performing her contract to deliver the goods to the consignees, and because the non-completion of the voyage was not due to the "incapacity of the cargo to proceed."

The short answer to the first contention of the claimants is that there is no contract to which the

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

court can look which is applicable to the existing facts. This court has no concern, touching the matter now in question, with the contracts between the shipowners and the shippers or cargo-owners. Whatever claim the shipowners may have under their contracts is not taken away by the decision of this court. By the very facts of the situation the shipowners could not perform their contract by carrying the enemy goods to their destination.

As to the second contention, a neutral vessel and a British vessel are not in the like case or condition. Even before the Declaration of Paris a neutral vessel had the full right to carry enemy goods into an enemy country, subject to the risk of her detention by a belligerent for the purpose of seizing the goods; and this was the foundation of the principle which, generally speaking, secured to them their full freight.

It is needless to cite the cases in which the doctrine was applied, or in which exceptions were made. But I will quote from two of the latest cases in which Lord Stowell dealt with the matter —his statement of the principle. The first is the case of *The Fortuna* (Roscoe, vol. 2. 17; Edw. 56): "The general principle has been stated very correctly, that where a neutral vessel is brought in on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo." The other is the case of *The Prosper* (Roscoe, vol. 2, 25; Edw. 72): "In this court it is held that where neutral and innocent masters of vessels are brought into the ports of this country on account of their cargoes, and obliged to unliver them, they shall have their freight upon the principle that the non-execution of the contract, arising from the incapacity of the cargo to proceed, ought not to operate to the disadvantage of the ship. This rule was introduced for the benefit of the shipowners, and to prevent the rights of war from pressing with too much severity upon neutral navigation."

Since the Declaration of Paris, and indeed before that, by the practice adopted in the Crimean War, neutral vessels laden with enemy goods could not be prevented from continuing their voyages and so earning their freight, except where the goods were contraband, or where the pursuit of the voyage would amount to a breach of blockade; and in these cases no freight would be allowed. With British vessels it is quite otherwise. They must not carry enemy goods, nor proceed on voyages for which such goods are shipped. In the present case there was accordingly an "incapacity to proceed," attributable not only to the cargo, but also to the ship.

It would not be right, however, in my opinion to withhold from the shipowners all the freight on account of the "incapacity of the ship" where the shipment took place before war and the voyage was partly accomplished. What, then, ought to be the rule? It is possible that even if the cargo is not carried to its destination, it would be just in some cases that the whole amount of the freight should be paid. For instance, suppose an enemy cargo was shipped before the war from Australia to Hamburg; and was seized near British waters and taken to Bristol. It may be that it would be fair to pay the shipowners the full freight.

On the other hand, suppose a cargo of enemy goods had been shipped before the war for Bristol, and destined for Cameroon or Kaio-Chao, and was seized, as in this case, at Swansea. It would be wholly inequitable for the shipowners to claim, or for the captors to be subject to, payment of the full freight, even though by the contract it was due on shipment at Bristol.

In the present case, where only a comparatively small part of the voyage was made, I think the whole freight ought not to be allowed. What part should be allowed I will refer to the registrar and merchants to say, but I must give them some direction or guidance, although no strict rule can be laid down which would be universally applicable. Cases differ greatly. The phrase *pro rata itineris* has been used in some cases. But this does not import a mere arithmetical calculation of distances or times. The only rule which I propose to state for the guidance of the registrar and merchants is this: Such a sum is to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, and to the labour and cost expended or any special charges incurred, in respect of the cargo seized before its seizure and unlivery, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unlivery; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war or to the consequent detention and seizure. I am conscious that the rule is not precise. I doubt whether any precise rule could be laid down; but, such as it is, I am satisfied that the experience of the registrar and merchants will enable them to apply it so as to bring about a fair and satisfactory result.

As to the items for extra cost of discharging and shifting the goods at Swansea, I think these should go against the cargoes, and should be allowed. I have said that the claimants in the affidavit in support of their claim urged that the detention at Swansea should be taken into account, and that it would amount to the whole freight. In this particular case the fact is that the owners themselves, according to Mr. Taylor's affidavit, on the 1st Aug. "decided, owing to the political situation on the Continent, to keep the *Juno* at Swansea and to await developments." Apart from this, and as the point will no doubt arise in future cases, I desire to pronounce as my opinion that no sum ought to be allowed, unless there are some special and exceptional circumstances, in respect of any delay or inconvenience which may occur to a ship as the necessary result of her diversion or detention for the purpose of seizing and making unlivery of confiscable enemy cargo. Such things, and their consequent losses, are some of the unfortunate, albeit minor, results of war to which those engaged in shipping have to submit as other citizens must in other capacities and walks of life.

I allow the claim of the claimants to some freight, and to the special items mentioned, and order a reference to the registrar and merchants to ascertain the amount.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Holman, Birdwood, and Co.*

Oct. 29 *and Nov.* 9, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE MÖWE. (*a*)

Alien enemy—Right of alien enemy to appear in Prize Court—Practice—Owner of captured vessel—Capture "in port"—Capture on "high seas"—Capture in territorial waters—Condemnation—Detention—Hague Conference 1907*—Convention VI.*

The question of the right of an enemy owner of a ship or a cargo to appear in a Prize Court is not a matter of international law, but, under the Prize Court Rules 1914, *is to be provided for according to the practice to be settled by the judge of the Prize Court. Accordingly the President sitting in Prize directed that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of* 1907, *he shall be entitled to appear as a claimant and to argue his claims before the Prize Court, the grounds of such claim being stated in the affidavit to lead to appearance which is required to be filed under Order III., r.* 5, *of the Prize Court Rules* 1914.

A German sailing vessel, owned by her master, was captured in the Firth of Forth shortly after the outbreak of war between Great Britain and Germany. She was taken into Leith. On behalf of the Crown it was contended that the capture took place "at sea." On behalf of the owner it was contended that the capture took place "in port" or in territorial waters, and that therefore she was not liable to condemnation, but only to detention.

Held, that the word "port" as used in the Hague Conventions did not mean the "fiscal port," which might cover a considerable area and include several ports, but referred only to a place where ships were in the habit of coming to load or to unload, to embark or disembark, and that as the capture took place in the Firth of Forth it was not a case of capture "in port"; that it was immaterial whether the capture took place in the territorial waters of Great Britain or not; and that as the vessel was seized upon the high seas, she was properly liable to condemnation as prize and not simply to detention.

THIS was a case in which the *Möwe*, a German sailing vessel, of the port of Rhandermoor, in the German Empire, was captured in the Firth of Forth on the 5th Aug. 1914 by H.M.S. *Ringdove*, and taken into Leith, and the court was asked to condemn both the vessel and her cargo as being an enemy vessel captured on the high seas, and not "in port" in the sense of that term used in Convention VI. of the Hague Conference 1907. The important question of the right of an alien enemy to appear in an English Prize Court was also raised.

The *Attorney-General* (Sir J. Simon, K.C), *T. E. Holland*, K.C., and *Bentwich* for the Crown.

Dunlop for the owner of the vessel.

All the facts and the arguments adduced are sufficiently set out in the judgment. In addition to the cases referred to by the learned President, the following were cited by counsel:

The Fenix (otherwise *The Phœnix*), Roscoe's English Prize Cases, vol. 2, 238; Spinks, 1;
Robinson and Co. v. *Continental Insurance Company of Mannheim*, 112 L. T. Rep. 125; (1915) 1 K. B. 155.

Cur. adv. vult.

Nov. 9.—THE PRESIDENT.—The *Möwe* was a merchant sailing vessel of the port of Rhandermoor, in Germany. Her master was Harm Schier, a German subject. He was also the sole owner of the vessel. She was captured by His Majesty's ship *Ringdove* on the 5th Aug. in the Firth of Forth and taken to Leith. Her ship's papers showed that she was a German vessel and had sailed from Norderney, and that her destination was Bo'ness, in the Forth. The master has deposed in his affidavit that he was bound to Morrisonshaven for coal. This statement is incorrect, but I can pass it over as it does not affect any issue in the case. She arrived near Morrisonshaven between seven and nine o'clock p.m. on the 4th Aug. At this time hostilities between this country and Germany had not begun. The declaration of war was made as from eleven p.m. (English time) on that day. She came to anchor about a mile off the Creek of Morrisonshaven. Early in the morning of the 5th Aug. the master weighed anchor and proceeded under way, according to his account, for Granton, a port about eight miles higher up the Firth of Forth. After being under way for about an hour, the vessel was captured as prize by the *Ringdove*, when, to use the words in the affidavit of her master, "she was in British territorial waters, between Morrisonshaven and Granton." In a subsequent paragraph he said the vessel was "taken at sea." It was not shown that the master knew of the outbreak of war, and for the purposes of this case it is assumed that he did not know. An appearance was entered in these prize proceedings by Harm Schier, "as owner of the vessel."

The first question which arises for decision is whether, in the particular circumstances of this case, Schier, an admitted enemy subject and the owner of an enemy merchant ship, has a right to appear as a claimant in the proceedings; or whether he should be given such a right in order to assert whatever privileges he deems to be conferred upon him by the Sixth Hague Convention of 1907. The second question to be determined is whether this vessel was in an enemy port and not allowed to leave at the commencement of hostilities; or whether she was encountered and captured at sea, within the meaning of the Sixth Hague Convention of 1907. Assuming the question to depend upon the Convention, in the former case the vessel is only to be detained and not confiscated, in accordance with arts. 1 and 2; in the latter she is subject to condemnation, as Germany made a reservation with respect to art. 3, and is not a party to it.

Pending the decision upon the first question, I allowed Mr. Dunlop (who was instructed to appear for the enemy owner) to present his arguments fully as *amicus curiæ* upon the two questions to be decided.

The question of the right to appear naturally comes first. I have already dealt with this matter

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

in one of its aspects in *The Marie Glaeser* (12 Asp. Mar. Law Cas. 601; 112 L. T. Rep. 251; (1914) P. 218). In that case an appearance in the proceedings was entered for the enemy owners, but at the hearing no one came forward to represent them. It was obvious that no ground could be shown, either under the Hague Convention or otherwise, against the ship's capture and condemnation; and I ordered the appearance to be struck out, both on the ground of the insufficiency of the affidavit upon which the appearance was founded, and on the ground that there were no substantantial special circumstances which could be put in any other affidavit in support of any valid claim.

In the case now before the court, although the affidavit of the claimant is not very aptly drawn to set forth a claim, it is contended that he is entitled under the said Hague Convention to appear to resist condemnation of his vessel, and to secure that the vessel is subjected only to a decree of detention without compensation, during the war, or requisition upon making compensation. I will assume that the affidavit sufficiently disclosed the special circumstances in which this contention is put forward. I will also assume that the Hague Convention referred to is in force and applicable. Upon this a word will be said later.

I referred in *The Marie Glaeser* (*ubi sup.*) to some decisions of Lord Stowell and Dr. Lushington, and I will not repeat them. There are other decisions to the like effect, *e.g.*, in *The Falcon* (6 C. Rob. 194), where, in the following passages, Lord Stowell deals with the disabilities of citizens of a hostile State in this court, and of citizens of this country in the courts of an enemy:—

"He is, it seems, invested with the character of the American Consul at Bordeaux; and certain it is that an American Consul resident in France is subject to all the difficulties of a French merchant, as to the power of becoming a claimant in this court": (*ibid*, p. 197). . . .

"But I am to recollect who the persons are from whom the objection comes. They are British subjects, who could have no *persona standi* there (*i.e.*, in French courts), and could not have been parties to the proceedings either in the court of Leghorn or Paris without stating themselves out of court. It was impossible that the proceedings could be otherwise conducted; and, therefore, I cannot think that the absence of the parties, which is urged as a fundamental defect, is material in such a case. It is nothing more than what takes place here in cases of common condemnations, which do not rest solely on the effect of the monition, but pass on a view of the evidence of the case. The enemy proprietor is necessarily absent by operation of law, and yet the sentence is completely valid, as well against him as against all the world": (*ibid.*, p. 199).

All the forms since the days of Sir Wm. Marriott, Lord Stowell's predecessor, down to the present day accord with the principle and practice promulgated by Lord Stowell in *The Hoop* (Roscoe's E. P. C., vol. 1, 104; 1 Ch. Rob. 196): (see Marriott's "Formulary," *passim*).

These are followed in some of the forms appended to the recent Prize Court Rules 1914. See form 13, where this paragraph appears: "There were at the time of such capture no contraband goods on board the said ship, and no subject of (*insert the name of Government at war with Great Britain*) or enemy of Great Britain had at the time of such capture, or at any other time material to the matters in this cause, any share, right, title, or interest, in the said ship or cargo or any part thereof." Far be it from me to wish to decide on mere matters of form unless compelled thereto by the law: I only cite them to illustrate the principles and practice.

A claimant in a Prize Court is not in a position analogous to that of a defendant, but rather to that of a plaintiff. In the writ the owners of a vessel are not made defendants. But I wish to avoid complicating this case with any discussion of the position or rights of alien enemies in legal proceedings in the King's Bench or our other municipal courts.

The principle on which the Prize Court in the times of Lord Stowell and Dr. Lushington proceeded was that no one who was a subject of the enemy could be a claimant unless under particular circumstances that *pro hâc vice* discharged him from the character of an enemy, such as his coming in under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. Otherwise such a person was regarded as totally *ex lege*. In the words of Story, J., in his authoritative work on Prize Courts, "An enemy cannot interpose a claim unless under the protection of a flag of truce, a cartel, licence, pass, treaty, or some other act of the public authority suspending his hostile character": (Pratt's Story, p. 21). In this passage Story, J. adopted the words of Lord Stowell in *The Hoop* (*ubi sup.*). adding by way of illustration the words "licence" and "treaty."

In his argument the Attorney-General submitted two propositions as embodying the result of the authorities in this court, viz:—

(1) Where an owner avowed his enemy character without qualification, he had not a *persona standi in judicio*, and was not a person who had a right to be heard; and (2) where a person avowed that he was a subject of the enemy State in general, but had ground for urging that *pro hâc vice* he stood in a position which relieved him from the pure enemy character, he was entitled to appear and to be heard; and that the real question was under which of these two rules a German owner should be regarded when he came before the court. In my opinion, that submission is well founded and accurate.

Practical illustrations of the second proposition were frequently afforded in the time of the Crimean War, when claimants appeared on the ground of the immunity of their ships from capture by reason of the Order in Council dated the 29th March 1854. This Order in Council is set out at p. iii. Appendix D, in Spinks' Prize Cases. That order allowed six weeks to Russian merchant vessels in any ports or places within the British dominions for loading their cargoes and departing from such ports or places, and also gave permission to such Russian vessels if met at sea by any of Her Majesty's ships to continue their voyages if their cargoes had been taken on board before the expiration of six weeks. The order also granted permission to any such Russian vessel which prior to its date should have sailed from any foreign port bound for any port or place in the British dominions to enter and discharge their cargoes, and afterwards

forthwith to depart without molestation, and if met at sea to continue their voyage to any port not blockaded. In short, the Order in Council exempted entirely from capture Russian merchant vessels in the special circumstances therein specified.

Claimants whose vessels were within the special terms of the order therefore brought themselves within the category of persons who were within the Queen's peace *pro hâc vice*, and who were relieved from their enemy character or had their hostile character suspended during the operation of the Order in Council. They were accordingly heard as claimants in the Prize Court.

Reference was made in argument to cases in the American courts arising during the Spanish-American War in 1898. Upon examination it will be found that in almost all the cases where enemy claimants were heard at that time their claims arose in circumstances very similar to those in the class of proceedings already referred to which came before the British Prize Court during the Crimean War.

At the outbreak of the war between the United States of America and Spain the President of the Republic issued on the 26th April 1898 a proclamation exempting Spanish ships from capture in terms practically identical with the Queen's Order in Council exempting Russian ships forty-four years earlier. Arts. 4 and 5 of the President's Proclamation were obviously framed upon the British Order in Council of 1854.

Following upon this proclamation of the President, the cases cited before me came before the United States courts. *The Pedro* (175 U. S. 354) turned upon arts. 4 and 5 of the proclamation. *The Guido* (*ibid.* 382) simply followed *The Pedro* (*ubi sup.*). *The Buena Ventura* (*ibid.* 484) depended upon the application of art. 5 of the proclamation. *The Panama* (176 U. S. 535) was also decided upon arts. 4 and 5 of the proclamation. The other case cited—namely, *The Paquete Habana* and *The Lola* (175 U. S. 677)—did not depend upon the provisions of the proclamation; but it is to be observed that the claim there put forward and decided was also that the vessel was "exempt from capture." There may be other cases which I have not been able to examine in which enemy claimants were allowed to appear in the United States courts. And there may be regulations touching the matter which I have not seen. But the authorities cited fall short of showing that in the United States any claimant who avowed an enemy character has been allowed generally to appear in their Prize Courts.

In argument before me, Mr. Dunlop also compendiously referred to cases which were heard during the Russo-Japanese War in 1904-5, and reported in the Russian and Japanese Prize Cases, vol. 1, p. 182, and vol. 2, pp. 1, 12, 39, 46, 52, 92, 95, 116, and 354.

Upon examination of these cases again, it appears that they dealt with claims either of neutrals, or of claimants whose contention was that their property was entirely immune from capture and from sentence of condemnation. In most of them the claim was founded (no doubt among other grounds) upon the Japanese Imperial Ordinance No. 20, of the 9th Feb. 1904, which allowed days of grace to certain Russian vessels upon the same lines as the British Order in Council of 1854 and the United States Proclamation of 1898: (see Ordinance Appendix C, vol. 11, of Russian and Japanese Prize Cases p. 445). In *The Tetarlos* (vol. 1, 166), in the Russian Prize Court, the original claimants were the neutral owners of a German ship which a Russian cruiser captured and sank. It was ultimately held that the ship was wrongfully sunk. Thereupon the liquidator of what was apparently a Japanese company (the Teshio Timber Company, of Otaru), the owners of the cargo which was in the captured ship, and was also wrongfully sunk, made a claim, which was allowed. The other cases reported in the pages referred to in vol. 2 were heard in the Japanese Prize Courts.

In *The Ekaterinoslav* (vol. 2, 1) the owners of a Russian vessel claimed exemption from capture on grounds (*inter alia*) coming within the Days of Grace Ordinance (No. 20) already referred to. *The Mukden* (vol. 2, 12), *The Rossia* (vol. 2, 39), and *The Argun* (vol. 2, 46) were also cases in which exemption was claimed (among other grounds) under the same Ordinance. In *The Manchuria* (vol. 2, 52), and *The Lesnik* (vol. 2, 92) the Ordinance was relied upon; and in the former case a claim was made on behalf of neutral insurers. The claim in *The Kotik* (vol. 2, 95) was for exemption as a fishing vessel, and also under Ordinance 20. In *The Thalia* (vol. 2, 116) the vessel was seized in a repairing dock, and the basis of the claim was that she was property "on land," and therefore exempted from capture. And in *The Orel* (vol. 2, 354) the capture was said to be wrongful as the vessel was a hospital ship, and therefore immune. But it was held, notwithstanding, that she was guilty of hostile acts, and therefore subject to condemnation.

I have dealt briefly with these cases, because reliance was placed upon the liberty which was said to be given by the Russian and Japanese Prize Courts to enemy claimants, as adding force to the right asserted on behalf of enemy owners in this court. In each of the cases, however, which I have examined complete immunity was claimed, as I have said. As to Russia, I observe that art. 60 of the Regulations Relating to Naval Prizes (1895) deals with "original owners of the captured property" in general terms; but I cannot say how these words would be construed.

All the cases mentioned were, of course, before the Hague Conventions of 1907. Under the Hague Convention (No. VI.) the attitude which the owner in the present case must take may shortly be stated in these terms: "I admit that I am an alien enemy; and therefore that my ship was lawfully captured, or seized, as being enemy property; but I wish to appear to put forward and to argue my claim that in the circumstances of my case the ship is not confiscable, and cannot be condemned; but can only be detained during the war, to be restored to me after the war." Applying the principles laid down by Lord Stowell and Dr. Lushington, I am satisfied that in their day they would not have allowed the enemy owner to appear to assert such a claim. There is here no coming *pro hâc vice* within the King's peace; there is here no suspension of the hostile character. As to what those eminent judges would have done if they had lived at the present day, I would not hazard a conjecture.

As before indicated, I desire to say a word as to whether the Hague Convention (No. VI.) is operative and applicable. I cannot close my eyes to the provision in art. 6 of the Convention, which reads as follows: "The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention." By arts. 7 and 9 the Convention requires to be ratified by the signatory Powers, and by art. 8 non-signatory Powers may accede to the Convention. Similar articles appear in the other Conventions enumerated hereafter. Of the belligerents in the present war at the time of the capture of the vessel, Germany and Austria-Hungary, and Belgium, France, Great Britain, Japan, and Russia had ratified the Convention (Germany and Russia making reservations of art. 3 and part of art. 4). Of the other belligerents, Montenegro and Serbia (whose representatives signed the Convention) have not ratified it. Turkey, who is now also a belligerent, has not ratified it. None of these States were non-signatory Powers, so there has been no accession on the part of any of them. In strictness, therefore (apart entirely from the question whether the enemies of this country are acting under or in accordance with the Convention), it is not clear that the Convention is binding or applicable.

It is not my function or province to do anything more than to declare the law. But I trust that I shall be forgiven for a humble expression of opinion that it would accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of Conventions solemnly agreed upon by the plenipotentiaries of forty-five States or Powers after most careful deliberation, with the most beneficent international objects.

I am not required finally to determine the effect or the binding character of the Conventions. This court is mainly concerned with the 6th, 7th, 10th, and 11th of them as dealing more directly with maritime concerns; although, incidentally, others of them—*e.g.*, the 3rd, 8th, and 13th—might come under consideration in proceedings before it. Of the belligerents, Montenegro has no navy, and, so far as I know, no mercantile marine; it has a coast line, but only of about thirty miles; and Serbia is a purely inland State, having no sea-board at all. It would scarcely seem desirable that the non-ratification by these Powers should prevent the application of the Maritime Conventions; and it may be that the counsellors who have the responsibility of advising the Crown may deem it fit to advise that by proclamation or otherwise this country should declare that it will give effect to the Conventions, whether by the literal terms thereof they are strictly binding or not.

Having premised so much, I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under the Hague Conventions assuming, as was done during the argument, that they are operative. Under some of the Conventions some degree of protection and relief is given in respect of vessels which are not wholly immune from capture at sea or seizure in ports—*e.g.*, under the Sixth Convention the consequences of seizure or capture are minimised and limited in certain cases, although complete immunity is not afforded. Under others of the Conventions some vessels are entirely exempted from capture. For instance, under the Tenth Convention, hospital ships are free from capture, except in certain specified circumstances; and under the Eleventh Convention certain coast fishing vessels and local trading boats, as well as those employed on religious, scientific, or philanthropic missions, are similarly exempted. With regard to vessels comprised within the Tenth and Eleventh Conventions, the cases which might arise would approach nearly to those of vessels which came within the protection afforded by the Order in Council of 1854.

Dealing with the Hague Conventions as a whole, the court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise. Mr. Holland argued that this a matter not of international law, but of the practice of this court. That view is correct. I think that this court has the inherent power of regulating and prescribing its own practice unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned. Moreover, by Order XLV. of the Prize Court Rules 1914 it is laid down that "in all cases not provided for by these rules the practice of the late High Court of Admiralty of England in prize proceedings shall be followed, or such other practice as the President may direct." The rules do not provide for the case now arising. I therefore assume as President of this court I can give directions as to the practice in such cases as that with which the court is now dealing.

The practice should conform to sound ideas of what is fair and just. When a sea of passion rises and rages as a natural result of such a calamitous series of wars as the present, it behoves a court of justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the seas, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a court of justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.

A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn conventions dealing with a state of war like those formulated at The Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard in cases where his property or interests were affected as to the effect and results of such compacts upon his individual position. It is to be remembered also that in the international commerce of our day the ramifications of the shipping business are manifold; and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy)

the case for a seized or captured vessel was permitted to be independently placed before the court.

From the considerations to which I have adverted, and in order to induce and to justify a conviction of fairness, as well as to promote just and right decisions, I deem it fitting, pursuant to powers which I think the court possesses, to direct that the practice of the court shall be that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this court. The grounds of his claim should be stated in the affidavit to lead to appearance which is required to be filed by Order III., r. 5, of the Prize Court Rules 1914.

I will now proceed to deal with the substance of the claim of the owner in the present case. He contends that his vessel cannot be condemned as prize. Was his vessel captured at sea, or seized in port? It was argued for him that she was seized in port, and therefore ought only to be detained during the war. For the Crown, on the other hand, it was contended that the vessel was captured at sea, and ought to be condemned. I have sufficiently stated the facts.

It was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not "on the high seas," and therefore is not confiscable: (see art. 3 of the Sixth Hague Convention 1907, to which Germany did not agree, and under which her citizens cannot benefit). In this Convention I am of opinion that the word "port" must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. It does not mean the fiscal port. The ports of Morrisonshaven, Granton, and Bo'ness, I was informed, are within the fiscal port of Leith, but they are all separate ports in the ordinary sense. The vessel was not seized in any of such "ports" as the term is so understood, and as it seems to me to be used in the Convention. She was not in a port from which, if days of grace had been arranged, she could be said to "depart" ("*Sortir*"). Alternatively, it was alleged, but not proved, that she was taken in "territorial waters," and that therefore she was not captured on the high seas. But I will assume that she was within territorial waters when the capture was made. In my view that is wholly immaterial. The Sixth Hague Convention does not refer to "territorial waters." A vessel might be in territorial waters for scores of miles, either innocently or nefariously, and pass numerous ports, without any intention to enter any of them. It it idle to say that on this account she would be free from capture. Where the Hague Conventions intend to deal with territorial waters they are expressly mentioned as distinguished from ports; for example, in Convention XII., arts. 3 and 4, and Convention XIII., arts. 2, 3, 9, 10, &c., the words "*les eaux territoriales*" are used in contradistinction to "*les ports*": (cf. also the Declaration of London, art. 37, where territorial waters are described as "*les eaux des belligérants*". "*En mer*," which is the phrase used in art. 3 of the Sixth Convention, is altogether inapt to indicate "territorial waters."

Then it was contended that the vessel could not be condemned because she was not captured on "the high seas." The words "encountered on the high seas" in art. 3 are not an accurate rendering of the authoritative French "*rencontrés en mer.*" Where the Conventions intend to describe "upon the high seas," the appropriate phrase "*en pleine mer*" is used: (see Convention VII. recital). Another phrase, "*en haute mer*," is used in the Declaration of London, art. 37, to signify the same thing.

To illustrate the meaning of the word "port" in the Convention, I would further observe that the word "ports" is used in various places in conjunction with, but in contradistinction to, roadsteads, and to territorial waters: (see Convention XIII., where the words "*les ports, les rades, ou les eaux territoriales*" are frequently used). In my view the claimant in his affidavit was accurate when he said his vessel was taken at sea. The words of art. 3, "*rencontrés en mer*," are exactly applicable to this case, and I have no hesitation in finding that she was captured at sea, and not seized in port. I therefore decree that the vessel be condemned as lawful prize.

Solicitor for the Crown, *Treasury Solicitor.*
Solicitors for the owner, *Stokes* and *Stokes.*

Nov. 2 *and* 23, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE MIRAMICHI. (*a*)

British ship—Cargo shipped by neutrals before declaration of war—Cargo consigned to German merchants—War declared whilst cargo at sea—Documents of title not taken up by alien enemies—Money advanced by neutral bankers—Property in goods at time of capture—Right of seizure and condemnation — Principles to be applied.

In June 1914 an American firm contracted to sell a cargo of wheat to a German firm, carrying on business in Germany. The wheat was to be shipped in July 1914 under a c.i.f. contract, and it was, in fact, shipped on a British vessel which left the United States before the declaration of, or of imminence of, war between Great Britain and Germany. The bill of lading was given in favour of F., from whom the American firm bought the wheat in order to fulfil their contract with the German firm, and was made out to the order of D. or his assigns. The bill of lading was indorsed generally. The American firm then paid F. and obtained the bill of lading from him, but did not indorse it in favour of the buyers. The sellers afterwards obtained the certificates of insurance, and drew a bill of exchange on the buyers which was discounted with an American bank, with whom were deposited the bill of lading and other documents to be delivered up to the buyers through a Berlin bank on payment of the amount due on the bill of exchange. The buyers were notified of everything that had been done, but after the outbreak of war they refused to accept the bill. Whilst on her voyage the ship was ordered to proceed to a British port instead of to her original destina-

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

tion, and the cargo was eventually seized as enemy property.

Held, that although enemy goods on a British ship are liable to seizure in port and to condemnation as prize in time of war, yet where the goods have been shipped during peace without any anticipation of the imminence of the outbreak of war, and where neither the property or the goods has passed to the enemy nor the documents of title representing the same have been taken up by the enemy, and where money has been advanced on the faith of these documents by a neutral banker, the same are not subject to condemnation by the Prize Court.

The liability to seizure of enemy goods on British ships discussed.

THIS was a case in which the Crown claimed the condemnation of the cargo shipped in the British steamship *Miramichi* by neutrals before the outbreak of the war between Great Britain and Germany, and consigned to German merchants who, therefore, became alien enemies after the 4th Aug. 1914, whilst the *Miramichi* was *en route* from a neutral port in the United States of America to Europe.

The cargo consisted of 16,000 bushels of wheat, which was shipped at Galveston (Texas) on the 28th July, and consigned to German buyers in Germany. One half of the consignment was sold by Messrs. Muir and Co., American shippers, to George Fries and Co., of Colmar, in Alsace, and the other half to Gebrüder Zimmern, of Mannheim. The contracts were c.i.f. contracts —net cash against documents, insurance free of war risk. Messrs. Muir and Co. arranged with the Guarantee Trust Company of New York for an advance against the cargo, and handed to the company the shipping documents relating to the wheat. They then sent forward a bill of exchange drawn by themselves on Gebrüder Zimmern, but the latter refused acceptance on the ground that it was tendered one month after the due date. In the meantime war had been declared between Great Britain and Germany, and on arrival of the *Miramichi* at Queenstown, whither she had been sent by her owners for orders, the Trade Board of the Admiralty refused to allow her to continue her voyage to Rotterdam with her cargo, to which port she had been destined when she left Galveston. She then proceeded to Eastham, in the Manchester Ship Canal, where the cargo was seized by the officer of customs.

The *Attorney-General* (Sir J. Simon, K.C.) and *R. A. Wright* for the Crown.—The cargo should be condemned as being enemy property. The test to be applied whenever the question of seizure and condemnation arose was this: At whose risk was the property at the time of capture? Although the American claimants had a *jus disponendi*, and therefore a certain proprietary interest, the general property in the cargo was in the German consignees. Theirs was the risk, and condemnation should follow. They cited

The Sally, Roscoe's English Prize Cases, vol. 1, 28; 3 Ch. Rob. 300, *n.*;
The Atlas, Roscoe, vol. 1, 31, *n.*; 3 Ch. Rob. 300;
The Paqueta de Bilbao, Roscoe, vol. 1, 209; 2 Ch. Rob. 133;
Mirabita v. *Imperial Ottoman Bank*, 3 Asp. Mar. Law Cas. 591; 38 L. T. Rep. 597; 3 Ex. Div. 164;
Clemens Horst Company v. *Biddell Brothers*, 12 Asp. Mar. Law Cas. 1, 80; 105 L. T. Rep. 563; (1912) A. C. 18.

Leslie Scott, K.C. and *Balloch* for the claimants.—The same principle was not to be applied in the case of goods shipped before the outbreak of war as to those shipped when hostilities had commenced. The rule in *The Sally* (*ubi sup.*) that goods which would become the property of an alien enemy upon delivery were subject to condemnation did not apply to those goods which were shipped before the declaration of war. The true test was not that which had been suggested by the Attorney-General, but it was this: In whom was the beneficial ownership? Here the beneficial ownership was in the unpaid vendors. No property had passed to the German buyers, but it remained entirely in the American sellers. The cargo, therefore, was owned by neutrals, and as such could not be condemned. They cited

The Vrow Margaretha, Roscoe, vol. 1, 149; 1 Ch. Rob. 336;
The Cousine Marianne, Roscoe, vol. 2, 85; Edw. 346
The Ida, Roscoe, vol. 2, 268; Spinks, 26;
The Abo, Roscoe, vol. 2, 285; Spinks, 42;
Shepherd v. *Harrison*, 1 Asp. Mar. Law Cas. 66; 24 L. T. Rep. 857; L. Rep. 5 H. L. 116;
Ogg v. *Shuter*, 3 Asp. Mar. Law Cas. 77; 33 L. T. Rep. 492; 1 C. P. Div. 47;
Ryan v. *Ridley*, 8 Com. Cas. 105.

Cur. adv. vult.

Nov. 23.—THE PRESIDENT.—The subject-matter of the claim in this case is a part cargo of 16,000 bushels of wheat carried on the steamship *Miramichi*, which was seized or captured as enemy property on the 1st Sept. 1914, in the circumstances hereinafter mentioned. The *Miramichi* was a British ship. The cargo of wheat to which the claim relates was shipped at Galveston (Texas), and was stowed, with other wheat, in holds 1, 4, and 6 of the vessel. It was shipped in the month of July 1914, before the commencement of the war, and without any anticipation of war. It was destined for the port of Rotterdam, and was intended to be delivered, as to part to George Fries and Co., of Colmar, as purchasers of 8000 bushels, and as to the other part to Gebrüder Zimmern, of Mannheim, as purchasers of 8000 bushels. Both these firms were German firms, and at the time of the seizure or capture of the cargo they were enemy subjects.

The two transactions were separate, but there is no distinction in substance, or from the legal aspect, between the two. It will therefore be sufficient to deal in this judgment with one of the cases, and I will take the first—namely, the case of the sale by Messrs. Muir and Co. to Fries and Co. The cargo of wheat destined for Fries and Co. was, as I have said, laden on board the British steamship *Miramichi*. On her voyage towards Rotterdam her owners, by telegraph, directed the vessel to proceed to Queenstown for orders by reason of the outbreak of war. At Queenstown the owners communicated with the British Admiralty, and asked their instructions as to whether the steamship could proceed to Rotterdam, as the cargo was destined for German merchants. Permission to proceed to Rotterdam was refused, and accordingly the vessel proceeded to the port of Eastham, in the Manchester Ship Canal, as the best port for the disposal of the cargo.

A question might have arisen as to whether the cargo was captured at sea, or seized in port. But that makes no material difference in this case; and it is agreed that the cargo was seized in the port of Eastham. The seizure was on the 1st Sept. 1914. The Crown claim the cargo as prize or as droits of Admiralty. The claimants, on the other hand, contend that the cargo was not subject to seizure, as it did not belong to enemy subjects, but to themselves as neutrals, being citizens of the United States of America.

The contest between the Crown and the claimants may be stated shortly as follows: The contention of the Attorney-General for the Crown was that the cargo at the time of seizure was at the risk of subjects of the German State then at war as purchasers, and therefore was subject to seizure on behalf of the Crown. The contention of the claimants, on the contrary, was that the cargo was their property, and therefore could not be lawfully seized.

The facts as to the contracts for sale and purchase of the cargo must now be stated in substance, but briefly. For the details, the documents which were in evidence can be referred to. I will premise that the contract, and all material transactions in relation to it up to the time of seizure of the cargo, were entered into before the war, and in entire innocence of any anticipation of war. In short, all the transactions, so far as concerned the claimants, were carried out in times and conditions of peace. The claimants were the sellers of the goods, and their bankers who discounted the bill of exchange. They have made common cause, and no distinction need be made between them in this judgment. I will describe the claimants, Messrs. Muir and Co., as "the sellers"; and Fries and Co., the German merchants, as "the buyers."

The sellers contracted to sell the cargo to the buyers on the 25th June 1914 for shipment during the month of July 1914 from a port of the United States direct or indirect to Rotterdam at a price to include cost, freight, and insurance; in other words, the contract was what is so well known as a c.i.f. contract. Payment (or, in American terminology, "reimbursement") was to be "by check against documents." The sellers were to furnish policies of insurance or certificates of insurance (free of war risk). A clause of settlement of disputes in London was included, which shows (apart from anything else) that any disputes were to be determined according to English law.

The sellers had bought the wheat to enable them to fulfil their contract with the buyers, from C. B. Fox, a grain merchant, in Galveston. The wheat was shipped by Fox at Galveston on the 23rd July 1914. The bill of lading was given in favour of Fox, the shipper, and was made out to the order of one Davis, or to his or their assigns. It was indorsed generally, and in due course the sellers paid Fox for the wheat and obtained a bill of lading. They did not indorse in favour of the buyers, and it remained a bill of lading only indorsed generally. The necessary insurances were effected, and the certificates of insurance were obtained by the sellers on the 23rd July.

On the 28th July the seller drew a bill of exchange upon the buyers, and, according to the statement of the Attorney-General, discounted it with the bankers (the Guarantee Trust Company, of New York, who have joined them as claimants). On the same date they deposited with the bankers the bill of lading and the certificates of insurance, to be delivered up on payment by the buyers through a Berlin bank of the amount due on the bill of exchange for the cost and insurance, less the freight which was credited, as it was to be paid for by the buyers on delivery.

On the same date, also, the original documents were forwarded to the Berlin bank for credit of the New York bank by the steamship *La Savoie*, which sailed from New York on the 29th July and arrived at Le Havre on the 5th Aug.; and duplicate documents were forwarded by the steamship *Carmania*, which sailed from New York on the 29th July and arrived at Liverpool on the 7th Aug. The buyers were duly notified of these matters, and an invoice was forwarded to them by the sellers on the same day (the 28th July) with all the necessary particulars of the shipment, bill of exchange, and documents.

So far as the buyers are concerned, no further information was given to the court except that the documents were tendered to them, and that on the tender they refused to accept the documents, or to pay the sums due under the bill of exchange and indorsed on the bill of lading as follows: "Refused on account of late production, nearly one month after normal due date.—Colmar, Sept. 3, 1914—GEO. FRIES."

That reason was a mere excuse; the real reason, no doubt, was that war had broken out. The sellers, therefore, or their bankers, still hold the bill of lading, and the bill of exchange remains unpaid.

These, I think, are all the material facts. The question of law, as I have already stated, is: Was the cargo on the 1st Sept. subject to seizure or capture by or on behalf of the Crown as droits of Admiralty or as prize?

Before this question is dealt with I desire to point out and to emphasise that nothing which I shall say in this case is applicable to capture or seizure at sea or in port of any property dealt with during the war, or in anticipation of the war. Questions relating to such property are on an entirely different footing from those relating to transactions initiated during the happier times of peace. The former are determined largely or mainly upon considerations of the rights of belligerents, and of attempts to defeat such right. I will refrain from discussing these matters, and will only refer to such authorities as *The Sally* (*ubi sup.*), *The Paquete de Bilbao* (*ubi sup.*) and *The Ariel* (11 Moo. P. C. C. 119; Roscoe, vol. 2, 600) for the principles applicable in the Prize Court during a state of war.

In the case now before the court there is no place for any idea of an attempt to defeat the rights of this country as a belligerent; and the case has to be determined in accordance with the principles by which rights of property are ascertained by our law in time of peace. The main contest is as to the right test to apply in these circumstances for determining whether a particular property is subject to seizure or capture. Another point was taken, and argued chiefly by junior counsel for the claimants, that in any event enemy property in a British ship could not be seized in port or captured at sea.

I will state the contention and propositions submitted by the learned Attorney-General. He said: "My first proposition is that the test of

the right to capture and sale is the answer to the question, 'On whom is the risk at the moment of capture?' That is to say, who suffers if the goods are captured? Applying that test, the American claimants here would have the *jus disponendi*, because they are the holders of the bill of lading, which has not been indorsed, and therefore they would have to that extent, of course, a special property, a proprietary interest in the cargo, but they would not have a general property in the cargo; still less would they have the risk. And there is a third proposition, which is really a development of the other proposition, namely, the American sellers had a vested right of payment, whatever happened to the goods on the tender of the documents, and I will add as a point for my third proposition, that for the purpose of determining whether the cargo is good prize (which is quite a separate question from the other), the material question is not the abstract question of property, but whether it is an enemy or a neutral who will suffer if the cargo is condemned—on whom is the risk?" And summing it up, the learned Attorney-General later submitted, "If my main proposition is right, that in a Prize Court one is not concerned with these niceties about the abstract law of property, but the point really is, at the moment of capture, the goods being on the high seas, is it or is it not open to the consignor to compel payment by the consignee? That is the real test. Then plainly I am entitled here to the condemnation of the goods."

As I have intimated, it was subsequently assumed, and for this purpose agreed by the Attorney-General, that the goods were seized when afloat in port; but that makes no material difference.

The contrary contention of Mr. Leslie Scott for the claimants was that "the true criterion to apply where goods are shipped before war is, whose goods are they? In whom is the property, in the sense of a beneficial ownership of the goods, vested?" Very difficult questions often arise at law as to when the property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss. These are the kind of questions which are often brushed aside in the Prize Court when the transactions in which they are involved take place during the war, or were embarked in when war was imminent, or anticipated.

But where, as in the present case, all the material parts of the business transaction took place *bonâ fide* during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods.

Where goods are contracted to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership: (see sect. 20 of the Sale of Goods Act 1893). The main determining factor is whether according to the intention of the seller and the buyer the property had passed.

The question which governs this case, therefore, is, Whose property were the goods at the time of seizure? This principle is consonant with good sense and with the notion of what is right in commercial dealings. It is also in accordance with the doctrines adopted by the eminent jurists who have become authorities on the law of nations, and applied in the decisions of our Prize Court: (see *The Cousine Marianne, ubi sup.*; *The Ida, ubi sup.*; *The Abo, ubi sup.*; *The Vrow Magaretha, ubi sup.*; and *The Ariel, ubi sup.*).

The learned Attorney-General by the tenor of his argument rendered it almost unnecessary for me to go through the many authorities dealing with the vesting or transfer of property under such contract, or to discuss the question whether the property in this case had on the 1st Sept. passed from the sellers and become vested in the buyers. He did not, as I understood, argue that the property had passed to the enemy buyers. He admitted that the neutral sellers had a *jus disponendi*, because they held the bill of lading, which was not indorsed, although possibly he may have intended to qualify this admission by saying that "therefore the sellers would have to that extent a special property" in the goods. But, at any rate, as he did not contend that by law the property had passed to the buyers, I think that it is sufficient to deal very briefly with the matter, and to state my conclusions without elaborating the grounds.

In my opinion, the result of the many decisions from *Wait* v. *Baker* (2 Ex. 1) up to *Ogg* v. *Shuter* (*ubi sup.*), *Mirabita* v. *Imperial Ottoman Bank* (*ubi sup.*), and thence up to the Sale of Goods Act 1893; and of the provisions of the Sale of Goods Act 1893 itself (following closely on these matters the judgment of Lord Justice Cotton in *Mirabita* v. *Imperial Ottoman Bank, ubi sup.*), and of the decisions subsequent to the Act—*e.g.*, *Dupont* v. *British South Africa Company*, 18 Times L. Rep. 24; *Ryan* v. *Ridley, ubi sup.*; and *Clemens Horst Company* v. *Biddell Brothers, ubi sup.*)—is that in the circumstances of the present case the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers and the bill of exchange for the price had been paid.

It follows that the goods seized were the property of the American claimants and were not subject to seizure. The court decrees accordingly, and orders the goods to be released to the claimants.

The other point referred to remains; and as it was argued and has been foreshadowed in other cases I will deal with it, although, in view of the decision just given, it becomes immaterial. It was that, as the cargo was in a British ship, it could not be seized or captured even if it was enemy property. In my opinion, this proposition is wholly lacking in foundation. No authority was cited for it. Such a contention has never been put forward, because, as I think, no one has

thought that it could prevail. Enemy property at sea or in port can be captured or seized except where an express immunity has been created. Abundance of authority exists for this in the acknowledged books of international jurists. I will only cite one—namely, Wheaton; and I will cite from what is regarded as the best edition, that of Mr. Dana, published in 1866. After an exhaustive and most interesting account of the right of capture according to the usage of war on land and on sea, Wheaton wrote as follows:

Sect. 355. The progress of civilisation has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy, taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war by land and sea has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be atttained by the capture and confiscation of private property.

I will also cite Mr. Dana's note upon this section, as it was written years after the Declaration of Paris:

Note 171.—Distinction between Enemy's Property at Sea and on Land.—The text does not present the principal argument for the distinction observed in practice between private property on land and at sea; nor, indeed, has this subject been adequately treated upon principle, if that has even been attempted, by most text-writers. War is the exercise of force by bodies politic for the purpose of coercion. Modern civilisation has recognised certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile Power has an interest in the property which is available to him for the purposes of war, that fact makes it *primâ facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property from things almost sacred, to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be open to the military; and the moral dangers attending searches and captures in household and among non-combatants But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the Power under whose Government the owner resides. The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile Power has some interest for purposes of war, is *primâ facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections of a moral and economical nature to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the *primâ facie* right of capture. To merchandise at sea these objections apply with so little force that the *primâ facie* right of capture remains.

There is no distinction now to be made between capture at sea or seizure in port, and—apart from the practice introduced by the Declaration of Paris in favour of neutral vessels—it does not matter in what ships the cargoes seized may happen to be. According to the Order made in Council in 1665 as to the rights of the Lord High Admiral in former times, which are now the rights of the King in his office of Admiralty, "all ships and goods coming into ports, creeks, or roads of England or Ireland unless they come in voluntarily on revolt, or are driven by the King's cruisers," belonged to the Lord High Admiral and now belong to the Crown. And according to Lord Stowell: "Usage has construed this to include ships and goods already come into ports, creeks, or roads, and these not only of England and Ireland, but of all the dominions thereunto belonging": (see *The Rebeckah*, Roscoe, vol. 1, 118; 1 Ch. Rob. 227). It has never been urged that enemy goods are free from capture or seizure if they happen to be in British ships.

This is, no doubt, the reason why there are no reported judgments upon the point; but if decisions of Prize Courts are desired to show that enemy cargoes in British ships have been captured, reference can be made to *The Conqueror* (2 Ch. Rob. 303) and *The Mashona* (10 Cape Times Law Report, 163, and the Journal of Comparative Legislation, 1900, p. 326). See also *The Cargo ex Emulous* (1 Gallison, 562; *sub nomine*, *Brown* v. *The United States*, 8 Cranch, 110) for the opinion of Story, J. in similar cases.

As to the suggestion that the right of seizure or capture of enemy property carried as cargoes in British ships no longer exists after the Declaration of Paris, it is obvious that the Declaration only modified or limited the right in favour of neutrals for the benefit and protection of the commerce of neutrals and in the interest of international comities; and did not in any other respect weaken or destroy the general right.

It is well known that the United States of America refrained from acceding to the Declaration of Paris because they desired that all property of private persons should be exempted from capture at sea, to which other States have always refused to agree. And, in practice, what would become of such cargoes? A British ship could not in times of war carry it or hand it over

to the enemy either directly or through any intermediary, as it is not permitted for her to have any intercourse with the enemy. In my view it is abundantly clear that enemy goods carried in British vessels are subject to seizure in port and capture at sea in times of war.

In the present case, since the goods have been sold, there will be an order for the payment out of court of the proceeds of the sale to the claimants. There will be no order as to costs.

On the application of the Attorney-General, a stay of execution for three weeks was granted.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitor for the claimants, *Thomas Cooper* and *Co.*

Monday, Nov. 30, 1914.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE SCHLESIEN. (*a*)

Enemy ship—Signalling apparatus fitted to ship—Apparatus the property of neutral company—Part of ship—"Goods"—Declaration of Paris—Limited powers of Prize Court—Discretion of Crown.

Submarine signalling apparatus fitted to a ship is a part of the ship itself, and if the ship is one owned by the enemy the apparatus is liable to be condemned along with the ship. It is immaterial that the apparatus is the property of a neutral, and only leased to the owner of the ship. The neutral owner who desires to put in a claim under such circumstances has no right in the Prize Court, and must rely entirely upon the discretion and the clemency of the Crown.

THIS was a case in which the Crown claimed the condemnation of the steamship *Schlesien*, belonging to the Norddeutscher Lloyd Steamship Company. The ship was captured in the Bay of Biscay and taken into Plymouth.

The vessel was fitted with a submarine signalling apparatus which had been supplied by a Bremen agency of an American company, the Submarine Signal Company, and the company asked that the apparatus, although attached to the vessel, should not be condemned as it remained the sole property of the American company and had only been leased to the Norddeutscher Lloyd Company.

Colin Smith (for *G. Lawrence*, at present serving with His Majesty's Forces) for the Crown.

Leslie Scott, K.C. and *Dunlop* for the claimants.—The signalling apparatus remained the property of the American company and had only been leased to the German shipping company through their Bremen agency. It was impossible to produce the agreement referring to the matter, as it was at present in Germany. The apparatus ought to be treated as goods. If this was so, the apparatus came under the category of neutral goods on an enemy ship, and was not subject to condemnation under the provisions of the Declaration of Paris. There was no authority upon the subject. The matter was one of the greatest importance, as there was a great number of these apparatus on various ships in different parts of the world. If it was held that the signalling apparatus could be condemned, probably the same rule would have to be applied in the case of the Marconi apparatus. In spirit, at any rate, the Declaration of Paris covered the property of the claimants.

Colin Smith in reply.—The apparatus was a part of the ship and was used in navigating the vessel. It could not be considered as coming in any way under the category of goods.

THE PRESIDENT.—In this case, as far as the vessel is concerned, I condemn her as lawful prize, and there will be an order for her sale. As regards the submarine signalling apparatus which was fixed and fitted in the vessel, it has been said that it is the property of an American company, and in an affidavit which has been put in it is stated that the apparatus was supplied and fixed by an agency of the American company at Bremen. I know nothing whatever about the constitution of this so-called company and agency, and the document which was said to constitute the lease has not been produced. It is quite possible that by the constitution of the agency at Bremen the German people were the real owners of the apparatus and that the American company had ceased to have any rights in it at all. But the evidence before me is altogether insufficient for me to say to which of the two it really belonged in law. There has been a document exhibited to me, and I am willing to assume that the terms of the lease were the same as those contained in the document, and that the ownership was settled by those terms. But that does not affect my judgment in this case. It has been argued on behalf of the claimants that the apparatus, as being the property of a neutral company, ought to be protected under the express terms of the Declaration of Paris. It is true that the terms "neutral goods" and "enemy goods" are to be found in the Declaration; but in every case when the question has arisen up to the present time the word "goods" has invariably been read as applying to cargo, and to cargo only. If reference is made to the French text of the Declaration, it will be seen that the word used is "*merchandise*," and it is quite clear to my mind that this means, and was intended to mean, merchandise. The submarine signalling apparatus is not merchandise in any sense of the term.

But, says Mr. Leslie Scott, we are at any rate within the spirit of the Declaration. The spirit of the Declaration, however, is to make things during a state of war as easy and as little disturbing as possible to those who are engaged in neutral commerce. It is obvious that in modern ships, especially those belonging to the same class as the *Schlesien*, there must be many kinds of apparatus installed—like the signalling apparatus—which actually form a part of the ship itself. Far be it from me to say that, if such apparatus could be easily detached from the ship the captors of the vessel ought not, if they thought fit to do so, to hand over the same to the rightful owners. Such things as privately owned chronometers and compasses belonging to the captain and the crew of a vessel have been given up, and I have given general directions to the marshal

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

that such things shall be given up. But it is a totally different matter to assert that claimants like those in the present case have a right to come to the Prize Court and say that a particular piece of apparatus which is attached to the vessel belongs to them and cannot be condemned. The claimants would, in fact, be making a request that the court should adjudicate as to their rights if they could be heard in a matter of this kind. The Prize Court does not exist for that purpose. It exists for the purpose of deciding whether, having regard to the ship as it stands, it is a subject-matter fit for condemnation as prize. I have condemned the ship, and I am not called upon to investigate questions which touch the property in parts of the ship, whether those parts have been leased or whether they remain the property of the original lessors. I am not unmindful of the importance of the point raised, especially as it involves the question of the rights of neutrals. But it seems to me that the matter is one which must be dealt with by the Crown. If the Crown thinks that the apparatus is the property of the American company, no doubt it will be dealt with accordingly. As far as I am concerned, however, I consider that the apparatus forms a part of the ship, and it will be condemned.

Leave to appeal.

Solicitor for the Crown, *Treasury Solicitor.*
Solicitors for the claimants, *Waltons* and *Co.*

Dec. 7, 14, 17, *and* 21, 1914.

(Before the Right Hon. Sir S. T. EVANS, President).

THE ODESSA; THE CAPE CORSO. (*a*)

Enemy ship—British ship—Enemy cargoes—Neutral bankers—Advances against cargoes—Seizure of ships and cargoes—Claims by bankers as pledgees—Condemnation.

If the legal property in goods captured at sea on a ship, whether British or enemy, is at the time of the capture in an enemy subject, such goods are lawful prize and will be condemned in spite of any claims made by persons who assert that they are pledgees or are otherwise entitled to any rights in them. The Prize Court cannot regard the rights of pledgees in any shape or form.

THESE were two cases in which, besides the condemnation of the first-named vessel, a German barque, there arose questions as to the condemnation of the cargoes carried by the two ships, such cargoes being consigned to German merchants. Claims were made in each case by British firms who sought to assert their rights as pledgees. All the materials facts of each case are fully set out in the judgment.

The *Attorney-General* (Sir J. Simon, K.C.), *Maurice Hill*, K.C., and *T. Mathew* for the Crown in the case of the *Odessa*.

Maurice Hill, K.C. and *Balloch* for the Crown in the case of the *Cape Corso*.

MacKinnon, K.C. and *Dunlop* for the claimants in the case of the *Odessa*.

Stuart Bevan for the claimants in the case of the *Cape Corso*.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

In addition to the cases cited by the learned President, the following were referred to in the course of the argument:

The Packet de Bilbao, Roscoe's English Prize Cases, vol. 1, 209; 2 Ch. Rob. 133;
The Tobago, Roscoe, vol. 1, 456; 5 Ch. Rob. 218;
The Frances, 8 Cranch, 418;
The Abo, Roscoe, vol. 2, 285; Spinks, 42;
The Hampton, 5 Wall, 372;
The Amy Warwick, 2 Sprague, 150;
Shepherd v. *Harrison*, 1 Asp. Mar. Law Cas. 66; 24 L. T. Rep. 857; L. Rep. 5 H. L. 116;
Mirabita v. *Imperial Ottoman Bank*, 3 Asp. Mar. Law Cas. 591; 38 L. T. Rep. 597; 3 Ex. Div. 164;
Glyn v. *East and West India Dock Company*, 4 Asp. Mar. Law Cas. 58, 220, 345; 47 L. T. Rep. 309; 7 App. Cas. 591;
Sewell v. *Burdick*, 5 Asp. Mar. Law Cas. 79, 298, 376; 52 L. T. Rep. 445; 10 App. Cas. 74;
Bristol and West of England Banking Company v. *Midland Railway Company*, 65 L. T. Rep. 234; (1891) 2 Q. B. 653;
The Winkfield, 9 Asp. Mar. Law Cas. 259; 85 L. T. Rep. 668; (1902) P. 42;
The Rossia, Russian and Japanese Prize Cases, vol. 2, 39;
The Nigretia, Russian and Japanese Prize Cases, vol. 2, 208;

Cur. adv. vult.

Dec. 21.—The PRESIDENT.—It is quite clear from the ship's papers that the *Odessa* was a German vessel. She was captured at sea by H.M.S. *Caronia* on the 19th Aug. last. I therefore condemn the vessel as lawful prize. The other vessel, the *Cape Corso*, is a British ship. Claims have arisen as to the cargoes in both ships, and as these claims are of a similar nature, I shall deal with the two cases together. There is, in fact, no difference between the claims in any matters essential for my judgment; and the principles applicable must be the same in both.

The subject-matter of the claim in the first case is a large quantity, 51,043 bags, of nitrate of soda laden on board the German barque *Odessa*, which I have just condemned. The cargo was captured in the vessel at sea on the 19th Aug. last. The claimants are J. Henry Schröder and Co., of Leadenhall-street, London—a firm of which Baron von Schröder, a naturalised subject of this kingdom, and Frank C. Tiarks, a British subject, are the partners. The cargo was purchased from Weber and Co., a firm of Chilian merchants, at Valparaiso, by the Rhederei Aktien Gesellschaft von 1896, a German company carrying on business at Hamburg. By a business arrangement between this German company and Schröder and Co., the latter accepted bills of exchange in favour of the sellers against the cargo, and received the bills of lading as security for the acceptances, and the moneys payable under them. The bill of lading in this instance was dated the 8th May 1914, and was made out in favour of J. Henry Schröder and Co., London, or their assigns. The vessel was stated therein to be "bound for Channel for orders."

Fifteen bills of exchange for various amounts were accepted by Schröder and Co. on the 4th June 1914, and twenty-one others on the 9th June. The due dates of these sets of bills were the 5th and the 10th Sept. 1914 respectively; but, the time of payment having been extended

by proclamation, the actual dates for payment were the 19th and the 24th Oct. Therefore when Schröder and Co.'s claim was made the bills had not been met. They have since been paid, and the total sum amounts to 41,153*l.* The claimants claim the cargo "as being the property of British subjects, and (or) as holders for full value of the bills of lading therefor," and "as the persons beneficially interested in the cargo."

The subject-matter of the claim in the second case is a large quantity of valuable wood laden on board the steamship *Cape Corso*, a British vessel. She was detained for some days at Suez on the 7th Aug., and the cargo was seized on the arrival of the vessel at Brixham on the 26th Aug. The claimants are William Brandt, Sons, and Co., of Fenchurch-avenue, London, a firm of British subjects. The cargo was purchased from one Shütze, of Otaru, in Japan, by one Leo Küpper, of Hamburg, a German subject. The vessel was chartered to Küpper. The goods were shipped in Japan, and the vessel was bound for Rotterdam, or, at the option of the charterer, for Hamburg. By a business arrangement between Küpper and the claimants, the latter gave to Mitsui and Co., in London, on behalf of their house at Otaru, letters of credit authorising them to negotiate drafts of Shütze on the claimants for the cargo purchased from him by Küpper. A certain number of bills of exchange were accepted by the claimants before the war, which fell due after the war, but which have now been paid. The bills of lading were made out to Shütze's order or assigns, and were indorsed generally by Shütze. They were in due course received by the claimants as security against their acceptances. The claimants then forwarded them to their agent at Hamburg to deliver up to Küpper against payment, and some of them were presented before the war. Certain collateral securities were given to the claimants by Küpper, in part by a guarantee of the Rheinische Creditbank Filiale Karlsruhe, and in part by a deposit with the claimants' agent in Hamburg. The transactions were not quite so simple as in the first case. Their effect has been stated, and no further details need be given. The balance of accounts stated by the claimants to remain due from Küpper is 6104*l.* The claim was formulated by the claimants as follows:—

A. (1) A declaration that the goods are their property.

(2) Release to them of the said goods.

Alternatively:—

B. (1) A declaration that they are entitled to possession of the goods.

(2) Release of the goods to the claimants for the purpose of sale and retention by them out of the proceeds of sale of the amount paid by them for the bills of lading and the amount of costs, losses, and expenses (if any).

(3) Alternatively for payment to them out of the proceeds of sale of the goods of the amounts referred to in (2).

In reference to the transactions between them, the claimants in writing to their German customer, Küpper, said, "We shall be pleased to finance the wood shipments from Mr. Carl Shütze for your account on the basis as sketched by you." Just as Brandt and Co. financed the wood shipments for their customer, so did Schröder and Co. finance the nitrate shipments for their customers, the Rhederei Aktien Gesellschaft von 1896.

It was admitted for the claimants in each case (1) that in law the property in the cargoes had been transferred to, and become vested in, the German purchasers, and that the latter were at all material times the legal "owners" of the cargoes; and (2) that the claimants were merely pledgees of the bills of lading representing the cargoes as security for moneys advanced, or agreed to be advanced.

The important questions of law now raised are whether the Prize Court should nevertheless regard the claimants as the real owners of the goods, and should therefore release the goods captured on the ground that they were not "enemy property"; or whether the court should in some way take cognisance of their claims, and direct the captors or the marshal to pay them out of the proceeds. The argument was presented ably and persuasively by Mr. MacKinnon, and the court is indebted to him for his assistance. He admitted that no decisions of this or any other Court of Prize had given effect or even lent countenance to such a claim; but he urged that side by side with the development of commercial dealings, on the lines of those now presented there should be such an extension of the law of prize as would protect people who, like the claimants, lent money on the security of cargoes on their bills of lading.

At the outset two things must be remembered: first, that this is a court of law, and, secondly, that the law to be administered here is the law of nations, *i.e.*, the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion. The decisions of a court of law should proceed upon definite principles. Those principles have to be applied to ever-varying sets of facts. But the court has the function and duty not merely of deciding individual cases, but of determining them upon principles which shall be a guide to others as to what their positions and rights are in the eye of the law.

In the domain of international law, in particular, there is room for the extension of old doctrines, or the development of new principles where there is, or is likely to be, a general acceptance of such by civilised nations. Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside. Already, in the course of the present war, I have had to deal with questions not remote from those raised in these proceedings; and in dealing with them I have striven, after careful consideration, to decide them in this spirit, with the guidance of the past, and in the light of later experience.

In *The Marie Glaeser* (12 Asp. Mar. Law Cas. 601; 112 L. T. Rep. 251; (1914) P. 218) the position of owners of enemy vessels and of other persons, neutral and British subjects, claiming liens or charges upon the vessels, fell to be decided. In *The Miramichi* (*ante*, p. 21; 112 L T. Rep. 349; (1915) P. 71) rules for determining the "ownership" of cargoes laden on an innocent ship had to be laid down. In *The Marie Glaeser* (*ubi sup.*) the decision was that in cases of capture, no mortgages, liens, or charges upon an enemy ship could be set up in this court against the captors. In *The Miramichi* (*ubi sup.*) it was

held that in cases of seizure the "ownership" of or "property" in a cargo shipped during peace depends upon the municipal law governing contracts for the sale and purchase of goods. I must adhere to those decisions, unless and until they are corrected by a higher tribunal; and I must apply the principles on which they were founded consistently to the facts of the present claims, unless there is good reason in reference to these cargoes for adopting different tests or doctrines.

As to charges or liens, no doubt a distinct line could be drawn between ships and cargoes laden in them if it were deemed right to make such a distinction. But it has never yet been made, I think, on any occasion by the Prize Court of any nation. The reasons for not allowing any charges or liens against ships are set out in *The Marie Glaeser* (*ubi sup.*) and the many authorities therein cited. Some of these authorities related to cargoes, and the same reasons were applied. I will not go over the same ground again, but I will just refer to three instances as examples where cargoes were dealt with upon the same footing, covering the century from the time of Lord Stowell in 1805, through the period of the Crimean War in 1854, up to the Spanish-American War in 1906. There are *The Marianna* (Roscoe's English Prize Cases, vol. 1, 518; 6 Ch. Rob. 24), *The Ida* (Roscoe, vol. 2, 268; Spinks, 26), and *The Carlos F. Roses* (177 U. S. Rep. 655).

It appears to me that it is impossible to distinguish the two last-named cases from those with which I am now dealing. Nor do I see any reason for running counter to them.

In the first case now before the court, that of the *Odessa*, the vessel and the cargo are both "properties" belonging to enemy subjects. What reason of any validity, or even plausibility, can there be for barring the claims of British or neutral subjects having liens or charges upon the vessel, and at the same time allowing similar claims against the cargoes? I can see none.

Accordingly, upon authority and principle, inasmuch as the claims of Schröder and Co. and Brandts and Co. are founded upon their positions as pledgees, and not legal owners, they cannot, in my judgment, be allowed.

But it was further argued that, although the claimants were not the legal owners of the cargoes, they had such a beneficial interest therein that their claims should be allowed. To accede to this proposition would be to open a door for all sorts of inquiries and calculations which has been consistently and firmly closed by my predecessors and by Courts of Prize. A consideration of the circumstanees in the case of Brandts and Co.'s claim will at once show the difficulties. In the initial stage, how would a captor, who may have had good reason to believe that the cargo seized was enemy property, know how to act if he had to consider before seizure, or knew he might be confronted after seizure with claims from pledgees as moneylenders in various parts of the world, whose advances might be either 5 per cent. or 95 per cent. or any other proportion of the value of the goods? Or if he might be subject to the taking of a general account as between banker or customer or guarantor of customer in order to ascertain the extent of the alleged charge or lien? When a later stage is approached, what would the captors or the marshal have to do? Are they to be parties to the taking of an account between the pledgors and pledgees, or persons possibly claiming under them, an account which *ex hypothesi* would during the war have to be taken in the absence of some of the parties? Such proceedings would be wholly foreign to the jurisdiction and working of this court. That persons may be losers during war time in pecuniary or commercial transactions with enemy traders is only too obvious. Loss is no test of legal rights. The claimants have rights of action against their customers for their full claims which they can set in motion either during the war or after it. How far these claims might be fruitful is no concern of this court.

In my judgment, the only safe guiding principle is to ascertain who are the legal owners of the cargoes; and, if the goods are found to be the property in law of an enemy, to condemn them, or if they are the property of neutrals or British subjects to release them, as was done in *The Miramichi* (*ubi sup.*).

There is one other matter to mention relating to the second case lest it may be thought that it has been overlooked. Counsel for Brandts and Co. contended that in regard to part of the cargo claimed—namely, 2834 logs—both Küpper and, his guarantors, the Rheinische Creditbank Filiale. Karlsruhe, had before the outbreak of hostilities and capture refused to take up the bills of lading and that thereupon the pledgees could have sold Even if the fact of refusal were established, it is clear that until the pledgees did sell, the general property in the goods remained in the owners, who had at any time the right to redeem. I may further note that the facts upon this head were precisely similar in *The Carlos F. Roses* (*ubi sup.*) The statement of them which is to be found at p. 679 of the report is as follows:—"The purchase of the goods, the drawing and cashing of the drafts, and indorsement and delivery of the bills of lading, all took place before the sailing of the vessel, and long before the declaration of war, and before there was any reason to anticipate hostilities. The drafts were accepted before the war, and were paid before the seizure of the vessel." Nevertheless it was held that tne claimants had no right to the goods as against the captors.

My judgment, therefore, is that in none of the forms suggested can the claims in either case be allowed; and I must condemn the cargoes in both cases as lawful prize.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Stibbard, Gibson,* and *Co.; Coward* and *Hawksley, Sons,* and *Chance.*

Feb. 8 *and* 22.

(Before the Right Hon. Sir S. T. EVANS, President.)

THE CORSICAN PRINCE. (*a*)

Ship—Cargo—Seizure of cargo—Sale—Claim for freight—Proceedings in King's Bench Division—Jurisdiction of Prize Court—Transfer of case—Practice.

Where the cargo of a ship has once been seized as prize, even though the cargo is subsequently

(*a*) Reported by J. A. SLATER, Esq., Barrister at-Law.

released, the jurisdiction to determine as to the rights of the shipowner to receive freight and also the amount of the freight, if he is entitled to receive any at all, is in the Prize Court and not in the common law courts of the country.

SUMMONS adjourned into court for argument as to the exclusive jurisdiction of the Prize Court in questions regarding a claim made by shipowners for freight when the ship's cargo has been seized by the Crown as prize and afterwards released. The facts of the case, as far as are necessary, are set out in the judgment of the President.

T. H. T. Case for the Crown.

Maurice Hill, K.C. and *Balloch* for the shipowners, the Prince Line Limited.

Butler Aspinall, K.C. and *R. A. Wright* for the Russian Bank for Foreign Trade.

Darby for the Société Générale de Paris, agents for the International Bank of Commerce, Petrograd.

Cur. adv. vult.

Feb. 22.—The PRESIDENT.—This is a summons which came before me in chambers, and which I adjourned into court for argument. It is a summons issued by the Prince Line Limited—the owners of a British vessel, the steamship *Corsican Prince*—in effect asking for directions for the assessment of the amount of freight and other moneys claimed by the shipowners, and for payment of the amount so assessed out of the proceeds of the cargo now in court in these prize proceedings. Part of the cargo was claimed by the Russian Bank for Foreign Trade (hereinafter referred to as "the Russian Bank"), and a consent order was made for payment out to the bank of part of the proceeds of the sale of the cargo upon the terms, and in the circumstances, which will be referred to later. A *caveat* against payment out without notice was afterwards entered on behalf of the shipowners in accordance with the Prize Court Rules. Later a writ was issued in the King's Bench Division by the Russian Bank against the shipowners, in which a declaration as to the rights of the parties was claimed; and a summons to stay that action was issued, which at present stands adjourned. The matter which now arises for decision is whether the claim of the shipowners and the questions as to the rights of the shipowners and the cargo owners in respect of the proceeds of the cargo are to be determined in a common law court in the King's Bench Division or in the prize proceedings in this division. I apprehend that the principles and the practice governing this matter are the same since the assignment to this division of the Prize Court jurisdiction of the High Court under the Judicature Act 1891 as in former times, when the jurisdiction in prize was vested in and exercised by the High Court of Admiralty. The subject is one of general importance affecting our judicature, and I propose in the first place to deal with it upon lines applicable to proceedings of this nature generally, and then to state the particular facts of this case, to which the principles and the practice governing such cases have to be applied.

Mr. Maurice Hill has cited many authorities in his argument on behalf of the shipowners that this court, exercising its prize jurisdiction, has the exclusive right to determine such questions as those which are now in issue, and not a common law court, and that such determination should be in accordance with the prize law.

It has been my duty to examine those authorities and also other authorties which deal with these matters in so far as they throw light upon the subject. Having done so, it does not appear to me to be necessary or useful to go through the cases in detail, because the examination of them shows that the results which are summarised in text-books of various authors—themselves authorities of acknowledged renown—are abundantly justified by the decided cases. Story, J., who, as an exponent in treatises and judgments of matters relating to Prize Law, is hardly second to Lord Stowell himself, in his Notes on the Principles and Practice of Prize Courts writes as follows (p. 30): "When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. It will follow, as has been already observed, prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title; and in proper cases will decree the parties to pay over the proceeds, with interest upon the same for the time they have been in their hands. It may also enforce its decrees against persons having the proceeds of prizes in their hands, notwithstanding no stipulation, or an insufficient stipulation, has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy on the stipulation; and in these cases the court may proceed upon its own authority *ex officio*, as well as upon the application of parties; nor is the court *functus officio* after sentence pronounced, for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter. The Prize Court has also exclusive jurisdiction as to the question who are the captors and joint captors entitled to share in the distribution, and its decree is conclusive upon all parties. It has also exclusive authority as to the allowance of freight, damages, expenses, and costs in all cases of captures, and though a mere maritime tort unconnected with capture *jure belli* may be cognisable by a court of common law, yet it is clearly established that all captures *jure belli*, and all torts connected therewith, are exclusively cognisable in the Prize Court." And in a decision of the Supreme Court of the United States in which Story, J. delivered judgment, he says: "For if the Admiralty has, as it is conceded on all sides it has, jurisdiction over the incidents, as well as the principal matter of prize, it must be just as much exclusive in the first case as in the last": (*Maisonnaire* v. *Keating*, 2 Gallison, 324, at p. 343).

So Chancellor Kent, in his work on International Law, says: "It is a principle perfectly well settled, and constantly conceded, and applied, that Prize Courts have exclusive jurisdiction, and an enlarged discretion, as to the allowance of freight, damages, expenses, and costs, in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captures *jure belli*": (12th edition by Holmes, J., p. 400).

This passage was cited with approval in 1868 by the Supreme Court in *The Siren* (7 Wallace, 152, at p. 161). One more passage may be cited

from Halleck's International Law (4th edit, vol. 2, p. 433): "Prize Courts also have exclusive jurisdiction, and an enlarged discretion, as to allowance of freight, damages, expenses, and costs, and as to all torts, personal injuries, ill-treatments, and abuse of power, connected with maritime captures *de jure belli*, and they frequently award large and liberal damages in such cases. This rule rests upon the ground that where the Prize Court has the sole and exclusive jurisdiction of the original matter, it ought also to have such jurisdiction of all its consequences and of everything necessarily incidental thereto. The Courts of Common Law in England have no jurisdiction at all of such incidental questions; and this doctrine has been reaffirmed by the courts of the United States."

In the leading case of *Le Caux* v. *Eden* (2 Douglas, 594), Buller, J. in a judgment which deals exhaustively with the subject says (at p. 609): "The principle is that the question prize or no prize, and the consequences of it, are cognisable solely in the Admiralty Court: the true reason of which is that prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations and not by the particular municipal law of any country."

Lord Mansfield, who was a party to the decision in *Le Caux* v. *Eden* (*ubi sup.*), in the history he gave of the Instance and Prize jurisdictions of the Court of Admiralty in *Lindo* v. *Rodney* (2 Douglas, p. 614), said: "The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself; it is no more like the Court of Admiralty than it is to any Court of Westminster Hall." And after describing some of the matters with which the Prize Court had to deal, he added: "These views cannot be answered in any Court of Westminster Hall, and therefore the Courts of Westminster Hall never have attempted to take cognisance of the question 'prize or not prize': not from the locality of being done at sea, as I have said, but from their incompetence to embrace the whole of the subject."

The decision in *Le Caux* v. *Eden* (*ubi sup.*) was that an action for false imprisonment would not lie at common law where the imprisonment was in consequence of taking the ship as prize, although the ship had been acquitted and restored, and the captor had been condemned in costs and damages in the Prize Court. More than thirty years afterwards came the case of *Faith* v. *Pearson* (4 Camp. 357), which carried the doctrine of the exclusive jurisdiction of the Prize Court still further, because in that case (which was an action at common law for trespass for seizing ship and cargo) the captor, who found that he had made a mistake in capturing the ship, had given her up without having instituted any proceedings against her in the Court of Admiralty. In deciding that the Common Law Court had no jurisdiction, Gibbs, C.J. said (at p. 358): "The moment it appears that the ship was seized as an enemy, that is an end of this action. Although the defendant had no probable cause for what he did, he is only amenable in the Court of Admiralty. I well remember the case of *Le Caux* v. *Eden* (*ubi sup.*) being decided. The decision was approved of at the time, and has been adhered to ever since. The principle there laid down fully applies to the action we are now trying. If the ship is actually seized as prize, although she is released by the captor without being libelled in the Admiralty Court, the Courts of Common Law have no jurisdiction upon the subject. The inconvenience would be equally great in either case. If trespass lies for seizing the ship, every sailor on board may bring an action for false imprisonment."

We are incompetent here to consider whether the captor was excusable for what he did; and, if he was not, what compensation he ought to make to the parties injured. I conceive that they are by no means without remedy, and that proceedings may be originated in the Admiralty Court on the part of the captured. There the question of prize or not prize will be properly discussed, the existence of probable cause will be proved or negatived, and by a single decree justice will be done to all concerned.

The Prize Court has constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo, and have adjudicated upon such claims whether the ship or cargo has been released, and when both ship and cargo have been released; and apparently no action involving questions in similar cases were brought in any Common Law Court.

And this is obviously for grounds solid in justice and convenient in practice; because the two courts administered two different codes or systems of law; the Prize Courts deal with claims in accordance with the law of nations and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure by reason of the non-appearance or non-completion of the contract of affreightment; whereas Common Law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King's Bench Courts would either give the claimants for freight the whole or nothing, according to whether the contract of affreightment had been performed or not. But the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole or a moiety of the freight, or a sum *pro rata itineris*; or it may discard the contract rate altogether, even as a basis for assessment on calculation (*The Twilling Riget*, Roscoe's English Prize Cases, vol. 1, 430; 5 Ch. Rob. 82); or it may withhold or diminish the sum by reason of misconduct, as, *e.g.*, resistance to search or spoliation.

And we find that in accordance with the principles, precedents, and practice which have established the exclusive jurisdiction of the old High Court of Admiralty, to which the Admiralty Division of this court has succeeded when sitting as a Prize Court, the Prize Court Rules have been framed for this court, and have been made by the Privy Council under the Prize Court Act 1894, and not by the Rule Committee which frames the rules for the High Court. It is not necessary to refer further to these rules; but attention may be directed to Order XLV., which provides that in the absence of prescribed rules, the practice of the late High Court of Admiralty in prize proceedings shall be followed or such other practice as the President of this division may direct. It

may also be noted that the appeal from decisions of this court on all questions, claims for freights included, is to the Judicial Committee of the Privy Council; whereas, if similar questions could be tried in the Commercial Court or any court of the King's Bench Division, the appeal would be to the Court of Appeal or to the House of Lords.

The court has also its special officers, like the registrar and merchants and the Admiralty marshal, and its special machinery for dealing with all such matters as may arise in prize proceedings.

I have dealt with the important question of jurisdiction generally. But, in truth, Mr. Aspinall, for the claimants, did not dispute the main propositions which have been stated. He contended, as I understood, that where, as in this case, the captors or the Crown after seizure released the goods, not only had the King's Bench Courts jurisdiction to deal with the claim for freight, but that they alone had the jurisdiction to the exclusion of this court, even when the proceeds of the cargo seized and sold are now in the hands of this court. This contention is, in my view, quite unsound. A somewhat similar argument was put forward in *Le Caux* v. *Eden* (*ubi sup.*) on the ground that the ship had been declared by the sentence of the Prize Court to be no prize, but it did not prevail. As I have before pointed out, the Prize Court exercised jurisdiction and exclusive jurisdiction, where the subject-matter had been acquitted or released, and it had been held that such jurisdiction was vested in it, even when captures had been abandoned without any proceedings having been instituted at all.

When the particular facts of the present case are looked at it is perfectly clear that this court alone has jurisdiction to deal with the claim for freight, and that it would be most inconvenient if it were otherwise. The essential facts very shortly stated are as follows: The ship's cargo consisted of 250,000 poods of barley. It was loaded at Odessa, the loading being completed after war was declared between Russia and Germany. It was all consigned to Hamburg. The Russian authorities raised difficulties about the ship leaving, but afterwards allowed her to sail on an undertaking by the master to call at Malta, Gibraltar, and Falmouth. She arrived at Falmouth, and was ordered by my marshal to Liverpool. She was detained, and afterwards, on the 29th Oct., her cargo was seized. Upon the application of the marshal an order was made by this court for the sale of the cargo to prevent its deterioration and for the payment of the proceeds into court.

A writ was in due course issued by the Procurator-General claiming the condemnation of the cargo or its proceeds as prize. The whole cargo was sold for about 29,800*l.* The net proceeds amount to about 28,600*l.*, and are now in court. Appearances were entered in these proceedings by the Russian Bank claiming as owners of part of the cargo—viz., 51,500 poods; by the Société Générale, claimants as to other parts—viz., 46,280 poods; and by the Prince Line Limited as owners of the vessel. So far as I have been informed, no claims have been made in respect of the rest of the cargo, over 150,000 poods, or its proceeds. After the sale of the cargo, an order was made with the consent of the Procurator-General and of the claimants in these terms: "Upon consent of H.M. Procurator-General, it is ordered that he do pay out to the Russian Bank for Foreign Trade the net proceeds of sale of 51,500 poods of barley *ex* the above vessel upon production of the copy bills of lading, payment of any charges which may have been incurred in connection with the detention thereof, and subject to any rights as to freight which the shipowners may have had over the goods at the date of the seizure thereof." A similar order was made in favour of the Société Générale in respect of 46,280 poods. The Prince Line Limited, as claimants for freight, demurrage, and charges, entered a *caveat* against the payment out of court of any of the proceeds without notice to them. After all these steps were taken in these proceedings the Russian Bank issued their writ in the King's Bench Division. The summons to transfer the trial of the action to the Commercial Court is stayed pending this decision. The Société Générale, through their counsel, Mr. Darby, adopted the argument of Mr. Hill, and they desire that the questions affecting them should be heard in this court. Upon these facts I repeat that it is clear beyond dispute that the owners and cargo owners are within the exclusive jurisdiction of this court,

I will only point out further that the Crown has full right to consent to the release of any ship or goods captured or seized on any grounds that the Crown may see fit. Moreover, it does not by any means follow as a necessary consequence of the release that goods were not properly seized as prize as the Crown's droits of Admiralty. In the present case, as the Empire of Russia is our ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them quite otherwise than as an acknowledgment of wrongful seizure. And if it is thought material, it would be quite open to anyone interested in these proceedings at any stage to allege and to set out to prove that the seizure of the cargo was lawful. I give directions therefore that the claim of the shipowners and all questions between them and the Russian Bank and the Société Générale be heard in these prize proceedings.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the shipowners, *Wilkinson* and *Marshall*, Newcastle.

Solicitors for the Russian Bank for Foreign Trade, *Coward* and *Hawksley, Sons*, and *Chance.*

Solicitors for the Société Générale de Paris, *Loughborough, Gedge, Nisbet*, and *Drew.*

House of Lords.

Nov. 5, 6, *and Dec.* 8, 1914.

(Before Earl LOREBURN, Lords DUNEDIN, ATKINSON, and PARMOOR.)

OWNERS OF THE STEAMSHIP HATFIELD *v.* OWNERS OF THE STEAMSHIP GLASGOW; THE GLASGOW. (*a*)

Collision during salvage—Regulations for Preventing Collisions at Sea, art. 29—*Appeal on matters of fact—Concurrent findings in courts below—Jurisdiction on appeal to review conclusions resting upon probabilities.*

The rule that concurrent findings should not be disturbed on appeal does not apply where on appeal there is tolerably clear evidence which satisfies the court that the findings are erroneous. The principle is especially applicable to a case in which the conclusion sought to be set aside rests upon the consideration of probabilities.

A vessel, while rendering assistance to another, was rammed by the latter. She sank and all her hands with one exception were lost.

In the court of first instance both vessels were held to blame, but the Court of Appeal reversed that decision and held that the salving vessel was alone to blame.

The owners of the salving vessel appealed.

Held, that this case was not a true example of concurrent findings in the courts below; that there was jurisdiction to review the concurrent findings in the courts below; and that on the facts the vessel which was being salved, but which sank the salving ship, was alone to blame.

Rule laid down by Lords Herschell and Watson in The P. Caland *v.* Glamorgan Shipping Company (7 *Asp. Mar. Law Cas.* 83, 206, 317; 68 *L. T. Rep.* 469; (1893) *A. C.* 207), *as to concurrent findings, considered.*

APPEAL by the owners of the steamship *Hatfield* against an order of the Court of Appeal.

In the action the present appellants were plaintiffs and the present respondents defendants.

The collision took place between the two vessels in the North Sea on the 11th Oct. 1911, while the *Hatfield*, an iron screw steamship of 1753 tons gross and 1086 tons net register, at the request of those in charge of the *Glasgow*, was attempting to render salvage assistance to the latter. The *Glasgow* was a steel screw steamship of 1068 tons gross and 492 tons net register.

On the morning of the collision the *Glasgow*, her steering gear having gone wrong, was drifting not far from the Galloper Lightship, in the North Sea, flying signals of distress. The evidence as to what happened was not very conclusive, but established that the *Hatfield* came up to take her in tow. She rounded the stern of the disabled vessel and came out on her starboard quarter. A few minutes later the *Hatfield* was struck on the port bow by the *Glasgow's* stem, and almost immediately went to the bottom, all her hands, with the exception of one man named Hagar, being lost.

By the decree of the Admiralty Court both vessels were pronounced to blame. Bargrave Deane, J. found that the master of the *Hatfield* in a heavy sea and wind miscalculated his direction and got too close to the *Glasgow*. He therefore attributed blame to the *Hatfield*. He found also those in charge of the *Glasgow* to blame, because although he did not find that the engines of the *Glasgow* were set ahead, he found that they were not reversed at the time and at the distance when they were asserted to have been reversed or at any material time. He was advised by the assessors and found that had the engines been so reversed the collision would have been avoided.

From that judgment both parties appealed to the Court of Appeal (Lord Parker, Lord Sumner, and Warrington, J.), who found that the *Hatfield* was alone to blame. In their opinion the sole cause of the collision was a miscalculation by those in charge of the *Hatfield* and negligence. The charges of negligence made against those navigating the *Hatfield* were: (1) That a good look-out was not kept on the *Hatfield*; (2) that the *Hatfield* failed to keep clear of the *Glasgow*; (3) that the *Hatfield* was in the circumstances manœuvred too close to the *Glasgow*, and improperly and at an improper distance attempted to cross the *Glasgow's* bows; (4) the engines of the *Hatfield* were not stopped or reversed in due time or at all; (5) that those in charge of the *Hatfield* neglected to comply with art. 29 of the Sea Rules, the only article of such rules material to the case. Its terms are as follows:

> Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper look-out or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

From the judgment of the Court of Appeal the owners of the *Hatfield* appealed.

Adair Roche, K.C. and *Lewis Noad* appeared for the appellants.

Sir *Robert Finlay*, K.C., *A. D. Bateson*, K.C., and *Raeburn* for the respondents.

The House, having taken time for consideration, gave judgment allowing the appeal and holding that the *Glasgow* was alone to blame.

Earl LOREBURN.—This is a collision case in which Bargrave Deane, J. found both ships to blame—namely, the *Hatfield*, which was attempting to salve the *Glasgow*, and the *Glasgow*, which sank the *Hatfield*. The Court of Appeal found that the *Hatfield* alone was to blame. A sad feature of the collision is that all hands were lost in the *Hatfield*, except one man, Hagar by name. In such a state of things the crew of the surviving ship is especially bound to be careful not to admit any unconscious bias in favour of their own vessel into their evidence, and a court has always to keep in mind that what is said against the ship which has been destroyed is said against those who cannot tell their own story. I must advert to the fact that a scrap log was thrown overboard the morning after the collision because, it is said, it had been wetted by sea water and had been reduced to pulp. This has not, though it might have, affected my judgment, but it was very wrong to throw it overboard under the circumstances.

Some things are common ground. The *Glasgow* is a steamship of 1068 tons gross. Her steering gear went wrong and she was drifting not far from the Galloper Lightship on the morning of

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

the 1st Oct. 1911, flying signals of distress. About 11 a.m. the *Hatfield*, a steamship of 1753 tons gross, came up to take her in tow, rounded her stern, and came out on her starboard quarter. What then happened we have to collect from various sources, but in a few minutes the *Hatfield* was struck on her port bow by the *Glasgow's* stem, and almost immediately went to the bottom. At the time a gale was blowing from N. or N.E., and there was a rough sea. Everything else that is material we have to find out for ourselves from such evidence and indications as are afforded us. There are three sources of information, in addition to skilled witnesses.

In the first place, the surviving ship, the *Glasgow*, was inspected when she came into port. The forward fluke of the anchor on her port side was broken off. There was substantially no setting over of the stem, and the rivets can be seen in the photographs, apparently not displaced. In fact, except the anchor on the port side, the bows of the *Glasgow* were not substantially injured. Now that shows one thing. When the impact took place the *Hatfield* was not going ahead. It is agreed that the stem of the *Glasgow* struck the port side of the *Hatfield*. In fact, it was clear, and hardly disputed at the close of the argument, that the *Glasgow* struck the *Hatfield* practically at right angles and when the latter ship was not moving, or hardly moving. One more fact appeared from this inspection. The condition of the *Glasgow's* bows showed that the blow was not an up-and-down blow. The bows of the *Glasgow* went clean into the *Hatfield*.

Our next source of information is the solitary survivor of the *Hatfield*, namely, Hagar, who came on deck immediately after the collision. Bargrave Deane, J., who saw him, says he was an honest witness, but thought he was too agitated—as well he might be at the time—to be reliable upon detail. Hagar said that the stem of the *Glasgow* penetrated 6ft. or 7ft. into the *Hatfield*, at about right angles, and if that is accurate then the experts are satisfied, nor was it disputed that the *Glasgow* must have had headway on her—in other words, that she rammed the other ship—which, if accepted, would put an end to the case. I will not act upon that because I do not feel absolutely clear about the extent of penetration, and both courts below declined to accept it. It is due to the witness to say that his evidence is decidedly confirmed by the report made by the mate of the *Glasgow* to the master, and I am by no means sure that this is not true.

The last source of information is the crew of the *Glasgow*, and before I deal with them I will put together the facts which are either admitted or established, apart from what those present at the collision can prove. I take with me to the consideration of the *Glasgow's* evidence these facts: "The blow was struck at about right angles; the *Hatfield* was practically motionless at the time; the blow was severe enough to sink her almost at once, and it was not an up-and-down blow.

Now for the account given by the officers of the *Glasgow* herself. The master's version was as follows, and the others agreed so far as they went. After describing how he had his steering gear broken and how the *Hatfield* passed under his stern and came out on the starboard quarter in order to take him in tow, he proceeds: "She appeared stationary there for about five or ten minutes and then she appeared to go on the same course as we were heading ourselves, and steaming slowly ahead; but it appeared to me that she was still edging in towards us all the time. When he had got forward of the beam he seemed to act on a starboard helm then and still edging in, and he got nearly abreast of our forecastle head, still under his starboard helm and still edging in towards us . . . well, he still had headway on him; he still appeared to be attempting to cross the bow, and when he had got nearly at right angles to us and about two ships' lengths off I thought it was dangerous and I put the engines full speed astern." Here the witness was interrupted by the learned judge, but he proceeds a little later: "Just when she was about these two ships' lengths off I rang the engines full speed astern, and I could tell by the vibration of the ship that the engines were going astern, and about a minute after I had rung the engines astern the collision occurred." The witness then described by models how the ships were placed towards each other at the time he thought there was a risk and ordered the engines full speed astern, and this diagram showed the *Hatfield* on the starboard bow of the *Glasgow*, not far from right angles, and about 480ft. off. The witness said that "the *Hatfield* came broadside down on us," and was steaming ahead at the time of the collision about four or five knots.

I know how strange are the views that honest men can take of what they have themselves seen, or even done, especially in times of agitation, and I do not wish to be understood as imputing falsehood, but I decline to accept this version, for the following reasons.

There is nothing to show that the relative positions of the two ships a minute before the accident was inaccurately described by the master of the *Glasgow*, Captain Turnbull. It rather squares with what others said. Taking it to have been broadly speaking as he described it, the crucial point is—how did these two ships get in a minute's time from that position into the position they were in unquestionably at the moment of collision, namely, the *Hatfield* right across the bows of the *Glasgow*, and the *Glasgow's* stem running into her at about right angles? They could not have drifted together in so short a time. Captain Turnbull says that the *Hatfield* "had been edging round on this starboard helm," and "as soon as the wind got her on the port quarter that assisted her to get round," and "the *Hatfield* came broadside down on us." He adds that at the time of the collision the *Hatfield* was "steaming ahead about four or five knots." That is in substance his explanation of the *Hatfield's* movements. In regard to the *Glasgow* he says that he reversed his engines when the ships were in the position described in the diagram, two ships' lengths apart, but the accident nevertheless occurred.

I make all allowances for inexactitude as to distance and time, to which we are all liable. But this is quite clear. If the two ships were in anything like the position described by the master of the *Glasgow* in his diagram, it was his duty to reverse his engines in time to avoid a collision. The event proves that he did not reverse in time. The *Hatfield* could not move laterally. The *Glasgow* could move back, for her engines were in

good working order, and there was ample sea room. Now, he says that he did reverse a minute before the collision, when the ships were in the position described. Bargrave Deane, J. did not accept this statement, and his finding is not impaired by reason of the fact that he thought the order was given but not obeyed in the engine room. More than that, there is no statement in any of the logs except the engineer's log that the engines were reversed before the collision, and the engineer's log was written up six or seven days afterwards. More than that, the account given by Captain Turnbull to the owners' agent says nothing about reversing, but that the *Glasgow* was lying dead in the water, and helpless, at the time of the collision. I will add that the nautical assessors advise us that there could have been no collision if the *Glasgow* had reversed at the time her master alleges. This being so, I agree with Bargrave Deane, J. I am quite satisfied, on the evidence, that the *Glasgow* could have avoided the collision by reversing, and ought to have reversed, and did not so reverse. Therefore I hold the *Glasgow* to blame.

Ought we then to say that the *Hatfield* also was to blame? The contention of her owners at the trial rested partly on an allegation that the *Glasgow* rammed her by going ahead, and partly on the contention that the *Glasgow* ought to have reversed. To my mind it does not much signify what alternative views learned counsel thought it right to rely upon, provided there was no surprise, and that is not suggested. We have to act on the evidence. The only blame imputed to the *Hatfield* is that she came too near, though it was her business to come somewhat near with a view to taking the *Glasgow* in tow. The only evidence s the evidence of Captain Turnbull. I have already pointed out that his evidence cannot be accepted as to reversing his engines. Nor can it be accepted when he says that the *Hatfield* was moving at the speed of four or five knots when the collision occurred, because every witness agrees that she must have been practially motionless, judging from the condition of the *Glasgow's* bows, almost the only solid material we have in this case. Certainly I will not accept his evidence, under these circumstances, to inculpate another ship, when no one can contradict him. I do not mean to charge him with falsehood, because one knows how much room there is for honest error; but the story he tells of the way in which the one ship drifted on to the other is unsatisfactory in itself, quite apart from the errors I have adverted to already, and I cannot act upon it.

I find, therefore, that, upon his own statement, upon which he must be judged, when corrected by other testimony, the master of the *Glasgow* was in fault, because he ought in any view to have avoided the collision by reversing. I am not at all satisfied with the evidence he gives of the *Hatfield's* default, and it is not proved that she was to blame.

I do not feel the difficulty urged by Sir Robert Finlay of accepting Captain Turnbull's evidence when it inculpates himself and rejecting it where it inculpates the *Hatfield*. It is not a case of founding two mutually contradictory conclusions upon the same basis of facts, though this, too, may be sometimes necessary in a court of law, because a man's own evidence may be conclusive against himself as an admission when it cannot be received, and is no evidence at all against another person. But that is not this case. The master's statement is not an entirety, one and indivisible. Accepting that part of it which is not corrected by other evidence, I think it shows that he was to blame, and does not show that the *Hatfield* was to blame. I feel at liberty to form my own opinion on the whole of the evidence and the advice we receive, and to pick and choose what I believe to be true. I suspect that the *Glasgow* was going ahead, perhaps manœuvring to get near enough for a line to be thrown. It is sufficient to say that no fault on the part of the *Hatfield* has been proved to my satisfaction, and it is upon that ground that I found my opinion.

Lord DUNEDIN.—I agree with the motion made by the noble earl who has preceded me, and I concur with much of what he has said.

But, for myself, I feel constrained to go somewhat further, and to say that I have come to the conclusion that the true cause of the collision was that the *Glasgow* at the last moment went ahead and not astern.

The fault I have to find with the judgments under appeal is that, with all respect to the learned judges, none of them faces the question: What caused the accident? There was a collision of sufficient force to effect the sinking of the *Hatfield* in seven minutes after impact.

The question of how that came about is not handled at all by the Court of Appeal, except in an indirect manner in some remarks by Lord Sumner, as to which I shall afterwards say something; and in the court of first instance it is left thus by the learned trial judge: "There was sufficient momentum between the two vessels to cause this serious damage which caused the *Hatfield* to sink."

Now, "momentum" never did and never will cause a collision. I do not make this remark as a mere verbal criticism on the use of the word without something more.

What I do mean is that you must have motion in a certain direction on the part of one or both bodies in order to make those bodies collide, and before one can approach the question of blame I think it is necessary to make up one's mind on this topic.

Now, the *Glasgow*, it is admitted on all hands, was lying in the trough of the sea, with the wind on her starboard quarter, and drifting to leeward, and, upon the assumption that no use was made of her engines, was incapable of forward motion.

Therefore, upon this assumption, the impact must have been due to motion on the part of the *Hatfield*. Inasmuch, however, as the collision, when it took place, was one in which the ships were, according to the description, almost at right angles to each other, the motion must have been, if it existed, caused by a forward movement on the part of the *Hatfield*.

The idea, however, is to my mind completely negatived by the fact, admitted by all, that if the *Hatfield* at the moment of collision had had forward way on her the bow of the *Glasgow* would have been twisted at least to a slight extent to port, which was not the case. Indeed, the expert witnesses for the *Glasgow* admit that at the moment of collision the *Hatfield* could not have had any way on her.

The only other theory that remains is, then, that the *Hatfield*, by her motion, having got into immediate proximity, the actual collision was caused by the effect of a wave lifting up one vessel and, so to speak, dropping it on to the other. But if this had happened the markings on the stem of the *Glasgow* must have been more or less vertical, whereas in fact they were all horizontal. The matter, however, does not end there.

All the expert witnesses admit that if the penetration was severe it would speak to forward motion on the part of the *Glasgow*. Now, what was the penetration? It was at least sufficient to cut through the stringer plates, for without doing that you could not knock a hole in the vessel sufficient to make her founder in seven minutes. How much further did it go?

The mate of the *Glasgow* admitted in cross-examination that the gash extended "to pretty near the coamings of the hatchway," and the sole survivor of the *Hatfield* said distinctly that he tried to get past the hatchway on that side, and could not because of the knocked up splinters.

I confess I am utterly unable to appreciate the comment of the learned trial judge on the evidence of this witness. I can imagine a great discount would have to be put on computation as to feet.

But trying to get past a certain place and failing is a positive fact which does not rest on calculation, and, unless the witness is to be disbelieved, leaves no room for exaggeration one way or other. The calculation as to feet can be done afterwards on the plan.

What, however, is the view of the expert witnesses on the other side? They have to admit that an ugly hole was knocked in the *Hatfield*, or she would not have sunk. But they think that the penetration of the stem of the *Glasgow* cannot have been more than 2ft. Why? Because they found marks on the sides of the stem, and these marks do not extend more than 2ft. from the actual nose of the stem.

To my mind this is absolutely inconclusive, and for a very simple reason. Of course, if you force a V-shaped wedge slowly into a homogeneous substance it may very well be that the marks on the sides of the "V" will register for you the extreme point of penetration. That, however, will only be because in the case supposed there will be lateral pressure on the edges of the wedge.

But when you come to the case of a violent blow effected by the edge of a wedge-shaped object against a substance which is not homogeneous no such result necessarily follows. It becomes a question of chance, as to which no one can accurately predict how far the opposing substance is knocked clean away by the blow of the entering wedge.

This is especially the case when you are dealing with metal. No one can tell where exactly the stringers, which admittedly were burst, would break away. It is, therefore, in my judgment, quite inconclusive as to the amount of penetration finally achieved to find out how far on the side of the stem you find marks of friction.

On the whole matter I therefore come to the conclusion that this collision, with its effects, was impossible except in the view that the *Glasgow* had forward way. If that is so it settles the whole case, for I entirely concur with the reasoning of the noble earl as to the dearth of any evidence against the *Hatfield*.

I cannot help thinking that the opinion I have just expressed was really shared by my noble friend, Lord Sumner, and that he over-rated the weight to be put on Bargrave Deane, J.'s comment on the evidence of the survivor and the mate.

I am very far from wishing to depart from the salutary rule as to our not, in this House, interfering with concurrent findings on matters of fact. I cannot, however, look on this case as a true example of concurrent findings.

The learned trial judge and the Court of Appeal do not come to the same result, and their theory of what actually happened is not the same. And, further, neither the trial judge nor the Court of Appeal pronounce any finding on what I consider comes first of all, namely, What caused the collision?

To say that the *Hatfield* "came too near" is, in the circumstances, not enough. I therefore do not consider that in coming to the conclusion I have come to I in any way do violence to a rule which I should always wish to follow.

Lord ATKINSON.—I concur. This is a most painful and embarrassing case. Every soul on board the *Hatfield* who could have given evidence as to the movements of his vessel and the cause of the collision has perished. The witnesses for the *Glasgow* have a free field. They can, if their consciences permit, without fear of contradiction, suppress facts, invent facts, minimise or exaggerate occurrences. One has to decide, in reality, on the story of one side. The story of the other side never can be told, and this demands that the case of the living against the dead should be clearly and satisfactorily established.

The *Glasgow* called for help. She invited the *Hatfield* to come to her assistance, and in a high wind and heavy sea endeavour to perform the difficult and dangerous operation of taking her in tow. In such an operation, I think, a duty was cast upon the vessel so asking for assistance to be on the alert, to observe the movements of the vessel coming to salve her, to accommodate her own movements as far as safety would permit to those of the latter vessel, and to render aid, according to the rules of good seamanship, in assisting in the enterprise both desired to accomplish.

The only fault attributed to the *Hatfield* is that her captain miscalculated his distance and came too close to the ship he was trying to salve. It was not even suggested that any other of his manœuvres were negligent or improper or contrary to good seamanship. But even if it be taken, for the moment, that he did come too close, and was in that respect guilty of negligence, and therefore to blame, the *Glasgow* would also be to blame if, by the exercise of due care and skill on her part, she could have avoided the consequence of the *Hatfield's* negligence. It would have been her duty to reverse her engines in time so as to get stern-way on herself and get out of the way of the approaching ship so far as good seamanship in the circumstances would require. I do not think it is enough that the captain of the *Glasgow* should merely give the order to reverse at the moment he in

fact came to the conclusion that the *Hatfield* was coming too close, if according to good seamanship he should, with his means of knowledge, have reached that conclusion earlier. If the *Glasgow* was moving ahead, then the reversing of her engines was in the result useless; no stern-way could be got upon her, and it is not even pretended by Captain Turnbull that any stern-way was acquired by her until the very moment of the collision. He said, I think that she (*i.e.*, his ship) just got stern-way on at the moment the collision took place.

Now for the *Glasgow*, the reversing of her engines became the crucial movement. The first question is, Has it been satisfactorily proved that the engines were reversed at all, and (2) has it been satisfactorily proved that, even if reversed, they were reversed as soon as, according to the requirements of good seamanship, they should have been reversed?

I confess, Bargrave Deane, J.'s way of dealing with this matter somewhat puzzles me. He evidently kept in mind the circumstances that the scrap log in existence at the time of the collision had disappeared; that in only one of the four logs produced is any mention whatever made of this reversing of the engines, though the logs were all written up at leisure; that the only log in which it does appear is written up one week after the arrival of the crew at Dover, and after consultation with the captain; that the entry is merely "Engines working full speed astern at the time"—*i.e.*, the time of collision; that there is any statement whatever as to how soon that operation commenced, and that even this entry is inserted after entries of events occurring some days later than the collision itself.

These, in my mind at all events, are rather damning facts. They throw, I think, grave suspicion on the *Glasgow's* case. Now, the learned judge deals with them thus. He comes to the conclusion—

(1) That the engines were in fact reversed.
(2) That they were not reversed in time.
(3) That the delay in reversing them was due to the absence of the engineer from the engine room.

This last finding was wholly wrong. Not only was there no evidence to support it, but it was in direct conflict with the only evidence given on the point. The engineer, according to the evidence, was sent down to the engine room by the captain, not one minute before the collision, but five minutes before the order to reverse was alleged to have been given.

And then the judge says: "I do not believe, in the absence of proper books made up at the proper time, that these engines were reversing a minute before the collision, or anything like it. If they had been reversing for a minute, then I cannot believe that the *Glasgow*, which is a speedy ship, and, according to her engineer, would probably go eight-knots at her full speed when reversing, could not, in a minute, have got away from the *Hatfield*. He was not reversing for a minute; there was no time to reverse a minute. The whole thing was done late."

He thus rejects the evidence of the captain and engineer, that the latter was ordered to go to the engine room, and went there five minutes before the order to reverse was given. He further rejects their evidence that the engines were reversed one minute before the collision, but he accepts the statement made by them that the engines were in fact reversed, which is the very fact upon which the state of the log books throws most suspicion.

The Court of Appeal, seeing that this third finding was in conflict with the only evidence given on the point, most properly put it aside, and Captain Turnbull having sworn that he gave the signal to reverse the engines as soon as he observed that the *Hatfield* was approaching too close, held that he was not guilty of any negligence.

It is clear, and is not, I think, seriously disputed, that if the *Hatfield* was at the time of the collision steaming across the bow of the *Glasgow* from starboard to port at any considerable rate of speed, the stem of the *Glasgow* must have been twisted or bent to port. It has not been bent to port. On the contrary, according to the evidence of the two experts, Messrs. Casebourn and Blackett, it has been bent slightly to starboard. The first of these witnesses said that the existence of this twist to starboard involves the theory that the *Hatfield* was very nearly motionless. If she had been going about four or five knots, the speed her captain fixes, the stem of the *Glasgow* would have been bent to port. Mr. Blackett agrees with him, and the theory of the collision which the former of these two gentlemen adopts is this, that there was a hatchet blow "from the *Glasgow* inflicted on the other vessel." If that means that the *Glasgow* from the crest of a wave fell down upon the *Hatfield*, cutting into her hull so deeply that she sank in a few minutes, then the unfortunate thing for this theory is that the *Glasgow* delivered this blow from above downwards without inflicting a single vertical scratch on her own hull. The marks she bore were horizontal. The same consideration would apply if the *Hatfield* from the crest of a wave had fallen upon the stem of the *Glasgow*.

It appears to me almost inconceivable that the collision could have occurred in either of these ways without leaving some vertical marks upon the stem and bow of the *Glasgow*. The fact that the marks are horizontal suggests, I think strongly, that the stem of the *Glasgow* did not come into collision with the hull of the *Hatfield* with an ascending or descending motion; but that the blow was, on the contrary, a direct and level blow. I cannot find that Bargrave Deane, J. ever alluded to this important point, or found as a fact, or even indicated what in his opinion, the speed of the *Hatfield* was as she approached the *Glasgow*. It is, I think, clear that the speed could not have been as high as that mentioned by her captain, four or five knots. From the evidence of the experts as to the bending the *Glasgow's* stem to starboard, it could hardly have been half so much.

The captain of the *Glasgow* must be held bound by the diagram he drew. He said that the *Hatfield* was distant from him two lengths of his own ship, *i.e.*, 480ft. (160 yards), at right angles to her, when he concluded that the *Hatfield* was coming too close, and gave the order to reverse. Now a knot is about 2000 yards; 160 yards is something a little more than one-twelfth of this. If the *Hatfield* was going ahead

at the rate of two knots, that would be one knot in thirty minutes, she would steam one-twelfth of a knot in two and a half minutes. If going at three knots it meant a knot in twenty minutes and one-twelfth of a knot in one and two-third minutes. But the captain said that though he kept his engines going astern after the impact, he only kept them going for a minute altogether from first to last. Again he said that he only felt the vibrations of the engine going astern for about half a minute.

The strange thing is, however, that he says that he thought the *Hatfield* was getting too close five minutes before he gave the order to reverse.

The learned judge put the question to him: 'About five minutes before that you saw the chief engineer on the bridge deck?" Answer "Yes." "And told him what?" Answer: "To be ready, as I thought the ship was getting rather close to us and I might require to go astern or go ahead, whichever I thought fit." He also says when the *Hatfield* got only 480ft. away he thought it was dangerous.

Captain Turnbull had, therefore, ample warning. He saw and appreciated the threatening danger, yet five precious minutes were by him allowed to elapse before he took action. If he had reversed when the *Hatfield* was 160 yards away he must, having regard to the rate of progress of the latter vessel, have got stern-way on his own ship in time and kept clear. Bargrave Deane, J. found as a fact that the *Glasgow* was late in reversing, but gave a bad reason for his conclusion. There are no concurrent findings of fact on this point, and therefore nothing to prevent your Lordships from coming to the conclusion that the *Glasgow* was too late in reversing, and was therefore to blame.

The remaining question is, was the *Hatfield* to blame? I confess I have the greatest difficulty in accepting the conclusion that the injuries the *Hatfield* received were brought about in the manner described by the expert witnesses or by Captain Turnbull. It may well be that Hagar was inaccurate as to the precise number of feet to which his ship was penetrated, but he was found to be an absolutely honest witness, intending to speak the truth. Why, then, should his evidence be rejected when he says he could not pass between the hole in the *Hatfield's* side and the hatch coamings, the jagged ends of the irons helping to prevent his doing so? He tried to pass in order to see the damage done to his ship, and he says he had to go up to the forecastle deck to discover if the water was coming into her hold—a vital matter for him. He states that his opinion was that the *Glasgow* must have been going ahead to be able to deliver the blow that she did.

The forming of that opinion tends, I think, to prove Hagar's sagacity rather than his unreliability, but he receives the strongest corroboration of his statement as to the depth of the penetration of his ship from the fact that at the very moment of, or very soon after the collision, the mate of the *Glasgow* told his captain that his ship had cut into the *Hatfield* to near the coamings of her hatch. There was little or no time for invention. It was said at once. He repeated it at the Board of Trade inquiry, and though on the trial he tried to wriggle out of this statement, he was ultimately forced to admit that what he had stated at the inquiry was correct.

No doubt that evidence was in conflict with the evidence of the two experts, who from the absence of all signs of injury on the bow of the *Glasgow* beyond 2ft. from her stem, concluded that she could have only penetrated 4ft. into the hull of the *Hatfield*.

Well, no doubt it would be somewhat strange that if she had penetrated deeper than 2ft. some more marks or injuries to her hull more aft of her stem than those found should not have been discovered, but not at all more strange than that she should have given or received a descending or ascending blow, and nothing but horizontal marks or scorings been found upon her hull. Nor, indeed, more strange, it would appear to me, than that she should have penetrated even to the depth of 2ft., and, considering what she must have gone through, not been more damaged than she was. For it was, as I take it, proved by Mr. Steel that the stem of the *Glasgow* must have cut through three stringer plates and for some distance through part of an iron deck, making a V-shaped hole in the side of the *Hatfield* through which the water rushed in and sank her.

It is not disputed that the stem of the *Glasgow* made this hole. The mate saw it. The blow must, therefore, have been delivered with considerable force, and must, I should think, have been a level and direct blow. An effort was made at the trial to show that it was not delivered at right angles, but that is contrary to the case made at the earlier stages of the proceedings.

I think that the evidence as to the nature of the *Hatfield* injuries is not inconsistent with Hagar's opinion that the *Glasgow* had headway on her when the collision occurred. It is scarcely possible, one would think, that all this injury could have been inflicted if the *Glasgow* was at the time of the collision a receding vessel. Such is the extremely unsatisfactory position in which the case is left.

It could not, I think, be successfully contended that the case of the *Hatfield* came within the principle laid down in *Skinner* v. *London, Brighton, and South Coast Railway* (5 Ex. 787), and *Great Western Railway Company of Canada* v. *Fawcett* (8 L. T. Rep. 31; 1 Moore P.C. N. S. 101) and such like cases, to the effect that the happening of the accident is *primâ facie* proof of negligence on the part of the persons having control over the thing which caused the accident.

Bargrave Deane, J., though he apparently disbelieved much that Captain Turnbull and his engineer deposed to on other points, believed them when they said they never went ahead, and endeavoured to reconcile this conclusion with the extent of the *Hatfield's* injury by saying first that the amount of penetration of the *Glasgow* stem into the *Hatfield* was not so great as is alleged, and then by saying that "we all know in these collision cases that the damage is most difficult to reconcile with the history of the case."

Well, certainly this is a case to which this last remark is singularly applicable; but he never dealt with the question of the horizontal marks upon the bows of the *Glasgow*—no more than he dealt with the speed of the *Hatfield*.

I have no hesitation in saying that in my view the evidence does not, in the peculiar

circumstances of this case, establish satisfactorily that the *Hatfield* was guilty of any negligence causing this collision.

The question is, am I precluded from giving effect to that opinion by the rule as to concurrent findings of fact laid down by Lords Herschell and Watson in the case of *Owners of the P. Caland* v. *Glamorgan Steamship Company* (*sup.*) Lord Watson said he concurred that the findings of fact in the courts below should not be disturbed in this House unless their Lordships should arrive at a tolerably clear conclusion that the findings are erroneous, and added "and the principle is specially applicable to a case in which the conclusion sought to be set aside rests upon considerations of probability."

The question of fact there alluded to was this: whether the red side-light of the ship *Caland* was invisible to the crew on board the *Glamorgan*—the ship which collided with her—or whether it was visible but was either unseen by the latter's crew, or seen and disregarded. Both the courts held that on a balance of probability the light was not visible.

There was in that case, as in the case of *Gray* v. *Turnbull* (L. Rep. 1870 2 H. L. Sc., 53), abundant evidence on each side. Here there was no conflict of evidence. There could not be. But once Bargrave Deane, J. believed the captain and engineer on this one point, that their ship did not go ahead, the only point on which apparently he did believe them, he concluded that the *Hatfield* came too close and was to blame.

The Court of Appeal did not feel itself at liberty, notwithstanding the circumstantial evidence, to disagree with the opinion of the judge in the court below as to the credibility of these witnesses, and accordingly accepted his decision as to the culpability of the *Hatfield*. I think, however, that these two decisions fall far short of such concurrent findings of fact as Lords Herschell and Watson were dealing with in the case above cited.

In my opinion, therefore, your Lordships are not debarred by the rule there laid down from holding that, considering all the evidence, direct and circumstantial, in this case, it has not been satisfactorily established that the *Hatfield* was to blame. I am therefore of opinion that the appeal of the *Hatfield* should be allowed, and the *Glasgow* should be held alone to blame.

I do not think that the case of *The Ngapoota* (1897) A. C. 391; 66 L. J., P. C. 88) applies to this case, as the captain of the *Glasgow*, five minutes before he says he ordered the engines to be reversed, thought that the *Hatfield* was too close.

Lord PARMOOR.—The ship *Hatfield*, belonging to the appellants, collided with the ship *Glasgow* in the North Sea on the 1st Oct. 1911. At the time of the collision the *Glasgow* was disabled by reason of an accident to the steering gear, and the *Hatfield* had come up in response to signals of distress to endeavour to take the *Glasgow* in tow for the purpose of salving her. It was during the attempt to carry out this manœuvre that the collision occurred, and the *Hatfield* sank with the loss of all her crew save one. The only member of the crew saved was called, but the learned judge found that, though this witness was absolutely honest himself, he did not feel inclined to accept his evidence as absolutely trustworthy, having regard to the terrible state of circumstances at the time of the accident. The learned judge found that both vessels were to blame, the *Hatfield* owing to want of skilful navigation, and the *Glasgow* owing to the fact that she did not reverse her engines in time before the collision. The Court of Appeal have found the *Hatfield* alone to blame, and it is against this decision that the appeal is brought.

The main case put forward by the appellants was that, immediately before the collision, the engines of the *Glasgow* were put ahead and should have been put astern, and that in consequence of this she rammed and sank the *Hatfield*. The nature and extent of the injury to the *Hatfield* are not inconsistent with this explanation of the collision, and the marks on the stem of the *Glasgow* are in a horizontal direction, such as would naturally be found on a ramming ship. Owing to the loss of life it was not possible for the appellants to call direct evidence. They mainly relied on the evidence of experts to prove that the nature of the injuries to the *Hatfield* was such that they could not have been inflicted unless the *Glasgow* was steaming ahead at the time.

The learned judge held that the amount of the penetration by the *Glasgow's* stem in the *Hatfield's* side was not so deep as alleged, and did not sustain the case of the appellants that the *Glasgow* must have been steaming ahead at the time of the collision. He found that the engines had not been put ahead immediately prior to the collision. In this finding the Court of Appeal concurred.

Although the evidence on this point appears to me to be of an unsatisfactory and inconclusive character, I am not prepared to differ from the finding of the learned trial judge, indorsed in the decision of the Court of Appeal. The learned trial judge further found that the *Glasgow* did not reverse her engines in time, and that the whole thing was done too late. He says: "I do not believe, in the absence of proper books made up at the proper time, that these engines were reversing a minute before this collision, or anything like it." I can see no reason for differing from the learned judge's finding under this head, although there is considerable difficulty in dealing with a case in which direct evidence is only available on one side.

An agreed diagram to which I attach great importance shows the direction of the wind and "the position of the vessels when *Glasgow's* engines were ordered full speed astern, as stated by Captain Turnbull, a witness for the defendant." In this diagram the distance shown between the two vessels is approximately 480ft. Captain Turnbull in his evidence estimates that the *Hatfield* was steaming ahead at about four or five knots. If this had been accurate the collision would have taken place in about a minute from the time that the *Glasgow's* engines were said to be ordered "full speed astern." Having regard to the state of the stem of the *Glasgow* after the collision, I think it is impossible that the *Hatfield* could have been steaming at this rate, and that her speed was probably not more than two knots. Assuming that the speed of the *Hatfield* did not exceed two knots, the captain of the *Glasgow* appreciated the danger and ordered "full speed astern," according to the witness of the diagram,

two minutes at least before the collision. If the order was so given and had been promptly carried out there was sufficient interval for the stern-way to be got on the *Glasgow* before the collision took place, and the accident would have been avoided.

Without attempting to determine the exact cause of the delay, I should draw the same conclusion as the learned trial judge, that, having regard to the time at which the captain of the *Glasgow* appreciated the risk of a collision, the engines were not reversed in time, and the whole thing was done too late.

I agree with the opinion expressed by Lord Parker, that it is not fair to be too meticulous on the question of time, but it is proved that had the engines been reversed not less than one minute before the collision, an appreciable way astern would have been got on the vessel, sufficient to avoid the collision.

The learned trial judge, in forming his opinion of the time at which the engines of the *Glasgow* were reversed, comments on the absence of proper books made at the proper time. There is no satisfactory explanation given by the respondents. The statement of the captain of the *Glasgow* that the scrap log, being reduced to a pulp, was thrown away from the bridge deck, is open to serious adverse comment. Whatever its condition, every document, in a case in which one ship has foundered and the crew is lost, should be carefully safeguarded as a precaution in the interest of truth and good faith. The logs produced, other than the engineer's entry from his scrap log, were written upon the 1st Oct., and contain no reference to a reversing of the engines of the *Glasgow*. This same criticism applies to the letter of the 2nd Oct., written from Messrs. Hammond to the owners of the *Glasgow*, and forwarded on information obtained from Captain Turnbull. This letter makes no reference to a reversing of the engines. The entry from the engineer's scrap log contains the entry, "engine full speed astern at the time," but it was not made untill the 9th Oct. and gives no assistance in solving the difficulties which surround the case. I am therefore of opinion that the learned judge was justified in finding that the *Glasgow* did not reverse her engines in time, and holding that in this respect she was to blame.

On the question whether the *Hatfield* was solely to blame, I concur with the judgment of my noble friend on the Woolsack, and I do not desire to add anything further.

Appeal allowed.

Solicitors for the appellants, *Downing Handcock, Middleton*, and *Lewis* for *Downing* and *Handcock*, Cardiff.

Solicitors for the respondents, *Thomas Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 15, 16, *and* 18, 1914.

(Before Lord COZENS-HARDY, M.R., KENNEDY and SWINFEN EADY, L.JJ.)

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) LIMITED *v.* ASHTON. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—"Thirds" or sharing system — Owner and master—Loss of cargo through unseaworthiness of vessel—Liability of owner —Position of master.

A ketch was owned by two co-owners, and worked on the basis that the master took two-thirds of the gross freights, out of which he paid the mate and the crew, the provisions, and expenses of the voyage. The owners took one-third of the gross freights, subject to deductions for port dues. The owners provided for the upkeep and insurance of the vessel. The ketch loaded a cargo under a charter-party made by the master, which cargo was lost, as was alleged by the owners thereof, through the unseaworthiness of the vessel. An action was accordingly brought by the owners of the cargo against one of the co-owners of the ketch.

It was decided by Pickford, J. (12 *Asp. Mar. Law Cas.* 501; 110 *L. T. Rep.* 776) *that the allegation of the plaintiffs that the ketch was unseaworthy at the time when she sailed was well-founded; and that the condition of the ketch was not due to the loading berth at which she was moored being defective or dangerous. But Pickford, J. decided that the contract of charter-party was made by the master personally; and that the defendant was therefore not liable.*

The plaintiffs appealed.

Held, that the findings of Pickford, J. in favour of the plaintiffs on the issues of unseaworthiness and condition of the vessel were abundantly supported by the evidence, and could not therefore be disturbed by the Court of Appeal.

But held, that there was a contract of charter-party between the plaintiffs and the defendant, although there was no reference therein nor in the bill of lading to the "owner" of the vessel; that the master was not bailee of the vessel, but was the agent or servant of the owner; and that the real control of the vessel rested with the defendant, and not with the master.

Bernard *v.* Aaron (9 *Jur. N. S.* 470) *distinguished.*

Steel *v.* Lester (37 *L. T. Rep.* 642; 3 *C. P. Div.* 121) *applied.*

Decision of Pickford, J. (ubi sup., *p.* 501) *on this point reversed.*

APPEAL by the plaintiffs from the decision of Pickford, J. (*ubi sup.*) and cross-appeal by the defendant.

The facts of the case sufficiently appear from the judgments.

Compston, K.C. (with him *A. Cohen*), for the appellants, referred, on the question of the contract of charter-party, to

Dry v. *Boswell*, 1 Camp. 329;
Frazer v. *Marsh*, 13 East, 238;

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Colvin v. *Newberry*, 1 Cl. & F. 283;
Baumwoll Manufactur von Carl Scheibler v. *Furness*, 7 Asp. Mar. Law Cas. 59, 130, 263; 68 L. T. Rep. 1; (1893) A. C. 8;
Manchester Trust Limited v. *Furness, Withy, and Co. Limited*, 8 Asp. Mar. Law Cas. 57; 73 L. T. Rep. 110; (1895) 2 Q. B. 539;
Bernard v. *Aaron*, 9 Jur. N. S. 470.

The defendant's cross-appeal was then heard.

Roche, K.C. (with him *Dunlop*), for the cross-appellant, referred, on the question of the unseaworthiness of the vessel, to

The Moorcock, 6 Asp. Mar. Law Cas. 357, 373; 60 L. T. Rep. 654; 14 P. Div. 64.

No reply on this question was called for.

Lord Cozens-Hardy, M.R.—It is impossible in my view to differ from the finding of the learned judge in the court below upon the question of the unseaworthiness of the vessel.

Kennedy, L.J.—I agree.

Swinfen Eady, L.J.—I agree.

Roche, K.C. and *Dunlop*, for the respondent to the plaintiffs' appeal, referred, on the question of the contract of charter-party, to

Thomas v. *Edwards*, 2 M. & W. 215; 2 Sm. L. Cas. 11th edit., p. 390;
Boon v. *Quance*, 102 L. T. Rep. 443;
Cutler v. *Windsor*, 23 Mass. Rep. 335;
Steel v. *Lester*, 37 L. T. Rep. 642; 3 C. P. Div. 121;
The Fanny; *The Mathilda*, 5 Asp. Mar. Law Cas. 75; 48 L. T. Rep. 771;
Abbott's Law of Merchant Ships and Seamen, 14th edit., p. 63.

[Lord Cozens-Hardy, M.R. referred to *Jones* v. *Owners of Ship Alice and Eliza* (3 B. W. C. C. 495). Kennedy, L.J. referred to Carver's Law of Carriage by Sea, 5th edit., s. 853.]

Compston, K.C. replied on this question.

Cur. adv. vult.

Dec. 18, 1914.—The following written judgments were delivered:—

Lord Cozens-Hardy, M.R.—This action is brought to recover the amount of the loss of a cargo of cement shipped at a wharf belonging to the plaintiffs to Fowey in a ketch called the *Myrtle*. The *Myrtle* sank in calm weather in the Channel. The plaintiffs alleged and the defendant denied that she was unseaworthy when she sailed, and that the loss was due to that. This issue has been found by Pickford, J. in favour of the plaintiffs. It was alleged by the defendant, and denied by the plaintiffs, that the condition of the ketch was due to the berth being defective or dangerous. This issue has also been found by Pickford, J. in favour of the plaintiffs. We have already held that these findings by Pickford, J. are abundantly supported by the evidence, and cannot be disturbed by us.

There was a third issue: The plaintiffs alleged and the defendant denied that there was a contract between the plaintiffs and the defendant. And this issue was found by the learned judge in favour of the defendant, and judgment was entered for the defendant. From this judgment the plaintiffs appeal.

It is admitted that the defendant was the owner of the *Myrtle*, though at some date, not clearly ascertained, Smith became co-owner. For simplicity I shall treat Ashton as sole owner. It is also admitted that Cole was the master. It is not disputed that the *Myrtle* was being worked on "the thirds system" and that the master took two-thirds of the gross freights, and thereout paid the mate and the crew and the cost of the provisions and expenses of the voyage. On the other hand, the master handed over to the owner one-third of the gross freights less port dues, the owner providing the ship and paying for her upkeep.

In this state of things, two documents were executed by Cole: (1) A charter-party, dated the 11th June 1913, by which Cole, described only as "of the good ship or vessel called the *Myrtle*," chartered the *Myrtle* to the plaintiffs to convey cement from the charterers' wharf to Fowey at certain rates of freight. It is not necessary to refer in detail to the terms of the charter-party. (2) A bill of lading dated the 17th June 1913 in which Cole is described as "master of the said ship." The conditions of the charter-party are incorporated.

In neither document is there any reference to the owner. The defendant contends that the only contract was with Cole, and that there is nothing to show that he was agent for, or servant of, an undisclosed principal. I am unable to accept this view. The observations of Lindley, L.J. in *Manchester Trust Limited* v. *Furness, Withy, and Co. Limited* (*ubi sup.*) are important on this point. [His Lordship read them, and continued:] I think all the facts of the case must be looked at to ascertain whether Cole was really a bailee of the *Myrtle* or was the agent or servant of the owner. In truth this is a question of fact rather than of law. Unfortunately there is nothing in writing to define the relations between the owner and Cole. The owner did not give evidence, either in court or by commission. We are left to spell out the truth as best we can from admitted facts.

Cole says he usually arranged the freight, as he did in this instance. He speaks of his "wages"—a word to which I do not wish to attribute undue importance, but which certainly is not what a bailee or hirer would be likely to use. He admits that he was appointed by the owner and could be removed at the end of the voyage, though not—except, I presume, on the ground of misconduct—during the course of the voyage.

Pickford, J., contrary, I think, to his real opinion, thought he was bound by *Bernard* v. *Aaron* (9 Jur. N. S. 470), decided in 1863, which, as he said, could scarcely be distinguished from the subsequent case of *Steel* v. *Lester* (37 L. T. Rep. 642; 3 C. P. Div. 121) decided in 1877. A careful examination of *Bernard* v. *Aaron* (*ubi sup.*) satisfies me that that case does not really assist us. In the first place, the sole question was whether Sharpley, one of two co-owners, who had not appointed the master, was liable for the acts and defaults of the master appointed by Aaron, the other co-owner. It was held that Aaron had hired Sharpley's share. In the second place, it was an action of tort, and this is an action *ex contractu*. It is worth mentioning that *Bernard* v. *Aaron* (*ubi sup.*) appears never before to have been cited, and certainly it has not been treated as an authority laying down any principle.

On the other hand, *Steel* v. *Lester* (*ubi sup.*) is a direct authority in point. It has been recognised

by the text writers: (see Carver's Law of Carriage by Sea, 5th edit., sect. 49). The vessel there was worked on "the thirds system." The facts are in all material points identical with those of the present case, except that the owner took one-third of the net profits, whereas in the present case the defendant Ashton took one-third of the gross profits. That distinction might be of importance if it were necessary for the plaintiffs to establish a partnership between the defendant and Cole, but not otherwise. As was pointed out by Lindley, J., the arrangement did not amount to a demise or anything of the kind. His Lordship said (at pp. 127, 128 of 3 C. P. Div.): "The facts are that for about three months after the defendant had bought this ship, he traded with it on his own account, employing Lilee as skipper at standing wages, before the passing of the Merchant Shipping Act 1873. That arrangement was altered, and the question is the true effect of the alteration. I will first consider what it was. It was this, that instead of Lilee being employed at standing wages, the defendant Lester, still remaining owner, allowed Lilee, who was master, to take management of the ship on the terms that Lilee should pay Lester one-third of the profits. What is the true substance and result of that arrangement? We are asked to say that it amounted and was equivalent to a demise of the ship by the owner to the master, throwing the whole responsibility of the management on the master and taking it off the shoulders of the owner. I do not think such an arrangement amounted to a demise or anything of the kind. I look on it either as a mere mode of paying Lilee for his services—the owner paying him a share of profits instead of fixed wages, and retaining control over the master, but leaving the master to choose his ports and men; or it was this, viz., that the defendant Lester, still remaining owner, became partner with the master for the adventure, sharing the profits with him. I rather think that the latter is the true view. But in either view the result is that the sloop was managed by Lilee for the joint benefit of himself and the owner. That is a consequence from which there is no escape. The true conclusion on the facts is that Lilee was either the partner or agent of the owner, and if partner he was still agent of the owner for the managment of the vessel. I do not think the agreement between them amounted to a demise of the ship, so as to render the master solely responsible." The real control rested with the defendant, not with the master, and that is perhaps the critical test.

The respondent's counsel referred to the decision of this court in *Boon* v. *Quance* (102 L. T. Rep. 443) as laying down that there can be no contract of service between the owner and the master of a vessel worked on "the thirds system," and that the relationship must be that of bailment. But in *Jones* v. *Owners of Ship Alice and Eliza* (3 B. W. C. C. 495) it was clearly explained that such was not the effect of the decision in *Boon* v. *Quance* (*ubi sup.*). It is a question of fact to be decided upon the evidence in each case: (see also *Smith* v. *Horlock*, 109 L. T. Rep. 196).

Moreover the question under the Workmen's Compensation Act 1906 is whether the relationship of master and servant exists, and an answer to that question in the negative would be in no way decisive upon the question whether the owner of a vessel is answerable for the contracts made by the master. As was pointed out in *Steel* v. *Lester* (*ubi sup.*), the question is whether the master was agent of the owner for the management of the vessel. Cases under the Workmen's Compensation Act 1906 are of little assistance.

The result is that in my opinion the appeal must be allowed and judgment entered for the plaintiffs for the amount claimed.

KENNEDY, L.J.—In this case the court has decided to affirm the judgment of Pickford, J. in so far as he held that the defendant's vessel the *Myrtle* was unseaworthy for the voyage in question. It has also decided that that unseaworthiness was not due to any fault of the plaintiffs in regard to the condition of the berth in which the *Myrtle* lay at the time she took the cargo on board; and the unseaworthiness unquestionably caused the loss of the plaintiffs' cargo on board the *Myrtle*.

The only question left for our judgment is whether, in relation to the charter-party, the bill of lading, and carriage of the goods, Cole, the master of the *Myrtle*, was or was not the servant or agent of the defendant, who was the managing owner of the vessel, the alternative being that the master was the hirer of the vessel from the defendant, and, therefore, to be regarded as an independent contractor solely liable for the unseaworthiness.

The question really which I have so stated may be stated in the terms in which, in the case of *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (*ubi sup.*), Lord Herschell put the question in that case, in which the facts were not an alleged demise to a master, but an alleged demise to a charterer. Using the language as it would be applied to the present case and quoting Lord Herschell, the question is whether there was a demise of this ship, or if not, strictly speaking, a demise, was there an agreement which put the vessel altogether out of the power and control of the then owner, and vested that power and control in the master, so that during the time that the hiring lasted she must be regarded as the vessel of the master and not as the vessel of the owner.

Now, in the present case there is not, as there was in the case from which I have quoted the language of Lord Herschell, a written agreement defining the terms on which the relation between the master and the defendant commenced or continued to exist. There is language used in the evidence, as appearing in the shorthand notes, which leads one to the impression that there probably was a letter, or may have been two letters which related to the arrangement—I shall use a neutral word—between the master and the defendant. But no document has been produced, and we have come to a conclusion upon that which is truly an inference from facts, upon evidence not altogether satisfactory and possibly incomplete, which depends upon the statements of the master himself and also of a person named Smith, who was a co-owner with the defendant, the managing owner, and who was called to give evidence for the defendant. The owner of the ship, the defendant himself, was not called, and the statement in the evidence, which I see no reason at all to disbelieve—I do not think it would be right to do so—is that his absence was due to illness. But whatever the cause, we have to spell out the

relations of the parties for oral evidence, and the inferences to be drawn from certain documents, the bill of lading and the charter-party, which are before us.

According to the evidence of Smith, when asked how the vessel was managed, he said that Ashton might have written to Cole saying he wanted Cole to work the vessel. It is, of course, always unwise and very often unjust to press particular words or expressions of a witness who is not a specially skilled witness, upon some matter upon which he may be presumed to have accurate knowledge. But I think the fact that the defendant applied, so to speak, to Cole to work the ship is to some slight extent, at any rate, rather calculated to give the impression that he was applying for a servant or agent rather than the impression of engaging a person who was brought into business relations to contract for the use of the vessel as a hirer.

Again, although in regard to these small vessels it may be—I do not know how it is in the present case—that the parties are not in a high sense business persons, if there was no written agreement considering the change which a hiring of the vessel introduces in the relations of the parties who seek as shippers of goods to do business with the ship, I think it is to some extent more probable that the terms, which nobody sought to reduce accurately into writing, were terms such as not infrequently exist with regard to some vessels in an oral employment of a captain to work them. And more, it appears that this master was on more than one occasion wanted by the defendant to work this ship; and the second engagement it is stated was exactly in the same terms as the first.

What were those terms? The terms were that the master was to take two-thirds of the gross earnings and the owners to receive one-third of the gross profits after certain deductions. Those deductions appear upon the evidence of the master and of Smith to have been of three kinds: Harbour dues, towage dues, and brokerage. As an amount, I daresay those deductions would not often be considerable; they might be very small. But, at any rate, it is a case in which deductions were made by the master from the gross takings before any portion of those takings was payable by him or payable by those over whom he had control to the owners at all. Well, though to some extent the comment is applicable to all, I do think that the deduction of brokerage has some significance, because, assuming it was simply a demise of the ship to the master, it would not seem to be in the ordinary course, at any rate, that the master, who had the responsibility of working the ship, should be relieved of the cost of entering into the mercantile engagements of the vessel, but the defendant for himself and his co-owner was willing that that element should be deducted before he took any profit.

In other words, to some extent I think it points to the engagement of the vessel being made on account of the managing owner and his co-owner, the owner also paying the upkeep and insurance. I think no stress can be laid upon that. If you once have got the fact of a letting or demise, even in the case of house property, of course you may make any special reservations that you like with regard to the upkeep of the structure, and naturally enough the owner would wish to insure the vessel for his own interest; and therefore upon that no inference, I think, can be drawn at all hostile to the inference which the defendant in this case asks us to draw. It also appears from the master's own words in evidence: "I paid the crew their wages, paid my own wages, and kept the crew in food."

Again, I do not lay special stress upon the words "I paid my own wages"; but *pro tanto* to some extent it is not the phrase that I think even a comparatively illiterate man would have chosen of whom it could be truly said that he had bargained either orally or in writing for a hiring—I will not use the technical word "demise"—by himself for his own benefit, subject to a certain payment of the ship the *Myrtle* in this case. It is true that he entered into the charter-parties in his own name, and entered into this charter-party in his own name. I will assume, though it would have been more satisfactory to have had definite written evidence, that that is true. I assume it is perfectly true. But he also adds that he usually exercised his own discretion as to what cargo he should take. We have narrowly to scrutinise the somewhat ragged evidence which is given by word of mouth in this case.

One cannot help saying that the word "usually" leads without unfairness to the implication that there were some cases in which to the best of his belief he had consulted the owner with regard to what cargoes he should take. Lastly, with regard to the terms as proved, he could, he says, be dismissed; but only on the termination of the voyage. There is nothing in that to my mind inconsistent with either view. If it had to be considered, I entirely agree with the other members of this court that that does not negative the right of the owner, if he found that there was dishonesty or misuse of the vessel going on, to have summarily dismissed him. What I think is the fair meaning is: "Assuming I have performed my part of my duty properly, whatever that may be, there would be no right to dismiss me until the voyage had ended." Naturally in any view that would be so, because his own remuneration, again to keep to a neutral term, was dependent upon the completion of the voyage, upon which alone, except in the possible case of the payment of advanced freight, would be dependent the right to the possibility of receiving any payment at all for his work.

Turning to the charter-party and the bill of lading in the particular case, it is quite true that Cole is not described as master in the charter-party. The words are "Cole, the ship or vessel *Myrtle*," which are uncoloured one way or the other. He does not profess to sign as master, nor is there even the expression "for the owner." All that has to be considered in favour of the defendant's contention so far as it goes; but speaking for myself, from such experience as one has gained in the courts, I do not think either the presence or the absence of the words "for the owners" helps us much. It is an indefinite term which leaves it still open to proof who the owners were, whatever words have been used. It is also in my experience, and impressed upon my mind, that it is not uncommon for the person who signs the charter-party, whether as agent or master, to leave the name of those for whom he signs blank. In the bill of lading he certainly executes the document in a form which shows that he was signing

as master of the ship. I need not, I think, refer to the document itself, but the last clause is: "Particulars of which"—that is the bills of lading—"affirmed by the master," and so on; and then there is the signature.

What is really and truly the inference to be inferred from these facts as they stand? I think perhaps I should have added to the last remark that which is pointed out by Lindley, L.J. in the case of *Manchester Trust Limited* v. *Furness, Withy, and Co. Limited* (8 Asp. Mar. Law Cas. 57; 73 L. T. Rep. 110; (1895) 2 Q. B. 539, at p. 543) with regard to bills of lading: "The plaintiffs, who are holders of the bills of lading, rely upon the general rule of law that *primâ facie* at all events a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner." Now, in considering that inference I desire to say a word or two, because it was submitted to us more than once very properly by the learned counsel who argued for the defendant, that no stress must be laid upon the fact that the defendant from the very beginning apparently remained the managing owner of this vessel upon the register. It is quite true, if there is no doubt at all as to there being upon the face of the contract a hiring or letting which, if not expressly so stated in terms is clearly to be inferred the fact that the person who is the person who let out the ship or demised it was the managing owner upon the register, is not a fact of importance.

That was pointed out by Bowen, J., as he then was, in the well-known case of *Frazer* v. *Cuthbertson* (6 Q. B. Div. 93), and was pointed also, as counsel was good enough to show us, by Lord Herschell in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (*ubi sup.*). Still, where you have to spell out the legal nature of the arrangement between the owner and somebody who it is suggested is a hirer of the vessel from the facts, the fact that the person who says he is not liable is the managing owner upon the register is a matter which may legitimately at any rate be borne in mind. Bowen, J., in the case to which I have just referred of *Frazer* v. *Cuthbertson* (*ubi sup.*), in the course of his judgment said: "The registered owner, until the contrary is shown, may be presumed to be the employer of those who have the custody of her"—that is the ship—"and were engaged in her navigation."

We have to see whether, taking that fact into consideration, we ought to be satisfied here that the owner, the defendant, did in fact enter into such a contract of hire or demise as the defendant asserts, the question being, I think, stated with great authority and very clearly by Lord Herschell in the case I have more than once referred to of *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (*ubi sup.*). At p. 18 of (1893) A. C. he refers to the case of *Frazer* v. *Marsh* (13 East, 238) dealt with by Lord Ellenborough as far back as the year 1811. He says, and says with approval, that Lord Ellenborough rested his judgment upon the fact that the registered owner has divested himself of all control and possession of the vessel in favour of another, and that that person has all the use and benefit of it; "he puts the question to be determined thus, whether the captain in this instance, who ordered the stores was or was not the servant of the defendant who was sued as the owner. He makes that the test of liability, and he says that if he has so divested himself of the vessel and of its use and benefit as that it is in the possession of another, whose servant the master is, then the owner ceases to be liable in respect of stores ordered by the master."

Having considered as far as I can with the utmost care the facts of the present case, and the legitimate inferences in my opinion to be deduced from them, it is not the case in the present instance that the owner has divested himself of the control and management of this ship, and the interest in this ship, so as to enable him to resist the plaintiffs' claim in this action. In my opinion the plaintiffs are entitled to succeed, because in the contract and in the carriage of the goods the master of this ship ought to be regarded as being the agent or servant of the owner. If you turn from facts to authority, I think that the judgment of Lindley, J., as he then was, in *Steel* v. *Lester* (37 L. T. Rep. 642; 3 C. P. Div. 121) is a very important guide. As far as I can see, the only difference, if there be any difference in the two cases, that ought to be deemed material, or that could be put *arguendo* I should say as material, is the difference which counsel insisted upon between the owner taking a third of gross profits subject to deductions, and the owner taking a share of net profits, as was the case in *Steel* v. *Lester* (*ubi sup.*); but it seems to me that there is really no substantial difference to be drawn on that ground.

I do not say that the sharing of net profits does not make, upon the circumstances of remuneration, an additional argument for a view against the owner's freedom from liability. But it seems to be in no case conclusive where really in a sense there is a deduction, which may be at any rate substantial, from the gross profits in the form of harbour dues and towage—those are both matters relating to the working of the ship—and the brokerage, which, it seems to me, for the reasons I have given, is even more significant than the others, as the taking by the owner of a share of the burden and of the wisdom or unwisdom of the contracts of employers of the vessel into which the master may enter.

In *Steel* v. *Lester* (*ubi sup.*) the particular passage to which I should refer is the one that begins at the bottom of p. 127 and goes on to p. 128 of 3 C. P. Div. The learned judge first considers what the arrangement was: "It was this, that instead of Lilee being employed at standing wages, the defendant Lester, still remaining owner, allowed Lilee, who was master, to take management of the ship on the terms that Lilee should pay Lester one-third of the profits. What is the true substance and result of that arrangement? We are asked to say that it amounted and was equivalent to a demise of the ship by the owner to the master, throwing the whole responsibility of the management on the master and taking it off the shoulders of the owner. I do not think the arrangement amounted to a demise or anything of the kind. I look on it either as a mere mode of paying Lilee for his services—the owner paying him a share of profits instead of fixed wages, and retaining control over the master, but leaving the master to choose his ports and men; or it was this—viz., that the defendant Lester, still remaining owner, became

partner with the master for the adventure, sharing the profits with him. I rather think that the latter is the true view. But in either view the result is that the sloop was managed by Lilee for the joint benefit of himself and the owner. That is a consequence from which there is no escape."

It is quite true that both Grove, J. and Lindley, J. speak, as confirmatory of their view of the effect of the contract on certain facts, of the existence of the owner on the register as managing owner. Also at the close of Lindley, J.'s judgment there is a reference to the fact that the master entered into the charter-party there for the owner. But they treated those matters as strong evidence at the most by way of confirmation of a legal view which they base upon the terms of the contract itself. There is a reference there to the fact that the master, as appears from the evidence in the present case, chose his own ports, so far as he was free to do so. He naturally did so incidentally through the charter-parties or other engagements for the carriage of goods into which he entered, and also chose his own crew. I suppose in almost all cases the master is the man who chooses and employs his own crew.

As I have said, so far as the ports are concerned, they would depend generally, or to a very large extent, upon the terms of the contract into which he enters for the carriage of goods from one particular port to another particular port. I did not mention that in the course of my statement of the relations of the parties in the present case, because it seems to me that throws no light on the case in favour of the defendant, because it would be part of the bargain if he is to be regarded as the person who enters into the engagements that ports will follow. And with regard to the choice of men and the payment of men, that is the ordinary duty of the captain. But the ultimate payment rests upon the master, according to the arrangement of which I have already spoken.

My brother Pickford felt himself bound by the case of *Bernard* v. *Aaron* (9 Jur. N. S. 470). I say felt himself bound, because I entirely agree with what my Lord has said that, reading his judgment, I am certainly of opinion that he was not satisfied, but for that authority, that he was deciding rightly. He expresses himself in these terms after referring to that case: "I do not express any opinion as to whether the principle of *Bernard* v. *Aaron* (*ubi sup.*) is right or is reconcilable with the other authorities that have been cited. I think it is an authority so much on all fours with the present case that I am bound to act upon it. It is not mentioned at all by Scrutton, J. in his book, and it is only mentioned very casually in Mr. Carver's book, and mentioned in a way that leads me to think that Mr. Carver thought that it was in conflict with the current authorities. But I find it so on all fours with this case that I do not feel myself justified in considering what I should decide apart from it, and upon that ground I think the defendant is entitled to judgment."

I am quoting from a printed report; and it may be different in the shorthand note, as the Master of the Rolls has been kind enough to point out to me. I do not know whether this report was submitted to the learned judge or not. Pickford, J. went on to say: "It would be very satisfactory, I think, if the matter is cleared up by some court which can disregard *Bernard* v. *Aaron* (*ubi sup.*) if it thinks fit. I do not say it ought to do so. I do not think that I am at liberty to do so."

That brings me to *Bernard* v. *Aaron* (*ubi sup.*). I have taken that case, as it is reported in the Jurist Reports, but we are told there is another report, in the *Law Journal*. To begin with, the question raised in that case was not a question between master and owner. It was a question between two co-owners. As to one of those co-owners, there was no doubt that he had taken upon himself the whole management and control of the ship. The court in substance held that there was a demise, a hiring, by that co-owner, who took the management from his co-owner of the vessel. They drew that inference from the facts of the case. But there was not present, of course, in that case what there is here—the fact that, in entering into shipping contracts for the carriage, there was that which Bowen, J. (as he then was) referred to in *Frazer* v. *Cuthbertson* (*ubi sup.*) as an acting by persons, in the absence of proof to the contrary, who might be presumed to be acting for the owner of the ship. Co-owners are not partners. There must be, as it has been judicially pointed out, an assent by one of several owners in order to make him liable for the acts of a man who may be apparently the registered owner or otherwise working the vessel. In such circumstances there must be an assent; that is elucidated in *Frazer* v. *Cuthbertson* (*ubi sup.*).

With regard to a master there is *primâ facie*, at any rate, the presumption that he is acting, not for himself, but as employed by those who are in fact the owners of the ship. In the next place, the facts in *Bernard* v. *Aaron* (*ubi sup.*) are meagrely stated. But, so far as reported, it is stated that the vessel was worked by Aaron on a principle, well known amongst shipowners, of thirds, under which Aaron took two-thirds of the total gross earnings of the ship and Sharpley one-third, Aaron taking upon himself, as between himself and Sharpley, all the liabilities and expenses of the ship. There were no deductions, so far as appears from the report. Personally, I do not think, if you barely stated that the master was paid by receiving two-thirds of the gross earnings, it would be sufficient to destroy the liability of the owner who paid him on that principle. But, be that as it may, the court decided upon the particular facts proved in that case. There had been a verdict by the jury at the trial. There was no dispute, said Williams, J.—and, if I may say so with the utmost respect, I agree with him—about what the law of the case was. The only doubt raised was what was the true result of the facts laid before the jury.

Willes, J. said he was of the same opinion. Byles, J. said also, "I am of the same opinion, but not without some degree of doubt." And he specially lays stress, in coming to a conclusion apparently, on the whole, in agreement with the other learned judges, on the fact that this was an action *ex delicto*, not an action *ex contractu*.

It was a case very different from the present on the facts, because the thing complained of had nothing to do with the contract. It did not arise out of any arrangements made by the master for the working of the ship, or the conduct of the carriage of the goods under that arrangement. It was a case in which some of the crew had negligently dropped a piece of timber on the

plaintiff's horses and injured them. The question was, Was the man, who was one of two co-owners, as well as his co-owner liable for that act of negligence, because the members of the crew who dropped the timber ought to be considered to be his servants? I for myself do not feel called upon to say whether *Bernard* v. *Aaron* (*ubi sup.*) was rightly decided or not, and I do not think I should have any business to do so, without knowing more of the facts which were no doubt before the court and before the jury, but which are reported only in the very brief form in which I have restated them from the report in the *Jurist* newspaper. But it is, as my Lord has pointed out, remarkable that so far as the learned counsel were able to tell us, and so far as one's own investigation into this case or previous knowledge can justify the conclusion that that case has never been cited as an authority.

I think the explanation is that it is felt to be a case which, like the present, depends upon its own facts and upon the inferences to be drawn, as they were drawn no doubt, from a number of circumstances. I do not know myself, for example, the important question, so far as the report goes, as to whether the contract between Aaron and Sharpley was a written contract or not. If the terms of that written contract negative as well they might do, because things are apt to become more definite when they are reduced to writing between business men, a relation which the learned judges found to exist of actual hiring, the case would no doubt be perfectly right. I do not think in the present case that we are in any way bound by anything that appears in *Bernard* v. *Aaron* (*ubi sup.*).

There was one other case referred to, which is the case of *Boon* v. *Quance* (*ubi sup.*). My Lord (the Master of the Rolls) gave judgment in that case, with which judgment Fletcher Moulton, L.J., as he then was, and Farwell, L.J. agreed. My Lord pointed out very clearly in the judgment upon what grounds it proceeded. He said: "The absence of evidence to justify that which was vital—namely, the proposition that the deceased man was a servant of Mrs. Quance." The deceased man in that case was the master of the ship himself. The widow deposed to that which, if true, was a contract of service. Evidence was given in that case that a letter had been given to Mr. Quance, the owner's husband, thinking that he would be responsible for damages, but the learned Master of the Rolls said: "In this case I think there has been a mistake, and that there is not a scintilla of evidence to justify that which is vital to the present case—namely, the proposition that the deceased man was a servant of Mrs. Quance. I am very anxious not to say anything which may prejudice the subsequent appeals of *Boon* v. *Quance* and *Cobbledick* v. *Quance*, as to which it is quite clear different considerations may arise."

Then the circumstances of the deceased man, Boon, are referred to and the facts there are stated: "It is for him"—that is, the dead man, the captain—"subject to any directions which may be given to the contrary (none such were given here) to go to what port he likes, to engage what crew he likes, to pay what wages he likes. His only obligation is to pay to Mrs. Quance one-third of the gross freight which may be earned, less 10*s.*, which is something in the nature of a discount." So that there were in fact no deductions for what one may call the working of the ship or for the expenses of getting charter-parties. "Out of the balance he pays his crew, pays any dues, and pays any expenses. In those circumstances, what is there to suggest the relation of master and servant? According to the evidence, I think, of all the witnesses, there was no right even to terminate Captain Boon's possession of the vessel until the voyage was at an end. He was solely in control of the vessel; entitled to take it where he would; entitled to man it as he thought fit, and I cannot see anything which even lends colour to the suggestion that the relation of master and servant existed between Mrs. Quance and Captain Boon. It is not necessary in the present case, and it is not desirable, that I should indicate any opinion as to whether the master and Mrs. Quance could be considered co-adventurers, or whether the whole transaction was simply one of bailment of the vessel, the remuneration for the bailment being one-third of the gross freight. On that I express no opinion."

It seems to me that there again you have a decision upon the facts as proved in the evidence, whether viewed as affirmative or whether considered in its meagreness. The conclusion that was come to in that case was a conclusion which I have no doubt was perfectly right, but in no way binds us on the very different facts of the present case. One may compare that, as was done, I think, by the Master of the Rolls in the course of the argument in the present case, with the case of *Jones* v. *Owners of the ship Alice and Eliza* (*ubi sup.*), to the judgment in which I myself was a party. In that case the owners called no evidence as to the relation between the master and themselves. But the court held that there was, in the special facts of that case, evidence to support the finding of the County Court judge that a contract of service existed between the master and the owners. That was a case in which, as I have said, there was affirmative evidence by the widow that her husband was the servant of the owners. But the counsel for the owners submitted that the master was not a servant.

The case of *Boon* v. *Quance* (*ubi sup.*) was cited, and in my opinion, now, as it was then, the different decision on the different evidence in *Boon* v. *Quance* (*ubi sup.*) lends force to that which strikes me as the thing to be borne in mind above all others in dealing with a case of this kind, namely, that we have got to decide according to the true facts of the particular case. It is not to be lost sight of, also, that that which the court has to bear in mind is that the question of control is perhaps the most important, especially in employer and workman cases. You have to get that particular relationship that the Act of Parliament which gives the right to compensation requires to be proved; and it is somewhat of a different matter to consider whether or not there is a contract with a master for the use of the vessel. And you have the inference, which Bowen, J. says in *Frazer* v. *Cuthbertson* (*ubi sup.*) is the true legal inference in the absence of anything to the contrary, or a presumption at any rate, that he was employed to navigate, and those who navigate a ship are employed by those who are the owners of the vessel to act as masters.

When you bear all that in mind, it seems to me that this case ought to be decided on its facts as not being a case in which the true inference, as shown to us by the evidence, is that the master was acting otherwise than as the agent or servant of Ashton.

SWINFEN EADY, L.J.—It having been established that the ketch the *Myrtle* was unseaworthy on leaving the Thames and starting on her voyage to Fowey, and it having now been decided that such unseaworthiness was not caused, as alleged, by any act of the plaintiffs in giving her a bad and unsafe loading berth, the question remains whether the defendant as owner of the vessel is liable to the plaintiffs for the loss of their cargo of cement shipped on board.

In my judgment this depends upon the true inference to be drawn from the facts proved. If Cole, the master, hired the ship from the owners, and sailed her on his own account, engaging and paying the crew, and paying as consideration for the hire one-third of the gross freights received, less harbour dues and towage, Cole would be the charterer of the ship and alone liable to the plaintiffs.

If, however, Cole, the master, was sailing the ship as the servant of the owners, being remunerated by a share of the gross earnings, out of which he was to pay the wages of the crew and the cost of their food, then the defendant, the shipowner, will be liable to the plaintiffs for the loss of their cargo.

The law was stated by Lord Tenderden in the House of Lords in 1832 in *Colvin* v. *Newberry* (1 Cl. & F. 283, at p. 297); and in *Bernard* v. *Aaron* (9 Jur. N. S. 470, at p. 471) Williams, J. stated the law in the same way.

Indeed, these general propositions of law were not disputed. But it was contended by the defendant that where a ship is sailed "on thirds," meaning thereby that the master pays to the owner or owners one-third of the gross freights, and retains for himself the other two-thirds, paying thereout for provisions and the wages of the crew, such an arrangement amounts in law to a bailment of the ship, and the master is not the servant of the owner or owners, but charterer, and alone liable for the goods shipped on board.

In my opinion this proposition cannot be maintained. It is a question of fact in each case whether the transaction amounts to a hiring of the ship, and whether the master is the servant of the owner or owners. The answer depends upon the proper conclusion to be drawn from all the facts proved.

The proper conclusion of fact in the present case is that Cole, the master, managed and sailed the ship for the joint benefit of himself and the owner; and that there was not any demise or bailment of the ship to him. It is quite consistent with such an arrangement that he should be left to choose his own crew, and arrange the charters, which latter he said he usually did, but apparently not always. He was asked: "Did you communicate with Ashton before chartering, or were the instructions from him?" He answered: "I usually used my own discretion that way as to what cargo I should take."

It was pointed out by Lindley, L.J. in *Steel* v. *Lester* (37 L. T. Rep. 642; 3 C. P. Div. 121) that where an owner pays a master a share of profits instead of fixed wages, retaining control over the master but leaving him to choose his ports and men, such an arrangement would not amount to a demise or anything of the kind. Nor in my judgment would such an arrangement amount to a demise if the owner received a share of gross freights instead of net profit. By retaining control over the master the owner in such a case retains control over the ship.

In the present case the master was appointed to sail the ship. He could not lay her up, instead of sailing her, as *primâ facie* a charterer may if it is worth his while to do so. The owner in effect says you must work the ship for my benefit, although also for your own benefit. Again, I cannot doubt that for misconduct the master could have been dismissed, even during a voyage, if he put into a port and misbehaved himself, and the owner became aware of it.

Again, the master himself referred to the remuneration coming to him as his "wages." He was also asked in chief: "Q. Could Mr. Ashton dismiss you, and, if so, when? A. He has not dismissed me during the time I was there. Q. If he wanted to dismiss you, when could you have been dismissed? A. At the end of the voyage." This language is appropriate to the dismissal of a servant, but not to the termination of a charter-party.

In *Manchester Trust Limited* v. *Furness, Withy, and Co. Limited* (*ubi sup.*) Lindley, L.J. said that the general rule of law was that *primâ facie* at all events a bill of lading signed by the master, is signed by the master as the servant or agent of the shipowner. To determine the question of liability the test in each case is whose servant is the master? Who is his undisclosed principal when he signs the bill of lading. In my opinion the answer to that question in the present case is, that he signed the bill of lading as master and the servant of the owner, and was not himself the charterer of the vessel.

The result is that the appeal ought to be allowed, but in so deciding I do not consider that we are overruling *Bernard* v. *Aaron* (*ubi sup.*), the decision in which case turned upon the particular facts, which are very meagrely reported.

Appeal allowed.

Solicitors for the appellants, *Ballantyne, Clifford,* and *Hett.*

Solicitors for the respondent, *W.* and *W. Stocken.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION

Friday, Dec. 4, 1914.

(Before BAILHACHE, J.)

ROPNER AND CO. *v.* RONNEBECK. (*a*)

Charter-party — Demurrage—Strike—Charterer's refusal to load.

The terms of a charter-party provided (inter alia) *that the charterer should load a cargo within a period of ninety-six running hours after notice of readiness to receive cargo, and to pay demurrage if the ship was delayed beyond her*

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

loading time. The parties mutually exempted each other from liability for time lost through strikes preventing or delaying the working, loading, or shipping of the cargo. A strike of engineers was in progress when the steamer arrived at the port of loading and notice of readiness to load was received, and the shipowners refused to sign on engineers at the terms they were demanding.

On the day after notice of readiness to load was given, the charterer asked the shipowners to give him an assurance that their engineers would be signed on and that the ship would sail as soon as possible, which the shipowners declined to give. When the shipowners received a full complement of engineers fifteen days after the ship was ready to receive the cargo, the charterer commenced loading. In an action by the shipowners to recover demurrage in respect of the detention of the ship for 413 hours beyond her loading time:

Held, that the charterer was liable, as the existence of a strike which might affect the time of sailing did not prevent the cargo being loaded, nor excuse the charterer from his obligation to load within the period provided by the charter-party.

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs, owners of the steamship *Thirlby*, sued the defendant, the charterer of the steamer, for 344*l.* 3*s.* 4*d.* as demurrage in respect of the detention of the *Thirlby* at the port of loading.

The *Thirlby* was chartered by the plaintiffs under the terms of a charter-party dated the 20th June 1914, to carry a cargo of coal from Blyth to Russia. By the terms of the charter-party the charterer engaged "to load the cargo of coal within a period of ninety-six running hours (Sundays, pay Saturdays, cavilling days, colliery and dock holidays excepted), time to count from 6 a.m. on the working day next after receipt of written notice of readiness to receive the entire cargo given to the staithman or colliery agent, or handed to him in his office."

It was also provided that if the ship was detained beyond her loading time the charterer was to pay demurrage at the rate of 16*s.* 8*d.* per running hour, and "the parties hereto mutually exempt each other from all liability (except under the strike rules) arising from or for time lost through riots, strikes, lock-outs of workmen or disputes between master and men . . . and any unavoidable accidents and hindrances beyond their control either preventing or delaying the working, loading or shipping of the said cargo occurring on or after the date of this charter until the expiration of the loading time . . . strikes of seamen, disputes between owners and crew always excepted."

On Saturday, the 20th June, the *Thirlby* arrived at Blyth, and notice of readiness to load was at once given, the time for loading commencing at 6 a.m. on Monday, the 22nd June.

On the 17th June a strike of engineers had commenced, and on the 23rd June the charterer, who had not commenced to load, asked the shipowners for an assurance that their engineers would be signed on and that the boat would sail as soon as possible. The shipowners refused to give the charterer the required assurances, and declined to sign on engineers on the terms demanded by them, and a full complement of engineers was not secured until the 7th July.

The loading was not completed until the 13th July, the total time occupied from 6 a.m. on the 17th June being 515 hours less six hours for bunkering.

Roche, K.C. and *Raeburn* for the plaintiffs.—The strike did not prevent the working, loading, or shipping of the cargo:

Dobell v. *Green*, 8 Asp. Mar. Law Cas. 473; 9 Asp. Mar. Law Cas. 53; 82 L. T. Rep. 314; (1900) 1 K. B. 526;

Embiricos v. *Reid*, 12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45.

Leslie Scott, K.C. and *Dunlop* for the defendants.—The charterer was entitled under the circumstances, to delay the loading, as there might have been an indefinite delay after the cargo was loaded before the ship could leave the port. The charterer was not bound to put the cargo on board if there was no reasonable probability of the ship being able to proceed on the voyage whether the delay was occasioned by strike or restraint of princes:

Embiricos v. *Reid* (*sup.*).

They also referred to

The Teutonia, 1 Asp. Mar. Law Cas. 32, 214; 24 L. T. Rep. 21; L. Rep. 4 P. C. 171.

BAILHACHE, J. (after stating the facts) said:—The defendant in this case contends that he was not bound to load the cargo because he had no means of knowing at the time how long a strike would last, nor how soon, if he did load, the *Thirlby* would be able to get away. It is quite true that sometimes circumstances arise which entitle a charterer to refuse to load a cargo if he thinks she will not be able to proceed with the cargo on board to her destination within a commercially reasonable time. Such cases, however, have hitherto, so far as I know, always arisen in time of war. There were several at the time of the Franco-German War, and also at the time of the recent war between Turkey and Greece. I have, however, never known the principle applied to the case of a strike in this country. I have never heard it suggested before to-day that a charterer is not bound to load a steamer which is ready to take the cargo on board because of the existence of a strike which might affect the time of her sailing. I am not prepared to be the first to apply this principle, which, as I have said, has been applied in cases arising at the time of war, to cases arising through the existence of a strike, and to do so would be a new departure. Strikes, of course, vary in length, and no man can say when a strike begins whether it will be a long or short one. I do not think that a charterer is entitled, merely because a strike is in force, to say that he expects it will be of long duration and will frustrate the commercial object of his venture, and that therefore he is entitled to refuse to load. In my opinion, the doctrine has no application to cases of strikes, and the plaintiffs are entitled to succeed.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Botterell, Roche*, and *Temperley*, West Hartlepool.

Solicitors for the defendant, *W. W. Wynne* and *Sons*, for *H. Meredith Hardy*, Middlesbrough.

Wednesday, Dec. 9, 1914.

(Before Bailhache, J.)

H. G. Harper and Co. *v.* John Bland and Co. Limited. (a)

Freight — Assignment — Disbursements — Legal and equitable assignment—Practice at port of Cardiff.

The plaintiffs, H. and Co., carrying on business at Cardiff as ship's brokers and agents, sued the defendants for 317l. 3s. 4d. as freight payable for the carriage of goods from Riga to Cardiff per the steamship C., a German ship, for which the plaintiffs were acting as agents, the defendants being the consignees of a portion of the cargo. The ship arrived at Cardiff on the 20th July 1914. The freight could not be ascertained until the cargo had been measured, and the plaintiffs, following the practice at the port of Cardiff, took from the master of the C. a document in the following terms, which was signed by the master: "Cardiff, 20th July 1914.—Dear Sirs, —I hereby authorise Messrs. H. and Co., Cardiff, to collect the freight due to my steamer the steamship C. on the cargo of timber from Riga on my steamer."

On the strength of that document the plaintiffs made disbursements on behalf of the ship and collected some of the freight, some of which they remitted to Germany, after which a balance was still due to the plaintiffs in respect of disbursements. The plaintiffs gave the defendants due notice of the master's letter, which they relied upon as an assignment.

Held, that the document was not an assignment at all; but if it were it was at most an equitable assignment, and, as the assignees had not been joined, the plaintiffs were not entitled to recover.

Commercial Court.

Action tried by Bailhache, J.

The plaintiffs' claim was for 317*l.* 3*s.* 4*d.* as freight payable for the carriage of goods from Riga to Cardiff on the steamship *Casablanca*.

The facts and arguments are sufficiently stated in the judgment.

Mackinnon, K.C. and *Gordon Smith* for the plaintiffs.

Holman Gregory, K.C., *McCardie*, and *St. J. Field* for the defendants.

Bailhache, J.—In this case Messrs. H. G. Harper and Co., who are ship brokers and ship agents at Cardiff, sue Messrs. Bland and Co. Limited to recover the sum of 317*l.* 3*s.* 4*d.*, being the freight payable by Messrs. Bland as receivers of a parcel of timber on the steamship *Casablanca*, which arrived in Cardiff on or about the 20th July 1914. The cargo was measurement cargo, and the freight could not be ascertained until the cargo was duly measured. As a business arrangement, and to avoid delay, the cargo was delivered to the various consignees, the receivers of the various parcels of cargo on the *Casablanca*, leaving the question of the amount of freight payable to be ascertained and determined after measurement had taken place. Of course, there are many conveniences in doing that, one of them being that the ship was able to get away, and the master was able to get away, and the merchants were able to get their goods at once. Messrs. Harper and Co. had been appointed by the owners of the *Casablanca*, a German company, to act as agents for the *Casablanca* upon her arrival in Cardiff. The practice which was followed in this case was the practice which is apparently very common, if not universal, in Cardiff, and so far as I know, in all other ports in the Kingdom. Where there is an agent appointed by the owners, and where there is any difficulty in immediately ascertaining the freight, and the cargo requires to be either measured or weighed or selected, or something requires to be done to it, and the receivers are persons of good standing, the practice is for the cargo to be delivered to the receivers, a freight account is afterwards made out, and the master, who does not desire to be detained on shore, and who is perhaps going on a foreign voyage, gives an authority to the agent in the particular port in which he happens to be (in this case Cardiff) to collect the freights from the receivers. The agent, being armed with that authority, and because he gets that authority to collect the freight, performs other duties; that is to say, he disburses the ship in his particular port. The master orders the goods that are required for the ship, the stores, and so on, for his outward voyage; he signs the accounts of the various tradesmen, the ship's chandlers, the butchers, bakers, and so on, and they present their accounts with the master's signature to the agent. The agent pays these accounts, relying upon the fact that he will have moneys in hand which he can retain to answer these disbursements. Where the freight is a large sum, and is paid at different times—part at one time and part at another—a very common practice is that the agent, when he receives the first instalment of the freight, and if he thinks that the balance of the freight is likely to be sufficient to cover him for his disbursements, very often at once forwards the first instalment of the freight to the owners, so as not to keep too large a sum in his own hands, and in order that the owners may have the money that belongs to them at the earliest possible moment. In that case, what he does is, he sends the first instalment of the freight on, he waits till he has collected all the accounts, he collects the balance of the freight, and then if there is a balance in his hands, as of course he hopes and expects there will be, and intends that there should be, he sends these accounts to the owners, making out an exact account of all the disbursements he has made on behalf of the ship and on behalf of the master, who by this time is probably far away on his ship, and he remits to the owners the balance that is in his hands after paying these various disbursements. That was the course which Messrs. Harper and Co. intended to pursue in this case. It so happens (I do not know how it came to be so) that they had remitted more freight to the owners of the ship than they were justified on their own behalf in doing, and that left them with more disbursements than there was balance of freight to collect, and even if Messrs. Bland were to pay this sum of 317*l.*, which is the subject-matter of this action, I am satisfied on the evidence that there would still be a balance to recover at some time or another from the owners of the *Casablanca*. The owners of the *Casablanca* are Germans, and alien

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

enemies, and Messrs. Bland say that that is the reason why they do not follow the usual practice and pay on the freight authority which Messrs. Harper had in this case. I am very doubtful whether that is the real reason, on two grounds, firstly, because it is clear that the responsibility of sending this money to Germany would be Messrs. Harper's and not theirs; and, secondly, because they have been for a long time, I have no doubt, perfectly satisfied that if they did pay this freight there would be no money to go to Germany, but there would still be a balance owing to Messrs. Harper. However that may be, they take the point, which they are quite entitled to take, that this particular form of document which Messrs. Harper took is not a legal assignment of the freight, that it is not an equitable assignment, and if it is an equitable assignment Messrs. Harper and Co. are not the right parties to sue upon it. What they say is that in truth and in fact it is a mere authority given by the master to Messrs. Harper and Co. to collect the freight instead of the master doing so himself, and that it is not an assignment, and is not intended to be an assignment, and under those circumstances they say Messrs. Harper are not the right parties to sue.

The document upon which this dispute turns is on these lines. It is dated "Cardiff, 20th July 1914," and it is in these terms: "I hereby authorise Messrs. H. G. Harper and Co., Cardiff, to collect the freight due to my steamer, the *Casablanca*, on the cargo of timber from Riga in my steamer.—Yours faithfully, John Horde." Mr. Horde was the master of the steamer. The document is quite in common form, and it is a form upon which everybody in Cardiff except Messrs. Bland pays as a matter of course. They first of all say that if it is to be treated as an assignment, the master had no authority to make such an assignment. The owners did not take any point of authority at all. They are not in any way objecting to the master having exercised his authority, if he had it, in this particular way. I have come to the conclusion without much hesitation that having regard to the ordinary course of business which is pursued in this trade in Cardiff, and has been pursued in this trade for many years, it must be taken that the master has authority to act in a way so consonant with his owners' interest, which enables him to get away with his ship, to get a further cargo on board, to leave with her, and to leave the duty of collecting the freight to the duly appointed agents in Cardiff; and I have no hesitation in saying that the master undoubtedly has, and I shall assume as a matter of fact that the master in this case undoubtedly had, authority to give this note to the plaintiffs.

The defendants say that the note is not addressed to anybody in particular. That, of course, is quite true. It begins: "I hereby authorise Messrs. Harper and Co. to collect the freight due to my steamer," and it does not begin with the name of any person whatever. Of course, it is quite clear that the note is intended for the various receivers, and I think in this case there were eight of them who were receivers of parcels of cargo in this steamship *Casablanca*, and I do not think the absence of direction to any particular consignee or receiver is of any consequence.

Then it was said that it did not refer to the particular sum which is to be collected, but I do not think there is anything in that either, because it is an authority to collect the freight due on the cargo of timber from Riga "on my steamer." It is quite clear that when that is delivered to a receiver of cargo the freight which is due from him is the freight which is due on his particular parcel, and so it is a sufficiently clear indication what the amount to be recovered is.

But then it is said that it is not an assignment at all, and to that objection I think I must very reluctantly give effect. The truth of the matter is that what it is intended to be is an authority to Messrs. Harper and Co. to collect freight for the owners, which would, under different circumstances, be effected by the master, but which in this trade, carried on in this way, is practically universally collected by the agent. In my judgment, what this document really does is to substitute the plaintiffs, as the agents for the owners, to collect this freight for the owners instead of the master, who under different circumstances might collect it himself. I do not think, therefore, that it is intended to be an assignment, either legal or equitable. If it is intended to be one or the other I think it must certainly be intended to be an equitable assignment, and if it is an equitable assignment there is the serious difficulty in Messrs. Harper's way that they have not joined the owners of the steamer as plaintiffs in this action. It is quite true that owing to the fact of the war having broken out since this document was signed, and since Messrs. Harper made these disbursements, that it is an impossibility, but not an impossibility that will last (at least, we hope it will not last) for ever. It is an impossibility that will last during the continuance of the war, and will cease when the war is over. The result of it is not that it is impossible for them to join the owners, but that if they have to join the owners there will be considerable delay in bringing this action.

In the result, I come to the conclusion that if Messrs. Bland take this point, as they do, it is legally a good one, and I feel compelled very reluctantly to give effect to it. My decision is that the document, if an assignment at all, is an equitable assignment, but, in my view, it is really not an assignment either legal or equitable, but is a mere appointment of Messrs. Harper and Co., as the agents, to receive certain moneys instead of the master. Under these circumstances there must be judgment for the defendants with costs.

Solicitors for the plaintiffs, *Williamson, Hill,* and *Co.*, for *Ingledew* and *Sons*, Cardiff.

Solicitors for the defendants, *Trinder, Capron,* and *Co.*

Oct. 29 *and Nov.* 9, 1914.

(Before Bailhache, J.)

Reddall v. Union Castle Mail Steamship Company Limited. (a)

Sale of goods—Purchase of goods for shipment abroad—Transit—Transit in stages—Stoppage in transitu—*Interception of goods by purchaser—Right of unpaid vendors.*

Semble, *where goods are consigned so as to involve a transit by several stages, and are intercepted at the end of one of the stages by the buyer, the transit may be regarded as ended and the right of the seller to stop lost where the goods cannot be set in motion again without further orders from the buyer.*

Commercial Court.

Action tried by Bailhache, J.

The plaintiff's claim was for delivery up of thirty-nine pieces of cotton tick, value 78*l.* 4*s.* 10*d.*, or, alternatively, for damages for their detention and conversion.

The facts and arguments are sufficiently stated in the written judgment.

Roche, K.C. and *Frank Dodd* for the plaintiff.

MacKinnon, K.C. and *Darby* for the defendants.

Bailhache, J. read the following judgment:—This action is in form an action for conversion of a bale of goods, but the real question is one of the right of the sellers of the goods to stop *in transitu*. The plaintiff is a trustee under a deed of assignment, dated the 24th April 1913, to one F. T. Snow, trading as Trew and Snow, the buyers of the goods. The goods were in the defendants' hands on the 26th April 1913, when the defendants, at the request of Messrs. Rutherford, of Glasgow, the unpaid sellers, delivered the goods to them in compliance with the alleged right of stoppage *in transitu*.

The plaintiff asserts that the sellers' right to stop *in transitu* had ceased, and that the delivery of the goods to them was wrongful, and this is the question to be decided. The facts are that the buyers were buyers in England for a South African merchant named Ebrahaim, of Johannesburg, and dealt with the sellers as principals. The formal order for the goods was given on the 10th March 1913. The sellers were not informed by the buyers of the name of the South African merchant. They knew who he was from other sources of information. The sellers were informed by the formal order referred to that the goods were for shipment for South Africa.

On the 13th March the buyers sent shipping instructions to the sellers directing them to "forward the goods by the quickest route to the defendants' steamship, *Armadale Castle*, at the docks, Southampton, forwarding the enclosed shipping note with your consignment note."

Accompanying these instructions was a note on the defendants' own printed form, addressed to the London and South-Western Railway Company, requesting them to receive the goods for shipment per Union-Castle Line. Both these documents gave the marks to be put upon the bale, the description of the goods as one case, and a case piece goods, respectively, and the destination Algoa Bay.

The goods were packed by the sellers in Manchester by Lloyd's Packing Warehouse Company Limited, to whom the sellers on the 15th March sent shipping instructions embodying the instructions they had themselves received, and I gather also the note of the London and South-Western Railway. In pursuance of these instructions the packers handed the goods to the Great Northern Railway, who in turn passed them on to the London and South-Western Railway, who delivered them with other goods of the buyers to the defendants alongside the *Armadale Castle*, which was then loading in the Southampton Docks.

The buyers on the 17th March sent shipment instructions to the defendants giving the marks, destination Algoa Bay, and description of the goods. The column for name of consignee with forwarding agent at the port of loading was not filled in, but the shipment instructions asked for two bills of lading to order.

On the same day the buyers wrote to defendants asking them to forward documents at their earliest convenience, and again on the same date, in anticipation of insolvency, wrote to the defendants to stop all their shipments per *Armadale Castle*, promising further instructions later.

The shipping instructions and those letters were received by the defendants by the same post on the 18th March. They wired to the buyers: "Referring to contradictory letters yesterday please wire definite instructions. Some packages already shipped." Afterwards on the same day they wrote the buyers that they were holding all the packages now on hand until they heard from the buyers. On the same day, the 18th March, the sellers sent the invoice to the buyers for the price of the goods, with a note at the end "forwarded to Southampton Docks, care of Union-Castle Line for shipment per steamship *Armadale Castle* on account of Trew and Snow, London."

If the goods had not been stopped by the buyers they would have been shipped and carried to Algoa Bay, as in effect these packages which had been loaded before the morning of the 18th March were carried. This bale remained in the custody of the defendants, who charged the buyer with warehouse rent for it, until it was handed to the sellers under their claim to stop *in transitu* as already stated.

I think, on the facts, the transit was to Algoa Bay. The cases upon stoppage *in transitu* are very numerous, and, where the transit is made in stages, difficult to reconcile. I think, however, it is true to say that where goods are delivered by the seller or his agent to a carrier at each successive stage of the transit from the hands of one carrier to another without the intervention of the forwarding agent to the destination indicated by the buyer to the seller, the transit continues until the destination is reached.

It makes no difference in such a case whether one intermediate carrier receives his instructions direct from the buyer or from the seller, provided that those instructions are given to facilitate the transit of the goods upon a journey originally intended and communicated to the buyer.

The case in its facts most like this case is *Kemp* v. *Ismay and Co.* (14 Com. Cas. 202). This does not dispose of the case, because the goods were intercepted at Southampton and the journey to Algoa Bay was stopped. The buyers not

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

having contracted with the sellers that the goods should go to Algoa Bay were within their rights in doing this: (see *Whitehead* v. *Anderson*, 9 M. & W. 518).

The defendants, thereafter, held the goods at rent at the buyers' disposal and could not have sent them forward to Algoa Bay or to any other destination without fresh instructions from the buyers. I think, therefore, that although the original transit was to Algoa Bay, that transit had been ended at Southampton, and that under the circumstances the intended stoppage *in transitu* was too late, and the defendants were wrong in delivering the goods to the sellers. When an original *transitus* is intercepted by the buyer I think the test is whether the goods will be set in motion again without further orders from the buyers. If not, the transit is ended and the right to stop lost.

There will be judgment therefore for the plaintiff in the case for 78*l.* 4*s.* 10*d.*

Solicitors for the plaintiff, *Tatham* and *Nash*.
Solicitors for the defendants, *Parker, Garrett*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

March 15 *and* 22, 1915.

(Before Sir S. T. EVANS, President.)

THE PANARIELLOS. (*a*)

Trading with enemy—Goods of ally—Consignment to enemy—Contract of sale at date prior to outbreak of war—Neutral vessel—Dispatch from neutral port—Date of departure after the outbreak of war—Liability to seizure and condemnation—General principles to be applied—Obligations as to trading binding Confederate States.

When war breaks out between States the following rules apply, according to international law, to trading: First, all commercial intercourse between citizens of the belligerents ipso facto *becomes illegal, unless it is expressly allowed or licensed by the head of the State. Secondly, where a belligerent State has allies, the citizens of all the allied States are under the same obligations to each of the allied States as its own subjects would be to a single belligerent State as regards commercial intercourse with the enemy. Thirdly, where such illegal intercourse is proved between allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts. Fourthly, when such intercourse in fact takes place, the property of the persons engaged in it is confiscable, whether they were acting honestly and with* bona fides *or not.*

Prior to the outbreak of war between Great Britain and her allies and Germany and Austria, a French company contracted to sell certain goods to a German firm. The goods were shipped from a neutral State in a neutral vessel. War broke out whilst the ship was being loaded. She afterwards sailed with the goods on board for Antwerp and Newcastle. The French company later on directed her to Swansea. From certain correspondence it appeared that attempts were made by the English representative of the French company to deliver the cargo to the German company if they accepted delivery in England. The goods were seized as prize at Swansea, and later sold. It was admitted that at the time of seizure the property in the goods was still in the French company.

Held, that although the French company had acted honestly and bonâ fide *in the transaction, what they had done constituted trading with the enemy after the outbreak of war, and as they were citizens of a State in alliance with Great Britain the goods were confiscable under the above-named principles of international law in the same manner as those of a British citizen would have been under similar circumstances.*

THIS was a case in which the Crown claimed the condemnation of the proceeds of sale of 1020 tons of silver lead shipped by the Compagnie Française des Mines de Laurium, a French company, in the steamship *Panariellos*, a Greek vessel, and consigned to Beer, Sondheimer, and Co., a German firm, carrying on business at Frankfort.

The silver ore was sold by the Laurium Company in July 1914, in pursuance of a contract dated the 9th May 1914, to the German firm of Beer, Sondheimer, and Co, f.o.b. Ergasteria, in Greece. At the request of the purchasers the vendors chartered the *Panariellos*, under a charter-party dated the 10th July 1914, for a voyage from Ergasteria to Antwerp and Newcastle. The loading of the silver ore began on the 29th July, and the ship sailed from Greece on the 11th Aug., the war between Great Britain and the German Empire having in the meantime broken out—namely, on the 4th Aug. The *Panariellos* put in at Swansea, where the cargo was seized and afterwards sold. The sale realised 15,507*l.*, and the money was paid into court. A claim originally put forward by the German firm was withdrawn, and it was agreed that the property in the goods at the time of seizure was in the Laurium Company. Evidence was given by the managing director of the Laurium Company that an effort was made to stop the sailing of the ship from Greece, and that, when that was impossible, her voyage was diverted from Antwerp to Swansea. After an interview with the London representative of the German firm, which came to nothing, as he had the bills of lading still in his possession, he sold the silver ore to a firm in London, who in turn resold the same to a firm in Newcastle. Meanwhile, however, the Procurator-General had sold the cargo after its seizure to the same firm at Newcastle.

The *Solicitor-General* (Sir S. O. Buckmaster, K.C.) and *G. W. Ricketts* for the Crown.—The facts of the case made it quite clear that there had been trading with the enemy by the Laurium Company. The company should never have allowed the ship to sail from Greece. A contract had been entered into with the enemy, and it was quite enough for the purposes of condemnation of the goods that there was trading with the enemy at the inception of the voyage. The present case went beyond that. There was a clear case of trading until the time of the seizure at Swansea, for negotiations had been going on

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

with the London representative of the German firm. As this was certainly trading with the enemy, the goods, or the proceeds of their sale, were liable to condemnation.

Butler Aspinall, K.C. and *R. A. Wright* for the claimants, the Laurium Company.—There should be no condemnation. The goods were in a neutral ship, and were consigned from a neutral port by an ally for sale in Newcastle. The company had acted with perfect propriety throughout. Whatever might be said as to trading with the enemy at the time of the commencement of the voyage, it was impossible under the circumstances to say that the trading had continued, or that there was such trading at the time of the seizure. They cited

The Juffrow Maria Schroeder, Roscoe's English Prize Cases, vol. 1, 279; 3 Ch. Rob. 147;
The Abby, Roscoe's English Prize Cases, vol 1, 464; 5 Ch. Rob. 251.

W. N. Raeburn held a watching brief on behalf of the London house of Beer, Sondheimer, and Co.

All the facts of the case are sufficiently set out in the judgment.

Cur. adv. vult.

March 22.—The PRESIDENT.—In these proceedings the Procurator-General, on behalf of the Crown, asks for the condemnation as prize of a cargo of 1020 tons of silver lead, which was shipped by allied citizens in a neutral vessel. The vessel was a Greek vessel, the steamship *Panariellos*. The shippers, and the owners of the cargo at all material times, were a French company—La Compagnie Française des Mines du Laurium. The cargo was laden upon the vessel at Ergasteria, in Greece. It was originally shipped and intended to be delivered, pursuant to a contract of sale, to a German company, Beer, Sondheimer, and Co., of Frankfort.

The case raises for the first time during the present war the important question of the liability to capture and confiscation of property of citizens of an ally, who are alleged to have had commercial intercourse with, or to have been trading with, the enemy. Therefore, before I deal with the facts, as the question affects this country and its allies and their respective subjects or citizens in the present complicated hostilities, it seems desirable in the public interest to state the general principles which are applicable to such cases according to the law of nations. The following general propositions can, I think, be established: First, when war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State. Where the intercourse is of a commercial nature, it is usually denominated "trading with the enemy." This proposition is true also, I think, in all essentials with regard to intercourse which cannot fitly be described as commercial. Secondly, on the outbreak of war in which a belligerent has allies, the citizens of all allied States are under the same obligations to each of the allied States as its own subjects would be to a single belligerent State, with relation to intercourse with the enemy. Thirdly, where such illegal intercourse is proved between allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts. Fourthly, when such intercourse in fact takes place, the property of the persons engaged in it is confiscable, whether they were acting honestly and with *bona fides* or not.

The rule embodied in the proposition first mentioned was authoritatively stated by Lord Stowell in *The Hoop* (Roscoe, vol. 1, 105; 1 Ch. Rob. 196) as follows: "In my opinion, there exists such a general rule in the maritime jurisprudence of this country, by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as a universal principle of law—*Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant*, &c. . . . In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under colour of that, had the means of carrying on any other species of intercourse he might think fit?" And, after an exhaustive review of numerous authorities, he added: "The cases which I have produced prove that the rule has been rigidly enforced; . . . that it has been enforced where strong claim, not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the Crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied States in war had a right to notice and apply mutually to each other's subjects": (*Ibid.*, p. 216).

And Mr. Justice Story, in his well-known Notes on Prize Courts, writes: "It is a fundamental principle of prize law that all trade with the enemy is prohibited to all persons, whether natives, naturalised citizens, or foreigners domiciled in the country during the time of their residence, under the penalty of confiscation. The same penalty is applied to subjects of allies in the war trading with the common enemy": (Pratt's Story, 69).

These statements of the law affecting commercial intercourse and trading with the enemy are a century old. In the meantime commerce, especially international commerce, has advanced and expanded, and occasionally in times of war there have since been special permission and licences given in relaxation of the rule. But the general rule, in the absence of any such licence, has been adhered to as the years have rolled on and commercial enterprises have developed. It may be well to fortify this by one or two more recent authorities, and reference may be made for this purpose to Dana's Wheaton, 1866 edit.

sects. 309-315; and to the 4th edition of M. Calvo's most valuable and careful work, vol. 4, sects. 1953-1955. There is no doubt that the rule exists in all its force and vigour at the present day. In the view I take of the facts of the present case, as will be hereafter stated, there was a commercial intercourse between the claimants and the enemy which amounted to a "trading with the enemy." But, lest the higher and final tribunal might think otherwise and adopt the argument for the claimants that there was no actual "trading with" the enemy, I will deal further with the more general and fundamental conception of the illegality of intercourse with the enemy, apart from the element of commerce and falling short of the act of trading.

In *The Cosmopolite* (Roscoe, vol. 1, 326; 4 Ch. Rob. 8) Lord Stowell states the rule in quite general terms thus: "It is perfectly well known that by war all communication between the subjects of the belligerent countries must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile States but by the special licence of their respective Governments." And in Christopher Robinson's note to the case is cited a passage from the Black Book of the Admiralty (the original of which is the most precious possession entrusted to the President for the time being of this Division) as follows: In the ancient practice of the Court of Admiralty (says the editor) we find it laid down: 'Item, soit enquis de tous ceux qui entrecommunent, vendent, ou achatent, avec aucuns des ennemis de Messieur le Roi *sans licence* especiale du Roi, ou de son Amiral.—Black Book, p. 76.'" No doubt it was with cases of commercial intercourse that Lord Stowell was dealing in *The Hoop* (*ubi sup.*) and *The Cosmopolite* (*ubi sup.*), but it will be remembered that in the former he enforced the reason for the rule by reference to the possible consequences of allowing persons to carry on a commercial intercourse, and under colour of that to give them the means of carrying on any other intercourse they might think fit: (see 1 Ch. Rob., at p. 200). In the United States of America the Supreme Court has given a very wide range to the "intercourse" which is prohibited by the rule we are dealing with. In *The Rapid* (8 Cranch, 156), Johnson, J., in delivering the judgment of the Supreme Court (of which be it noted, Marshall, C.J. and Story, J. were two of the members), pronounced upon this subject as follows: "The universal sense of nations has acknowledged the demoralising effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. It is not necessary to quote the authorities on this subject; they are numerous, explicit, and respectable." And after dealing thus generally with the subject, he proceeded to consider the point urged for the claimant in that case that there was no trading in the eye of the prize law such as would subject the property to capture, because the claimant had only sent a vessel to fetch away his own property acquired before the war from a small island belonging to the enemy, where they had been deposited before the war. He answered this point thus: "The force of the argument on this point depends upon the terms made use of. If by *trading*, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation of contract has therefore no necessary connection with the offence. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument."

On the same day as this judgment was pronounced (the 7th March 1814), Story, J. delivered the judgment of the Supreme Court in another case, *The Julia* (8 Cranch, 181)'; and he expressly adopted the decision and the reasons and principles of the judge of the Circuit Court.

In various cases intercourse which could not be properly described as commercial or which could not answer the description of "trading" has been declared illegal, and it would not be difficult to enumerate instances of such intercourse in cases of absolute gifts of property to enemy subjects of a comforting, useful, or beneficial character. It remains to note a rule of a correlative nature that whatever intercourse, commercial, trading, or otherwise, is prohibited, the same obligations are laid upon the citizens of an ally as upon the subject of a single belligerent State, and the same penalties of confiscation fall upon allied citizens as upon such subjects on non-observance of the obligations. Statements to this effect are found in the dictum from the judgment in *The Hoop* (*ubi sup.*) and in the passage from Pratt's Story, which have already been cited. But in *The Neptunus* (Roscoe, vol. 1, 595; 6 Ch. Rob. 403) the doctrines as to the position of the allies were material to the decision. Lord Stowell declares them in the following part of his judgment: "If one State only is at war, no injury is committed to any other State (*i.e.*, by allowing particular relaxations). It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express, contract, that one State shall not do anything to defeat the general object. If one State admits its subjects to carry on an interrupted trade with the enemy the consequences may be that it will supply that aid and comfort to the enemy. . . . It should seem that it is not enough, therefore, to say that the one State has allowed this practice to its own subjects; it should appear to be at least desirable that it could be shown that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate State." Again, this rule is stated in its full force sixty years later in Wheaton (see Dana's Wheaton, 8th edit., 1866, par. 316): "Not only is such intercourse with the enemy, on the part of the subjects of the belligerent State, prohibited and punished with confiscation in the Prize Courts of their own country, but during a conjoint war, no subject of

an ally can trade with the common enemy without being liable to the forfeiture, in the Prize Courts of the ally, of his property engaged in in such trade. This rule is a corollary of the other, and is founded upon the principle that such trade is forbidden to the subjects of the co-belligerent by the municipal law of his own country, by the universal law of nations, and by the express or implied terms of the treaty of alliance subsisting between the allied Powers. And, as the former rule can be relaxed only by the permission of the sovereign power of the State, so this can be relaxed only by the permission of the allied nations, according to their mutual agreement. A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse. Where one State only is at war, this interdiction may be relaxed, as to its own subjects, without injuring any other State; but when allied nations are pursuing a common cause against a common enemy there is an implied, if not an express, contract that neither of the co-belligerent States shall do anything to defeat the common object. If one State allows its subjects to carry on an uninterrupted trade with the enemy, the consequence will be that it will supply aid and comfort to the enemy, which may be injurious to the common cause. It should seem that it is not enough, therefore, to satisfy the Prize Court of one of the allied States to say that the other has allowed this practice to its own subjects; it should also be shown, either that the practice is of such a nature as cannot interfere with the common operations, or that it has the allowance of the other confederate State."

And still more recently, M. Calvo, in the edition already referred to (vol. 4, par. 1956), states the rule and the reasons for it: "Sect. 1956. La même règle s'étend aux sujets alliés. Heffter, il est vrai, n'est pas de cet avis: il trouve la question plus délicate pour les alliés que pour les nationaux, parce qu'à l'égard des premiers, le belligérant semble en quelque sorte assumer une autorité juridictionelle que ne lui appartient que quand elle découle pour lui de stipulations conventionnelles expresses. Mais c'est là, suivant nous, une thèse irrationnelle, puisque l'alliance devant avoir pour conséquence logique de placer les co-belligérants exactement sur la même ligne à l'égard de l'ennemi, il n'est pas admissible que la prohibition imposée à l'un ne s'étend pas le plein droit à l'autre. C'est au surplus ce que Wheaton démontre d'une manière irréfutable, quand il dit que pour être justes et sensées, la règle et les exceptions qui y sont apportées doivent s'appliquer également à tous les deux; qu'en défendant la continuation du commerce avec l'ennemi, le belligérant obéit à la fois aux préceptes du droit civil interne, aux principes généraux du droit des gens et à l'esprit ou à la lettre de l'alliance qu'il a contractée. Il faut enfin remarquer que la situation de l'allié par rapport à l'ennemi commun étant la même que celle de son co-belligérant, on ne saurait en ce qui concerne le commerce, établir de distinction entre ceux qui enterprennent une lutte de concert et se sont par là tacitement obligés à ne rien faire de contraire au but général de l'alliances qui lest unit. Dans une de ses sentences, Sir W. Scott déduit de ce principe qu'il ne suffisait pas pour sa justification que l'état allié put alléguer qu'il avait autorisé la continuation du trafic avec son adversaire, mais qu'il fallait encore que son co-belligérant eût donné son assentiment à la mesure."

So intimate and imperative are the neutral duties of allies bound to each other by sacred and solemn bonds to fight a common foe that I believe the true rule to be that, whatever intercourse with an enemy is prohibited by international law, no relaxations whatever can be allowed by one State in favour of its citizens, which can affect the confederate States, unless expressly sanctioned by the latter.

Finally, it is clear that the rule must be enforced and confiscation decreed whether a person engaging in the prohibited intercourse acts innocently, in good faith, and in pursuance of advice honestly believed to be sound, or of licences or permissions honestly believed to be valid. The authorities for this are numerous. *The Hoop* (*ubi sup.*) in itself would be sufficient. The fact of actual intercourse is the determining factor. Innocence of intention is no answer. If there has been an infraction of the rule, however innocent, the court must apply the consequences by decreeing confiscation. To borrow the quaint language of a judge of the United States Supreme Court: "It is the unenvied province of this court to be directed by the head, and not by the heart. In deciding on principles that must define the rights and duties of the citizen (and it may be added of allied citizens), and direct the future decisions of justice, no latitude is left for the exercise of feeling."

Having stated the principles, it now remains to set out the material facts in the present case to which the principles have to be applied. The claimants—the French company—had had constant dealings with Beer, Sondheimer, and Co., the German company. The Germany company sold to the French company silver and lead ores; and the French company then carried out in Greece a process of reduction which resulted in a product called silver lead, which they contracted to sell to the German company. The contract was before the war. For the purpose of fulfilling the contract, after the silver lead was manufactured, the French company chartered the Greek steamship *Panariellos* to carry the lead to the purchasers. The loading of the silver lead upon the steamship began before the war. It was continued for about seven days after the war.

The vessel began her voyage on the 11th Aug., with the cargo on board, which was intended to be delivered pursuant to the contract with the German company. While the loading was proceeding, the following letter was sent, on the 4th Aug. 1914, by the agents of the French company at Ergasteria to the French company's head office in Paris:

> Having received from Frankfort the following telegram: "Send Bill of Lading Ship *Panariellos* 1000 tons Silver lead direct Beer Sondheimer et Co. London 120 Fenchurch Street and transmit by your Paris Office by Telegram these instructions. Telegraphic communications with Paris stopped. Acknowledge receipt.—'BEERSONDHEIMER,' we wired you this morning:—'Telegraphic communication between Frankfort and Paris stopped; Beersondheimer beg us to ask you send Bills of Lading for 1000 lead *Panariellos* direct 120 Fenchurch London.'"

Beer, Sondheimer, and Co., of 120, Fenchurch-street, London, was a mere agency for Beer, Sondheimer, and Co., of Frankfort. The work at

the agency was carried on by a German subject, who was in Germany at the outbreak of the war, with the aid of a clerk who was an Austrian subject.

On the 12th Aug. 1914, after the voyage commenced, the French company sent the following telegram to the London agency of the buyers:

Panariellos started eleventh with 1020 tons lead. Suppose you have defrayed insurance.—LAURIUM.

It may be stated that the contract was f.o.b. Ergasteria. On the 21st Aug. 1914 the following telegrams were also exchanged between the parties in London and Paris:

Telegram de MM. Beer, Sondheimer et Co., London Agency. London, Aug. 21, 1914, 11 o'clock. To Laurium Company: "Received telegram regarding steamer *Panariellos*. Where are bills of lading? Telegraph Beer, Sondheimer Company."

Aug. 21, 1914.—Telegram de la Compagnie Française des Mines du Laurium à Beer, Sondheimer Company, 120, Fenchurch-street, London: "Not yet received bill of lading *Panariellos*.—MINES LAURIUM."

And on the same day the two following letters were written, one from the claimants' post office to the London agency of the German buyers, and the other from the latter to the former:

Paris, the 21st Aug. 1914.—Gentlemen, *Panariellos*.—We beg to acknowlege receipt of your to-day's telegram as follows: "Received telegram regarding steamer *Panariellos*. Where are bills of lading? Telegraph Beer, Sondheimer Company"; and to confirm that which we sent you in answer as follows: "Not yet received bill of lading *Panariellos*." The steamer *Panariellos* left, indeed, the port of Ergasteria on the 11th of this month, bound to Antwerp and Newcastle, and we have not yet the documents in our possession. But we will send you these as soon as we get them, according to the instructions received from your firm of Frankfort.—We remain, Gentlemen, yours faithfully, S. Ingenieur Secretaire General. (Signed) P. ALBRAND.

P.S.—Don't forget that in the present circumstances letters and packets from Greece are much delayed in reaching us.

Beer, Sondheimer, and Co., London Agency, 120, Fenchurch-street, London, the 21st Aug. 1914.—To Monsieur le Baron J. de Catalin, E.V.—Dear Sir,—I hear by MM. Leopold Walford et Co. that you will be in London to-morrow. I should be very glad to see you about the silver lead loaded on the steamer *Panariellos*. I will take the liberty of calling you on the telephone to-morrow at about 10.30 in the morning in order to make an appointment with you.—I remain, dear Sir, yours faithfully, for Beer, Sondheimer, and Co., London Agency. Signed (unreadable).

On the next day Baron de Catelin, the managing director of the French company, had an interview in London with Mr. Weissberger, the Austrian subject, who was then in charge of the London agency of the German company. In a statement subsequently sent to the Procurator-General by the Baron he said that at this interview "it had been verbally agreed that if the lot of lead was delivered to the said firm a complete settlement of accounts would follow." The Baron seems to have thought that up to that time the London agency of Beer, Sondheimer, and Co. had a right to continue to carry on their business on behalf of the German company. On the following day, the 23rd Aug. the offices of Beer, Sondheimer, and Co. in London were seized and closed. On the 25th Aug. 1914 a letter was sent from the Paris office of the claimants, apparently without any knowledge of the interview of the 22nd Aug., that already reported, or of the closing of the agency office. The Baron said that it was written without any authority from him or the company, but in these proceedings I have no means of testing that statement, and must assume that it was written in the ordinary course of business, especially as no steps were taken to put an end to any further communications. The following is a translation of the letter:

Gentlemen,—*Panariellos*.—Confirming our letter St. No. 5863 of the 21st of this month, we beg to send you annexed: 1. A bill of lading indorsed in blank 10,476 pigs or 510 tons of silver lead loaded in holds 1 and 3. 2. A bill of lading indorsed in blank 10,493 pigs or 510 tons silver lead, loaded in holds 2 and 4. We beg you please to acknowledge the receipt of these documents, and we remain, Gentlemen, yours faithfully, l'Ingenieur Secretaire General—(Signed) P. ALBRAND.

The vessel arrived in the Downs about the 28th Aug., and the master refused to proceed to Antwerp, where part of the cargo (viz, some zinc ore) was to have been delivered, and part of it was destined for Germany or for German firms.

The vessel was afterwards sent to Swansea, where there was a market for the zinc ore. The zinc ore, which was stored above the silver lead, was sold. The vessel arrived at Swansea on the 7th Sept. 1914, and on that day the silver lead was formally seized pending further inquiries, and was finally seized as prize subject to confiscation on the 25th Sept. 1914. Meantime, on the 31st Aug., a letter was written by the claimants to their London brokers, of which the following is a translation:—

My dear Walford,—Enclosed I send one bill of lading of the *Panariellos* indorsed in blank, so you have every right to take delivery of the cargo. I remind you that the 800 tons of calamine No. 1 and the 300 tons of calamine No. 3 are sold through Dixon at Swansea. So far as concerns the lead, you decide with Dixon and Heberlein the best course to adopt with regard to this lot. If Beer, Sondheimer, and Co. or the English Government wish to use the parcel bill of lading which they have in their hands you should explain that this bill of lading was sent them in current account, but that in reality almost the whole, say, four-fifths, belong to us. In fact, I have no time to give you details of this current account, but the balance in favour of Beer, Sondheimer, and Co., without reckoning the *Panariellos*, comes to 103,648f. 35c. As the value of the 1000 tons of lead in the *Panariellos* is about 500,000f., the difference should come to us, say, in round figures, 400,000f., and the Government should only be able to seize the balance. As we have another specimen of the general bill of lading, and as this letter might possibly not reach you, I am sending one of our employees to bring it to you and also a copy of this letter. The money coming over from the calamine or from the lead should be paid to the account of our company at the London County and Westminster Bank Limited. Relying on your efforts, and thanking you in advance for all that you will do for us, I remain, dear Sir, yours, &c., (Sd.) J. DE CATELIN.

The Baron de Catelin disavowed with emphasis any intention in these transactions to do anything which would be helpful to the enemy or prejudicial to this country. I accepted willingly his disavowal. He probably thought that he could properly deliver the cargo of silver lead to his customers, Beer, Sondheimer, and Co., if they accepted delivery at Newcastle or elsewhere in England. After these proceedings were instituted

Beer, Sondheimer, and Co., London Agency, caused an appearance to be entered, and put in a claim as the owners of the goods. This claim was subsequently abandoned by an express notice of withdrawal. The above facts are amply sufficient to show that in respect of the cargo of 1020 tons of silver lead there was commercial intercourse and a trading after the war between the present claimants and citizens of the enemy. The cargo was sold by arrangement between the marshal and the claimants, and the proceeds, amounting to about 16,000*l.*, are now in court. Applying the principles deduced to the facts proved, I have no alternative but to declare that the cargo was confiscable, and to decree the condemnation of the proceeds as lawful prize.

Leave to appeal.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Rehder* and *Higgs.*

Solicitors for the London house of Beer. Sondheimer, and Co., *W. A. Crump* and *Son.*

March 29, *April* 13, *and May* 3, 1915.

(Before Sir S. T EVANS, President.)

THE POONA. (*a*)

British ship—Cargo—Goods the property of a company domiciled in England—Enemy shareholders and directors—Management of company during war—Status of company—Principles to be applied when cargo claimed as prize.

Certain goods were sent from England to Australia on sale or return before the outbreak of war between Great Britain and Germany, and were sent back from Australia to England after the commencement of hostilities. They were seized in the Port of London as prize. The Crown claimed them as enemy goods. The sellers were a company incorporated in this country in May 1912. *All the directors of the company were aliens residing in Germany, and the whole of the shareholders were either alien enemies or persons residing in Germany. On the day before war broke out the secretary of the company, who was a German, left England, having purported to appoint one of the employees as manager.*

Held, that the goods were at the time of seizure the property of an English company, and that although the company was so constituted that all its directors were enemy subjects resident in Germany and all its shareholders were either enemy subjects or aliens resident in Germany, the goods were not enemy property, and therefore not subject to condemnation as prize. The goods were released to the manager of the English company with a direction that he should not deliver them or their proceeds to any enemy shareholders or use them or apply their proceeds for the benefit of any such shareholders during the war.

THE *Poona* was a British ship which carried amongst its cargo a certain number of cases of electric fans. These fans were sent out on board the ship to Australia in May 1914, and as they were not sold they were brought back again in Aug. 1914 and were seized in the port of London on behalf of the Crown. It was proved in evidence that the goods were the property of Isaria Limited, a company established in this country, but composed of directors and shareholders who were either alien enemies or resident in Germany. The Crown claimed the cargo as goods of alien enemies. The claimants, Isaria Limited, denied that the goods were liable to seizure or confiscation. on the ground that they were the property of an English company, and that such company was distinct as an entity from the persons who composed it.

By sect. 3 of Trading with the Enemy Proclamation No. 2, dated the 9th Sept. 1914, it is provided:

> The expression "enemy" in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country.

J. B. Aspinall for the Crown.

Elkin for the claimants.

The facts and the arguments are sufficiently set out in the judgment.

Cur. adv. vult.

May 3.—The PRESIDENT.—The claimants to the goods seized and claimed in these proceedings (which consisted of five cases of electric fans) are a company named Isaria Limited, which was incorporated in May 1912, and whose registered office at the time of the outbreak of war was No. 208, Tower Bridge road, in the county of London. The company carried on business in this country and abroad. The goods (with others) had been sent out to Australia for sale, and were returned to the company in Aug. 1914. They were seized in the port of London as prize on the 17th Oct. 1914. The Crown claims them as enemy goods. After an investigation of the facts I am satisfied that the goods at the time of the seizure were the property of the company.

The question, therefore, which remains to be decided is whether, having regard to the constitution of the company, the goods were enemy property subject to seizure. At all material times the number of shares in Isaria Limited issued was 1250 shares of 1*l.* each. Of these 1244 were held by Isaria Zahlerwerke, of Munich, a German manufacturing company; one share was held by each of the four directors of Isaria Limited, who were German subjects and resident in Germany; one other share was held by one Schoenmann, the secretary of the company, also a German subject; the remaining share was held by one Vallée who was said to have been a French subject, but who for some time before the war had resided at Munich, and had been employed by the German company, the Isaria Zahlerwerke. Schoenmann left this country on the 3rd Aug. last for Germany, having purported to appoint one of the company's employees, Mr. Frank Morton, to be manager. The date of his departure was one day before the outbreak of war between Great Britain and Germany. Mr. Morton represented the company in these proceedings. After the outbreak of war he was informed by the Board of Trade that they were advised that there was no objection to the sale from stock of the company of goods imported from Germany before the war, and that no licence was required for that purpose.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Later on, in Nov. 1914, he was informed by the Comptroller of the Companies Department of the Board of Trade that as Isaria Limited was a company incorporated in this country there was nothing (having regard to sect. 3 of the Trading with the Enemy Proclamation No. 2, dated the 9th Sept.) to prevent trading with the company, or the payment to it of money which might be owing to it. So Mr. Morton appears to have carried on the business of the company; and the books and papers of the business have been inspected when required by the official accountant appointed by the Board of Trade.

For the claimants it was contended that the goods belonged to an English company, not to alien enemies, and were not subject to seizure or confiscation. On the other hand, it was argued for the Crown that, as all the directors were enemy subjects and resident in Germany, and all the shareholders were also either enemy subjects or aliens resident in Germany, the goods were in reality the property of alien enemies, and ought to be condemned as such.

I was referred to my decision in this court in *The Roumanian* (*ante*, p. 8; 112 L. T. Rep. 464; (1915) P. 26), and, of course, to the judgments pronounced later by the Court of Appeal in *Continental Tyre, &c., Company Limited* v. *Daimler Company Limited* and *Same* v. *Thomas Tilling Limited* (112 L. T. Rep. 324; (1915) 1 K. B. 893). I will only observe, as to *The Roumanian* (*ubi sup.*), that it does not necessarily govern this case. The facts there were different in important and material respects. Moreover, I think that it will be found that in the course of the arguments in *The Roumanian* (*ubi sup.*) counsel for the claimants expressly admitted that the Europäische Petroleum-Union Gesellschaft mit beschrankter Haftung was a German company; and the case was dealt with accordingly. The judgments in the Court of Appeal in the *Continental Tyre Company* cases (*ubi sup.*), however, bear directly upon the point arising in the present case. What, therefore, ought I to do in this court in view of those decisions?

In matters relating to prize, the Court of Appeal does not bind this court, for the reason that no appeal lies to the Court of Appeal from judgments given in the Prize Court. The only appellate court in such cases is the Judicial Committee of the Privy Council. If I was of opinion that different principles applied in the present proceedings in a Court of Prize, or if I held a strong opinion upon the legal aspects, even if the same principles were applicable, I conceive that it would be my duty to give effect to such opinion, even though I differed from that of the Court of Appeal. But I do not think in the present case that different principles ought to be applied.

The matter in controversy appears to me to be one which should be regarded from the point of view of municipal law, and no question of an overruling principle of international law arises. The claimants come forward as a company incorporated in accordance with the law of this country. The claim is not made by the individual shareholders—subjects of a foreign country, enemy or otherwise. The questions turn upon the status of the company in this kingdom. Accordingly, nothing in this case depends upon the bearing of the law of nations upon our municipal law.

In these circumstances, I think that it is more respectful to the Court of Appeal to act in accordance with their judgment, however much I might feel inclined to sympathise with the dissentient views of Buckley, L.J.

In the special facts of this case and of the *Continental Tyre Company* cases (*ubi sup.*), a decision in accordance with Buckley, L.J.'s judgment might be easy; but it is fairly obvious that with even a slight variation of facts as to the holding of the shares the adoption of a definite general principle as a foundation for his judgment and its application would give rise to great difficulties. Without dealing with it any further, I may observe that even in Buckley, L.J.'s dissenting judgment this passage is to be found: "The corporation, if it be a British corporation, stands in the same position for most purposes as a British subject. For instance, as regards rights of ownership of property and the right to protection and assistance by the law. But while it stands for most purposes in the position of a British subject, it cannot, I think, be correctly described as a British subject."

The question before me deals with "rights of ownership." For the reasons which I have stated, I am content to accept respectfully the law as laid down by the Court of Appeal, and must leave the ultimate decision to a higher tribunal. If the judgment of the majority of the Court of Appeal is unsound, it must be so pronounced by the House of Lords on appeal from them, or by the Privy Council on appeal from this court. If it is affirmed as good law, but is considered to require alteration as a matter of just policy, then the Legislature must act.

I desire to add one word by way of reservation. The case of the ownership of vessels registered in this country is so special, having regard to our merchant shipping legislation, that I venture to repeat what I said in *The Tommi* and *The Rothersand* (*ante*, p. 5; 112 L. T. Rep 257; (1914) P. 251), and to reserve expressly all questions which might arise if it was contended that a British vessel was the property of a company constituted like that of Isaria Limited.

The judgment of the court is that the goods seized are not enemy property, and I order their release. On their release they will be delivered over to Mr. Morton, the present manager of Isaria Limited, and he, of course, will deal with them as belonging to the English company; but he will not be able to deliver them or their proceeds over to the alien enemy shareholders of the company, or to use them or to apply their proceeds for the benefit of any such shareholders during the existence of the war.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Russell* and *Arnholz.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 11, 14, 15, 1914, *and Feb.* 5, 1915.

(Before Lord Cozens-Hardy, M.R., Kennedy, L.J., and Warrington, J.)

Polurrian Steamship Company *v.* Young. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Policy — Insurance against risk of seizure and detention—Actual total loss —Constructive total loss—Particular average loss—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 57 (1), 60.

By sect. 60 *of the Marine Insurance Act* 1906, *the test of "unlikelihood of recovery" has been substituted for "uncertainty of recovery" in cases relating to constructive total loss.*

A neutral ship belonging to the plaintiffs was chartered to carry a cargo of coal from the United Kingdom to Constantinople. She was insured with the defendant against capture, seizure, and detention. While on the voyage war broke out between Greece and Turkey, and the ship was stopped by the Greeks off Tenedos, who took her to Lemnos and removed the cargo. The plaintiffs gave the defendant notice of abandonment, and six weeks after the Greeks released the ship. An action was brought by the plaintiffs on the policy for an actual or a constructive total loss, or, alternatively, damages for a particular average loss.

Held, that, while on the date of the commencement of the action the recovery of the ship by her owners was quite uncertain, it could not be shown that the balance of probabilities had been proved so clearly against her recovery that it could be said that there was "unlikelihood of recovery" within the meaning of the Marine Insurance Act 1906; *and that this being so the plaintiffs had failed to make out their case.*

Decision of Pickford, J. (12 *Asp. Mar. Law Cas.* 449; 109 *L. T. Rep.* 901) *affirmed.*

Appeal by the plaintiffs from the decision of Pickford, J.

The facts of the case are fully stated in the judgment of the Court of Appeal.

Roche, K.C. (with him *Alexander Neilson*), for the appellants, referred to

Andersen v. *Marten*, 99 L. T. Rep. 254; (1908) A. C. 334;
Goss v. *Withers*, 2 Burr. 683;
Hamilton v. *Mendes*, 2 Burr. 1198;
Cologan v. *London Assurance Company*, 5 M. & S. 447;
Dean v. *Hornby*, 3 Ell. & Bl. 180;
Lozano v. *Janson* 3 Ell. & Ell. 160;
Shepherd v. *Henderson*, 7 App. Cas. 49;
Cory v. *Burr*, 49 L. T. Rep. 78; 8 App. Cas. 393, at p. 398;
Ruys v. *Royal Exchange Assurance Company*, 8 Asp. Mar. Law Cas. 294; 77 L. T. Rep. 23; (1897) 2 Q. B. 135;
Sailing Ship Blairmore Company Limited v. *Macredie*, 8 Asp. Mar. Law Cas. 429; 79 L. T. Rep. 217; (1898) A. C. 593;
Bank of England v. *Vagliano Brothers*, 64 L. T. Rep. 353; (1891) A. C. 107;
Robinson Gold Mining Company Limited v. *Alliance Marine and General Assurance Company Limited*, 91 L. T. Rep. 202; (1904) A. C. 359;
Marine Insurance Act 1906, ss. 27, 91 (2);
Chalmers' Digest of Marine Insurance, 2nd edit., pp. 61, 80.
Phillips on Marine Insurance, 5th edit., vol. 2, ss. 1530, 1620, 1621.

[Kennedy, L.J. referred to *Rankin* v. *Potter* (29 L. T. Rep. 142; L. Rep. 6 E. & I. App. 83), *M'Iver* v. *Henderson* (4 M. & L. 576, at p. 582), and Phillips on Marine Insurance, 5th edit., vol. 2, p. 380, s. 1704.]

Maurice Hill, K.C. and *R. A. Wright*, for the respondent, referred to

Bainbridge v. *Neilson*, 10 East, 329;
Mansell and Co. v. *Hoade*, 20 Times L. Rep. 150;
Roux v. *Salvador*, 3 Bing. 266;
Cossman v. *West*, 6 Asp. Mar. Law Cas. 233; 58 L. T. Rep. 122; 13 App. Cas. 160, at p. 174;
Hall v. *Hayman*, 17 Com. Cas. 81;
Rodocanachi v. *Elliott*, 28 L. T. Rep. 840; L. Rep. 8 C. P. 649, on appeal 31 L. T. Rep. 239; L. Rep. 9 C. P. 518;
Rotch v. *Edie*, 6 Term. Rep. 413;
Barker v. *Blakes*, 9 East. 283;
Marine Insurance Act 1906, s. 60 (2);
Arnould on the Law of Marine Insurance, 8th edit. ss. 829, 832, 1095, 1096, 1104;
Phillips on Marine Insurance, 5th edit., vol. 2, ss. 1108, 1109, 1523, 1525;
Marshall on Marine Insurance, 5th edit., part 1, Ch. 12, s. 3, p. 394.

[Kennedy, L.J. referred to *De Mattos* v. *Saunders* (27 L. T. Rep. 120; L. Rep. 7 C. P. 570), *Stringer* v. *English and Scottish Marine Insurance Company* (3 Mar. Law Cas. O. S. 440; 22 L. T. Rep. 802; L. Rep. 5 Q. B. 599.]

Roche, K.C., in reply, referred to

Bolton v. *Gladstone*, 5 East, 155, at p. 156;
Powell v. *Hyde*, 5 Ell. & Bl. 607.

Cur. adv. vult.

Feb. 5, 1915.—Lord Cozens-Hardy, M.R.—The judgment which Warrington, J. is about to read is the judgment of Kennedy, L.J. The day before his death he told me that he had finished it, and had ordered two copies to be typed for his colleagues to read. These copies were in his room when he died. Warrington, J. and I have carefully read and considered this judgment. We agree with it, and desire that it should be taken as the judgment of the court. To regularise this procedure we propose that the judgment should be dated the 16th Jan., the day before Kennedy, L.J.'s death.

The following written judgment of the court (Lord Cozens-Hardy, M.R., Kennedy, L.J., and Warrington, J.) was accordingly then read by

Warrington, J.—The question for our determination upon the appeal in this case is whether or not on the 26th Oct. 1912, when the plaintiffs, the owners of the steamship *Polurrian*, gave notice of abandonment of that vessel to the defendant, the insurer, and are by agreement to be taken as having issued the writ in this action, the state of things was such as to entitle the plaintiffs to recover upon the policy of insurance

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

as for a constructive total loss. Pickford, J. has dismissed the plaintiffs' claim, and the plaintiffs have appealed to this court against his decision.

The policy of insurance, so far as its contents are material to the matter in dispute, covered the plaintiffs against the risks of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted; and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. The plaintiffs allege, and the defendant denies, that on the 26th Oct. 1912 there was a constructive total loss of the *Polurrian* by one of the perils thus insured against.

It is indisputable that according to the law of England, in deciding upon the validity of the claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date. If there then existed a right to maintain a claim for a constructive total loss by capture, that right would not be affected by a subsequent recovery or restoration of the insured vessel: (see the judgment of Collins, J. in *Ruys* v. *Royal Exchange Assurance Corporation*, 8 Asp. Mar. Law Cas. 294; 77 L. T. Rep. 23; (1897) 2 Q. B. 135), which reviews the history of the law on this point.

In strictness, therefore, in regard to the facts, I might, I think, confine myself for the purpose of this judgment to a statement of them as they stood on the 26th Oct., which, as I have already said, is by agreement to be taken as the date of the issue of the writ in this action, and was also the date of the plaintiffs' notice of abandonment. As, however, the learned judge in the court below has in his judgment included a review of the events which occurred in reference to the *Polurrian* after she had been taken by the Greek naval forces out of the possession of the plaintiffs on the 25th Oct. 1912 until her release seven weeks later on the 8th Dec., and has drawn therefrom, in support of his conclusions, inferences more favourable to the defendants' case than do I venture with all respect to think the evidence warrants, I do not think it would be proper for me, having to consider that judgment, wholly to confine my reference to the facts to their position on the 26th Oct. But that is the material date, and I shall deal with the later period as briefly as possible.

The *Polurrian*, laden with a cargo of Welsh coal and bound for Constantinople, was on the 25th Oct. 1912 off the island of Tenedos. Her master, Mr. Jones, had known of the war between Italy and Turkey, which existed when the *Polurrian* started on her voyage, but had terminated before the 25th Oct. He did not know that Greece was at war with Turkey. Off Tenedos the *Polurrian* was overhauled by Greek warships and taken by them to Mudros Bay, a harbour in the island of Lemnos, in which a portion of the Greek fleet was lying. The master, in the course of his interview with the Greek officer who had come on board the *Polurrian* when she was arrested, told the officer that he did not know of the war; and the order to follow the Greek destroyer to Mudros Bay was given after the officer had communicated by wireless telegraphy with the Greek admiral, with the result that he informed the master of the *Polurrian* "that he had orders to seize us; that he would have to convoy us to Mudros Bay, in the island of Lemnos."

In the evening, after the *Polurrian* had anchored in the spot designated by an officer from the flagship, the master of the *Polurrian* was further interrogated as to his cargo and destination, the ship's papers were examined, and the master was told by the Greek officer (I quote the words textually from the shorthand notes) that "his country intended to confiscate the cargo, but they were not quite sure what they would do with the ship; but in the meantime the ship would be deemed a capture, although he personally did not think it could be maintained." The master, either the same evening or the next day—the telegram is dated the 26th—telegraphed to the plaintiffs: "Arrived Mudros Bay, Lemnos Island, convoyed Greek destroyer. Now awaiting admiral's instructions. All well. Please inform families."

The next day the *Polurrian* was ordered alongside the flagship in order to coal her, and the master of the *Polurrian* had a conversation with the Greek admiral through an interpreter, the flag lieutenant, who spoke, says Mr. Jones, indifferent English, in the course of which the master of the *Polurrian*, according to the account, told the admiral, in answer to questions as to his knowledge of hostilities between Greece and Turkey, that he had no knowledge of them; and the conclusion of the interview, so far as regards the fate of the vessel as distinguished from her cargo, appears in the following question and the witness's answer thereto: "(Q.) Did he tell you at all what would ultimately be done with the ship?—(A.) No. With regard to the ship he said he was not quite sure; it was a doubtful question; but that the question could be settled later on. In the meantime the capture of the vessel would be maintained and they would take the cargo."

This is the master's evidence as to facts in regard to the 25th and 26th Oct., and I see no reason to doubt its substantial accuracy. But one important additional fact has to be added. Although the master of the *Polurrian* no doubt intended in his interview with the Greek Admiral to convey to him through the interpreter his ignorance of the existence of war between Greece and Turkey, it is quite plain that he conveyed in fact a very different impression. It is clear beyond doubt that the admiral understood him to admit that he did know of the war, and that, treating it as a serious admission, the admiral so informed his Government at Athens, and that it was upon this ground that that Government maintained the capture until the 8th Dec.

I say that this is quite clear, because on the 28th Oct. our Foreign Office, whose intervention had been invoked by the plaintiffs and the defendants, telegraphed to the plaintiffs: "H. M. minister at Athens reports Greek Government maintain capture to be lawful. He has demanded reference to prize court," and on the same day Mr. Henderson, the underwriters' agent at Athens, telegraphed to the Salvage Association, acting for the underwriters in London: "*Polurrian*, Government considers prize, alleging captain admitted was aware declaration war. British minister had informed Greek Government vessel must come Piræus and matter decided by prize court here": (see also the letter from Henderson

at Athens to the Salvage Association in London, the 28th Oct.).

I have now stated, and, I hope, accurately stated, the facts as they existed on the material date, the 26th Oct. 1912, the agreed date of the commencement of the present action, and the date on which the plaintiffs, having received from the master of the *Polurrian* at Mudros Bay the telegram which I have already set out, caused notice of abandonment on the ground of loss by capture to be given to the insurer. As it is, I think, for the reason which I have given, proper that I should deal with the subsequent history of the transaction it will be convenient, for the sake of clearness, that I shall now complete the narrative before considering the legal rights of the parties to this litigation as they stood at that date.

A few days after the 26th Oct., and after the commencement of the discharge of the *Polurrian's* cargo into the Greek warships in Mudros Bay, the master had an interview with an officer whom he describes as the admiral's secretary. The master asked him as to the ship, and was told that the question of the ship would be settled by the Government, and that he (the secretary) thought it would have to go to the Piræus. On the 28th Nov., when the discharge was completed, the master of the *Polurrian* was ordered to proceed to the Piræus and there present himself at the general shipping office. He obeyed those orders, sailed to the Piræus, which he reached on the 29th Nov., and was there directed by the captain of the port to await the instructions of the Minister of Marine.

He was informed by the British Minister at Athens that the Greek Admiral stated that he (Captain Jones) had admitted knowledge of the declaration of war before sailing, and that the Greek Government was claiming that the *Polurrian* was a lawful prize; that a prize court was going to be held, and that he (Captain Jones) would have to give evidence. On the 1st Dec. an armed guard was put on board by the Greek authorities, and by orders of the officer in command of the guard the *Polurrian*, with the guard on board, was navigated to the naval arsenal at Salamis, and there remained until her release on the 8th Dec.

Meanwhile, from the 28th Oct. onwards, the underwriters and the owners, without prejudice to their respective contentions as to the validity of the notice of abandonment, had continued vigorously and persistently through the Foreign Office in London and the British Minister at Athens, to press the Greek Government for the release of the *Polurrian*. At one time during the first fortnight of November, it appeared likely that the application would succeed, so far, at any rate, as regards her release after her cargo had been discharged at Lemnos: (see the correspondence of the 1st-14th Nov.). But if the Greek Government ever led our Minister at Athens, as it seems that they did, to suppose that such a course would be adopted, they altered their views on the 15th Nov. The *Polurrian*, after her cargo had been taken out of her, was brought to the Piræus and thence to Salamis, with the intention that her case should be dealt with by a prize court. And on the 4th Dec. Mr. Henderson, who, as I have already said, represented the interest of the underwriters at Athens, telegraphed to the Salvage Association in London: "*Polurrian* must go before the prize court on ground that captain made statement alleged knowing state of war. Court will be formed in about two days. Will cable later asking certain instructions."

There is in the correspondence a letter written from Athens on the 5th Dec. by the same gentleman to the like effect. On the 8th Dec. the Greek Government released the *Polurrian*. It appears from a letter from Messrs. Harris and Dixon Limited to the plaintiffs, dated the 9th Dec., and referring to a communication just received in London from Lloyds' agent at Athens, that the Government did so after submitting the question to the Legal Council of State, "who decided no capture under art. 43 of the Declaration of London." On the 15th Oct. 1913 the Greek Administrative Prize Court rejected the claim put forward on behalf of the owners of the *Polurrian* for indemnity for her seizure and detention of the *Polurrian*, holding that the seizure and detention was justifiable, and holding in substance and effect, that whilst in fact he was, whilst carrying the coal cargo, ignorant of the outbreak of the Greco-Turkish War, the master of the *Polurrian* had used words which might fairly be construed as meaning that he was aware of the war, and "it could well be considered that both the vessel and her cargo were subject to seizure."

On careful consideration of the evidence given by the master of the *Polurrian*, and of the admitted correspondence and admitted documents, I must confess myself with all respect to my brother Pickford unable to concur in the view which, reading his judgment, I understand him to express—viz., that neither the Greek Admiral nor the Greek Government ever entertained any real doubt as to the right of the owners of the *Polurrian* to have the ship restored to them; that the Greek authorities knew quite well that they had no grounds for condemning the ship, and meant only to keep her so long as it was convenient for them to keep her to coal their fleet.

In my view, the evidence shows that the Greek Admiral attached serious importance to the admission which he understood the master of the *Polurrian* to make when examined by him at Lemnos as to his knowledge of the state of war; and so did the Greek Government when he communicated it to them between the 26th and 28th Oct., as shown by the communication to our Foreign Office, which appears in the telegram of the latter from our Foreign Office to the plaintiffs. A few days after the capture, and therefore soon after the discharge of the cargo at Mudros Bay had begun, the master of the *Polurrian* was informed by the Secretary of the Admiral that the question as to the ship would be settled by the Government, and that he thought the ship would go to the Piræus—for the purpose, as I understand the words, of having the question of the right to condemn her as a prize settled by a Prize Court.

In regard to our own Minister at Athens the inference which I draw from the evidence is that he also treated the question of the release of the *Polurrian* as a real question. On the arrival of the *Polurrian* at the Piræus he calls the attention of the master to his alleged admission to the admiral and tells him that he will have to go into

court and give evidence. And indeed it was the British Minister who had from the first insisted that the *Polurrian* ought to come to the Piræus and be dealt with by a Prize Court: "Government considers prize, alleging captain having admitted was aware declaration war. British Minister had informed Greek Government must come Piræus and matter decided by Prize Court here." This is the effect of Henderson's telegram to Salvage Association, 28th Oct. 1912, at p. 43 of Correspondence.

The release of the *Polurrian* on the 8th Dec. was due, no doubt, mainly, to the fact that the evidence of her master, obtained after the arrival of the *Polurrian* at the Piræus, had then been shown to the Greek Government, and that the Government, after consulting the Legal Council of State, decided to accept his denial of knowledge of the war, and his denial of having intended in his interview with the Greek admiral to make any admission to the contrary. As to what the master thought at any time as to the prospect of the *Polurrian* being released, either soon or ultimately, I cannot find in the evidence any satisfactory proof, and I venture to think that the learned judge in the court below was under some misapprehension when he stated in the course of his judgment that the master in his evidence given in court said that practically all the officials that he saw expressed their own personal view that they had no right to touch the ship—that is to say, no right to condemn it—and he certainly did not think that the ship was not going to be restored within a reasonable time. At any rate, I have failed to find such a passage in the shorthand notes of his evidence taken at the trial. It is quité true that in a written statement which he gave to the underwriters' solicitors at Athens, made, as he deposed, "for the benefit of the underwriters in the interest of underwriters" and "against the Greeks," there are words which might have that effect.

The fair result of the evidence in regard to the position of the *Polurrian* on the 26th Oct., whether viewed apart from subsequent events, as I think it should be, or by the light of those events, was, in my judgment, one in which her ultimate release from capture was a matter of uncertainty. There was, of course, a possibility that she would be released after her cargo had been discharged without her being subjected to adjudication in the Greek Prize Court. There was a good ground for belief that the Greek Government would release the vessel, being a neutral vessel, as in fact they did, without waiting for the decision of a Prize Court, if that Government could be persuaded that the master of the *Polurrian* was pursuing his voyage in ignorance of the war, and that at all events the Prize Court would be satisfied of this when the evidence of the master was before it.

On the other hand, the Greek admiral believed that he had an admission from the master that he did know of the war, and both he and the Greek Government did take the view which finds expression in the judgment given by the Greek Prize Court as appears by their judgment, published the 29th Oct. 1913, that if this knowledge existed "it could well be considered that both the vessel and the cargo were subject to seizure," or, as Henderson's telegram from Athens of the 28th Oct. puts it, and Harris and Dixon's letter to the plaintiffs of the same date puts it, that the *Polurrian* might be considered a lawful prize. Even if the *Polurrian* should be released, either by the Greek Government or by the decision of a Prize Court, the date of such release was obviously uncertain—it might be weeks, or months, or longer before the matter would be settled.

Assuming that this was, as it appears to me to have been, the true position of affairs, I am of opinion that if the present action had come to be decided before the Marine Insurance Act 1906 had come into force the plaintiffs would have been held to have been entitled to recover upon the policy of insurance as for a constructive total loss. The material section of this Act is sect. 60, sub-sects. (1) (2), which are as follows:

(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. (2) In particular there is a constructive total loss—(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered.

According to the law as it stood before the passing of that Act, the seizure or arrest or detention of a vessel for that which is either avowedly or obviously a temporary purpose, which will end within a period not, from the commercial standpoint, unreasonably long, as in the case cited by Arnould on Marine Insurance (9th edit., vol. ii., s. 1108) from Emerigon, gives no ground of abandonment. But if the taking of the vessel, lawful or unlawful, out of the possession of the owner was, at the date of the commencement of the owner's action to enforce his notice of abandonment, a taking which still continued in operation, and the owner's loss of the use and disposal of the ship, once total, was at that date one which might be permanent and was, at any rate, of uncertain continuance, the owner who had duly given notice of abandonment was held by English law entitled to recover upon his insurance for a constructive total loss.

In giving judgment in *Goss* v. *Withers* (2 Burr. 683), Lord Mansfield, in a passage which is quoted by Lord Halsbury in *Andersen* v. *Marten* (99 L. T. Rep. 254; (1908) A. C. 334, at p. 340) observed (at p. 694 of 2 Burr.): "The ship is lost by the capture; though she be never condemned at all, nor carried into any port or fleet of the enemy. And the insurer must pay the value." And again (at p. 696 of 2 Burr.) his Lordship said: "The better opinion of the books says '*sufficit semel extitesse conditionem, ad beneficium assecurati, de amissione navis; etiam quod postea sequeretur recuperatio. Nam per talem recuperationem, non poterit præjudicari assecurato.*'"

In *De Mattos* v. *Saunders* (27 L. T. Rep. 120; L. Rep. 7 C. P. 570, at p. 579), Willes, J., in a passage which is quoted in the judgment of the Privy Council in *Cossman* v. *West* (6 Asp. Mar. Law Cas. 233; 58 L. T. Rep. 122; 13 App. Cas.

160, at pp. 179, 180) said: "The cases cited of hostile seizure and condemnation by a Prize Court have no application. In such a case the original seizure is *primâ facie* a total loss." "A vessel by being captured is certainly lost to its owner; but, as in one case where the question arose, a vessel may be taken and retaken before anyone knows of the loss, and as the contract of insurance is mainly a contract of indemnity, one can see how the courts would struggle against a large profit being made out of such a contract": (per Lord Halsbury, L.C. in *Sailing Ship Blairmore Company* v. *Macredie* (8 Asp. Mar. Law Cas. 429; 79 L. T. Rep. 217; (1898) A. C. 593, at p. 599).

Marshall, in his standard work on the Law of Marine Insurance (4th edit., p. 403), after adverting to the law of France, which then fixed a period of six months before an arrest of a ship in Europe could be treated by the owner as a total loss, proceeds: "In England the rule is more just, for there, from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo, and are deprived of the free disposal of them; because, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, it is equivalent to a total deprivation. It is therefore unreasonable to oblige the insured to wait the event of a capture, detention, or embargo."

But whilst, if the law to be applied was the law as it stood before the Marine Insurance Act 1906 came into force, I should, as I have said, have held upon the facts as I understand them that the plaintiffs were entitled to succeed in this action, we have now to consider the case as the law has been established by the relevant provisions of that Act. It is an Act, as appears by its title, to codify the law relating to marine insurance, but if the court finds that in plain and unambiguous language it has altered pre-existing law, its duty is to decide in accordance with the change. The section which governs the present case is sect. 60 (1 and 2). So far as it relates to a constructive loss by capture that section runs thus: (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable. . . . (2) In particular there is a constructive total loss (i) Where the assured is deprived of the possession of his ship . . . by a peril insured against, and (*a*) it is unlikely that he can recover the ship."

One may, I think, without disrespect, declare some regret that the two expressions "reasonably abandoned on account of its actual total loss appearing to be unavoidable" and "unlikely that he can recover the ship" should be used apparently to describe the same position of things. For in my view, at any rate, it is one thing to predicate that a total loss of a thing reasonably appears to be "unavoidable," and another to predicate that its recovery is "unlikely." Taking, however, the latter, and, as it seems to me, the less severe test of the right to treat a capture as constituting a constructive total loss, I think that the statute has modified the pre-existing law to the disadvantage of the assured.

One is always properly afraid of incompleteness in attempting a definition, but I venture to say that the test of "unlikelihood of recovery" has now been substituted for "uncertainty of recovery." The assured must now show two things—the first, that he has been deprived of the possession of his ship; the second, that it is unlikely that he can recover it. Whence the statute derived the phrase "unlikely that he can recover" as expressing a necessary condition of the assured's right to recover for a constructive total loss by capture I do not know. I have referred to many of the reported capture cases and have been unable to find it used judicially in any of them. But there it stands in the section of the Act of Parliament; its meaning is quite clear.

Therefore, in the present case, to enable the plaintiffs to succeed they must establish fully (1) that at the date of the commencement of this action they had been deprived of the possession of the *Polurrian*; (and (2) that it was not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so.

They have, as my brother Pickford has held, and I quite agree with him, made the first point good—the Greek captors did deprive the plaintiffs of the possession of their ship. Have they also shown that there was more likelihood that the plaintiffs would not, than that they would, recover her? The test is, in my humble judgment, one the application of which in this case is, and generally in similar cases of capture would be, very difficult to apply with any sense of satisfaction, because it necessarily involves conjecture and speculation as to what is likely to be the outcome of a number of possible contingencies.

Addressing myself, however, to the best of my ability to the question which this sect. 60 directs me to consider, my conclusion is that whilst I hold that on the 26th Oct.—the crucial date, because the date of the commencement of the plaintiffs' action—the recovery of the *Polurrian* by her owners was quite uncertain, I do not feel myself justified holding that the balance of probabilities has been proved so clearly against her recovery that I can say that such recovery was "unlikely."

This being so, the plaintiffs must be held to have failed to make out their case, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff.

Solicitors for the respondent, *Parker, Garrett*, and *Co.*

Tuesday, Feb. 16, 1915.

(Before Lord Reading, C.J., Swinfen Eady, L.J., and Bray, J.)

Pyman Steamship Company Limited *v.* Hull and Barnsley Railway Company. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Dock—Contract for use of—Unfitness of appurtenances at dock—Negligence—Damage to ship—Exemption clause in general words—Liability of dock owner.

The plaintiffs, owners of a steamship, claimed against the defendants, owners of a graving dock at Hull, damages for the defendants' alleged breach of a contract for reward in and about the dry-docking of the steamship. She suffered damage by reason of the unevenness of the block caps on which she rested. The unevenness was found to be due to the defendants' want of care. There were no statutory provisions relating to the defendants' rights and liabilities as dry-dock owners.

The steamship required painting, and the defendants let the dock for that purpose and did not do the painting themselves. She entered the dock under a contract with the defendants, by virtue of which dock dues were charged, and there were also charges for pumping and the use of blocks, shores, &c., which the defendants contracted to supply, the blocks being of the usual kind.

Clause 9 of the defendants' regulations was as follows: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising."

Held, that the defendants were exempted from liability by the terms of the above clause, which were so general that they would cover even a fundamental obligation, and that they were therefore not liable for negligence in providing uneven block caps.

Decision of Bailhache, J. (111 *L. T. Rep.* 41) *affirmed.*

Plaintiffs' appeal from a judgment of Bailhache, J. reported 12 Asp. Mar. Law Cas. 511; 111 L. T. Rep. 41; (1914) 2 K. B. 788.

The plaintiffs, owners of the steamship *Marmion*, claimed against the defendants, who were owners of a graving dock at Hull, damages for alleged breach of contract and duty in and about the dry-docking of the steamship *Marmion*.

The facts appear sufficiently from the headnote.

Bailhache, J. held that clause 9 of the defendants' regulations applied; that the defendants were negligent, but that the clause covered negligence and rendered the defendants immune from liability for the condition of the blocks.

The plaintiffs appealed.

Adair Roche, K.C. and *W. N. Raeburn* for the plaintiffs.—It is submitted that the antecedent obligation on the defendants was to provide proper blocks, and that that obligation was absolute, and that, as the defendants admittedly failed to supply proper blocks, they are not protected by clause 9 of their regulations. The defendants were bound to take all possible care, and the highest degree of skill, as, for instance, that care and skill that must be exercised by a person who lets out a carriage for hire. Here the general words of the clause are not sufficient to relieve the defendants from liability, and express words should have been used to secure that result. Bailhache, J. held that the words "however caused" were sufficient to cover negligence on the part of the defendants, and, in view of the recent decision in *Joseph Travers and Sons* v. *Cooper* (12 Asp. Mar. Law Cas. 561; 111 L. T. Rep. 1088; (1915) 1 K. B. 73), that holding cannot now be disputed in this court. The obligation of the defendants was fundamental, just as the obligation which is on a shipowner to supply a seaworthy ship, and the cases dealing with the effect of unseaworthiness apply to the present case. They referred to

Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 A. C. 72;

Hyman v. *Nye*, 44 L. T. Rep. 919; 6 Q. B. Div. 685;

Price v. *Union Lighterage Company*, 9 Asp. Mar. Law Cas. 398; 88 L. T. Rep. 428; (1904) 1 K. B. 412;

Joseph Travers and Sons v. *Cooper* (*sup*);

The West Cock, 12 Asp. Mar. Law Cas. 57; 104 L. T. Rep. 736; (1911) P. 208;

Randall v. *Newsome*, 36 L. T. Rep. 164; 2 Q. B. Div. 102;

The Forfarshire, 11 Asp. Mar. Law Cas. 158; 99 L. T. Rep. 587; (1908) P. 339;

Tattersall v. *National Steamship Company*, 5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297;

Morris v. *Oceanic Steam Navigation Company*, 16 Times L. Rep. 533;

Hart v. *Pennsylvania Railroad Company*, 112 U. S. Rep. 331;

Chartered Bank of India v. *British India Steam Navigation Company*. (1909) A. C. 369;

Mersey Dock Trustees v. *Gibbs*, 2 Mar. Law Cas. O. S. 353; 14 L. T. Rep. 677; L. Rep. 1 H. L. 93;

Bede Steamship Company v. *River Wear Commissioners*, 96 L. T. Rep. 370; (1907) 1 K. B. 310;

Nelson Line (Liverpool) Limited v. *James Nelson and Sons Limited*, 10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16.

Further, the position of clause 9 in reference to clause 11 is important. Clause 11 deals with the provision of the blocks, and from the position of the clauses the inference should be drawn that clause 9 was not intended to apply to or qualify the defendants' liability under clause 11.

Maurice Hill, K.C. and *Burt* (for *Moss-Blundell*, serving with His Majesty's forces), for the defendants, were not called upon to argue.

Feb. 16.—Lord Reading, C.J.—This is an appeal by the plaintiffs from a judgment of Bailhache, J. sitting without a jury, who gave judgment for the defendants.

The plaintiffs are steamship owners, and the defendants a railway company, who also carry on business as owners of dry docks. The question

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law

relates to the defendants' obligation in the capacity of dry-dock owners.

The steamship *Marmion* owned by the plaintiff company, entered the defendants' dry dock, and in consequence of the set of blocks which were provided for the ship to rest upon in the dock not having been evenly placed by those responsible for the working of the dock, damage was caused to the *Marmion's* bottom. The amount of that damage measured in money has been estimated by the learned judge at 284*l*.

The question upon which the case has turned is whether or not clause 9 of the defendants' regulations, which are incorporated in the contract between the plaintiffs and the defendants, excludes the defendants from liability for negligence in the performance of their contract to provide blocks, or for failure to provide blocks, as fit and proper as care and skill could possibly make them. No question arises upon this appeal as to the negligence of the defendants, or as to their failure to perform the obligation to provide fit and proper blocks, or to use blocks which were placed in a fit and proper way so as to support the vessel without causing it damage. The learned judge has found that there was such negligence or failure to perform, and that finding of fact has not been challenged.

The learned judge, however, exempted the defendants from liability, and gave judgment in their favour, because he felt bound to give effect to his interpretation and construction of clause 9 of the regulations, and everything in this appeal turns upon the meaning to be attributed to the words of this clause 9.

Now, the contract between the parties is for the use of the defendants' graving dock by the steamer *Marmion*, and the plaintiffs further "accept, agree to, and undertake to act in conformity with the company's graving dock regulations in force in respect of such user of the dock as per printed copy thereof forming part of this agreement, and engage prior to the vessel leaving the company's dock to pay the graving dock rent pumping, and user of blocks caps at the following rates." Then follow certain rates provided for the pumping, the rent, and the use of the block caps.

The regulations which formed part of the contract are: "The company's graving dock must be used subject to their regulations and to the following conditions." Then clause 9 runs as follows: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into or out of or whilst in the graving dock, whatever may be the nature of such accident or damage, or howsoever arising, nor for loss occasioned by delay in getting vessels into or out of the dock; nor shall the company be liable for any injury to persons employed at vessels while using the graving dock."

Looking at the language of this clause, and given its ordinary significance, the words undoubtedly are wide enough to cover an exemption to the dock owners from all liability arising from the user of the graving dock. I think that when one speaks of the user of the graving dock with all its appurtenances for use as a graving dock, that means the graving dock with block caps, pumps, horizontal shores, trestles, and staging planks, which are all requisites of the user of a graving dock. The word "user" certainly goes far enough. In the first instance it is said that the owner of a vessel using the dock must do so at his own risk. Then the company are not to be responsible for any accident or damage, whatever may be the nature of the accident or damage, or howsoever arising. With reference to those last words "or howsoever arising," there has been undoubtedly some difficulty in arriving at the true view, and as to whether those words are to be construed as meaning arising from any cause whatever, and whether they would be sufficient to release the contractors from liability caused by any negligence.

It is sufficient for the purpose of this case to say that, although the point is raised before us as to the meaning of those words for the purpose of saving the point should it be thought desirable to raise it elsewhere, the decision in *Joseph Travers and Sons* v. *Cooper* (111 L. T. Rep. 1088; (1915) 1 K. B. 73) is binding upon this court, and therefore we are bound to hold, and do hold, that those words must be construed as having the widest possible application.

The plaintiffs say that, notwithstanding that they must admit for the purpose of this case that *Joseph Travers and Sons* v. *Cooper* (111 L. T. Rep. 1088; (1915) 1 K. B. 73) binds this court, and that therefore those words must be read with the very widest meaning to which I have already referred, those words "howsoever arising," looking at the contract as a whole, and bearing in mind its nature, terms, and—they add—the sequence of clauses, this court should come to the conclusion that this clause was intended to have only a limited operation, and that full effect could be given to the words of the agreement, and the language used in that clause, if we so construed it as to limit its operation to accident or damage to the vessel once it has arrived in the graving dock, and for anything that might occur in the graving dock, but that the clause should not apply to the obligations imposed upon the dock owner to provide proper block caps for use in the dock. They said that it is not necessary that the language should be so construed; that, looking at the decisions to which our attention has been called, the courts have construed, not these words, but somewhat similar words, in a limited sense, and therefore we should do the same in this case.

The argument which was addressed to us was that this obligation to provide block caps is, in the language used in the discussion in the case, a fundamental obligation of the contract. Sometimes, it is said, it is a "primary object of the contract," or it is one of the "initial obligations of the contract." I do not propose, in deciding this case, to discuss the exact meaning to be given to those expressions, because it seems to me that their meaning does not arise for our decision in this case. It seems to me that assuming, as I will for the purpose of the argument, that the obligation to provide blocks and block caps is a fundamental or initial obligation of the contract, the language used in clause 9 is such that we must read it as covering failure to perform any such obligation, and covering negligence arising

from a want of care in the performance of such obligation. Looking at the clause from the various points of view that have been put forward to us by counsel for the plaintiffs, it seems to me that one must inevitably arrive at the conclusion that what was intended by the parties when they entered into this contract was that the graving dock should be used with all its appurtenances, but it should be used at the owners' risk. The shipowners were to make certain payments for the use of the dock, and for the use of the blocks and other appurtenances, but in no case were they to have any claim against the owners of the dock for any accident or damage which might be caused to their vessel.

This seems to me to dispose entirely of the case, and to make it unnecessary to discuss the various authorities to which our attention has been called. In all these cases there has been considerable difficulty in arriving at a reconciliation of all the authorities and decisions upon the meaning of clauses in contracts of this description. In truth those decisions turned upon the actual words of the clause. The principle which is to be deduced from them is, I think, as Mr. Roche rightly contended, that it may be that by the language employed and the subject-matter of the contract you are able to find that the clause was intended by the parties to be read only in the limited sense, and that when you have an absolute obligation, such as, for example, the warranty of seaworthiness in a ship, and a contract of carriage or affreightment is entered into, you must find from the language of the contract words which indicate that it was intended to exempt the shipowner from liability for breach of that warranty, and that you would not ordinarily read into words of general exemption an extension of the exemption to such an obligation as that. But, even so, it is quite plain that in law the language used may be sufficient to exclude the shipowners even from such an obligation. It may be by express words; it may be by necessary implication to be gathered from the language which has been used in the contract; but in any event you must find in the contract words which would justify the exemption of the shipowner for a breach of that obligation, and, unless you do find them quite clearly, the courts have said that he is to be held liable.

I only wish to add one word upon an argument addressed to us that because this exemption clause is to be found in clause 9 of the regulations and the provisions with regard to the blocks, which are to be found in clauses 11 and 12 of the regulations, that therefore we are to infer that the provisions as to the blocks were not included in the exemption in clause 9, but that we must read that as applying only to the obligations which preceded clause 9.

I think it impossible to give effect to that argument. One clause must succeed the other. If there is to be more than the one clause, there must be some order, and it is impossible to say that because of the numbers that are given to the clauses, or because one clause follows another, therefore you are to eliminate the meaning which you would otherwise give to the words. It seems to me to come back to this: that everything must depend upon the meaning to be given to the words of clause 9, and if they have the wide application which I think they must have, having regard to the language used in the clause, then it must follow, whatever the position in which we may find the clause, that the dock-owners are exempted from this liability.

Therefore, in my judgment, though, perhaps, not for the same reasons, I agree with the decision of Bailhache, J., and think that this appeal must be dismissed.

Swinfen Eady, L.J.—In this case the plaintiffs' ship suffered damage in the defendants' graving dock. It appears that the tops of the blocks on which the ship *Marmion* rested were uneven in height, and when, after the water was let out of the dock, the ship rested, it rested unevenly on those blocks, whereby the frame sustained some strain, and the forward plates were set up and damaged; and in consequence of that the ship sustained damage to the extent of some 284*l*.

The question which arises in this action is whether the defendants, the dock company, are liable for the amount of that damage.

The ship entered the graving dock under the terms of a contract in writing, and, in my opinion, the rights of the parties depend upon the true construction of the contract. There is no doubt that the vessel sustained this damage whilst in the graving dock. [His Lordship read clause 9 of the defendants' regulations, and continued:] *Primâ facie* it is obvious the language of that clause covers the events that have happened here. The ship sustained damage whilst in the graving dock, and the provision is that, whatever the nature of the accident or damage or howsoever arising, the dock company are not to be liable, and that the owner of a vessel is to use the dock at his own risk.

But then it is said that although those are general words of wide import, they are not to be construed in this case so as to exclude the liability of the dock owner for damage, because the damage arises in the present case, it is true, while the vessel was in the dock, but in consequence of a neglect of the defendants to provide proper block caps, and that ought to have been done before the vessel entered the dock, and that there was a fundamental obligation, an obligation which went to the whole root of the contract, to provide block caps in proper position on which the vessel could safely rest. Therefore it is like the cases of unseaworthiness, where the obligation of the shipowner is to provide a ship that shall be seaworthy; and reliance was placed upon cases that have arisen, mostly cases with regard to ships, where it has been held that the obligation of the shipowner is such that the exemption from liability for damage occurring by particular clauses in the contract extends only to damage that shall arise after the voyage has commenced, and not to damage arising from the unseaworthy condition of the ship which the shipowner supplied. For instance, one of the cases cited, *The West Cock* (12 Asp. Mar. Law Cas. 57; 104 L. T. Rep. 736; (1911) P. 208), was a case of towing, and there it was held that the special conditions of exemption for damage related only to defects occurring after the commencement of the voyage and not to a

pre-existing defect in the tug. Similarly, *Tattersall* v. *National Steamship Company Limited* (5 Asp. Mar. Law. Cas. 206; 50 L. T. Rep. 299; 12 Q.B. Div. 297) was a case where cattle caught foot-and-mouth disease from being placed on an infected ship which was not seaworthy for that purpose. At the commencement of the voyage the ship was unfit for the purpose, and therefore the terms of the contract relied upon only related to the carriage of the goods upon the voyage, and the damage arose from the unseaworthy condition of the ship before the commencement of the voyage.

Cases of that kind were prayed in aid in support of the argument in the present case. It seems to me they have no application to it.

Here the contract was for the use of a particular dock which is described in the contract. The shipowner was to use that dock at his own risk, and whatever the damage arose from while the vessel was in that dock, in my opinion, it is covered by clause 9, and the dock owner is exempted from liability.

It is not a case of whether the shipowner has or has not to pay for block caps not provided in accordance with the contract. It is not that case at all. It is a case whether the dock company is liable for the damage to the ship by reason of not providing block caps which were suitable and of the requisite height.

In my opinion the exemption from damage is comprised in and entirely covered by clause 9, and on that ground the plaintiffs are not entitled to recover against the owners of the dock, and the appeal should be dismissed.

Bray, J.—I am of the same opinion.

What we have to do here is to construe clause 9 of the regulations having reference to the remaining clauses of the contract.

We have had considerable argument as to what is a fundamental obligation, and as to whether that includes cases where the liability is absolute, or where the liability is only to use reasonable care or all possible care. I think it is unnecessary to go into those considerations.

I will assume for the moment here that there was as to the graving dock, and as to the blocks, the duty, and, if you like, the absolute duty, to provide a fit dock and proper block caps put in proper position. I do not say that it is the construction of the contract, but for the purpose of this case I am willing to assume it. I should, however, like to guard myself especially against saying that there was any absolute contract to provide a fit dock here. There was a warranty of some kind. For the purpose of this case I assume it was as wide as possible.

Then the question which remains is this: Whether clause 9 of the regulations is wide enough to exempt the defendants from a breach of contract in respect of that liability. The clause begins in these words: "The owner of a vessel using the graving dock must do so at his own risk." The words "owner's risk" and the meaning of those words are now well known, particularly in the contracts of railway companies. Railway companies, in carrying goods, are under certain obligations under the Railway and Canal Acts, and they have to give a choice of two rates. One rate is called the ordinary rate, and the other is called the "owner's risk rate"; and the owner's risk rate covers what is meant by "owner's risk." It means what it says. The clause in question begins with the words I have read, and then it follows on explaining the meaning of those words, and making sure that they are to include every possible damage: "Any accident or damage to a vessel going into or out of or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." It is difficult to use wider words than those, and although undoubtedly we must see that the construction that we are proposing to put upon this clause is a clear construction, because ambiguous words are not sufficient, and the words must be clear in order to exempt from a liability which would otherwise enure, yet it seems to me that these words are quite clear so far as regards the graving dock. Now, it is quite true that we must read the words "graving dock" as meaning something more than the dock itself in order to exempt the company here. I think the remaining words of the section are sufficient to show that, because the words "any accident or damage" follow the words that I have read. There is clause 13, which says: "The owner of any vessel using the graving dock will be held responsible to the company should any person employed in connection with the vessel cut, destroy, or injure the walls, floor, or any of the blocks, machines, pitch boilers, cranes, tackle, or other appendages to the graving dock." In my opinion, the words "graving dock" in clause 9 include the graving dock and all its appendages. I do not think it is material to notice the exact position of these clauses. I cannot think that it could have been the intention of the parties that the defendants should be exempted from all liability for any defect in the dock in carrying on the business of the dock, and that, although they are exempt from that liability with regard to the dock, are yet to be liable in respect of such small things as these block caps.

In my opinion the decision of Bailhache, J. was right.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Botterell, Roche*, and *Temperley*, West Hartlepool.

Solicitors for the defendants, *Davenport, Cunliffe*, and *Blake*, for *Moss, Lowe*, and *Co.*, Hull.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 2 *and* 3, 1915.

(Before BAILHACHE, J.)

MATSOUKIS *v.* PRIESTMAN AND CO. (*a*)

Contract to build ship—Delivery within specified time—Exceptions—Delay—Force majeure—Vis major—*Coal strike—Indirect effect of—Breakdown of machinery.*

By an agreement in writing dated the 21st Feb. 1912 *the defendants agreed to build a steamer for the plaintiff and deliver her on or before the 28th Feb.* 1913. *The agreement contained* (inter alia) *the following clause: "If the said steamer is not delivered entirely ready to purchaser at the above-mentioned time, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of* 10*l. sterling for each day of delay and in reduction of the prices stipulated in this contract, being excepted only the cause of* force majeure *and* (*or*) *strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor."*

The steamer was not delivered till the 22nd Aug. 1913, *and in order to get delivery the plaintiff paid under protest the full price without any deduction for delay. Owing to the coal strike of* 1912 *there was a delay of seventy days and a further delay of seven days on account of a breakdown of machinery and a shipwrights' strike. There was also some delay due to bad weather, to the absence of men attending football matches, and attending the funeral of their manager. The plaintiff claimed as damages or money had and received by the defendants to his use* 1750*l., or* 10*l. per day for every day's delay in delivery after the 28th Feb.* 1913.

Held, that the words force majeure *covered the delay occasioned by the consequential results of the coal strike and also breakdown of machinery, but did not include the other matters claimed.*

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiff, Jean Gerassime Matsoukis, of Roumania, claimed damages for delay in the delivery of a steamship built by the defendants at their yard in Sunderland at the request of the plaintiff.

The plaintiff pleaded that by an agreement in writing made between the Bank of Athens, as agents for the plaintiff, and the defendants, the latter agreed to build a steamer and deliver her at Sunderland afloat and ready for sea on or before the 20th Feb. 1913. It was provided that if the steamer was not delivered entirely ready at the time mentioned the defendants were to pay to the plaintiff the sum of 10*l.* for each day of delay and in deduction of the price stipulated in the contract. He said the defendants did not deliver the steamer on the date agreed, and failed to deliver her until the 22nd Aug. 1913. The plaintiff paid the price stipulated for in the contract without deduction in respect of the delay under protest in order to get delivery of the steamer, and he claimed as damages, or as money had and received, 1750*l.*, being 10*l.* per day for every day's delay in delivery after the 28th Feb. 1913, and, in addition, 518*l.* interest at 5 per cent.

By their points of defence the defendants admitted that the steamer was not delivered until the 22nd Aug., but they denied that any breach of the agreement was committed, and that the delay was wholly due to causes within the exception clause of the contract, which was as follows:

> If the steamer is not delivered entirely ready to purchaser on or before the 28th Feb. 1913, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of 10*l.* for each day of delay, and in deduction of the price stipulated in this contract, being excepted only the cause of *force majeure*, strikes of workmen of the building yard where the vessel is being built, or the workshops where the machinery is being made, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor. In case of strikes or any cause of delay, as above, the builders are to advise immediately the purchaser, and at the beginning of the strike.

Among the items causing the delay were the following: Bad weather caused sixteen days' delay, shipwrights' strike two days, breakdown of machinery in Sunderland works three and three-quarter days, delay in supply of materials eleven days, football matches and holidays seven days, funeral of a Mr. Knox one day, miners' strike 182 days, making a grand total, according to the defendants, of 222 days.

Hudson, K.C. and *Dunlop*, for the plaintiff, cited

Nichols v. *Marsland* (1876) 2 Ex. Div. 1;
Nugent v. *Smith* (1876) 3 Asp. Mar. Law Cas. 198; 1 C. P. Div. 423.

Roche, K.C. and *Lewis Noad*, for the defendants, cited the following cases:

Yrasu v. *Astral Shipping Company* (1904) 9 Com. Cas. 100;
Re Lockie and Craggs (1901) 9 Asp. Mar. Law Cas. 296.

BAILHACHE, J.—This action was brought by Mr. Matsoukis, who is a Roumanian gentleman, against Messrs. Priestman and Co., who are shipbuilders in this country, on a contract to build a ship, which is dated the 21st Feb. 1912. The action was tried before myself and a City of London special jury, and there was one question of fact left to them. It was this: Assuming that Mr. Priestman was entitled to an allowance for the delay occasioned indirectly by the Welsh coal strike, how much time ought he to be allowed in respect of this?

The jury found in respect of this he should be allowed seventy days. The total amount of the delay was 175 days; seventy from 175 leaves 105. He was to be liable for this in any case, but for the fact that there were two other exceptions, in respect of which I think he is entitled to time. This is in respect of the shipwrights' strike and breakdown of machinery. Allowing seven days for this, this would bring the total amount which was due to 980*l.* A question of interest has been agreed between the

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

parties at 20*l.*, and this is the only question which has been agreed between the parties.

The only question about which I have found a great deal of difficulty in the case is whether the consequential result of the Welsh coal strike, which, according to the verdict of the jury, delayed the vessel by seventy days, can be said to be covered by exceptions in the contract. The contract is to deliver the ship on the 28th Feb. 1913, and unless Mr. Priestman can bring this Welsh coal strike within the exceptions, then he is not entitled to the allowance of the seventy days which the jury by their finding have given him.

The question turns upon the construction of the contract. The contract says that if the steamer is not delivered on the due date, the plaintiff agrees to be paid as liquidated damages 10*l.* a day in deduction of the price stipulated in the contract. Then comes the clause, which is written in English, it is true, but obviously by a gentleman who is not familiar with English idiom, but, still, it is plain enough. It goes on to except the cause of *force majeure*, strikes of workmen in building yard where the ship is being built, or in the machinery shops, or works of sub-contractors; and the question is, what is the meaning of the words *force majeure* in the contract.

Mr. Hudson has argued for the plaintiff that the words *force majeure* can never in any circumstances cover the strike or consequence of a strike, and that in particular they cannot do it in this case because, if I take the whole of the clause and read it together, I ought to find that strikes are a special cause of exception, and that I ought to find these strikes are excluded by the fact that strikes are specifically referred to in the clause.

My own opinion about the matter has fluctuated a great deal in the case, although the clause as it stands seems simple enough. The words *force majeure* are not words which are appropriate to an English contract, and they are not common in an English contract. They are taken from the Code of Napoleon, and they were inserted in this contract by a Roumanian gentleman or by his advisers, who no doubt were familiar with the words as used in the Code of Napoleon and as used on the Continent. We have had the opinion of a Belgian lawyer, and he says the words as understood in Belgium and on the Continent mean a cause you cannot prevent or avoid and for which you are not responsible.

Mr. Hudson argued that the words practically meant the same as *vis major*, which in substance means very nearly the same as act of God. In my construction of the words I am influenced to some extent by the fact that they were inserted by this foreign gentleman, who was familiar with the meaning of the words upon the Continent.

But I am not sure that on this account I should be entitled or bound to give them the full meaning they have on the Continent. I am not going to attempt to give any definition of the words *force majeure*. But I am quite satisfied I ought to give them a meaning which is more extensive than the meaning we give to the words "act of God," or the words *vis major*. The trouble is how much can I extend the meaning? I think the strike was anticipated in this sense, that it was obvious a strike might take place, although it was common knowledge everybody was expecting that such a disaster as a national strike would be avoided. The strike took place.

The result was that, as far as Mr. Priestman was concerned, the yards from which he had contracted to get his materials for other ships, not this one, got very much behindhand in their supplies. We all know that shipbuilding in shipyards can only be done upon certain ways or berths, and Mr. Priestman had four berths, but had other ships to build besides this, and he had in contemplation to build this ship in berth No. 2, after another ship numbered No. 239.

The result of the coal strike, and his inability to obtain materials and coal, was this: Ship No. 239 occupied the berth for a great deal longer than it otherwise would have done. The result was that the berth was detained, and that the plaintiff's ship could not be laid down in the berth until some time in October. As a matter of fact, it was not laid down until December. Now, could, under such circumstances, the delay be described as coming under the words *force majeure* if it had been a direct result of the coal strike?

The delay was caused by the general dislocation not only in all of Mr. Priestman's business, but all businesses in the North of England, such as that of makers of steel plates and things of this kind, and a general dislocation of the whole businesses in the North of England. In my opinion—although, as I say, my opinion has fluctuated from time to time during the arguments in the case—I think I should be right in saying, justified in saying, that, under the circumstances, this strike constituted a case of *force majeure*.

If I were to give the words *force majeure* the full meaning which the Belgian gentleman said they had on the contract, there would be no doubt about it at all. I think the events which happened, this calamity of a universal coal strike, could completely dislocate all the businesses in the North, and so, by delaying the building of the ship in front of the plaintiff's ship, could come within the reasonable meaning of the words *force majeure*.

I think, therefore, Mr. Priestman to this extent is absolved from delay. This delay did not operate directly on the plaintiff's ship, and if it had been a case of building a ship which is to be built at a berth in turn, I should have had great doubt whether the words *force majeure* could be held to apply to a case of this kind. But, having regard to the way in which the ship was built and to the berthing, and to Mr. Priestman's right to carry on his business that way, I think I am justified in holding that the defendants are entitled to be absolved.

Then Mr. Priestman wanted an allowance in respect of bad weather, shipwrights' strike, breakdown in machinery, football, and a funeral. So far as the shipwrights' strike is concerned, this comes within the clause. I think the words *force majeure* cover breakdowns in the machinery. But when I come to bad weather, football matches, and funerals, then I think the words *force majeure* cannot in any circumstances be held to cover such things. So far as weather is concerned, I have no doubt that Mr. Priestman, in making the contract, took into account the ordinary weather one experiences in Sunderland, and took care to allow himself some time for this.

The time he stipulated for to build the ship was twelve months and a week, when the actual operation of the building of the ship does not take more than six or seven months.

I shall give effect to the finding of the jury, and allow him seventy days, which they have held was due to the general dislocation of the business in the North of England in consequence of the Welsh coal strike. Then there are seven days for the shipwrights' strike and breakdown in the machinery shop. I am told this leaves the number of days as ninety-eight, and for this the sum of 980*l.* is due. Then Mr. Hudson wants interest in respect of a certain sum, and the parties have sensibly agreed at 20*l.* interest. Add this to 980*l.*, and you have 1000*l.*, and I give judgment for this amount for the plaintiff, with costs.

Solicitors for the plaintiff, *Rowland Payne*, Cardiff.

Solicitors for the defendants, *Downing, Handcock, Middleton*, and *Lewis*, for *Bolam, Middleton*, and *Co.*, Sunderland.

Wednesday, Feb. 10, 1915.

(Before COLERIDGE, J.)

LISTON AND OTHERS *v.* OWNERS OF STEAMSHIP CARPATHIAN. (*a*)

Seaman—Wages—Outbreak of war—War risks—Agreement for extra remuneration — Right to recover—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 113, 114).

The risks of war not being contemplated by seamen when they undertake a commercial voyage, they are entitled, when there is a reasonable belief of risk from mines or of capture on the voyage home, to refuse to put to sea. A contract, therefore, made by the master of the ship to pay them extra wages to incur such risks is binding on the owners.

ACTION tried by Coleridge, J. without a jury.

The plaintiffs were engaged as seamen on the steamship *Carpathian*, a British ship, on a commercial voyage from Tilbury Dock, London, to Port Arthur, Texas, and to a final port of destination in the United Kingdom, the period of engagement not to exceed one year. While at Port Arthur news arrived of the declaration of a state of war as between England and Germany. The ship's crew were also made aware of the presence in the vicinity of a German cruiser called the *Karlsruhe*. The plaintiffs thereupon refused to proceed to sea and complete the voyage, on account of the extra risk due to the outbreak of war, unless they received extra remuneration. The master, being unable otherwise to obtain their services, signed an agreement to pay them an extra 12*l.* each to take the ship home. The agreement ran as follows :—

> Steamship *Carpathian*, Port Arthur, Sunday, Aug. 16, 1914.—The following men having refused to proceed to sea unless I promise to give them twelve pounds each to take the steamer to her final port in the United Kingdom, I hereby promise that amount in order to enable me to proceed to sea.

(*a*) Reported by L. H. BARNES, Esq., Barrister-at-Law.

The owners of the ship, on her arrival in England, refusing to pay, the plaintiffs, who were seven in number, brought this action to recover the sum of 84*l.* as wages, being 12*l.* due to each plaintiff under the above-mentioned agreement. By their defence, the defendants contended that the master had no authority to enter into the alleged or any agreement, and that, if any agreement was made, it was made without consideration.

By sect. 113 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) :

> The master of every ship . . . shall enter into an agreement . . . in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom.

By sect. 114 "an agreement with the crew shall be in a form approved by the Board of Trade . . . and shall be signed by the master before a seaman signs the same," and "shall contain" (*inter alia*) "the amount of wages which each seaman is to receive."

Ivor Bowen, K.C. and *S. Duncan* for the plaintiffs.—The master is the agent of the owners of the ship for all purposes, and has a general authority. He engages the seamen. War having broken out new risks had arisen which were not contemplated when the plaintiffs undertook the voyage. It is not necessary to show that the risk amounts to danger to life. It is sufficient that a new risk has arisen which is not a commercial risk such as the articles contemplated. See

> *Palace Shipping Company* v. *Caine*, 97 L. T. Rep. 587 ; (1907) A. C. 386.

Here the ship, being a belligerent vessel, was liable to capture. The plaintiffs were therefore entitled to leave the ship and to refuse to continue the voyage unless they received extra remuneration. See

> *O'Neil* v. *Armstrong, Mitchell, and Co.*, 73 L. T. Rep. 178 ; (1895) 2 Q. B. Div. 418.

The agreement was made for a sufficient consideration and is binding on the owners.

A. Neilson for the defendants.—This agreement is not enforceable against the owners. For more than 100 years it has been held as a principle of law that seamen are not entitled to claim for their services as seamen any sum beyond the wages specified in the articles unless there is evidence that an extra risk has arisen which is a real risk to life. There is no evidence that there was any such risk to life in this case. The master, therefore, had no implied authority to make this agreement on behalf of the owners. He referred to

> *Harrison and another* v. *Dodd*, 111 L. T. Rep. 47 ;
> *Thompson* v. *H. and W. Nelson Limited*, 108 L. T. Rep. 847 ; (1913) 2 K. B. 523 ;
> *Harris* v. *Carter*, 3 El. & Bl. 559 ;
> *Hartley* v. *Ponsonby*, 7 El. & Bl. 872 ;
> *The Araminta*, 18 Jur. 793.

COLERIDGE, J.—This case raises an important point involving questions of both law and fact. The plaintiffs, seven seamen, bring an action for 12*l.* each under an agreement made with the master of the steamship *Carpathian* at Port Arthur, Texas, on the 16th Aug. 1914. The question which I have to decide is whether

these men can upon that contract recover this extra remuneration for their services as seamen against the owners of the ship. It involves the further question whether the master of the ship had implied authority to make such a bargain on behalf the owners. [His Lordship then stated the facts as set out above, and continued:]

The test which I must apply is whether the seamen, under the circumstances, were discharged from their obligation to serve any further on the vessel. If they were so discharged, the cases all go to show that the master could not punish them for not serving, could not enforce their service, and had implied authority from the owners to make such a contract as is sued upon in this action to get them to serve and to incur the war risks, whatever they might be, by the promise of increased remuneration. The question, therefore, is, whether the seamen could have legally remained on shore and declined to join the ship when it sailed. It is quite clear that seamen who engage in service as seamen cannot demand to be released from their contract—for that is what a request for increased remuneration really amounts to—merely because they do not like the conditions, or because there happens to come a storm, or because under certain circumstances, such as illness among the crew, they are asked to do a little more work. They undertake to give their whole time, and they undertake certain risks of navigation which are well known to them all, and all those risks are in the contemplation of the parties when the wages are fixed. But it is quite clear that it is not in the contemplation of the parties when they make a contract that war will break out between the country to which the ship belongs and another country, both being maritime powers, and both having vessels of war which may or may not overrun the very portion of the sea through which the ship has to pass on her voyage. *Primâ facie* if there is a war risk, it is not necessarily a risk to life. There are circumstances in which a risk to life has been held to be a ground for discharging a contract; it is not necessary, however, for me to discuss them now, as that is not the guiding point of my judgment in this case. The real point is whether there were war risks which, in the reasonable contemplation of the parties, might involve capture at sea, for that is certainly not one of the risks which you undertake on a commercial voyage.

What were the risks which reasonable seamen might contemplate in this case? The *Carpathian* was bound for Rotterdam, and had, therefore, not only to cross the Atlantic within possible sight of the *Karlsruhe*, but also to pass up the English Channel, where other German war vessels, as well as mines, might be encountered.

The mere fact that war existed between two powers might not involve any substantial risk, or, indeed, any risk at all, on a voyage at sea, even though the vessel belonged to one of the belligerent powers. In this case, the risk of capture was, in fact, so great that the vessel proceeded across the Atlantic without lights, and, indeed, when she reached the English Channel she was diverted from her course by a British cruiser and told that she could not proceed to Rotterdam, and found her ultimate port of destination in London, the voyage, owing to the war risks, not being able to be carried out.

I must not, however, consider as decisive what happened after these plaintiffs considered themselves free from the contract. The question is, what was the reasonableness of their conduct in seeking to be discharged from their contract?

I think that they might reasonably have taken into consideration not only the risk of the ship being captured by the enemy, but also the risk run throughout the voyage from mines, which, even if everyone obeyed the laws of the Hague Convention, would not be altogether eliminated. Moreover, there were risks not only from the *Karlsruhe*, but, in their progress up the channel, from other German war vessels.

It seems to me, therefore, that it was perfectly reasonable in the circumstances to consider that, although it did not amount to a certainty, there was not only some risk, but every risk, of the capture of this vessel. Under these circumstances, I am clearly of opinion that the crew were justified in remaining on shore in Texas and refusing to proceed on the voyage. They were therefore discharged from their obligation to sail, and the master, being unable to compel them to serve, was impliedly clothed with authority from the owners to make such reasonable contract with them as he could to obtain their services. That contract is binding on the owners. I therefore give judgment for the plaintiffs for the amount claimed.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Humphreys, Phillips, and Co.*

Solicitors for the defendants, *Botterell and Roche.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 10, 11, *and* 12, 1914.

(Before BUCKLEY, PHILLIMORE, and PICKFORD, L.JJ.)

OLYMPIA OIL AND CAKE COMPANY LIMITED *v.* PRODUCE BROKERS COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Sale of goods—Appropriation of cargo to buyers—Arbitration clause—"All disputes from time to time arising out of this contract"—Award—Finding of arbitrator as to custom of trade—Whether conclusive or conditional—Jurisdiction of arbitrators.

In connection with a contract for the sale of goods a dispute had arisen between the parties as to whether a certain tender was a good tender or not. That question was referred to arbitration under the clause in the contract and an award was duly made. That was carried to the board of appeal and they stated a special case for the opinion of the court. Certain questions were put to the court, and the material one was whether under the terms of a certain contract

(*a*) Reported by G. H. KNOTT and EDWARD J. M. CHAPLIN, Esqrs., Barristers-at-Law.

there could be a valid tender or appropriation of a cargo shipped on board the C. to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Divisional Court answered those questions in the negative: (12 *Asp. Mar. Law Cas.* 570; 111 *L. T. Rep.* 1107). *Thereupon the matter went back to the board of appeal and they made an award in which they stated that, while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law, apart from the custom of the trade," they nevertheless found that there was a long-established and well-recognised custom of the trade by which, in the circumstances of this contract, there was an appropriation of the cargo to the buyers.*

On a motion to the court by the buyers to set aside the award:

Held, that the arbitrators had no jurisdiction to find conclusively the existence of a trade custom. The motion to set aside the award must therefore stand adjourned, both parties to be at liberty to file further affidavits on the question as to the existence of the alleged custom.

Decision of the Divisional Court (Horridge and Rowlatt, JJ.) affirmed.

Hutcheson *v.* Eaton (51 *L. T. Rep.* 846; 13 *Q. B. Div.* 861) *and* Re Arbitration, North-Western Rubber Company and Hüttenbach and Co. (99 *L. T. Rep.* 680; (1908) 2 *K. B.* 907) *discussed and followed.*

APPEAL by the Produce Brokers Company Limited from the decision of the Divisional Court (Horridge and Rowlatt, JJ.) upon a motion to set aside an award of arbitrators.

This was a motion by the Olympia Oil and Cake Company Limited (hereinafter called the buyers) to set aside the award of the board of appeal of the Incorporated Oil Seed Association, dated the 25th June 1914, acting in an arbitration between the buyers and the Produce Brokers Company Limited (hereinafter called the sellers).

On the 30th May 1912 the sellers agreed to sell and the buyers agreed to buy 6000 (10 per cent. more or less) tons of 22401b. each Harbin and (or) Dalny Soya beans to be shipped from an Oriental port or ports during Dec. 1912 and (or) Jan. 1913 by steamer direct or indirect *viâ* Suez Canal or Cape to Hull, at 7*l.* 18*s.* 9*d.* per ton, gross weight, *ex* ship, usual new bags included. The contract provided: "If shipped as a cargo buyers to have the option of charter-party."

Clause 3 of the contract provided:

Particulars of shipment, with date of bill or bills of lading and approximate weights, marks (if any), and number of bags to be declared by original sellers not later than forty days from the date of last bill of lading. . . . In case of resales copy of original appropriation shall be accepted by buyers and passed on without delay. Buyers shall not object to slight deviations in marks so long as the beans can be identified on arrival as the *bonâ fide* shipment intended to be delivered on the declaration. . . .

Clause 10 of the contract provided:

This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract, and also if shipment or delivery be prevented by embargo, hostilities, prohibition of export, or blockade.

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

By a contract dated the 9th Sept. 1912 the sellers purchased from the East Asiatic Company (the shippers of the cargo), under a contract similar to the above-mentioned contract, an identical quantity of 6000 tons, 10 per cent. more or less, Harbin and (or) Dalny Soya beans for shipment in Dec. 1912 and (or) Jan. 1913.

By letter dated the 24th Jan. 1913 the sellers informed the buyers that they had not yet received a tender, but believed that the same would be in the *Canterbury*.

On the 29th Jan. 1913 the sellers agreed to purchase from the buyers 6000 tons Harbin and (or) Dalny Soya beans, December-January, to Hull, and stated in their letter of this date confirming the purchase: "We shall put this against our sale to you of the 30th May 1912."

On or about the 4th Feb. 1913 the sellers received a notice of appropriation of 6400-6600 tons per *Canterbury*, stated to have sailed from Vladivostok on the 31st Jan. By letter dated the 4th Feb. the sellers declared and appropriated this shipment to their contract with the buyers, and claimed that the buyers should retender the same in fulfilment of the contract of the 29th Jan. 1913.

The *Canterbury* sailed from Vladivostok on the evening of the 3rd Feb., and shortly after sailing struck submerged rocks fifteen miles from Karatsu. She was towed off on the 4th Feb, but foundered immediately afterwards. The loss was known in London at about 3 p.m. on the 4th Feb. It was not known to the East Asiatic Company at the time of their tender, but the sellers were aware of it at the time of making their said tender.

The buyers contending that they were not bound to accept the tender per *Canterbury*, arbitration was claimed under the terms of the contract and the dispute was referred to arbitration in pursuance of the rules indorsed on the contract. The umpire, by his award dated the 7th May 1913, awarded "that the appropriation per *Canterbury* is a good appropriation in the terms of the contract, and must be accepted by the buyers."

The buyers thereupon appealed from the award to the committee of appeal of the Incorporated Oil Seed Association, and certain members were elected as a board of appeal to hear the appeal, in accordance with the provisions of the contract and the rules and regulations of the association.

The buyers contended before the board:

(1) That, the steamship *Canterbury* having sunk or been lost with her cargo before the tender by the sellers, the said tender was bad.

(2) Alternatively that the said tender was bad because the sellers knew of the said sinking or loss of the *Canterbury* and (or) her cargo before they made the said tender.

(3) That there was not a resale within the meaning of clause 3 of the contract, the sale to the buyers having taken place before the sellers

purchased the beans under the contract of the 9th Sept. 1912, and that the buyers were not bound to accept the tender as an appropriation passed on by their sellers on a resale.

(4) That the provisions of clause 3 as to resales could not in this case apply, the *Canterbury* and her cargo being at the bottom of the sea when the sellers made or purported to make the appropriation.

The buyers requested the board to state a case for the opinion of the court on the question of law arising in the reference.

The sellers contended:

(1) That under clause 3 of the contract the buyers as "buyers" from the sellers under a resale were bound to accept as a valid declaration the copy of the original appropriation received by the sellers and handed on by them to the buyers.

(2) Alternatively that by clause 3 the sellers, having passed on without delay to the buyers the copy of the original appropriation received and accepted by them as "buyers," were entitled to call on the buyers to accept such copy as a valid declaration.

(3) That by reason of the loss of the *Canterbury* with all her cargo the contract became void pursuant to clause 10 of the contract.

The questions of law submitted in the special case stated by the board at the request of the buyers were:

(1) Whether, regard being had to the terms of the contract of the 30th May 1912, a tender or appropriation under clause 3 could validly be made if at the material time, and whether to the knowledge of the sellers or not, the vessel and her cargo had already become a total loss.

(2) Whether there was any difference "in case of resales," and, if so, whether the sentence in clause 3, "In case of resales copy of original appropriation shall be accepted by buyers and passed on without delay," applied to the facts of this case.

(3) Whether under the circumstances above detailed the provisions of clause 10 of the contract applied so as to render the contract void as regards the beans shipped by the *Canterbury* which had not arrived by that vessel.

(4) (*a*) and (*b*) was not relevant to this case.

(5) Whether the sellers were relieved from every obligation to the buyers under the said contract by tendering the cargo shipped per steamship *Canterbury*.

The court answered questions 1, 2, 3, and 5 in the negative, and sent back these answers to the board of appeal: (12 Asp. Mar. Law Cas. 570; 111 L. T. Rep. 1107; (1915) 1 K. B. 233).

On the 25th June 1914, the board of appeal, having considered the case and the answers of the High Court of Justice to the questions stated in the special case in the matter of the said arbitration, unreservedly accepted the said answers upon the construction of the contract, as a matter of law, apart from the custom of the trade, but it nevertheless found:

(1) That by the long established and well recognised custom of the trade in cases of resales buyers under the form of contract impliedly agree with their sellers (*a*) that they will accept the original shippers' appropriation passed on without delay, provided that the original shippers' appropriation was valid and in order at the time of being made by the original shipper to his buyer, and (*b*) that those sellers shall be under no obligation to make any appropriation other than that of passing a copy of original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might, apart from such custom and implied agreement, be invalid and not in order.

(2) That the appropriation by Messrs. the Produce Brokers to the Olympia was made under a resale, to which the said custom of the trade applies, and

(3) That the appropriation of the original shippers, the East Asiatic Company Limited, to their buyers, Messrs. the Produce Brokers, was valid and in order, and they do hereby decide and award that the original award, dated the 19th May 1913, of Berthold Vinner, the umpire appointed in the arbitration, be varied, and award that Messrs. the Olympia are bound to accept as a valid appropriation under the contract of the 30th May 1912 copy of the original shippers' appropriation, passed on to them by Messrs. the Produce Brokers.

Leslie Scott, K.C. and *C. R. Dunlop* for the applicants.

D. C. Leck, K.C. and *F. D. MacKinnon* for the respondents.

HORRIDGE, J.—This is a motion to set aside an award made by the appellate tribunal of the Incorporated Oil Seed Association upon the ground that the award is based, on the face of it, upon an alleged custom of the trade and that the custom of the trade does not exist.

Now, I think that the result of the two cases of *Hutcheson and Co.* v. *Eaton and Son* (*sup.*) and *North-Western Rubber Company Limited* v. *Hüttenbach and Co.* (*sup.*) is correctly expressed in the headnote to the latter case. The headnote to that case says: "Held, that the arbitrators had no jurisdiction to deal conclusively with the question of the existence of the custom for the purpose of making their award; that, as the custom upon which they based their award had been found not to exist in fact, the award compelling the buyers to accept goods not in accordance with the written contract has been and must be set aside." That says that the arbitrators had not jurisdiction to settle conclusively; the meaning of that, in my view, appears from the language which is used by Vaughan Williams, L.J. He says: "The truth of the matter is that, if the custom is not contrary to the terms of the contract, or as Jessel, M.R. says in *Southwell* v. *Bowditch*, to the tenor of the contract (which is the better expression), the arbitrators would be acting within their jurisdiction, and would be doing no wrong if, in the first instance, they heard evidence and decided whether there was a custom or not. Of course, if the custom were inconsistent with the tenor of the contract, they would have no right to give effect to it. A conditional finding of arbitrators is not unusual; such a finding happens frequently in the County Court, where the jurisdiction is limited in at least two ways, besides the limitation of the area of the court; first, the judge cannot try a dispute as to land where title comes in question; and, secondly, there is a money limit. On the question of title the County Court judge must

hear evidence and consider whether there is a real dispute as to title; and where the High Court is deciding upon a question of *mandamus* or prohibition in such a case, although they will not readily reverse the decision of the County Court judge, yet his decision is conditional in the sense that it is open to review. The case of *Hutcheson* v. *Eaton* seems to have positively decided that arbitrators are not the proper tribunal for dealing with a question of custom, and I should have thought the Divisional Court, on a motion to set aside an award, had jurisdiction to determine whether the custom alleged had an existence in fact."

I think that, subject to the qualification in the passage which I have read from the judgment of Vaughan Williams, L.J., that the custom must not be contrary to the terms of the contract. In this case we are bound by that authority to decide whether or not there is any such custom as the arbitrators have purported to find and act upon in this case. Is it contrary to the terms of the contract? I think that the true test is the one which was suggested by Mr. MacKinnon. If you wrote into the contract the custom, would you be contradicting the terms of the written contract; in other words, if you had clause 3 in this case standing side by side with the contract would you, in order to give effect to the contract, have to strike out any portion of clause 3? In clause 3 it says: "Particulars of shipment with date of bill or bills of lading, approximate weight, marks (if any), and number of bags to be declared by original sellers not later than forty days from the day of the last bill of lading. . . . In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay." Now, of course, when you insert a custom you naturally add something to the contract, but I do not think that you would have to strike out any words in that clause if you read it in this way: "In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay, and such notice of appropriation may be given after the vessel has been lost." If the custom does exist, I do not think that it contradicts the written contract in the sense in which Mr. Leslie Scott suggests that it does.

Therefore the position is that we have to ascertain whether or not there is any such custom. Vaughan Williams, L.J., in the passage which I have just read, says that the Divisional Court have power to arrive at a conclusion upon that question. In the case of the *North-Western Rubber Company* v. *Hüttenbach* the parties consented to Mr. Justice Walton deciding the issue, and an issue was framed, and he decided upon it that a custom did not exist. What is the regular way to ascertain that on a motion in this court? By conflict of affidavit. But it is said, "This is obviously a matter which cannot be tried satisfactorily by affidavit, because custom, when you cross-examine about it with a witness in the box, very often breaks down, and the witness is shown not to know what he is talking about." That difficulty can be got over in this case by giving both sides liberty to give notice to the people who have made affidavits to attend for the purpose of cross-examination. As to the rest of the matter, we give no decision as to whether the award is to be set aside or not; but we adjourn the rest of this application to be heard before us on affidavits and on notice, if the parties wish to cross-examine the witnesses.

ROWLATT, J.—I should just like to express my views upon the question which has been argued, because no further judgment will be given in this court upon that part of the case, and this is an important matter.

This case has had a curious history because in the first instance a case was stated for the opinion of the court under sect. 19. That was, and must have been, according to the language of the Arbitration Act, a question of law arising in the course of the arbitration; and the question assumed to come under that designation was: "What was the construction of this printed contract according to what appears within the four corners of it?" Upon that question the court, of which I happened to be a member, delivered its judgment; (12 Asp. Mar. Law Cas. 570; 111 L. T. Rep. 1107). Now we get an award which states that the arbitrators treat with great respect that decision, but that they find that there is a custom which makes it wholly irrelevant, because whatever may be the construction of the contract, according to what appears within its four corners, the custom leads to a directly contrary result, as it adds another term to the contract.

The question whether there is a custom or not will have to be decided in the future; but I am bound to say that it is really making a vast draft upon my credulity to ask me to be convinced that these gentlemen, knowing in their own minds, as they do not claim to have heard any further evidence, that there is this custom which decides the thing apart from what is written here *ex concessis*, still go and take the trouble to ask us the question: "What is the meaning of what is written here?" However, whether there really is such a custom, whether it is not really that they have thought all along that the construction of the contract is different, and having found they have made a mistake, if our decision is right (it may not be), thereupon they say, "Very well, there is a custom to the contrary," I do not know. I hope very much that I shall not have to sit in the inquiry which decides which is correct. That is how the matter comes before us. It is certainly curious enough.

How does the position stand? The first question I think logically is, assuming that there is such a custom, is the custom inconsistent with the written document so as not to be admissible as evidence? I do not think that it is. I think Mr. Leck is right upon that part of the case, because here we have a document which contains the sale of so many tons of these beans, then the particulars of shipment are to be declared, and in case of resales a copy of the original declaration is to be taken and handed on as soon as possible; but nothing at all is said in the contract bearing upon the question whether these people choose to agree or not that a cargo may be declared after it has been lost. I do not think that it is impossible that that should be the meaning of the contract. It may be the intention of the parties; it may be one way or it may be the other way; but it is not expressed on the face of the contract. It has to be collected from what you can gather by looking at what is here and arguing from it. It seems to me that to find

that there is such a contract is not to find anything inconsistent with the terms of the contract, because I think that it could be written in either way at the bottom of the contract without altering a single word that exists in it now. Whichever way it might be settled you could write in "Declarations not to be valid if the cargo has been lost"; or, on the other hand, "Declarations to be valid notwithstanding the cargo has been lost." You could read it in either way without affecting what appears there. I think that that is the sort of test that one must apply. Therefore I do not think that there is anything inconsistent with the contract in the alleged custom. I observe that the custom does not go to all declarations. It is only in the case of resales that the declaration is good, although the cargo has been lost, and that comforts me a little, because, apparently, we were, after all, in everybody's view, right in holding that the declaration by the original shipper had to be of a cargo which was still afloat, and what we have decided amounts to this, that we have not been able to find that there is any distinction in the case of a resale because it says that a copy of the original appropriation shall be accepted by the buyers and passed on without delay. I am bound to say that I still think that it is extraordinarily difficult, as a matter of construction of language, to get out of that phrase that a copy of the original appropriation shall be accepted and passed on without delay, an agreement between the parties that, contrary to the case of the original appropriation, the appropriation in the second instance shall be valid although the cargo is lost, merely because they declare that a copy shall be accepted and passed on without delay. However, I am of opinion that there is nothing in this alleged custom which is inconsistent with the terms of the contract.

Now comes the question as to what effect it has upon the arbitration. What is the position of the arbitrator? It seems to me that after the two cases in the Court of Appeal, one in 1884 and the other in 1908, the position is that the question whether a term is to be added by custom to the express terms of a contract is a question going to the jurisdiction of the arbitrator, and therefore, although the arbitrator may, and indeed must, provisionally ascertain whether he is to proceed on the footing that such a custom exists, still he cannot conclusively decide it, and any award on the basis of the existence of the custom is good only if the custom in fact exists—a question to be decided by the court. The position itself is a very familiar one in cases of courts of limited jurisdiction, but the interest of these cases is that they bring within that principle an arbitration upon a contract such as this in connection with which a question as to the existence or non-existence of a custom arises. However, I think that we must deal with the question upon the footing that the arbitrators cannot conclusively decide on such a question because it is a question which goes to their jurisdiction, and under these circumstances the only order which we can make is this: Order the motion to be adjourned, the parties to file further evidence on the alleged custom as set out in the award, and to be at liberty to give notice requiring the attendance of deponents before us for examination; leave to appeal.

The Produce Brokers Company Limited appealed.

Leck, K.C. and *MacKinnon*, K.C. for the appellants.

Leslie Scott, K.C. and *C. R. Dunlop* for the respondents.

Buckley, L.J.—I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning, such as they are, I should say that it is wrong. But I am bound by authority, which of course it is my duty to follow, and following authority I feel bound to pronounce the judgment which I am about to deliver.

By a contract bearing date the 30th May 1912, the appellants, the Produce Brokers Company, sold to the respondents, the Olympia Oil and Cake Company, 6000 tons of Soya beans which were to be shipped to Hull. The contract contained a provision, upon which the question arose, in the following words: "3. Particulars of shipment with date of bill or bills of lading, approximate weight, marks (if any), and numbers of bags to be declared by original sellers not later than forty days from the date of last bill of lading. The buyers shall have at least three clear days after appropriation to give the necessary orders for port of destination, at port of call, demurrage (if any) up to three days to be for account of sellers. In case of resales copy of original appropriation shall be accepted by buyers and passed on without delay." On those last words the question arose. The contract also contained an arbitration clause which so far as material was in these words: "All disputes from time to time arising out of this contract . . . shall be referred to arbitration according to the rules endorsed on this contract." Further on it provided that neither buyers nor sellers nor any other persons shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by the arbitrators, umpire or committee, or board of appeal as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to take any legal proceedings against the other in respect of any claim arising out of this contract. The cargo was to be shipped from an Oriental port or ports during Dec. 1912 and (or) Jan. 1913. That contract having been made on the 30th May 1912, the Produce Brokers Company, the sellers, on the 9th Sept. 1912 made a similar contract for the purchase of a like quantity of Soya beans for the fulfilment of the first contract with the East Asiatic Company. On the 4th Feb. 1913 the East Asiatic Company under their contract declared or tendered to the Produce Brokers Company a shipment by a ship called the *Canterbury*. The Produce Brokers Company having received that tender passed it on to the Olympia Oil Company, availing themselves of the words "In case of resales," which it is not disputed apply to this case, strange as it may be, "copy of original appropriation shall be accepted by buyers and passed on without delay." At the moment when the East Asiatic Company made the tender to the Producer Brokers Company no one knew that any mischance or misadventure had

happened to the *Canterbury*. When, however, the Produce Brokers Company handed the tender over to the Olympia Oil Company, the facts which I am about to state were known. The *Canterbury* sailed on the 3rd Feb and had stranded on some rocks. On the 4th Feb. she was towed off and sank. The fact that she had sunk was known in London at 3 p.m. on that day. Therefore on the 4th Feb. 1913, the tender by the East Asiatic Company to the Produce Brokers Company was made without, and the tender by the Produce Brokers Company to the Olympia Oil Company was made with knowledge that the *Canterbury* had sunk. Under those circumstances a question arose between the Produce Brokers Company and the Olympia Oil Company as to whether or not that tender was a good tender. That question was referred to arbitration under the clause in the contract. In May 1913 an award was made in favour of the Produce Brokers Company. That was carried under the scheme of arbitration which prevails in this trade to the appeal committee. On the 14th Jan. 1914 the appeal committee stated a case for the opinion of the court. That case came before the Divisional Court on the 19th May, when the Divisional Court answered certain questions in the special case in the negative: (12 Asp. Mar. Law Cas. 570; 111 L. T. Rep. 1107).

The first of those questions, which is the only one I need read, was this: "Whether, regard being had to the terms of the contract of the 30th May 1912, a tender or appropriation under clause 3 can validly be made, if at the material time, and whether to the knowledge of the sellers or not, the vessel and her cargo have already become a total loss." The Divisional Court, expressing a consultative opinon only, answered that question in the negative—that is to say, they said it was not a good tender. Rowlatt, J. protected himself by saying, wisely as I think, that he confined himself to answering it in the negative when there was knowledge. The fact was that there was knowledge. Of course it is not material for the present purpose. So consultatively the Divisional Court upon a special case stated by the appeal committee answered that this was not a good tender.

Thereupon the matter went back to the appeal committee, who heard it, and on the 25th June 1914 made this award. Having considered the special case and unreservedly accepting the answers upon the construction of the contract as matter of law apart from the custom of the trade, the appeal committee nevertheless found "that by the long-established and well recognised custom of the trade in case of resales buyers under this form of contract impliedly agree with their sellers (*a*) that they will accept the original shippers' appropriation." The result therefore was that, having obtained the consultative opinion of the Divisional Court that this was a bad tender, the appeal committee found that it was a good tender, relying upon custom. Thereupon the Olympia Oil Company, against whom the award was made, served notice of motion to set aside the award on the ground that it was bad on the face of it, and for various other reasons. On the 20th Nov. 1914 the Divisional Court made the order now on appeal before us. That order was that the motion to set aside the award "do stand adjourned, and that both parties be at liberty to file further affidavits on the question as to the existence of the alleged custom mentioned in the awards." Of course the operation of that order is that the Divisional Court are going to hear evidence and cross-examination, if necessary, and that the Divisional Court are going to determine whether there is or is not such custom, a matter which has already been decided by the arbitrators if it is competent to the arbitrators to decide it.

The question between the parties is whether or not it is competent for the arbitrators to decide it. The relevant questions in considering that question seem to me to be these. Whenever a party comes into court alleging a contract, of course he must prove it unless it is admitted. The proof of the contract consists in adducing before the tribunal evidence to show what the contract is. Let me suppose, in the first place, that it is an oral contract. What would be the material evidence? The tribunal would hear the evidence of the two parties who were present as to what was said and what passed, and upon the result of that would find what the contract was. But if the parties who were thus summoned before the court were members of a particular trade the tribunal would be bound, in addition to hearing what they respectively said, to learn by evidence what in the mouths of those speakers was the meaning of the words they used; in other words, what was the custom of the trade which must be assumed to be in the minds of the parties speaking in using the words which they uttered. Let me put the case in the concrete. Suppose that it were a case of an oral contract made for the sale of coals, and that the oral evidence was that A. agreed to sell to B. 100 tons of coal, and then evidence was adduced that in the trade a ton meant 21 cwts. The result would be that the tribunal would have to find, if it was satisfied by that evidence, that there was a contract for the sale by A. to B. of 100 times 21 cwts. of coal, although they said tons. That, it seems to me, would be the case if it were an oral contract. Now let us suppose that it is a written contract. Of course, if a contract is in writing, the best evidence—it may be the only evidence, but not necessarily the only evidence—is the written contract, the written words appended to which are found the signatures of the contracting parties. But it does not follow that this is the only evidence. Suppose, for instance, the price being either 15*s.* or 16*s.*, the word, whatever it is, is so written that it is very difficult to say whether it is 15*s.* or 16*s.* I apprehend that under those circumstances the tribunal, upon looking at the document or assisting itself by such evidence as is legally admissible, would have to determine the question whether it was 15*s.* or 16*s.* and adjudicate upon that. In other words, you have to find out what the writing is, in order to ascertain what the contract is. Then further, as in the former case, when you have got the written contract before you, and you know exactly the words used as they are written down there on paper, I cannot see how this case differs from the former case; the tribunal must then receive evidence, if it be a question of custom, to show what those parties meant by their written words, just as in the former case to show what they meant by their spoken words. As a result of that, the evidence proving the contract would

be the written document plus such evidence as is legally admissible to show what is the meaning in the mouths of those contracting parties, of the language which they have used, and it is only I should have thought when you have read the written contract, and have added to it the custom, if custom be proved, explaining what the words in the contract mean, it is only when you have done both those that you have heard all the evidence to enable you to determine what the contract is.

Now, I think this is not disputed, that if there be before the arbitrators the duty of determining all disputes arising out of this contract, it must be within the competency of the arbitrators to determine what this contract is, otherwise they cannot get on. Here we come to the cleavage point. It is said by the authorities to which I have referred that it is competent to the arbitrators to determine that *de bene esse*, provisionally, for the time being, for the purpose of getting along with the arbitration, but they cannot determine it conclusively they may determine it, but ultimately it is for a court to determine it. That seems to me to be directly in conflict with what I have already said. If that is authority, what I have said must be wrong. What happens, therefore, is this: It is said by the authorities to which I am going to refer that the jurisdiction of the arbitrators is only to determine disputes arising out of the contract; if they admit the evidence of the custom and adjudicate upon the custom, according to the words used in these judgments, they are adding to or altering the contract. I cannot see that myself. It seems to me that you cannot ascertain what the contract is until you ascertain and introduce the custom; but that is the language used; and it is said that, if they add to or alter the contract by introducing the custom, giving themselves jurisdiction—because, if custom is read into the contract, then it is for them to decide upon it; if it is not read into the contract, it is not for them to decide upon it—and therefore they are giving themselves jurisdiction by introducing the question of custom.

I am bound to take it that that is so upon these authorities. I will just state what they are: The first was the case of *Hutcheson* v. *Eaton* (*sup.*). That case would not give me so much trouble, for a reason which I will state, as the second case. In that case there was a contract signed by certain persons, "Francis J. Eaton and Son, brokers." The question that arose was not what the contents of the contract were, not what the language of the instrument meant, but who was liable upon the contract, let the contract mean what it would. It was said that, according to the custom in that trade, if Francis J. Eaton and Son signed in that name "brokers," then, so soon as they disclosed the name of their principals, they were discharged, and their principals became liable. That does not trouble me so much. That appears to me to be a case in which it was confessed that the contract bound someone at first, and then by some custom it ceased to be binding upon him and became binding upon somebody else—a sort of novation of contract, which is not the case which we have to deal with, of course. But the reasoning upon which the court proceeded in that case is the reasoning which I was referring to just now, and inasmuch as we are bound by the principle of cases, as the principle seems to be that which I have stated, it may be that if that case stood alone we should have to follow it, as I myself have felt bound to follow it in *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.* (*sup.*), because of the principles laid down in the judgments; but otherwise that case is distinguishable, and it does not govern the present case. The second case was *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.* (*sup.*). That was the case of the sale of a certain quantity of rubber, fair quality, with a description of what it is at so much a ton, and there was an arbitration clause with the words, "any dispute on this contract to be settled by arbitration here in the usual way." When the goods arrived the buyers refused to take delivery on the ground that the goods were not in accordance with the contract.

Then there was an arbitration clause. The arbitrators found that the goods were not in accordance with the contract, but must be accepted by the buyers at an allowance of 10*s.* a ton. In other words, they found that according to the custom of that trade, when goods were sold which were of a defined quality, that meant of that quality or approximately of that quality, and if not exactly of that quality, then at a proper reduction. That was the custom. What was held there was that the arbitrators had no authority to deal conclusively with the question of the existence of a custom. I, myself, in the very short judgment which I gave in that case, expressed the doubts which I have been expressing now. I then was, and I still remain, unable to understand the principles laid down in *Hutcheson* v. *Eaton* (*sup.*), which bind me. I concurred with the majority of the court, who did not feel the difficulty which I did in saying that I was bound by *Hutcheson* v. *Eaton* (*sup.*), not because it was exactly the same case, but because applying the principles in that case it applied to the principles here, and I feel myself in the same condition still. I do not think that I could usefully add anything to my judgment in the *North-Western Rubber* case as to my views as regards *Hutcheson* v. *Eaton* (*sup.*).

Those being the authorities, the order under appeal stands in this position: The Divisional Court under the order will hear evidence as to whether this custom is good or bad. If they find it good, then they will say: "The contract includes the custom. Therefore the contract upon which the arbitrators had jurisdiction to adjudicate was a contract including the custom. Therefore they did not exceed their jurisdiction in awarding as regards the custom, and the award is good." If, on the other hand, they find the other way, that there was no custom, then they will say, according to those authorities: "That being so, the contract upon which the arbitrators had jurisdiction to arbitrate was a contract which did not include the custom—*ergo*, in awarding as regards the custom they exceeded their jurisdiction, and the award is bad." That is perfectly logical, and, upon the principles in these cases, I cannot say that it is wrong. I do not understand how it is possible to say that you have arrived at what the contract is until you have determined whether there is a custom or not, for, if there is a custom that contract is one thing, and if there is not a custom it is another thing. Therefore I do not understand the two stages under which the

arbitrator is to determine something, but not determine it conclusively.

Those are the grounds upon which I think the decision which I am pronouncing is wrong; but on the authorities it seems to me that I am bound to say that the decision I am pronouncing is right, because upon those authorities the contract is a thing of which it is impossible to say whether it does or does not include the custom until somebody whose function it is not to determine what the contract is has determined whether the custom is applicable or not. That being so, it seems to me that upon those two authorities I am bound to say that this order is right, and I think on these grounds that this appeal must be dismissed.

Phillimore, J.—With reluctance—I might almost say with sorrow—I concur in the view that this appeal must be dismissed. I trust that the case will proceed to the House of Lords. The matter arises in this way: There is a contract for the sale of certain goods, with an arbitration clause which is not merely an arbitration clause in the sense that disputes under the contract are to be settled by arbitrators, but is an arbitration clause in the sense that until there has been an award of arbitrators nobody can proceed to recover damages or debt under this contract. The odd thing is that the people who are putting the difficulty in the way of getting an award, no doubt because the award which they have got is not to their liking, are the people who must get an award in order to recover that which they seek to recover. This being so, and an arbitration having begun, the same respondents applied to the arbitrators to state a case for the consultative opinion of the Divisional Court and got the consultative opinion of the Divisional Court, which expressed *pro tanto* an opinion on the construction of the contract which was in their favour. With that opinion the matter went back to the arbitrators, which was the appeal committee. That board of appeal stated that it unreservedly accepted the answers of the Divisional Court on the construction of the contract as a matter of law apart from the custom of the trade, but it nevertheless found "that by the long-established and well-recognised custom of the trade in case of resales, buyers under this form of contract impliedly agree with their sellers" certain facts thereupon stated. That being so, they decided and awarded against the present respondents. Thereupon the present respondents applied to the Divisional Court on a notice of motion asking that the awards of the original arbitrators and the appeal committee might be set aside upon certain grounds, the second being "That the appeal committee exceeded their jurisdiction in determining whether the custom mentioned in the award dated the 25th June 1914 had any existence in fact, or in deciding that the Olympia Oil and Cake Company Limited were bound by the alleged custom to accept the appropriation therein referred to, which was invalid under the terms of the contract."

Among the points which they raised, and which they are entitled to raise, was the point that the custom contradicted the contract. That matter is not now before us. I understand that, provisionally, the Divisional Court expressed an opinion unfavourable to them on that, but the Divisional Court were struck by the point that the appeal committee exceeded their jurisdiction in determining whether the custom had any existence in fact, and they came to the conclusion that it was for them, the Divisional Court, to determine whether the custom had any existence in fact. In order that they might be better informed upon this matter, there being some affidavit evidence and some conflict upon the evidence, they selected as the mode to determine it, it being open to them to select the mode, that of affidavit and cross-examination. They might have directed an issue, but that was a matter for their discretion, and on the whole they preferred that mode of deciding it. But by making the order that there should be affidavit evidence and cross-examination they asserted—and that is the real subject matter of this appeal—that it was their duty to determine whether the custom mentioned in the award had any existence in fact. They put it upon the ground which is perhaps not otherwise than neatly expressed, as one would expect to find it neatly expressed, by the late Walton, J. in the case of *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.*: "It seems to me impossible to resist the conclusion that in *Hutcheson* v. *Eaton* (*sup.*) the Court of Appeal held that under a submission to arbitration of all disputes under a written contract, the arbitrators have no jurisdiction in arriving at their award to inquire as to the existence of a custom to which no reference is made in the written contract, and to decide that such contract is subject to such a custom. On this ground, and this ground only, we think the award in question is not in itself binding or conclusive between the parties."

It is really difficult to express exactly what that conclusion of law means otherwise than as it is expressed by Walton, J. It seems that the inference to be drawn from *Hutcheson* v. *Eaton* (*sup.*), and strongly confirmed unfortunately by the decision of the Court of Appeal in *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.* (*sup.*), is this: The arbitrators can construe a contract but they cannot superadd to the contract. No doubt if there is a custom the contract is the written contract as explained by the custom, always assuming that the custom does not contradict the contract, but if there is no custom then the contract is the written contract, and the arbitrators are introducing into the construction of the contract something which is not part of the contract. It is extremely difficult to understand the principle upon which that rests. Custom is a question of fact. The arbitrators are appointed to decide the question of fact, and, indeed, also questions of law, so far as they are not otherwise directed, and why the arbitrators should not determine this question of fact as well as any other question of fact, I do not know. Whether the principle of these cases goes so far as this—that if there is a dispute as to what is the contract, whether it is contained in one piece of paper or two, whether an interlineation is to be read in or not, the arbitrators have not jurisdiction to determine that, I do not know, but the principle which apparently is to be extracted from the opinion of the majority of the judges in both those cases is that the arbitrators may no doubt, must no doubt, at any rate pro-

visionally, decide every point submitted to them, that if they determine that something is to be added to the written contract which in the opinion of the correcting tribunal is not in fact in existence and is not to be added, they have then exceeded their jurisdiction. They have jurisdiction on condition that they decide rightly. One does one's best to express it, one almost fears that one is falling into the grotesque in representing it, but it is no doubt a possible result, a thinkable conclusion. Apparently without principle as it is, it is a conclusion, as I have said, that one can think and that one can express. It is quite possible to say that the decision in *Hutcheson* v. *Eaton* (*sup.*) and the decision in *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.* (*sup.*) were perfectly correct and yet to jettison the reasoning which I have mentioned.

In *Hutcheson* v. *Eaton* (*sup.*) the proceedings were peculiar. There had been one award on the question of the quality of the stuff that was sold, and in order to enforce that award the successful party brought an action upon it. The defendants' point was not that the contract had been misconstrued or anything of that kind, but that by a peculiar custom of the trade, though they had signed it, they were not, in the events which afterwards happened, liable under it, and accordingly they pleaded to the award that by custom they were not bound by it, also *pendente lite* they procured a second award on this point, and that second award was also in their favour. They also pleaded that second award. At the trial the jury found the custom against them. They had provoked that issue by pleading custom and submitting it to the jury. Notwithstanding that the jury found the custom against them, the learned judge on the trial entered judgment for them because he thought that the award was sufficient protection. Thereupon the plaintiffs came to the Court of Appeal, and the Court of Appeal could not, or would not, or did not, disabuse its mind of the question that the jury had found that there was no such custom. Both the Master of the Rolls and still more pointedly Bowen, L.J. referred to that. "First of all," says Bowen, L.J. "be it observed that no such custom exists at all." Why they began with the verdict of the jury and then went to the award, instead of beginning with the award and then going to the verdict of the jury, one cannot tell; but having begun by the verdict of the jury, they said, "there is no such custom." *Ergo*, the arbitrators must have exceeded their jurisdiction in importing something which had no bearing upon the question into the contract. They imported extraneous matter into the contract, and it was as if they had said that the contract was not to be enforced because one of the parties was a Hottentot, and therefore they said that the arbitrators had exceeded their jurisdiction. In the particular case it may well be that the arbitrators had exceeded their jurisdiction because it was not a matter to which custom could possibly apply, or the custom might be held to be unreasonable, and many other reasons might have been given why the very peculiar defence which the defendants raised should not have prevailed. One feels practically certain that the decision in *Hutcheson* v. *Eaton* (*sup.*) was just; but the language of the majority of the court goes as far as that which I have said.

As to the *North-Western Rubber* case, I myself am partly to blame for what has happened. I was sitting in the Divisional Court with the late Walton, J. In that case there was an award which on the face of it looked ridiculous, a finding that there had been a contract to deliver and accept certain goods and only certain goods, but that the buyers must accept inferior goods at a reduction in price which the arbitrators fixed. On the face of it that award looked all wrong, and we should have done very much better, in my humble opinion now, as I see it, to have set it aside without prejudice to another award which the arbitrators might have made; but upon the application to the Divisional Court to set it aside it was suggested in support that there was a custom regulating this market under which that would be a right decision, and it appeared that that contention had been submitted to the arbitrators, or the umpire, or both of them or all of them, and that really that was the ground upon which the decision had been made. On the other hand, there was no finding by the arbitrators in terms of the custom, and we were faced with the difficulty of the decision in *Hutcheson* v. *Eaton* (*sup.*) and a judgment which was prepared by Walton, J., but to which I was an assenting party, was delivered, the last clause of which I recently read. That being so, we felt that there must be some inquiry made as to whether there was such custom, being thereunto the more moved because there was no finding in terms by the arbitrators upon it, and because, apart from the custom, the award was obviously bad. I do not exactly remember all the stages, but I suppose that various ways of determining this question were considered, and ultimately somebody suggested that it would be well that an issue should be tried in the High Court to determine whether or not there was such a custom, and an order was made, which was not appealed against and which therefore stood binding, that Walton, J., if he was good enough to take it, should undertake the trial of that issue. He undertook the trial of that issue and he found, no doubt quite rightly found, and as the Court of Appeal so far as it investigated it said rightly found, that there was no such custom. Therefore, exercising the powers which had been reserved to him, he set aside the award. From that an appeal was brought to the Court of Appeal.

The Court of Appeal were in one respect very much in the same position as in *Hutcheson* v. *Eaton*. They had a finding in the High Court that there was no such custom at all, and they had an award which *ex facie* seemed bad, and which could only be made good by reading into it that there was such a custom. Thereupon they again decided against the award, and no doubt rightly in my humble opinion. Then again the grounds which were given by Vaughan Williams, L.J., and even more pointedly by Fletcher Moulton, L.J., grounds again underlined and made more significant by the fact that Buckley, L.J. expressed grave doubts about them, go so far as saying that that form of exercise of jurisdiction by the tribunal which tries the matter and is prepared, if a custom is found, to read it into the written contract is one which can only be warranted by a correct exercise of it, that it is a preliminary point going to the jurisdiction of

the arbitrators that if they introduce the question of custom they decide it rightly. I presume that if they rejected custom, and the court was satisfied that they ought not to have rejected custom, the tables would be turned and the award would be set aside on the other ground. I agree accordingly that this rule of law should be introduced. I conceive that it might lead to questioning nearly 50 per cent. of the arbitrations under these various business forms of sale note, and I also think that it is entirely contrary to the principle, the principle being that if the parties choose to refer their disputes to a domestic forum the arbitrators or the umpires are to decide the questions finally and without appeal, or with only such internal appeal as the submission of the parties grants; but these are the two decisions, and though I think both decisions might stand and should stand, notwithstanding that one thought that the Lords Justices who formed the majority were not so accurate in their reasoning as one would hope to find, still I think we are bound by the principle upon which these judgments were decided, particularly the second, which it is more difficult to avoid, and therefore I think one must agree that this appeal should be dismissed.

Pickford, L.J.—In this case the appellants sold to the respondents a certain quantity of soya beans under a printed contract, one of the terms of which was, "All disputes from time to time arising out of this contract, including any question of law appearing in the proceedings, shall be referred to arbitration," and the obtaining of an award was made a condition precedent to any action by one party against the other. A dispute did arise as to whether a declaration made by the appellants was good, and an award was made. The respondents appealed, as they could under the contract, to the appeal committee of the Incorporated Oil Association, and they, at the request of the respondents, stated a case for the opinion of the King's Bench Division under their consultative jurisdiction. The Divisional Court decided that on the proper interpretation of the contract the declaration was not good because it was made at a time when the goods and the ship carrying them had been lost. The appeal committee then made an award in which they stated that they unreservedly accepted the decision of the court, and proceeded to decide directly contrary to it because they found a custom of the trade under which such a declaration was held good. As they found this custom, not upon the evidence of witnesses, but upon their own expert knowledge, presumably they had as much knowledge of it when they stated the case as afterwards, and therefore the utility of asking the opinion of the court without mentioning the existence of the custom is not very apparent.

The respondents moved to set aside the award on the ground that the arbitrators had exceeded their jurisdiction, and contended that the question of whether there was such a custom or not was one which determined the jurisdiction of the arbitrators, and that therefore the finding by the arbitrators of its existence was not conclusive and ought to be reviewed by the Divisional Court. That court held upon the authority of *Hutcheson* v. *Eaton* (*sup.*) and *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.* (*sup.*), that they had jurisdiction to inquire into the question whether the custom existed. They were, however, of opinion that they had not sufficient material before them upon which to determine it, and adjourned the motion that further evidence might be given. Against that order this appeal was brought.

The appellants on this appeal wished to argue the question whether the decision of the first Divisional Court on the construction of the contract was correct, as they said that if it was wrong the award was good, even assuming that the arbitrators had gone wrong on the question of the custom. I do not think that question was open to them on the appeal. On the question open to them I think the matter is concluded by authority. I think that the two cases cited decide that where there is in a written contract a submission to arbitration of "any dispute arising out of this contract," a finding of the arbitrators that there is a custom affecting the contract is not conclusive, as the question is not one left to the decision of the arbitrators, but goes to their jurisdiction, and that, like any other tribunal of limited jurisdiction, they cannot give themselves jurisdiction by wrongly finding the facts. Sometimes the language used is that they have no jurisdiction to entertain the question, sometimes that they cannot decide it conclusively; but the result is that, as it is a question going to their jurisdiction, the court, if the arbitrators find the existence of the custom, can inquire into the correctness of that finding, and if they find that no such custom exists, they will set the award aside as being made without jurisdiction. In *Hutcheson* v. *Eaton* (*sup.*) Fry, L.J., dissented from this conclusion, holding that where an arbitrator had to decide a "dispute arising out of this contract," he must first ascertain "what is this contract?" and that it is competent for him to ascertain the true interpretation of the contract, having regard (*inter alia*) to all customs, if any, which affect its construction or alter the terms of the contract.

Buckley, L.J., in *Re Arbitration North-Western Rubber Company and Hüttenbach and Co.* (*sup.*), agreed with this view, though he felt bound to follow the decision of the majority of the court in *Hutcheson* v. *Eaton* (*sup.*). Personally, I agree with the view of these two learned judges, but I feel bound to follow the decision of the majority of the court. The circumstances of both the cases mentioned were very peculiar, and in each case there had been a finding in the High Court that the custom did not exist, before the case came before the court. The principle, however, is so clearly laid down that I do not think that the difference of the facts allows me to say that it does not govern this case, It might be possible to distinguish *Hutcheson* v. *Eaton* (*sup.*), as suggested by Buckley, L.J. in *Re Arbitration, North-Western Rubber Company and Hüttenbach and Co.* (*sup.*), but the latter case cannot, in my opinion, be distinguished. If the finding of the arbitrators be open to review, I cannot see that it makes any difference at what time the review takes place.

I think, therefore, following these authorities, that it is open to the Divisional Court to inquire whether the circumstances necessary to give the arbitrators jurisdiction, as defined in these cases, existed, and that they were not bound by the

finding of the arbitrators. If that be so, it becomes a matter of discretion whether they decide it on the materials before them at the time or adjourn it for further information.

For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *W. A. Crump* and *Son*, agents for *Andrew M. Jackson* and *Co.*, Hull.

Solicitors for the defendants, *Waltons* and *Co.*

House of Lords.

Feb. 26, *March* 1 *and* 8, 1915.

(Before the LORD CHANCELLOR (Viscount Haldane), Lords DUNEDIN, ATKINSON, PARKER OF WADDINGTON, and PARMOOR.)

LENNARD'S CARRYING COMPANY LIMITED *v.* ASIATIC PETROLEUM COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Cargo—Loss of cargo by fire caused by unseaworthiness—"Actual fault or privity of" owners—Merchant Shipping Act 1894 (57 *&* 58 *Vict.* c. 60), *s.* 502.

Parties who invoke the protection of and plead sect. 502 *of the Merchant Shipping Act* 1894 *must bring themselves within its terms. Thus a limited company can only free themselves from liability under this section if they discharge the onus of proof which is on them by showing that the matter for which they seek protection arose without their actual fault or privity.*

By sect. 502 *of the Merchant Shipping Act* 1894 *the owners of a British sea-going ship shall not be liable to make good to any extent whatever "any loss or damage happening without his actual fault or privity" where any goods or merchandise taken in or put on board his ship are lost or damaged by reason of fire on board the ship.*

A cargo on board a ship was destroyed by fire, the effective cause of the loss being the stranding of the vessel in a gale caused by the unseaworthiness of her boilers which prevented her getting up sufficient pressure of steam to avoid being driven to the leeward.

The shipowners claimed to be protected by sect. 502 *of the Merchant Shipping Act* 1894.

Held, on the facts, that the shipowners were not entitled to the protection of that section inasmuch as they had not discharged the onus of showing that the loss had not happened without their actual fault or privity.

Decision of Court of Appeal (12 *Asp. Mar. Law Cas.* 381; 109 *L. T. Rep.* 433; (1914) 1 *K. B.* 419) *affirmed.*

APPEAL from a judgment of the Court of Appeal, reported 12 Asp. Mar. Law Cas. 381; 109 L. T. Rep. 433; (1914) 1 K. B. 419, which affirmed a decision of Bray, J., reported 12 Asp. Mar. Law Cas. 269; 107 L. T. Rep. 581, in favour of the respondents, the plaintiffs in this action.

The appellants are shipowners, and were at all material times the owners of the oil tank steamship *Edward Dawson*.

By a charter-party dated the 23rd Feb. 1911 the appellants let the *Edward Dawson* on time charter to the Anglo-Saxon Petroleum Company Limited for a period of nine to fifteen months. In pursuant to the orders of the time charterers the *Edward Dawson* in Aug. 1911 proceeded to Novorossisk, and there loaded a cargo of 2011 tons of benzine in bulk for carriage to Rotterdam. Six bills of lading, which were alike in their material terms, were signed by the master of the *Edward Dawson*. The respondents were indorsees of the bills of lading. On the 1st Oct. 1911, while in the course of her voyage from Novorossisk to Rotterdam, the *Edward Dawson* on entering the Scheldt grounded owing to it being impossible in the state her boilers were to get up sufficient steam pressure to prevent her being driven to the leeward by a strong head gale that she then encountered. The stranding caused some of the benzine to escape from the tanks, and the vapour from the escaped benzine coming into contact with the combustion chambers of the boilers caused an explosion which resulted in the loss of the ship and cargo. On the 9th Jan. 1912 the respondents brought their action for damages for breach of contract for non-delivery of the benzine.

The respondents alleged by their points of claim that as such indorsees of the bills of lading they had suffered damage by reason of the appellants failure to deliver the benzine at Rotterdam. In the alternative, the respondents alleged that it was an implied condition of the bills of lading that the *Edward Dawson* on sailing from Novorossisk should be seaworthy, and in the further alternative they said that the conditions of the charter-party of the 23rd Feb. 1911 were incorporated in the bills of lading, and thereby the appellants had guaranteed the *Edward Dawson* to be seaworthy, and that they would so maintain her during the continuance of the charter; and they alleged that in breach of that implied or alternatively express condition the *Edward Dawson*, by reason of certain defects in her boilers, was unseaworthy when she sailed from Novorossisk, and that the loss of cargo was occasioned by the breach of these conditions.

The appellants by their points of defence admitted that the respondents were indorsees of the bills of lading, and that the benzine was not delivered at Rotterdam, but said that they were excused for the non-delivery because the benzine was destroyed by fire on the 1st Oct. 1911, and that therefore by virtue of sect. 502 of the Merchant Shipping Act 1894 they were not liable.

The appellants denied that the *Edward Dawson* was unseaworthy. Alternatively they said that the loss was due to causes for which they were excused by the exceptions in the charter-party, and in the further alternative they said that if the loss was in any way due to want of steam in the boilers, such want of steam was caused by the bursting of a tube on the 30th Sept. 1911, for which the appellants were excused by the conditions of the charter-party and bills of lading.

Sect. 502 of the Merchant Shipping Act is as follows:

The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

whatever any loss or damage happening without his actual fault or privity in the following cases—namely:—

(1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

The facts as to the loss of the cargo sufficiently appear from the judgments.

Adair Roche, K.C. and *Raeburn* (with them *I. H. Stranger*, for *J. A. H. Wood*, serving with His Majesty's Forces) for the appellants.

Maurice Hill, K.C. and *F. D. MacKinnon*, K.C., for the respondents, were not heard.

The following authorities were referred to by the appellants:

Virginia Carolina Chemical Company v. *Norfolk and North America Steamshipping Company*, 12 Asp. Mar. Law Cas. 82; 105 L. T. Rep. 810; (1912) 1 K. B. 229;

Ingram and Royle v. *Services Maritimes du Tréport*, 12 Asp. Mar. Law Cas. 387; 108 L. T. Rep. 304; (1913) 1 K. B. 538;

The Fanny, 56 S. J. 289; 28 Times L. Rep. 217;

The Warkworth, 5 Asp. Mar. Law Cas. 194, 326; 49 L. T. Rep. 715; (1883) 9 P. Div. 20;

Wilson v. *Dickson*, 1818, 2 B. & Ald. 2;

Smitton v. *Orient Steam Navigation Company*, 96 L. T. Rep. 848; 12 Com. Cas. 270.

The Lord CHANCELLOR (Viscount Haldane).—In this case the appellants have, at all events, the satisfaction of knowing that their case has been excellently argued by both the learned counsel who have appeared for them at your Lordships' Bar.

The case, which we have now heard fully and as to which we do not think it necessary to trouble the respondents' counsel, is shortly this. The *Edward Dawson* was a tank steamer designed for the carriage of oil in bulk. She was chartered by her owners, the appellants, on a time charter to a company known as the Anglo-Saxon Petroleum Company, and in the course of her employment she proceeded to Novorossisk in the Black Sea. There she loaded in bulk 2011 tons of benzine, and the bills of lading, six in number, were indorsed by the Anglo-Saxon Petroleum Company to the Asiatic Petroleum Company, who are the respondents in this case. The benzine has been lost, and the respondents have brought an action against the appellants to recover damages for the loss of their cargo.

Now the story of the case is in outline this: The *Edward Dawson* was built in 1890, as I have said, for the carriage of oil in bulk, and in 1907 she was bought by the appellants, who spent a good deal of money upon her, and proceeded to use her for certain voyages. In Jan. 1911, after she had been for a good while at sea, she was overhauled at Birkenhead, and the Bureau Veritas, a well-known agency which issues certificates and keeps a list for the purpose of showing the condition of ships, gave a certificate through Mr. Viehoff, who was their agent at Birkenhead, to the effect that she would have a satisfactory character for another twelve months, but only on conditions that her boiler pressure was reduced from 160lb. to 130lb. That obviously made a great deal of difference to the energy developing limits of capacity of the ship. Subsequently to that she proceeded on what she has described in the course of the argument as a round voyage. She went to Thames Haven, and at Thames Haven certain repairs were done under the superintendence of a Mr. Clarke to her boilers; she proceeded to New York, and from New York to Barcelona, and after various intermediate voyages she came to Novorossisk in the Black Sea, where she loaded a cargo of benzine of which I have spoken. She left Novorossisk, and the unsatisfactory condition of her boilers soon became manifest. These boilers leaked; they leaked salt water into the central furnaces, the furnaces became silted up with salt, so that their capacity was diminished, and the result was that when the ship on her way back passed the Straits of Dover and came into the North Sea she was not in a condition to develop such power as was desirable in the event of her encountering heavy head weather. She found herself on the 1st Oct. off the Dutch coast near the mouth of the Scheldt. There was a gale blowing, and she hove to and set her head against the gale to prevent herself from being driven on to the lee shore, but she was driven to the leeward and grounded. She first grounded on the Botkill Bank, and after bumping on the bank several times, she got off, but finally grounded in the Scheldt near Flushing. Her port of destination was Rotterdam. She does not appear to have been under adequate control. She had, among other things, burst a tube, which was not unlikely, having regard to wear and tear in excess of the length of life of tubes, which was given in the evidence as only ten years, and to the general condition of her boilers. She burst a tube, she took the ground, she was unable to get off the ground, she bumped, and as the result of bumping the benzine got loose from the tanks, the deck bulged, the tanks were probably cracked, anyhow the benzine began to get into the furnaces, and the result was a conflagration. It was suggested that if the flame had been extinguished by the injection of water, this might have been prevented, but I do not think the evidence upon that point at all satisfactorily established that that could have been secured, or, at any rate, that the operation could have been properly carried out.

In that state of things the loss of the cargo took place, and the case came before Bray, J. who tried it, and Bray, J. found a number of facts. He found these facts after hearing the evidence on both sides, and I think that his findings of fact were justified. They were these: The first was that the ship when she left Novorossisk was unseaworthy by reason of defects in her boilers. The second finding of fact was that the stranding on the Botkill Bank, just off the mouth of the Scheldt, was caused by the want of steam, which in it turn was caused by the unseaworthy condition of the boilers; and he found the same causes as regards the subsequent stranding in the Scheldt itself. Then in the third place he found that the loss was not caused by any negligence or want of precautions on the part of the engineers, because he does not find it proved that anything they could have done could have altered the consequences. He found that the loss of the cargo was caused by the unseaworthiness of the ship due to the condition of the boilers. Then there are other findings which are findings of mixed fact and law. One of these is that the duty of supervision remained with the managing

owners, and that the fault of the managing owners was a fault that affected the company itself.

That last question gives rise to the real question of law which occurs in this case. Taking the facts to be as the learned judge has found them, what is the consequence as regards the liability of the appellants? The appellants are a limited company, and the ship was managed by another limited company, Messrs. John M. Lennard and Sons, and Mr. J. M. Lennard, who seems to be the active director in J. M. Lennard and Sons, was also a director of the appellant company, Lennard's Carrying Company Limited. In that state of things, what is the question of law, which arises? I think that it is impossible, in the face of the findings of the learned judge, and of the evidence, to contend successfully that Mr J. M. Lennard has shown that he did not know or can excuse himself for not having known of the defects which manifested themselves in the condition of the ship, amounting to unseaworthiness. Mr. Lennard is the person who is registered in the ship's register and is designated as the person to whom the management of the vessel was entrusted. He appears to have been the active spirit in the joint stock company which managed this ship for the appellants; and under the circumstances the question is whether the company can invoke the protection of sect. 502 of the Merchant Shipping Act to relieve it from liability which the respondents seek to impose on it. That section is in these words: "The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases —namely, (1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

Now, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. Whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of sect. 502. It has not been contended at the Bar, and it could not have been successfully contended, that sect. 502 is so worded as to exempt a corporation altogether which happened to be the owner of a ship, merely because it happened to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim *respondeat superior* the burden lies upon him to excuse himself.

In that state of the law it is obvious to me that Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action. But Mr. Lennard did not go into the box to rebut the presumption of liability, and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr. Lennard's position was. The memorandum and articles of association were not put in. The only evidence was that of the secretary, Mr. Simpson, who told the court that he was secretary not only to the company, but also to the managing company, and the inference to be drawn is that the officials of the two companies were very much the same and transacted very much the same business. Under the circumstances I think that the company and Mr. Lennard have not discharged the burden of proof which was upon them, and that it must be taken that the unseaworthiness, which I hold to have been established as existing at the commencement of the voyage from Novorossisk, was an unseaworthiness which did not exist without the actual fault or privity of his own company. If that is so, then the judgment of the majority of the Court of Appeal and of Bray, J. was right.

There is another point which I have not entered upon, because it was not touched upon in the court below, and that is the question as to whether the terms of the charter-party are such as to exclude the operation of sect. 502 altogether. That question remains intact. It is not necessary to deal with it in this case, and I therefore pass it by.

For the reasons which I have given, I move that this appeal be dismissed, and dismissed with costs.

Lord DUNEDIN.—I concur, and I have but little to add to what the noble and learned Lord on the Woolsack has said. It appears clearly from the facts, and indeed eventually was admitted by the appellants' counsel, that the loss which had its final outcome in the fire was really due to a set of defects in the steam power in the boilers which constituted unseaworthiness. In the court below

at the trial the principal controversy seems to have turned upon whether the fault in allowing the vessel to be unseaworthy was a fault committed by the captain at Novorossisk or was the fault of J. M. Lennard, the registered manager of the ship. I agree with what my noble and learned friend has said that the true view of the facts is that the fault was the fault of Lennard. But before your Lordships' House the chief argument has been, admitting that it was the fault of J. M. Lennard, whether that was actual fault or privity in the sense of sect. 502 of the Merchant Shipping Act. The real question therefore turns upon what is to be the application of the words there used to a metaphysical conception like an incorporated company who cannot act directly themselves.

I do not know that a case will ever arise in which that will need to be treated as a purely abstract proposition. I do not think it arises in this case, and I certainly incline to the opinion that it will be found always to depend upon the particular facts of the case. If I was bound to decide affirmatively in this case, I should be inclined to think that there was enough known about Lennard to show that, to use the appellants' learned counsel's own phrase, he was the *alter ego* of the company. He was a director of the company. I can quite conceive that a company may, by entrusting its business to one director, be as truly represented by that one director as in ordinary cases it is represented by the whole board. I am quite sure that you cannot at least put as a general proposition in law that it is true that nothing will ever be the actual fault or privity of an incorporated company unless it is the actual fault of the whole board of directors. But I think the true criterion of the case is that which was found and applied by Hamilton, L.J., that the parties who plead this 502nd section must bring themselves within its terms; and therefore the question is—Have the company freed themselves by showing that this arose without their actual fault or privity? I think they have not. Lennard may have been deputed by the company to do all these things, or, again, there might have been liability upon the ground that Lennard had told the whole body of directors, and that they knew and sent him the money, and so on. Anyway, they have not discharged the onus which was upon them, and I therefore concur in the motion which has been made by my noble and learned friend on the Woolsack.

Lord ATKINSON.—I concur.

Lord PARKER OF WADDINGTON.—I concur.

Lord PARMOOR.—I concur.

Appeal dismissed with costs.

Solicitors for the appellants, *Downing, Handcock, Middleton,* and *Lewis,* for *Bolam, Middleton,* and *Co.*, Sunderland.

Solicitors for the respondents, *Parker, Garrett,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 16, 17, *and* 30, 1915.

(Before BUCKLEY, PICKFORD, and BANKES, L.JJ.)

BRITISH DOMINIONS GENERAL INSURANCE COMPANY LIMITED *v.* DUDER AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Reinsurance — Constructive total loss—Compromise between insured and insurers of original policy—Benefit of compromise to reinsurers.

The plaintiffs insured a ship against total and (or) constructive total loss only, and reinsured the risk with the defendants, the policy of reinsurance not containing the usual clause "to pay as may be paid thereon." The ship stranded, and notice of abandonment was given by her owner, who alleged that she was a constructive total loss. The plaintiffs refused to accept the notice of abandonment, and the owner brought an action against them which was compromised by the plaintiffs paying the owner 66 per cent. of the loss. The defendants were invited to agree to the compromise, but declined on the ground that there had been no constructive total loss in fact. In an action by the plaintiffs against the defendants on the policy of reinsurance, Bailhache, J. held that there was a constructive total loss in fact; that the defendants were disentitled to the benefit of the compromise, and were liable to the plaintiffs for the full amount of the reinsurance, subject to the benefit of any rights they might have had in respect of the abandonment of the ship if no compromise had been effected.

Held, that a contract of reinsurance is a contract of indemnity only, and that the defendants were entitled to the benefit of the compromise made by the plaintiffs with the owners; the plaintiffs therefore could only recover from the defendants the 66 per cent. of the loss which they had paid to the owner, and not the full amount of the reinsurance. The plaintiffs, however, were entitled to add to their claim against the defendants a proper proportion of the expense of obtaining the compromise.

Uzielli *v.* Boston Marine Insurance Company (5 *Asp. Mar. Law Cas.* 405; 52 *L. T. Rep.* 787; 15 *Q. B. Div.* 11) *discussed.*

Judgment of Bailhache, J. (12 *Asp. Mar. Law Cas.* 575; 111 *L. T. Rep.* 1079; (1914) 3 *K. B.* 835) *reversed.*

APPEAL by the defendants from a judgment of Bailhache, J. in the Commercial list, reported 12 Asp. Mar. Law Cas. 575; 111 L. T. Rep. 1079; (1914) 3 K. B. 835.

The plaintiffs' claim was upon two time policies of reinsurance, dated the 23rd Jan. 1913, upon the hull and machinery of the steamship *Katina,* valued at 20,500*l.*, one policy being for 850*l.* and the other for 650*l.*, and expressed to be against total and (or) constructive total loss only, warranted free from all average and salvage charges. The plaintiffs were the original insurers

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

to the extent of 1500*l.* under a time policy dated the 31st Dec. 1912, on the hull and machinery of the *Katina*, valued as in the reinsurance policy. This policy was an f. p. a. policy, but covered collision damage. By clauses attached to the policy the insured value was to be taken as the repaired value. The reinsurance policies contained the same clause.

The *Katina* stranded on the rocks near Hartland Point on the 23rd May 1913. Notice of abandonment was given on the 26th. It was not accepted, but the underwriters agreed to treat the matter as though a writ had been issued. The *Katina* came off on the 5th June and was ultimately taken to Swansea. As it was doubtful whether the *Katina* was a constructive total loss, an agreement was made between the owners and the underwriters other than the plaintiffs by which the owner agreed to accept 66 per cent. of their claim. The defendants were asked by the plaintiffs to agree to this compromise and to pay accordingly, but they refused upon the ground that there was no constructive total loss in fact. The plaintiffs, having at first refused to join the other underwriters in the compromise, were sued by the owner, who claimed for a constructive total loss. The action was settled upon the terms of the compromise, and the plaintiffs paid the owner's costs. The plaintiffs then brought this action against the defendants, claiming payment in full under the reinsurance policies. The defendants denied that the *Katina* was a constructive total loss, and contended that, if she were, they were liable to the plaintiff only for the amount of the loss which the plaintiffs had paid—namely, 66 per cent., and not 100 per cent. Bailhache, J. held that there was a constructive total loss in fact; that the defendants were disentitled to the benefit of the compromise, and were liable to the plaintiffs for the full amount of the reinsurance, subject to the benefit of any rights they might have had in respect of the abandonment of the *Katina*, if no compromise had been effected.

The defendants appealed.

Maurice Hill, K.C. and *F. D. MacKinnon*, K.C. for the defendants.—A contract of marine insurance is a contract of indemnity, and of indemnity only:

Burnand v. *Rodocanachi*, 4 Asp. Mar. Law Cas. 576; 47 L. T. Rep. 277; 7 App. Cas. 339;
Castellain v. *Preston*, 49 L. T. Rep. 29; 11 Q. B. Div. 380.

The decision in *Re Eddystone Marine Insurance Company* (7 Asp. Mar. Law Cas. 167; 66 L. T. Rep. 70; (1892) 2 Ch. 423), and *Re Law Guarantee Trust and Accident Society* (111 L. T. Rep. 423; (1914) 2 Ch. 617), have no application here; they were cases where the original insuring companies were in liquidation and paid at most only a dividend on the original policies, and it was held that they could recover the full amount from their reinsurers. The distinction is that in those cases the liability still remained after the payment of the dividends, and recourse could have been had to any further assets. It is true that in *Uzielli* v. *Boston Marine Insurance Company* (*sup.*) it was held that the plaintiffs, the reassured, were entitled to recover on the reinsurance policy 100 per cent. of the loss, although they had settled the assured's claim for 88 per cent. only, but it is difficult to see on what principle the court there proceeded. In holding that the indemnity afforded by the reinsurance was against the reinsurer's liability and not against the discharge of his liability it is submitted that Bailhache, J. was wrong. [They referred also to *Chippendale* v. *Holt* (8 Asp. Mar. Law Cas. 78; 73 L. T. Rep. 472; 1 Com. Cas. 197); and Arnold on Marine Insurance, 9th edit., s. 866.]

Adair Roche, K.C. and *R. A. Wright* for the plaintiffs.—The plaintiffs were liable to the insured for the full amount of the loss, but compromised for 66 per cent. of it. The defendants refused to have anything to do with the compromise, and cannot now have the benefit of it, especially as the cost to the plaintiffs of obtaining the compromise was heavy. A policy of reinsurance is an independent contract, and not one of indemnity: (*Nelson* v. *Empress Assurance Corporation*, 10 Asp. Mar. Law Cas. 68; 93 L. T. Rep. 60; (1905) 2 K. B. 281) and the reassured can recover from the reinsurer the amount insured, if he proves the loss of the subject-matter of the insurance—namely, his interest in the ship. Sects. 67 and 68 of the Marine Insurance Act 1909 are a mere restatement of the law, and go to show that the plaintiffs can recover the full amount. In so far as a contract of reinsurance is one of indemnity it is of indemnity against the liability of the reassured and not against the discharge of liability. *Uzielli* v. *Boston Marine Insurance Company* (*sup.*), a decision of the Court of Appeal, is a clear authority in our favour, and this case is stronger, as the reinsurance policy here did not contain the words "to pay as may be paid thereon." Further, here the plaintiffs' interest in the ship has been valued, and the amount of the plaintiffs' claim is determined by the valuation.

Maurice Hill, K.C. in reply.—The plaintiffs' interest is not valued; it is the ship that is valued. The two sums of 850*l.* and 650*l.* merely represent the maximum liability of the defendants, and must not be taken as the amounts for which the defendants are liable in case of the loss of the ship. The principle of all insurance is of indemnity and of indemnity only. [He referred also to sects. 9, 16, 55, 67, 68, and 91 of the Marine Insurance Act 1909.]

Cur. adv. vult.

March 30.—Buckley, L.J.—On the 31st Dec. 1912 the plaintiffs were original underwriters to the extent of 1500*l.* on the hull and machinery of the steamship *Katina* valued at 20,500*l.* On the 23rd Jan. 1913 the plaintiffs by two policies of that date, the one for 850*l.* and the other for 650*l.* reinsured against the risk of total and (or) constructive total loss only of her hull and machinery 20,5000*l.* or v.o.p., or (that is) value as in original policy.

The ship stranded on the 23rd May 1913, off Hartland Point, and three days later the owners gave notice of abandonment. The plaintiffs contended that the ship was not a constructive total loss. The owners brought an action against the plaintiffs; and in the result that action was compromised as between those parties on the terms that the plaintiffs paid the owners 66 per

cent. of liability upon the footing of a constructive total loss.

The defendants were invited to come into that compromise, but declined to do so. They said that the plaintiffs must act as uninsured, and that they, the defendants, did not admit that the ship was a constructive total loss. On the 12th Feb. 1914 the plaintiffs, by their solicitors, wrote to the defendants a letter in the plainest terms to the effect that they had satisfied themselves that the vessel was in fact a constructive total loss, and that a settlement at 66 per cent. was very beneficial to the underwriters; and asking the defendants to come into the compromise, and stating that, if they did not do so, the plaintiffs would then prosecute their action against the defendants, claiming a constructive total loss on the reinsurance polices strictly in accordance with their full rights on the policies, which they said entitled them to claim 100 per cent. on establishing in fact that there was a constructive total loss. The defendants adhered to the position which they had taken up, and refused to admit that the vessel was a constructive total loss. Thereupon the plaintiffs paid the 66 per cent., and now sue the defendants on the reinsurance policies.

In this action they have proved that there was in fact a constructive total loss: and upon that there is now no dispute. The question is whether the plaintiffs are entitled to 100 per cent. or 66 per cent. against the defendants. The learned judge has decided this in favour of the plaintiffs, holding that they are entitled to recover 100 per cent. The question is whether this is right.

On the one side it is said that a contract of reinsurance is a contract of indemnity, and that it is a contract of indemnity only; that the plaintiffs have in fact only had to pay 66 per cent. and cannot recover more against the defendants. On the other side, it is contended that the defendants were offered an opportunity of coming into the compromise; that they refused to do so, alleging that they were liable for nothing, because (as they contended) there was not a constructive total loss; whereupon (it is contended) they cannot now have the benefit of the compromise, which was obtained not in any way for them, but as a compromise of the question of constructive total loss, which has now been determined against them.

A contract of insurance and a contract of reinsurance are independent of each other. But a contract of reinsurance is a contract which insures the thing originally insured—namely, the ship. The reinsurer has an insurable interest in the ship by virtue of his original contract of insurance. The thing insured, however, is the ship, and not the interest of the reinsurer in the ship by reason of his contract of insurance upon the ship.

In *Uzielli and Co.* v. *Boston Marine Insurance Company* (5 Asp. Mar. Law Cas. 405; 52 L. T. Rep. 787; 15 Q. B. Div. 11), a case I find it very difficult to understand, the Court of Appeal affirmed that by reason of the total loss which had occurred, the original underwriter was entitled to recover from the reinsuring underwriter up to 1000*l.*, being 100 per cent. upon the amount named in the policy of reinsurance, notwithstanding that the original underwriter had settled with the owners for 88 per cent. The judgment of Sir Baliol Brett, M.R. goes to, first, a decision that no more than the 1000*l.* could be recovered, because, although the reinsurers had an insurable interest exceeding their share in the value of the ship by reason of the sue and labour clause, yet the policy of reinsurance was only for 1000*l.*, and they could recover no more; and, secondly, that the sue and labour clause was not available for the benefit of the reinsurers. He left the first point at a stage at which he seems to have assumed that up to the 1000*l.* the reinsurers could recover without saying why; and then upon the second point he went on to hold that they could not recover more. I cannot find that he gives any reason why the difference between the 88 per cent. and the 100 per cent. could be recovered. Cotton, L.J. says it is true: "They are liable to this extent"—that is 1000*l.*—"by reason of the total loss which has occurred"; but I cannot find any reasoning which leads to this conclusion. His reasoning seems to be only a summary of that of the Master of the Rolls. Lindley, L.J.'s judgment is rested upon "pay as may be paid thereon." I cannot think that this case is an authority for the proposition that upon a contract of reinsurance there can be recovered more than an indemnity—that the reinsurer can make a profit out of the reinsurance.

In *Castellain* v. *Preston* (49 L. T. Rep. 29; 11 Q. B. Div. 380) I find a principle laid down in the following passages: "The contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified": per Brett, L.J., at p. 386. "If there is a money or any other benefit received which ought to be taken into account in diminishing the loss, or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is": (per Cotton, L.J., at p. 395). "Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind": (per Bowen, L.J., at p. 397).

In *Burnand* v. *Rodocanachi* (4 Asp. Mar. Law Cas. 576; 47 L. T. Rep. 277; 7 App. Cas. 333, at p. 339) I find Lord Blackburn saying: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire or land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it

becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

In these passages I find a principle stated. The use of all authorities is to ascertain from them the legal principles which they affirm. In *Uzielli* v. *Boston Marine Insurance Company* (*sup.*), having read the case more than once, I cannot find a principle. I must guide myself, therefore, by *Castellain* v. *Preston* (*sup.*) rather than by *Uzielli* v. *Boston Marine Insurance Company* (*sup.*). Bailhache, J. rested his judgment upon the proposition that the indemnity afforded by reinsurance is against liability, and not against discharge of liability. I am not able to assent to this proposition, if it means, as by the context it must have meant, that if the liability be discharged by payment of a less amount, the assured by reinsurance can recover against the reinsuring underwriter the amount of the liability, although exceeding the amount paid for its discharge.

There are cases such as *Re Eddystone Marine Insurance Company* (7 Asp. Mar. Law Cas. 167; 66 L. T. Rep. 70; (1892) 2 Ch. 423) and *Re The Law Guarantee Trust and Accident Society* (111 L. T. Rep. 817; (1914) 2 Ch. 617), in which it would seem, until they are further considered, that the assured by way of reinsurance is recovering more than the amount he has to pay on the original insurance. They are cases, however, in which the assured by way of bankruptcy or liquidation seems to discharge his liability by payment of a dividend to the original assured. This, however, is not the fact. Notwithstanding the payment of a dividend, the liability to the full extent remains; and out of further assets, if any, it must in law be discharged. When the estate pays only 10*s.* in the pound, and recovers 20*s.* in the pound, it is not recovering in excess of a sum for which it has compromised its liability. The liability is not compromised at less than 20*s.* in the pound. The liability is still 20*s.* in the pound, and the right to recover a like sum against the reinsuring underwriter is an asset of the estate; and its proceeds must go according to the law of bankruptcy or liquidation to all the creditors in administration.

I regret to have to come to the conclusion that the defendants, who would have nothing to do with the compromise, are nevertheless entitled to the benefit of it. But it seems to me that as matter of legal right the plaintiffs cannot, even in such a state of facts as this, make a profit out of the reinsurance. For these reasons I think that the appeal must be allowed. The plaintiffs are, however, entitled to indemnity, and this is not necessarily confined to the 66 per cent. They are entitled to such further sum, if any, as is required to give them an indemnity. The costs, for instance, of obtaining the compromise at 66 per cent. should be added to the 66 per cent. I shall be prepared to hear anything that may be said as to the proper terms of an inquiry to ascertain what such further sum should be.

Pickford, L.J.—This action was brought on two policies of reinsurance on the steamship *Katina*, valued at 20,500*l.* The policies were against total or constructive total loss only, and were warranted free from all average and salvage losses. The plaintiffs were original insurers of the *Katina* to the extent of 1500*l.*, the valuation being the same as in the reinsurance policies. This original policy was an f.p.a. policy, but included collision damage. The reinsurance policies were 850*l.* and 650*l.* on hull and machinery, 20,500*l.* or v.o.p., meaning value original policy, being a reinsurance against the risk of total and (or) constructive total loss only, warranted free from all average and salvage charges. They did not contain the words "to pay as may be paid thereon."

The *Katina* was stranded and suffered severe damage, and the owners gave notice of abandonment to the underwriters, who did not accept it, but agreed to treat the matter as if a writ had been issued. The *Katina* was eventually got off and taken to a place of safety. It then appeared that it was a doubtful point whether the vessel was a constructive total loss or not; and, as neither party was clear on the point, they entered into negotiations, the result of which was that an agreement was come to between the owners and the underwriters by which the former agreed to accept 66 per cent. of the total claim. The defendants were asked to agree to this compromise, but they refused to do so on the ground that they considered there was no constructive total loss. The plaintiffs, in consequence of the defendants' action, declined at first to join the other underwriters in the compromise, and the owners sued them. The plaintiffs settled the action upon the terms of paying 66 per cent. and the owners' costs; and they then sued the defendants, claiming, as they had intimated that they would, 100 per cent. of the total loss. The defendants contested the claim on the ground that there was no constructive total loss; and also denied that the plaintiffs were entitled to recover for a total loss, as they were not liable and had not paid on that basis. The question of constructive total loss was decided against the defendants by Bailhache, J., and they accept that part of his decision, but they appeal against so much of it as decides that they are liable to pay 100 per cent. of the loss.

There is no direct authority on the subject, and the question does not often arise, because the reinsurers generally join in the compromise; but in this case they decided to try to escape liability altogether, on the ground of there being no constructive total loss, and if they failed on that ground, to claim the benefit of the compromise in which they refused to join. Bailhache, J. has decided that they cannot claim this benefit, and the question is whether this conclusion is in accordance with the principles of marine insurance.

A contract of marine insurance is a contract of indemnity, and a contract of reinsurance is also a contract of indemnity, though it is a contract independent of the original contract of insurance, and so not within the third party rules relating to indemnity decided in *Nelson* v. *Empress Assurance Corporation* (10 Asp. Mar. Law Cas. 68; 93 L. T. Rep. 60; (1905) 2 K. B. 281). Bailhache, J. accepts the principle that a contract of reinsurance is a contract of indemnity; but he says that it is a contract of indemnity against liability; and that he sees no more reason why a reinsurer should pay less by reason of a compromise made with the assured for the benefit of the original assured and not of the insurer, than in the case where the original underwriter becomes bank-

rupt and pays a small dividend or none. The reference in these last words is *Re Eddystone Marine Insurance Company* (*sup.*); and *Re Law Guarantee Trust and Accident Society* (*sup.*). It does not seem to me that those cases stand at all on the same footing as this. They proceed on the ground that the reinsurer has to pay the original insurer his liability, whether he has discharged it or not; and that it is immaterial to him what the original insurer does with the money. But there is no diminution of the liability; the original insurer though bankrupt is still liable for the full amount; if assets were to come in in time he could be made to pay; and even in his insolvent state, if the creditor could get judgment, he could be made to pay this particular creditor, if it were not for the bankruptcy laws, which compel an equal distribution of his assets.

In this case there is an actual diminution of the liability; and the plaintiffs could never be called upon to pay more than 66 per cent. The case of *Uzielli* v. *Boston Marine Insurance Company* (*sup.*) was also relied upon by the plaintiffs. The case is very hard to understand, and does not decide the point in this case. The plaintiffs there had paid 88 per cent. for a total loss, and 24 per cent. for suing and labouring; and Mathew, J. had given judgment against the defendants for 112 per cent. The Court of Appeal held that the suing and labouring clause did not apply to that reinsurance, and gave judgment for 100 per cent. The judgment of the Master of the Rolls does not, in my opinion, touch this point; that of Lindley, L.J. seems to me to proceed upon the words "to pay as may be paid thereon," which are not in this policy; and the only difficulty is caused by the passage in the judgment of Cotton, L.J.: "As to the second point, I agree that the policy is a contract of insurance upon the ship; it is a reinsurance upon the policy issued by the French Company to pay as they shall pay, but to cover a total loss only. The insurance is effected by those who are not owners, but by those who are liable in respect of the ship. That is the extent of the defendants' liabilities? The original insurers are liable in respect of the loss of the ship; but the defendants' liability on the policy is limited to the extent of 1000*l.*, and that is all which they can be properly called upon to pay on the policy. They are liable to this extent by reason of the total loss which has occurred." If this means that on the happening of a total loss the reinsurers are liable irrrespective of whether the original underwriters are liable or not, it is, I think, inconsistent with the doctrine that they only indemnify the original insurers against their liability; and if it only means that they are liable to the extent of the original insurers' liability, it does not deal with the question whether a diminution of that liability enures for the benefit of the reinsurers. It is to be noticed that in that case the original insurers had in fact paid more than the 100 per cent., and the court does not make it very clear why they gave judgment for more than 88 per cent. The judgment of Cotton, L.J. seems rather to treat the policy there as a valued policy, and it was contended before us that the policies in this case were valued policies, valuing the plaintiffs' interest at 850*l.* and 650*l.*, and that, therefore, as soon as a total loss happened, 850*l.* and 650*l.* immediately became payable. I do not think this is so. I think they are insurances of 850*l.* and 650*l.* on the plaintiffs' interest in a ship valued at a certain sum, not insurances on a valuation of the plaintiffs' interest. As the policies are in respect of total loss only on a valued ship, the effect under ordinary circumstances is the same as a valued policy, because the original insurer is liable for the whole amount or none; but this does not seem to me to make them valued so as to exclude a consideration of the real amount of the plaintiffs' liability.

I think these policies are subject to the principles stated in *Castellain* v. *Preston* (*sup.*) where Brett, M.R. says: "I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right." And Bowen, L.J. says (*ib.*, at pp. 401, 402): "Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss he must account for the diminution to the underwriters"; and in *Burnand* v. *Rodocanachi* (*sup.*), per Lord Blackburn. It is true that these cases were not concerned with reinsurance, but the principle of indemnity applies to it as much as to original insurance. Here the plaintiffs have obtained a diminution of their liability by compromise, and it seems to me they come within the principles stated by Brett, M.R. and Bowen, L.J. in *Castellain* v. *Preston* (*sup.*), just as much as if some actual thing diminishing the loss had come into their hands, as mentioned by Lord Blackburn.

I think, therefore, that the plaintiffs are not entitled to recover 100 per cent, and that the defendants are entitled to the benefit of the compromise. I do not think it very material whether it be put on the ground that the plaintiffs' liability was reduced by agreement, and that they, therefore, never became liable for more than 66 per cent., or on the ground that their legal liability was 100 per cent., but by virtue of an agreement with the shipowners they only paid 66 per cent., and that the reinsurers by subrogation became entitled to the benefit of that agreement.

I do not, however, think that they are entitled to take the benefit and refuse to contribute to the expense of obtaining it. We were told that there were expenses incurred in obtaining the compromise, but were not told what they were. *Nelson* v. *Empress Assurance Corporation* (*sup.*) shows that they are not to be measured in the same way as costs of a third party under Order XVI., r. 48; and, indeed, in this case it is not clear that the costs of the action brought against the plaintiffs by the shipowners were expenses of obtaining the compromise, as it seems that the plaintiffs might have secured the same terms without an action.

There must, therefore, be an inquiry as to the expenses of obtaining the compromise, unless the parties come to an agreement about them.

Bankes, L.J.—The only question raised by this appeal is whether the respondents are entitled to recover from the appellants the whole, or only portion, of the amounts of two policies of reinsurance both dated the 23rd Jan. 1913.

The only facts which need be stated are as follows: "The respondents were original insurers to the extent of 1500*l.* under a time policy dated the 31st Dec. 1912 on the hull and machinery of the steamship *Katina*, valued at 20,500*l.* The respondents reinsured the risk with the appellants in so far as it related to total and/or constructive total loss by the two policies above referred to, one being for 850*l.* and the other for 650*l.* In May 1913 the *Katina* was stranded, and the original assured claimed as against the respondents that she was a constructive total loss. The respondents refused to admit the claim, and ultimately the assured commenced an action. The matter was then compromised, the assured agreeing to accept 66 per cent. of the claim in full discharge of the respondents' liability in respect of a constructive total loss and salvage charges. The respondents had asked the appellants to join in the compromise, or at any rate to be bound by it. This the appellants refused to do, and as they persisted in the view that the vessel was not a constructive total loss, the present action was commenced. Bailhache, J. found that the vessel was a constructive total loss, and he accepted the respondents' contention that they were entitled to the full amount of the policy moneys, and he gave judgment for that amount (less certain allowances with regard to which no question arises). The appellants contended, and now contend, that they are liable only for the amount which the respondents, as a result of the compromise, actually paid to the original assured.

The respondents' counsel complained bitterly of the conduct of the appellants in refusing to come into the compromise; and he pointed out that as a result not only had the respondents to accept the compromise at their own risk, but they had to bring the present action at considerable cost to themselves in order to establish as against the appellants the facts that the vessel was a constructive total loss. It would be most unfair, he contended, that the appellants should be allowed any benefit where they had so unreasonably refused to shoulder any portion of the burden. From a business point of view I quite sympathise with the complaint, but I am unable to give it the legal effect for which the respondents contend, or which Bailhache, J. appears to some extent to have attributed to it.

In my opinion, it is not possible, without losing sight altogether of the root principle of insurance law that the contract of insurance is a contract of indemnity, to accept the respondents' contention that they are entitled to ignore the compromise, and claim the full amount of the reinsurance policies. I find the rule laid down in very plain terms by Lord Blackburn in *Burnand* v. *Rodocanachi* (*sup.*). He says: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the persons to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

Bailhache, J. founds his judgment in the present case mainly upon two considerations. First, that the respondents bought the compromise, as he expressed it, and under the circumstances bought it for their own advantage, and not for the joint benefit of themselves and of the appellants, and consequently that the appellants are not entitled to any benefit from it; secondly, that the contract of reinsurance is a contract of indemnity against liability, and not against discharge of liability. There is, no doubt, truth in both propositions, but, with respect to the learned judge, the propositions are only partially true. If the simile of a purchase is employed because a price was paid, it cannot, I think, be denied that it is a kind of purchase which does not put the purchaser into the shoes of the vendor so as to enable him to take advantage of the vendor's contract and to sue on it. In speaking of the contract of reinsurance as an indemnity against liability, and not against the discharge of liability, no account is taken of the fact that in the present case, before the liability was discharged, it was reduced in amount by agreement between the parties. In discussing the rights of these parties, I think that it is useful to consider what the position would be in a case where a reinsurer pays the original underwriter the full amount of his liability, and the latter, by some compromise with the original assured, afterwards reduces his liability to a less sum than he had received from his reinsurer. In such a case, upon the authority of such cases as *Castellain* v. *Preston* (*sup.*), in my opinion the reinsurer would be entitled by the doctrine of subrogation to be paid back the difference between what he had paid to the original underwriter and what the latter paid to his assured, and this because the contract of reinsurance is a contract of indemnity which in the case referred to can only be given effect to by invoking the aid of the doctrine of subrogation. In my opinion, unless there is something special in the present contract excluding the operation of the principle of indemnity, the same result must follow whether the compromise precedes or follows the payment by the reinsurer; and the conduct of the reinsurer, however unreasonable, with reference to the compromise, cannot, in my opinion, alter the character of the contract into which the parties originally entered.

It was contended for the respondents that in the present case the contract was a special one. It was said that the policy was a valued policy, and there having been a constructive total loss of the vessel the subject-matter of the insurance, the appellants must pay their agreed proportion of the agreed value of the vessel. I do not agree with this contention. It is true that as between the respondents and the original assured the value of the subject-matter of the insurance was agreed, and it is also true that as between the respondents and the appellants the latter had

agreed to reinsure a certain proportion of the former's liability in respect of that agreed value; but that does not, in my opinion, in the events which happened, exclude the principle of indemnity. The effect of the compromise may be variously stated. It may be said that the claim of the original assured having been compromised, there was no payment by the original assured of any agreed fixed proportion of the agreed value. It may perhaps be said that the result of what happened was that a lower value was substituted for the one originally inserted in the policy, or that the original liability was reduced by agreement. Whatever view is taken of the compromise, the respondents cannot, in my opinion, after the compromise, successfully contend that the reinsurance policies were valued policies in the sense that the respondents' claim was "conclusively quantified," to use Mr. Wright's phrase, in the policies merely because it was established that the vessel, the value of which was agreed, was a constructive total loss. To use the language of Lord Selborne in *Burnand* v. *Rodocanachi* (*sup.*), the law does not justify the use of the estoppel founded upon the valuation for any such purpose.

No case was cited to us which, in my opinion, supported the respondents' contention. *Mackenzie* v. *Whitworth* (2 Asp. Mar. Law Cas. 490; 33 L. T. Rep. 655; 1 Ex. Div. 36) was cited to us for the respondents as supporting their contention. I do not so read that case. So far as it has any bearing upon the question, I think that it tells against the respondents. In that case the question was whether in a policy which was really a policy of reinsurance, though not so expressed, the description of the subject-matter of the insurance was sufficient. The description was "on goods" merely, the goods being cotton shipped by a New Orleans firm of Tatman and Co., insured by New York underwriters, and reinsured by them with the defendants. Blackburn, J., as he then was, speaks of the interest of the original insurer in these words. He says: "The assured here had a direct interest in the safe arrival of the cotton. . . . It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendants' contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against." It is plain, from what the learned judge said, that he was dealing with a case in which the original assured had been called upon to pay the full amount of the damage sustained, and the point which is raised in this appeal was not therefore before the court. The language of the learned judge is, in my opinion, important as indicating the nature of the interest of the respondents, and the character of the contract of reinsurance.

Uzielli v. *Boston Marine Insurance Company* (*sup.*) was referred to and relied on. It is generally accepted that this case on some points is very difficult of explanation. So far as it can be regarded as any authority in the present case, I think it is important to consider the arguments presented to the court. The underwriters, who were reinsured by the plaintiffs, compromised the claim of the original assured at 88 per cent., but a considerable sum had been expended in getting the vessel off. The plaintiffs thereupon, as stated in the report, became liable as reinsurers to pay their proportion of the 88 per cent., and a proportion of the expenses, less the proceeds of the sale, which sums altogether amounted to a loss of 112 per cent. Mathew, J. held that there had been a constructive total loss, and that the underwriters had expended more than 100 per cent. in the efforts to save the vessel, and he gave judgment for the full 112 per cent., although the policy was a policy for 1000*l.* only. Upon the appeal the defendants contended that their liability ought to be limited to the 88 per cent., and that they ought not to be held liable under the sue and labour clause. The plaintiffs contended that by the terms of the policy the defendants were liable to pay what the plaintiffs were liable to pay under the sue and labour clause. The point which is taken in the present case was not taken in that case. On the contrary, it appears to me to have been assumed that but for the point under the sue and labour clause the claim would have been limited to the 88 per cent. The Master of the Rolls deals with the question in this way. He says that the interest of the plaintiffs as reinsurers is the loss which they might or would suffer under the policy upon which they themselves were liable. He points out that this loss might be more than the share in the full value of the ship, because of the liability under the sue and labour clause, and though he holds that the claim must be limited to the amount of the policy—viz., 1000*l.*—he apparently treats the 12 per cent., representing the difference between the 88 per cent. and the 100 per cent., as recoverable because of the position of the plaintiffs under the policy upon which they were themselves liable, and the terms of the policy under which the plaintiffs were claiming from the defendants. I share the difficulty experienced by other judges more experienced in these matters than myself, in finding a satisfactory explanation of why the 12 per cent. was allowed: (see per Bigham, J. in *Western Assurance Company of Toronto* v. *Poole*, 9 Asp. Mar. Law Cas. 390; 88 L. T. Rep. 362; (1903) 1 K. B. 376, at pp. 386-388). But, on the other hand, I do not find any trace of the point which we have to decide in this appeal having been taken, or of any intention on the part of the court to decide it.

A third case that was relied on was *Nelson* v. *Empress Assurance Corporation* (*sup.*). That case turned upon the question whether the third party procedure should be applied as between an original insurer and his reinsurer. The Court of Appeal decided that it ought not to be applied in the particular case before it, Mathew, L.J. observing that the attempt to apply the third party procedure was quite a novel departure which would lead to great inconvenience owing to the two contracts being independent contracts often covering different risks, and he said that he was not prepared to create a precedent. It is true that he said also that the contract of reinsurance could not be treated as a contract of indemnity within the meaning of Order XVI, r. 48. It seems clear from what immediately follows this statement in the judg-

ment, that the Lord Justice had not the present case in his mind when he made the statement; and even if the statement be accepted as correct in the narrow sense in which it was used, I do not think that it is any authority in support of the respondents' contention. I need not refer in detail to *Re Law Guarantee Trust and Accident Society*; *Liverpool Mortgage Company's* case (*sup.*), which proceeded, in my opinion, upon an entirely different principle, and I see no reason at all to suppose that Scrutton, J. had the point which we are considering in his mind when he used the language to which we have referred.

The conclusion to which I have come is that the present case is covered entirely by the principles laid down in the judgment in *Castellain* v. *Preston* (*sup.*), and that the present appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendants, *Thomas Cooper and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 10 *and* 12, 1915.

(Before SANKEY, J.)

HAPPE v. MANASSEH. (a)

Sale of goods—C.i.f. contract—Payment against shipping documents—Moratorium—Effect of—Postponement of Payments Act, 1914 (4 & 5 *Geo.* 5, *c.* 11).

The moratorium provided by the proclamation under the Postponement of Payments Act 1914 *has no application to a c.i.f. contract.*

COMMERCIAL COURT.

Action tried by Sankey, J.

The plaintiff's claim was for damages for alleged breach of contract.

Maurice Hill, K.C. and *Morton Smith* appeared for the plaintiff.

Hohler, K.C. and *C. M. Pitman* appeared for the defendant.

The facts and arguments are sufficiently stated in the judgment.

SANKEY, J.—In this case the plaintiff claims damages for alleged breach of contract, and the amount is not in dispute. The facts are contained in the evidence of Mr. Wright, plaintiff's manager, which I accept as absolutely true, and in certain correspondence between the parties. On the 12th June the defendant wrote the plaintiff a letter which contained the terms of the contract in the following words:

> I confirm the sale to you of five chests of Patna opium at 117*l.* per chest net, shipment from Calcutta during July 1914, payment cash against documents upon arrival of steamer.

The steamer duly sailed from Calcutta, and upon the 14th Aug. defendant wrote to the plaintiff:

> I beg to send you the statement of the five chests of Patna opium ex steamship *Nore*. I have received information that the steamer expects to arrive in port on Monday afternoon next. Shipping documents will therefore be tendered to you for payment on Monday next.

The reply to that was on the 15th Aug., when the plaintiff wrote:

> In reply to yours of the 14th Aug., we beg to inform you, under the proclamation of moratorium, we desire to postpone payment for one calendar month, or less, at our option.

Nothing further was done till the 20th Oct., when the plaintiff telephoned to the defendant and asked for delivery of two chests of the opium, and in reply a message was received that he must take the lot—the five chests—or none.

The plaintiff followed up that telephone conversation of the 20th Oct. by a letter of the 21st Oct, in which he says to the defendant:

> Please give bearer statement and warrants on delivery order for the five chests of opium; date of contract, June 12, 1914.

To that request the defendant made no reply, and in consequence Mr. Wright went to the defendant's office and asked for the five chests of opium. The defendant at that time refused to deliver, repudiated the contract, and in consequence Mr. Wright went back and informed his employer, who bought two chests, of which he had urgent need, that same afternoon. And he wrote:

> Seeing you have failed to deliver the parcel of opium, payment against same having been legally postponed under the proclamation of moratorium, we hereby give you notice that we shall cover ourselves against this contract in the open market and shall hold you responsible for any loss.

Very soon after that there was another telephone communication between plaintiff and defendant, and defendant wrote later the same afternoon, having received the letter I have just read, in the following terms:

> In reply to yours of even date, I send you per bearer statement for above amounting to 592*l.* 14*s.* 8*d.* Warrants for the five chests are in my office, and will be handed to you in exchange for payment of cash, which please send at once.

Plaintiff wrote a letter in reply saying that that offer was too late, that he had already bought against defendant, and on the 26th Oct. defendant wrote:

> With reference to your claim for delivery of the above and my tender of same within a few hours, I regret you have not paid for and taken delivery of the goods, and I give you notice that unless you do so within twenty-four hours from now I shall dispose of the goods and hold you responsible for all loss and damage suffered.

On those facts Mr. Hohler contends: (1) That the moratorium does not apply to a c.i.f. contract. (2) That the plaintiff having repudiated his agreement by refusing to pay against the documents the defendant became excused from performing his part of the contract.

As to the first point: This is a pure question of law. The nature of such a contract is fully discussed and decided in the judgment of Kennedy, L.J. in *Biddell Brothers* v. *E. Clemens Horst and Co.* (12 Asp. Mar. Law Cas. 1; 104 L. T. Rep. 577; (1911) 1 K. B. 934), which received the express approval of the House of Lords. Beyond that the evidence in this par-

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

ticular case satisfies me that it was the duty of the defendant under the contract to tender the documents in question to the plaintiff. The plaintiff, however, is not entitled to have the documents except upon the terms of payment. It would be impossible for him to say that he was entitled to the documents but could postpone the payment. It is the payment which entitles him to the documents.

In my view the moratorium proclamation does not apply to such contracts; it only applies where the payment is a naked one, and not to cases where there is a stipulation that to obtain documents of title the purchaser must perform the condition precedent of payment. To hold otherwise would lead to the most startling results. The duty of the vendor ends upon his tender of the documents, but if the purchaser is entitled to postpone payment the effect would be to place upon the vendor the obligation to pay landing and warehouse charges, which are no part of his contract and cannot, as I think, be placed upon him by the moratorium proclamation.

It was said in the course of argument that the vendor would have a lien on the goods for the landing and warehouse charges. This I doubt, but if the goods were of a perishable nature the value of such a lien might be worthless, and this again shows that such an agreement is not within the moratorium proclamation, which was merely to postpone payments and not to alter contracts.

Further, part of the c.i.f. rate is for maritime freight, which is expressly excluded from the operation of the moratorium, and although I think that the words of the proclamation are very wide, in my view they refer to payments in respect of contracts already performed by one party and not to payments which are conditions precedent to the fulfilment of a contract by the other party. I therefore am of opinion that the moratorium proclamation does not apply to a c.i.f. contract.

I now come to the second point. As already stated, the evidence is that under such an agreement payment would not be due till tender of the documents by the defendant. The defendant never did tender the documents, but, on the contrary, refused to complete on the 23rd Oct. Mr. Hohler asks me to find either: (1) Plaintiff dispensed with such a tender, or (2) announced his intention of repudiating before the defendant had had an opportunity of tendering. For this he relies on the plaintiff's letter of the 1st Aug. I do not so read that letter. It appears to me that so far from being an intimation by the plaintiff that he intends to repudiate, it is just the reverse.

It is at the most a request for postponement or an announcement of plaintiff's desire to rely upon an alleged right under the moratorium proclamation. In any event it is not such an act as entitles the defendant to treat it as a repudiation of the contract, or as an excuse for him not tendering the documents. Nor, indeed, did the defendant so regard it or so treat it, for on the 23rd Oct. he regarded and treated the contract as still existing, and was willing—though too late—to fulfil his part of it.

It is said that the effect of this will be to place the landing and warehouse charges upon the shoulders of the defendant in this case. I do not agree to that. I regard the case set up by the plaintiff not as substituting a fresh contract for the original c.i.f. contract, as suggested by Mr. Pitman, but rather as a request by the plaintiff to postpone the time of payment which the subsequent conduct of the defendant showed he acquiesced in and granted.

Under these circumstances the defendant, in my view, would be entitled, as he has acted upon such request, to recover such charges from the plaintiff. For these reasons I think the claim succeeds and I must give judgment for the plaintiff, with costs.

Judgment for the plaintiff for 100*l.* 18*s.* and costs.

Solicitors for the plaintiff, *Herbert Oppenheimer* and *Nathan.*

Solicitors for the defendant, *Oldman, Cornwall* and *Ward Roberts.*

March 24 *and* 25, 1915.

(Before BAILHACHE, J.)

HOLLAND GULF STOOMVAART MAATSCHAPPIJ *v.* WATSON, MUNRO, AND CO. LIMITED. (*a*)

Charter-party—Marine insurance—War risk "for charterer's account"—Charterer's duty to insure.

The plaintiffs were the owners of a Dutch steamship, which was chartered by the defendants under a charter-party which provided (inter alia) *that the owners were to pay and provide for insurance, that the charter-party was not to be construed as a demise of the ship, and that the owners were to remain responsible for insurance. The charter-party also contained the following written clause: "War risk, if any required, for the charterers' account. It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy."*

On the 21*st Sept.* 1914, *while on a voyage from Portland, Oregon, to Ireland with a cargo of wheat, the ship was sunk by a German cruiser.*

In an action by the plaintiffs to recover damages for the defendants' failure to insure the steamer against war risks after having been requested by the plaintiffs to do so:

Held, that the defendants were liable, as the business meaning of the words "for charterers' account" were that the charterers were bound to provide and pay for a war risk policy.

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs' claim was to recover damages for the defendants' failure to insure a Dutch steamship against war risks under the terms of a charter-party, dated the 17th Sept. 1912.

The facts and arguments are sufficiently stated in the written judgment.

Leck, K.C. and *R. A. Wright* for the plaintiffs.

Roche, K.C. and *A. Neilson* for the defendants.

BAILHACHE, J.—The main question in this action, and the only one raised at the trial before me, was whether the defendants were liable to the plaintiffs in damages for failure to insure the plaintiffs' steamer *Maria* against war risks under the following circumstances:—

The *Maria* was sunk at sea by the German cruiser *Karlsruhe*, on the 21st Sept. 1914, while

(*a*) Reported by LEONARD C THOMAS, Esq., Barrister-at-Law.

on a voyage from Portland (Oregon) to Ireland, with a cargo of wheat for merchants at Belfast and Dublin. Her loss was not known until the 24th Oct. The *Maria* was a Dutch steamer, and was, at the time of her sinking, under a five years' time charter-party made between the parties to this action, and dated the 17th Sept. 1912.

At the end of the charter-party there was this written clause:

War risk, if any required, for charterers' account. It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy.

Upon this clause two principal points arose. First, was the obligation to insure against war risks upon the charterers or the owners? Second, if upon the charterers, for what amount? There were other subsidiary points, which I will deal with as I proceed.

The charter-party stated in clause 2 how the disbursements were to be borne as between owner and charterers, and by that clause the owners were to pay and provide for insurance. Clause 23 provided that the charter-party was not to be construed as a demise of the steamship, and that owners were to remain responsible for, among other things, insurance.

It was admitted for the charterers that the premiums payable in respect of war risks fell upon them, but it was argued that the duty of covering the *Maria* by a war risks policy fell upon the owners. In support of this argument I was referred to clauses 2 and 23, and to the obvious convenience of this course in view of the fact that the war risks policy was to protect the owners and not the charterers, and that the amount to be covered was to be based upon the value stated in owners' annual policy, an amount of which the owners only would be aware.

I do not think this contention is sound. I think the words "War risk, if any required, for charterers' account," mean that the charterers are to provide and pay for the war risks policy.

The words "for charterers' account" are a business form of expressing the fact that the charterers were to provide and pay for a war risks policy, just as by clause 2 the owners are to provide and pay for the ordinary insurance.

The word "policy" does not occur, but it is common ground, and it is indeed obvious from the words "if any required," and from the whole clause, that the charter-party means "war risks policy," and not war risk.

It is not, of course, conclusive, but it is a satisfaction to me to find that the parties understood their obligation in the sense in which I have decided, as witness the whole correspondence between them. Two letters will sufficiently illustrate this. One is dated the 6th Aug. 1914, and is from the plaintiffs to the defendants, and it reads thus:

Considering the actual political situation, we must ask you to satisfy us that the war risk on the steamship *Maria* is covered, or we must instruct the captain at his coal port to wait the developments. It is, under the circumstance that you are at war, probable that a cargo with destination of Belfast or Dublin will be captured. We await your reply latest in two days, and are in the meantime, dear sirs, yours faithfully,

Signed for the defendants.

The other is dated the 2nd Sept. 1914 and is from the defendants to the plaintiffs, and the material parts read thus:

War risk.—We note your remarks, but as explained to your Mr. Kerdel, as the *Maria* is a neutral ship at present we cannot see any necessity to insure her against war risks and consequently do not propose doing so at present. As she is bound for Irish ports she will not come into the mine area of the North Sea, which appears to us to constitute her only risk.

Mr. Kerdel mentioned to us that it was within the bounds of possibility that you might transfer this steamer to the English flag, and we shall be glad to know if you propose taking any such steps; furthermore, he was going to advise us the steamer's present insured value, but we have not yet received this information.

In that latter letter, the defendants ask the steamer's insured value. This is required to enable them to effect a policy for the agreed amount. They did not get this information until the 8th or 9th Oct. It was conveyed to them in a letter of the 5th Oct., and was said to be 30,500*l*. The material parts of that letter run thus:

We have further telegraphed you asking to insure the ship for war risk according to the charter. Her insuring value is 30,500*l*. There are rumours here that England may break our neutrality and in that case, of course, Holland would be in war with England, and we are sorry to say that we cannot run this risk.

By the 9th Oct. the *Maria* was overdue at Las Palmas. She had, in fact, been sunk nearly three weeks before that; but her loss was not known. No evidence was given on either side as to what premium would have been required for a war risks policy on the 9th Oct., but I cannot assume that she would have been uninsurable, in fact or in a business sense.

So far, indeed, as war risks alone were concerned, she was not an undesirable ship to submit to underwriters. She was Dutch, and her cargo was only at worst conditionally contraband. The burden of proving that she was not insurable on the 9th Oct. lies upon the charterers; and they have not discharged it.

If the delay in letting them know the insurable value had increased the premium payable they might have had some claim against the owners. But they did not insure; they made no attempt to insure; and the point does not arise.

It is to be observed that by the 5th Oct. the plaintiffs were asking to be covered against the risks of a war between this country and Holland, and they returned to the point in a further letter of the 9th Oct.

To this they were not, in my opinion, entitled, nor could the defendants have effected such a policy. The fact that they asked for too wide a policy does not, however, justify the defendants in giving them no policy at all, nor did their request affect the matter. The defendants were not minded to insure.

It was somewhat faintly suggested for the charterers that no war risks policy was required. It was said that, the ship being Dutch and the cargo wheat for a private buyer, the Germans had no right to sink her, and in doing so were acting as pirates and not as belligerents. I agree that the clause which says "War risk, if any required" means "if reasonably required"; but I do not think it possible to hold that, as things were in August

and September last, the plaintiffs' request to be covered against war risk was unreasonable.

I hold, therefore, that the defendants committed a breach of their charter-party, and must pay damages. The remaining question is how much.

The war risks policy was to be based upon value stated in owners' annual policy. The amount of cover asked for by the plaintiffs was 30,500*l.* They arrived at that amount in this way.

They were insured to the extent of some 20,000*l.* by valued yearly policies on hull and machinery. The value of the *Maria*, as stated in those policies, was 24,000*l.* They had also a yearly policy on what was described as "excess value," but which was obviously to cover that very elusive subject-matter of insurance called disbursements, for a sum of something over 6400*l.*, and they added this sum to the 24,000*l.*, and so arrived at their figure.

The disbursements policy was an honour policy, and contained the clause "full interest admitted." Mr. Leck argued that where you have a policy for a definite sum, with full interest admitted, you have in effect a valued policy; and that the plaintiffs were entitled to add the amount of the policy to their valued policies on hull and machinery. I do not think this policy can be taken into account.

No doubt for some purposes, as, for instance, over-insurance, an honour policy on disbursements may and will be considered, but not, I think, in such a case as this. I do not agree with Mr. Leck's contention that the policy can be treated as a valued policy.

There is no value stated in the policy, as required by the charter-party. Moreover the owners' annual policy means, I think, the policies on hull and machinery, and not on disbursements.

I do not, however, think the owners' request for a policy for an excessive amount excuses the defendants from effecting a policy against war risks, though if they had done so they might, I think, have called upon the owners to refund the proportion of premium attributable to the excess of insurance covered by the inclusion of this disbursements policy.

The truth of the matter is that the defendants considered the risk to the *Maria* so small as to be negligible; and they did not anticipate that the Germans would so violate international law as to sink a neutral vessel with an English cargo, not contraband, and they preferred not to insure. Their estimate of the risks run proved, most unfortunately for them, to be wrong; and, while I regret that their quite intelligible breach of contract has led to such a disastrous result, I must give judgment for the plaintiffs for 24,000*l.* and costs.

Solicitors for the plaintiffs, *William A. Crump and Son.*

Solicitors for the defendants, *Botterell and Roche.*

Friday, March 26, 1915.

(Before Scrutton, J.)

Arnhold, Karberg, and Co. *v.* Blythe, Greene, Jourdain, and Co. Limited.; Theodor Schneider and Co. *v.* Burgett and Newsam. (*a*)

Contract—C.i.f.—Tender of bill of lading with or without policy of insurance after outbreak of war—Buyer not bound to accept.

Certain beans were sold under a c.i.f. contract before the outbreak of war between Germany and England to be shipped in a German bottom from China to Naples. The sellers and buyers were English firms. The price was to include freight as per bill of lading and insurance—payment net cash in London on arrival of goods at port of discharge in exchange for bill of lading and policies; but payment to be made in no case later than three months from date of bill of lading. The beans were shipped before the war, after which the vessel took refuge in a neutral port. The sellers sought to recover (in one case) on a tender of the German bill of lading, and (in another case) on a tender of a German bill of lading and a German policy of insurance.

Held, that after the outbreak of war the tender of the above documents was in neither case good tender.

Special cases stated by arbitrators for the opinion of the court.

In *Arnhold, Karberg, and Co.* (sellers) v. *Blythe, Green, Jourdain, and Co.* (buyers) the facts (as stated in the judgment of the court) were as follows:—

The sellers, a firm carrying on business in England, sold to the buyers, also an English firm, on the form of contract quoted in the judgment of the court (*inf.*), a quantity of horse beans to be shipped from China to Naples. In July 1914 the beans were shipped on the German steamer *Gernis* for conveyance to Naples, the bills of lading being dated the 6th and 11th July respectively. At the end of July the buyers insured part of the cargo against war risk, the remainder neither buyers nor sellers were able so to insure. A declaration of one shipment was made on the 29th July, and a provisional invoice was sent to the buyers on the same day. The receipt of the declaration was confirmed by the buyers on the 13th Aug. A declaration of the other part, numbered 871, was made on the 1st Aug., the provisional invoice was sent on the 12th Aug., and receipt of the declaration was confirmed by the buyers on the 13th Aug. On the 11th Oct. the German bill of lading and an English policy of insurance were tendered to the buyers, who refused to pay. The *Gernis* was in a port of refuge in the Dutch East Indies and is probably there still. The matter went to arbitration and the arbitrators stated a special case on the question whether the sellers were entitled to payment against such documents at the expiration of three months from the date of the bill of lading.

In the case of *Theodor Schneider and Co.* (sellers) v. *Burgett and Newsam* (buyers), both English firms, the sellers sold to the buyers on the same form of contract a quantity of horse beans

(*a*) Reported by W. V. Ball, Esq., Barrister-at-Law

for shipment from China to European ports. In July the sellers shipped beans in accordance with the contract by the German steamer *Camilla Rickmers* from Shanghai to Rotterdam, the bill of lading being dated the 21st July. Apparently no war insurances were effected. On the 24th Aug. the sellers sent a declaration of the shipment to the buyers, who acknowledged receipt. The court was not told the date of provisional invoice. On the 21st Oct. the sellers tendered to the buyers a German bill of lading and a German policy of insurance. The buyers refused to pay. The *Camilla Rickmers* was, and probably still is, in a port of refuge in the Philippines. The matter went to arbitration; the arbitrators decided that the documents were a good tender, but stated their award in the form of a special case, in order that the opinion of the court might be taken on the point.

George Wallace, K.C. and *Stuart Bevan* for the sellers in the first case; *Maurice Hill*, K.C. and the Hon. *Malcolm Macnaghten* for the buyers.

R. A. Wright for the sellers in the second case; *W. Norman Raeburn* for the buyers.

SCRUTTON, J. — In these proceedings two special cases stated by arbitrators on the same form of contract raise a question of general importance, whether when, before the outbreak of war, goods have been sold by one English firm to another on a c.i.f. contract and shipped in a German ship to a neutral port, the seller is entitled, after the outbreak of war, to tender in one case the German bill of lading, in the other case the German bill of lading and a German policy of insurance, and to claim the price. The contract in each case is the London Corn Trade Association form for Chinese and Manchurian cereals. Under it there is sold a quantity of grain, with liberty to vary it within limits, to be shipped at a time and place specified, at a price specified, with allowance for foreign substances to be ascertained at port of discharge. The price is to include freight as per bill of lading and insurance. Payment net cash in London on arrival of goods at port of discharge in exchange for bill of lading and policies of insurance, free of war risk, on Lloyd's conditions and including the London Corn Trade Association f.p.a. clause, effected with approved underwriters for whose solvency the seller is not to be responsible. But payment to be made in no case later than three months from date of bill of lading or upon the posting of vessel at Lloyd's as a total loss.

In the event of war, sellers are empowered to cover war risk for and at expense of the buyer, if the buyer does not himself insure. Provisional invoice to be tendered within thirty days from the date of the bill of lading unless the mail is late. The contract appears to be a c.i.f. contract with the variation that the price is ultimately payable only on quantity delivered, unless the vessel is posted as lost or three months have elapsed from date of bill of lading, in which case payment is made on bill of lading weight. [His Lordship stated the facts as above set out, and continued:]

The only differences between the two cases were that in the first case the policy was English and in the second German, and that in the first case two declarations and one provisional invoice were before the outbreak of war, and in the second case neither declaration nor provisional invoice was before the outbreak of war. In each case the acknowledgment of receipt of declaration was after the outbreak of war.

The argument for the buyers, as I understood it, was that the contract of affreightment was rendered void on the outbreak of war, or that if it were not, to become a party to it would involve trading with the enemy, which the buyers could not be required to take upon themselves, and that the tender was therefore bad. For the sellers, in the first case, Mr. Wallace argued that the acceptance of the tender did not involve trading with the enemy or that under the Crown licence of the 25th Sept. 1914, to be referred to hereafter, the buyers might pay freight and charges and get their goods from the ship in Java without trading with the enemy in any punishable way. Mr. R. A. Wright for the sellers in the second case admitted that the contract of affreightment became void on the outbreak of war but said that this was immaterial in a c.i.f. contract. After the goods had been shipped in accordance with the contract the goods and the contract were at buyers' risk. It was immaterial that the goods were lost when the documents were tendered (*Groom* v. *Barber*, 12 Asp. Mar. Law Cas. 594; 112 L. T. Rep. 301; (1915) 1 K. B. 316), and equally immaterial that the parties contracting to carry had become alien enemies or insolvent. The risk was the buyers', and they must insure against war risk. Such were the contentions. To deal with them requires a careful analysis of the position.

As the contract was a sale of unascertained goods by description, no property passed to the buyers at the time of shipment, or at any rate until the goods were unconditionally appropriated to the contract: (Sale of Goods Act 1893, s. 18 (5) (1). In each of the special cases there was an appropriation of the goods to the contract by the sellers, assented to by the buyers, but in neither case was there an unconditional appropriation, as the sellers took the bill of lading to their own order and had not tendered it at the time of the appropriation. The effect of this is discussed by Bramwell and Cotton, L.JJ., in *Mirabita* v. *Imperial Ottoman Bank* (3 Asp. Mar. Law Cas. 591; 38 L. T. Rep. 597; 3 Ex. Div. 164). I understand the effect of these judgments to be that where the seller so reserves the power of dealing with the goods, the property does not pass on shipment, but is vested in the seller until he receives payment in exchange for documents of title.

What must be the condition of the goods when the sender (*a*) appropriates them to the contract, (*b*) tenders documents and asks for payment, has been the subject of some discussion. In *Olympia Oil and Cake Company* v. *Produce Brokers Limited* (12 Asp. Mar. Law Cas. 570; 111 L. T. Rep. 1107; (1915) 1 K. B. 233), where goods which the sellers knew to be lost at the time of appropriation were appropriated to a contract, all three members of the court held it a bad appropriation, Avory, J. going further and holding that it was a bad appropriation if the goods were lost at the time though the sellers did not know of it. I am not sure that Shearman, J. in saying that the goods were not in a deliverable state does not mean the same thing. It is not expressly stated whether the price was c.i.f., or

payable against documents, and I do not understand, as reported, the passage in the judgment of Avory, J. which appears to treat a sale of goods to arrive and a sale of goods c.i.f. as the same thing. The case, however, is binding on me on the point it decides, and on that form of contract it appears to treat the existence of ship and goods at the time of appropriation as essential to its validity, at any rate if the destination of the subject-matter is known. On the other hand, in *Groom* v. *Barber* (*sup.*) Atkin, J. on a c.i.f. contract held that on a tender of documents complying with the contract it was immaterial whether the goods represented by them had at the time been lost, whether there had been a prior appropriation to the contract or not. This case was not cited to the Divisional Court in the *Olympia* case (*sup.*), and the two lines of reasoning hardly appear consistent. I do not think it is necessary for me in the present case to decide between them, for here the goods were in existence. But I am strongly of opinion that the key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods. It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination, and the ordinary contract of insurance of the goods on the voyage, and to tender these documents against payment of the contract price. The buyer then has the right to claim the fulfilment of the contract of carriage, or if the goods are lost or damaged such indemnity for the loss as he can claim under the contract of insurance. He buys the documents, not the goods, and it may be that under the terms of the contract of insurance and affreightment he buys no indemnity for the damage that has happened to the goods. This depends on what documents he is entitled to under the contract of sale. In my view, therefore, the relevant question will generally be not "what at the time of declaration or tender of documents is the condition of goods"? (and in this I agree with Atkin, J. in *Groom* v. *Barber*, *sup.*), but what at the time of tender of documents was the condition of those documents as to compliance with the contract of sale?

I refer to the careful statement of the effect of such a contract by Hamilton, J. in *Biddell* v. *Clemens Horst* (103 L. T. Rep. 661; (1911) 1 K. B., at p. 220). It is true that in the contract in question in this case the goods must usually arrive to fix the price, but they clearly need not when the ship is posted as lost, and I think if they have not arrived by the expiration of three months after the bill of lading date, the price is payable against the tender of proper documents, whether the goods will ever arrive or not. I next address myself to consider, when the documents were tendered in these cases three months after the date of bill of lading and payment demanded against them, what condition and validity of these documents were required to make them a good tender.

On the 4th Aug. war broke out between England and Germany. In the first case, the contract of affreightment obtained was with a German shipowner; in the second case both contract of affreightment and policy were with German subjects. What, in English courts, is the effect of the outbreak of war on these contracts? The contract of affreightment was on the 4th Aug. partly executed, partly executory. No claim had then accrued on the policy of insurance for loss before the war. On this point, I have the authority of the Court of Exchequer Chamber in *Esposito* v. *Bowden* (7 El. & Bl., at p. 783), where Willes, J. says: "As to the mode of operation of war upon contracts of affreightment made before but which remain unexecuted at the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it." In that case the contract of affreightment was between an Italian shipowner and an English charterer to carry goods from Russia, and war had broken out between England and Russia, and the trading with the enemy involved was an English subjects' purchasing a cargo in Russia, and dealing with the Russian Custom-house and Russian lighterman to get it exported. The illegality here is more direct as the two parties to the contract of affreightment are subjects of countries at war and part of the contract on each side is unperformed. The judgment in *Esposito* v. *Bowden* (*sup.*) is based on the Prize Court decision of *The Hoop* (1 C. Rob. 196), where Lord Stowell said, at p. 198, "In my opinion there exists such a general rule in the maritime jurisprudence of this country by which all trading with the public enemy, unless with the permission of the Sovereign, is interdicted," and again at p. 216, "The rule has been rigidly enforced . . . where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities." This judgment and statement of the law was adopted by the Common Law courts in 1800 in *Potts* v. *Bell* (8 Term Rep. 548), where Lord Kenyon said at p. 561, "It might now be taken for granted that it was a principle of the common law that trading with an enemy without the King's licence was illegal in British subjects," for the reasons given in the judgment in *The Hoop* (*sup.*). The same statement was made by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines Limited* (87 L. T. Rep. 372; (1902) A. C. 484), where he says at p. 509 in the Law Reports: "War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading." When, however, a claim has accrued before the war, under a contract made before the war, as in case of a loss before the war on a policy of insurance, the contract is not dissolved, but the remedy is suspended until the close of the war. This explains Lord Halsbury's apparently general statement at p. 493 of the *Driefontein* case (*sup.*), "No contract or other transaction with a native of a country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the courts of either country while the war lasts, but the rights of the contract are unaffected, and when the war is over the remedy in the courts of either is restored." This is true of a right to

recover vested before the war, which was the state of things in the *Driefontein* case (*sup.*), but was not true on the existing authorities, which Lord Halsbury cannot have meant to overrule without reference to them, in the case of contracts to be executed at the time of the outbreak of war. It follows, therefore, that on the 4th Aug. the contracts of affreightment and the policy of insurance became void except as regards claims then accrued, if any, which, however, could not be enforced during the war. What then was the position of the English owner of goods in a German ship? According to the passage in Lord Tenterden's work on shipping cited with approval by Willes, J. in *Esposito* v. *Bowden* (*sup.*), "If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined" [and I think the same principles must apply if the war is between the country of the shipowners and the country of the cargo-owner or charterer] ". . . the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage."

Apparently, therefore, on the 4th Aug. the goods owner could not require the German ships at Manila or the Dutch East Indies to proceed on their voyage under the contract, but could require them to deliver his goods, and the ships could not claim freight or charges under the contract, which was void. I mention, to show that I have not overlooked it, that a German ship being German territory questions might arise whether the British subject was not trading with the enemy by removing his own goods from German territory, a state of things discussed in *The Hoop* (*sup.*). But on the 25th Sept. 1914, before the three months from the bill of lading date had expired in either case, the Board of Trade granted a licence "that British owners of cargo now lying in a neutral port in a ship owned by the enemy may, for the purpose of obtaining possession of such cargo, pay freight and other necessary charges to the agent of the shipowner at such port." It would follow from this that if for any reason the courts of the neutral State refused to order the enemy ship to deliver the British cargo except upon payment of freight or charges the British subject could do it without trading with the enemy. But it does not appear to me that this licence makes the contract of affreightment valid as to any future execution, or indeed in the past—*i.e.*, since the declaration of war. When, therefore, the seller in these cases tendered documents and demanded the price, he tendered documents which had been contracts, but which were now by considerations of public policy void and unenforceable as regards any obligations of performance which would but for the war have been carried out after the 4th Aug. To carry out their original obligations would involve entering into contractual relations with the King's enemies; and these relations were now impossible either in England or in Germany, the countries of the original contracting parties. I do not suppose that Hamilton, J. in *Biddell* v. *Clemens Horst* (*sup.*) had this point in his mind when he used the phrase, "an insurance which will be available for the benefit of the buyer," but I cannot believe that contracts which are illegal and void can be regarded as good tenders, and available for the benefit of the buyer. It is clearly not essential that if the goods do not arrive the buyer should have a good claim on one of the contracts, but I think it is essential that each contract should be one into which he can legally enter as a contracting party, and when the legal relations of the seller under the contract of affreightment tendered have become void, and it is illegal for the buyer to enter into any similar legal relations with shipowner or insurer, I cannot hold that such documents are good tender, or that the buyer can be required to pay against them.

I add, further (1), that I do not think the argument that a neutral might acquire these documents and sue the German helps the matter. I do not see how void contracts can come to life by transfer to neutrals; but if they can, the buyers are not neutrals, but enemies to Germany. (2) I do not see that the confirmation after war of the declaration helps the seller. A contract involving consequences contrary to public policy cannot be forced on the courts by estopping the purchasers from telling the truth. A man is not estopped from pleading the Gaming Act by recognising or confirming a bet. (3) I think that as valid contracts in documents were never tendered, the property in these goods never passed to the buyers. (4) Like Atkin, J. in *Duncan Fox and Co.* v. *Schrempt* (12 Asp. Mar. Law Cas. 591; 112 L. T. Rep. 298; (1915) 1 K. B. 365, 370), I shrink from entering the attractive field of discussion opened by the question whether the indorsement of a German bill of lading passes the contract, if any, contained in it, and, if so, why it does. (5) A point was raised that Arnhold, Karberg, and Co., who had one German partner, were alien enemies and could not claim. This point, if it had been material, could not, in my opinion, be raised on the findings in the special case, but must have been raised on a motion to enforce the award.

It follows from this judgment that in the case of *Arnhold, Karberg, and Co.* v. *Blythe, Green, Jourdain, and Co.*, I answer the question in the negative, and the arbitrators seem to have saved the court the trouble of dealing with any question of costs.

In *Schneider and Co.* v. *Burgett and Newsam*, the court is of opinion that the tender was not a proper tender under the contract, and that the buyers are entitled to reject it, and it orders the sellers to pay the costs of the argument of the special case.

Judgment for the buyers in both cases.

Solicitors: for the sellers in both cases, *Coward* and *Hawksley, Sons,* and *Chance*; for the buyers in the first case, *Armitage, Chapple,* and *Macnaghten*; for the buyers in the second case, *Thomas Cooper* and *Co.*

March 2 and 4, 1915.

(Before SANKEY, J.)

HARPER AND SONS *v.* KELLER, BRYANT, AND CO. (*a*)

Principal and agent—Foreign principal—Contract—Personal liability of agent—Presumption—Agent's authority to pledge principal's credit.

Where an agent in England contracts on behalf of a foreign principal he is presumed to contract personally unless the contrary intention plainly appears on the evidence or on the documents or in the surrounding circumstances.

If there is no such evidence the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such a way as to establish privity of contract between such principal and the other party, and that he is personally liable on the contract.

Held, in the circumstances of this particular case, that the defendants acted as agents and were known to the plaintiffs to be acting as agents, and were therefore not liable.

COMMERCIAL COURT.

Action tried by Sankey, J.

The plaintiffs' claim was for 3457*l.* 8*s.* as the price of goods sold and delivered to the defendants.

By their defence, the defendants pleaded that they had acted solely as agents, and were not personally liable.

Schiller, K.C. and *Du Parcq* appeared for the plaintiffs.

Roche, K.C. and *A. Neilson* appeared for the defendants.

The facts and arguments are sufficiently stated in the judgment.

SANKEY, J.—In this case the plaintiffs claim 3457*l.* 8*s.* as the price of goods sold and delivered to the defendants, and it is alleged that on various dates in July 1914 plaintiffs supplied to the order of the defendants 2585 tons of bunker coal for the *Kaiser Wilhelm II.*, a steamship belonging to the North German Lloyd Line, then calling at Southampton. There is no dispute that the coals were so supplied and that the price, 26*s.* 9*d.*, is a proper one, but the defendants say that throughout the transaction they acted solely as agents for the North German Lloyd Line and are not personally liable.

On that the plaintiffs take two points: (1) That there was a direct agreement between them and the defendants; (2) that the defendants were agents for a foreign principal and so were personally liable. In most cases it is advisable to ascertain the facts before discussing the law, but in the present case it is convenient to reverse the process in order to examine the plaintiffs' two contentions.

A number of cases were cited on either side, and in my view the true effect of them is that they lay down the presumption rather than a principle of law which is to be applied, such presumption being that where an agent in England contracts on behalf of a foreign principal he is presumed to contract personally unless the contrary intention plainly appears on the evidence or on the documents or in the surrounding circumstances.

If there is no such evidence the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such a way as to establish privity of contract between such principal and the other party, and that he is personally liable on the contract. In other words, the rule is one depending on evidence rather than on law, and the question to be determined is one of fact for the judge or jury.

Starting therefore with the presumption in favour of the plaintiffs I proceed to examine the evidence: Mr. Vivian Harper, a partner in the plaintiff firm, described the course of business which had been going on for many years with the defendants. Plaintiffs were in the habit of supplying coal on the defendants' order to a variety of steamship lines. They loaded and trimmed the coal and got the ship's receipt, which they forwarded with an invoice to the defendants, who paid the sum due by their own cheque within a few days.

Coming to the coal supplied to the North German Lloyd Line, the contract for 1912 will be found referred to in a letter of the 29th Dec. 1911, that for 1913 in a letter of the 9th Oct. 1912, and the contract for the coal in question in a letter of the 8th Jan. 1914. It will be noticed in the letter of the 29th Dec. plaintiffs quoted for coal to the North German Lloyd, saying they are giving to the company (that is, the North German Lloyd) a benefit which they trust will prove acceptable to them. In the letter of the 9th Oct. 1912 plaintiffs wrote for a further contract. It is true in respect of this contract, which was concluded in Jan. 1913, the plaintiffs allege that it is the only one of the contracts which were entered into with the North German Lloyd direct, but I do not think that in its inception or fulfilment it really differs from either of the other two contracts.

In the letter of the 8th Jan. 1914 it is the defendants who intimate to the plaintiffs that the North German Lloyd are seeking tenders for the year for the coal they required, and that letter is followed by numerous others in which the plaintiffs ask to be advised whether their quotations are acceptable to the North German Lloyd Company. In July 1914 defendants gave orders for the coal in question to be supplied to the *Kaiser Wilhelm II.*, and in due course of time it was so supplied and loaded, and on the 29th July the chief engineer gave a receipt which was forwarded to the defendants with invoice.

Then followed the outbreak of the war and this action. In their sales book plaintiffs entered the sales as being to specific ships, and in their ledger they generally showed that the sales were to specific ships, Keller, Bryant, and Co. being entered as agents. Moreover the correspondence of the defendants is headed "Norddeutscher Lloyd Line. Keller, Bryant, and Co., agents," or "Keller, Bryant, and Co., general agents for the Norddeutscher Lloyd Line."

In these circumstances I am satisfied that the contract in question was not made by plaintiffs with the defendants direct, and therefore the first contention of the plaintiffs fails.

Coming to the plaintiffs' second contention, in my opinion that also fails. It seems to me that although the defendants were agents for a foreign principal, so that the presumption above referred to arises, it is clear that the contrary intention

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

plainly appears on the terms of the contract and from the surrounding circumstances.

There is, in my opinion, ample evidence that the defendants had authority to, and did in fact establish, privity of contract between the North German Lloyd and the plaintiffs. The letters, the course of dealing, and the plaintiffs' own documents appear to me clearly to establish this fact. I am of opinion that the defendants both acted as agents and were known by the plaintiffs to have so acted.

The plaintiffs' claim therefore fails, and there must be judgment for the defendants.

Solicitors for the plaintiffs, *Helder, Roberts, Walton,* and *Giles,* for *Robert Ritson,* Southampton.

Solicitors for the defendants, *Surr, Gribble, Nelson,* and *Oliver.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 23, 24, *and* 25, 1915.

(Before BUCKLEY, PICKFORD, and BANKES, L.JJ.)

BANK OF AUSTRALASIA *v.* CLAN LINE STEAMERS LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Express contract of liability for unseaworthiness—Limitation of time for making claims—Whether limitation applies in case of unseaworthiness—Transhipment of goods.

The indorsees of bills of lading sued shipowners for breach of contract and for damages for injury to goods carried. The goods were shipped upon one ship at one place, and later at another transhipped into another ship. The first ship arrived on the 13th April 1912, and the second on the 23rd April. The goods were damaged by the unseaworthiness of the first ship. Clause 3 of the bill of lading provided for possible transhipment of the goods. Clause 12 provided as follows: "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." Clause 14 provided contractually for liability for unseaworthiness. No claim was made in respect of the goods shipped within the time limited by clause 12. Bailhache, J. held that as the first ship was unseaworthy the time limitation clause did not apply. Held, by the Court of Appeal, that as there was an express and not an implied contract in the bill of lading for liability for unseaworthiness, clause 12 applied, and the shipowner was protected by it as regards the goods arriving by the first ship, which was the steamer indicated in the clause But held by Pickford and Bankes, L.JJ. that the shipowner had not protected himself by clear and unambiguous words as regards the goods arriving by the second ship, to which ship part of the goods had been transhipped from the first, and there was consequently no answer to the claim of the indorsees in respect of the goods which arrived by the second.

Tattersall *v.* National Steamship Company (5 *Asp. Mar. Law Cas.* 206; 50 *L. T. Rep* 299; 12 *Q. B. Div.* 297) *and* Morris *v.* Oceanic Steam Navigation Company Limited (16 *Times L. Rep.* 533) *discussed.*

Order of Bailhache, J. varied.

DEFENDANTS' appeal from a judgment of Bailhache, J. in the commercial list.

The plaintiffs, the indorsees of bills of lading, sued the defendants, the shipowners, for breach of contract and for damages for injury to goods carried.

The following facts are taken from the judgment of Bailhache, J.

The action was brought by the holders of a number of bills of lading for wool which was shipped on board the defendants' steamer, the *Clan Maclaren,* at Wellington, New Zealand, at the end of Jan. 1912. The bills of lading for the most part were dated the 29th Jan. 1912. Shortly after the *Clan Maclaren* left Wellington it was discovered that there was a leak, and that water was getting into cargo holds Nos. 2 and 3, and damaging the wool. The causes of the leak were discovered when the ship got into port—namely, the pipe which led into a hold had broken about the bulkhead division between two water tanks, and part of certain tank tops had become so badly corroded that a small hole had burst through the tank top and water entered into a hold. The vessel went on to Port Pirie, where she was to load a part cargo of galena. The whole cargo that was damaged, so far as could then be ascertained, was taken out of the *Clan Maclaren,* and was reconditioned and sent on later by the steamer *Geelong.* The *Clan Maclaren* with the wool that was supposed to be undamaged on board arrived in London on the 13th April 1912, and was followed ten days later by the *Geelong.* When the wool came to be discharged, it was discovered that there was damage of three different classes. No claim in respect of the damage caused by the unseaworthiness was made until the 10th June 1912—that is, long after the expiry of seven days limited by clause 12 of the bill of lading for making claims.

The bill of lading in respect of the goods shipped on the *Clan Maclaren* provided that:

Clause 3. The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and reship and forward the same at the owner's expense but at merchant's risk.

Clause 12 provided:

No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there.

Clause 14 provided:

The shipowners shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage. But any latent defect in hull, machinery, equipment, or fittings shall not be con-

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

sidered unfitness or unseaworthiness, provided the same do not result from want of due diligence of the shipowner or of the ship's husband or manager.

Bailhache, J. held that, so far as the damage could be traced to unseaworthiness, clause 12 of the bill of lading was no excuse, and the defendants were liable for so much of the damage to the bales of wool as could be attributed to unseaworthiness—that was to say, to the direct and indirect effects of the incursion of seawater. His judgment was therefore for the plaintiffs.

The defendants appealed.

George Wallace, K.C. and *Stuart Bevan* for the defendants.—The plaintiffs did not make their claim in time, and therefore clause 12 of the bill of lading, which limits the time for making claims, prevents the plaintiff recovering for damage caused to their goods by the unseaworthiness of the *Clan Maclaren*. Clause 12 applies as much to damage caused by unseaworthiness as to any other damage. The plaintiffs, claiming as indorsees, only get the bill of lading contract, and their position is not so favourable as that of an indorser:

Leduc v. *Ward*, 5 Asp. Mar. Law Cas. 571; 54 L. T. Rep. 214; 20 Q. B. Div. 475.

Here the warranty of seaworthiness was express; it excludes the implied warranty, and lets in all the conditions of the bill of lading. A contract of affreightment is not put an end to by a breach of the warranty of seaworthiness:

Kish v. *Taylor*, 12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604.

It is not a condition precedent in cases of bills of lading that a ship should be seaworthy, for the bill of lading is not given before the goods are loaded on board. The ordinary warranty of seaworthiness is reduced by the terms of the bill of lading, and if the warranty of seaworthiness is reduced, then the clauses of the bill of lading will all apply. In *Tattersall* v. *National Steamship Company* (*sup.*) there was no express stipulation as regards seaworthiness, and that case is distinguishable on that ground. The present case is like *Morris* v. *Oceanic Steam Navigation Company* (*sup.*), where the implied condition of seaworthiness was qualified by the express condition. Secondly, Bailhache, J. held that the time limitation did not apply either to the *Geelong*, to which goods were transhipped from the *Clan Maclaren*, and which arrived later, but clause 3 is wide enough to cover the transhipment and must be read together with clause 12. They referred also to

The Europa, 11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84;
The Maori King, 73 L. T. Rep. 141; (1895) 2 Q. B. 550.

Adair Roche, K.C. and *F. D. MacKinnon*, K.C. for the plaintiffs.—On the second point, the time limitation clause does not apply in any case to the goods which arrived by the *Geelong*. Clause 12 speaks of "steamer's arrival," and that must refer to the *Clan Maclaren*. The clause is not clear and unambiguous, and should be construed against the shipowner:

James Nelson and Sons v. *Nelson Line* (*Liverpool*) *Limited*, 11 Asp. Mar. Law Cas. 1; 97 L. T. Rep. 812; (1908) A. C. 16.

As to the first point, there are two contracts here—(1) as to the condition of the ship, and (2) as to the carriage of the goods, of which the first contract may be implied. In the absence of clear words the limitation clause only applies to the contract of carriage. In *Bond, Connolly, and Co.* v. *Federal Steam Navigation Company Limited* (21 Times L. Rep. 440) Channell, J. said that "as regards the terms of the bill of lading, the cases show that one ought to approach the exceptions in a bill of lading as exceptions to the liability of a carrier and not as exceptions to the liability of a warrantor." The difficulty here arises from the decision in *Morris* v. *Oceanic Steam Navigation Company* (*sup.*), which is out of line with the other decisions, though attempts have been made to reconcile it. It is not necessary to disapprove it owing to its special clause. To insert an implied condition by using express words has no effect on the implied condition, and nothing limits the fundamental obligation to provide a seaworthy ship. They referred also to

Baxter's Leather Company v. *Royal Mail Steam Packet Company*, 11 Asp. Mar. Law Cas. 98; 99 L. T. Rep. 286; (1908) 2 K. B. 626;
Wiener and Co. v. *Wilson's and Furness-Leyland Line Limited*, 11 Asp. Mar. Law Cas. 413; 102 L. T. Rep. 716.

George Wallace, K.C. in reply.—*Morris*' case is not really inconsistent with *Tattersall's*. There are not two contracts here, the implied and the express, for the express contract takes the place of the implied, and there is no room left for the implied condition of seaworthiness. Clause 3 must be read together with clauses 12 and 14. The words "steamer's arrival" should be read as if they were "this steamer or any other steamer to be substituted under clause 3."

Cur. adv. vult.

BUCKLEY, L.J.—In this action the indorsees of bills of lading sue the shipowner for breach of contract, and for damages for injury to the goods carried by the ship. There are three clauses in the bill of lading which are of importance. The first is clause 3, which provides for possible transhipment of the goods; the second is clause 12, which contains a limitation of time within which claims must be made in respect of goods shipped; and clause 14 is a clause which provides contractually for liability for unseaworthiness. The points for decision really are two: first, whether, if the case of seaworthiness is a case which arises here, the clause of limitation of time for claim applies; and, secondly, if it does apply, what is the true meaning of the clause as to limitation?

The goods were shipped at Wellington upon a ship called the *Clan Maclaren*. She sailed to Port Pirie. At Port Pirie she transhipped some goods into a ship called the *Geelong*. The *Clan Maclaren* arrived with so much of the goods as remained on board that vessel on the 13th April 1912. The *Geelong* arrived with the rest of the goods upon the 23rd April. The goods were damaged by unseaworthiness of the vessel. Certain tanks were corroded, and water escaped, and the goods were damaged. There was a question raised at the trial as to latent defect. There was not a latent defect, it was well known to the shipowner. There was no question but that the shipowner is liable but for the points which now arise before us for decision.

The first question to be determined is that arising upon clause 14—as to what is the liability of the shipowner for unseaworthiness.

It is well settled that, where goods are shipped on board ship, there is an implied obligation on the part of the shipowner that he will provide a ship proper for the voyage. If there be no provision in the express contract at all with relation to it, there is nevertheless that implied contract.

It is another matter whether, if there be an express contract in the bill of lading, the implied contract survives. That is the question which arises here. But there may, and generally do, arise two contracts, the one arising by implication as a matter of law, that a seaworthy vessel will be provided, and the other, the express contract, as contained in the document.

There are two cases bearing on this matter on which I want to say something: *Tattersall* v. *National Steamship Company* (5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297) and *Morris* v. *Oceanic Steam Navigation Company* (16 Times L. Rep. 533). The decision in *Tattersall* v. *National Steamship Company* (*sup.*) was this: The express contract contained a clause limiting liability. The goods shipped were cattle, and the limit of liability was 5*l.* a head. There was a clause limiting liability. There was no express contract as to seaworthiness. The implied contract of seaworthiness, therefore, applied. What was decided in *Tattersall's* case was that the contractual limit of liability was confined to the terms contained in the express contract, terms as to the carriage of the goods, and that the limitation of liability did not extend to the liability arising under the implied contract as to seaworthiness. That was the whole of the decision in *Tattersall's* case. I will just read a sentence of Day, J.'s judgment. The goods "were damaged simply because the defendant's servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them. There is nothing in the bill of lading that I can see to restrict or qualify the liability of the defendants in respect of the breach of this obligation, and, therefore, I think our judgment upon the question submitted to us must be for the plaintiff." That was the whole of the decision in *Tattersall's* case.

It has been supposed that *Morris* v. *Oceanic Steam Navigation Company* contains something which is in conflict with *Tattersall's* case. In *Morris* v. *Oceanic Steam Navigation Company* the relevant clause was this: "The carrier shall not be liable for loss or damage occasioned by any latent defect in hull, machinery, or appurtenances, or unseaworthiness of the ship, even existing at time of shipment, or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy." So there was a clause there, an express contract, as to unseaworthiness in an event—provided they had exercised due diligence. They had not exercised due diligence. There was, therefore, a contract as to unseaworthiness in an event which had not happened. You may say that under these circumstances there was no contract as to unseaworthiness. If you regard the case from that point of view, then it was the same as *Tattersall's* case, in which there was no contract as to unseaworthiness. In *Morris* v. *Oceanic Steam Navigation Company* Mathew, J. held that the clause of limitation of liability did apply, but, of course, if you regard it from that point of view, as Hamilton, J. pointed out in *Wiener and Co.* v. *Wilson and Furness-Leyland Line Limited* (11 Asp. Mar. Law Cas. 413; 102 L. T. Rep. 716), the two cases are in conflict. There is no question about that. But, to my mind, that is not the decision at all. I do not see any conflict between the cases, for the reasons I am going to state. Now, it will be remembered that the provision said that the carrier should not be liable for unseaworthiness in an event. There was no obligation that he should exercise due diligence to make the vessel seaworthy; there was only a provision that if he did not do that act, then a consequence would ensue, but there was no contractual liability to make the vessel seaworthy. If he did it, he was relieved from liability for unseaworthiness. There was no obligation on his part to use due diligence. If he did not use it, the clause did not apply, and he was left to other consequences. But Mathew, J. did not so read the contract, because what he says was this. His language runs thus: "It was not necessary to deal with the present case on the footing of a case"—which he mentions—"because here the bill of lading contains an express provision that the shipowner was to use due diligence to make the vessel seaworthy." As I pointed out, he did not. Then Mathew, J. concludes his judgment thus (16 Times L. Rep. 534): "He felt compelled to come to the conclusion that the clause was intended to limit the liability of the defendants in the event of a breach of their duty to use diligence to make the vessel seaworthy." If the contract was one by which the shipowner was contractually responsible towards the cargo owner to use due diligence to make the ship seaworthy, and he was sued for not performing that obligation, then it would be easy enough. It seems to me that is all the learned judge says. In order to see exactly what was the language which he used, the solicitors have been so kind as to give to me the shorthand notes of the judgment, and I am going to read the two passages in the judgment as delivered, which are those reproduced in the Times L. Rep. The former of them, that in the left hand column of 16 Times L. Rep., p. 534, runs in these words in the transcript of the shorthand notes. The learned judge says: "Because there is here what makes the meaning of the parties perfectly clear independently of the Act"—that is the Harter Act—"express provision that due diligence is to be used in making the vessel seaworthy for the voyage"; so the report seems to be quite right. He found there was an obligation to do it. The later passage at the end of the judgment I will read at length. Before reading it I ought to say that what the report calls clause 1 of the contract is found in the headnote beginning with the words: "It is also mutually agreed that the value," and so on. That is what the judge calls clause 1. "Moreover, it is to be borne in mind that the latter part of the section"—that means this clause 1—"is clearly intended to limit the pecuniary liability of the owners in case of a loss. It was pointed out that any claim against the owners under the terms of the bill of lading was not likely to arise,

because they were exonerated from all liability. The answer was, 'Yes, liability would arise in case due diligence was not used to make the ship seaworthy, and that is the only case that probably would arise, and this clause limits the liability in that case.' I am compelled to come to the conclusion that this is the true construction of the clause, and it was to limit the liability in the event of the owners being made liable for a breach of their contract as to due diligence." That is perfectly plain, and the report was quite right. What the learned judge thought —erroneously, I think—was that the contract, the bill of lading, contained an express provision that the shipowner should use due diligence. As I have pointed out, it did not, but of course we must read his decision on the footing of the contract as he read it. He read it as containing a clause imposing the liability to exercise due diligence, and consequently they were liable. There is no difficulty at all in the case. It does not conflict in the remotest degree with the case of *Tattersall*; it seems to me to have nothing to do with it.

Those being the only authorities I need mention, I now go to clause 14. It seems to me that clause 14 is this: It is an express contract covering the ground which would be the subject of the implied contract if there were nothing more in it. The relevant words are these: "The shipowners shall be responsible for loss or damage arising from any unseaworthiness of the vessel when she sails on the voyage." Now I apprehend, as regards implied contract, the way in which the law proceeds is always this: There are certain contracts entered into under such circumstances as that the law says: "This is not the whole contract between you, because the relations between you are such that the law will imply something which is not here expressed." The familiar instance is where there would be a contract in a trade in which there is a custom of the trade, or some obligation arising in a matter in which there is a custom of the manor. So, in ship cases, a contract in which there is an implied contract to supply a seaworthy vessel. If the express contract contains that which, if there was nothing said about it in the contract, the law would imply, then the implied contract takes effect; but if the express contract deals expressly with that which, in the absence of that which is expressed, would be implied, then the whole thing rests upon the expressed contract, and there is no need to imply anything, because it is already there. It seems to me that in this case clause 14 has expressly introduced that which otherwise would be implied, and that therefore the obligation as regards seaworthiness in this case rests upon express contract, and not upon implied contract. The relevance of that for the present purpose is this. The clause of limit of liability, according to *Tattersall's* case, would not extend to the implied contract if it were implied, but if it is expressed, then if it was to be included in the contract of limit of liability or limit of time, as regards a matter forming part of the contract, then the clause comes to be applied to that part of the contract as well as to any other part. The result is that *Tattersall's* case does not apply in this case. There is here an express contract as to unseaworthiness, and consequently clause 12 applies.

It remains to see what clause 12 means, and here there is a matter of very considerable difficulty. It will be remembered that, under clause 3 the goods could be transhipped, and they were transhipped, and the one vessel arrived on the 13th and the other on the 23rd April. Bearing these facts in mind, clause 12 runs thus: "No claim that may arise in respect of goods shipped by this steamer"—that means the *Clan Maclaren* obviously—"will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." As I said, the *Clan Maclaren* arrived on the 13th April and the *Geelong* on the 23rd. No claim was made till June, more than seven days after either arrival. Now the reading of this clause seems to me to mean this. The goods which are the subject-matter of the clause are defined thus: Goods shipped by this steamer, or the goods shipped on the *Clan Maclaren*. That is the operation of those words; and as regards that class of goods, this bargain is made—that no claim that may arise in respect of them will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there. I myself should read that clause as meaning, unless made at the port of delivery within seven days from the date of the arrival of the steamer making the delivery, and, if so, of course that would be as regards the latter goods, the *Geelong*, and not the *Clan Maclaren*. On the other side it is said you have this steamer mentioned in the earlier part of the clause plainly meaning the *Clan Maclaren*, and when you come to "steamer's arrival there," that must mean the same steamer. So that you are to read it: "The date of the *Clan Maclaren's* arrival there." I myself do not take that view. Of course it is a trifling thing, but it does not talk of "the steamer," or "this steamer," or "the said steamer," but "of steamer's." The conclusion at which I have arrived is based upon this, that the contract is one which contemplates, amongst other things, transhipment, and you would expect that the contract would wish to work out this kind of clause as regards all events which might arise under the contract, including that of transhipment, and therefore you would expect the clause to provide for the case of transhipped goods as well as of other goods, and I can so read the clause, on reading it in the way I have suggested —"unless made at port of delivery within seven days of the delivering steamer's arrival there." On the other hand, it may be, and it is said in the reports, that the shipowner is bound to say exactly what he means. He is going to relieve himself from liability here, and he must do it by plain words. I thought the words did mean what I suggest; but if they do not, if they are ambiguous, no doubt the contract ought to be construed upon the usual footing—namely, against the shipowner. Therefore, if it be ambiguous, the thing must be construed against him, and consequently it must be taken he is not so relieved. That is the view taken by the other members of the court. I myself have arrived at a different conclusion. That may be a sound ground for deciding it, and therefore I do not differ as regards it, although I myself have arrived at a different conclusion. The result, of course, is this: The goods which arrived by the *Geelong* ought, upon that construction of the clause, to

have had a claim made in respect of them within seven days after the arrival of the *Clan Maclaren*. That would have been the 20th April, which would be six days before the *Geelong* arrived. That clause will not fit that case. Therefore it is said that case is not within the clause at all, and consequently the shipowner is not relieved. That is a matter which weighed upon me in arriving at the other construction of the clause, but that is the result. If the clause is to be so construed, then the shipowner has not introduced relevant words for the purpose of protecting himself as regards the goods which arrived by the *Geelong*, because, in reason, the indorsees could not claim them until after they had arrived and had seen that they were damaged; and inasmuch as the seven days expired on the 20th April, and the goods did not arrive until the 26th they never could make a claim. That being so, the cargo owner's claim succeeds as regards the *Geelong*, and fails as regards the *Clan Maclaren*. I myself should have allowed the appeal *simpliciter*, but if the clause be construed in that way, the order must be to discriminate between the two classes of goods.

PICKFORD, L.J.—I agree as to the first point, and I should not add anything at all, but for the fact that we are differing from the learned judge in the court below, who is a judge of very great experience in these matters.

To my mind what you have to do in every one of these cases is to look at what the contract before you means, what the bill of lading upon which the action is brought means. There is nothing in law to prevent a shipowner from putting an exception into his bill of lading which will relieve him from all the consequences of unseaworthiness wherever and whenever it exists. The only question in each case is whether he has done it or not, and in order to see whether he has done it or not you have to look at the particular document before you, and the cases which have been decided are only of assistance so far as they lay down principles, if they do lay down principles, which ought to be applied to the construction of the document. Now the two cases which are always cited on the one side and on the other in these matters are the cases of *Tattersall* v. *National Steamship Company* (*sup.*) and *Morris* v. *Oceanic Steam Navigation Company* (*sup.*). They do not, either of them, seem to me to help very much in the construction of this document. I agree that really what the decision in *Tattersall* v. *National Steamship Company* comes to is this, that upon that contract, which the court had before it in that case, the exceptions in the bill of lading only applied to the contract of carriage, to the carriage of goods, and therefore they did not affect the obligation to provide a seaworthy ship, which was different from and antecedent to the obligations of the contract of carriage. The case of *Morris* v. *Oceanic Steam Navigation Company* certainly presents difficulties when you take the facts of the contract with the construction which the learned judge seemed to put upon them. There were no express words there which imposed liability for unseaworthiness, and all that there was in the bill of lading which related to unseaworthiness was an exception from liability in respect of unseaworthiness provided due care had been taken to avoid it.

That was an exception and nothing more, and when it was shown that due care had not been taken, and therefore the condition upon which the exception rested was not fulfilled, I should have thought that the result was what was expressed in the words of Moulton, L.J. in the case of *James Nelson and Sons* v. *Nelson Line* (*Liverpool*) *Limited* (10 Asp. Mar. Law Cas., at p. 394; 96 L. T. Rep. 402; (1907) 1 K. B. 781): "The jury have found"—in the case of *Morris* v. *Oceanic Steam Navigation Company* it was not a jury, but a judge—"that in this case all reasonable means to that end had not been taken. The exception therefore disappears, and the obligation of initial seaworthiness remains." And again: "Here the jury have found that the condition was not in fact satisfied, and the case is therefore reduced to one which is subject to the ordinary obligation to supply a seaworthy ship." I should certainly have thought that that was the true view to take of the position of things in *Morris* v. *Oceanic Steam Navigation Company*. But it seems to me quite clear that the learned judge who decided it did not take that view. He took the view that there was in that contract an express provision that the shipowners should exercise due diligence to avoid unseaworthiness. I cannot see anything of the kind. There was a provision that they should not escape liability for unseaworthiness unless they exercised due diligence, but I cannot see that that made a contract that they should exercise due diligence. They might not do so. Then they would remain liable. However, the learned judge so construed it, and so construing it, he came to the conclusion that the exception, which was one of value in that case, applied to that express contract which he thought to exist in the bill of lading. That was the explanation given of it by Hamilton, J. in the case which has already been referred to of *Wiener and Co.* v. *Wilson and Furness-Leyland Line Limited* (*sup.*).

I do not think either of those cases really helps materially to construe the contract before us. The contract begins with the usual obligation, of course: "To be delivered subject to all the above liberties to deviate and to the exceptions and conditions at foot hereof in like good order and condition." Then there was a number of other things chiefly providing what the ship would not be liable for, and then we come to clause 14: "The shipowners shall be responsible for loss of damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the vovage. But any latent defect in hull, machinery, equipment, or fittings shall not be considered unfitness or unseaworthiness, provided the same do not result from want of due diligence of the shipowner or ship's husband or manager." The first part of that clause does not seem to me to do more than express in terms what would be the obligation if it were not there, and it may be said, and it has been said with some force, that cannot make any difference. If you write in what otherwise must be taken as impliedly written in, it is exactly the same as if you had not written in it at all. There is great force in that argument; but I do not think it is really sound, because I

think the effect of writing it in, instead of leaving it to be implied, is that it makes a term of the bill of lading an express term of the bill of lading, which was not so in either of the cases to which I have referred; and, making it an express term of the bill of lading, it is more likely that the meaning of the bill of lading exception is that it shall apply to the term which is expressly put into the bill of lading. The clause is, as I have read: "The shipowners shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage." That seems to me to mean responsible in every way, and, amongst other ways, responsible in damages, or, to put it in another phrase, responsible to satisfy any claims which may arise in consequence of unseaworthiness or unfitness. Then, going to clause 12, we find that "no claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival here." Looking at the express terms of clause 14, and looking at the whole of the bill of lading, it seems to me that you must read it as including, in the operation of that exception, the express provision that the shipowner shall be responsible, which is contained in clause 14. The action is upon the condition in clause 14. The action is upon the bill of lading. It is a claim upon the bill of lading, and it is a claim upon the bill of lading in respect of that very expressed condition. Therefore it seems to me that, looking at the whole, you must read clause 12 as operating upon a claim in respect of unseaworthiness. I prefer to put it that looking at the bill of lading you must so read it, rather than, as it is sometimes put, "It must have been in the contemplation of the parties," because that seems to presuppose a meeting of the parties and an agreement of the terms of this particular bill of lading, which we know does not take place. There is a document which is signed by the master and accepted by the holder of the bill of lading, but they neither of them, in fact, look at and discuss the terms of the bill of lading. Therefore when you say it is in the contemplation of the parties, it simply means that, looking at the whole of the bill of lading, that is what it means. For these reasons I think clause 12 does apply.

The question is, what does clause 12 mean? And on this I confess I have very great doubt. I have very great doubt because I think the condition is by no means clear. It says this: "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there." Now, reading that, I think if one asked anybody who was not construing the bill of lading, "Does 'steamer' in the second part mean the same as 'steamer' in the first part? they undoubtedly would say "Yes, it does." "No claim in respect of goods shipped by this steamer shall be recoverable unless made within seven days of the date of the steamer's arrival there," and in order to read it otherwise, it seems to me you must read some other words in. If you read it as my lord says would be the inclination of his mind to read it, you have in effect, I think, to read in "In respect of the date of the steamer or of any other steamer which may be substituted for it under clause 3," or, "This steamer or any other steamer which may be carrying the goods." If you have to read it, as I think is really the right way to read it, you have to put in these words: "No claim that may arise in respect of goods shipped and delivered by this steamer will be recoverable unless made within seven days of the date of the steamer's arrival." If you have to read in any words at all, as this is a document put forward by the shipowner, I think you must read in the words which are against the shipowner, and therefore I think that the second words which I put should be read in. But I think it may also be put on another ground, and that is that if the shipowner is to protect himself, he must do so by words that are perfectly clear, and it seems to me that these words are not clear. They are not clear to show that they mean that if you tranship the goods under clause 3, the protection is to be in respect of the arrival of each ship into which they are transhipped. We have the authority in the House of Lords in the case of *James Nelson and Sons Limited* v. *Nelson Line* (*Liverpool*) *Limited* (11 Asp. Mar. Law Cas. 1; 97 L. T. Rep. 812; (1908) A. C. 16) that if a shipowner puts in a clause which he intends for his protection, and which is ambiguous and is not clear, then it does not operate in order to protect him.

I think on either of these grounds that is the proper construction of clause 12. Therefore I think the result is that the goods owners are entitled to claim for the goods which were carried by the *Geelong*, but are not in respect of the goods which were carried by the *Clan Maclaren*.

Bankes, L.J.—Every contract for the carriage of goods by sea is, unless it is expressly excluded, subject to the implied condition as to the seaworthiness of the vessel.

The bill of lading may be silent as to this implied condition, or it may refer to it. In cases where it is silent the contract between the shipowners and the holder of the bill of lading consists partly of the implied contract and partly of the express contract.

It is quite true that the implied contract is just as binding as the express contract, and that the written contract must be read as though the implied contract was written into it. The implied contract is, however, free from conditions—consequently if it is written into the express contract it must be written in such a way as to make it plain that the conditions contained in the express contract do not apply to it. Unless this is done the contract which is written in is not the implied contract, but something different.

This, I think, is an explanation of the decisions which hold that where the bill of lading is silent as to the condition of seaworthiness the conditions in the bill of lading are not to be applied to the implied contract. The same train of reasoning is applicable in the case where a provision is made in the bill of lading co-extensive, or practically co-extensive, with the implied contract. In such a case the rule of construction that the express contract excludes any implied contract would apply; but upon the assumption that any implied contract still exists and is written into the express contract, a condition in this case is found in the written contract in terms referring

to the subject-matter of the implied contract and controlling it.

In the present case the bill of lading contains an express contract as to seaworthiness. It is for breach of this contract that this action is brought, and in my opinion clause 12 applies. I agree with what Buckley, L.J. has said about the decision in *Tattersall* v. *National Steamship Company* and *Morris* v. *Oceanic Steam Navigation Company*, and to understand the latter decision it is necessary to bear in mind always that Mathew, J. held that the bill of lading contained an express contract as to seaworthiness.

Upon the question as to the construction of clause 12, I am not prepared to read any words into the contract to enable the shipowner to limit his liability in the event which happened. Mr. Wallace wishes to read into the clause between the word "steamers" and the word "arrival," some such words as "or other the steamers substituted for the said steamer under clause 3."

I read the word "steamer" at the end of the clause as referring to the steamer mentioned in the earlier part of the clause.

If so it would be an absurd construction to read the clause so as to apply it to any other than the original steamer, and, in my opinion, it must therefore be confined to that steamer and to that steamer only. Under these circumstances the clause does not apply to the goods delivered from the *Geelong* and is no answer to the claim in respect of those goods, and I agree with the order proposed to be made.

BUCKLEY, L.J.—The result will be that the judgment will be altered, and will run thus: Judgment to be entered for the plaintiffs on the question of liability as regards the goods which arrived by the *Geelong*, but not as regards the goods which arrived by the *Clan Maclaren*. The plaintiffs will have their costs in the court below, and the appellants will have the costs of this appeal, to be set off.

Order varied.

Solicitors for the plaintiff, *W. A. Crump* and *Sons*.

Solicitors for the defendants, *Coward* and *Hawksley, Sons*, and *Chance*.

Tuesday, March 16, 1915.

(Before BUCKLEY, PICKFORD, and BANKES, L.JJ.)

MEADE, KING, ROBINSON, AND CO. *v.* JACOBS AND CO. AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Loss of time — Prevention of efficient working—Cesser of hire.

A charter-party contained the following clause: "In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than forty eight running hours, the payment of hire shall cease until she be again in an efficient state to resume her service." On the construction of the clause:

Held, that for losses of time of less than forty-eight hours no claim for cesser of hire could be made; but where, from any of the causes named in the charter party, there were losses of time exceeding forty-eight hours, the charterer was entitled to cesser of hire for the whole of the time so lost.

Decision of Bailhache, J. (12 *Asp. Mar. Law Cas.* 515; 111 *L. T. Rep.* 410; (1914) 3 *K. B.* 156) *affirmed.*

APPEAL by the defendants from a decision of Bailhache, J. in an action tried by him without a jury.

The plaintiffs' claim was for a declaration that they were entitled to a reduction of hire in respect of time lost under a charter-party dated the 29th Aug. 1910, by which they chartered the tank steamer *Batoum* from the European Petroleum Company for three years and nine months to carry all lawful merchandise in any part of the world except Baltic and White Sea ports between the 1st Oct. and the 1st April and all ports in British North America. The charter-party provided that the hire of the vessel, which was 1722*l.* per calendar month, should be paid monthly in cash in advance.

Clause 25 of the charter-party provided as follows:

In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding or damage preventing the efficient working of the vessel for more than forty-eight running hours, the payment of hire shall cease until she again be in an efficient state to resume her service; and should the vessel from any of the aforementioned causes put into any other ports than those to which she is bound under the instructions of the charterers, the port charges, pilotages, and other expenses at those ports, loss of time consequent upon putting in shall be borne by the owners; also should the steamer put back while on voyage, by reason of any accident, the hire shall be suspended from the time of her putting back until she be again in the same position, and the voyage resumed therefrom; but should the vessel be driven into port or to anchorage by stress of weather such detention or loss of time shall be at the charterers' risk and expense. In the event of the nation to which this vessel belongs becoming engaged in hostilities, the hire to cease during the continuance of such hostilities, if the charterers find it impossible to employ the steamer in consequence. It is agreed that all detention or loss of time provided for in this clause and not paid for shall not count as part of the guaranteed time specified under this charter. All graving dock charges to be at owners' expense.

On the 21st Dec. 1910 the defendants gave notice to the plaintiffs that the benefit and burden of the charter-party had been assigned to them. The plaintiffs duly paid in advance monthly hire at the rate specified in the charter-party less certain agreed deductions. Owing to some of the causes mentioned in clause 25, the steamer lost time for a period exceeding forty-eight hours. The defendants having refused to allow the deduction, the plaintiffs brought the present action: claiming (*inter alia*) a declaration that they were entitled to deduction of hire in respect of the whole time of detention. Bailhache, J. held that for losses of time of less than forty-eight hours no claim for cesser of hire could be made; but where from any of the causes named in the charter-party there were losses of time exceeding forty-eight hours the charterer was

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

entitled to cesser of hire for the whole of the time so lost, and accordingly he gave judgment for the plaintiffs.

The defendants appealed.

Roche, K.C. and *Raeburn* for the appellants.

Greer, K.C. and *MacKinnon*, K.C. for the respondents.

Buckley, L.J.—The order under appeal, I think, is right. It raises the shortest possible question of construction upon a few words in clause 25 of the charter-party. I am going to give three reasons, but the most convincing one is, I think, the one suggested by Pickford, L.J. in the course of the argument before us. That reason is this, that the clause should be read thus: "In the event of loss of time through certain things preventing the efficient working of the vessel for forty-eight hours or less, the payment of hire shall not cease; but in the event of loss of time preventing the efficient working of the vessel for more than forty-eight hours the payment of hire shall cease." Of course, in the former of these two alternatives it must speak as from the moment when the vessel ceased to be efficient. Why should it not speak in the same way when the latter portion of the alternative applies? I think that is the true test to apply to the clause.

The second reason I assign is this: I think the clause has to be read as if you put into brackets the words beginning "through deficiency of men" down to "forty-eight running hours." The clause would then read thus: "In the event of loss of time the payment of hire shall cease," and you have to qualify that by saying, in the event of loss of time the payment of hire shall cease if the loss of time is attributable to certain causes, and amongst those, of course, comes in the provision, which is that the efficient working must be prevented for more than forty-eight running hours.

The third reason is this: I think there is considerable light to be obtained from the words "until she be again in an efficient state to resume her service." The word "until" of course predicates a period of time having a *terminus a quo* and a *terminus ad quem*, from a time to a time. And the word "again" conveys the idea that she is to be found at the end of that time in the position in which she was at the beginning of that time. So that the words "until she be again in an efficient state" call attention to a period of time commencing with the moment at which she ceased to be and ending at the time when she again became in an efficient state, and it is that period of time which seems to me to be regarded as that for which the payment of hire shall cease. The whole question to be determined is this: Assume that the vessel has been, by the causes here mentioned, prevented from efficiently working for, say, fifty hours, is the loss of time to be taken to be the two hours—*i.e.*, fifty less forty-eight—or is it to be taken to be fifty hours—*i.e.*, the whole time? The learned judge thought it was the latter, and in that I think he was right. I think the clause means that the whole loss of time is to be paid for—that is to say, the whole of the hire ceases during the whole period of time provided that the contingency which is mentioned in the clause has been satisfied—that is to say, that through the causes mentioned the efficient working of the vessel for more than forty-eight hours has been prevented.

For these reasons I think the appeal fails.

Pickford, L.J.—I am of the same opinion, and I do not think it necessary to add anything.

Bankes, L.J.—I agree.

Appeal dismissed.

Solicitors for the plaintiffs, *Field, Roscoe*, and *Co.*, agents for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the defendants, *William A. Crump* and *Son*.

March 12, 16, 17, *and* 18, 1915.

(Before Lord Reading, C.J., Swinfen Eady, L.J., and Bray, J.)

William France, Fenwick, and Co. Limited *v.* Merchants' Marine Insurance Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Policy—Collision—Damage—Collision caused to third ship by backwash—Liability.

Where there is a clause in a policy of marine insurance providing that "if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured," this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of the costs which the assured shall thereby incur or be compelled to pay. . . ." As a matter of law and as a matter of the true construction of the clause, an assured may become liable to pay damages in consequence of a collision between his ship and another ship although the damage is not immediately and directly caused by the impact between the two colliding vessels.

A collision occurring between the steamship C. *and the steamship* R., *the impetus thus given to the* R., *plus the backwash from the* C.'s *propeller, drove the* R. *into the steamship* G., *causing damage which the owners of the* C. *were held liable to pay. In an action on the policy:*

Held, that the collision with the G. *was in consequence of the collision between the* R. *and the* C., *and that the* C. *by this collision caused the* R. *to come into contact with the* G.; *and that the defendants were liable on the policy.*

Decision of Bailhache, J. (12 *Asp. Mar. Law Cas.* 544; 111 *L. T. Rep.* 812; (1914) 3 *K. B.* 827) *affirmed.*

Appeal by the defendants from the judgment of Bailhache, J. reported 12 Asp. Mar. Law Cas. 544; 111 L. T. Rep. 812; (1914) 3 K. B. 827 in an action tried by him in the Commercial Court without a jury.

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law

The plaintiffs, who are the owners of a steamer called the *Cornwood*, sued the defendants, who were underwriters, in the sum of 1300*l.*, of a policy of marine insurance dated the 8th Sept. 1911 for one year upon the hull and machinery of the *Cornwood*, valued at 19,000*l.*, in respect of a loss under the policy arising out of two collisions.

The facts and arguments sufficiently appear from the judgments.

Bailhache, J. held that as the forces, set in operation by the *Cornwood* caused the collisions the defendants were liable.

The defendants appealed.

Sir *R. B. Finlay*, K.C., *Leslie Scott*, K.C., and *MacKinnon*, K.C. for the appellants.

Roche, K.C. and *Balloch* for the respondents.

Lord Reading, C.J.—The plaintiffs, who are the owners of the steamship *Cornwood*, brought an action against the underwriters under a policy of insurance, and to that policy of insurance was attached a slip containing the Institute time clauses. It is with regard to the first clause of those clauses that the question now at issue has arisen, the plaintiffs claiming that they are entitled to recover from the underwriters the damages or part of the damages which they have been held liable to pay in consequence of a collision which occurred between the *Cornwood* and the *Rouen* and a collision between the *Rouen* and the *Galatee*. The plaintiffs contend that on the true view of the facts of the case damage to the *Galatee* was damage which arose in consequence of the collision between her and the *Rouen*. The material words of the clause upon which this case depends are: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby assured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay. . . ."

The question in this case is whether the plaintiffs have brought themselves within the words "shall in consequence thereof"—that is, in consequence of a collision with another ship—"become liable to pay and shall pay" the damages. This case has been ably argued before us. The history of the litigation dates back to a case in the Admiralty Court. As a consequence of the events on the particular day upon which this damage was done, an action was brought in the Admiralty Court, and, as a result of it, the *Cornwood* was held alone to blame. It is desirable to state the facts with some particularity, as the question which this court has to answer depends upon a true view of the facts, the question being whether the damage claimed was a consequence of the collision between the *Cornwood*, the vessel insured under the policy, and another vessel. The *Cornwood* and the *Rouen* were both steamships proceeding up the river Seine to Rouen. They were vessels as they then stood with a displacement of about 5000 tons each. The *Rouen* was ahead of the *Cornwood* proceeding up the river when close to the La Riche light, which is on the starboard bank; that is to say, the south bank; the *Cornwood* gave the signal that she wished to pass the *Rouen* on the *Rouen's* port side. The *Rouen* repeated the signal, which, according to the rules in force on the river Seine, meant that she acceded to the wish of the *Cornwood* to pass her. As the *Cornwood* then proceeded to come upon the port side of the *Rouen*, the latter vessel reduced her speed. The *Cornwood* then put her helm to port and cut across the bows of the *Rouen*. Seeing that collision was inevitable, at the moment of the collision, or it may be at an even almost indefinable space of time immediately after the collision, as it is quite impossible in such matters as these to be absolutely precise in point of time, the *Rouen* reversed her engines and put her helm aport, but, nevertheless, in not sufficient time and not with sufficient effect to prevent a collision between the anchor on her port bow and the starboard quarter of the *Cornwood*. The *Cornwood* was steering by a light on the shore, called the Marais Vernier, on the south bank of the river. The *Rouen* was also steering by the same light, so that both vessels when at a distance apart—again it is not possible to speak with precision, but, according to the finding of the Admiralty Court, of about 10ft.—were on a gradually and slightly converging course. As the *Cornwood* drew ahead and there was little distance between the two vessels, she, as I have already said, ported across the bows of the *Rouen*, and in that way, drawing ahead of the *Rouen*, attempted to get over to the other side of the river, clear of the *Rouen*, by this manœuvre of porting her helm. The *Cornwood* was going at a speed of ten knots. At this time the *Rouen*, after she had acceded to the signal that the *Cornwood* wished to pass her, at any rate at the material time, was going at something like three or four knots; it may be a little more. As the *Cornwood* passed in front and ahead of the *Rouen* the stem of the *Rouen* was attracted by the *Cornwood*—that is to say, the *Rouen* undoubtedly at this moment drew from her course towards the *Cornwood*. There was a suggestion persisted in in the Court of Admiralty that what had happened was that the *Rouen* had steered carelessly and had sheered towards the *Cornwood*, but this view was rejected by Bargrave Deane, J., who tried the case in the Court of Admiralty, as a cause of the deflection of the *Rouen's* stem. The learned judge took the view that the attraction of the stem of the *Rouen* to the starboard quarter of the *Cornwood* was by the interaction of forces or the phenomenon of attraction owing to the displacement of water caused by the *Cornwood* as she passed across the *Rouen*. There is no doubt that there is such a phenomenon as this attraction and it is not in one sense in dispute. It is agreed on both sides, as we have heard during the course of the argument, that there would be such an interaction of forces as in those circumstances would cause the stem of the *Rouen* to be drawn towards the quarter of the *Cornwood*, which actually did happen. Then a collision took place which undoubtedly was of a very slight character. That seems to be common ground. There has

been some discussion before us as to whether it can be said to have been an impact between the one vessel and the other, or only a contact between the two vessels. It does not seem to me that it matters in the slightest degree which it was. The vessels did actually come into contact and therefore into collision. The collision was between the stem of the *Rouen* and the starboard quarter of the *Cornwood* at some 30ft. from the stern. The collision, besides being very slight, was momentary only. Again it is impossible to speak with precision of the time, but the witnesses agree, and for that reason I do not propose to spend any time in discussing it at any length because it was agreed that in fact the collision itself—that is, the actual blow or the actual push, it does not matter which you call it—was in itself negligible. No doubt there was a certain amount of damage done to the *Cornwood*, but the whole matter was of little consequence, one might have said, and one may say here but for what happened after the collision, of practically no consequence. Now after the collision, no doubt, or at the time of the collision, or just immediately before, the *Cornwood* hard-a-ported her helm, and therefore at the moment of collision or just about after the collision was going straight across, almost at right angles to the *Rouen*, to the south bank to starboard. As she proceeded in that way, the *Rouen*, which had been coming to port just before the collision, when disengaged from contact with the *Cornwood*, again swung or continued her swing or began swinging, whichever may be the true view to take, to port, and apparently whatever she did, whatever steps she took to counteract this swing, would be of no avail. It is said that that again was all the result of the forces that were operating, and it is said by the plaintiffs that it was the result of the collision which had taken place. The conflict of fact in this case, if there really is a definite conflict of fact—perhaps I should say the argument as to the right inference to be drawn from the facts as proved—is by the plaintiffs on the one hand, who say that but for the collision the *Rouen* never would have swung round to port as she did and thus get into the middle of the stream where she struck the *Galatee*, which was a vessel coming down the river, amidships almost at right angles to her. That blow caused undoubtedly very serious damage, and it is the damage to the *Galatee* which has given rise to this litigation. The plaintiffs say, that being the cause, the damage which they have had to pay by reason of the decision of the Court of Admiralty in the *Galatee* was a consequence of the collision between the *Cornwood* and the *Rouen*, and if so, they are entitled to recover under the Institute time clause, under their policy. On the other hand the defendants say that the damage to the *Galatee* was not caused by the collision, although it is true it arose immediately after the collision; but it would have happened even if there had been no collision, because what is said is that the cause of the damage was the *Cornwood* porting to go across the bows of the *Rouen*. It is said that when once that had taken place it was negligent navigation, and the attraction of the stem or the blow or the push from the stem of the *Rouen* on the starboard quarter of the *Cornwood* really had no effect. The *Cornwood* continued her negligent navigation, and having got into that position as she passed the *Rouen* almost at right angles with her propeller moving—she was going at the rate of ten knots an hour—the wash from her propeller with the ship in that position operated upon the starboard bow of the *Rouen*, and so forced the head of the *Rouen* round to port and into the middle of the river and into the *Galatee*.

The real question in this case is whether the swing of the *Rouen* to port after the collision arose from the negligent navigation of the *Cornwood*, and not from the collision between the *Rouen* and the *Cornwood*. Of course, if it arose both from the negligent navigation of the *Cornwood* and from the collision which followed the negligent navigation, then the plaintiffs would be right in saying that it arose in consequence of the collision. The learned judge in the Admiralty Court found that the damage was the result of the collision, or of the proximity of the *Cornwood* to the *Rouen* at the particular time. On the facts of the case there can be and is no dispute between the parties up to the particular point which I have just mentioned. The case in the Admiralty Court was taken to the Court of Appeal and to the House of Lords, and Bargrave Deane, J.'s judgment was affirmed. Now it is to be noticed in the language which I have just quoted from Bargrave Deane, J.'s judgment that he did not decide the point which we now have to decide, because he said the damage was the result of the collision or of the proximity of the *Cornwood* to the *Rouen*. Whether the plaintiffs succeed in this action or not depends upon whether this court thinks that it was the collision or the proximity that caused the *Galatee* damage. If it was the result of the collision the plaintiffs must succeed. If on the other hand it was only the proximity by reason of the negligent navigation of the *Cornwood*, then, in my opinion, the plaintiffs will have failed to establish that the damage arose in consequence of the collision. In that state of facts it seems to me to be unnecessary to discuss in greater detail what the position of these vessels was before the collision, and, indeed, before us these facts are scarcely, if at all, in dispute. But when we approach the events immediately after the collision we find ourselves in an acutely debated area. I desire to say for myself that I am not inclined in this case to attribute too much importance to the scientific evidence as to the immediate results that would follow from this interaction of forces or attraction phenomenon immediately after the collision. The evidence upon this point was summed up by Bailhache, J. in these words, after an answer: "The helm necessary to keep her course increases very rapidly as the side of the vessel is approached." Then says Bailhache, J., who had heard the evidence of Professor Gibson, who had given scientific evidence upon the results which, in his view, must follow upon the position of these vessels: "But that is not because of the collision; it is because the forces which are brought into play by the close proximity of these two vessels are brought more and more strongly into play as proximity increases; and of course they are at their very strongest when there is actual contact." Mr. Leslie Scott agreed that if by "when there is actual contact," you do not mean "whilst they are in actual contact," he would not dissent from that as a true view of what would happen. But he says that does not assist in this case

because the actual contact having taken place —assuming that the forces did not operate whilst the contact was actually in operation— there would be a neutralising effect of those forces by reason of the natural tendency of the *Rouen* to be deflected to starboard on account of the push or blow on the *Cornwood*. Therefore, he says, so far, whatever the impetus was that was given to the *Rouen* to port by reason of the attraction was stayed—he says it was actually stopped—by reason of this collision, and that what happened thereafter had really nothing to do with this interaction of forces. The plaintiffs, on the other hand, contend that the close proximity of the vessel made this play of forces very serious the moment the *Rouen* disengaged herself from the *Cornwood*; and it began at once to operate, and indeed the plaintiffs say never ceased to operate. The plaintiffs do not agree that the forces are not in actual operation whilst the vessels are in contact. The argument is that the weight of water and the forces were accumulating whilst the two vessels were in contact, because there would be no outlet for the water which otherwise would pass along the quarter and stern of the *Cornwood*. I do not propose in this case to lay any stress upon this scientific evidence. I am satisfied that there is an attraction in these circumstances, whatever the cause may be, and indeed it is not disputed. I am also satisfied that the moment there was a collision, immediately in point of time—perhaps an immeasurable point of time—the reversing of the engines of the *Rouen* with the tide as it then was with its effect upon the *Rouen*, would cause a certain loss of control. I would prefer to say that it would cause a loss of steerage way. The reversal of the engines in these circumstances would have that effect, and would therefore have its operation upon the direction of the head of the *Rouen*, which is the material point in question in this case. As the result of that it seems to me that when you have two vessels moving as these two vessels were, coming into collision, the *Cornwood* going across the bows of the *Rouen* at ten knots an hour, with the other vessel the *Rouen* going at a speed of something like three to four knots an hour, perhaps slightly more, and then seeing that a collision is inevitable, or at the moment that the collision takes place the *Rouen*, in order to do all that she could either to minimise the damage and injury, or if possible—it seemed at this moment quite impossible—to prevent the collision, reversed her engines, and did what she could in order certainly to minimise the effects of the collision. She did it with some success, or at any rate, whether with success or not, the damage to the *Cornwood* was, as I have already said, quite negligible. But in executing this manœuvre, the *Rouen* was drawn with her head out to the centre of the river further to port, and with a loss of steerage way upon her engines going astern. When one remembers that we are now dealing with matters almost of seconds, certainly of a minute or minutes at the very utmost—I have not calculated exactly what it would be in time, but it is something very, very short in point of time—the fact of the swinging out to port of the *Rouen's* bow in such circumstances, in consequence of her having to reverse her engines and to take measures to prevent the collision, did result in the damage.

That being so, I then put to myself the question whether, if those are the facts, the collision with the *Galatee* was the consequence of the first collision? I have come to the conclusion that it was. I think that it is a very finely balanced question, and arguments have been advanced on either side of great force and cogency, but still I have come to the conclusion that the *Cornwood* did, by this collision, cause the *Rouen* to come into collision with the *Galatee*. Therefore, in my opinion, the conclusion at which Bailhache, J. arrived is right, although I do not think that I am arriving at the same conclusion by the same process of reasoning or upon the exact findings of fact, or limited to the findings of fact of Bailhache, J. He seemed to me, in his judgment at the last, just to halt at the precise point which it was necessary to find. I am not sure that the criticism of the language may not be, perhaps, a little too fine when he says this: "I think it is sufficient to find that the forces put into operation by the negligent navigation of the *Cornwood* did in fact not only cause a collision between herself and the *Rouen*, but having done that, afterwards sent the *Rouen* into the *Galatee*." If the words "having done that" are to be taken literally—and it is right to say that the same words are used both in the shorthand note and in the Law Report—that finding would not be sufficient in my opinion to carry the plaintiffs; but having regard to the evidence and to the facts before us, I have come to the conclusion, not without a good deal of hesitation and doubt during the course of the case, that in the circumstances which happened the collision with the *Galatee* was brought about by the collision of the *Cornwood* with the *Rouen*. For that reason I am of opinion that this appeal must be dismissed.

SWINFEN EADY, L.J.—The question raised by this appeal turns upon the construction and true effect of part of the running down clause in the Institute time clause which is attached to a policy of insurance. By the terms of that clause it was agreed that if the ship insured should come into collision with any other ship or vessel "and the insured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured," then the company will pay. The material words that have to be construed and dealt with in this clause are the words "in consequence thereof."

The collision between the *Cornwood* and the *Rouen*, and afterwards between the *Rouen* and the *Galatee*, has already been the subject-matter of proceedings in the Admiralty Court. The question there, of course, was different from the question which we have to decide, but the facts as found and determined by the Court of Admiralty, and ultimately by the House of Lords, are the basis from which we start in this case. The question there to be determined was whether the *Cornwood* or the *Rouen* was the ship to blame for the collision which took place between the *Rouen* and the *Galatee*. The collision between the *Rouen* and the *Galatee* was the result of the action of one or both the *Cornwood* and the *Rouen*, one or both of those vessels being to blame. It was ultimately determined that the *Cornwood* was to blame for

the collision, so that we start with that fact. The collision between the *Cornwood* and the *Rouen* was itself very slight and caused very slight damage, not of any material consequence further to consider, but the damage occasioned to the *Galatee* by the collision with the *Rouen* was very serious damage, involving we are told something like 15,000*l*. In the litigation in the Admiralty Court it was held that the *Cornwood* was to blame. The present case raises the question whether that collision for which the *Cornwood* was to blame was in consequence of the collision between the *Cornwood* and the *Rouen*. That is the question which arises in the present case. The learned judge below has held that it was, but the appellants contend that he has misdirected himself in point of law, and that upon the facts as he found them he ought to have decided the other way. That contention is based upon this finding. Bailhache, J. said, and of course it is agreed, that actual contact between the two vessels—that is to say, collision between the ship insured and some other ship or vessel, is essential in order to bring this clause into operation. Then the learned judge said this: "In one sense it is quite true to say that the collision between the *Rouen* and the *Galatee* was not due to the collision between the *Rouen* and the *Cornwood*—that is to say, it was not due to the actual impact between the two vessels. I do not think it was. The impact, so far as it had any effect at all, was to drive the *Rouen* away from the *Galatee*." It is said that that finding of fact goes the whole way, and that as the learned judge found that the collision between the *Rouen* and the *Galatee* was not due to the actual impact between the two vessels, the *Rouen* and the *Cornwood*, therefore he ought to have said that the plaintiffs were not entitled to succeed. In my opinion, as a matter of law, and as a matter of the true construction of a clause such as the present, an assured may become liable to pay damages in consequence of a collision between his ship and another ship, although the damage is not immediately and directly caused by the impact between the two colliding vessels. The learned judge afterwards goes on to say this: "It does not seem to me to be necessary at all, granted that there is a collision, to find that the actual impact of the two vessels drove the *Rouen* into the *Galatee*. I think it is sufficient to find that the forces put into operation by the negligent navigation of the *Cornwood* did in fact not only cause a collision between herself and the *Rouen*, but, having done that, afterwards sent the *Rouen* into the *Galatee*." That is a part of his judgment which has been much commented upon.

I think that the negligent navigation of the *Cornwood* might have caused a collision between that vessel and the *Rouen*, and the negligent navigation of the *Cornwood* might also and subsequently have caused the *Rouen* to collide with the *Galatee*, and yet the collision between the *Cornwood* and the *Rouen* would not necessarily have caused the collision between the other two vessels.

It is therefore necessary to consider how the facts of this case stand. In the navigation of these vessels proceeding up the river owing to the improper way in which the *Cornwood* was navigated she approached too close to the *Rouen*. There was an attraction between these vessels with actual collision. The effect of the attraction was to cause the bows of the *Rouen* to be turned to or inclined to port, which action was for the moment arrested during the time the vessels were in contact; but after the *Cornwood* had proceeded to pass the stern of the *Rouen*, the port direction of the *Rouen* proceeded and was accelerated by the wash of the *Cornwood* on the starboard bow of the *Rouen*. Moreover, in order to avert a collison, those on board the *Rouen*, seeing the collision was imminent, had put their helm hard-a-port and had reversed their engines. The consequence was that the *Rouen* was setting across the river and had lost her steerage way and proceeded directly into the *Galatee*, striking that ship almost at right angles. I observe that when Mr. Littledale, who is a master mariner, was called he was cross-examined with regard to the actual or direct effect of the impact itself between the *Cornwood* and the *Rouen*, and he said that it might be disregarded, that it was a blow and not a push, and that as a blow it might be disregarded. Then, dealing with the *Rouen* being out of control, he said: "A ship is always out of control in a collision," and then he explained that as meaning "from the mere fact that once in a collision various actions have to be taken, such as putting her engines astern to minimise the effect of the blow." "It is a recognised thing at sea in collisions that your vessel is altogether out of control for the time being. Her speed is reduced. The moment you put your engines astern you have lost control of your ship"—meaning that the ship has lost steerage way. It is therefore the proximity of the vessels which occasioned the collision, and a direct consequence of the incidents of the collision, including the manœuvres necesitated by the collision; that was the cause of the *Rouen* striking the *Galatee*. Under these circumstances I am of opinion that the damage, that is to say, the damage occasioned to the *Galatee*, arose in consequence of the collision between the *Cornwood* and the *Rouen*, although not the direct and immediate consequence of the impact, although one ship was not by virtue of the impact driven directly against the other. The collision, with what has to be taken as part of the collision, the attendant incidents of the collision, produced the subsequent effect. For these reasons I think, although not exactly on the same grounds, that the judgment below was right, and that the appeal should be dismissed.

Bray, J.—The question which we have to decide is this, whether the assured was, in consequence of the collision, liable to pay a large sum to the *Galatee* for the injury done to her by the collision between the *Rouen* and the *Galatee*. In order that the plaintiffs may succeed it is necessary first of all to show that there was a collision. There is no question about that. The next thing we have to see is, what were the circumstances in existence; what was the position of the ships and the forces in play at the moment of the collision or perhaps immediately before it; lastly, we have to consider what took place after the collision. At the moment of the collision the vessels were, I think, in the position shown in the diagram. The *Rouen* was proceeding at a slow speed, probably not exceeding four knots, and if I recollect aright, with the tide. She had been stopped for

the purpose of avoiding or minimising the collision very shortly before the collision happened, a very proper and necessary manœuvre on the part of the pilot. Either at the moment of collision, or just before or just after, her engines had been put full speed astern, again a very proper and necessary manœuvre. She was swinging to port owing to the attractive forces which had been brought into play by the proximity of the *Cornwood*. The last-named vessel was going at a higher speed, probably nearly ten knots, and at the moment of the collision was crossing the bow of the *Rouen*. Again either at or immediately after the collision she ported her helm for the purpose if possible of avoiding, or at all events minimising, the force of the collision. The *Galatee* was at a short distance away, certainly under 200 yards, perhaps considerably less than that, and the time between the two collisions could not have much exceeded a minute, and certainly could not have exceeded two minutes. That is the position at the moment of the collision. I should have added that the attractive forces which had been brought into play by the proximity of the *Cornwood* were at their strongest at that moment. What was the position at the moment that was produced by the collision? It was necessary to put the engines of the *Rouen* full speed astern. That, if not putting her out of control—if one does not go quite as far as the witness said—would at once, at all events, very seriously diminish his control of her and her steering powers. In consequence of that she continued to swing to port notwithstanding that her helm was put hard-a-port to avoid if possible the consequences of the collision. In my opinion the collision and the manœuvres which were necessarily taken in order to avoid or minimise the collision, were the cause of the *Rouen* being unable to avoid the *Galatee*.

There was another point which was dwelt upon very strongly by the defendants and that was that this second collision was caused by the wash from the propeller of the *Cornwood*. There is no doubt that that prevented the *Rouen* from being able to avoid the *Galatee*; there is no doubt that it fell on her starboard bow and sent her to port in the direction of the *Galatee*. In my opinion that was not a negligent act of the *Cornwood* at all. The *Cornwood* could not help it, the position being what it was at the time of the collision. The *Cornwood* very properly ported her helm in order, as I have said, if possible, to avoid and minimise the collision. The result of that would be that it would bring the two vessels very nearly at right angles through the wash of the propeller of the *Cornwood* acting upon the bow of the *Rouen*. If it were shown that that was a negligent act on the part of the *Cornwood* it might well be said that the causes to which I have referred were too remote. But, in my opinion, it was not a negligent act on the part of the *Cornwood*. Having regard to the position of the vessels the *Cornwood* could take no other course than she did. I dare say she did not anticipate what the consequences would be, but there was no negligence on her part. The result, therefore, is that, in my opinion, the collision and the manœuvres which both parties adopted, and rightly adopted, to minimise the collision and the course taken by them after the collision led to the second collision with the *Galatee*, and consequently the first collision was the cause of the second collision.

That being so the judgment of the court below, in my opinion, was right.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Waltons* and *Co.*

March 23 and 24, 1915.

(Before Lord Reading, C.J., Swinfen Eady, L.J., and Bray, J.)

Hewitt Brothers *v.* Wilson. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Material fact — Innocent mistake as to materiality—Concealment.

A policy of marine insurance contained the following clause: "In the event of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged." In an action to recover a loss under the policy:

Held, that, if the assured honestly believed that the correct definition was not a material matter for disclosure to underwriters, the fact that the assured knew that the "interest insured," which must be taken to mean "subject-matter insured," was not correctly defined, did not deprive him of the benefit of the clause.

Decision of Bailhache, J. (*reported* 12 *Asp. Mar. Law Cas.* 546; 111 *L. T. Rep.* 839; (1914) 3 *K. B.* 1131) *affirmed.*

Appeal by the defendants from a decision of Bailhache, J. in an action tried by him in the Commercial Court, reported 12 Asp. Mar. Law Cas. 546; 111 L. T. Rep. 839; (1914) 3 K. B. 1131.

A policy of marine insurance, dated the 23rd July 1912, was subscribed by the defendants, by which the plaintiffs insured four cases of printing machinery on the steamships *Gulf of Suez* and *Orchis* against ordinary marine perils, including risk of breakage, on a voyage from London to Malta. The policy contained the following clauses:—

In the event of claim for particular average or loss or injury to interest, underwriters only to be liable for cost of replacing the parts lost or injured and all charges incidental thereto.

In the event of deviation being made from the voyage hereby insured or of any incorrect definition of the interest insured, it is agreed to hold the assured covered at a premium (if any) to be arranged.

A portion of the machinery was damaged by breakage during the voyage, and the plaintiffs brought the present action to recover the amount of the loss sustained.

By their defence the defendants pleaded that the plaintiffs, when effecting the policy, had omitted to disclose that the machinery was second-hand.

Evidence was called to the effect that the difficulty and cost of replacing lost and injured parts of machinery was greater in the case of second-hand machinery than where the machinery was new; and evidence was called on behalf of the plaintiffs that it was unusual in such cases

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

to disclose whether the machinery was new or old, and that the defendants were accustomed to insure different classes of machinery at one uniform rate.

Bailhache, J. held that if the assured honestly believed that the correct definition was not a material matter for disclosure, the fact that the assured knew that the insured interest was not correctly defined did not deprive him of the benefit of the clause.

Compston, K.C. and *MacKinnon*, K.C. for the appellants.—The two points to be considered are (1) whether there was concealment of a material fact from the insurers, and (2) whether this loss was occasioned by any peril of the sea insured against. There is no evidence there that this loss was caused by the perils insured against. The goods were landed in Malta on the 16th Aug. and the machinery was not discovered to be broken until the 22nd Aug., so that there was no proof of any damage until some time after the arrival of the goods. It is nowadays common form to have a "held covered" clause inserted in all policies in a slightly varying form, and in such a case where there has been a non-disclosure of a material fact it is open to the assured to say to the underwriter that all he can claim is to have an additional premium paid to him, and the effect of Bailhache, J.'s judgment amounts to a waiver of necessity for disclosure by inserting a deviation clause. Under sects. 5 and 6 of the Marine Insurance Act 1906 "interest" means insurable interest, and not "subject-matter of interest," so that there may be a loss or injury to the subject-matter without there being an injury or loss to the interest insured:

Allison v. *The Bristol Marine Insurance Company*, 3 Asp. Mar. Law Cas. 178; 34 L. T. Rep. 809; 1 App. Cas. 209;
Anderson v. *Morice*, 3 Asp. Mar. Law Cas. 290; 31 L. T. Rep. 605; L. Rep. 10 C. P. 609; 35 L. T. Rep. 566; 1 App. Cas. 713.

It is not suggested that there has been any fraud; at the same time the respondents cannot say that the misdescription of the machinery was unintentional. There is no evidence here to show that the damage occurred during the period covered by the insurance or through any of the perils insured against. They also referred to

Maritime Insurance Company v. *Stearns* (1901) 2 K. B. 912;
Laing v. *Union Marine Insurance Company*, 1 Com. Cas. 11;
Carter v. *Boehm*, 3 Burr. 1905, 1909, 1910.

Langdon, K.C. and *Dobb* for the respondents.—The only point at issue is whether the true construction of the clause is that given by Bailhache, J. in his judgment. What the clause refers to is an unintentional or accidental misdescription of the subject-matter of the insurance which would have affected the premium asked for. In this case the fact that the goods, which were second-hand machinery, were described as machinery pure and simple constitutes a misdescription. The goods ought in the circumstances to have been insured at a higher premium. See

Greenock Steamship Company v. *Maritime Insurance Company*, 9 Asp. Mar. Law Cas. 464; 88 L. T. Rep. 207; (1903) 1 K. B. 367.

There is no reason here for cutting down the words of the clause as has been suggested on behalf of the appellants, and the judgment of Bailhache, J. should be affirmed. [They were stopped by the Court.]

Compston, K.C. in reply.

Lord Reading, C.J.—This is an appeal from the judgment of Bailhache, J. in favour of the plaintiffs in a claim to recover from the defendants, the underwriters, the amount of the loss sustained on some machinery insured by them with the defendants and shipped from London to Malta. The goods were damaged to the extent of 55*l*., as found by the learned judge. The plaintiff's case was that under a policy of marine insurance four cases of machinery were covered by the defendants as underwriters, and the insurance was against loss by injury to the goods, substantially in transit, including risk of breakage, from the time they left till the time they were delivered to the consignees.

The plaintiffs said the damage happened to the goods during that period, and, though I do not find in the evidence the exact cause of the damage, I think it is shown that during the period covered by the policy the goods were damaged. Upon that the learned judge has found that this is sufficient proof to entitle the plaintiffs to recover. The defendants, the underwriters, say this policy is repudiated by us because there has been concealment of a material fact, or, at any rate, a non-disclosure of a material fact by the plaintiffs.

No charge is made of dishonesty or of intentional concealment, or suppression of material facts, but it was said that the omission to disclose a fact which it was material for the underwriters to know when they were negotiating and considering whether they should underwrite this policy, is sufficient to bring the case within sects. 17 and 18 of the Marine Insurance Act 1906, and therefore they were entitled to repudiate the claim. Upon the facts proved in the action, which I accept as found by the learned judge, it appears that of the four cases of machinery shipped three were new and one was old.

They were all shipped from London to Malta under the description in the policy of "four cases of printing machinery, marked H.B.F." There is no doubt that the goods were four cases of printing machinery. But it is said by the defendants that as one of the cases contained second-hand machinery this was an incorrect description or definition of the goods, or, in the words of the policy, an "incorrect definition of the interest insured" within the meaning of the "held covered" clause in the slip attached to the policy. For the plaintiffs it was said: "We have for years shipped old printing machinery under the description of 'machinery' in insurance policies, and among others with the defendants, and we have made claims for loss in such cases against the defendants and no question has ever arisen, and so far as we are concerned we thought the description of new and second-hand machinery as 'machinery' was a correct definition of the interest insured." They called witnesses who were also accustomed to ship new and second-hand machinery to confirm this statement.

For the defendants witnesses were called, and one of the defendants' firm said they did not insure second-hand machinery under this definition.

"If we insure machinery we mean new machinery, and if it is intended to insure second-hand machinery it ought to be so described." One of their witnesses went so far as to say that if he had been asked to insure second-hand machinery in no circumstances would he have contemplated such an insurance.

One must also bear in mind, further, that the insurance of the machinery was at a uniform or flat rate of only 12*s.* 6*d.* per cent. on a value which was put at 100*l.* The insurer, it is true, receives a less sum in premium if he is insuring second-hand goods, which are presumably of less value than new, but equally he is running less risk. But we need not consider what the effect of this condition may be, as the learned judge has found it was a circumstance material to be stated to the underwriters, and that the plaintiffs did not state it, and that their omission to do so was unintentional and quite honest.

Having come to that conclusion, he says: "By reason of the concluding words of the 'held covered 'slip attached to the policy, the defendants are not entitled to repudiate." Notwithstanding that he finds there is a non-disclosure of a material fact. In other words, that means that by reason of a contract entered into between the insurer and the assured, an incorrect definition of the subject-matter is not to avoid the policy. The holder is still to be held covered, but he may nevertheless be bound to pay if circumstances warrant a higher premium.

Bailhache, J. said that clause was sufficient to protect the assured, though he did say that a different conclusion might be arrived at, in his view, if the misdescription or incorrect definition was intentional.

The first point made by the appellants is that the incorrectness referred to in the words "any incorrect definition of the interest insured" was meant to apply to the insured interest of the assured and not to the subject-matter insured.

It is said that "interest" is a well-known term in insurance use and is frequently used in the Marine Insurance Act 1906, and that it has always been held to mean insurable interest, but we have to consider this clause in a mercantile document in a reasonable way, and according to the ordinary and recognised canons of construction, and in my opinion it is not possible to give these words the meaning for which the appellants contend.

Mr. Compston says we must construe the language as we find it, but I have looked through the statute and have asked if counsel could point to anything in it which shows that the use of the phrase "interest insured" in the slip is applicable to the insurable interest. Counsel have been unable to point out anything of the kind. Without doubt I come to the conclusion that the true meaning is that the words "interest insured" refer to the subject-matter insured.

I have no hesitation in coming to the conclusion that that is the true meaning of the words used. We must also bear in mind that when we are discussing here what would avoid the contract of insurance because of non-disclosure of material facts, the thing which it is not necessary to disclose is the insurable interest of the person insured. It is the one thing he need not disclose: (see sect. 26, sub-sect. 2). But, of course, in a number of cases, and in this one, there is disclosure of the insurable interest, but if there had been none it would not have avoided the contract, (sect. 6, sub-sect. 1). I agree with Bailhache, J. that the phrase "interest insured" means the subject-matter insured.

It was next said that even if this was so that does not take away from the underwriters the right given them in sects. 17 and 18 of the Act to avoid the policy. Mr. Mackinnon has addressed to the court an argument based on the importance of preserving to the underwriters the right of repudiating a contract of insurance where there has been a failure to disclose a material fact.

For myself I quite appreciate the force of that argument, and I think it is true, unless you find something to the contrary in the contract between the parties or some occasions which would entitle you to hold there was a waiver by the underwriters. But if there is a contract that the assured shall always be held covered even though it may be that he is to pay a higher premium, it would, in my opinion, clearly show that the contract could not be a voided if the event in which he is to be held covered has happened. I am supported in this view by the judgment of Bigham, J. in the case of the *Greenock Steamship Company* v. *Maritime Insurance Company* (*sup.*). The clause there was: "Held covered in case of any breach of warranty, deviation, and (or) any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged." The breach was a breach of warranty of seaworthiness.

There it was held that the shipowner was entitled to require the underwriters to hold him covered as soon as the shipowner discovered that the warranty had been broken. In my opinion, as soon as you come to the conclusion that the "interest insured" means "subject-matter" insured, the case is clear. In this case the incorrect definition was not intentional; but, no doubt, in a case where the misdescription was intentional and intended to induce a person to enter into a policy, the courts would hold that the insurance would not be covered by the clause in this policy, on the point that there was no evidence that the loss was occasioned by any perils of the sea insured against. Here, the goods arrived at Malta on the 16th inst., and apparently inspection took place on the 22nd, when the damage was discovered. Mr. Compston says that being all the evidence, and the goods having been delivered to the consignees before the inspection took place, the plaintiffs have failed to prove that the loss was occasioned by any peril insured against.

I think it is unnecessary to specify the particular peril which caused the loss, as the perils insured against were of the widest possible character during the period of the transit in which the goods were insured, and it is sufficient to prove that there was injury and that it arose from perils covered by the policy.

The last point, that the damage was not caused during that period, is one that has really not been determined, and the point never was raised in the court below. We have heard the shorthand notes read and we come unhesitatingly to the conclusion that words were never used which raised this point, which I understand to mean that the injuries may have been caused between

the 16th or 17th Aug., when the policy had come to an end, and the 22nd Aug. when the goods were examined and the damage found. If that point had been raised in the court below an application would have been made for evidence to be called on the subject. That point not having been raised there, it would be against the well-established practice of the court to allow it to be raised here. Under these circumstances I think all the points taken for the appellants fail and that the judgment of Bailhache, J. is correct and must be affirmed.

Swinfen Eady, L.J.—I am of the same opinion. By a policy of marine insurance subscribed by the defendants the plaintiffs insured "four cases of printing machinery" for the voyage from London to Malta "to pay average and including risk of breakage." Three of the cases contained new, and the fourth contained second-hand machinery. One case of new and the case of second-hand machinery were damaged during the voyage. The plaintiffs described all the four cases as containing machinery, and they acted honestly in so doing, believing it to be a proper and sufficient description. They knew the facts and that one of the cases contained second-hand machinery. Bailhache, J. held that the description of the case of second-hand machinery as "machinery" simply, without the addition of the word "second-hand," was not only a concealment of a material fact, but was also an incorrect definition of the interest insured. I take the facts as found by Bailhache, J. After saying that the assured were under no mistake of fact the learned judge added: "They were, however, under a misapprehension as to the necessity of describing the machinery as second-hand, and the mistake arose in this way. First, it is a common practice in this trade to ship all machinery, new or old, as machinery *simpliciter*. The proportion of second-hand machinery shipped is comparatively small. Secondly, they had done so for years, and had on many previous occasions so insured with these same defendants. Thirdly, although machinery differs largely in its liability to breakage in transit, some kinds being more delicate than others, these underwriters had never inquired, as many underwriters do, as to the class of machinery they were insuring, but had taken it all at a uniform or flat rate of 12*s.* 6*d.* per cent., and that, too, irrespective of the length or nature of the insured voyage. Under these circumstances the plaintiffs say—and I believe them—that they thought these defendants were indifferent on the subject, and were, to use a popular expression, willing to take the rough with the smooth. In short, the plaintiffs, though knowing that this machinery was second-hand, honestly thought that to describe it as machinery was a sufficient and correct definition of the interest insured." So far as the plaintiffs were concerned, there was good faith on their part, but the learned judge held that there had been a misapprehension on their part, and that the description of the interest insured was insufficient and incorrect. The question, and really the only question, we have to consider is, whether that is cured by the clause in the policy that "in the event of any incorrect definition of the interest insured, it is agreed to hold the assured covered at a premium (if any) to be arranged."

I can see no reason for upholding the contention that the words "interest insured" in the "held covered clause" relate to the insurable interest which the assured had in the goods insured under the policy. It is not necessary more particularly to describe or deal with the insurable interest under the policy. It is not necessary that the assured should have an insurable interest in the subject-matter of the insurance at the time when the insurance is effected: (See Marine Insurance Act 1906, s. 6, sub-s. 1.) In my opinion the words "interest insured" do not refer to insurable interest, but only to the subject-matter of the insurance, so that the words "any incorrect definition of the interest insured" mean therefore, "any incorrect definition of the subject-matter of the insurance." That is a small matter which must be specified in the policy by sect. 23 of the Marine Insurance Act 1906.

The effect of this "held covered" clause is that the insurer is to hold the assured covered if there is any slip or mistake in regard to the description of the subject-matter. According to the argument addressed to the court on behalf of the defendants, this clause, assuming that it applies to the subject-matter of the insurance, would only operate in cases in which there had been a misdescription of the subject-matter of the insurance which was immaterial—in which case the clause would not be necessary—or which was not or could not reasonably be known to the assured. In my opinion that clause should not have so limited a construction put upon it. I quite agree that a case in which there had been an intentional misdescription or an intentional concealment of material facts would not be covered by a clause of this kind. But I think that a mistake made honestly and in good faith is covered, and is intended by the parties to be covered, by such a clause. In my opinion this appeal fails, and should be dismissed.

Bray, J.—I agree. The main question raised in this case is as to the true construction of the "held covered" clause. Two points have been urged before us in reference to it. In the first place it is said that the words "interest insured" mean "insurable interest" in the subject-matter of the insurance, and not the subject-matter itself. I agree that we ought to apply the ordinary principles of construction to the words. Under the Marine Insurance Act 1906, and under the ordinary law merchant, it is not necessary to define the interest of the assured at all. Therefore the words "definition of interest" (if "interest" is to be taken as meaning insurable interest) do not describe anything that is usually to be found in policies of insurance. But I can see no reason for giving to these words any such meaning. The term is a good one to use in order to describe the subject-matter of the insurance, and I can see no reason why any artificial meaning should be attributed to it, more especially when it is remembered that in this same policy there is another clause in which the word "interest" is clearly used to mean the subject-matter of the insurance.

The second point which has been urged presents somewhat more difficulty. It is said that the words "incorrect definition of the interest insured" do not cover a case in which there has been non-disclosure of a material fact. I do not

think that those words should receive such a limited meaning. I think the clause implies that the incorrect definition is a material matter because it provides for an increased premium to be paid in such a case. If the words are to be considered as not including the non-disclosure of a material fact, we should be limiting their operation to cases which in practice will probably arise very rarely.

I can see no reason for thus limiting these words any more than for limiting the words "breach of warranty" so as to exclude "breach of warranty for seaworthiness." At the same time I quite agree that this clause would not cover a case of fraud, but in saying this I do not in any way suggest any limitation to the meaning of these words. In their ordinary signification they would not include a fraudulent non-disclosure or misdescription. For these reasons this appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Ballantyne, Clifford,* and *Hett.*

Solicitors for the respondents, *Ashley, Tee,* and *Sons.*

Tuesday, April 28, 1915.

(Before Lord COZENS-HARDY, M.R., and PICKFORD, L.J.)

Re WILHELM HEMSOTH LIMITED. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Alien enemy—Internment of ship—Requisition by Crown—Application by creditors to vest ship in custodian trustee — Discretion of court— Trading with the Enemy Amendment Act 1914 (5 *Geo.* 5, *c.* 12), *s.* 4.

Where a German ship was seized as a prize by the Crown after the declaration of war with Germany and was subsequently requisitioned by the Crown and was in the possession of the Admiralty, sect. 4 *of the Trading with the Enemy Amendment Act* 1914 *was held to be inapplicable.*

Held, also, that it was not expedient for the purposes of that Act under the circumstances of the case to make an order vesting property of such a nature as a ship in the custodian trustee.

Decision of Warrington, J. affirmed.

THE Villie Steamship Company Limited of Northumberland were owed before the outbreak of the war with Germany a sum of 716*l.* in respect of freight by a German company registered at Emden.

That German company had at the declaration of war a steamship called the *Hans Hemsoth,* lying at the port of Blyth, in Northumberland. She was then under arrest in the Admiralty Court by certain other creditors.

After the outbreak of the war she was seized as a prize by the Crown, and in due course was brought before the Prize Court, and on the 11th Nov. 1914 the Prize Court made an order for detention of the ship and not for condemnation, in accordance with art. 2 of the Hague Convention.

That article provides as follows:

A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port . . . may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

On the 21st Jan. 1915 the Crown exercised its right of requisition of the German steamship which had been so interned.

Thereupon the English steamship company issued a summons under sect. 4 of the Trading with the Enemy Amendment Act 1914, asking in effect that the German steamship should be taken out of the control of the Prize Court and vest in the custodian trustee, subject to the rights of the Crown in the vessel and without prejudice to the jurisdiction of the Prize Court.

The summons came on to be heard before Warrington J., sitting at chambers, who refused in the exercise of his discretion to make any order thereon, on the ground that, owing to the fact that the ship had been requisitioned by the Crown and was in the possession of the Admiralty, sect. 4 of the Trading with the Enemy Amendment Act 1914 was at present inapplicable to the circumstances of the case.

Accordingly his Lordship, without deciding as between the parties whether the application might at any future time be one that could be maintained, ordered the summons to stand over generally, with liberty to restore it.

From that decision the applicants now appealed.

C. Robertson Dunlop, for the appellants, referred to

Hague Convention, arts. 2, 3;
Trading with the Enemy Amendment Act 1914, s. 4.

Sir *Stanley Buckmaster* (S.G.) (with him *Dighton Pollock*) for the respondent, the Procurator General.

Austen-Cartmell for the respondent, the Public Trustee, appointed to act as custodian under the Act of 1914.

C. Robertson Dunlop replied.

Lord COZENS-HARDY, M.R.—This is an appeal from an order of Warrington, J., not deciding as between the parties whether the application may at any time be one that could be maintained, but saying that it is not expedient now to make any order and amending the summons and letting it stand over generally, with liberty to restore.

It is an application that a German ship, which was in an English port at the declaration of the war, should be vested in the custodian trustee, and the application is made under sect. 4, subsect. 1, of the Trading with the Enemy Amendment Act 1914, which enables the High Court, or a judge, on the application of any person who appears to the court to be a creditor of an enemy—that is the position of Mr. Dunlop's clients, who are creditors for the balance of freight which is due to them—"or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the custodian or any Government department, by order vest in the custodian any such real or personal property as aforesaid, if the court or the judge is satisfied

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

that such vesting is expedient for the purposes of this Act." Then he may make an order conferring upon the custodian "such powers of selling, managing, and otherwise dealing with the property as to the court or judge may seem proper."

This vessel was first of all interned and has now been requisitioned by the Admiralty. That turns upon another provision in the Hague Convention: "The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation." At the present time it has been requisitioned by the Admiralty, and at the present time there is not a penny of compensation on the evidence due or which can become due. Under those circumstances it seems to me that the learned judge was quite right in saying it is not expedient for the purposes of this Act now and under these circumstances to make an order vesting property of such a nature as a ship is in the Custodian Trustee, who strongly objects to this order being made.

In my opinion the learned judge was quite right, and this appeal ought to be dismissed with costs.

Pickford, L.J.—I am of the same opinion.

This is, of course, admittedly a discretionary order. The learned judge has exercised his discretion not by absolutely refusing to make an order on the summons, but by making an order which, if there be any property which practically is of any use to the creditor, will enable the creditor to make his application and to get such remedies as he is entitled to. Looking at the nature of the property, the fact that it is in the hands of the Crown and subject to the jurisdiction of the Prize Court, and to all the circumstances, I certainly can see no reason for saying that the learned judge exercised his discretion wrongly. But I should like to go further than that and say that, in my opinion, he exercised it quite rightly and his method of exercising his discretion was, at any rate, not too unfavourable to the applicants.

Appeal dismissed.

Solicitors for the appellants, *Stokes* and *Stokes*, agents for *Bramwell, Bell*, and *Clayton*, Newcastle-upon-Tyne.

Solicitors for the respondents, *Solicitor to the Treasury; Coward, Hawksley*, and *Co.*

Feb. 24, 25, 26, *and April* 23, 1915.

(Before Lord Reading, C.J., Swinfen Eady, L.J., and Bray, J.)

Sanday and Co. *v.* British and Foreign Marine Insurance Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Policy—"Restraint of princes" — State of war — Construction — Total loss — Whether "restraint" involves use of physical force — Restraint by Government of assured— Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.

The words "arrests, restraints, and detainments of kings and princes" imply some interference of a fortuitous character, some interference out of the ordinary course of events by governing authorities who have the force of the State behind them to compel submission to their authoritative decrees.

The plaintiffs, who were British merchants, in July 1914 *shipped certain linseed on the British steamers A. and O. in the River Plate for carriage to Hamburg. They had sold the linseed to German merchants at a price covering cost, freight, and insurance, but upon terms by which the property was left in the plaintiffs until delivery. They insured the linseed with the defendants, a British company, from ports in the River Plate to Hamburg, and it was agreed that the subject-matter of the policy was linseed valued at* 33,000*l.*, *and the perils insured against included "arrests, restraints, and detainments of all kings, princes," &c. War was declared by Great Britain on Germany on the 4th Aug., and proclamations forbidding trading with the enemy were issued on the 5th Aug. and the 9th Sept. The A. when in the Channel received a signal from a French cruiser that she should go to Liverpool for security, and the O., on the suggestion of the Admiralty, was diverted by her owners to Glasgow.*

The plaintiffs having given notice of abandonment and claimed for a total loss:

Held (*Swinfen Eady, L.J. dissenting*), *that* (1) *the word "restraint" in the policy did not necessarily involve the use of physical force;* (2) *"restraint of princes" included a restraint imposed by the British Government on British subjects, provided it was imposed for a cause other than a violation of law;* (3) *the inability of the ships to proceed with the voyages after the existence of a state of war had become known was caused by a "restraint of princes" within the meaning of the policy;* (4) *the rule of law in accordance with which the impossibility of goods shipped reaching their destination is to be treated as a constructive total loss of the goods has not been altered by the Marine Insurance Act* 1906; (5) *there was therefore a constructive total loss of the goods by a peril insured against, and the plaintiffs were entitled to recover on the policy.*

Decision of Bailhache, J. affirmed.

Appeal by the defendants from a judgment of Bailhache, J. in the Commercial Court.

The following facts are taken from the judgment of Bailhache, J.:—

The plaintiffs in this action were the owners of two parcels of linseed shipped on the steamship *St. Andrew* and *Orthia* at Buenos Aires ports, in the months of June and July 1914, for carriage to Hamburg. The defendants were the underwriters on the cargo. The case came before the court without pleadings upon admitted facts, and the question to be determined was whether upon those facts there had been a constructive total loss of the linseed, so as to render the underwriters liable upon their policies.

The linseed was sold to German buyers at a price which covered c.f. and i., but upon terms which left the linseed the property of the plaintiffs until delivery. The plaintiffs and defendants were British subjects, and the steamers were British. There were two policies, both dated the 31st July 1914, for 32,000*l.* and 11,000*l.* respectively, and, except as to amounts, in identical terms. The policies originally con-

(*a*) Reported by Leonard C. Thomas and W. C. Sandford, Esqrs., Barristers-at-Law.

tained the usual free of capture and seizure clause, but on payment of an extra premium the clause was deleted. They were free of particular average except in circumstances which had not arisen, and among the perils insured against were: Takings at sea, restraint and detainments of all kings, princes, and people of what nature or quality soever.

War was declared on the 4th Aug. 1914. On the 9th Aug., as the *St. Andrew* was approaching the Lizard, she was stopped by a French cruiser and told to go to Falmouth. She went into Falmouth and there her master received orders from some naval officer in authority to proceed to Liverpool and discharge, which he actually did. The master of the *St. Andrew* knew that war had been declared, and if he had not been stopped by the French cruiser he would have signalled for orders at some Channel signalling station, probably the Lizard or the Start.

The *Orthia* was diverted to Glasgow, where she discharged. Her owner on the 3rd Aug. received a telegram from the Admiralty in these terms: "Admiralty suggest in the interests of the nation that your *Orthia*, now bound for Hamburg with grain, be diverted to a British port, any further information is available at Trade Branch, War Staff, Admiralty." On the 5th Aug. they sent a cable to St. Vincent, which the master received on the 7th, directing the *Orthia* to proceed to Glasgow. Trading with the enemy was prohibited by proclamations, the first of which was issued on the 5th Aug.

The *St. Andrew* arrived at Liverpool on the 11th Aug., and the *Orthia* at Glasgow on the 20th Aug. On the 7th Sept. the plaintiffs gave notice of abandonment, which the defendants declined to accept. No point was made as to the lateness of the notice. The linseed depreciated in value to the extent of some 25 per cent. It is obvious that neither of the steamers could lawfully complete her voyage to Hamburg, and that there was in August 1914 no prospect of the linseed being sent forward to Hamburg within any reasonable time.

Roche, K.C. and *Dunlop* for the plaintiffs.

Leslie Scott, K.C. and *MacKinnon*, K.C. for the defendants.

Cur. adv. vult.

Feb. 1.—Bailhache, J. (after stating the facts).—Upon these facts the plaintiffs submitted that there was a total loss of the linseed due to a peril insured against, viz., restraint of princes, and that the defendants were liable.

The defendants denied liability on six grounds, which may be summarised thus:

(*a*) No loss, or if a loss, not by a peril insured against;

(*b*) The peril insured against was not the proximate cause of the loss;

(*c*) If loss is alleged by takings at sea, arrests or detention by the British authorities, the policy does not insure against loss by such a cause; and

(*d*) After the 4th Aug. the adventure became illegal and the policy was therefore avoided.

There are two questions falling for decision in this case. First, was there a constructive total loss within the meaning of the policy; second, if so, was such loss due to a peril insured against or its proximate cause? I shall try in answering these questions to cover the points raised by the defendants.

As to the first question, it was conceded that in the case of a marine policy on goods the insurance is on the venture, and the loss of the venture constitutes a constructive total loss of the goods: (see *Rodocanachi* v. *Elliott*, 31 L. T. Rep. 239; 2 Asp. Mar. Law Cas. 399; L. Rep. 9 C. P., p. 518). This is not one of the instances of constructive total loss given in the Marine Insurance Act 1906, but I think it still remains the law. The venture in this case was clearly destroyed, for this point clearly seems covered by the authority to which I have referred. There was a constructive total loss of the linseed.

Next, was such loss due to a peril insured against as the proximate cause of the loss?

It will be convenient to divide this question into two parts, and to discuss first whether the loss was in any sense due to a peril insured against. There is a slight difference between the incidents which led to the *St. Andrew* going first to Falmouth and then to Liverpool, and those which led to the *Orphia* going to Glasgow, but it was not suggested that this difference makes any distinction in principle between the two cases, and in my opinion the two cargoes stand on the same footing.

The voyage in both cases was lost because by English law and by proclamations modifying the law the further prosecution of the voyage became illegal and the owners in both cases obeyed the law. Do these facts bring the case within the "restraint of princes" clause in the policies? No force was used, but "restraint of princes" does not necessarily involve the use of force; any authoritative prohibition on the part of a governing power or the operation of municipal law is sufficient: (see *Miller* v. *Law Accident Insurance Company*, 9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712).

In my judgment the loss of the venture in both cases was due to "restraint of princes." The defendants say, however, that even if this is so yet as the restraint was by the operation of British municipal law or by the authoritative act of the British Government in issuing their proclamations, it matters not whether such restraint is not covered by the policy.

The reason they give is that in a British policy upon the goods of a British subject restraint by the British Government must always be taken to be excepted however wide-reaching the terms of the restraint clause may be. They say the clause should be construed as though after the words "of what nature, condition or quality soever" there were added the words "other than British."

This point is of importance, and as it is not, I think, covered by any decided case which can be said to be conclusive, I propose to criticise it at some length.

The grounds of the restraint clause are admittedly wide enough to cover acts of the British Government, and if they were not to have full effect given to them it must be because they have acquired some more limited meaning by custom, or because there is some ground of public policy which should prevent the court giving them their full effect. No customary meaning was proved, and I have failed to discover any ground of public policy.

The question was discussed as long ago as 1702, in *Green* v. *Young* (2 Lord Raymond, 840), where an embargo was laid by the British Government upon a vessel at Jamaica insured on a voyage from Jamaica to London. The vessel was seized and converted into a fireship. The point was not actually decided but Lord Holt, who tried the case, expressed the opinion that such an embargo and seizure were covered by the restraint of princes clause.

In 1802, in *Tonting* v. *Hubbard* (3 Bos. & P. 291), which was an action by a Swedish owner for freight due under a charter-party, Lord Alvanley, in the course of his judgment, quoted Marshal as saying on p. 437: "If a British ship be arrested or seized by the authority of the British Government from State necessity, this shall be a detention within the meaning of the policy for which the insurer is liable." Lord Alvanley discusses the point, but expresses no decided opinion of his own.

In the last edition of Arnould, p. 803, the law is thus stated: "There are two classes of cases in which loss may be occasioned by the public authoritative acts of the Government by the assured, those, namely, in which the assured and the underwriter are both subjects of the same State, and those in which they are subjects of different States. In the former class of cases it may now be taken as settled law that the underwriter is liable for all loss occasioned by the public acts of the Home Government in detaining, arresting, or laying embargo on the ship, either in the home or foreign port." And in the fourth edition of Phillips, sect. 10, par. 1109, under the head "Capture, Arrests, Restraints, and Detention," the restraints clause in these policies is set out, and the author says: "The policy extends to captures, arrests, and detention by public enemies, by belligerents where the property insured is neutral, or by the Government of which the assured is a subject for any other cause than a violation of law." These last words are very material; they do not appear in par. 803 of Arnould, who possibly takes the qualification for granted.

Incidentally they bring me to a further point taken by the defendants, and supply the answer to it. They put their point in this way: "Even if the restraint clause in this way does cover authoritative acts of the British Government at all, we deny it only covers those acts if they were illegal or mistaken," and for this I was referred to the case of *Lozano* v. *Jansen* (2 E. & E 160).

In that case the British ship *Newport*, with a cargo on board belonging to a Brazilian subject, while on her voyage to Ambriz, and when near Ambriz, was seized by a Queen's ship under the statute 5 Geo. 4, c. 113, s. 4, as being illegally engaged in the slave trade. She was condemned by the local court at St. Helena, and the shippers of the cargo, who were merchants in London and agents for the Brazilian consignee, were condemned in penalties amounting to double the value of the goods, and in costs. The ship and certain perishable goods were sold under order of the court. The rest of the goods were detained by order of the court at St. Helena.

The cargo was insured at Lloyd's under a policy containing a restraint clause in the present form. On hearing of the proceedings at St. Helena, notice of abandonment was given in due time The Privy Council, on appeal, reversed the order of the St. Helena court, and ordered restitution of ship and goods. Upon these facts it was held in an action against the defendant, the underwriter, that the seizure being wrongful there was a loss of the goods by a peril insured against.

It is to be noted that had the seizure been legal the owners of the *Newport* would have been guilty of a breach of English statute law, and the policy would not have covered them. It was, therefore, necessary to hold that the seizure by the Queen's ship was illegal if the assured were to recover. This case is, in my view, no authority at all for the defendants' proposition, but merely illustrates the correctness of the statement by Phillips that the policy extends to captures by the Government of which the assured is a subject, for any cause other than a violation of the law.

I may note, in passing, that I find that in the article on insurance in the Laws of England, on p. 443, it is submitted by the late Mr. Arthur Cohen that the case of *Lozano* v. *Jansen* (*sup.*) only means that if the property insured is liable to arrest or detention by the British Government on account of some illegal act of the assured, and is for that reason arrested or detained, the assured cannot recover. I am glad to have such high authority in support of my own view.

In my judgment, therefore, the restraint clause, in the form in which it occurs in the policies before me, does cover the municipal law of this country and the authoritative acts of the British Government. I adopt the statement of the law by Phillips in the paragraph quoted above.

Another point taken by the defendants was that after the declaration of war the voyage became illegal and the policy ceased to be effective.

Now, there is no doubt that a British policy of insurance upon a venture illegal according to English law at the time the policy is issued is of no effect. No authority is now needed for this proposition. When, however, the venture is legal according to English law when the policy is issued, but becomes illegal during the currency of the policy by some municipal law or authoritative act of the Government, one must distinguish.

If the assured persists in the venture after it has so become illegal, and as a consequence his goods are seized, he is uninsured. The seizure is due to his violation of English law. If, however, he, in consequence of such supervening illegality, abandons the venture and thereby suffers loss, that loss, if I am right in my judgment, so far falls within the restraint of princes clause, and, apart from any possible question of *causa proxima*, the assured is covered.

If it were not so, an assured would indeed be in a sorry plight, for whether he obeyed or disobeyed the law, he would equally be uninsured. In my opinion he is not in this position, and I take the law to be that a British subject does under a restraint clause in the present form insure himself against loss caused by a compliance with the law of his country or the commands of his Government, although he cannot and does not insure himself against a loss caused by a defiance of such law or commands.

One last point remains: Was the restraint of princes a proximate cause of the loss? The defendants say no, and refer me to a line of cases of

which *Hadkinson* v. *Robinson* (3 Bos. & P. 388) is an early example, and *Kacianoff* v. *China Traders' Insurance Company* (12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 112) is, I think, the latest.

The defendants, on the other hand, refer me to *Miller* v. *Law Accident Insurance Company* (*sup.*) It is, I think, correct to say that the *Hadkinson* v. *Robinson* line of cases proceed upon the principle that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so avoided.

In deciding within which set of authorities a given case falls, it must always be borne in mind that much depends upon the character and description of the particular peril which has to be relied upon as to the cause of the loss. In this case the restraint took the form of the Corn Law, which upon the outbreak of war sprang automatically into force, and of the command issued by proclamation. One of these was an injunction to shipowners "not to permit any British ship to leave or enter or communicate with any port or place of the German Empire."

When once it is admitted that force is not necessary to constitute restraint of princes, it is clear that a shipowner who keeps his vessel at home or directs her to a home port in obedience to such a proclamation, is not taking steps to avoid that particular peril, but is submitting to its operation.

In such a case restraint of princes is the proximate cause of loss. If, on the other hand, he acted in precisely the same way in order to avoid capture, and if the only peril insured against of which he could avail himself against his indemniter was seizure or capture, then *Hadkinson* v. *Robinson* and cases of that class decide that as his vessel has not in fact been captured he cannot rely upon capture as the cause of loss. In my opinion this case falls within the principle of *Miller's* case and restraint of princes was the proximate cause of the loss.

The defendants appealed.

Sir *Robert Finlay*, K.C., *Leslie Scott*, K.C., and *F. D. MacKinnon*, K.C. for the appellants.

Adair Roche, K.C. and *Dunlop* for the respondents.

The nature of the arguments appears sufficiently from the judgments.

Cur. adv. vult.

The following written judgments were delivered:—

April 23.—Lord Reading, C.J.—The plaintiffs bring this action to recover the value of two cargoes owned by them and shipped at ports in the River Plate in the steamships *Orthia* and *St. Andrew* for carriage to Hamburg. The cargoes were insured by the plaintiffs with the defendants under two policies of marine insurance subscribed by the defendants, and the question is whether the plaintiffs are entitled in the circumstances of this case to recover from the defendants the values named in the policies. Bailhache, J. tried the action and decided in favour of the plaintiffs, and the defendants appeal from this judgment.

The plaintiffs are corn merchants carrying on business in this country, and had contracted to sell and deliver to German merchants resident in Hamburg, in the German Empire, two parcels of linseed; the price covered cost, freight, and insurance, but the property was not to pass until the goods were delivered at Hamburg. The linseed was shipped in the month of July on the steamships *Orthia* and *St. Andrew* for carriage from the River Plate to Hamburg. A small parcel of wheat was also shipped in the *St. Andrew* which the plaintiffs intended to sell to German firms at Hamburg. War was declared on the 4th Aug. 1914, at 11 p.m., by His Majesty the King against the German Emperor. On the 3rd Aug. the owners of the *Orthia* received a telegram from the Admiralty suggesting that in the interests of the nation the vessel should be diverted to a British port. On the 5th Aug. the owners cabled to St. Vincent directing the *Orthia* to proceed to Glasgow. On the 7th Aug. the *Orthia* called at St. Vincent for orders, received the message from the owners, and in consequence proceeded to Glasgow, where she arrived on the 20th Aug. and duly discharged the linseed.

On the 9th Aug. the *St. Andrew* was forty miles S.S.W. of the Lizard, proceeding on her voyage to Hamburg, when a French cruiser signalled her to stop and asked whither she was going. The master replied "To the Lizard." At that time he did not know that we were at war with Germany, although he was aware that France and Germany were at war. The cruiser signalled her "For security go into Port Liverpool." This was an obvious mistake, as Port Liverpool is in Canada, and the cruiser then signalled her to go into Falmouth. The *St. Andrew* then proceeded to Falmouth, and, when there, learnt that this country was at war with Germany. About an hour or two after dropping anchor at Falmouth the master received orders through the examining officer at Falmouth from the chief naval transport officer at Devonport to go to Liverpool, whither he proceeded, and upon arrival on the 11th Aug. duly discharged the linseed and the wheat. Both the plaintiffs and the defendants are British subjects, and the *Orthia* and the *St. Andrew* are British steamships.

By the policies of insurance, the shipments of linseed and wheat were insured upon a voyage "at or from port or ports in the River Plate and tributaries to Hamburg" against loss by perils, including the peril of "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." The printed form of the policy contained the common form of the f.c.s. clause, "Warranted free of capture, seizure, and detention and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." This clause was deleted on payment of an extra premium. The policies were warranted free from particular average, except in circumstances which have not arisen. The value of the cargoes was depreciated to the extent at most of some 25 per cent. On the 7th Sept. the plaintiffs gave notice of abandonment to the defendants, who refused to accept abandonment, whereupon the plaintiffs brought this action. It is agreed that no point should be made as to the date of the notice. By reason of the war the vessels could not lawfully continue the voyage to Germany, and, so far as the human mind could foretell, the linseed could not be

forwarded to Germany within reasonable time. On these facts, which were not in dispute, Bailhache, J. held that the linseed had been lost owing to restraint of kings and princes, and that the underwriters were liable for a total loss under the terms of the policies. The learned judge drew no distinction between the shipments of the *Orthia* and the *St. Andrew*, and held that "the voyage in both cases was lost because by English law and by proclamations notifying the law the further prosecution of the voyage became illegal, and the owners in both cases obeyed the law." There is no doubt that the *Orthia* proceeded to Glasgow instead of continuing her voyage to Hamburg because of the orders received from the owners of the vessel, who were aware of the existence of a state of war between this country and Germany. The case of the *St. Andrew* is not quite so simple. She was advised by the French cruiser to run into Falmouth for security. The action of the French cruiser was not a hostile intervention, and there was no exercise of force or threat to exercise it. The master of the vessel knew that the voyage to Germany had become illegal and must be abandoned before he received the orders of the Admiralty to proceed to Liverpool. Upon these facts I agree with the learned judge that the shipment in the two vessels stand, for the purpose of the decision in this case, in the same position.

The question to be determined is whether the abandonment of the voyage, in consequence of its having become illegal, was an abandonment caused by "restraint of kings and princes" within the meaning of the policy. The defendants contend, first, that there was no act of restraint, and, secondly, that the restraint did not cause the loss. On the first point they argue that the word "restraint" implies an act of intervention by force, *manu forti*, and that, as no force or violence had been exerted to prevent the continuance of the voyage, there was no restraint. Must force be actually exerted before there can be a "restraint of kings and princes"? There is no special meaning attributable to these words either by custom or usage among merchants, and they must be construed according to their natural and ordinary meaning. They find a place in this policy at the end of a long series of enumerated perils, all of which contemplate a loss by the intervention of some fortuitous occurrence. By rule 7 of the Rules for Construction of Policies in the first schedule of the Marine Insurance Act 1906, "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of wind and waves." The words "arrests, restraints, and detainments of kings and princes" to my mind also imply some intervention of a fortuitous character, some interference out of the ordinary course of events by the governing authorities who have the force of the State behind them to compel submission to their authoritative decrees. In *Rodocanachi* v. *Elliott* (*sup.*) Brett, J., in construing the words "restraints and detainments of all kings, princes, and people," said: "Now, I apprehend that goods are restrained or detained where they are, by the application of a hostile force, prevented from being carried to their destination. That that applies to embargo there seems to me to be no doubt; and there is equally, in my opinion, no doubt that it applies to blockade; in both it is intended that the ship or goods shall not be removed." In that case the court had only to consider restraint or detainment by a hostile force. The conclusion is that there was restraint or detainment because by the action of the German army, then besieging and investing Paris, the goods were prevented leaving Paris and reaching their destination. In that case it was argued that there was no loss of goods by restraint of princes because there had been no action on the goods themselves, but Bramwell, B., in delivering the judgment of the Exchequer Chamber, rejected that argument and observed that the word "restraint" is "more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods," and held that the goods, having been effectually prevented from coming out of Paris by reason of the siege and investment of Paris by the Germans, were lost by restraint of princes. The same words are to be found in the exception clauses of charter-parties and bills of lading, and, although the points decided are not the same as in the present case, the construction of the words must be the same whether they are found in charter-parties or bills of lading or in policies of marine insurance. In *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404) the question was whether the defendant was justified in determining the contract by reason of the blockade at the port of discharge; Cockburn, C.J. thus answered it at p. 410: "Is a blockade a restraint of princes? I think it is. It is an act of a Sovereign, State, or prince; and it is a restraint, provided the blockade is effective; and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of State of one of the belligerent Sovereigns, and consequently constitutes a restraint of princes. The case, therefore, is brought within the exception of the charter-party." Rule 10 of the Rules for Construction of Policies in the first schedule of the Marine Insurance Act 1906 confirms the view I have expressed as to the meaning of "restraint." The rule is in the following words: "The term 'arrests, &c, of kings and princes and people' refers to political or executive acts and does not include a loss caused by riot or by ordinary judicial process." Acts of State are clearly included; a declaration of war by the Sovereign is an act of State and is a political or executive act. "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law": (*Esposito* v. *Bowden*, 7 E. & B. 763, at p. 781). Whether war is declared by or against the Sovereign or at all is immaterial for the purpose under consideration. It is equally an act of State if the forces of the Crown are used by order of the Crown against the enemy. A political or executive act may, however, be an act of interference and of forcible interference notwithstanding that force is not actually exerted. The executive has the power of compelling

obedience to its orders by the exercise of force if necessary; the force need not be actually physically present when the master of the vessel submits to an order of the executive. The master acts in obedience to such an order without requiring the exertion of force to coerce him into submission, because it would be useless to refuse to submit.

In my opinion it is not necessary that an actual exertion of force should be made to constitute a restraint. Such judicial authority as exists supports this view and is against the defendants' contention that actual force must be used. They relied upon the dictum of Martin, B. in *Finlay* v. *Liverpool and Great Western Steamship Company* (23 L. T. Rep. 254). There it was held that an order by a court of competent jurisdiction in New York to the defendants to deliver up goods was no answer to a claim for non-delivery of goods in accordance with the terms of the bill of lading, and was not an act within the exception in the bill of lading of "restraint of princes." Martin, B. said that these words "have reference to the forcible interference of a State or of a Government of a country taking possession of the goods *manu forti*, and do not extend to the legal proceedings which, it is alleged in the plea, afterwards took place in the courts of New York." It is to be observed that Martin, B. did not express the view that there must be actual physical exertion of force. This dictum came under review in *Miller* v. *Law Accident Insurance Company* (*sup.*), where the question arose whether the operation of the municipal law of a country which prevented the delivery of goods at their port of destination was a restraint of princes within the meaning of the policy. As the plaintiffs maintain that the decision of the Court of Appeal in that case covers the present case it is necessary closely to examine the facts and judgments. The plaintiff had shipped a number of bulls in the steamship *Bellevue* to be carried from Liverpool to Buenos Aires, and then effected a policy of insurance on the animals. Months before the date of the shipment the Argentine Government had passed a decree forbidding the entry of animals suffering from contagious diseases. By art. 5 of the decree it was provided that animals suspected of being affected with diseases should be slaughtered. The *Bellevue* arrived on the 10th Sept. 1900, and after inspection of the animals by Argentine officials the Ministry of Agriculture ordered the vessel to leave the port, but gave leave to tranship the cattle to another vessel outside the limits of the port. On the 11th Sept. 1900 a general order was issued by the Ministry forbidding the discharge of cattle from the United Kingdom. The *Bellevue* left the port and transhipped the cattle. The plaintiffs demanded to recover against the underwriters on the ground that there had been a restraint of princes. Bigham, J. decided that the mere operation of an ordinary municipal law was not a restraint within the meaning of the policy. He quoted the dictum of Martin, B. in *Finlay* v. *Liverpool and Great Western Steamship Company* (*sup.*) and said: "So in the present case the words do not in my opinion cover the operation of the ordinary law of the land but relate only to some violent departure from the ordinary course of things." He held that *Rodoconachi* v. *Elliott* (*sup.*) was distinguishable because in that case, although there was neither actual seizure nor arrest of the goods, nor a specific order preventing the goods leaving the besieged city, the goods were as effectually prevented leaving the city as if they had been actually seized by the German army; whereas in the case before him no force of any kind was used, the captain was only required to obey the ordinary law existing in the country at the time when the goods arrived, and he obeyed it. The Court of Appeal (88 L. T. Rep. 370; (1903) 1 K. B. 712) differed from Bigham, J. and held that there was an active intervention of the Government which came within the "restraint of princes." They dissented from the view that direct force must be applied to bring the peril of restraint of princes into operation. Stirling, L.J. said: "There was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or the police force intervened." Mathew, L.J. pointed out that *Finlay* v. *Liverpool and Great Western Steamship Company* (*sup.*) was not an authority for the proposition that there must be an exercise of direct force to constitute restraint. He treated the acts of the executive authorities at Buenos Aires as acts of restraint of princes and said: "If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used." I think the decree of the 11th Sept. was in itself sufficient ground for the decision. There was a definite act of intervention by the State, it was an act done by a superior authority supported by the force of the State; it mattered not whether it was a legal or an illegal act, the captain was bound to obey the decree and therefore was acting under the restraint of the rulers of the country notwithstanding that no direct force was exerted. This case is an authority tending to support the plaintiffs' main contention, and in any event decides that direct force need not be used to constitute restraint: (see also *Mansell* v. *Hoade*, 20 Times L. Rep. 150, per Walton, J.). In the present case the plaintiffs contend that the declaration of war is an act of State which immediately and automatically forbade trading with the enemy and made the master, and all those who became responsible for the continuance of the voyage to the enemy country, amenable to the criminal law. The masters and owners of the vessels, being subjects of the King, were bound to conform to the law which sprang into operation at the moment we became engaged in war with Germany. The Royal Proclamation of the 5th Aug. did not make the law; it notified it to the public and warned them against breach of the law. Is the loss of the voyage by submission to the municipal law the direct consequence of the Act of State and therefore a loss by restraint of kings and princes? Such a loss of voyage is not, in my judgment, a loss by "ordinary judicial process." That phrase is used to denote proceedings in a court of law such as arose, for example, in *Finlay* v. *Liverpool and Great Western Steamship Company* (*sup.*), and rule 10 is so expressed as to give effect to the distinction drawn in that case between acts of intervention by a governing authority and acts under ordinary judicial process of the courts. I have no doubt that the state of war is a political

or executive act, but for the plaintiffs to succeed the loss must be not only the consequence, but the direct consequence, of that act; in other words, the restraint must be the proximate cause of the loss.

For the defendants reliance was placed upon a line of cases of which *Hadkinson* v. *Robinson* (*sup.*) is the leading authority. That action was brought on a policy of insurance upon a cargo of pilchards at or from a port in Cornwall to Naples. After the vessel had proceeded on her voyage with the pilchards on board it was ascertained that the port of Naples was shut against all British ships. The vessel was sailing under convoy and was ordered by the commodore to make a port in Minorca, where she duly arrived and the cargo was sold. The plaintiff gave notice of abandonment and demanded payment for a total loss. The vessel could not have proceeded to the port of Naples without running the risk of confiscation by the Government of Naples. Lord Alvanley, C.J., delivering the judgment of the court, said: "It has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. . . . The doctrine" (that the assured might abandon in respect of a loss of voyage) "is only applicable to cases in which the loss is occasioned by a peril insured against; which, as it appears to me, must be a peril acting on a subject insured immediately, and not circuitously, as in the present case." This case was decided upon the principle that the peril insured against must be the proximate cause of the loss, and that if the master diverted the voyage or stayed in port to avoid coming under the operation of the peril, the vessel cannot have suffered loss by the peril: (see also *Kacianoff* v. *China Traders' Insurance Company*, *sup.*). A similar point arose before Lord Ellenborough in *Lubbock* v. *Rowcroft* (5 Esp. 49). This was an action on a policy of insurance on goods from London to Messina; the ship arrived at Minorca and then found that Messina was in the hands of or blockaded by the French. The plaintiffs claimed for a total loss. It is to be observed that in the statement of facts it is not clear whether Messina was only blockaded by the French or was temporarily in the occupation of the French. According to the argument of Erskine as reported, he distinguished occupation from blockade and contended that the French having taken Messina was a restraint by the enemies of the country, which created an incapacity in the ship to perform the voyage intended to be guarded by the policy. Lord Ellenborough said that the abandonment of the voyage "was from an apprehension of an enemy's capture, and not from any loss within the terms of the policy," and he added that "if such was allowed, every ship about to sail from the port of London for a port which had fallen into the hands of the French might be abandoned," just as Lord Alvanley said in *Hadkinson* v. *Robinson* (*sup.*) that if the plaintiffs had succeeded the same principle would have applied in case information had been received that the ship could not safely proceed to Naples. In reference to these cases Sir Robert Finlay called attention to the passage in the second edition of Arnould on Marine Insurance at p. 109. The learned author says: "In this country, however, it has been repeatedly decided, and must now be taken as clear insurance law, that neither interdiction of trade at the port of destination after the risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amount to a risk for which English underwriters are answerable under the common form of policy, either as an arrest, restraint, and detention, or in any way whatever. The principle on which these decisions rest, is the maxim *Causa proxima non remota spectatur*; the cause of loss must be a peril acting upon the subject insured, immediately and not circuitously, as is held to be the case where the loss arises from the ship's being prevented from completing her voyage by the impossibility of entering her port of destination without being captured": (see also Phillips on Marine Insurance, 4th edit., vol. 1, par. 1115, p. 667.

Sir Robert Finlay lays great stress not only upon the absence of judicial authority, but also upon the absence of any statement in either of these or any other text-books on marine insurance law to support the proposition affirmed by Bailhache, J. Mr. Roche in answer points to *Miller* v. *Law Accident Insurance Company* (*sup.*), and moreover comments on the absence of all authority against his contention. Certainly it is remarkable that the present should be the first case in which there is any record of the point having been taken or decided when one recalls the cases on marine insurance law which arose out of the Napoleonic and Crimean Wars, but these reflections do not by themselves assist one to arrive at a conclusion. So far as they have any value they tend in my view in favour of the underwriters, as it may be said that it is inconceivable, if the assured ever thought such a loss came within the perils insured against, that there should be no record of any attempt made to enforce the claim, and equally inconceivable that the underwriters should have submitted to such a claim without a decision of the courts to that effect. Nevertheless I think the decision of the Court of Appeal in *Miller* v. *Law Accident Insurance Society* (*sup.*) tends distinctly in favour of the plaintiffs and the principles of law for which they are contending. The principle of *Hadkinson* v. *Robinson* (*sup.*) was again discussed in the case of *Miller* v. *Law Accident Insurance Company* (*sup.*). It was there held that it did not apply in that case as the master went as far as he could towards the completion of the venture and only desisted when the Government intervened. That seems to me very close to the present case. Both the *Orthia* and *St. Andrew* were proceeding on the voyage and were compelled to abandon it because the Government intervened by the declaration of war. That act of the Sovereign was in itself, by the operation of the common law, a prohibition to trade with the enemy; the voyage to Germany immediately became illegal and if persisted in would doubtless have been prevented by force. Indeed, if the master had continued the voyage and loss had arisen the underwriters could have pleaded in answer to the claim on the policy that the loss was caused by his unlawful act. *Hadkinson* v. *Robinson* (*sup.*) differs from the present case in

that the abandonment of the voyage because of the blockade or for fear of capture was a voluntary act of the master of the vessel. He elected not to run the risk of capture; the voyage had not become illegal. He could have proceeded on the voyage although it was fraught with danger, but he abstained from attempting to enter the blockaded port. In the present case simultaneously with the outbreak of hostilities the voyage became illegal and impossible of performance for a British subject in a British ship. The abandonment of the voyage was not a voluntary act on the master's part, there was no other course open to him in consequence of the war.

The defendants further contend that the restraint if any was an act of the British Executive and that such a restraint is not covered by the policy notwithstanding that the words are "restraints and detainments of all kings, princes, and people of what nation, condition, and quality soever." It is obvious that the language of the clause embraces the authoritative acts of British as well as all other Governments, and the natural and ordinary meaning of the words must prevail unless there is some custom or usage attributing special meaning to them. No such customary meaning is even suggested. The argument is that on the ground of public policy the court ought to read the clause as if it excepted acts of restraint by the British Government. I am at a loss to understand why an insurance against loss by acts of restraint by the British Government should necessarily be against public policy. I think the following passage in Phillips on Insurance, sect. 10, par. 1109, accurately expresses the law in this respect: "The policy extends to captures, arrests, and detentions by public enemies, by belligerents where the property insured is neutral, or by the Government of which the assured is a subject for any other cause than a violation of law." Lord Holt in *Green* v. *Young* (*sup.*) and Lord Alvanley in *Tonting* v. *Hubbard* (*sup.*) express opinions to this effect. Bailhache, J. in his judgment closely examines the authorities and I do not think I can usefully add anything to his observations. I agree with him that the point fails.

Lastly the defendants contend that there was no constructive total loss of the goods. The law before the passing of the Marine Insurance Act 1906 was well established that when goods were insured to be carried to their port of destination the owner of the goods could recover as for a total loss, if it became impossible to perform the voyage, that is, if there was a destruction of the contemplated adventure by reason of a peril insured against. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by any of the perils insured against from arriving in safety at the port of their destination: (see *Roux* v. *Salvador*, 3 Bing. N. C., per Lord Abinger at p. 278). The total loss of the cargo may be effected by a total incapacity indefinitely prolonged in the ship to perform the voyage, for that is a loss of the voyage and therefore a destruction of the adventure: (per Lord Ellenborough in *Barker* v. *Blakes*, 9 East, 283; and *Anderson* v. *Wallis*, 2 M. & S. 240). In *Rodoconachi* v. *Elliott* (*sup.*), in the Exchequer Chamber, Bramwell B. says: "The result of this state of things undoubtedly was that the goods were prevented from leaving Paris, and that the whole adventure was broken up, and so continued at the time when the notice of abandonment was given and up to the commencement of the action. We are of opinion that this amounts to a constructive total loss of the goods by restraint of kings and princes within the terms of the policy. This is not a mere temporary retardation of the voyage, but the breaking up of the whole adventure. It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, 'to a destruction of the contemplated adventure.'" Has the law been changed in this respect by the Marine Insurance Act 1906? This statute is "an Act to codify the law relating to Marine Insurance," but by sect. 91, sub-sect. 2, "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." That the language of the statute has altered the theretofore prevailing law in some respects is shown by the decisions in *Hall* v. *Hayman* (12 Asp. Mar. Law Cas. 158; 106 L. T. Rep. 142; (1912) 2 K. B. 5) and *Polurrian Steamship Company* v. *Young* (12 Asp. Mar. Law Cas. 449; 109 L. T. Rep. 901), since affirmed by the Court of Appeal (13 Asp. Mar. Law Cas. 59). By sect. 56, sub-sect. 1, "A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss." By sect. 56, sub-sect. 2, "A total loss may be either an actual total loss, or a constructive total loss." By sect. 56, sub-sect. 3, "Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss." What is an actual total loss? That is defined by sect. 57, sub-sect. 1: "Where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss." What is a constructive total loss? That is defined by sect. 60, sub-sect. 1: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." Sub-sect. 2: "In particular there is a constructive total loss—(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods as the case may be, or (*b*) the costs of recovering the ship or goods as the case may be would exceed their value when recovered." In my opinion the definition is exhaustive, but it must be read, as indeed must every section of the statue, subject to sect. 91, sub-sect. 2. The law in my opinion before the passing of this Act was well settled that constructive total loss of the goods could be proved by establishing the destruction of the contemplated adventure. It is contended by the defendants that by this statute the Legislature has now abolished the distinction in this respect

between a constructive total loss of a ship and a constructive total loss of goods, and has placed both on the same basis by enacting for both ships and goods the law hitherto prevailing only in respect of the ship, and has taken away the right of the owner of goods to claim for a total loss where there is a destruction of the adventure. "There is a constructive total loss when the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable" are the words of the statute on which the decision must turn. The defendants say "subject-matter insured" is the goods and nothing but the goods, and cannot include the contemplated voyage of the goods. They point to the words of the policy: "And it is also agreed and declared that the subject-matter of this policy . . . shall be and is as follows—Upon linseed valued at 11,000*l.*" in the case of the *Orthia*, "Upon linseed and wheat valued at 33,800*l.*" in the case of the *St. Andrew*. But it is not only the goods that are the subject-matter of the insurance, but the goods on a voyage at and from ports in the River Plate to Hamburg. The insurance on the goods is a contract by the underwriters to indemnify the assured for any loss he may sustain by the goods not arriving in safety at their destination as an immediate consequence of a peril insured against. The term "subject-matter" occurs in many of the sections, but is nowhere defined. According to the common law which must still prevail unless inconsistent with the express provisions of the statute, the loss of the voyage was, in regard to goods, treated as a loss of the goods notwithstanding that they were in specie and even uninjured. The loss of the venture by a peril insured against was treated as conclusive evidence of the loss of the goods if the owner of the goods gave due notice of abandonment. I cannot find any provision in the statute which are inconsistent with this rule of the common law, and I come to the conclusion that the law as it existed before the Act of 1906 has not been altered in this respect by the statute. I am therefore of opinion that there was a constructive total loss of the goods.

In my opinion the judgment of Bailhache, J. is right and the appeal should be dismissed.

Swinfen Eady, L.J.—In July 1914 the plaintiffs shipped at Rosario, on the British steamship *Orthia*, for carriage to Hamburg, certain bags of linseed, which they had contracted to sell to German merchants delivered cost, freight, and insurance Hamburg. but the property in the goods had not passed. The plaintiffs insured the goods with the defendants for the sum of 11,000*l.* A state of war existed between Germany and Great Britain at and from 11 p.m. on the 4th Aug. 1914. On the 5th Aug. the owners of the steamship cabled to St. Vincent directing the *Orthia* to proceed to Glasgow; this cablegram was sent in consequence of a suggestion by the British Admiralty that the ship should be diverted to a British port. On the 7th Aug. the *Orthia* while on the voyage to Hamburg called at St. Vincent for bunker coal, became aware of the existence of a state of war, and received the owners' cable, and accordingly proceeded to Glasgow, where she arrived on the 30th Aug., and the owners discharged her cargo. On the 7th Sept. the plaintiffs gave to the defendants notice of abandonment of the goods to them as a total loss, and on the 9th Sept. the defendants refused to accept abandonment. Bailhache, J. decided that there was a loss due to a peril insured against, as its proximate cause, being covered by the words "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever," and that such loss was a constructive total loss. The defendants appeal, and contend that there was not any loss due to any peril insured against, and in any case that there was not a constructive total loss.

The facts not being in dispute, the question is whether the occurrence of a state of war between this country and Germany, whereby the further continuance of the voyage to Hamburg of the *Orthia* became illegal, is a "restraint of kings, princes," &c., within the meaning of the policy. There was not in this case any actual interference with the ship or cargo. The owners themselves diverted the ship's course, and discharged her cargo, at Glasgow. Their possession and control of both ship and cargo were never actually disturbed. They were constrained to act as they did by the existence of the state of war; they were precluded by that alone from continuing the voyage to Hamburg, which had become illegal. Was the loss occasioned by the abandonment of the voyage, in consequence of the existence of a state of war, a loss by reason of one of the perils insured against? Does the fact that, after the commencement of a voyage, a state of war supervened which rendered the further prosecution of the voyage illegal, and therefore impossible, amount to a "restraint of kings, princes," &c., within the meaning of those words, as used in the policy of marine insurance in question? A policy of marine insurance must be construed like other instruments, and is not subject to any peculiar rules of construction. In *Robertson* v. *French* (1803, 4 East, 130, at p. 135) Lord Ellenborough, C.J., in delivering the judgment of the Court of King's Bench, thus stated the law: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases. It is therefore proper to state upon this head that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance—viz, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." Bowen, L.J., when citing this passage in *Hart* v. *Standard Marine Insurance Company* (6 Asp. Mar. Law Cas. 368; 60 L. T. Rep. 649; 22 Q. B. Div. 499), stated that he thought that no better exposition had been given of the broad rules of construction applic-

able to all commercial documents; and in the recent case in the House of Lords of *Glynn* v. *Margetson and Co.* (7 Asp. Mar. Law Cas. 148, 366; 69 L. T. Rep. 1; (1893) A. C. 351) Lord Halsbury referred to this judgment as stating the law with great precision. It is therefore necessary to consider whether the abandonment of the voyage in the present case was caused by an "arrest, restraint, or detainment," &c, within the plain and ordinary meaning of those words of the policy, or within some known and definite meaning which the usage of trade has attached to them, some special and peculiar sense distinct from the popular sense of the words, and to which effect must be given in order to effectuate the intention of both parties to the contract, and with reference to which both parties must be presumed to have contracted. The language used in a Lloyd's policy, which was introduced into England more than three centuries ago, is often not intelligible without the aid of usage and judicial decisions. The assured in the present case has been compelled to abandon a voyage which, although lawful at its commencement, had become unlawful by the common law of the country, owing to the occurrence of a state of war. By abandoning the voyage and altering the destination of the ship and cargo, the assured acted in obedience to the general law of the country, which forbids trading with the enemy. Although in this case he obeyed the law voluntarily, there lies behind the law the sanction of force, which compels obedience to it; but the force of any country which compels obedience to its ordinary municipal law is not a "restraint of kings, princes," &c, in the plain, ordinary, and popular sense of those words occurring in a marine policy to describe perils insured against. Each of the words used, "arrest," "restraint," "detainment," implies the presence of force; if not physically exerted (otherwise than by its mere presence), yet actually present, and ready to be immediately exerted, if obedience to the force is not yielded without its being exercised; as in *Rodocanachi* v. *Elliott* (*sup.*), where, although there was no actual seizure or arrest of the goods, the city in which the goods were (Paris) was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army. Similarly ships are "detained" by force in a blockaded port and "restrained" from coming out, where the port is completely invested, and the cordon of the blockading squadron sufficient to prevent any vessel from passing through it, although no ship is seized or arrested or in the actual possession of the blockading force. Lord Stowell defined a blockade as "a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off": (*The Vrouw Judith*, 1 C. Rob. 150). But it is essential that this human force should be actually present. The words "arrest," "restraint," "detainment," all naturally imply the presence and exertion of force in the same sense, and I am not aware of any instance in which an event has been held by judicial decision to constitute an arrest, restraint, or detainment where no force has been used, unless it has been present, and ready to be immediately exercised, if obedience be not accorded without it being actually exerted.

In *Goss* v. *Withers* (2 Burr. 696) Lord Mansfield laid down that by the general law the assured may abandon in the case merely of an arrest or an embargo by a prince not an enemy; and in *Rotch* v. *Edie* (6 T. R. 413) that principle was applied to an embargo laid on by the Government of the country of the port of loading. But in these instances of arrest, restraint, or detainment force was present. In *Finlay* v. *Liverpool and Great Western Steamship Company* (*sup.*) the defendants pleaded, by way of answer to a claim for not delivering goods in accordance with the bill of lading, that they were prevented by "acts or restraints of princes," an exception contained in the bill of lading, and then set out in the plea that they had been sued in New York by the true owner of the goods, and had been ordered by a court of competent jurisdiction to give up the goods to him. This was adjudged a bad plea. Martin, B. said: "The 'acts and restraints of princes and rulers' mentioned and provided against in the bill of lading have reference to the forcible interference of a State or of the Government of a country taking possession of the goods *manu forti*, and do not extend to the legal proceedings which, it is alleged in the plea, afterwards took place in the courts at New York." In *Rodocanachi* v. *Elliott* (*sup.*) goods in transit from Marseilles to London had to pass through Paris, and on their way they came within the lines of the German army, by which Paris was then completely invested. This was held to constitute a restraint of princes. Bramwell, B., in delivering the judgment of the Exchequer Chamber, in the passage from which I have already quoted, says: "But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army." This shows that the court was of opinion that the goods were, for all effective purposes, seized by the German army, and taken out of the control and disposition of the owners; they were in an area inclosed by German soldiers, and by them physically prevented from leaving that area. It was by the forcible and therefore by the violent act of the German army that the goods were prevented from reaching their destination. No other view of the facts in that case could have been taken, and having regard to that view, no other conclusion could be arrived at than that the plaintiffs had lost their goods by a restraint of princes: (see per Bigham, J. in *Miller* v. *Law Accident Insurance Company*, (1902) 2 K. B., at pp. 699, 700). In that case it was decided by Bigham, J. as a judge of first instance that the mere operation of an ordinary municipal law affecting or preventing the delivery of the insured goods at their destination is not a "restraint of princes or people" within the meaning of a Lloyd's policy of marine insurance, that the words of the policy do not cover the operation of the ordinary law of the

land, but relate only to some violent departure from the ordinary course of things. On appeal (1903) 1 K. B. 712) the court took a different view, holding that what had actually taken place did amount to a "restraint of princes," Stirling, L.J. (at p. 719) stating that on the day following the arrival of the steamer *Bellevue* at Buenos Aires there was a decree of the President, which stated the arrival of cattle by that steamer, and decreed that the discharge of all cattle from the United Kingdom was stopped until further notice. "The captain accordingly took the ship outside the port, and, with the view to minimise the loss, transhipped the cattle into another vessel, and they were carried to Monte Video and there sold at a great loss. It seems to me that there was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or of the police force intervened." And Mathew, L.J. said: "If actual force was not used it was because there was no opposition. The master submitted to the orders of the administration." The case was thus dealt with as one of active intervention and restraint by a foreign Government under a special decree made after the arrival of the vessel in the port, the Government having there available the force to compel obedience to its orders if necessary. Stirling, L.J. points out that if the master, when about to enter the port, had been informed of the existence of a law restricting the right to land cattle, and that the Government were likely to put that law into force, and he had then gone on his voyage and not entered the port, the case would have been like *Hadkinson* v. *Robinson* (*sup.*) and similar authorities. That is to say, if the proceedings of the Government had been the same, but the shipowner had acted differently and not entered the port, there would have been no loss within the meaning of the policy. In *Hadkinson* v. *Robinson* (*sup.*) the insurance was on a cargo of pilchards at and from Mounts Bay to Naples. The vessel sailed under convoy. In the course of the voyage the master received notice that the port of Naples was absolutely closed to British ships by the Government in the kingdom of Naples, and she put into Minorca by order of the commodore of the convoy, where the cargo was sold. The merchant gave notice of abandonment, and claimed for a constructive total loss. It was argued on his behalf that it was impossible to contend that the ship was not as much prevented from proceeding to Naples by "the restraint of princes" as if she had been actually detained by the Government of an intermediate port, since she could not sail into Naples without rendering herself liable to immediate confiscation. The judgment of the Court of Common Pleas was delivered by Lord Alvanley, C.J., who said: "I think that the detention of the cargo on board the ship at a neutral port, in consequence of the danger of entering the port of destination, cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against. This is an insurance upon an article from England and Naples, warranted free from particular average. The plaintiff, therefore, cannot recover unless the article be totally lost by a peril within the policy; and such peril must, as I think, act directly and not collaterally upon the thing insured." *Lubbock* v. *Rowcroft* (*sup.*) was an action on a policy on goods London to Naples, Leghorn, or Messina, with liberty to touch at Gibraltar or any other port in the Mediterranean. When the ship arrived at Minorca it was found that Messina was in the hands of the French, and the merchant gave notice of abandonment and claimed as for a total loss. It was urged on his behalf that it was not merely a case of great probability of the ship being captured, but that the port was in the possession of the enemy, so that her capture was certain. Lord Ellenborough, however, said "that he still retained his first opinion, that the abandonment was from an apprehension of an enemy's capture; and not from any loss within the terms of the policy. That if such was allowed, every ship about to sail from the port of London for a port which had fallen into the hands of the French might be abandoned." The case afterwards went off on other grounds, but it shows that in the opinion of Lord Ellenborough the fact that if during the course of a voyage the port of destination became the port of an enemy the cargo did not thereupon become a constructive total loss. That indeed is the present case.

It is conceded that there is not any reported case, down to the present time, in which it has ever been determined that the mere occurrence of a state of war, rendering the further prosecution of a voyage to an enemy port illegal, and of which the master of the ship has notice, of itself occasions a loss by restraint of kings, princes, &c., although this is an event which in the course of English history must have happened many times. Nor is there any statement in any text-books of authority that such an occurrence is deemed to occasion a loss, as a restraint of kings, princes, &c., by the general usage or custom of merchants and underwriters. In my opinion the outbreak of war, whereby the further continuance of a voyage to a port, which has become an enemy port, has become impossible, is not an arrest, restraint, or detainment, either within the ordinary meaning of those words or within any meaning which the custom of merchants or the usages of trade have affixed to those words when used in a policy of marine insurance. If a contrary view were to prevail the further point would arise whether the assured could claim for a constructive total loss, although the actual possession and control of both ship and goods have not in any way been interfered with.

What is a "constructive total loss" is defined by the Marine Insurance Act 1906. By sect. 91, subsect. 2, the rules of the common law, including the law merchant, are to continue to apply to contracts of marine insurance, save in so far as they are inconsistent with the express provisions of the Act. There is, however, an express provision in sect. 56, sub-sect. 1, that "any loss other than a total loss, as hereinafter defined, is a partial loss." The definition of a total loss is therefore exhaustive, and any loss not coming within that definition is expressly declared to be a partial loss. The judge below proceeded on the ground that in the case of a marine policy on goods the insurance is on the venture, and the loss of the venture constitutes a constructive total loss of the goods. He added that this is not one of the instances of constructive total loss given in the Marine Insurance Act 1906, but he thought that it was still the law, and that the point was

covered by *Rodocanachi* v. *Elliott* (*sup.*). The learned judge thus considers what the law was, apart from the Act, and decides that the Act has not altered the law in this respect. But this is not the true point of view from which to approach the construction of the statute. The canon of construction applicable to a codifying Act has been in several cases laid down in the following manner: "The proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view": (*Bank of England* v. *Vagliano Brothers*, 64 L. T. Rep. 353; (1891) A. C. 107, per Lord Herschell at p. 144; *Robinson* v. *Canadian Pacific Railway Company*, 67 L. T. Rep. 505; (1892) A. C. 481; *Bristol Tramways Company* v. *Fiat Motors Limited*, 103 L. T. Rep. 443; (1910) 2 K. B. 831).

Now to apply this canon of construction to the statute. By sect. 56, sub-sect. 1, a loss is a partial loss unless it is a total loss "as hereinafter defined." By sect. 56, sub-sect. 2, "A total loss may be either an actual loss or a constructive loss." By sect. 57, sub-sect. 1, there is an actual total loss "where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof." It is not suggested in the present case that there was any actual total loss. By sect. 60 constructive total loss is defined. "There is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable." What is the "subject-matter insured" in the present case? The policy says "that the subject-matter of this policy . . . is . . . upon linseed valued at 11,000*l*." The linseed was not destroyed or damaged, nor was the assured irretrievably deprived of it, nor was it abandoned on account of its actual total loss appearing to be unavoidable. I agree with Bailhache, J. that there was not any constructive total loss as defined by the Act, but as in my opinion that definition is exhaustive, there was not any constructive total loss. It was contended that the subject-matter of the insurance was not the linseed, but the venture, and that the loss of the venture constituted a constructive total loss of the goods. But if "the subject-matter insured" was the venture, there was an actual total loss as defined by sect. 57, sub-sect. 1, because sect. 57, sect. 1, says: "Where the subject-matter insured"—I treat that as the venture—"is destroyed or so damaged," and so on, "there is an actual total loss." By sect. 23 of the Act, "A marine policy must specify" (*inter alia*) "(2) The subject-matter insured and the risk insured against; (3) The voyage, or period of time, or both as the case may be, covered by the insurance." Many other sections of the Act might be referred to, including sect. 60, sub-sect. 2, as showing that where there is an insurance on goods (as in the present case) the subject-matter mentioned in sect. 60, sub-sect. 1, means, as I hold that it does mean, the goods insured. It was urged that if this construction be right, the Act has altered the law on this point. This may be, but it is the duty of the court to give effect to plain and unambiguous language, notwithstanding that it may have altered the previous law. The statute has already been held to have altered the previous law, in favour of underwriters, in other respects: (see *Hall* v. *Hayman*, *sup.*; *Polurrian Steamship Company* v. *Young*, *sup*).

It follows that on both points the appellants are entitled in my opinion to succeed. Thus far I have dealt only with the steamship *Orthia*.

The steamship *St. Andrew* sailed from the River Plate with a cargo, mostly of wheat, for Hamburg, the property not having passed to the intended German buyers. On the 9th Aug. when approaching the Lizard, she was stopped and interrogated by a French cruiser. The cruiser signalled: "For security, go into Port Liverpool"; there was some error in the signal letters, as Port Liverpool is in Canada; the cruiser was told of the error, and then signalled: "Go into Falmouth, English Channel." On arriving at Falmouth, if not before, the captain learnt of the war between this country and Germany, and thus knew that the further prosecution of the voyage to Hamburg had become impossible. He was then instructed, through the examining officer at Falmouth, by the chief naval transport officer at Devonport to proceed to Liverpool, where the cargo was discharged. These circumstances do not enable me to draw any distinction between the two ships. The communication by the French cruiser was only a friendly act, a message for the ship's own protection, "for security," as the cruiser's captain said. That was not a hostile act, and was not an arrest, restraint, or detainment. On arrival of the ship at Falmouth, the voyage was no longer possible, and any instructions given by the transport officer did not affect that question. Liverpool was probably a much more convenient port of discharge than Falmouth.

The result is that the decision in the case of the steamship *St. Andrew* must be the same as the steamship *Orthia*.

In my judgment the appeal should be allowed.

Bray, J.—In this case the defendants appeal from the judgment of Bailhache, J., who held that the plaintiffs were entitled to recover the full amount payable by the defendants under two policies of insurance, one in respect of a parcel of linseed and a parcel of wheat on board the steamship *St. Andrew*, and another in respect of a parcel of linseed on board the steamship *Orthia*, in each case as for a constructive total loss.

The facts were not in dispute and may be shortly stated thus: The plaintiffs are merchants in England and British subjects. They shipped in July 1914, on board the *St. Andrew*, a British ship, at two ports in South America, the parcel of linseed and the parcel of wheat under bills of lading dated the 3rd, 6th, and 11th July for carriage to Hamburg. The linseed had been sold by the plaintiffs to German merchants, but the property had not passed, and they intended to sell the wheat in Germany. In the same month, by bills of lading dated the 1st July, they had shipped at a port in South America the second parcel of linseed on board the

Orthia, also a British ship, for carriage to Hamburg. This linseed had also been sold to German merchants, but the property had not passed. The parcels by the *St. Andrew* and the parcel by the *Orthia* had been insured with the defendants by two separate policies, each dated the 31st July. The perils insured against included "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever," and on payment of an extra premium the usual f.c. and s. clause was deleted. In both cases they were free of particular average except in circumstances which did not arise, and the voyage was "at and from port or ports in River Plate to Hamburg with leave to call for orders at Las Palmas and (or) St. Vincent and (or)" elsewhere. War was declared by the British Government against Germany on the 4th Aug., and on the 5th Aug. the proclamation forbidding commercial intercourse with the enemy was published. On the 9th Aug., as the *St. Andrew* was approaching the Lizard, she received a signal from a French cruiser to stop instantly. She stopped and the cruiser came alongside and signalled to her to go into Falmouth, English Channel, emphasising such signal. In consequence of this she proceeded to Falmouth, when the captain was informed that there was war between England and Germany, and received orders through the "examining officer" from the chief naval transport officer at Devonport to proceed to Liverpool. In consequence of these orders she proceeded to Liverpool and there discharged the linseed and the wheat. But for the signals from the French cruiser the captain would have stopped at the next signal station and communicated with his owners, but if the weather had been foggy he would have proceeded direct to Hamburg. On calling at Las Palmas on his way to the Lizard the captain had learnt that there was war between France and Germany, but not that there was war between England and Germany. As regards the *Orthia* her owners on the 3rd Aug. received a telegram from the Admiralty in these words: "Admiralty suggests in the interests of the nation that your *Orthia* now bound for Hamburg with grain be directed to a British port. Any further information is available at Trade Branch, War Staff, Admiralty." On the 5th Aug. the owners, having become aware of the declaration of war and the proclamation, sent a cable to St. Vincent, which the captain received on the 7th, directing the *Orthia* to proceed to Glasgow, and in consequence the *Orthia* proceeded to Glasgow and there discharged. The linseed in each case depreciated to the extent of some 25 per cent. Due notice of abandonment was given to the defendants in each case, but was declined. The action was tried before Bailhache, J. without a jury, with the result I have already mentioned.

The points raised by the defendants on the appeal were these: (1) That a declaration of war by the British Government with its consequence, namely, that the further prosecution of the voyage became illegal, was not a restraint of princes. (2) That a restraint by the British Government, the owners of the goods and the ships being British subjects and the underwriters also, must be taken to be excepted from the perils insured against. (3) That the restraint, if any, was not the proximate cause of the loss. (4) That there was no constructive total loss.

The first point seems to me to be a very important and very difficult point. It may be divided into two heads: (*a*) That there was no political or executive act, and that it was merely the bringing into operation of the ordinary law. (*b*) That a restraint of princes must be by force, and there was no force. As to (*a*) the tenth rule in the schedule to the Marine Insurance Act is this: "The term 'arrests, &c., of kings, princes, and people' refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process." A clear distinction is thus drawn between restraints caused by political or executive acts and a restraint caused by ordinary judicial process. Which is this? The restraint here is caused and brought into operation by the declaration of war. I think it is clear that a declaration of war is an act of State, a political act. In *Esposito* v. *Bowden* (*sup.*) Willes, J. said: "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law." It is not true, in my opinion, to say that the restraint which forbids intercourse with the enemy is "ordinary judicial process." It is to be observed that the tenth rule does not use the words "ordinary law." It speaks of "ordinary judicial process," meaning the act of an ordinary court of justice in relation to the goods. This is in accordance with and is no doubt based on the judgment in *Finlay* v. *Liverpool and Great Western Steamship Company* (*sup.*). There is no ordinary judicial process here, or any process, nor could there be except in the event of the ship being brought into port by a British cruiser and the goods condemned in a Prize Court. But even then I do not think the powers of a Prize Court could be said to be "ordinary judicial process." The restraint which forbids intercourse with the enemy is neither judicial process nor ordinary judicial process. Ordinary judicial process and ordinary law involve no fortuitous act or event. A declaration of war does. It is not an ordinary event. It is exceptional and fortuitous. There is a violent departure from the ordinary course of events. It was asked what if there be no declaration of war, but a state of war without a declaration? There is still a political act. A state of war cannot exist without the act of the State either in commencing hostilities or in using the naval or military forces to resist acts of violence committed by the enemy. The above reasoning, however, only gets rid of the exception. It remains to be considered whether there is a restraint. I do not think there is to be found anywhere an exhaustive definition of this word though there are cases where certain acts have been decided to constitute a restraint, and other cases where acts have been held not to constitute a restraint. The word "restraint" appears in charter-parties and bills of lading as well as in policies of marine insurance, and it has been held to have the same meaning in all these documents. The decided cases are, of course, a help in arriving at the meaning of this word, but there is nothing in them to prevent one giving the ordinary mean-

ing to this word. Now "restraint" is a word more properly applicable to persons than to goods. Lord Bramwell so held in giving the considered judgment of the court in *Rodocanachi* v. *Elliott* (*sup.*), where he said: "And as a verbal matter we may observe that 'restraint' is a word more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods." The word is used in the same way every day in these courts. An injunction is granted "restraining" the defendant from doing certain acts. This is of some importance because the effect of the declaration of war is to restrain persons, in this case the owners of the ships and the owners of the goods from prosecuting the voyage to Hamburg. It restrains and destroys the adventure. And it is a restraint of princes because it is a restraint imposed by or consequent upon an act of State. Restraint does not necessarily involve any actual seizure, nor actual physical force. This is clearly decided in charter-party and bills of lading cases. In Arnould on Marine Insurance, 9th edit., sect. 832, it is said: "A 'restraint' does not necessarily involve the use of actual physical force. An authoritative prohibition on the part of the governing power is sufficient." Reference is made to *Miller* v. *Law Accident Insurance Company* (*sup.*), which I shall deal with presently. The charter-party cases are *Geipel* v. *Smith* (*sup.*) and *Nobel's Explosives* v. *Jenkins* (1896) 2 Q. B. 326) In the latter case we find this passage: "It was said that the fear of seizure, however well founded, is not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith* (*sup.*) and *Rodocanachi* v. *Elliott* (*sup.*). I will deal with this further when I come to (*b*). It is to be observed further that the ordinary Lloyd's policy now contains, and has for some years contained, what is called the "f.c. and s. clause," which uses the words "and all consequences of hostilities or warlike operations whether before or after declaration of war." This affords some indication that but for these perils being excepted by this clause they would fall within the perils insured against. I do not place much reliance on this, but so far as it goes it throws some light not only on the words "restraint of princes," but on the very general and comprehensive words which follow. These general words are not without importance: (see the judgment of Mathew, L J. in *Miller* v. *Law Accident Insurance Company*, *sup.*). The defendants strongly relied on the fact that no such case as the present could be found in any of the decided cases. That is true, but on the other hand there is no suggestion to be found in the text books that such a case is not covered by the words "restraint of princes," and the definition of those words in the tenth rule in the schedule to the Marine Insurance Act does not exclude it unless it falls within the words "ordinary judicial process," which, in the opinion I have already expressed, do not include it. It is not unfair to look at it from the view of the ordinary business man, whether the owner of goods or the underwriter. Who would say that the owner of the goods was restrained from prosecuting this voyage by the operation of the ordinary law? The owner of the goods would say: "What did I pay the extra premium for? Was it not that I might be insured against all the perils excepted by the clause which I stipulated should be deleted? I anticipated a declaration of war and hostilities, and I wanted to be protected against the consequences of hostilities, and this is one of the consequences, so I had the f.c. and s. clause struck out." It is the absence of authority alone that makes me hesitate, but that in my opinion is not sufficient reason to justify me in refusing to construe the words "restraint of princes" in their ordinary signification, and so read I cannot hold that the restraint put upon the plaintiffs which prevented them from prosecuting the voyage is other than a restraint of princes.

I must, however, deal with the other contentions. I come, therefore to point (*b*), that a restraint of princes must be a restraint by force. I have already dealt partly with this point. Much reliance was placed on what was said by Martin, B. in *Finlay* v. *Liverpool and Great Western Steamship Company* (*sup.*). At most that was a dictum, and I think it is disposed of by what Mathew, L.J. said in *Miller* v. *Law Accident Insurance Company* (*sup.*) in his considered judgment. He said: "The words, it was contended, implied the use of direct force, and none had been employed. The case of *Finlay* v. *Liverpool and Great Western Steamship Company* (*sup.*), upon which reliance was placed by the defendants' counsel, affords no ground for this position, and no other satisfactory authority was referred to." Probably it may be necessary that the restraint should be capable of being enforced by force if necessary, but that consideration is fulfilled here, because if the owner or master had persisted in prosecuting the voyage, not only could the ship and goods have been confiscated, but the owner or master could have been prosecuted and sent to prison. In my opinion the proposition contended for by the defendants that restraint must be by force—that is to say, by direct force—is not established. It would certainly lead to a curious result here, because if the master had not submitted, but insisted upon the prosecution of the voyage, and the goods had been confiscated, the defendants could have contended, and in my opinion rightly contended, that the loss was caused by the illegal act of the master or owner. As regards the facts on this point, I think in the case of the *St. Andrew* there was some force. I I think it is to be inferred from the evidence that if the captain had not submitted to the orders of the French cruiser and the naval transport officer actual force would have been exercised. In the case of the *Orthia*, I do not think it can be said that any actual force was exercised, because the owners submitted, as they were bound to submit, to the law brought into operation by the declaration of war, but as I have expressed the opinion that force is not necessary, I draw no distinction between the two cases. I see nothing in this contention to make me alter my opinion that there was a restraint of princes.

I come now to the second point, that a restraint by the British Government is excepted. The words of the policy are "of all kings, princes, and people of what nation, condition, or quality soever." Why are these words to be limited? If the particular insurance is against the public policy of this country it is illegal and therefore not enforceable, not because there is a limitation to the words, but because it is illegal. There is very little, if any,

anthority upon the point. What there is seems to me to be against the defendants' contention, but this point and the authorities on it are so clearly examined and dealt with by Bailhache, J. that it is sufficient for me to say that I agree entirely with his decision upon the point and the reasons he gives.

The next point is that if there was a restraint it was not the proximate cause of the loss. No doubt the plaintiffs have to show that it was the proximate cause. In support of their contention the defendants relied on a line of cases of which *Hadkinson* v. *Robinson* (*sup.*) is a type. In that case Lord Alvanley, C.J. said: "But it has appeared to me that where underwriters have insured against capture and restraint of princes and the captain learning that if he enters the port of destination the vessel will be lost by confiscation avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. . . . The plaintiffs therefore cannot recover unless the articles be totally lost by a peril within the policy, and such peril must, as I think, act directly and not collaterally upon the thing insured." I think this and the other cases are clearly distinguishable. The existence of a blockade does not make the continuation of a voyage illegal. The blockade may not be in force when the vessel arrives at the port, or it may be so ineffective as not to prevent a prudent captain from trying to enter the port. He is not breaking any law of his country in running the blockade. Here the restraint acted directly upon the owner the moment war had been declared. From that moment it was illegal for him to prosecute the voyage at all. It acted directly and not collaterally. I think the defendants' contention on this point also fails.

I will now deal with the last question, whether, if there be a loss from the perils insured against, there is a constructive total loss. This question divides itself into two: (*a*) Whether there would be a constructive total loss according to the law prevailing before the passing of the Marine Insurance Act 1906; (*b*) whether that law has been altered by that Act. The answer to the first seems to me to be quite clear. When war was declared it became illegal both for the cargo owner and the shipowner to prosecute the voyage to Hamburg. The arrival of the goods at Hamburg was postponed for a considerable and indefinite time. It was not a mere temporary retardation of the voyage. In my opinion the authorities up to the passing of the Marine Insurance Act show that in that case if due notice of abandonment be given the loss of the voyage constitutes a constructive total loss of the goods. It is unnecessary to refer to many of the authorities. In *Barker* v. *Blakes* (*sup.*) Lord Ellenborough laid down the law thus: "In order to entitle himself to recover as for a total loss the plaintiff must establish two things—First, that a loss of the voyage (the only description of loss which can be contended for in this case as the goods themselves have been ordered to be restored and are capable of being so) was occasioned by the detention in question. . . . And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, is a total loss of the goods which were to have been transported in the course of such voyage; provided such loss had been followed by a sufficiently prompt and immediate notice of abandonment." In *Anderson* v. *Wallis* (2 M. & S. 240) Lord Ellenborough said: "In like manner a total loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage. That is a destruction of the contemplated voyage." In *Rodocanachi* v. *Elliott* (reported in the court below) (*sup.*) Grove, J. says: "What greater loss can an assured sustain than the detention of the thing insured for a considerable and indefinite time by a hostile power?" And in the Exchequer Chamber Lord Bramwell, then Bramwell, B., in a considered judgment of the court of five judges, says: "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, to a destruction of the contemplated adventure." In that case it appeared that the goods did ultimately and within six months arrive at their destination, and the purchaser accepted them and gave the full contract price, but it was held nevertheless that there had been a constructive total loss, and the plaintiff recovered on the footing that the loss was 15,000*l.*, the amount at which the goods were valued in the policy, although the price paid by the purchaser at their destination was under 10,000*l.* In Arnould on Marine Insurance, in the 1907 edition, after stating the law as laid down by Lord Ellenborough (see art. 1142), the author, in art. 1151, says: "So far the law may be considered as established." It appears therefore from the authorities I have quoted that according to the law merchant prevailing before the Act of 1906 if there was a loss the loss was a constructive total loss.

I now come to the consideration of the second question (*b*). Has that law been altered? Sect. 91, sub-sect. 2, of the Act provides that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of that Act, should continue to apply to contracts of marine insurance. Are the express provisions of the Act inconsistent with the law merchant so established? It seems almost impossible to suppose that it could have been intended to alter the law merchant on such a vital point of marine insurance when that law had been established for over a hundred years. Still we have to look at the Act, and if there be an express provision in clear and unambiguous terms altering that law effect must be given to it, but it must be an express provision which is inconsistent with the law merchant. Sect. 56, sub-sect. 1, provides that: "Any loss other than a total loss as hereinafter defined is a partial loss"; and sub-sect. 2: "A total loss may be either an actual total loss or a constructive total loss." Then sect. 60 defines what is to be considered a constructive total loss, and it must, I think, be taken as giving an exhaustive definition of a constructive total loss. If the present case does not fall within that definition I think it must be taken that the law has been altered. The words relied on by the plaintiffs are in sub-sect. 1 of sect. 60: "Subject to any express provision in the policy there is a constructive total loss where the subject-matter

insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable." That makes it necessary to see what is the "subject-matter" and what is an "actual total loss." Actual total loss is defined in sect. 57, sub-sect. 1: "Where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss." Having regard to the words in sect. 56, sub-sect. 1, "total loss as hereinafter defined," I think this must also be treated as an exhaustive definition. This brings us again to the consideration of the words "subject-matter insured." Now there is no express provision in the Act defining "subject-matter." It is referred to in many sections of the Act. Sect. 26 is, perhaps, the most important section to be considered, but that certainly contains no definition, and it contains no express provision inconsistent with the law as laid down by Lord Ellenborough, that a loss of the voyage upon received principles of law is considered as a total loss of the goods which were to have been transported in the course of such voyage, or, as Lord Bramwell put it, a destruction of the contemplated adventure. The subject-matter insured according to sect. 5 may be an adventure or property. It is not true that in a policy of this kind the goods only are insured. Their safe transportation to and arrival at the port of destination is also insured. It was argued that in this policy the subject-matter was stated to be goods. That is the common form, and apparently was the form of the policy in *Rodocanachi* v. *Elliott* (*sup.*), and yet it was held that it was an insurance of the venture. The word "subject-matter" occurs in many sections of the Act. It may be that in some the word is used as representing the property; but if it was intended in sect. 57 that subject-matter should mean property, and property only, why was not that word used? Two cases were referred to where the court held that the law was altered by the Act, *Hall* v. *Hayman* (*sup*) and *Polurrian Steamship Company* v. *Young* (*sup.*); but in both those cases the court relied on an express provision in the Act which they held to be clear and unambiguous. On the whole, after a careful consideration of the Act, I cannot come to the conclusion that there is any express provision inconsistent with the law on this point as it existed before the Act. I have dealt with this point by ascertaining first what was the law before the Act, but I should have arrived at the same conclusion if I had considered the construction of the Act first. The subject-matter, in my opinion, in this policy was not the goods only, but the whole venture, and the whole venture was destroyed. In my opinion, therefore, all the defendants' contentions fail and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the defendants, *Waltons* and *Co.*

Solicitors for the plaintiffs, *Pritchard* and *Sons*, for *Andrew M. Jackson* and *Co.*, Hull.

June 11, 14, *and* 15, 1915.

(Before SWINFEN EADY, PHILLIMORE and BANKES, L.JJ.)

DUNCAN FOX AND CO. *v.* SCHREMPFT AND BONKE. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Trading with the enemy—C.i.f. contract—Buyers and sellers carrying on business in England—Tender of documents after outbreak of war—Goods to deliver at Hamburg—Seller not entitled to force acceptance of documents involving trading with the enemy.

The claimants, who were English merchants of Liverpool, in May 1914 *sold certain Chilian honey to the respondents, who were also English merchants at Liverpool, to be shipped on a German-owned steamer and delivered at Hamburg, terms c.i.f. cash in Liverpool against documents. The honey was shipped on the* 28*th June and the shipment was declared on the* 28*th July; but the ship was interned at a neutral port shortly after the outbreak of war.*

On the 4*th Aug. war was declared with Germany, and on the* 5*th Aug. a proclamation was issued prohibiting trading with the enemy, and on the same day the shipping documents were tendered. The respondents having refused payment on the documents:*

Held, that the buyers were justified in refusing the tender of the documents on the ground that the delivery of the documents, including the bill of lading, which was the document of title to the goods, and the payment of the price by the buyers, would have been a carrying out of the contract, and a dealing with goods constituting a trading therein forbidden by the proclamation, and that the contract of sale had become dissolved by the war, because its further performance by either party would involve illegal acts.

Decision of Atkin, J. (12 *Asp. Mar. Law Cas.* 591; 112 *L. T. Rep.* 298; (1915) 1 *K. B.* 365) *affirmed.*

APPEAL by the claimants, the sellers, from a decision of Atkin, J. on a special case stated by arbitrators.

The special case was as follows:—

Differences having arisen between Duncan Fox and Co. (hereinafter referred to as the claimants), who are an English firm of general merchants carrying on business at No. 31, James-street, Liverpool, and Schrempft and Bonke (hereinafter referred to as the respondents), who are an English firm of merchants carrying on business at the Old Hall, Old Hall-street, Liverpool, as to the liability of the respondents in respect of a claim made against them by the claimants under a contract of sale, dated the 11th May 1914, such differences were referred to two of us—namely, Frederick Pyemont Pyemont and Arthur Edward Pattinson—as arbitrators appointed by the claimants and respondents, respectively, on or before the 21st Aug. 1914, under clause 20 of the Conditions of Sale of the Liverpool General Brokers' Association Limited, which said clause is incorporated in the said contract; and we, the said Frederick Pyemont Pyemon and Arthur Edward Pattinson, on or before the said 21st Aug. 1914, under the powers conferred upon us by the said clause, called in the other of us—namely, Edmond Gladstone Brownbill, a member of the said association—as third arbitrator.

2. By contract of sale contained in two letters, both dated the 11th May 1914, the claimants sold to the respondents, through Messrs. Hale and Paterson,

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

brokers, acting for both parties *inter alia*, "about 300 barrels June and (or) July shipment Chilian honey per steamer and (or) steamers direct or indirect, with or without transhipment, at 20*s.* 6*d.* per hundredweight, cost freight and insurance (f.p.a.) to Hamburg, delivered weights, tare, 12 per cent., no draft . . . Payment net cash in Liverpool in exchange for shipping documents on presentation of same and sellers to give buyers policy or policies of insurance covering 2 per cent. over the net invoice amount."

3. On or about the 28th June 1915 the claimants shipped on board the German steamship *Menes* at Penco 300 barrels of honey, and they received a bill of lading dated the 28th June 1914 for carriage of the said goods by the said steamship from Penco to Hamburg, there to be delivered to the claimants or their assigns. By art. 16 of the conditions indorsed on the said bill of lading it is provided that if the entering of any port should be considered unsafe by reason of war the master was to have an option of landing the goods at any port more or less near to the port of destination at the shipper's risk and expense. By art. 24 all questions arising under the bill of lading were to be governed by the law of the German Empire and to be decided in Hamburg. The said bill of lading is hereto annexed and marked B.

4. On the 28th July 1914 the said Hale and Paterson sent to the respondents a written notice which, omitting formal parts, was as follows: "Under date the 27th inst. and subject to correct transmission and translation of cable advice sellers declare shipment of 300 barrels honey per *Menes* (s.) in completion of contract dated the 11th May 1914, which kindly note." The said notice was received by the respondents on the 28th July 1914, or the day following.

5. On the evening of the 4th Aug. 1914 war was declared by Great Britain on Germany. On the 5th Aug. 1914 a Royal Proclamation relating to trading with the enemy was issued. By the said proclamation all persons resident, carrying on business, or being in the British dominions were warned not to supply to or obtain from the German Empire any goods, wares, or merchandise, or to supply to or to obtain the same from any person resident, carrying on business, or being therein, nor to supply to or obtain from any person any goods, wares, merchandise, for, or by way of transmission to or from the said empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the said empire, or for or from any person resident carrying on business or being therein on pain of penalties.

6. On the same date (5th Aug.) the said Hale and Paterson received from the claimants a provisional invoice for the said goods, and on the same day the said Hale and Paterson sent the said provisional invoice to the respondents, with a covering letter of that date, which stated that the shipping documents for the parcel were ready and awaited the disposal of the respondents on the terms of said contract. The said letter and invoice were received by the respondents. No other tender of documents was made than is contained in the said letter. No question has been raised as to the sufficiency of the form of tender. We find as a fact that the respondents waived the necessity of any further or other tender.

7. The documents thus tendered included the said bill of lading and a policy of insurance on the said goods. No question has been raised with regard to any of the documents except the said bill of lading, and the respondents agree that the other documents are in order.

8. The respondents refused to accept the documents. On the 7th Aug. 1914 the respondents stated on the telephone to the said Hale and Paterson that they could not take up the documents as there was no valid bill of lading, and on the same day they wrote a letter to the said Hale and Paterson confirming the said statement. The said steamship *Menes* had not arrived at Hamburg at the date of the said tender of documents.

9. The claimants maintain that the documents tendered were in order and claim payment. The respondents maintain that in the circumstances hereinbefore stated the said bill of lading was not valid, and they also dispute their liability to pay against the documents so tendered on the ground that payment is not due until after the said goods shall have arrived and been weighed.

10. We have been asked by the parties to state our award in the form of a special case for the opinion of the court.

11. In addition to the foregoing facts we find that the said bill of lading was received by the claimants as agents for the respondents, and that the property in the said goods passed to the respondents at shipment. If we had not so found we should have been prepared to find that the property passed to the respondents on receipt by them of the said provisional invoice.

12. We find also that the expression "delivered weights" contained in the said contract has a well-known meaning in the trade in reference to contracts such as this, that it refers to the adjustment of the price and not to the time of payment, and that if on weighing the goods at the port of landing it be found that the invoice of the goods is incorrect, an adjustment of the purchase money is made if it has been already paid, and that this effect is to be given to the words "delivered weights" in the contract.

13. We find also that, by the custom of the trade, interest is payable at the rate of 5 per cent. per annum on the purchase price from the date of tender of documents until payment.

14. The following are the questions for the opinion of the court: (*a*) Whether in the circumstances hereinbefore stated the tender of the said bill of lading (with the other documents) was a good tender of documents under the said contract, and if the court should answer this question in the affirmative; (*b*) Whether the claimants were entitled to payment on tender of the documents.

Atkin, J. held that the buyers were justified in refusing the tender of the documents on the ground that if they accepted them they would be offending against the provisions of the proclamation of the 5th Aug., inasmuch as it would involve trading with the enemy.

The claimants appealed.

Maurice Hill, K.C. and *Barrington Ward* for the claimants.—A seller under a c.i.f. contract has (1) to ship at the port of shipment goods of the description contained in the contract; (2) to produce a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; (3) to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; (4) to make out an invoice in the proper form; and (5) to tender these documents to the buyer so that he may know what freight he has to pay, and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage:

> *Biddell Brothers* v. *E. Clemens Horst Company*, 12 Asp. Mar. Law Cas. 1; 105 L. T. Rep. 563; (1911) 1 K. B., per Hamilton, J.

Here the claimants have complied with all these conditions. The position at the date of the making of the contract has alone to be regarded, for the seller cannot warrant that the goods shipped will reach the port of delivery, or that

the contract of affreightment will continue valid until the cargo has reached port. When the goods are once put on board, the property and the risk pass to the buyer, and when the war broke out the property and the risk had passed. There is no illegality in carrying out the contract, and the enemy is unaffected by the contract. What is forbidden is engaging in trade with the enemy, but one British merchant is not forbidden to sell to another. The mere substitution of one British subject for another as the owner of goods is not trading with the enemy, nor was it any concern of the seller what the buyer would do with the goods, the seller's duty being merely to hand over the documents to the buyer. The tender of the bill of lading was good, even if it gave no remedy to the buyer. All the buyer got was a cause of action; and he can sue on the policy of insurance. They referred to

Arnhold Karberg and Co. v. *Blythe, Green, Jourdain, and Co.*, 13 Asp. Mar. Law Cas. 94; 113 L. T. Rep. 185; (1915) 2 K. B. 379;

Groom Limited v. *Barber*, 12 Asp. Mar. Law Cas. 594; 112 L. T. Rep. 301; (1915) 1 K. B. 316;

Olympia Oil and Cake Company Limited v. *Produce Brokers Company Limited*, 13 Asp. Mar. Law Cas. 71; 112 L. T. Rep. 744; (1915) 1 K. B. 233;

Tregelles v. *Sewell*, 7 H. & N. 574;

Tamvaco v. *Lucas*, 6 L. T. Rep. 697; 1 B. & S. 185;

Orient Company v. *Brekke*, 108 L. T. Rep. 507; (1913) 1 K. B. 531; 18 Com. Cas. 101.

Ireland v. *Livingstone*, 27 L. T. Rep. 79; L. Rep. 5 H. L. 406;

Lecky and Co. Limited v. *Ogilvy, Gillanders, and Co.*, 3 Com. Cas. 329;

Landauer and Co. v. *Craven and Speeding Brothers*, 17 Com. Cas. 193;

Sanday and Co. v. *British and Foreign Marine Insurance Company*, *ante*, p. 116; 113 L. T. Rep. 407; (1915) 2 K. B. 781;

The Hoop, 5 C. Rob. 196;

Esposito v. *Bowden*, 24 L. J. 210, Q. B.;

Porter v. *Freudenburg*, 112 L. T. Rep. 313; (1915) 1 K. B. 857.

Greer, K.C. and *Greaves Lord* for the respondents.—First, the contract of sale was dissolved, for further performance would have involved illegality under the proclamation and at common law. Secondly, even if it is assumed that the contract of sale is still binding, the sellers cannot complain, for they cannot tender an effective contract of carriage to which we are entitled. They have given us no effective rights by which we can compel the ship to go to its destination. By reason of the proclamation it became illegal to do the acts remaining to be done under the contract. The contract of affreightment is no longer alive, and any loss must lie where it falls. By the contract of sale the buyers got nothing, for there were still acts to be done which would probably involve trading with the enemy. The object of the proclamation was to prevent goods getting into Germany. It is immaterial whether the completion of the contract between sellers and buyers is of advantage to the enemy; what is forbidden is the passing of the property in goods destined for the enemy. Even if the sale is good, we were not tendered a good document, and the decision of Scrutton, J. in *Arnhold Karberg and Co.* v. *Blythe, Green, Jourdain, and Co.* (*sup.*) was right.

Barrington Ward in reply.

June 15.—SWINFEN EADY, L.J.—This is an appeal from a judgment of Atkin, J. upon a special case stated by arbitrators.

Messrs. Duncan Fox and Co. are referred to as the claimants; they were the sellers under the contract in question, and Messrs. Schrempft and Bonke were the buyers. Both firms consist of British subjects.

The contract upon which the disputes have arisen was dated the 11th May 1914, and made at Liverpool through brokers acting for the parties, whereby the sellers sold and the purchasers purchased "about 300 barrels May shipment" —we have nothing to do with that—"about 300 barrels June and (or) July shipment New Crop Chillian Honey per steamer and (or) steamers direct or indirect, with or without transhipment, at 20*s.* 6*d.* per cwt. cost freight and insurance f.p.a. to Hamburg, delivered weights, tare 12 per cent., no draft. Cost of landing and weighing to be borne by buyers." Then there is a provision with regard to the quality: "Payment net cash in Liverpool in exchange for shipping documents on presentation of same, and sellers to give buyers policy or policies of insurance covering 2 per cent. over the net invoice amount. *Force majeure* clause." Then there is this provision: "All disputes on this contract to be settled by arbitration in Liverpool per the rules of the Liverpool General Brokers' Association Limited."

The goods in question were shipped on the West Coast, Chili, by a ship called the *Menes*, of the Cosmos Line, which was a German line of steamers, under a bill of lading which is set out in the special case. It was a shipment of these goods to Hamburg, freight was payable on the weight delivered, and the charges for weighing were to be paid by the consignees. The bill of lading provided for the freight being paid immediately on arrival of the steamer, without any allowance of credit or discount, in Hamburg at the quoted highest rate of exchange for sight bills on London on the day of ship's entry at custom house. Then the bill of lading provided in the last condition: It is mutually agreed that all questions arising under this bill of lading are to be governed by the law of the German Empire and to be decided in Hamburg." It is under that bill of lading that the honey in question was shipped on the good ship *Menes*, of the Cosmos Line.

On the 28th July the sellers gave notice to the buyers of appropriation of this consignment to meet this contract. On the 4th Aug. 1914 war was declared between Great Britain and Germany. On the 5th Aug. there was a communication that the shipping documents had arrived in this country, and were at the disposal of the buyers in exchange for the cash. That communication was received by letter by the buyers on the 5th Aug. They considered the matter until the 7th, and on the 7th they raised an objection, and declined to proceed further with the contract, and declined to pay against the delivery of the shipping documents. Both on the 5th and 7th Aug., for anything that we know, the ship was in some position in the South Atlantic. We were told that ultimately

she arrived at Las Palmas, a neutral port, and put in there as a port of refuge, and that she is there still, but as regards the position at the material date, whether it was the 5th or 7th Aug., so far as there is any information before us, this German ship was on the high seas somewhere between the port of loading, the port from which she sailed, and Las Palmas where she ultimately put in as a port of refuge.

The first objection is as to the buyers refusing to pay, and is this: that the terms of the contract of the 11th May, if they were carried out, would involve illegal acts on the part of the buyers or sellers, or both of them, and treating the contract of the 11th May, as we must do, as being in existence for the purpose of determining what the position of the respective parties would have been thereunder, we must see what the position was. It appears to me to be obvious that the goods were at this date on the high seas and destined for the German Empire. They had been shipped in a German ship under a bill of lading which was their contract of affreightment to carry the goods to Hamburg, and at this time they were destined for Hamburg. By the proclamation of the 5th Aug., British subjects are warned, amongst other things, "not to supply to or obtain from any person any goods, wares, or merchandise for or by way of transmission to the German Empire," and they are further warned "not to trade in any goods, wares, or merchandise destined for the said empire." It is clear that, apart from the contract of affreightment becoming dissolved or determined by the outbreak of war, these goods were goods which were then being in course of transmission to the German Empire, and dealing in the goods involved "trading in goods, wares, or merchandise destined for the said empire."

It was conceded by Mr. Maurice Hill that this contract of the 11th May, having regard to its nature and contents, could not have been lawfully entered into after the outbreak of war. I think that was properly conceded, and in my opinion it was incompetent to either of the parties to proceed to carry out this contract after the outbreak of war, because it involved trading with the German Empire, and it involved a breach of the terms of the proclamation. There is a statement in the special case to which our attention was drawn, that the arbitrators found that the property in the goods had already passed, that is to say, they found first that the property in the goods passed to the buyers on shipment, and if not so, they found or would have been prepared to find that the property passed to the buyers on receipt by them of the provisional invoice; but those points were not pressed by Mr. Hill, and he conceded for the purpose of the case that the property in the goods would not pass in this case until the delivery of the endorsed bill of lading. That being so, the further carrying out of the contract after the outbreak of war, that is, the delivery of the documents, including the bill of lading, which is the document of title to the goods and the payment of the price by the buyers, would have been a carrying out of the contract, and a dealing with the goods constituting a trading therein, which is forbidden by the proclamation and in my opinion this contract of sale of the 11th May, the c.i.f. contract, had become dissolved by the outbreak of the war, because the further performance of it by the buyers or sellers involved or would involve illegal acts.

There is a further point which was raised. and which no doubt is of general importance, but it would perhaps not be right to deal with the second point because the first point is sufficient to dispose of this case. The first point was the ground upon which the case was decided by Atkin, J. in the court below, and it really is sufficient to dispose of the appeal without considering the numerous other points which have been raised during the appeal.

In my opinion, on that short ground, the appeal fails and should be dismissed, and the judgment below was right and now stands affirmed.

PHILLIMORE, L.J.—I agree that this appeal should be dismissed.

If we look at the contract of the 11th May, the further performance of that contract became impossible on the 4th Aug., and, if we look at it in that way simply, the vendors could not here insist upon the purchasers taking any further steps towards continuing the contract. If we look at it in another way, and accept the position which I am quite prepared to accept, that in a c.i.f. contract the vendor fulfils his obligations when he has secured the cargo of the ship and has handed over the property in the shipping documents, we only remove the difficulty one stage, because this ship being destined for a port in the German Empire, the documents which he tenders are documents which only get their fulfilment if the ship proceeds to a port in the German Empire. Therefore, in either way, the further performance of the contract becomes impossible as being forbidden by the proclamation of the 5th Aug., which has statutory force, and which may or may not add to the common law in regard to these matters.

This leaves unanswered the second question which would arise if this cargo, being on a German ship, was for a neutral destination. I am not particularly anxious to rest this case upon one point only, and in some ways I should have liked the court to have dealt with the second point also, but the first point, which is the broad reason on which Atkin, J. proceeded, is quite sufficient for the support of his decision, and it may be wise to let the other matter wait till it is necessarily brought before us in some future case.

This contract, whether it be considered simply as a contract for the sale of honey to be delivered at Hamburg, or a contract for the sale of honey to be delivered at Hamburg to be performed by transferring documents which would involve delivery at Hamburg, in either case involves a breach of the proclamation of the 5th Aug., and upon that ground I think that the buyers were right in refusing to proceed further with the matter, and were entitled to resist taking delivery of the documents, and therefore I agree that the appeal should be dismissed.

BANKES, L.J.—I agree.

The matter comes before us in the following way: The parties entered into a contract of the 11th May 1914 for the purchase and sale of a certain quantity of honey under a c.i.f. contract, under which the honey was deliverable at Hamburg. War was declared between this country and

Germany on the 4th Aug. 1914. On the 5th Aug. the shipping documents were tendered by the sellers to the purchasers, and on the 7th Aug. the purchasers refused to take up the documents or to pay the purchase price. Under those circumstances the parties went to arbitration, the dispute being whether the purchasers were under an obligation to take up the documents and to pay the price.

The matter came before Atkin, J., and two points were urged before him. First of all, that under a c.i.f. contract the sellers' only duty was to procure the necessary shipping documents, the bill of lading, and the policy, and, if those documents were valid and good documents at the time that they were procured, the sellers were entitled to tender them to the purchasers, and the purchasers were bound to accept them even though something eventually intervened which rendered the contract unenforceable, and an interesting argument was addressed to us upon that point. But Atkin, J. did not consider it necessary to decide that point, and it appears to me that it is not necessary for us to decide it, having regard to the view of the court upon the other point.

The other point was that, owing to the declaration of war, it became an illegal act to do anything in further performance of this contract of the 11th May, and Atkin, J. so decided, and I think his decision was right, and on this short ground: The contract was a contract for the delivery of these goods at Hamburg, and, so long as that was a subsisting contract, it seems to me that it cannot be denied that it was a contract for a trading in goods destined for the enemy—that is to say, for trading in goods destined for the enemy in respect of any portion of that contract which was unfulfilled at the date of the declaration of war. It is because it was a contract for that time that, so far as it was unfulfilled on the 4th Aug., it became impossible of performance, and whether you say that it became impossible to perform or that it was discharged or that it was dissolved seems to me immaterial. The fact is that neither party could call upon the other to perform any act under that contract after the declaration of war. What acts were there which had to be performed under the contract? There was the tender of documents and the payment of the price, and it seems to me immaterial whether the buyers had called upon the sellers to tender the documents or whether the sellers had called upon the buyers to pay for the goods. In either case the one was entitled to say to the other: "At the moment that you are requiring me to do this act, the further performance of this contract has become impossible, and I am no longer under a legal obligation to perform the acts which you call upon me to do."

On those grounds it seems to me that Atkin, J.'s judgment was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the claimants, *Chester* and *Co.*, for *Morecroft, Sproat,* and *Killey*, Liverpool.

Solicitors for the respondents, *G. H. Walker*, for *Weightman, Pedder*, and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 21 *and March* 1, 1915.

(Before SCRUTTON, J.)

THAMES AND MERSEY MARINE INSURANCE COMPANY LIMITED *v.* BRITISH AND CHILIAN STEAMSHIP COMPANY LIMITED. (*a*)

Marine insurance—Policy—Valued policy—Total loss—Subrogation.

A ship was insured for an agreed value of 45,000*l. She was sunk in collision. The underwriters paid as for a total loss.*

In a collision action both ships were held to blame.

The owners of the insured ship were held to be entitled to recover five-twelfths of their loss, the other ship recovering the remaining seven-twelfths. The value of the insured ship was taken at its actual value at the time of the loss, and the shipowners were paid five-twelfths of that value—namely, 65,000*l. The underwriters claimed to be subrogated to the rights of the assured in respect of the sum recovered.*

Held, that as the amount recovered by the assured did not exceed the amount paid by the underwriters, the latter were entitled to recover from the assured the whole of the amount recovered by the assured in the collision action, in spite of the fact that it was based upon a value higher than the agreed value.

North of England Insurance Association *v.* Armstrong (1870, *L. Rep.* 5 *Q. B.* 244) *followed.*

COMMERCIAL COURT.

Action tried by Scrutton, J.

The plaintiffs' claim was for a sum of money which they alleged was due to them by virtue of a right of subrogation to the defendants in respect of what the defendants had received in respect of the loss of a vessel.

The facts and arguments are sufficiently stated in the judgment.

Maurice Hill, K.C. and *D. Stephens* for the plaintiffs.

Leslie Scott, K.C. and *Raeburn* for the defendants.

SCRUTTON, J. delivered the following written judgment:—The Thames and Mersey Marine Insurance Company, whom I will call "the underwriters," sue the British and Chilian Steamship Company, whom I will call "the shipowners," for a small sum of money under the following circumstances:—

By a policy dated the 6th June 1912 the underwriters insured to the extent of 1800*l.* the shipowners' ship *Helvetia*, valued at 45,000*l.*, against the ordinary sea perils, with the ordinary running down clause against sums the shipowners became liable to pay by reason of collision. Other underwriters insured the rest of the 45,000*l.*, so that the insured value was wholly covered by insurance. During the currency of the policy, the *Helvetia* came into collision with the *Empress of Britain*, and was totally lost.

The consequent collision action was, as is somewhat unusual, fought by the shipowners and not by their underwriters. Both ships were held to blame, and the blame was apportioned, the owners

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

of the *Helvetia* having to pay seven-twelfths of the damage, and the owners of the *Empress af Britain* five-twelfths of the damage. The next thing was to assess the value of the shipowners' loss. The *Helvetia* was at the time of the collision under a charter dated the 17th Nov. 1909, commencing in the spring of 1911, to run through seven consecutive St. Lawrence seasons, which would expire in the autumn of 1917. The shipowners claimed 75,000*l.* as the value of their ship and 24,320*l.* as the value of the charter.

The registrar, purporting to follow the decision in *The Racine* (95 L. T. Rep. 597; 10 Asp. Mar. Law Cas. 300; (1906) P. 273), took the value of the ship as at the 15th Nov. 1912, the end of the current season, and fixed it at 65,000*l.* He took the loss of hire up to the same date and assessed it at 2000*l.* The shipowners appealed, and the President held that on the true construction of the judgments in *The Racine* the value of the ship should be taken in Nov. 1917 and the hire assessed to that date, and remitted the report to the registrar for reconsideration of the figures on that basis.

When the parties came before the registrar they compromised and agreed on a lump sum of 67,000*l.* for the two items under consideration, being the same total as the registrar had awarded, without apportioning it. The owners of the *Empress of Britain* had, indeed, no interest in apportionment; the shipowners, who were under-insured as to ship and uninsured as to freight, may have thought the apportionment would affect their insurance prospects, or they may have thought nothing about it. Five-twelfths of 67,000*l.* was accordingly paid, being 26,000*l.* odd.

The underwriters, who had paid for a total loss of the ship *Helvetia*, then claimed to be subrogated to the payment received for the loss of that ship from the *Empress of Britain*. The shipowners replied that this payment was based on a value not the insured value, and that the underwriters could only recover five-twelfths of the insured value (45,000*l*), which, when set off against the sums due from the underwriters under the running-down clause, left nothing payable. The question, which involves difficult problems both of law and fact, therefore was: On what principles and to what sums were the underwriters entitled to claim subrogation?

The subject of the relation of an agreed insured value to claims for sums fixed on the basis of another value gives rise to considerable difficulties, and has been the subject of several decisions. In all the disputes each side vehemently accuses the other of seeking to reopen the value in the policy. In settling whether a vessel is a constructive total loss, in the absence of special provision only the real value is looked at, while when the vessel is found to be a constructive total loss only the insured and agreed value is paid.

In *Balmoral Steamship Company* v. *Marten* (87 L. T. Rep. 247; 9 Asp. Mar. Law Cas. 321; (1902) App. Cas., p. 511), under a policy on ship valued at 33,000*l.*, claims for general average and salvage based on a value of 40,000*l.* were made on underwriters. The House of Lords held, partly on evidence of a rule of adjustment of British adjusters, partly on principle, that the underwriters were only liable to pay thirty-three-fortieths of these claims, giving rough effect to the valuation of 33,000*l.* as between shipowners and underwriters.

In *The Commonwealth* (97 L. T. Rep. 625; 10 Asp. Mar. Law Cas. 538; (1907) P. 216) underwriters had insured a schooner valued at 1350*l.* for 1000*l.* She was sunk, and in the collision action the wrongdoer was held liable to pay her value, assessed in that action at 1000*l.* The underwriters, who had paid their 1000*l.* for a total loss, claimed to be subrogated to the 1000*l.* paid, but the Court of Appeal held that the 1000*l.* paid by the wrongdoer was in respect of the whole interest in the ship, which was in the policy valued at 1350*l.*, of which 1000*l.* was at the risk of the underwriters and 350*l.* uninsured at the risk of the owners, and that the 1000*l.* salvage must therefore be divided among underwriters and owners in the proportions of 1000*l.* and 350*l.* respectively, thus dealing with the whole agreed value and no more. Here part of the insured value was not covered by insurance; in the present case the whole of the insured value is covered by insurance.

Lastly, in *North of England Steamship Insurance Association* v. *Armstrong* (21 L. T. Rep. 822; L. Rep. 5 Q. B. 244), in 1870, underwriters insured the *Hetton*, valued at 6000*l.*, for the whole amount. The *Hetton* was sunk by the *Uhlenhirst*, and in the collision action the value of the *Hetton* was proved to be 9000*l.* The *Uhlenhirst* limited her liability, and only paid some 5500*l.* for damage to ship, freight, and cargo.

The underwriters claimed the part of the 5500*l.* which represented ship; the shipowners alleged that the underwriters were only entitled to two-thirds of it, the shipowners being treated as uninsured in respect of 3000*l.*, the difference between the collision value of 9000*l.* and the insured value of 6000*l.* and the 5500*l.* being distributed between the 6000*l.* and the 3000*l.* in the same proportions.

The Court of Queen's Bench rejected this contention, holding that it was not open to the shipowners, who had agreed that the insured value was 6000*l.*, to allege the real value was 9000*l.* Some expressions in the judgment suggest that the underwriters, who had only paid 6000*l.*, might have recovered the whole 9000*l.* if paid. They have been the subject of much criticism, and may be contrary to the principle that subrogation is to give an indemnity only, as expressed in *Castellain* v. *Preston* (49 L. T. Rep. 29; L. Rep. 11 Q. B. 380); they may result from failure to distinguish between abandonment and subrogation. But they were not necessary to the decision.

The decision itself is to the effect that an underwriter who has paid a total loss is not prevented from recovering up to the extent of his payment sums received by the shipowner in respect of the subject-matter insured by the fact that those sums are based upon, or part of, a larger sum fixed by reference to a value other than the insured value, where no part of that insured value is at the risk of the shipowner. In other words, under *Armstrong's* case, one underwriter of the *Helvetia* for 45,000*l.* on ship valued at 45,000*l.*, on payment of a total loss, would recover at any rate up to 45,000*l.*, sums received from the wrongdoing ship, though based on and part of a collision value of 65,000*l.*

If so, it appears to me to make no difference under *Armstrong's* case that instead of receiving the whole collision loss of 65,000*l.* he only receives half, 32,500*l.*, or five-twelfths. He has received a sum in respect of the subject-matter insured less than the underwriter's payment and is not allowed to say that it is based on a value of the subject-matter different from that agreed in the policy. He will have to hand over not five-twelfths of the insured value, but the sum he has received in respect of the subject-matter insured being less than the insured value which the underwriter has paid.

This appears to me to be the logical result of *Armstrong's* case, and, though it is possible that the principles on which it is based are not easy to reconcile with those on which the House of Lords decided the case of the *Balmoral*, the Law Lords do not mention in their judgments, still less disapprove of, *Armstrong's* case, although it was cited to them.

I am therefore, as a judge of first instance, bound by it, and in my view it compels me to hold that the underwriters here are entitled to recover to the extent to which they have paid in respect of the subject-matter insured any sum which the shipowners have received as a right in respect of the loss of the same subject-matter, though that sum is based on a larger value than the insured value. This result seems to me to be expressed in sect. 79 of the Marine Insurance Act. The underwriter here is asking to have all the right and remedy of the assured in respect of the subject-matter, not part of it.

The next question is, what sum have the shipowners received as a right in respect of the subject-matter insured? Now the shipowner in the collision action received a sum based on 67,000*l.* in respect of ship and the value given to the ship by the charter. It is by his doing that these two heads of damage have been mixed up so that it is not easy to apportion them, and I am not sure that it is not an answer to say that as he has mixed them up the whole sum must be taken against him as the value of the ship.

But the registrar, if he had separated the 67,000*l.*, would under the President's judgment have had to divide it into the value of the ship in Nov. 1917—five years after the collision—and the value of the charter from 1912 to 1917. I am unable to see what the underwriter has to do with this. His insurance of ship is from the 20th May 1912 to the 20th May 1913; if he had no valuation the subject-matter to be valued under sect. 16 of the Act is the value at the commencement of the risk of the ship, including outfit, stores, disbursements, and insurance.

It is this subject-matter that is valued by the policy. The open policy on freight for a year under the same section would be the gross amount of freight at risk, plus insurance. The value of the ship in 1917 would have nothing to do with such a policy on ship; the value of the net freight under a five years' charter would have nothing to do with such a policy on freight. But the addition of the two sums, ship and freight, by either method of calculation, is supposed to represent the value of ship and freight at the time of the loss. Taking, then, 67,000*l.* as representing the value of ship and freight at the time of the loss, the shipowner gave evidence that the value of the ship without engagements at the time of the loss was 75,000*l.*, but with the charter was 60,000*l.*—in other words, that the charter was detrimental to the value of the ship, and did not increase it.

Forming my own judgment, I fix 65,000*l.* as the value of the subject-matter insured at the time of the loss. In respect of that subject-matter the underwriter has paid a total loss, agreed at 45,000*l.* In respect of that subject-matter the assured has received at least 26,900*l.* The underwriter is entitled to be subrogated to that amount, which is less than the sum he has paid, and, after giving credit for the sum due from him under the running-down clause, to recover his proportion of the excess, which I understand on this basis is admitted to be 289*l.* 11*s.* 7*d.*, and I give judgment for him for that amount, with costs.

Solicitors for the plaintiffs, *Alfred Bright* and *Sons*, for *Batesons*, *Warr*, and *Wimshurst*, Liverpool.

Solicitors for the defendants, *Rawle*, *Johnstone*, and *Co.*, for *Hill*, *Dickinson*, and *Co.*, Liverpool.

House of Lords.

Tuesday, May 11, 1915.

(Before Earl LOREBURN, Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, and WRENBURY.)

PARKER *v.* OWNERS OF SHIP BLACK ROCK. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Employer and workman—Compensation—"Accident arising out of and in the course of the employment"—No agreement by master to provide food in articles—Seaman returning to ship at night after purchasing food on shore—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58) *s.* 1, *sub-s.* 1.

A fireman of a coasting vessel went ashore, with leave, to buy provisions for himself. The night was rough and dark, and while he was on shore the ship was moved away from steps by the pier to another part of the harbour. While endeavouring to return to the ship in the evening, he got to the steps by the pier, and nothing more was known except that his body was found washed up on the beach at a place where, had he fallen into the sea off the steps, it probably would have been taken by the tide. His contract of service was contained in a printed document issued by the Board of Trade, but the Board of Trade scale of provisions was struck out, and the words "Crew to provide their own provisions" substituted.

Held, that the accident did not arise out of his employment, as there was no contractual obligation on the deceased to go ashore to buy provisions, and that in going ashore he was not absent from the ship in pursuance of any duty owed to his employer, and in the absence of such duty no liability would arise under the provisions of the Workmen's Compensation Act.

Decision of the Court of Appeal (31 *C. C. C. Rep.* 455; 110 *L. T. Rep.* 520; (1914) 2 *K. B.* 39) *affirmed.*

(*a*) Reported by W. E. REID, Esq., Barrister at Law.

APPEAL by the widow of a fireman from an order of the majority of the Court of Appeal (Lord Cozens-Hardy, M.R. and Eve, J., Evans, P. *dissentiente*), affirming an award of His Honour Judge A. P. Thomas sitting as arbitrator under the Workmen's Compensation Act 1906 at the County Court, Liverpool.

The appellant, who was the widow of Christopher Parker, a fireman on board the respondents' coasting steamer *Black Rock*, claimed compensation in respect of her husband's death.

On the 7th Jan. 1913 Parker signed an agreement for a round coasting voyage in the *Black Rock*. The contract of service was contained in a printed document issued by the Board of Trade, but before Parker signed it the scale of provisions required by sect. 25 of the Merchant Shipping Act 1906 to be served out to the crew during the voyage (where the crew do not furnish their own provisions) was struck out and in lieu thereof were inserted in writing the words: "Crew to provide their own provisions."

On the 14th Jan. 1913 the *Black Rock* was moored alongside the North Pier at Newlyn. Parker went ashore in the afternoon with another man for the purpose of buying provisions for himself for the ensuing voyage. His going ashore for this purpose was with the knowledge and tacit consent of his employers. There was an entry in the ship's log-book that Parker and his companion had gone ashore to buy provisions, and the evidence was that they had purchased articles to the value of 7*s.* after having drinks together. The night of the 14th Jan. 1913 was dark and rainy, and a gale was blowing. The wind and rain would have been almost directly in the face of anyone walking down to the pierhead, which was badly lighted.

During the time that Parker was ashore the vessel had been moved from the North to the South Pier, but this fact could not have been known to him. After parting with his companion, nothing more was known about Parker's movements until the next day, when his body was found on the shore at a place where it was likely to have been washed up had the man fallen off the pierhead into the water.

The widow in these circumstances claimed compensation on the ground that at the time of the accident the deceased was fulfilling the duty he owed his employers to go ashore for the purchase of provisions, and therefore was on ship's business when the accident happened to him.

The County Court judge inferred from such facts as could be proved that Parker met with an accident while endeavouring to return to the ship after buying provisions, but thought that he was precluded by *Mitchell* v. *Owners of Steamship Saxon* (1912, 5 B. W. C. C. 623) from holding that the accident arose out of the deceased's employment, and therefore made his award in favour of the employers.

The Court of Appeal (Evans, P. dissenting) affirmed the award.

The widow appealed to this House *in formâ pauperis*.

Howard Jones and *Elliot Gorst* for the appellant.—The question is whether the deceased met with his death by accident arising out of his employment. The County Court judge answered that question in the negative because he felt himself bound to do so by the decision of the Court of Appeal in *Mitchell* v. *Owners of Steamship Saxon* (1912, 5 B. W. C. C. 623). But that case is not conclusive against the appellant, because the point in this case was not present to the mind of the court when considering *Mitchell's* case. Here the Court of Appeal has to decide the scope of the duty Parker owed his employer to go ashore to buy provisions as defined by words in the articles of contract: "Crew to provide their own provisions." This point was not suggested in the County Court, and objection was taken against it being raised by the respondents in the Court of Appeal. In the County Court only secondary evidence could be given of the terms of the articles, but in the Court of Appeal the articles themselves were produced and were admitted in evidence. Although the articles carried the question no farther than the parol evidence of the document did, it is submitted that the objection taken should have been sustained by the court. But, at any rate, before the accident happened, Parker had returned within the ambit of his employment; for the North Pier was the only means of access to the ship, and by having to return there on a dark and squally night he had exposed himself to a danger specially due to the nature of his employment:

Moore v. *Manchester Liners Limited*, 29 C. C. C. Rep. 612; 103 L. T. Rep. 226; (1910) A. C. 498.

For the reasons given in the dissenting judgment of Evans, P. this appeal should be allowed.

Alexander Neilson and *W. Greaves Lord*, for the respondents, were not heard.

Earl LOREBURN.—I think your Lordships will all agree that this case has been presented to us with great ability and with singular fairness, and that the argument which we have heard has assisted us in coming to our conclusion, but I do not think we need to call upon learned counsel for the respondents. We cannot say in this case that this unfortunate man promised his employers that he would feed himself. If that is the case, and if we cannot so construe the contract between them, what did it matter whether he went ashore to buy his provisions because he had contracted that his employers should not be obliged to feed him, or because he was obliged to go or to starve? In either case the necessity was there to get food, but that is not, I think, enough to entitle the appellant to succeed. In either case the question seems to me to be the same—namely, do those circumstances make the accident one that arises out of the employment? Did this injury arise out of this man's employment as a seaman on board this ship; did his employment involve as one of the things belonging to the employment that he should come ashore to get food and then return the same evening? I cannot think that the case can be regarded as one in which it was his duty for that purpose to come ashore and to be ashore and return to the ship. However much one may have sympathy, and we all must have sympathy with the widow, we ought not to allow our feelings to lead us beyond our duty. I have read the judgment of the learned County Court judge, and I take his facts as found and his inferences from the facts as found, and I cannot see that upon those facts the accident arose out of the employment. It arose from this

man needing to have food, which, of course, is a necessity common to all mankind.

Lord PARKER OF WADDINGTON.—The accident in this case took place during the absence of the employee from the vessel upon which he was engaged. He came on shore, and I think that under the circumstances it must be presumed that he came on shore with the leave of his employer, and it was during that absence from the ship that the accident occurred.

It is not sufficient in order to make this an accident arising out of the employment that the accident happened during a period when the man was lawfully absent from the vessel. In order to make it an accident arising out of the employment, the absence from the vessel must be in pursuance of a duty owed to the employer. It appears to me that that is, shortly stated, the result of the decided cases. This would appear to be the outcome of a line of decisions which lays down a distinctly workable rule upon the construction of an Act the obscurity of which is exceedingly great, and I should be unwilling in any way to interfere with it.

It is desired in the present case to show that the absence from the ship was pursuant to a duty owed to the employer, but I think that the effort to do so breaks down. It is said that the man was on shore to purchase provisions, that he was under a contractual obligation to his employer to purchase provisions and to feed himself, and that consequently he was absent from the ship pursuant to a duty owed to the employer. Now, the facts of the case are, shortly, these: Under the statutes the employer, if the workman does not provide his own provisions (as he did in this case), is bound to supply them, and the statutory form is a form whereby the employer contracts to supply provisions to seamen in accordance with a scale specified in a schedule. As a matter of fact when they came to contract, the employer and the seaman in this case agreed that the statutory provision should not apply, and, of course, the consequence was that the workman had to supply his own provisions so far as he required them, and he would require them in the normal course of nature. It was proved before the County Court judge that the form which that contract took was "crew to supply their own provisions," and I have no doubt whatever on the point that according to the proper contruction of those words the seaman did not come under any contractual obligation which the master could enforce. It merely means that the master is freed from an obligation which he might otherwise be subject to.

That being the case, I do not think that I need enter in any way into the question as to whether the Court of Appeal were justified or otherwise in looking at the original contract, the contract before the County Court judge having been proved by secondary evidence.

That appears to me entirely to dispose of the case. I cannot in the state of the authorities assent to the further proposition that was made to the effect that if a man goes on shore lawfully for a purpose which must have been contemplated as one of the purposes for which he would go on shore, that makes him on shore upon the ship's business or pursuant to any duty owed to his employer. The only possible way, as it appears to me, of putting the facts of the case in a light favourable to the seaman is that which has been suggested in the course of the argument—namely, that it being an extraordinarily dark, stormy night, and the proper and usual method of regaining the ship being by way of the North Pier, and the accident having evidently happened during transit from the land along the North Pier to the place where the ship was supposed to be, that may be considered as the access to the ship, and that an accident happening during the course of using that access might be, within the cases, an accident in the course of the employment. But, after all, that was a matter for the County Court judge, and there is no finding in the judgment of the County Court judge from which I think we in this House are justified in drawing any inference.

I conclude, therefore, by saying that the appeal fails.

Lord SUMNER.—I agree. It is enough, I think, to take the evidence that was before His Honour and his own findings upon that evidence, and thereupon the only question becomes one of construction. He signed the articles, says the master, the only witness on the point. The Board of Trade scale of provisions was crossed out and "Crew to provide their own provisions" was inserted, and His Honour Judge Thomas accepts that. Instead of provisioning the ship themselves, in which case they would have had to provide for the crew according to a scale as set up by the Board of Trade, the owners of the *Black Rock* struck this scale out of the articles and inserted a term whereby the members of the crew were to find their own provisions. Upon the secondary evidence of the written agreement it becomes a question of construction to decide what is meant by the erasure and the insertion of "Crew to provide their own provisions." I think it is quite clear that that does not constitute any promise by the seamen severally to the master of the vessel that they would as a duty towards him provide themselves with their own provisions. Testing it by the remedy, could he have recovered damages if any one of them had provided no provisions or not enough? Could he have dismissed one of them because for reasons of his own he preferred to be unduly abstemious instead of providing himself amply with food? The answer in each case must be no.

That being so, there is no contractual obligation which made the deceased's errand on shore part of his employment in itself. It is suggested that as, in fact, he fed himself on board, his going ashore at a convenient port to get provisions constituted such a moral necessity to do so, not arising generally but arising specially from the terms upon which he was on board, that that places him on his errand on the same footing as though he had gone to discharge a duty to the ship—either to buy provisions, to perform an errand, or otherwise. No authority is stated for that proposition, and I do not think it can be accepted.

That being so, little need be said about what was suggested as the admission of a new fact in the Court of Appeal. I am unable to appreciate why it is that it would be a new fact—that is to say, an attempt to decide the case upon materials other than those which were before His Honour Judge Thomas—when the Court of Appeal looks

at the best evidence of a written agreement, namely, the agreement itself, which by that time had come back from sea, and was forthcoming, instead of simply looking at the secondary evidence which was given in the County Court, especially as the two together seem to amount to precisely the same thing. The copy has been produced to us. There is a statutory provision that an erasure must be attested by the superintendent, and on the face of the copy produced it seems to me to be quite consistent with its appearance that it has been so attested, and I do not think we need go behind its appearance.

The remaining point that was made (and I am sure that no other point could have been made) was that under the circumstances the accident could be brought within those cases in which a man, having gone on shore for his own lawful purposes, but still his own purposes, is returning to his ship in order to take up again the active discharge of his employment, which has never ceased as an employment; and, although he has not actually regained the ship, he has been held to be so far approaching it and so far within the ambit of the means of access to the ship as to make it reasonable to hold that he has returned to that sphere in which his employment operates, and therefore that the accident arises out of the employment. I do not think that that has ever been physically extended for any great distance. All that we know of this man's death is that it took place by his falling off the North Pier somewhere between the grocer's shop and the end of the pier where the ship was not, though he thought that she was there. The pier is a quarter of a mile long, and whether or not under those circumstances, on the finding of fact by the County Court judge, that long pier was all one means of access to an absent ship I will not say, but I think it is quite clear, as the County Court judge has found nothing about it, that the argument is unsustainable before your Lordships.

I agree that the appeal fails.

Lord PARMOOR.—I concur. I think that there was no such contractual obligation as was contended for by the learned counsel for the appellant, and for my own part I do not see any difference between the evidence of the contract which was before the learned County Court judge and the actual document when it was produced before the Court of Appeal. I think it is clear that Christopher Parker, on whose behalf the claim is made, was not absent from the ship in pursuance of any duty owed to the employer, and in the absence of such duty no liability would arise under the provisions of the Workmen's Compensation Act.

As regards the second point, I think that that is concluded by the finding of the learned County Court judge on p. 21. There are only a few words which I wish to read, because I think that the facts are conclusive against any claim under this second heading. "The facts of the case do not bring the applicant within the Act, because, beyond drawing the inference that he met with an accident while endeavouring to return to the ship after buying the provisions, I am unable to draw any further inference as to the point of the accident except that it was somewhere on the North Pier."

I agree that the appeal should be dismissed.

Lord WRENBURY.—The question in this case is whether the accident was one arising out of the employment. The accident in question was that the man, in returning from a lawful outing upon shore to his ship, unfortunately fell into the water and was drowned. In order to succeed it is not sufficient that he should show that but for his employment he would not have been at the scene of the accident. He must do more than that; he must show that it was the employment which took him to the place of accident. Now, he has sought to do that in either one of two ways. In the first place his counsel has said that he was contractually bound towards his employer to do the act for the purpose of doing which he went on shore; that he was contractually bound to supply himself with provisions; that he went on shore to get provisions; that he was discharging his duty to his employer when he fell into the sea, and therefore he is entitled to recover. If the premises were granted, I agree that the conclusion would follow, but the premises seem to me to be wrong. Under the Board of Trade form, in the absence of anything to the contrary, it would be for the master to supply the crew with provisions. The only effect of that which was put into the agreement—namely, "Crew to provide their own provisions"—was, I think, this: that, the clause having been struck out which threw the obligation upon the master to supply the provisions by reason of the fact that the crew were going to provide their own, there was no contractual obligation on the part of the man to supply his own provisions, and the effect was only to discharge the master from the obligation which otherwise would have rested upon him. It appears to me, therefore, that there was no such contract.

But then it was said that, contract or no contract, at any rate under the circumstances the man was bound to get provisions in order to sustain himself during the next journey of the vessel, that that was a duty which he owed, and he was performing that duty. It seems to me that from the stipulation that he was to get his own provisions this consequence ensued, that the master was bound to give him reasonable facilities from time to time for going to buy them, but it does not follow that when he was buying them he was discharging any duty towards his employer. The man was doing an act which, under the circumstances, he had to do, but he was not doing an act which he owed to his employer the duty to do, and between those two things it appears to me rests the ground upon which this case is to be decided. It appears to me that this accident did not arise out of his employment—that it did not result from any contingency which had to be satisfied in order for him satisfactorily to perform the duties of his employment.

I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Griffiths* and *Roberts*, for *R. E. Warburton*, Liverpool.

Solicitors for the respondents, *Holmar, Birdwood*, and *Co.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

June 3 *and* 7, 1915.

(Before Sir S. T. EVANS, President.)

THE IOLO. (*a*)

British ship — Cargo — Consignment to alien enemies—Ship diverted during voyage—Outbreak of hostilities—Seizure of cargo—Sale—Release—Claim for proceeds of sale—Claim for freight—Jurisdiction of common law courts—Jurisdiction of Prize Court—Construction of charter-party and bill of lading—"Blockade and interdicted port" clause—Equitable adjustment.

Certain goods, the property of a Russian bank, were shipped in a British vessel at a Russian port before the outbreak of war between England and Germany, and were consigned to German merchants at Hamburg. Whilst the vessel was on her voyage hostilities began, and by the order of the British authorities she was diverted from her original destination and directed to proceed to a British port, where the goods were seized as prize and afterwards sold by order of the court. The proceeds were paid into court. The marshal gave an undertaking to the shipowners to pay to them the proper amount of freight and charges. The cargo was subsequently released to the Russian Bank upon their giving an undertaking to indemnify the marshal against all claims for freight and charges in respect of the same. The bank subsequently applied for payment of the proceeds of the cargo in full without any deduction for freight or charges.

Held, that although according to the common law the contract of affreightment came to an end immediately it became illegal because of the war to carry the cargo to its original destination, and that in a court of common law no freight can be recovered under such a contract when it has been so determined, the same rule does not apply when the cargo has been seized as prize. The Prize Court, proceeding on the principle of "even and equitable adjustment," will award a certain amount to the shipowners under special circumstances for freight and charges, such amount to be ascertained by the registrar and merchants.

SUMMONS adjourned into court for argument as to the right of the Russian Bank for Foreign Trade to claim the proceeds of the sale of certain barley shipped in the *Iolo*, a British ship owned by the Iolo Morganwig Steamship Company Limited, from Nicolaieff, a Russian port, before the outbreak of war between England and Germany, and consigned to German merchants at Hamburg, Whilst the ship was on her voyage hostilities began, and she was directed to proceed to a British port instead of to Hamburg. Upon her arrival at the British port the barley was seized as prize and subsequently sold by the Admiralty marshal, the proceeds being paid into court. Afterwards the cargo was released to the Russian Bank, which gave an undertaking to the Admiralty marshal in respect of all payments arising out of the seizure of the goods, and the marshal in turn had given an undertaking to the shipowners to pay to them the ascertained freight and charges on out-turn in terms of the charter-party and bills of lading. The Russian Bank claimed that there should have been no seizure of the barley at all, and that, as it had been released, they were entitled to the entire proceeds of the sale without any deduction for freight or charges. The shipowners, on the other hand, contended that they were entitled to be paid for freight and charges out of the proceeds, and relied (*inter alia*) on the "blockade and interdicted port" clause of the charter-party and the bill of lading.

Stranger for the Crown.

R. A. Wright for the Russian Bank for Foreign Trade.

Roche, K.C. and *Raeburn* for the shipowners.

The facts and the arguments are fully set out in the judgment.

Cur. adv. vult.

June 7.—The PRESIDENT.—The substantial question to be determined upon the application which is now before the court is whether the Russian Bank for Foreign Trade is entitled to the whole of the proceeds of the sale of certain cargo, originally seized as prize, without any deduction in respect of freight or other charges claimed by the shipowners. The form in which the question comes before the court can be disregarded in order to avoid unnecessary complication.

The steamship *Iolo* is a British vessel which started before the war from the port of Nicolaieff upon a voyage to Hamburg laden with various cargoes destined for Hamburg, and for German consignees. Part of the cargo consisted of two parcels of barley, one of 30,280 poods, and the other of 156,580 poods (making a total of 186,860 poods), which, or the proceeds of sale of which, were claimed in these proceedings by the Russian Bank for Foreign Trade, to which I shall hereinafter refer as the "Russian Bank." The Russian Bank was a bank incorporated under the laws of the Empire of Russia with its head office at Petrograd, and with branches elsewhere in the Russian Empire, and in other European countries, including England, but not in Germany or Austria. While the ship was on her voyage war was declared. The shipowners apprised the British Admiralty of her movements and asked for instructions. The Admiralty advised that the ship should proceed to Falmouth. This was communicated to the ship as she was passing Gibraltar. Before she reached the Lizard she was directed to proceed to Barry Dock, and she arrived there on the 19th Aug. 1914. On her arrival there her cargo was seized as prize by the Customs authorities acting for the Procurator-General of the Crown. On the 31st Aug. the writ in these prize proceedings was issued against the owners of the goods laden in the vessel, including the portion subsequently claimed by the Russian Bank. On the 2nd Sept., by the order of this court, the marshal was authorised to sell the cargo. It was sold accordingly, and the proceeds of the sale were paid into court in these proceedings. On the 4th Sept. an appear-

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

ance was entered on behalf of the Russian Bank claiming as owners of the 186,860 poods. The ship was directed by the marshal to proceed from Barry to Portishead to discharge the cargo for delivery to the purchasers. On the 7th Oct. the shipowners entered a caveat against the payment out of the proceeds of the sale without notice to them. The object of entering the caveat was to secure payment of the freight and other expenses claimed by the shipowners.

Shortly after the seizure the marshal had given to the shipowners an undertaking in the following terms: "I undertake to pay you on the completion of the discharge of the cargo the amount of the ascertained freight and charges on the out-turn in the terms of the charter-party and bills of lading." In accordance with this undertaking the marshal has already paid to the shipowners 1750*l.* on account. Later, the shipowners delivered particulars of their claim in respect of the whole cargo, which, summarised, was as follows: (1) Freight as per charter-party, 2118*l.* 6*s.* 9*d.*; (2) charges at Barry, 119*l.* 14*s.* 4*d.*; and (3) claim for detention or loss of time, 1080*l.* Roughly speaking, rather more than half of this claim, if allowed, would fall upon the portion of the cargo claimed by the Russian Bank.

After entering appearance in the proceedings the Russian Bank instituted an action in the King's Bench Division of the High Court asking for a declaration as to their rights. This action was subsequently abandoned, and I need not further advert to it.

Certain communications passed between the Russian Bank and the Procurator-General, the result of which was that the Procurator-General consented to release to the bank the net proceeds of part of the cargo to which they laid claim, upon the bank giving an idemnity in writing on or about the 19th Nov. The document evidencing this arrangement was in the following terms:

In Prize.—Steamship *Iolo*.—Whereas the undermentioned goods have been seized as prize, and whereas the Russian Bank for Foreign Trade claims to be entitled to the goods hereinafter described and has requested the Procurator-General to consent to an order for the release to them of the said goods, and whereas the Procurator-General is willing upon receiving the following indemnity (and subject to such other conditions, if any, as may have been arranged between the parties) to consent to such an order: Now, in consideration of the Procurator-General agreeing to give such consent, the said Russian Bank for Foreign Trade undertakes to indemnify the Procurator-General, whether on his own behalf or on behalf of the Crown or on behalf of the Admiralty marshal or of any officer or official of the Crown or of the Prize Court or of any person acting under the authority or instructions of the same or of any one or more of them, against all petitions (including petitions of rights), claims, proceedings, actions, or demands for or in respect or on account of the goods or any part thereof or any proceeds thereof or arising directly or indirectly out of or connected with the seizure, detention, or release of the goods or any part thereof, and against all costs, damages, and expenses in respect of the premises. And the bank undertakes to refund to the Procurator-General any sum or sums of money which may hereafter be found to have been paid or may be paid for the said parcels or of any of them by an alien enemy.

Then follows a description of the goods by reference to the numbers of the bills of lading and the numbers of the poods, amounting in all to 156,580 poods. I assume that a similar indemnity was given in respect of the 30,280 poods, or, at any rate, that the same conditions applied to the release of the proceeds of this parcel.

Later in the proceedings, by consent of the Procurator-General, orders were made authorising the marshal to pay out to the solicitors for the Russian Bank the net proceeds of sale of the 30,280 and 156,580 poods of barley, less certain sums which were retained until the question of freight and expenses was decided. Pursuant to such orders two sums of 2500*l.* and 11,000*l.* (making 13,500*l.*) were paid out to the Russian Bank out of the proceeds of the sale of the cargo, leaving in court about 1500*l.* (the balance of the proceeds) until the questions now in dispute were determined.

It has been necessary to set out the above facts in order that the circumstances in which the Russian Bank made the present application may be understood. Mr. Wright, counsel for the bank, contended that the bank was entitled to be paid out the balance of the proceeds of the sale of the barley in full, without any deduction for freight or any other charges. The foundation of this contention was that in law the contract between the shipowners and the bank, as owners of cargo, had come to an end, because the goods were not delivered at the port of Hamburg in accordance with the contract contained in the bill of lading; and that the shipowners were not legally entitled to recover the freight or any part thereof, or to any lien therefor, or to any allowance in respect of it.

But before proceeding to say anything about the legal questions which were argued, I must point out that, in the view that I take of the facts, there are difficulties in the way of the bank's claim which appear to me to be insuperable.

In the first place, counsel for the bank assumed that his clients were in the position of absolute owners of the cargo entitled to say that the seizure was wrongful; and that their claim must be considered without any reference to the seizure as prize, or to the sale, or to the prize proceedings, or to the terms on which the consent to the release of the proceeds of the sale was given. The argument was directed as if the question was merely one between the bank and the shipowners, and depended only upon the contract contained in the charter-party. This same bank was interested in a cargo shipped and seized under very similar circumstances in the case of *The Corsican Prince* (13 Asp. Mar. Law Cas. 29; 112 L. T. Rep. 475), which came before this court in February last, and I venture to repeat what I said in that case upon the question of release by the Crown as follows: "The Crown has full right to consent to the release of any ship or goods captured or seized on any grounds that to the Crown may seem fit. Moreover, it does not by any means follow as a necessary consequence of the release that the goods were not properly seized as prize as the Crown's droits of Admiralty. In the present case, as the Empire of Russia is our ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them quite otherwise than as an acknowledgment of wrongful seizure. And if it is thought material, it would be quite open to

anyone interested in these proceedings at any stage to allege and to set out to prove that the seizure of the cargo was lawful."

I will add that if it had been thought material in the interest of the bank in the present case, it would have been quite open to them to allege and to set out to prove, if they could, that the seizure of the cargo was unlawful, and that they were absolutely entitled according to prize law to have the cargo released with or without costs and expenses. That task they did not undertake. The course which they were advised to take, and which they may have taken with much prudence, was to accept the release of the net proceeds of the sale of the goods upon the terms of the indemnity hereinafter set out. These terms show clearly that the arrangement was a compromise, and that it was by no means admitted that the Russian Bank was entitled as of right to the cargo or its proceeds.

I need hardly say that according to the rules and practice of this court, the marshal rightly acted when he undertook to pay to the shipowners the ascertained freight and charges, by which I think was meant the proper amount of freight and charges to be ascertained by a reference to the registrar and merchants, in accordance with the principles which have been laid down for that purpose. These payments have in part been made, and will at the end be made in full out of the proceeds in court; and are covered by the wide words of the indemnity. Upon these facts I am of opinion that the Russian Bank is not entitled to be paid in full without any reduction for freight and expenses.

But lest my view of the result of the facts may be considered to be erroneous, and as the legal aspect of the case, and of cases similar to it, is of general importance, I will deal also with the law applicable to such cases. I can do this the more briefly because I have already had occasion to deal with the subject in some of its aspects in *The Juno* (13 Asp. Mar. Law Cas. 15; 112 L. T. Rep. 471) and *The Corsican Prince* (*ubi sup.*). The former dealt with the freight claimed by the owners of a British ship in respect of goods which were laden upon her and which were condemned as prize, as against the captors, and the respective positions of British and neutral ships in relation to their rights to freight in such cases were compared. In the latter I considered the general question of the jurisdiction of the Prize Court to award freight to owners of British ships where the cargo was seized as prize, and where it or its proceeds had been released as in the present case.

In order to avoid repetition I would refer to the authorities cited in these two decisions. From them I deduced certain results and venture to lay down the following propositions:

"The Prize Courts have constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo, and have adjudicated upon such claims whether the ship or cargo has been released, and when both ship and cargo have been released; and apparently no action involving those questions in similar cases was brought in any Common Law Court. And this is obviously for grounds solid in justice and convenient in practice; because the two courts administered two different codes or systems of law; the Prize Courts deal with claims in accordance with the law of nations and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure by reason of the non-performance or non-completion of the contract of affreightment; whereas Common Law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King's Bench Courts would either give the claimants for freight the whole or nothing, according to whether the contract of affreightment had been performed or not. But the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole or a moiety of the freight, or a sum *pro rata itineris*; or it may discard the contract rate altogether, even as a basis for assessment on calculation (*The Twilling Riget*, Roscoe's English Prize Cases, vol. 1, 430; 5 Ch. Rob. 82); or it may withhold or diminish the sum by reason of misconduct, as, *e.g.*, resistance to search or spoliation or non-disclosure of papers."

A passing reference was made in the judgment given in *The Juno* (*ubi sup.*) to the case of *The Friends* (Roscoe's English Prize Cases, vol. 2, 48; Edw. 246). It was not dealt with at length, because, as was pointed out, it was between shipowners and cargo owners, and not between shipowners and captors, as was that of *The Juno* (*ubi sup.*). That very circumstance renders the decision in *The Friends* (*ubi sup.*) of great importance in the consideration of the matter now before the court. It is right, therefore, to refer to it more fully. That was the case of a British vessel which had been chartered to deliver a cargo at Lisbon. The ship had prosecuted her voyage to the entrance of the Tagus, when she was warned off by the blockading squadron. A gale of wind afterwards blew her out to sea, and she was captured by a Spanish privateer, but was soon afterwards recaptured by a British cruiser and taken to Madeira, where the ship and cargo were sold by the recaptors to pay salvage. The ship and the cargo were afterwards decreed to be restored. The question which the court had to decide was what freight was due under the circumstances. On the part of the owner of the ship it was contended that the whole of the freight was due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo it was contended that no freight was due as the cargo was not delivered according to the terms of the charter-party. Referring to certain cases of American ships bound to France or Holland, and which were brought into this country under the prohibitory law, Lord Stowell said: "In those cases the court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the Court of Common Law, it could not say that the delivery at a port in England was a specific performance of its terms; but there being no contract which applied to the existing state of facts, the court found itself under an obligation to discover what was the relative equity between the parties. This court sits no more than the Courts of Common Law do to make contracts between

parties; but as a court exercising an equitable jurisdiction it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction." And in pronouncing his decision, he delivered himself as follows: "The present case is marked with peculiar misfortune, because here after the ship had been stopped by the blockading force she was blown out to sea, and, being subsequently taken out of the hands of the master, she was carried by the recaptors to a distant port, and there sold, together with her cargo, at a great loss. In this case, therefore, loss is unavoidable, and the only question is, upon whom the weight of it shall fall. Now, if the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there; but the fact is that the calamity is common to both, for both ship and cargo were equally affected by the blockade. The ship could not have entered the interdicted port in ballast, any more than the cargo could have entered it in any other vehicle. The loss arises from the common incapacity of the one and of the other; I think, therefore, that what equity would suggest is that the loss should be divided; and under these circumstances I shall direct a moiety of the freight to be paid."

In the case which now calls for decision in this court the cargo in question was seized as prize. It was subsequently sold, and its proceeds were paid into court to be dealt with in the prize proceedings. I have pointed out that, according to the authorities and practice of the Court of Prize, the jurisdiction of the court to deal with freight is not affected by the release of the cargo—even if it had been released upon the decision of the court that it had been wrongfully seized, which was not the case in relation to this cargo.

According to the Common Law the contract of affreightment came to an end immediately it became illegal because of the war to proceed to carry the goods to their German destination; and in a Court of Common Law no freight could be recovered under the contract which had so come to an end. An illustration of this is afforded by the recent judgment of Rowlatt, J. in *St. Enoch Shipping Company Limited* v. *Phosphate Mining Company* (139 L. T. Jour. 94; (1915) W. N. 197), where the learned judge decided that no freight could be recovered by the shipowners for the carriage of cargoes of cotton, copper, phosphate, and wheat from South America, which were destined for Hamburg, but which were diverted to Manchester. It must be noted, in connection with this decision, that, although the cargoes were in some way detained by the Customs authorities, no proceedings in prize were taken. The cargoes were given back as if they never had been interfered with by the Customs authorities, and the case was dealt with upon the footing that no seizure as prize was ever effected. I may be allowed to point out that the decision in that case, although I doubt not that it was given in accordance with the law of contract, might fairly be considered commercially as producing a hardship to the shipowners. On the other hand, it is satisfactory to note that if my view of the doctrines to be applied in such cases when they come before the Prize Court is correct, a more even and equitable adjustment can be made, which balances fairly the rights of the parties where the contract which has been ended no longer regulates them.

Upon the grounds on which my decision is based, it becomes unnecessary for me to decide the various questions which were argued upon the construction of the bill of lading, and the effect of the "blockade and interdicted port" clause.

In my judgment the application of the Russian Bank for payment of the proceeds in full without any deduction for freight or charges fails, and I dismiss their summons with costs.

Counsel for the shipowners did not contend in these proceedings that they were entitled to the full freight as the contract freight. In one sense it was not necessary upon this application to argue that point. But I do not apprehend that it is desired to argue it further. And so it may be convenient now to order that it be referred to the registrar and merchants to ascertain the amount due for freight or charges in respect of all the cargoes upon the principles laid down in the judgment of this court in *The Juno* (*ubi sup.*).

Leave to appeal.

Solicitor for the Crown, *Treasury Solicitor*.

Solicitors for the Russian Bank for Foreign Trade, *Coward* and *Hawksley, Sons*, and *Chance*.

Solicitors for the shipowners, *Botterell* and *Roche*.

June 10, 14, *and* 21, 1915.

(Before Sir S. T. EVANS, President.)

THE ZAMORA. (*a*)

Prize Court—Order in Council—Validity—Binding effect upon Prize Court—Prize Court Rules—Order XXIX.

By Order XXIX of the Prize Court Rules, as authorised by an Order in Council, it is provided that: "Where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given . . . the ship shall be released and delivered to the Crown."

By Order I of the Prize Court Rules: "Unless the contrary intention appears, the provisions of these rules relative to ships shall extend and apply, mutatis mutandis, *to goods."*

A Swedish vessel carrying copper, which was absolute contraband of war, was seized and brought into a British port. A writ was issued that the ship and her cargo should be condemned and confiscated. Before any adjudication as to these claims had taken place, the Procurator-General on behalf of the War Department took out a summons that the Crown should be entitled to requisition the copper, leaving the question of the right to the same, or the proceeds of the sale thereof, to be decided later on.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Held, that Order XXIX was binding upon the Prize Court, that it did not contravene the law of nations, and that it was not ultra vires.

SUMMONS adjourned into court for argument as to the right of the Crown to requisition goods alleged to be the property of neutrals.

The *Zamora* was a Swedish steamship, belonging to the port of Stockholm, and on the 19th March 1915 she sailed from New York with a cargo which included a quantity of copper, about 400 tons. This copper was shipped by the American Smelting and Refining Company of New York, and was consigned to the Swedish Trading Company of Stockholm. Copper was absolutely contraband of war, and whilst the *Zamora* was on her way from the United States to Sweden she was stopped and afterwards sent to a British port, as the Crown alleged that the copper which she carried was really intended for Germany. The ship and her cargo were then seized, and proceedings were commenced that the ship might be condemned and confiscated as lawful prize on the ground that the cargo which she was carrying was as to more than one-half thereof contraband of war, and that the cargo should be condemned and confiscated as contraband. Alternatively the Crown asked that an order might be made authorising the detention and sale of the cargo, on the ground that the vessel left a port other than a German port after the 1st March 1915, having on board the contraband cargo, the same having an enemy destination or being enemy property. No adjudication had taken place as to these claims, but in the meantime a summons was taken out by the Procurator-General on behalf of the War Department that the Crown should be at liberty to requisition the copper, leaving the question of the right to the same, or the proceeds of the sale thereof, to be decided later on. The summons was taken out under Order XXIX of the Prize Court Rules. The right to requisition was resisted by the claimants, the Swedish Trading Company of Stockholm.

By Order I., r. 2, of the Prize Court Rules 1914:

> Unless the contrary intention appears, the provisions of these rules relative to ships shall extend and apply, *mutatis mutandis*, to goods.

By Order XXIX of the Prize Court Rules, as amended by Order in Council dated the 23rd March 1915, it is provided:

> Rule 1. Where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given in accordance with rule 5 of this order the ship shall be released and delivered to the Crown.
>
> Rule 4. In any case where a ship has been requisitioned under the provisions of this order, and whether or not an appraisement has been made, the court may, on the application of any party, fix the amount to be paid by the Crown in respect of the value of the ship.
>
> Rule 5. In every case of requisition under this order an undertaking in writing shall be filed by the proper officer of the court on behalf of the Crown of the appraised value of the ship, or of the amount fixed under rule 4 of this order, as the case may be, at such a time or times as the court shall declare by order that the same or any part thereof is required for the purpose of payment out of court.

The *Attorney-General* (Sir E. Carson, K.C.) and *Branson* for the Crown.—The copper was requisitioned on behalf of the Crown under the terms of the new Order XXIX of the Prize Court Rules. The Crown was quite within its rights in making such requisition. It might be suggested that the Order in Council authorising the new order was *ultra vires*. It was submitted that no act on the part of the executive could be so designated when it was done in defence of the realm. No harm could happen to the claimants in any case. They were fully protected by the undertaking given in accordance with rule 5 of the order. Moreover, it was not a case of the seizure of neutral goods on the high seas. The cargo was actually in the possession of the Prize Court. The court had full powers to make the order asked for by the Procurator-General.

Leslie Scott, K.C., *Roche*, K.C., *Balloch*, and *Baty* for the claimants.—The submission of the claimants was that under the law which bound the Prize Court the judicial act which his Lordship was asked to perform was beyond his jurisdiction. It was contrary to the law of the court, and contrary to all rules of justice and equity. The order was not binding upon the Prize Court. It constituted a change in the substantive law regulating the rights of neutrals and their property when no charge of carrying contraband goods had been established. The Prize Court sat to administer the law of nations, and the right of requisition was unknown to such law. A right to seize neutral goods was claimed by military leaders in the field on certain occasions, when there was urgent military necessity. Here no such necessity had been shown. They cited

> *Cookney* v. *Anderson*, 8 L. T. Rep. 295; 1 De G. J. & S. 365;
> *Attorney-General* v. *Sillem*, 10 L. T. Rep. 434; 10 H. L. 704;
> *The Maria*, Roscoe's English Prize Cases, vol. 1, 152; 1 Ch. Rob. 340;
> *The Recovery*, 6 Ch. Rob. 341;
> Story's Prize Courts, pp. 2 *et seq.*

The *Attorney-General* in reply.—This was the first occasion in which an Order in Council had been questioned in a Prize Court. To succeed in their contention the claimants must go to the length of saying that the Crown could never, under any circumstances, requisition the goods of a neutral. That was an impossible proposition. He cited

> *The Fox*, Roscoe, vol. 2, 61; Edw. 311;
> *The Invincible*, 2 Gall. 29;
> *West Rand Gold Mining Company* v. *The King*, 93 L. T. Rep. 207; (1905) 2 K. B. 391;
> Wheaton's International Law (4th edit.), sects. 392, 396.

Cur. adv. vult.

June 21.—The PRESIDENT.—By a summons issued in an action in prize relating to the steamship *Zamora* and her cargo, an application was made by the Procurator-General for an interlocutory order that part of the cargo laden on the vessel, namely, about 400 tons of copper, should be released and delivered up to the Crown under Order XXIX of the Prize Court Rules, upon an undertaking to be given by the proper

officer of the Crown to pay into court the appraised value of the copper in accordance with rule 5 of the order. The claim in the writ in the prize proceedings was "for a decree that the said steamship *Zamora* be condemned and confiscated as good and lawful prize on the ground that the cargo which she was carrying at the time of her capture and seizure was as to more than one-half thereof contraband of war, and for a decree that the said cargo be condemned as good and lawful prize as contraband of war; or in the alternative for an order for the detention and (or) for the sale of the said cargo on the ground that the said steamship sailed from a port other than a German port after the 1st March 1915, having on board the said cargo, which had an enemy destination or was enemy property."

The *Zamora* was a Swedish vessel registered of Stockholm. She sailed from New York, U.S.A., on the 20th March 1915, bound for Stockholm. On the 8th April, when between the Faroes and the Shetlands, she was stopped and captured by His Majesty's ship *Alsatian*, and a prize crew was put on board. She was taken to the Orkney Islands and was, with the cargo, finally handed over to the marshal of this court on the 19th April. Thenceforth the ship and the cargo remained in the custody of the marshal of the Prize Court awaiting the hearing of the cause upon the judgment in which their condemnation or release depended.

In support of the present application for the release and delivery of the cargo to the Crown, a sufficient affidavit of the Director of Army Contracts was filed. The application was strenuously resisted on behalf of a Swedish firm who claim to be the owners of the cargo.

The summons came before me in chambers, and at the request of counsel for the claimants I ordered that it should be adjourned into court for argument. Upon the hearing it was contended that the provisions of Order XXIX material to the present question violated the law of nations; that they were not binding upon this court; and that this court owed no obedience to them, and ought not to act upon them. The argument spread over a wide field. In the expanse of the outlook the matter really in issue was so dwarfed as to vanish almost out of sight.

Before entering upon a survey of the extended area which was opened out in the argument, I propose to deal with the more restricted position in relation to which the decision of the question in issue depends.

The position is that prize proceedings resulting from the capture of the vessel and cargo are pending; and that the present application is for an interlocutory order in respect of the copper which was part of the captured property. Any order made upon the interlocutory application will not prejudice the case for the claimants upon the final hearing. It may be that their cargo will be decided to be confiscable and will be decreed to be condemned, or it may happen, on the other hand, that the decision will be the other way, in which case the claimants will have the value of the cargo decreed to be paid to them, and possibly, in addition, they may be awarded sums for damages and costs. The order made upon the present application will not affect their rights, which will fall to be determined at the hearing of the cause.

At the outset the capture or seizure as prize vests the possession of the property captured or seized in the Crown, and when the property comes into the custody of the marshal of this court it is subjected fully to the jurisdiction of this court. The court has inherent powers to deal with the property brought within its jurisdiction as it may deem fit in the exercise of its discretion. It has, in my opinion, such a power, apart from any rules of practice made under the Prize Acts of 1864 or 1894. It could, without any such rules, order a sale of perishable goods before condemnation; or order a sale of goods in order to avoid difficulties or expense of warehousing, or removing, or for any other reason which appeared sufficient to the court. In my view, persons who lay claim to property captured or seized have no right by any rule of international law to demand that the property should be preserved in specie until the final decree determines whether it is to be released or to be condemned. Prize Courts have always acted upon the principle that the capture is lawful, until the claimants establish the contrary. All that it is necessary for the captors to allege in prize proceedings is that the capture was made, and that the property captured is claimed as prize; thereupon the claimants must establish their claim to release. If their claim to release is sustained they may have the property delivered up, if it has been kept intact; or they will receive its value if it has been sold or otherwise disposed of, with or without costs and damages against the captors as the circumstances may require.

The argument of counsel for the claimants was, or necessarily involved, that the goods captured must in any circumstances be preserved to be delivered up in the same character if release is ordered; and that they cannot, except with the consent of the claimants, be sold or converted into a fund; or, in other words, that the claimants, in case their claim is allowed, must be put in possession of the property itself, and not of its value. I know of no principle or rule of international law to that effect. If the claimants have no such legal right to have the property delivered up in specie, it matters not whether the property is sold for good reasons and so converted into money, or is requisitioned by the Crown (instead of going through the form of sale) upon an undertaking to pay into court the appraised value.

But apart from any inherent power of the court, the order referred to in the Prize Court Rules, Order XXIX, deals expressly with the matter and prescribes the practice to be pursued. I will consider hereafter the larger question whether this order violates an acknowledged and settled principle of the law of nations; and whether, if it does, it nevertheless, as an order made by His Majesty in Council, must be observed and obeyed by this court. Before approaching that wide and important subject, however, I must declare that in my view Order XXIX deals only with a matter affecting the procedure and the practice of the court—a domestic affair in which no foreign neutral or enemy has any voice or right to interfere. It deals only with interlocutory steps which may be taken in this court after prize proceedings have been instituted. Matters of practice in proceedings such as sale of property or delivery up

on bail, or upon appraisement, are not of international concern, and are not, and cannot be, regulated by uniform international principles or procedure to be applied in the courts of all countries. As an example, a reference to the prize regulations of Russia and of Japan during the war of 1904-5 will show that they differ as to the rules regulating sale of captured vessels and goods before or after the institution of prize proceedings.

If Order XXIX deals, as I think it does, merely with the regulation of the practice and procedure of this Prize Court, it has the force of an Act of Parliament, as it has been made under statutory powers. But if it goes beyond procedure and practice, it has nevertheless the force properly attributable to an Order in Council. This appears by the order itself, and in the Naval Prize Act 1864 there is an express saving of the right, power, or prerogative of the Crown, as there is also of the jurisdiction or authority of or exercisable by the Prize Court. If it is regarded as an Order in Council, it is, in my opinion, within the power and prerogative of the Crown to make an order giving the right to requisition neutral property which may be of use to the Crown as a belligerent, subject to making compensation therefor. For instance, where, in former wars, such things as planks, sailcloths, pitch, hemp, and copper sheets belonging to neutrals were ordered before condemnation to be handed over to the Government pursuant to an order or declaration of the Crown: (see the following cases gathered from Hay and Marriott's reports: *The Vrow Antoinette*, p. 142; *De Jonge Joslers*, p. 148; *Concordia Affinitatis*, p. 169; *Sarah and Bernhardus*, p. 174; *The Hoppet*, p. 217; *Jonge Gertruyda*, p. 246; *Concordia Sophia*, p. 267; *Drie Gebroeders*, p. 270; *The Jonge Juffers*, p. 272; and also the cases mentioned at pp. 287 and 288).

As to the law relating to foodstuffs, reference may be made to *The Haabet* (Roscoe's English Prize Cases, vol. 1, 212; 2 Ch. Rob. 174). Lord Stowell deals with this question as follows: "The right of taking possession of cargoes of this description, *commeatus* or provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or, at least, of several maritime States of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood that on the side of the belligerent this claim goes beyond the case of cargoes avowedly bound to the enemy's port, or suspected on just grounds to have a concealed destination of that kind; or that on the side of the neutral the same exact compensation is to be expected which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit of the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to those terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, on which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorised exercises of the rights of war."

As to interlocutory orders dealing with seized cargoes in prize proceedings from early times in this country up to more recent times in the United States of America, numbers of instances will be found of orders for sale before condemnation, and also for delivery to the State of goods not already condemned upon their value being paid into court or secured, in some cases where on the final hearing it was decided that the goods were not confiscable, and in some even before legal proceedings in prize had been commenced.

As it was contended that to give effect to Order XXIX by allowing the State to requisition would be to act in violation of the law of nations, it would appear to be more useful for the purpose of inducing conviction to extract instances from the practice of other countries. Accordingly I will refer to some cases from the United States of America, the courts of which, next, possibly, to our own, have done most for the elucidation and the development of the law of nations applicable to the law of prize. In *The St. Lawrence* and cargo (2 Gall. 19) Story, J. states (at p. 22) that in that case the property was sold under an interlocutory order before final condemnation, and the proceeds were brought into the registry to abide the final decision of the Appellate Court. In *The Avery* and cargo (2 Gall. 308) the same learned judge dealt on appeal with an application by the captors relating to the proceeds of sale of goods made under an interlocutory order pending the proceedings in the court below, whereof restoration was afterwards decreed; and in the course of his judgment (at p. 310) he said: "It is very clear that the terms of this Act (cited) apply only to sales after a final condemnation, and not to sales made *pendente lite* under interlocutory decrees of court. Nor can it be admitted that the intention of the Legislature requires a more enlarged construction. Interlocutory sales are often ordered under a perishable monition and survey, or for other good cause in the discretion of the court."

I will cite a few later instances decided in 1862-3 which arose during the American Civil War. In *The Sarah and Caroline* and cargo (Blatchford, Pr. Cas. 123) a neutral vessel was captured on the ground that she was trying to break a blockade. The cargo was sold before condemnation, as appears from the following

passage in the judgment of Betts, J.: "No appearance having been entered in the suit on due return of the warrant of arrest of the cargo, and the *capture having vested jurisdiction in the Prize Court over the property seized*, it is ordered that an interlocutory order for the sale of the cargo arrested in the cause be made, and that the proceeds thereof be deposited in the cause on the registry of the court, to abide the further order of the court." Another significant case, when the vessel and cargo were delivered over to the public use by order made even before the libel in prize was filed and without notice to any claimant, was the steamer *Memphis* and cargo (Blatchford, Pr. Cas. 202). The vessel was British, and the cargo also belonged to British subjects. The headnote is as follows: "This vessel having been sent into court as a prize, the court, on the application of the District Attorney, before libel filed, and before any appearance by any claimant, and without notice to any claimant, made an order appointing appraisers to value the prize, *with the view to her being taken for the use of the* Government. After the libel was filed the claimant appeared in the suit and moved to vacate the order because it was made without notice to him. Held, the motion could not be granted. Property captured as prize is under the control of the court from the time it is delivered to the court by the Prize Master until it is finally disposed of, and the filing of a libel is not necessary to give the court cognisance of the property." I may observe that the order for appraisement and delivery embraced the cargo as well as the ship. I will cite one passage from the judgment, as it appears to me to be important:—

"The point most strenuously urged by the several counsel was that the Prize Court acquires no cognisance of a prize case except by means of a libel, which causes an arrest, in law, of the property captured and subjects it thereafter to judicial jurisdiction. This, it appears to me, is a manifest misapprehension of the state of the matter under the jurisprudence of the United States. The prize vessel and all her cargo and papers are in the first instance transmitted by the officer making the capture to the charge of the judge of the district to which such prize is ordered to proceed: (2 U.S. Statutes at Large, Act 7). These standing prize rules, fully confirmed by the fiat of Congress 'relative to judicial proceedings upon captured property and the administration of the law of prize' which appeared the 25th March 1862, place the property captured under the control of the court and its officers until the final adjudication and disposal of it by the court. The notion, therefore, that the prerogative powers of the Government can be exercised only directly by the United States in its military capacity, and not at all through the courts, cannot be supported under our laws. Those high functions are legitimately put in force by the instrumentality of the judiciary in obtaining through its agency the active use of the possession of prize property, which first vests in this department. Accordingly an order for the appraisal of captured property and the surrender or transfer of it to Government uses, under precautionary provisions to secure individual interests vesting in it, is palpably a judicial power, to be performed at the instance of the Government, and need not, if indeed it can, be superseded or dispensed with by a direct and summary act of appropriation of the property by the executive authority."

In the case of the steamer *Ella Warley* and cargo (Blatchford, Pr. Cas. 204), the method to be adopted for ascertaining the value of property handed over to the use of the captors was the matter chiefly discussed; but in the judgment Betts, J. dealt with the right of the captors thus: "The prerogative right of the captors to take the property seized to their own use is modified only in subserviency to the modern law of war, that in case a judicial confiscation of it is not secured, the captors are responsible over for its value to the lawful proprietor. That responsibility may be secured to the claimant by bail in court for its worth, or other equivalent protection to such contingent right. The usage of this court is to place the value in deposit in the registry of the court to be restored and paid to the claimant in case of the acquittal of the property in place of relying upon individual undertakings or responsibilities therefor"; and he proceeds (at p. 206): "But all the decisions must rest on the same principle—that it is competent to the Government, through the agency of the courts, to take immediate possession and use of the captured property, on guaranteeing by bail or deposit, at its worth, the restoration of its value to its lawful claimants." At a later stage in dealing with the same vessel and her cargo, the learned judge said: "I retain the conviction that the Government possesses the legal right of claiming a direct appropriation to public use of captured property, and that the courts are bound to carry such demand into execution, according to the usual course of procedure before it: (see *The Ella Warley* and cargo, Blatchford, Pr. Cas., at p. 209). The cases of *The Memphis* (*ubi sup.*) and *The Ella Warley* (*ubi sup.*) afterwards came on appeal before Nelson, J., Associate Justice of the Supreme Court of the U.S.A., who was no mean authority upon questions of prize law; and none of the principles enunciated by Betts, J. in that case were disapproved.

Finally, I would refer to the case of the schooner *Stephen Hart* and cargo (Blatchford, Pr. Cas. 387). The case was finally determined on the 10th July 1863. Meantime by interlocutory orders, some made before the libel in prize, and others after proceedings were taken, but all made before final decree, parts of the cargo were delivered to the Navy Department for the use of the United States; other parts to the War Department, the Ordnance Department, and the Sanitary Department of the States; and the schooner herself and the remainder of her cargo were sold by public auction; and all the proceeds of the vessel and her cargo delivered and sold as aforesaid were paid into the registry of the court to await the final determination and decree of the court.

In view of the cases to which reference has now been made, it cannot in my opinion be possible to maintain that the requisition by the State of captured property which is provided for by Order XXIX of the Prize Court Rules is a violation of an acknowledged or settled principle or rule of the law of nations. If the view just expressed is correct, it is not necessary to discuss the question whether this court is bound to obey an Order in Council which may run contrary to the acknow-

ledged law of nations. If that question should arise, I am humbly and fully content to assume the standpoint of Lord Stowell in the case of *The Fox* (*ubi sup.*), in which he had to deal with the Orders in Council which were made by way of reprisal after the celebrated Berlin and Milan decrees of Napoleon. He expressed his view of the duty of the Prize Court, with reference to the law of nations, and to Orders in Council by the State in and under which the court exercised jurisdiction, in the following classical passages:—

"In the course of the discussion a question has been started, what would be the duty of the court under Orders in Council that were repugnant to the law of nations? It has been contended on one side, that the court would at all events be bound to enforce the Orders in Council; on the other, that the court would be bound to apply the rule of the law of nations adapted to the particular case, in disregard of the Orders in Council. I have not observed, however, that these Orders in Council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract. And, therefore, it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes upon me that I observe that this court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its Government. This is what other countries have a right to demand for their subjects and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilised States. At the same time it is strictly true, that by the constitution of this country, the King in Council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this court. These two propositions, that the court is bound to administer the law of nations, and that it is bound to enforce the King's Orders in Council, are not at all inconsistent with each other; because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the court itself; or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

"The constitution of this court, relatively to the legislative power of the King in Council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. Those courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written and statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the courts could extract from mere general speculations. What would be the duty of the individuals who preside in these courts if required to enforce an Act of Parliament which contradicted those principles, is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition that any such will arise. In like manner, this court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observations and experience attest the general conformity of such orders and instructions to the principles of unwritten law. In the particular case of the orders and instructions which give rise to the present question, the court has not heard it at all maintained in argument that as *retaliatory* orders they are not conformable to such principles—for *retaliatory* orders they *are*. They are so declared in their own language, and in the uniform language of the Government which has established them. I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory from the moment the enemy retracts in a sincere manner those measures of his which they were intended to retaliate."

Judges and jurists have pronounced upon this subject after the judgment of Lord Stowell in *The Fox* (*ubi sup.*) In *Maisonnaire* v. *Keating* (2 Gall. 325), Story, J. expressed his view as follows (at p. 334): "The legality of the conduct of the captors may, under circumstances, exclusively depend upon the ordinances of their own Government. If, for instance, the Sovereign should, by a special order, authorise the capture of a neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt that it would afford a complete justification of the captors in all tribunals of prize. The acts of subjects, lawfully done under the orders of their Sovereign, are not cognisable by foreign courts. If such acts be a violation of neutral rights, the only remedy lies by an appeal to the Sovereign, or by a resort to arms. A capture, therefore, under the Berlin and Milan decrees, or the celebrated Orders in Council, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorised the exercise of all the usual rights of war."

Upon this subject I may again cite the following passage from the judgment of an American judge a generation later: "The general argument against the expediency of subjecting property to peremptory sale before condemnation or trial must yield to the provisions of positive law": (per Best, J. in *The Nassau*, Blatchford, Pr. Cas. 198).

Our text-writers acknowledge the binding force of Orders in Council of the State in which the court exercises jurisdiction. I will only cite the opinion of one of them—the late Dr. Westlake. In dealing with coast fishing vessels he writes: "But if the captures were made in pursuance of a Government order, the Prize Court, in the absence of anything to the contrary in the con-

stitution of the country, will be bound by such an order emanating from the authority under which it sits" (see vol. 2, p. 155); and, in dealing more generally with the subject, this learned and esteemed author writes: "Question of prize have always been matters of the domestic jurisdiction of the captor's country, commonly called the Admiralty jurisdiction from its original form, by whatever name the branch exercising it may be known in any modern system of procedure. It is open to all those of any nationality whose interests may be affected by its decisions, and it is the duty of its judges—a duty in which they have seldom failed in any civilised country—to do justice to them all with strict impartiality. In that sense a Court of Admiralty is an international one, but in that sense only, for the law which it administers cannot help bearing the impress of its own nationality.

"A court must take its law from the authority under which it sits, and for a Court of Admiralty that authority has never been any other than that of its own country. It must apply any rules on international questions which it finds to be generally agreed on—a condition which involves the agreement of its own country with them. Where there is no general agreement, and the supreme authority of its own country has not taken a decided line, the court must take that line which justice appears to it to require, whether favourable or not to a fellow subject being a party before it, or to what it may conceive to be the interest of its country. But where the supreme authority under which it sits has taken a decided line, a Court of Admiralty, like any other court, can only obey. Thus we have seen the English Parliament and Privy Council determining from time to time whether neutral goods in enemy ships should be deemed lawful prize, and the English Admiralty deciding one way in 1357 and the other way two centuries and a half afterwards. When the famous Orders in Council laid down rules as to neutral shipping for the then naval war which were certainly not justifiable otherwise than by way of retorsion against the Berlin and Milan decrees, the British Admiralty did not and could not presume either to refuse execution to the orders, or to exercise an independent judgment as to their justification" (vol. 2, pp. 317, 318).

I am not called upon to declare what this court would, or ought to, do in an extreme case if an Order in Council directed something to be done which was clearly repugnant to and subversive of an acknowledged principle of the law of nations. I make bold to express the hope and belief that the nations of the world need not be apprehensive that Orders in Council will emanate from the Government of this country in such violation of the acknowledged law of nations that it is conceivable that our prize tribunals, holding the law of nations in reverence, would feel called upon to disregard and refuse obedience to the provisions of such orders.

For the reasons, historical and other, which I have endeavoured to set forth, I am of opinion that nothing contained in the provisions of Order XXIX of the Prize Court Rules is repugnant to international law, and that the powers intrusted to, and to be exercised by, the court under the order are in accordance with the inherent powers of the court itself and are well within the rights of the Crown under the statutory provisions referred to, no less than under its prerogative authority.

I therefore order the copper to be delivered up to the Crown as prayed by the summons.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche.*

July 5 *and* 15, 1915.

(Before Sir S. T. EVANS, President.)

THE SOUTHFIELD. (*a*)

Prize—British ship—Goods shipped at foreign port—Shipment prior to outbreak of war—Goods consigned to enemy subject at enemy port—Goods in transitu—*Sale by enemy subject to neutral—Sale completed before outbreak of war—Imminence of war—Contemplation of war—Validity of sale*—Bona fides—*Right of capture of goods.*

Where upon the facts of the case it appears that goods consigned to an enemy subject at an enemy port, and shipped before the outbreak of hostilities, are sold bonâ fide *to a neutral purchaser during the period of their transit, neither the vendor nor the purchaser having the war itself in contemplation, the transaction of sale is complete and the goods are not subject to capture at sea by the armed vessels of the country which is at war with the vendor's country.*

IN this case the Crown claimed the condemnation of two consignments of barley on board the British steamship *Southfield.* The vessel sailed from a Russian Black Sea port in the month of July 1914, and the barley on board was the property of German merchants, on whose account it was consigned to a German port. Whilst the vessel was on its voyage the barley was sold, in two parts, to neutral subjects. The vessel was captured and brought into a British port, and the barley was subsequently sold. The neutrals claimed to be entitled to the proceeds of the sale.

Maurice Hill, K.C. and *Balloch* for the Crown.

H. C. S. Dumas for the claimants.

The facts and the arguments are sufficiently set out in the judgment.

Cur. adv. vult.

July 15. — The PRESIDENT. — The question which arises for decision in the case of each of the two consignments of barley depends upon the effect of the intervention of a state of war upon the rights of capture of a belligerent in respect of goods sold by an enemy subject to a neutral whilst the goods and the ship in which they are laden are *in transitu.*

The goods consisted of quantities of barley shipped before the outbreak of war at a Russian port in the British steamship *Southfield.* The barley was the property of German subjects, and it was consigned to a German port. During the voyage from Russia to Germany the barley was sold in two different lots to two Dutch merchants, Henkers and Berghoorn, both carrying on business at Groningen, in Holland. The transactions connected with the sale to the former took place

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

between the 20th and the 28th July 1914, whilst those connected with the sale to the latter took place during the last week of July of last year. Apart from any question depending upon the intervention of a state of war, there is no dispute whatever that the property in the goods had passed to the neutral purchasers prior to the date of the capture of the vessel—namely, the 8th Aug.

On the part of the Crown it is contended that when war broke out between Great Britain and Germany, on the 4th Aug. 1914, the goods which were still *in transitu* became subject to confiscation by the Crown, and were still confiscable at the date of the capture, in spite of the prior sale to neutral subjects. The claim of the Crown is based upon the ground that at the time when the sales were carried out war was imminent between Great Britain and Germany, or that it was in the contemplation of the enemy vendors. It is, therefore, important to examine very closely and carefully the principle which governs the right of capture of goods when they have been transferred *in transitu*, and to ascertain its limits accurately, because of the loose manner in which it is sometimes stated.

In order to deduce the rule, it will be sufficient, I think, for me to refer to two leading cases, and to a statement contained in an authoritative textbook. I shall take them in order of date. First, in the case of *The Vrow Margaretha* (Roscoe's English Prize Cases, vol. 1, 149; 1 Ch. Rob. 338), Lord Stowell in the course of his judgment refers to the subject as follows: "In the ordinary course of things in time of peace—for it is not to be denied that such a contract may be made, and effectually made (according to the usage of merchants)—such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery. This arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in an enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*, and in that sense I recognise it as the rule of this court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace."

Secondly, in the work of Story, J. on the Principles and Practice of Prize Courts, that celebrated jurist states the rule in the following passage (Pratt's Story, pp. 64-65): "In respect of the proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered; it is a general rule that, during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*. This rule equally applies to ships and cargoes; and it is so inflexible that it is not relaxed, even in owners who become subjects by capitulation after the shipment and before the capture. But if the ship sails before hostilities, when there is a decided state of amity between the two countries, and before the capture the owner again becomes a friend, and at the time of the capture, and also at the time of adjudication, he is in a capacity to claim, the Prize Courts will then give him the benefit of the principle, that the national character cannot be altered *in transitu*, and will restore to him. The same distinction is applied to purchases made by neutrals of property *in transitu*, if purchased during a state of war, existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery. It is otherwise, however, if a contract be made during a state of peace, and without contemplation of war; for, under such circumstances, the Prize Courts will recognise the contract and enforce the title acquired under it. And property is still considered *in transitu*, if it be ultimately destined to the hostile country, notwithstanding it has arrived at a neutral port, and the ship is there changed. The reason why Courts of Admiralty have established this rule as to transfers *in transitu* during a state of war, or expected war, is asserted to be that if such a rule did not exist all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect."

The last of the authorities which I shall quote is *The Baltica* (Roscoe, vol. 2, 628; 11 Moo. P. C. 141). In the judgment of the Lords of the Privy Council sitting to hear appeals in prize, Lord Kingsdown (then Mr. Pemberton Leigh) deals with the rule as applicable to ships and goods in the following passages: "The general rule is open to no doubt. A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee is good also against a captor if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents, which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*. With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize Courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Story, J. in his Notes on the Principles and Practice of Prize Courts, a work which has been selected by the British Government for the use of its naval officers as the best code of

instruction in the prize law. The passages referred to are to be found in pp. 63-64 of that work. . . . In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is that the ship and goods, having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers until the voyage is at an end. The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are as likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great that the courts have laid down as a general rule that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner."

It might be argued that, according to these authorities, transfers *in transitu* are invalid against belligerent captors upon the intervention of a state of war unless there is an actual delivery before capture; or, in other words, that if a state of war has intervened no transfer by documents alone can defeat the right of capture. But, in my opinion, that proposition is much too wide, and is not an accurate delimitation of the true rule.

In the passages cited, Lord Stowell speaks of "a state of war existing or imminent"; Story, J. of "a state of peace, without contemplation of war," and of "a state of war, existing or imminent, and impending danger of war"; and Lord Kingsdown of "war, either actual or imminent," of "war unexpectedly breaking out" (contrasting it with "a time of peace, without prospect of war"), and of "transactions during war, or in contemplation of war." It is important to note the reasons for the rule, which are elaborated by Lord Kingsdown in the latter part of the portion of his judgment which I have quoted.

In my view, the element that the vendor contemplates war, and has the design of making the transfer in order to secure himself and to attempt to defeat the rights of belligerent captors, is necessarily involved in the rule which invalidates such transfers. Sales of goods upon ships which are afloat are now of such common occurrence in commerce that it would be too harsh a rule to treat such transfers as invalid, unless such an element actually exists at the time of the transfer.

I have been considering the rule so far as it applies to the sale or transfer of goods; but it is as well to note that special and highly artificial rules as to the transfer of vessels during or preceding a state of war are now laid down in the Declaration of London of 1908, as agreed to by the representatives of the Powers, and as applied by the Orders in Council in this country. But these rules have no application to goods or merchandise.

As to the facts connected with these two cases of sale, it is abundantly clear that the neutral purchasers acted with complete *bona fides* throughout the respective transactions. They paid for the goods, and re-sold them to neutral customers of their own before war was declared, and I am satisfied that whilst the negotiations were proceeding they never contemplated the outbreak of hostilities between this country and Germany. This would not necessarily conclude the matter. But I am also satisfied that the vendors did not have the war between Germany and this country (to which the ship carrying the goods belonged) in contemplation when they sold the goods. They acted in good faith just as much as the purchasers did. The imminence of war between Germany and Russia has no materiality in considering these cases.

In the light of after events, the war between this country and Germany may be spoken of as having been imminent, regarded from the point of view of time, in the last two weeks of July; but there is no evidence that it was regarded as imminent in its proper meaning of "threatening or about to occur" by them at that time; not only so, but I find, after investigation in various directions, and on grounds which I deem satisfactory, that it was not in fact so regarded by them. What the hidden anticipation of the Government of the German Empire may have been upon the subject it is not for me to speculate; but I may express my humble opinion that our intervention in the war upon the invasion of Belgium in defence of treaty obligations against the breach of such obligations by the invaders was a complete surprise even to their own Government.

On the grounds that the German vendors had no thought of the imminence of war between Germany and this country, and did not have such a war in contemplation at any time while the transactions of sale were taking place, or before they were completed, I hold that the sales to the two Dutch merchants were valid, and that the goods were not confiscable. I therefore decree the release to them respectively of the net proceeds of the sale of their respective goods which are now in court.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Thomas Cooper* and *Co.*

House of Lords.

May 14, 17, *and June* 14, 1915.

(Before LORD PARKER OF WADDINGTON, and LORD SUMNER, Lord PARMOOR and Lord WRENBURY.)

CENTRAL ARGENTINE RAILWAY LIMITED *v.* MARWOOD. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Demurrage — Strike clause, construction and effect of—Delay.

The appellants chartered the steamer G. to carry a cargo of coal, of which they were the conignees, from B. Dock to V. C. in the Argentine.

By clause 8 *of the charter-party the cargo was to be taken from alongside by the consignees at the port of discharge free of expense and risk to the steamer at the average rate of* 200 *tons per day, weather permitting, Sundays and holidays excepted, provided the steamer could deliver at that rate. If the steamer were longer detained the consignees were to pay demurrage at the rate therein specified, "time to commence when the steamer is ready to unload and written notice given whether in berth or not. In case of strikes, lock-outs, civil commotions or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count unless the steamer is already on demurrage."*

The steamer arrived at V. C. and notice of readiness to discharge was given on the 12*th Jan.*, 1912. *At the date of her arrival there was a strike of engine drivers and stokers at the port, which continued until the* 15*th Feb.*, 1912, *but there was a partial resumption of the work of discharging coal-laden steamers at the port between the* 27*th Jan. and the* 15*th Feb., and during that period there were discharged from the various steamers in the port delayed by the strike* 6269 *tons of coal* = 6¼ *normal days' work, the normal rate of discharge from the four berths in the port being* 1000 *tons per day. The G. did not get into berth till the* 1*st March, and completed her discharge on the* 23*rd March.*

Held, that the words "such time" in clause 8 *of the charter-party meant the time for which the discharging was actually prevented or delayed by the strike, and had no application to delay in getting a berth in consequence of a strike having delayed the discharging of other ships; and that the* 6¼ *could be counted by the owner as lay days.*

London and Northern Steamship Company Limited *v.* Central Argentine Railway Limited (12 *Asp. Mar. Law Cas.* 303; 108 *L. T. Rep.* 527) *approved.*

Decision of Court of Appeal affirmed.

APPEAL by the charterers from an order of the Court of Appeal (Lord Reading, C.J. and Lush, J.—Phillimore, L.J., dissentiente), which reversed a judgment of Pickford, J.

The writ in the action was issued on the 5th May, 1913, the plaintiff thereby claiming as managing owner and part owner of the steamship *Goathland* on behalf of himself and co-owners in the vessel the sum of 238*l.* 8*s.* 1*d.* for demurrage of the *Goathland* in discharging a cargo of coal at Villa Constitucion.

No pleadings were delivered in the action, as the parties agreed that the issue should be tried and decided upon a statement of agreed facts which were as follow:

1. The plaintiff is the managing owner and part owner of the steamship *Goathland* and is suing in this action on behalf of himself and his co-owners.

2. The *Goathland* was chartered under a charter-party dated the 11th Nov. 1911 to carry a cargo of coal from Barry Dock to Villa Constitucion.

3. The defendants were the charterers and also the receivers of the cargo carried in the *Goathland*.

4. The *Goathland* carried 4169 tons of cargo on the voyage in question. On a calculation of the time allowed by the charter party the vessel had 20 days 20 hours for discharging, subject to the exceptions specified in the charter-party.

5. The *Goathland* arrived at Villa Constitucion, and notice of readiness to discharge was given at 4.30 p.m. on Friday, the 12th Jan. 1912, and she was then ready to discharge.

6. At the time of the arrival of the *Goathland* at Villa Constitucion there was a strike of railway engine drivers and stokers in existence at the port, which strike began 6th Jan. 1912.

7. The said strike continued until the 15th Feb. 1912 on which day it officially terminated under a Decree o the Government of the Argentine Republic. No work of discharging coal-laden steamers took place in the port from the date of the *Goathland's* arrival until the 27th Jan. 1912, and it is admitted by the plaintiff that the work of discharging coal-laden steamers in the port was impossible during that time owing to the said strike.

8. Between the 27th Jan. 1912 (when there was a partial resumption of the work of discharging) and the 15th Feb. 1912 there were discharged from the various steamers in the port 6269 tons of coal, which is equal to 6¼ normal days' work. This work the defendants were able to do in spite of the strike, but the defendants were prevented by the said strike from discharging any further quantity of coal between the said dates.

9. Under ordinary circumstances the discharge of coal from all steamers in the Port of Villa Constitucion is 1000 tons per day, there being four berths in the port at which discharging can take place and the normal amount discharged being 250 tons for each steamer. The said 6269 tons were all discharged from steamers occupying the said four berths, and the said steamers were all delayed by the said strike and not by any congestion or unusual number of steamers arriving at Villa Constitucion.

10. The *Goathland* did not get into berth until 11.30 a.m. on Friday, 1st March, 1912, and she did not complete her discharge until 10 a.m. of Saturday, the 23rd March 1912.

11. The defendants admit although work was not fully resumed on the 16th Feb. 1912, or for some time thereafter, that the steamer's lay time began to count as and from midnight of the 15th Feb. 1912, and calculating on this basis (excluding Sundays and holidays) they admit 30 days and 10 hours as having been occupied up to the time of the discharge of the cargo and they admit and have paid to the plaintiff 9 days and 14 hours' demurrage.

12. The dispute between the parties relates solely to the period between the 27th Jan. 1912 and the 15th Feb. 1912, both days inclusive. During this time the *Goathland* was, though ready to discharge, not in berth, and could not be berthed or discharged, because the said four berths were occupied by other steamers which had arrived at Villa Constitucion before the *Goathland*, and which had been delayed in discharging and remained occupying the said four berths by reason of the said strike.

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

13. The plaintiff claims that he is entitled to count 6¼ days during the said period, whilst the defendants contend that he is not entitled to count anything in respect of the said time.

14. Assuming that the plaintiff's contention is correct, then the vessel's discharging time of 20 days 20 hours expired at 2 p.m. of the 6th March 1912, and 16 days 20 hours' demurrage is due, against which the defendants have paid 9 days 14 hours, leaving still due 7 days 6 hours amounting to 238*l.* 8*s.* 1*d.*

15. Assuming that the defendants' contention is correct then the plaintiff has been paid the whole of the demurrage due to him.

The question in dispute turned mainly upon the construction of clause 8 of the charter-party as applied to the agreed facts.

Clause 8 of the charter-party was and is as follows:—

8. The cargo to be taken from alongside by consignees at port of discharge, free of expense, and risk to the steamer, at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of fourpence per net register ton per running day (or *pro rata* for part thereof). Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count, unless the steamer is already on demurrage. Consignees to effect the discharge of the cargo, steamer paying one shilling per ton of 20 cwt., or 1,015 kilos, and providing only steam, steam-winches, winchmen, gins, and falls.

The action was tried before Pickford, J, sitting as judge in the Commercial Court, who decided the question in favour of the defendant company, but on appeal his decision was reversed by the majority of the Court of Appeal.

The defendant company appealed.

Sir *Robert Finlay*, K.C., *D. C. Leck*, K.C., and *A. M. Bremner*, for the appellants.

Adair Roche, K.C. and *Raeburn* for the respondent.

Leck, K.C. in reply.

Lord PARKER OF WADDINGTON. — The first question your Lordships have to determine in this case concerns the construction of clause 8 of the charter party of the 11th Nov. 1911, whereby the appellants chartered the *Goathland* to carry a cargo of coal from Barry Docks to Villa Constitucion, the appellants being themselves the receivers of the cargo at the port of discharge. The eighth clause provides that the cargo is to be taken from alongside by the consignees at the port of discharge free of expense and risk to the steamer at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided the steamer can deliver at this rate. If the steamer be longer detained, the consignees are to pay demurrage at the rate therein specified. Time is to commence when the steamer is ready to unload and written notice given, whether in berth or not. Then came the words, "in case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count unless the steamer is already on demurrage." This clause cannot be said to be happily framed. There is no antecedent to which "such time" can be referred so as to give any reasonable meaning to the words. It appears to me therefore, that "such time" must mean either (1) the time during which any of the matters enumerated is operating to prevent or delay the discharge of the steamer, or (2) the time for which the discharging is actually prevented or delayed. The appellants contend that the former construction is the true one. Scrutton, J. decided in an action of *London and Northern Steamship Company Limited* v. *Central Argentine Railway Limited* (12 Asp. Mar. Law Cas. 303; 108 L. T. Rep. 527) in favour of the latter construction, and the Court of Appeal have adopted the same view. In my opinion the Court of Appeal were right. If the former construction were adopted, it might lead to anomalous results. Suppose, for example, that, notwithstanding a delay caused by a strike, the consignees succeeded in discharging 90 per cent. of the cargo. In such a case the lay days could not have commenced to run at all, and the consignees would have the whole of them to discharge the remaining 10 per cent. of the cargo, and might be as dilatory as they chose during this period. The latter construction is open to no such criticism. According to it, only the time lost would be excluded from the computation of the lay days, a perfectly reasonable arrangement, fair to both parties. A charter party is a business document and must be construed, at any rate where its terms are ambiguous, with some regard to business principles. It cannot, I think, be inferred from the second clause of the charter party, where the expression "the time lost" is actually used, that the parties must have meant something different by "such time," as used in clause 8. A charter party is not generally prepared with meticulous attention to consistency in the use of language. It may well embody clauses taken from a variety of precedents, and found by experience to be sufficient for working purposes.

The second question for decision arises in the following manner. The *Goathland* arrived at its port of destination on the 12th Jan. 1912, and on the same day at 4.30 p.m. gave notice that she was ready to discharge. At this time there was a strike of railway engine-drivers and stokers in existence at the port, and between the 12th Jan. and the 27th Jan. 1912, no work of discharging coal-laden steamers took place, such work being rendered impossible by reason of the strike. The respondent admits that the whole of this period is excluded by virtue of clause 8 in the computation of the lay days. On the 27th Jan. work at the port was partially resumed, and between that date and the 15th Feb. 1912, when the strike ended, 6,269 tons of coal were discharged from four steamers which had arrived in the port prior to the *Goathland*, and occupied the only available berths. The normal discharging capacity of the port is 1000 tons a day, 250 tons per vessel; the 6269 tons discharged between the 27th Jan. and the 15th Feb. represent, therefore, 6¼ normal days working. It follows that the delay due to the strike during this latter period is the difference between the whole period and 6¼ days. The respondent admits that this difference ought to be excluded by virtue of clause 8 in computing the lay days. The appellant contends that the 6¼ days ought similarly to be excluded. This is the only dispute between the parties.

The appellant bases this contention on the following reasoning. It is admitted, he says, that

the *Goathland* could not get a berth because all the berths were occupied by the other four vessels. It is further admitted that between the 27th Jan. and the 15th Feb. 1912 these vessels had been delayed in discharging and remained occupying the four berths because of the strike. Therefore it was because of the strike that the *Goathland* could not get to berth.

If your Lordships be of opinion that the construction of clause 8 for which the appellants contended is the true construction, this reasoning is obviously correct. But if "such time" in clause 8 means the time lost by reason of the strike, the reasoning is, in my opinion, fallacious. On this construction the only question is whether the 6¼ days is time lost by reason of the strike, and to state that the question in this way is, in fact, to answer it. The 6¼ days represent, in fact, time gained, notwithstanding the strike, during every moment of which the difficulty in the way of the berthing of the *Goathland* was being removed. It appears to me that the appellants, having already had all the benefit to which they are entitled under clause 8 by the exclusion in the computation of the lay days of all time lost by reason of the strike, are endeavouring, to the extent of 6¼ days, to secure that benefit a second time, and that the syllogism on which they base their contention pays less regard to the substance of the matter than to the verbal expressions contained in the agreed statement of facts. It must be remembered that according to the express terms of the charter party the lay days commence to run whether the vessel is or is not berthed. It follows, that the mere fact of the four available berths being already occupied when the vessel arrives is no reason for excluding any period of time from the computation of the lay days. Any hardship on the charterers in this respect is probably intended to be obviated by the fact that the lay days are calculated with reference to an average discharge of 200 tons per day only, though the normal rate of discharge at the port is 250 tons a day. The period of delay due to the occupancy of the four berths would in any case be counted in reckoning the lay days, and there is nothing in the statement of facts to show that this period was increased by reason of the strike beyond the period which the respondent has already allowed between the 12th Jan. and the 15th Feb. We are not told when the four vessels respectively went into berth or what was the tonnage of their respective cargoes.

In my opinion therefore the appeal should be dismissed with costs, and I move accordingly.

Lord SUMNER.—I think that clause 8 of this charter-party was rightly construed in *London and Northern Steamship Company* v. *Central Argentine Railway Limited* (12 Asp. Mar. Law Cas. 303; 108 L. T. Rep. 527). Its effect is thus stated by Pickford, J. in the present case, "for so much time as the discharging is prevented or delayed by the excepted causes, for so much time an allowance is to be made out of the lay-days." Scrutton, J. in the former case and the Court of Appeal in the present one gave illustrations which show how unreasonable the contrary interpretation would be.

The charter party is in a general form adapted to all sorts of vessels. The clause begins by showing how to calculate the number of lay-days to be allowed to the particular ship as her discharging time. Then it states when that time so calculated is to begin; then how and when it may be suspended. In my opinion, "such time" means the discharging time of the ship in question, and it is to be suspended and is not to count in case of strikes preventing or delaying the discharging of the ship. Sundays and holidays, which, as such, are not to count in the computation of lay-days, are separately excepted. Strike time is only excepted when the strike delays the ship in question, not when it simply occurs or even simply delays other ships.

The suggestion was made that the parties meant to suspend discharging time in the bare event of a strike operating upon the discharge of shipping generally, because in some ports the actual effect of strikes on a particular ship is so uncertain as to be unascertainable, at any rate with precision. If so, the clause involves the ship's unconditional surrender to the charterer, merely in order to avoid putting him to the expense of proving his right to come within the exemption, a stretch of complaisance that I think improbable.

I do not construe the agreed statement of facts as warranting the inference drawn at the trial, that "had it not been for the strike the four steamers would have been discharged and the berths would have been free, and therefore the *Goathland* would have been discharged in ordinary course." I think that the statement is consistent and is meant to be consistent with the arrival of some or all of these vessels so short a time before the *Goathland's* arrival, that considerable delay, or even delay as long as that now in question, might have happened to her in ordinary course.

Be this as it may, I do not think the charterers can succeed. It is to be remembered that when notice of readiness has been given, the ship being then ready to unload, the shipowner's part is done and the risk of delay, including the risk of want of a berth, falls on the charterer, subject to his right to bring himself within the strike clause in question, if he can. The words are express, "whether in berth or not." I think the words "which prevents or delays the discharging" mean strikes which in themselves prevent or delay the discharging of the chartered ship herself, and do not extend to the case of strikes which only prevent the chartered ship from getting into a berth because they prevent some other ship from getting out of that berth. Further, the *Goathland* was not delayed by the fact that partial discharging went on during the 75 hours in question, but by the total absence of any discharging during the earlier days. The fact that more work was not done during the 75 hours, may, in a sense, have delayed her, though even so, not for the 75 hours, but in truth the work actually done during that time advanced instead of delaying her discharging, because *pro tanto* it brought her nearer to the point at which she could berth and begin her discharge.

I am of opinion that the appeal should be dismissed with costs.

Lord PARMOOR.—The appellants chartered the steamship *Goathland* to carry a cargo of coal, of which they were the consignees, from Barry Dock to Villa Constitucion. The respondent, as managing owner and part owner of the

said steamship, brought an action against the appellants for the sum of 238*l.* 8*s.* 1*d.* for demurrage. The *Goathland* arrived at Villa Constitucion and notice of readiness to discharge was given on the 12th Jan. 1912, and she was then ready to discharge. When the *Goathland* arrived at Villa Constitucion, there was a strike of railway engine-drivers and stokers, which had begun on 6th Jan. and continued until the 15th Feb. Between the 27th Jan., when there was a partial resumption of the work of discharging, and the 15th Feb., there were discharged from the various steamers in the port 6,269 tons of coal, which is equal to 6¼ normal days' work. The *Goathland* did not get into berth until Friday, the 1st March, and did not complete her discharge until Saturday, 23rd March. The dispute between the parties relates solely to the period between the 27th Jan. and the 15th Feb. The respondent claims that he is entitled to count 6¼ days during the said period, while the appellants contend that the respondent is not entitled to count any days during this period.

The case depends upon the construction of clause 8 of the charter-party. Under this clause the appellants undertook to discharge at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver at this rate. The time commences when the steamer is ready to unload and written notice given, whether in berth or not, so that the risk of finding a vacant berth was on the appellants.

The important words of the clause are as follows: "In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count, unless the steamer is already on demurrage." It was argued on behalf of the appellants that so long as the strike continued the time did not count, and that since the strike did not terminate until the 15th Feb., the respondent is not entitled to count any days or parts of days between that date and the 27th Jan. I do not think that this is the natural meaning of the words used. Such time means time wasted, either by prevention or delay, in discharging a steamer from strike, lock-out, civil commotion, or any other cause or accident beyond the control of the consignees, and in this respect I agree with the contention of the respondent and the judgment in the Court of Appeal. It necessarily follows that the 6¼ days not wasted during the period between the 27th Jan. and the 15th Feb. should be counted in the discharging time.

One of the effects of the strike was that the *Goathland* could not be berthed because the four berths at Villa Constitucion were occupied by other steamers which had arrived before the *Goathland*. These steamers had been delayed in discharging, and remained occupying the four berths by reason of the strike. In my opinion the occupation of the four berths makes no difference. There was an obligation upon the appellants to discharge whether or not there were vacant berths, so soon as the *Goathland* was ready to unload, and written notice had been given.

In my opinion, the appeal fails.

Lord WRENBURY.—On the question of construction, I am of opinion that the words "such time" mean the time for which the strike prevents or delays the discharging. The time which has commenced is not to count as running during the period over which discharge is prevented or delayed by a strike. The English is not good, but the meaning, I think, is plain.

I learn from the agreed statement of facts that during the period from the 27th Jan. to the 15th Feb. the *Goathland* could not be berthed or discharged, because the four berths were occupied by other steamers, and that those steamers remained occupying the berths by reason of the strike. These statements may be compressed into the single statement that the *Goathland* failed to get a berth by reason of the strike. But under the charter time is to commence when steamer is ready to unload and notice given whether in berth or not. The charterer took the risk of being unable to get a berth. The *Goathland* was prevented from discharging, not by the strike, but by a consequence of the strike, namely, that the berths were occupied by other vessels longer than they otherwise would have been. From the 12th Jan. to the 27th Jan. she was also unable to get a berth. She has, however, rightly or wrongly, been allowed this time, because there was a strike. She is really seeking to be allowed this time over again. There is nothing to show that if there had been no strike she would have been able to get a berth at once upon arrival on the 12th Jan. Neither is there anything to show that if the four ships had arrived just before her, say, on the 11th Jan., they would have discharged and left the berths free in time to allow her to escape demurrage. There are not, I think, facts to support the charterer's contention.

I think the appeal fails, and must be dismissed.

Order accordingly.

Solicitors for the appellants, *Norton, Rose, Barrington* and *Co.*

Solicitors for the respondent, *Botterell* and *Roche.*

May 10 *and June* 21, 1915.

(Before Lords DUNEDIN, ATKINSON, PARKER, SUMNER and PARMOOR).

PORT OF LONDON AUTHORITY *v* BRITISH OIL AND CAKE MILLS LIMITED. (*a*)

APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Port — London—Port rates — Exemption—Goods imported for transhipment only — Goods imported for conveyance by sea to any other port coastwise—Transhipment of goods in Port of London for Rochester—Port of London Act 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London* (*Port Rates on Goods*) *Provisional Order Act* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *schedule, s.* 9.

By sect. 13, *sub-sect.* 1, *of the Port of London Act* 1908: "*All goods imported from ports beyond the sea or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port*" *shall be liable to port rates.*

By sect. 13, *sub-sect.* 5: "*For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported*

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point."

By sect. 9 of the Provisional Order confirmed by the Port of London (Port Rates on Goods) Provisional Order Act 1910: *"No port rates shall be charged by the Authority on transhipment of goods, which expression wherever used in this order means and includes goods imported for transhipment only" and "for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, whether beyond the seas or coastwise."*

Goods were imported from beyond the seas into the Port of London for transhipment only, and were duly certified by the owners as being for transhipment. They were conveyed by a sailing barge down the Thames to Rochester on the Medway.

Held, that the goods were exempted from port rates as they were goods imported for transhipment only within sect. 9 of the Provisional Order.

Decision of Court of Appeal (12 *Asp. Mar. Law Cas.* 548; 111 *L. T. Rep.* 1019; (1914) 3 *K. B.* 1201) *affirmed.*

DEFENDANTS' APPEAL from an order of the majority of the Court of Appeal (Buckley, L J. *dissentiente*), 12 Asp. Mar Law Cas. 548; 111 L. T. Rep. 1019; (1914) 3 K. B. 1201, which affirmed a judgment of Pickford, J., 12 Asp. Mar. Law Cas. 417; 109 L. T. Rep. 859; (1914) 1 K. B. 5, who tried the case as a commercial cause without a jury.

The plaintiff's claim was for 1*l.* 13*s.* 4*d.* as money paid to the defendants under duress to obtain the release of 100 tons of linseed, the amount in question being claimed as port dues. They claimed a declaration that the levying of such port dues was illegal. The question arose on the following facts: The steamship *Assyria* arrived from Calcutta at the Victoria Docks on the 12th June, 1912. She discharged 100 tons of linseed consigned to the plaintiffs by putting them overside into a sailing barge which took them to Rochester, on the Medway, The Port Authority claimed 1*l.* 13*s.* 4*d.* rates on these goods, on the ground that the Port of Rochester was inside the Reculvers line. The plaintiffs paid the rates under protest and brought the action claiming the return of the money and a declaration as above stated.

Pickford, J. decided against the defendants.

Upjohn, K.C., *George Wallace*, K.C., and *A. F. Wootten* for the appellants.

Ernest Pollock, K.C., *G. J. Talbot*, K.C., and *Morton Smith* for the respondents.

At the hearing of the appeal counsel for the appellants were alone heard.

The House, having taken time for consideration, dismissed the appeal.

Lord ATKINSON.—This is an appeal from an Order of the Court of Appeal, dated the 18th July 1914, upholding the judgment of Pickford, J. (as he then was) pronounced by him in the Commercial Court on the 17th Oct., 1913, in favour of the respondents in an action brought by the latter against the former to recover the sum of 1*l.* 13*s.* 4*d*, money paid under protest for foreign inwards port rates on 100 tons of linseed at 4*d* per ton.

The facts are undisputed. A ship named the *Assyria* arrived from Calcutta in the Victoria Docks, in the Port of London, on the 12th June, to be there discharged. She had on board 100 tons of linseed consigned to the respondents, who carry on their business at Rochester. This linseed was discharged by putting it over the side of the *Assyria* into a sailing barge. This barge sailed with her cargo down the Thames to the mouth of the river Medway, crossed the imaginary line which marks the northern boundary of the Port of Rochester, proceeded up the river Medway to the place within this port where the goods were delivered to the respondents.

The appellants claimed payment of the above-mentioned rates upon these goods solely on the ground that the Port of Rochester was inside an imaginary line which extends from Colne Point to Reculvers, two points on opposite sides of the river Thames, in argument referred to, for convenience sake, as the Reculvers line. The respondents paid these rates under protest.

It is admitted that this Reculvers line lies considerably to the eastward of the seaward boundary of the Port of London. This latter is an imaginary line drawn from Warden Point on the south side of the Thames to Havengrove Creek on the north. Within the zone between these two imaginary lines lie on the southern shore of the Thames Whitstable and Herne Bay, and to seaward of the Reculvers line on the same shore Westgate and Margate, so that according to the right claimed by the appellants at the time they exacted these rates they could not have exacted them at all if the sailing barge had been bound for Westgate or Margate, though to arrive at either of these destinations she should have traversed more of the waters of the Port of London than if she had gone to Rochester, and would in addition have traversed the waters within the zone, and the waters seaward of the Reculvers line, the accommodation received in the Victoria Docks being in each case precisely the same.

It is further admitted that if the *Assyria* had sailed direct from Calcutta through part of the waters of the Port of London into the Port of Rochester none of these rates could have been exacted. Nay, more; it is also admitted that according to the right claimed, if the *Assyria* had unloaded in the Victoria Docks all the cargo she carried, except this linseed, she could have delivered it at Rochester, Whitstable, or Ramsgate free of this rate.

These appear to me to be grotesque results, without any principle of reason or common sense to support them.

The question for the decision of this House then really is whether the construction of the Port of London Act 1908 and the Port of London (Port Rates on Goods) Provisional Order Act 1910, contended for by the appellants, from which these results necessarily follow, or the construction of them adopted by the Court of Appeal from which these results do not follow, is their true construction. The material portions to be considered of the two statutes are the thirteenth section of the first and the ninth section of the second.

First as to sub-sect. 1 of sect. 3: This section has been styled. in argument, a charging enactment. It might much more correctly be styled

an empowering enactment. It enables the Port Authority, subject to the provisions of the section, to impose certain rates on all goods imported from parts beyond the seas or coastwise into the Port of London, or exported to parts beyond the seas or coastwise from that port. The class of goods which is liable to the rate exacted in this case is thus defined or ascertained.

The section further provides for exemptions, or rebates being made either by Provisional Order or by the Local Authority, and enacts that the port rates charged by the Local Authority shall be charged equally to all persons in respect of the same description of goods under the like circumstance.

Now, it is quite clear that goods merely carried from one part of the Port of London to another part of the Port of London are not, as to that particular voyage, either imported into the Port of London or exported from the Port of London.

By proviso (*b*) of this section, it is enacted that the Provisional Order dealing with exemptions shall provide for exempting two classes of goods, namely, (1) goods imported for transhipment, (2) goods which remain on board the ship in which they were imported for conveyance therein to another port. These latter may, for convenience, be styled undisturbed goods. Stopping there for the moment, it will be observed that these undisturbed goods are to be exempted, to whatever port they may ultimately be conveyed. The words are simply "another port." No matter how long the ship may lie in the docks, or what portions of the waters of the Port of London it may traverse, these goods apparently escape, but not more completely, as far as this portion of proviso (*b*) is concerned, than do goods imported for transhipment only.

Proviso (*b*) is equally imperative as to the exemption of each. Both classes are placed on an absolute equality. The last clause of proviso (*b*), however, enacts that the Provisional Order may determine what goods are to be treated as goods imported for "transhipment only" for the purposes of exemption.

By sect. 9 of the Provisional Order of 1910 it is proposed to put in force the powers indicated in this clause. It provides that no port rate shall be charged upon "transhipment goods." That is its first provision, and as subordinate to this it then enacts that the expression "transhipment goods" shall, in the Order, mean and include goods imported for transhipment only, and also the goods which I have styled "undisturbed goods." The equality of treatment of the two classes of goods, made imperative by proviso (*b*), is thus preserved.

But now comes the provision contained in the same section which, according to the appellants, destroys that equality of treatment altogether—and enables the second class of goods, namely, undisturbed goods, though still "transhipment goods," to escape, if they be carried out by the Port of London to any port whatever, while the other kind of "transhipment goods" are not to escape unless they be carried to a port beyond the Reculvers line. The words relied upon to establish this strange and, apparently, senseless anomaly are contained in the definition in section 9 of the phrase, "goods imported for transhipment only." The definition runs thus: "For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to another port."

If the definition had stopped there the equality of treatment of the transhipped goods and the goods left undisturbed would, subject to the point as to the meaning of the word "sea," have been preserved. But other words are added to the definition upon which the whole argument turned. These words are, "Whether beyond the seas or coastwise." The effect, it is urged, of these added words is that while undisturbed goods may be conveyed to any port without being rateable, transhipped goods will be rateable unless carried to a port beyond the Reculvers line. This definition is only given for the purposes of sect. 9. That is stated expressly, but the primary purpose of the section is stated in its first clause, to be to exempt equally from these rates all "transhipment goods," including in that term both undisturbed goods and transhipped goods properly so called.

The words, beyond the seas or coastwise, are here used to denote the situation of the port which is the ultimate destination of the goods, and just as the undisturbed goods which must be carried by water to their destination, inasmuch as they are to be carried in the ship in which they were brought to London, so must the transhipped goods be conveyed by sea only, as contradistinct from being conveyed for any part of the transit by land. It was urged indeed that the goods in this case were not carried by "sea only," since they were carried over the waters of the Thames, within the Port of London, and that the Thames, though a tidal and navigable river for many miles above the Victoria Docks, is still a river and not a sea.

It is but fair, I think, to the Port Authority to say that they never put forward this point when they levied their rate. If it were a good point, then goods transhipped in the Port of London and carried to Edinburgh, Hull, Liverpool, or Calcutta, would not have been carried by "sea only," since part of the voyage would necessarily have been over the waters of a river, and the whole object of the statute introduced for the very purpose of exempting goods transhipped in the Port of London and carried out of it in ships would be defeated. In my view it is a plainly bad point.

The main argument was rested, however, on the words, "another port whether beyond the seas or coastwise." It was urged that by sect. 3 of the Provisional Order it is provided that expressions defined in the Port of London Act 1908 shall, unless the context otherwise requires, have the same meaning in this Order; that sect. 13, sub-sect. 5, contains a definition of the word "coastwise," and that that word must therefore bear the meaning thus given to it wherever it occurs.

The words of sect. 13, sub-sect. 5, run thus: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point."

These words are used in this thirteenth section for the purpose of indicating the places from which goods must be imported into the Port of London, or to which they must be exported from the Port of London in order to become goods liable to rates.

But the purpose of sect. 9 is wholly different. Its purpose and object is to determine what goods, in order to be exempted from rates, are to be treated as "goods imported for transhipment only." The words, "Goods imported from beyond the seas or coastwise," where they first occur in section 9 are really otiose, because the whole section purports to deal with goods which but for the exemption would have been rateable, yet no imported goods are rateable which are not imported into the Port of London from "beyond the seas or coastwise." So that these words are merely used to indicate that the goods imported for transhipment belong *primâ facie* to the class of rateable goods. And, of course, the words must for that purpose have the same meaning as they have in sect. 13, but where the words "beyond the sea or coastwise," are subsequently used in the section merely to indicate the ultimate destination of the goods after transhipment if they are to escape rateability, it by no means follows that the words are to bear the same meaning in this part of the section as they bear in the portion in which they first appear. In my view they are simply used in the second portion as equivalent to the word, "anywhere."

That construction restores and establishes on a sure basis that equality of treatment between goods "transhipped" and goods "undisturbed" which it is plainly the object of both Acts to secure. As the latter may be taken to "any port," wherever situate, so may the former.

Sect. 43 of the Act of 1908 has no application whatever to the case of undisturbed goods brought from the Port of London to any other port, and in no way explains what is the particular vice in a barge into which goods have been transhipped and brought to Rochester, which makes those goods liable to these rates, which they would not have been liable to at all if they had been carried to Rochester in the ship which brought them into London.

I am, therefore, of opinion that the judgment appealed from was right, and should be affirmed, and this appeal be dismissed with costs. I beg to move accordingly.

[Lord Atkinson then read the judgment of Lord Dunedin.]

Lord DUNEDIN.—In this case I began to prepare a judgment in accordance with the view which I held at the conclusion of the argument, but in doing so, and on carefully re-reading the judgment of Kennedy, L.J., in the court below, I came to the conclusion that that learned and lamented judge had so exactly expressed the arguments that weighed with me that I should really be guilty of plagiarism if I repeated what he had already said. I shall therefore only say that I agree with his judgment *in toto*.

Lord PARKER of WADDINGTON.—I agree that this appeal fails. The question to be determined arises on the construction of sect. 13 of the Port of London Act 1908 and the Provisional Order of the Board of Trade, made thereunder, and confirmed by the Port of London (Port Rates on Goods) Provisional Order Act 1910. The thirteenth section of the Act of 1908 provides, subsect. 1, that all goods imported from parts beyond the seas or coastwise into the Port of London, or exported to parts beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates to be contained in a Provisional Order to be made under this section, be liable to the port rates therein mentioned: Provided (*b*) that the Provisional Order under the section shall provide for exempting from such rates goods imported for transhipment only or which remain on board the ships in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only.

The expression "imported or exported coastwise" is obviously here used in contradistinction to the expression "imported or exported from or to parts beyond the seas." Goods imported or exported from or to Newcastle would clearly be imported or exported coastwise, notwithstanding that the first part and the last part of their transit would be up or down tidal and navigable rivers. I think, therefore, that the term "coastwise" must include transit by tidal and navigable rivers as well as transit along the sea coast, and this is confirmed by sub-sect. 5, which provides that for the purpose of the section goods shall not be treated as having been imported or exported coastwise unless imported from or to a place seaward or what his been called "the Reculvers-Colne line." This provision is not a definition clause as to the meaning of the word coastwise, but a clause withdrawing from the operation of the section a particular class of goods which would otherwise be subject to such operation.

Passing to the Provisional Order, your Lordships will find the Board of Trade, pursuant to the duty imposed on them by sect. 13 (1) (*b*) of the Act of 1908, provided (clause 9) that no port rates should be charged on transhipment goods, which expression was to include as well goods imported for transhipment only as goods remaining on board the vessel in which they were imported for conveyance therein to another port. The clause then proceeds to provide that the expression "goods imported for transhipment only" shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, whether beyond the seas or coastwise, as to which certain things therein mentioned are specified and proved. Here it seems to me that the expression "goods imported from beyond the seas or coastwise" has the same meaning as in sub-sect. 1 of the thirteenth section of the Act of 1908, but clause 9 contains no provision such as that contained in sub-sect. 5 of sect. 13, limiting the application of the clause to a particular class or particular classes of such goods. It would, I think, be contrary to all proper principles of construction to import such a clause by inference. I do not think that the words, "for the purpose of this section," in sub-sect. 5 of the thirteenth section of the Act of 1908 can be read as including all the purposes of the Provisional Order to be made by the Board of Trade under the thirteenth section. So to read it would, in my opinion, be to limit unduly the powers conferred on the Board of Trade, and, in fact, preclude such Board from exempting from port dues any goods imported for transhipment only where the transhipment is for the purpose of conveyance to a place landward of the Reculvers-Colne line. I do not think that this would be in accordance with the Legislature's intention. It would be an anomaly if a vessel coming to the Port of London

with goods destined for places in the Medway had herself to proceed to the Medway in order to obtain exemption for such goods from port rates, although from every point of view it might be more convenient to tranship such goods into lighters for conveyance to their destination.

Some stress was laid in argument on the expression "for the purpose of being conveyed by sea only" as used in the ninth clause. It is to be observed that this expression is used in reference not only to conveyance coastwise, but to conveyance to parts beyond the seas. It appears to me, therefore, that the expression is used in contradistinction to conveyance by land, and would exclude goods put overboard into lighters to be landed and sent by rail to Liverpool for exportation to America, but not goods transhipped for conveyance by water to Newcastle as their ultimate destination, although the first and last part of their transit might be said to be by river rather than by sea.

I think, therefore, the appeal should be dismissed.

Lord SUMNER.—Sect. 13 (1) of the Port of London Act, 1908, charges "all goods imported from parts beyond the seas or coastwise into the Port of London." "Imported" into the port means, in my opinion, brought in by water and not by land, and "coastwise" means from parts not beyond the seas. Sub-sect. 5, pursuant to the initial words of sub-sect. 1, qualifies the by excluding from charge goods coming from landward of the Reculvers Towers-Colne Point line, for it prescribes that they are not to be "treated" as having been "imported coastwise," that is, not to be treated as the subject of charge within sub-sect. 1. There the effect of sub-sect. 5 ends.

The rates to be charged and exemption from all charge are not dealt with by the Act of 1908 at all. They are wholly left to subsequent legislation, none the less that the Board of Trade is required to prepare a Provisional Order, so as to facilitate the passing of a further Act, whenever the Legislature should be minded to do so. For the rates resort must be had to the Schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, clause 9. This contains an exemption of certain goods from charge, namely, goods which are styled "transhipment goods."

These are defined as falling into two classes, which so far appear to be equally entitled to exemption. The first class is further defined by two terms, one dealing with the *provenance* of the goods, the other with their qualification for exemption. The first necessarily imports reference to the charging section of the Act of 1908 the goods is such as to make them subjects and its sub-sections, for unless the *provenance* of charge they need no exemption at all. Accordingly here "coastwise" is used as it is used in sect. 13 of the Act of 1908, reading sub-sects. 1 and 5 together, and so far restricting the area to which the word "coastwise" applies. When the term, which states the qualification of the goods for exemption is reached, we are dealing with new matter—namely, with rates of charge and exemption from charge—which the former Act did not prescribe at all. Hence there is no need here to import any reference to the language of sect. 13 of the Act of 1908, and though the same term "coastwise" recurs it must be read in its ordinary meaning. Indeed, sect. 13 of the Act of 1908 did not, strictly speaking, give that word a special meaning, but by sub-sect. 5 restricted, by an express geographical limitation, the area to which its ordinary meaning would have otherwise applied. In the Act of 1910 that limitation neither recurs nor is involved; accordingly, there is nothing to interfere with the full effect of the ordinary meaning of "coastwise."

Two grounds are urged to the contrary: the first, that the word must be used with the same meaning in both of the two consecutive lines, in which it occurs in clause 9; the second, that it is used in nineteen other places in the schedule and always in the same sense as when it first occurs in clause 9. This latter consideration does not really advance matters. It is used over and over again in that particular sense, because the context is the same over and over again and is one which imports a reference to the incidence of the charge in the first instance. Hence its repeated use in this sense is no weightier than its use in that sense once; but, in my opinion, there is no difference in the sense of the word itself between its first and its second occurrence in clause 9. The real difference is that when allusion is made to the charge, the context of the charging words given to sect. 13, sub-sect. 1, by sub-sect. 5 is necessarily drawn in, and so restricts the application of the word, but, when it is exemption only that is dealt with, that context has no place and so does not operate upon or restrict the natural meaning of the word. If the definition words in clause 9 be written out in full, this at once appears—"for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas into the Port of London and goods imported coastwise into the Port of London, provided they be goods imported thither from a place seaward of a line drawn from Reculvers Towers to Colne Point, which goods have been so imported for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise, etc." I am unable to see why "coastwise" may not be an adjectival expression descriptive of the word port as one speaks of "coastwise navigation" or of a "coastwise voyage," just as the expression "beyond the seas" in the same clause is a descriptive adjectival expression. "Coastwise" is not a word of technical meaning: (*Battersby* v. *Kirk*, 2 Bing. N. C. 584). To refer both to "conveyed" is to rearrange this section, for which the reason that "coastwise" implies motion rather than situation seems to me to be insufficient. The whole subject is importation and conveyance, and in that connection the *terminus ad quem* may, not inappropriately if perhaps inelegantly, be called "coastwise," as well as the process of getting there.

The other point is this. It is said that these goods, even though imported for the purpose of being conveyed to any other port whether beyond the seas or coastwise, were not imported for the purpose of being conveyed by sea only, for they were to go down one river nearly to its statutory mouth and then turn up another river on reaching its statutory mouth, where it joins the former, and so never were to go to sea at all. In my opinion, here the natural antithesis to "by sea"

is "by land," and is not "by river." If these words mean "for the purpose of being conveyed wholly by sea and never by river," transhipment goods going in another bottom to half the ports in Great Britain get no benefit from the exemption at all. For this the Act shows no reason and would conflict with the undoubted grant of exemption where they go in the same bottom. If they mean "partly by sea though partly by river," the word "only" is falsified. I see no adequate justification for resorting to any non-natural meaning of "by sea." What is being dealt with is "navigation" which is not "inland navigation." I think the appeal fails.

Lord PARMOOR. — The steamship *Assyria* arrived from Calcutta for discharge at the Victoria Docks, in the Port of London, in June 1912. She discharged 100 tons of linseed, part of her cargo, belonging to the respondents, within the Port of London by putting them overside into a sailing barge, which took them to the port of Rochester on the Medway. The appellants contend that the 100 tons of linseed are not "transhipment goods," or "goods imported for transhipment only," and therefore not free from port rates under sect. 9 of the Port of London (Port Rates on Goods) Provisional Order Act 1910. The question is whether this contention is well founded. I agree with the judgment of Pickford, J., and of the majority in the Court of Appeal. In my opinion the appeal fails.

Sect. 13 of the Port of London Act 1908 provides for the payment of port rates upon goods imported from the ports beyond the seas or coastwise into the Port of London, or exported to ports beyond the seas or coastwise from that port. In ordinary language, port rates are charged on all goods from whatever port they come and to whatever port they go. Goods imported or exported coastwise mean goods imported or exported as between the Port of London and some other port in the United Kingdom. Goods imported or exported from or to ports beyond the seas mean goods imported or exported between the Port of London and some port outside the United Kingdom. The contrast arises in the position of the port of origin or the port of destination. In subsect. 5 of the section, a limitation is placed on the ordinary meaning of goods imported or exported coastwise for the purpose of the section. It is provided that goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point. The object of this limitation is to exempt from port rates goods which have not been carried across the line drawn from Reculvers Towers to Colne Point,. But for this limitation, goods, not being goods for transhipment only, passing between the ports within the line and the Port of London would be subject to the same charges as goods passing coastwise between the Port of London and any other port in the United Kingdom.

Sect. 13 of the Act enacts that the Provisional Order to be made under the section shall provide for exempting from rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance thereon to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only. This Provisional Order was made in 1910, and contains a definition of goods imported for transhipment only. For the purposes of exemption from port rates, goods imported for transhipment only mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, whether beyond the seas or coastwise. It is admitted that the respondents complied with all the conditions entitling them to exemption if the 100 tons of linseed were imported for transhipment only. It is noticeable that the exemption applies to all goods, whether imported from beyond the seas or coastwise.

The main argument advanced on behalf of the appellants was that the 100 tons of linseed had not been conveyed coastwise from the Port of London to the Port of Rochester, because they had not crossed the line from Reculvers Towers to Colne Point. In other words, that the limitation introduced into sub-sect. (5) of sect. 13 of the Act of 1908 should be read into the definition of goods for transhipment only in the Provisional Order for 1910. This contention is, in my opinion, untenable. There is no reason for construing the expression "coastwise," in the definition of goods imported for transhipment only in any other than its ordinary natural meaning, or for excluding from the exemption goods imported from Calcutta for the purpose of being conveyed by sea only from the Port of London to the Port of Rochester.

It was said that the area of exemption in the Provisional Order should be the same as the area of charge under the Act of 1908. The effect of the limitation of the expression "coastwise" in the Act is to exclude from the liability to port rates goods not carried outside a definite area, but the Provisional Order deals with a different subject-matter. The exemption is general, and the test is in the purpose for which the goods are imported, if the other conditions are satisfied. If goods are imported for the purpose of transhipment only to any port, whether beyond the seas or coastwise, the exemption attaches. There is no exception of certain ports because they are situate within the line from Reculvers Towers to Colne Point. The exemption applies to goods imported for the purpose of being transhipped from the Port of London to the Port of Rochester. It was further argued, on behalf of the appellants, that the goods of the respondents were conveyed along the Thames from the Port of London and along the Medway to the Port of Rochester, and, therefore, were not conveyed by "sea only." In one sense, as was pointed out in argument, no goods transhipped at the Port of London are conveyed to any other port by sea only, since the Port of London is situate within the River Thames. I think, however, that the meaning of the words is clear. The contrast is necessarily between goods conveyed seaward from the Port of London to any other port, and goods conveyed inland by rail, road, or inland navigation. It makes no difference that the Port of Rochester is approached by a river navigation. There are many ports both in the United Kingdom and beyond the seas approached by river or some form of artificial waterway, but the exemption depends on conveyance seawards from the Port of London and not

on the nature of the approach to the port to which the goods are conveyed.

I think the appeal fails. *Appeal dismissed.*

Solicitors: for the appellants, *E. F. Turner* and *Sons*; for the respondents, *Dollman* and *Pritchard*, for *Hayward, Smith*, and *Challis*, Rochester.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, June 30, 1915.

(Before Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.)

Austin Friars Steam Shipping Company *v.* Spillers and Bakers Limited (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — General average — Collision with pier — Knowledge that collision would take place — Reasonable and prudent act — Contribution.

The owners of a steamship claimed from the cargo owners contribution in general average in respect of two items of alleged general average sacrifice and expenditure. On the 6th Nov. 1912 *the ship was bound for certain docks, and on proceeding up the river she grounded within a short distance of the docks. The following morning she floated, and was carried by the tide to about a mile above the entrance to the docks, where she became stranded. She was seriously damaged, and there was imminent danger to both ship and cargo. On the 7th Nov. she was got off by means of tugs. She had no steam available, and only her hand steering gear to work with. There was a pilot on board, and the intention was formed at first to take her down the river to a mud flat for the greater safety of the ship and cargo. When she had been towed about half a mile she was found to be making water, and it was then decided to take her into dock, which necessitated her being taken between two piers. The ebb tide was running very strongly, and it was contemplated by the master and pilot that she would strike the lower pier and do damage. In considering the choice between going to the mud flat and hitting the pier, the master and pilot both formed the opinion that the latter would be the lesser of two evils. She struck the pier with her starboard bow, and damaged herself and the pier.*

Held, that in the circumstances of the present case what was done was a general average act; and that the plaintiffs were entitled to contribution, not only for damage to the ship, but also for the damage for which she was liable by reason of damage to the pier.

Decision of Bailhache, J. affirmed.

Appeal by the defendants from the decision of Bailhache, J.

The facts of the case and the arguments of counsel sufficiently appear from the judgments.

On the 21st Dec. 1914 the following written judgment was delivered by

Bailhache, J.—In this case the plaintiffs, the owners of the steamship *Winchester*, claim from the defendants, the owners of the cargo, contribution in general average in respect of two items of alleged general average sacrifice and expenditure. The defendants deny their liability upon the ground that the items in question are neither general average sacrifice nor expenditure.

The facts are not in dispute and are as follows: The steamship *Winchester* was, on the 6th Nov. 1912, bound for Sharpness Docks, with a cargo of maize. As she was proceeding up the Severn, and a little way short of the docks, she grounded. She floated next morning on the flood tide and was carried by the tide further up the Severn to a point about a mile above the entrance to the docks, where she was stranded. She became very seriously damaged and both ship and cargo were in imminent danger. On the morning of the 7th Nov. she was got off the ebb tide with the assistance of tugs. She had no steam of her own, and only her hand-steering gear was available.

She had a pilot on board, and the intention at first was to take her down the river to a place called Ackthorn, and there put her on the ground for the greater safety of ship and cargo. After she had been towed about half a mile, the carpenter reported that she was making water, and the master and pilot thereupon consulted and decided to take her into dock. To get there she had to be taken between two piers. The ebb tide was running strongly, as it does in the Severn, and both master and pilot contemplated her striking the lower pier and doing damage.

The pilot, in fact, intended that she should touch the lower pier, as he said, to take the reach off her, and he remarked that it was not the time to trouble about another thousand pounds' worth of damage. The master and pilot both considered that as between going to Ackthorn and hitting the pier, the latter was the lesser of two evils, and took action accordingly. As was anticipated, she struck the pier with her starboard bow, and struck it twice, in fact. She struck harder than the pilot intended, and damaged herself to the extent of about 1600*l.*, and the pier to the extent of about 5000*l.* These are the two items in question. I find as a fact that to put into Sharpness with the knowledge that in doing so the steamship would strike the pier was a reasonable and prudent thing to do in the interests of ship and cargo.

Now the operation of getting the *Winchester* off and taking her either to Ackthorn or into Sharpness was, under the circumstances, a general average act, and a general average loss is defined in the Marine Insurance Act 1906, s. 66, as being "a loss caused by, or directly consequential on, a general average act. It includes a general expenditure as well as a general average sacrifice."

Lawrence, J. in *Birkley* v. *Presgrave* (1 East, 220) defines general average loss in terms which have become classical. He says: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionately by all who are interested."

(*a*) Reported by L. C. Thomas and E. A. Scratchley, Esqrs., Barristers-at-Law

There is probably no real difference between the two definitions. If there is, the statutory definition must prevail.

I only quote the well-known definition from Lawrence, J.'s judgment because I want to refer to a passage in Mr. Lowndes' work on general average which is extremely pertinent to the question I have to decide. It was written, of course, before the Act of 1906, and if I am to rely upon it, it is necessary to see that the law was the same then as now.

Mr. Lowndes, in his book on general average, 4th edit., p. 36, says, in respect of what constitutes a general average loss: "We have to determine *quod pro omnibus datum est?* and, since giving must always imply an intention to give, what we have here to ascertain must be, what loss at once has, in fact, occurred, and likewise must be regarded as the natural and reasonable result of sacrifice. Or, in other words, what the shipmaster would naturally, or might reasonably, have intended to give for all when he resolved upon the act. Mr. Lowndes cites a passage from Ulrich on General Average, which is worth repeating here. He says: "General average not only comprises the damage purposely done to ship and cargo, but also (1) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was given for the common safety; (2) all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or, in other words, was its necessary consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet, likewise would not have occurred but for some subsequent accident."

Both these passages are quoted with approval by Bigham, J. in the *Anglo-Argentine Live Stock and Produce Agency Limited* v. *Temperley Steam Shipping Company Limited* (8 Asp. Mar. Law Cas. 595; 81 L. T. Rep. 296; (1899) 2 Q. B. 403). I cite them again because they seem admirable guides to me in the decision of this case.

Following these guides it is quite clear upon the facts stated by me that the damage to the steamship and to the pier both fall within the statutory definition of general average loss. This disposes of the right to contribution in respect of the damage to the steamship, and would dispose of the right to contribution in respect of the damage to the pier, but, strangely enough, there is no decision to be found upon the point whether general average expenditure includes the making good of damage done to the property of some third person.

In principle, in such a case as this, it clearly does. If I ask Mr. Lowndes' question, *Quod pro omnibus datum est?* I answer, the damage to the steamship plus the liability to indemnify the dock authorities for the damage to their pier; and if I now turn to Ulrich, the collision with the pier was a foreseen result, and not the result of a subsequent accident. So far as text writers are concerned, there is authority in favour of such expenditure being treated as a general average expenditure. Phillips on Insurance, 5th edit., vol. 2, par. 1311, says so, and refers to Casarigis for his authority; Sir Joseph Arnould in his work, the last edition edited by himself, the second edition, vol. 2, p. 912, sect. 331, is to the same effect.

Mr. Leslie Scott urged that the law of general average has long since become crystallised, and that no further extension of it is possible, except, of course, by legislation. The answer is that it is not an extension of the law to apply old principles to new instances.

It was also suggested by Mr. Leslie Scott that as to run into a pier was *vis-à-vis* the dock authorities a tort, and as there is by English common law no contribution between joint tort feasors, there is no right to contribution in general average. This assumes that the dock company could have sued the cargo owner for the damage done by the ship to the pier, an interesting point which I should not be prepared to decide without argument and consideration.

I do not, however, think that the common law rule applies in any sense to general average. In my judgment the position is this: The master has implied authority when occasion arises for a general average act to do whatever is necessary and prudent for the preservation of ship and cargo, even if this involves committing a trespass, and that there is the further implied obligation, on the part of the cargo-owner and ship-owner, to bear between them in their respective proportions the consequences of every such necessary or prudent act.

This implied obligation may perhaps be said to be contractual as between shipowner and cargo-owner, but I rather incline to the view expressed by Brett, J. in *Burton* v. *English* (49 L. T. Rep. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 220) that it comes from the old Rhodian Laws, and is incorporated into English law as the law of the ocean. It is scarcely necessary to say that maritime law as administered in this country, although part of the law of England, is not necessarily the same as our common law. The every-day instance of this is the difference in result in collision cases on land and on sea, where both parties are in fault.

My judgment, therefore, is for the plaintiffs in this case, with costs.

From that decision the defendants now appealed.

Leslie Scott, K.C. and *Raeburn* (for *Chaytor*, K.C., serving with His Majesty's forces), for the appellants, referred to

The Leitrim, 9 Asp. Mar. Law Cas. 317; 87 L. T. Rep. 240; (1902) P. 256;
Merryweather v. *Nixan*, 8 T. R. 186;
Marine Insurance Act 1906, s. 66;
Arnould on the Law of Marine Insurance, 9th edit., p. 1161, sect. 933; p. 1678, sect. 937 *et seq.*; p. 1171, sect. 941;
Lowndes' Law of General Average, 4th edit., p. 114; 5th edit., p. 136.

MacKinnon, K.C. (*Roche*, K.C. with him), for the respondents, referred to

Iredale v. *China Traders' Insurance Company*, 8 Asp. Mar. Law Cas. 580; 81 L. T. Rep. 231; (1899) 2 Q. B. 356.

[He was stopped by the Court.]

No reply was called for.

Pickford, L.J.—This is an appeal from the decision of Bailhache, J., who gave judgment for the plaintiffs in an action for a certain contribution in general average. I do not think that it is necessary to state the case at any length because

the facts are admitted, and they are accurately stated in that judgment.

Put shortly, the facts amount to these: The vessel, which was chartered under a charter whereby average was to be paid according to the York-Antwerp rules, on her voyage to Sharpness Docks grounded on what I think was a rocky beach not very far from Sharpness. Whilst she lay there the whole adventure (ship, cargo, and freight) was in very considerable danger. It was decided, in order to minimise that danger, to take her down the river and run her upon a mud flat called Ackthorn. It was known to the captain and pilot who decided to do that, that that would in all human probability cause damage to her. That mud-flat was lower down in the river than the entrance to Sharpness Docks. I forget whether or not it was an ebb tide, but at the state of the tide as it then was there was a certain danger in going into Sharpness Docks between the piers.

Whilst she was going down the river, in consequence of certain matters discovered by the master and pilot, it was decided that it would be more dangerous to take her to Ackthorn and ground her there than it would be to take her into Sharpness Docks. But it was known to both the master and the pilot that it was practically certain, at that state of the tide, that going into Sharpness Docks the vessel would suffer damage. It was realised that she might or might not damage the pier. I do not know whether they considered that or not. But they certainly considered and said that in the state of things that existed a thousand pounds or so more damage would make no difference to anyone, They clearly contemplated that there would be damage and loss in all probability if they took her into Sharpness Docks. They took her in and there was damage to the ship and to the pier. There was damage to the ship, and there was a liability arising on the part of the ship to pay the Harbour Authority compensation for the injury done to the pier.

On that two questions are raised: It is said that this is not a general average act and therefore there can be no general average loss, and therefore there can be no contribution. It does not seem to me to be disputed that under the York-Antwerp rules, if she had been voluntarily stranded, where there was certainty of damage, on the mud-flat at Ackthorn, in order to avoid greater damage, that would have been a general average act. It was said that that was not so under the circumstances that existed. I confess that I am unable to follow that argument. It is said to be part of the whole consequences of the particular average, the particular average being the loss that was occasioned by the first stranding upon the bank above Sharpness Docks. It seems to me that if she were there in a position which produced danger to the whole adventure, and in order to minimise that danger a voluntary act was done which occasioned damage to one of the elements of the adventure—namely, the ship—that is a general average act. It does not seem to me to make any difference that there were two things that might have been done: that she might have been stranded voluntarily upon the Ackthorn mud-bank, or that she might have been taken into dock.

Nor does it seem to me to matter that that was her port of discharge. She would never have gone into her port of discharge under the circumstances that she did but for the purpose of avoiding greater damage to the whole adventure. It seems to me in that case it is just as much an act done in the sacrifice of one of the elements of the adventure for the safety of the whole as if it were a port of refuge. I cannot see the difference between the port of refuge and port of discharge. Upon that point, which was really the main point, it seems to me clear that this was a general average act.

I do not think it is necessary to lay down any principles as to what is a general average act in the case of voluntary stranding, but it seems to me in the circumstances of this case that this was a general average act.

Then the only other question is whether, if that be so, the plaintiffs were entitled to contribution not only for damage to the ship, but also for the damage for which the ship is liable by reason of damage to the pier. Mr. Leslie Scott very fairly said that he could not see any reason in principle why the one should not be on the same footing as the other, and I agree with him because I can see no reason either. The artificial doctrine of tort feasor established by *Merryweather* v. *Nixan* (8 T. R. 186) is not applicable to the present case, and it is not a doctrine which one is anxious to take further than it should go.

I think that Bailhache, J.'s judgment is right, and I do not think it is necessary to do more than say that I agree with what he said on that matter and with his reasoning.

Therefore I think that this appeal should be dismissed.

Lord Cozens-Hardy, M.R.—I agree.

Warrington, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellants, *Waltons* and *Co.*, agents for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the respondents, *Botterell* and *Roche*.

June 8, 9 *and* 28, 1915.

(Before Swinfen Eady, Phillimore, and Bankes, L.JJ.)

Fratelli Sorrentino *v.* Buerger. (*a*)

Charter-party—Sale of vessel after date of charter-party—Tender of vessel—Refusal of charterers to load—Effect of sale.

On the 15th Sept. 1913, *a vessel which formerly belonged to the claimants was chartered by the respondents to proceed to Odessa and load wheat or other grain for Rotterdam or Hamburg. While the vessel was discharging, before proceeding to Odessa, she was sold by the claimants, who duly notified the charterers of the sale. She was duly tendered for loading at Odessa, but the respondents refused to provide a cargo. In arbitration proceedings it was found as a fact that the claimants were ready and willing to perform their contract, and that they had duly tendered the vessel. On a case stated:*

Held, that there being a finding that both vendors and purchasers were ready and willing to per-

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

form all the obligations under the contract, the original owners were not precluded from carrying out the contract by the mere transfer of the ship with the benefit of the charter-party.

Decision of Atkin, J. (13 *Asp. Mar. Law Cas.* 1; 112 *L. T. Rep.* 294; (1915) 1 *K. B.* 307) *affirmed.*

APPEAL by the charterers from a decision of Atkin, J. on a case stated as follows:—

1. Whereas by a berth contract dated the 15th of September, one thousand nine hundred and thirteen, and made between Fratelli Sorrentino (therein described as the owners of the steamship *Rosalia*) and Elias Buerger and S. Teper (thereinafter and hereinafter described as the charterers), it was agreed that the said steamship *Rosalia* should proceed as ordered to Odessa, Nicolaieff, Theodosia, or Novorossisk, one port only, and there load as ordered, from one or more shippers, a full and complete cargo of wheat, (and or) grain, (and or) seed, for Rotterdam, Weser, or Hamburg, as ordered on signing bills of lading. Freight was to be paid at the rate mentioned in the berth contract.

2. By clause 4 of the said berth contract it was provided that orders for the loading port were to be given at Constantinople within ten running hours of the dispatch of the captain's telegram notifying the charterers of his arrival, and that if the orders were not given by the charterers within the said ten running hours the steamer was to proceed to Odessa Roads for orders, which were to be given within six running hours of arrival, Sundays only excepted.

3. By clause 5 of the said berth contract it was stipulated that the charterers were not bound to load before the 1st Oct. then next (new style), and that they were to have the option of cancelling the contract if the steamer did not arrive at the port of loading and was not ready as mentioned in the berth contract on or before 6 p.m. on the 25th October then next (new style).

4. By clause 21 of the said berth contract it was agreed that in the event of any dispute arising under the contract such dispute should be referred to two arbitrators in London, one to be appointed by each of the parties to the berth contract with power to the arbitrators in case of disagreement to appoint an umpire whose award should be final.

5. And whereas disputes did arise the said Fratelli Sorrentino duly appointed Mr. C. W. Gordon as their arbitrator, and the charterers duly appointed Mr. F. W. Temperley as arbitrator on their behalf, and the said two arbitrators having been unable to agree duly appointed me, the undersigned Charles Thomas Glanville as umpire.

6. And whereas on the hearing of the said reference both parties applied to me to state a case for the opinion of the court upon certain questions of law arising.

7. Now I, the said Charles Thomas Glanville, having taken upon myself the burden of the said reference, and having duly considered the evidence put before me do hereby make my award in the form of a special case for the opinion of the court as follows:—

8. A true copy of the berth contract above referred to and dated the 15th Sept. 1913 is hereto annexed and may be referred to as part of this award.

9. On the 25th Sept. 1913 whilst the steamship *Rosalia* was discharging a cargo of coal at Venice the said Fratelli Sorrentino entered into a contract for the sale of the said vessel to the Societa Anonima di Navigazione Adriatica (hereinafter called the Adriatica), an Italian company domiciled in Venice. The said contract contained the following clauses: "The sellers declare that the steamer is chartered from the Black Sea to Rotterdam at 12*s.* per unit, 12*s.* 3*d.* for Weser, 12*s.* 6*d.* for Hamburg with the 25th Oct. cancelling as per berth contract which will be handed over in a few days. . . ." "The buyers declare that they accept fully the execution of the charter-party for the Black Sea voyage to one of the ports as ordered on signing B/L for their entire risk and advantage, undertaking every obligation relating thereto." The berth contract or charter-party so referred to is the one now in question.

10. The said contract also provided for opening up for examination by the Adriatica of the engines, boilers, and double bottom of the said steamship, and the Adriatica were to declare within twenty-four hours of the opening of the last double bottom cell whether they accepted the steamer or not, and if they did accept her, the steamer thereupon became the absolute property of the buyers.

11. On the 4th Oct. the *Rosalia* was taken over by the Adriatica after the completion of the discharge of her coal cargo at Venice.

12. At Venice the steamer had her boilers cleaned and repaired, and certain repairs were effected to her engines, which occupied her six and a half days after the completion of the discharge. Such repairs were necessary in order to put the vessel in a seaworthy condition for the intended voyage. I find as a fact if and so far as it may be material that this delay was not more than a reasonable delay for the effecting of ordinary overhaul and repairs to a steamship in the ordinary course of business, and there was no unreasonable delay in the vessel proceeding from Venice to fulfil the said berth contract.

13. On the 11th Oct. the vessel sailed from Venice for Constantinople with a view to fulfilling her berth contract in question, and her departure was duly telegraphed to the charterers.

14. On the 11th Oct. Messrs. Jackson Brothers and Cory, the brokers acting in London on behalf of Fratelli Sorrentino, sent to Messrs. H. L. Milbourn and Co., the representatives of the charterers in London, a letter, of which the following is a true copy: "Under instructions from Messrs. Fratelli Sorrentino, we hereby beg to inform you that they have sold their steamship *Rosalia* to Messrs. The Societa Adriatica di Navigazione, and this latter firm will carry out the terms of the charter-party with you dated 15th Sept. 1913, which please note."

15. On the 13th Oct. Messrs. H. L. Milbourn and Co. wrote to Messrs. Jackson Brothers and Cory a letter in the following terms: "We are duly in receipt of your letter of the 11th inst., and in reply thereto would say it seems to us that Messrs. Fratelli Sorrentino have made no effort so far to perform their contract, and have now put it out of their power so to do, and our friends, Messrs. Buerger and Teper, do not propose to enter into fresh arrangements as to this vessel. Apart from this, perhaps you can inform us the cause of the extraordinary delay of the steamship at Venice. We have been expecting for some time past to hear her reported as passing Constantinopole."

16. On the contents of the last-mentioned letter being communicated to Fratelli Sorrentino and the Adriatica, both of these parties protested against the charterers' statements in the letter above set out and insisted that the contract should be fulfilled.

17. On the 15th Oct. the charterers' agents in London wrote to Messrs. Jackson Brothers and Cory that they considered that the contract was at an end, and the charterers claimed damages therefor and for the breach of the contract on the part of the owners to proceed with usual dispatch, and on the same day the charterers offered to load the vessel on the berth contract at a reduction of three shillings per unit in the freight, which amount approximated roughly to the fall that had occurred in the Russian freight market between the date of the berth contract and the 15th Oct.

18. The last-mentioned offer was not accepted, and on the 19th Oct. the vessel arrived at Constantinople, and the master duly cabled to the charterers for orders, and having received no reply within the time allowed by

clause 4 of the berth contract, proceeded to Odessa Roads and applied to the charterers' agents for orders there, and receiving no orders within the time limited by the berth contract, the captain made a formal protest against the charterers and informed the Adriatica, who then chartered the vessel for other employment.

19. I find as a fact that the said vessel was duly tendered under the said berth contract; that Fratelli Sorrentino and the Adriatica were always ready and willing to do all things necessary on their part towards the fulfilment of the said contract, and the said vessel was not loaded solely by reason of the charterers' refusal to load her.

20. Subject to the opinion of the court on any question of law, I find that the charterers were guilty of a breach of the berth contract in refusing to load the vessel as above set out.

21. I find that the damages which arose from the said breach of contract amounted to 1012*l.* 14*s.* 3*d.*

22. If and so far as it may be material I find as a fact that apart from any question of responsibility under the sale contract to the Adriatica the said Fratelli Sorrentino have not suffered any pecuniary loss by reason of the breach of contract, the said loss having up to the present fallen on the Adriatica, for whose benefit and by whose sanction and approval the arbitration proceedings were brought by Fratelli Sorrentino

23. I further find as a fact that the charterers suffered no damages by the delay at Venice by the vessel executing repairs there as above stated.

24. The following points were raised by the charterers before me as raising questions of law on which they desired the opinion of the court should be taken. (i.) That by the sale of the said steamship Fratelli Sorrentino put it out of their power to and were not able to perform the contract. (ii.) That by reason of the alleged assignment by Fratelli Sorrentino to the Adriatica of the berth note, the rights of Fratelli Sorrentino under the berth note ceased. (iii.) That Fratelli Sorrentino did not prove any damage, and that they have suffered none in fact. (iv.) That as to the claim made on the ground that Fratelli Sorrentino may be liable to the Adriatica for damages in consequence of the charterers' refusal to carry out the contract. (*a*) That under the contract of sale Fratelli Sorrentino are not liable to the Adriatica for damages in this connection; (*b*) the charterers cannot be held liable in damages for a prospective claim; and (*c*) that such damages are n any event too remote. (v.) That with regard to the statement that Fratelli Sorrentino were claiming as trustees for and on behalf of the Adriatica, the charterers contended that they could not do this, they contended that the Adriatica had no claim because there was no assignment of the berth contract, and that if there were an assignment no notice was ever given of the assignment, and that if there were an assignment and notice that the berth contract was not assignable so as to bind the charterers without their assent. (vi.) The charterers also denied that any claim could be made by Fratelli Sorrentino as trustees for the Adriatica, because there was no contract between the Adriatica and the charterers, and no submission to arbitrate between them, and that the umpire had no jurisdiction to try any dispute between the Adriatica and the charterers.

25. As desired I have put the whole of these points before the court for the decision of any question of law arising thereon, having stated above my findings of fact.

26. Subject to the opinion of the court on any questions of law that may arise, I award that the said Fratelli Sorrentino recover from the charterers the said sum of 1012*l.* 14*s.* 3*d.* damages as above found, subject to Fratelli Sorrentino producing to the charterers an order by the Adriatica to pay the amount of the said award by the said Adriatica or their agents or a discharge by the Adriatica for the amount.

27. I further award and direct that the charterers do pay the fees and expenses of this reference and award, amounting to 138*l.* 12*s.* 6*d.*, and that they also pay the costs of the said Fratelli Sorrentino upon the said reference, which I assess at 42*l.* If the said fees, expenses, and costs are paid in the first instance by the said Fratelli Sorrentino, they shall be entitled to recover same from the charterers.

28. If the court should be of the opinion that my award in par. 26 is wrong, and that the award should have been in favour of the charterers, then (subject to any direction of the court to the contrary) I direct that the said arbitrator's and umpire's fees and expenses and the costs of the charterers on the reference, which last-mentioned costs I assess at 42*l*, shall be borne and paid by Fratelli Sorrentino, and, if they shall be paid in the first instance by the charterers, that the charterers shall be entitled to recover the said amount from Fratelli Sorrentino.

As witness my hand this third day of July 1914.

Atkin, J. held that while a party to a contract cannot so assign it as to make the assignee solely liable, he may arrange for another person to discharge the burden of the contract in the first instance, provided it does not involve the doing of something which requires special performance by him, and that, inasmuch as the provision of a ship did not require any personal skill on the part of the owners, they were entitled to sue upon it, although they were only ready to perform it vicariously.

Judgment having been given for the claimants the charterers appealed.

Roche, K.C. and *MacKinnon*, K.C. for the appellants.

Leck, K.C. and *R. A. Wright* for the respondents.

The following cases were cited in argument:

Dimech v. *Corlett*, 12 Moo. P. C. 199;
Tolhurst v. *Associated Portland Cement Company Limited*, 87 L. T. Rep. 465; (1902) 2 K. B. 660;
British Waggon Company v. *Lea*, 42 L. T. Rep. 437; 5 Q. B. Div. 149;
Splidt v. *Bowles*, 10 East. 275;
Robson and Sharpe v. *Drummond*, 2 B. & Ad. 303;
Humble v. *Hunter*, 12 Q. B. 310;
Formby Brothers v. *Formby*, 102 L. T. Rep. 116;
Bolton v. *Jones and another*, 30 L. T. Rep. O. S. 188; 2 H. & N. 564;
Morrison v. *Parsons*, 2 Taunt. 407;
Kemp and others v. *Baerselman*, 1906, 2 K. B. 604;
French and Sons v. *Newgass and Co.*, 38 L. T. Rep. 164; L. Rep. 3 C. P. Div. 163;
Williams Brothers v. E. T. Agius Limited, 110 L. T. Rep. 865; (1914) A. C. 510;
Law Guarantee and Trust Society v. *Russian Bank for Foreign Trade and others*, 92 L. T. Rep. 435; (1905) 1 K. B. 815;
Braithwaite v. *Foreign Hardwood Company Limited*, 92 L. T. Rep. 637; (1905) 2 K. B. 543;
Carver's Carriage by Sea, 5th edit., par. 133.

Cur. adv. vult.

June 28.—SWINFEN EADY, L.J. read the following judgment:—This is an appeal from the judgment of Atkin, J. upon a special case stated by an umpire, who made his award in that form. By a berth contract dated the 15th Sept. 1913, and made between Fratelli Sorrentino, therein described as the owners of the steamship *Rosalia*, of a maximum cargo capacity of 7000 tons, Italian flag, then at or due at Venice to discharge,

of the one part and Elias Buerger and S. Teper, of Nicolaieff, charterers, of the other part it was agreed that the steamer should proceed as ordered to Odessa, or to one of three other named Black Sea ports, and there load as ordered from one or more shippers, a full and complete cargo of wheat, and (or) grain, and (or) seed for Rotterdam, Weser, or Hamburg, as ordered on signing bills of lading, on being paid freight at the rate of 12*s.* per unit Rotterdam, 12*s.* 3*d.* Weser, and 12*s.* 6*d.* Hamburg, with a reduction of 3*d.* per unit to be allowed on barley shipped. By the contract it was further provided that orders for the loading port were to be given at Constantinople within ten running hours from the time of dispatch of the captain's telegram notifying charterers of his arrival; and if orders were not given by the charterers within that time, the steamer was to proceed to Odessa Roads for orders, which were to be given within six running hours of arrival, Sundays only excepted. It was further provided that the charterers were not bound to load before the 1st Oct. (new style) and were to have the option of cancelling the contract if the steamer did not arrive at the port of loading on or before the 25th Oct. By clause 11 it was provided that the captain should sign bills of lading at not less than chartered rate, unless the difference between the above-named rates of freight and that payable under such bills of lading should be paid at port of loading before signing bills of lading, in cash, less 1 per cent. to cover insurance and all other charges. By clause 18, cash at port of loading for disbursements, not exceeding 700*l.*, was to be advanced to the captain if required by him, such advance to be indorsed by him on the bill of lading and to be deducted from freight at port of discharge, or to be repaid by captain's draft on his owners. By clause 20 it was provided that the charterers' liability under the contract was to cease when the cargo was shipped and the difference in freight, dead freight and demurrage at loading port had been paid. Any dispute arising under the contract was to be referred to arbitration.

The *Rosalia*, after discharging at Venice and executing certain repairs there, sailed for Constantinople on the 11th Oct. with a view to fulfilling the berth contract, and her departure was duly notified to the charterers. The umpire found that the repairs, which occupied six and a half days after the completion of the discharge, were necessary in order to put the vessel into a seaworthy condition for the intended voyage; and he found as a fact, if and so far as it might be material, that such delay was not more than a reasonable delay for the effecting of ordinary overhaul and repairs to a steamship in the ordinary course of business; and that there was no unreasonable delay in the vessel proceeding from Venice to fulfil the berth contract. On the 19th Oct. the vessel arrived at Constantinople, and the master duly cabled to the charterers for orders, and, not receiving any reply within the time allowed by clause 4 of the berth contract, the ship proceeded to Odessa Roads, and applied to the charterers' agents there for orders; and, not receiving any orders within the time limited by the berth contract, the captain made a formal protest against the charterers; and the vessel was then chartered for other employment. Between the date of the berth contract and the middle of October, the fall in the Russian freight market was approximately 3*s.* per ton.

It is now necessary to refer to the circumstances which occurred, which the charterers contend entitled them to treat the berth contract as at an end. On the 25th Sept. 1913, whilst the *Rosalia* was discharging a cargo of coal at Venice, the said Fratelli Sorrentino entered into a contract for the sale of the vessel to the Società Anonima di Navigazione Adriatica—hereinafter called "the Adriatica"—an Italian company domiciled in Venice. The contract for sale contained the following clause: "The sellers declare that the steamer is chartered from the Black Sea to Rotterdam at 12*s.* per unit, 12*s.* 3*d.* for Weser, 12*s.* 6*d.* for Hamburg, with the 25th Oct. cancelling as per berth contract, which will be handed over in a few days. The buyers declare that they accept duly the execution of the charter-party for the Black Sea voyage to one of the ports as ordered on signing bill of lading for their entire risk and advantage, undertaking every obligation relating thereto." The berth contract or charter-party so referred to is the one now in question. On the 4th Oct. the *Rosalia* was taken over by the Adriatica after the completion of the discharge of her coal cargo at Venice. On the 11th Oct. the brokers in London for Fratelli Sorrentino sent to H. L. Milbourn and Co., the charterers' representatives in London, a letter as follows: "Under instructions from Messrs. Fratelli Sorrentino we hereby beg to inform you that they have sold their steamship *Rosalia* to Messrs. the Società Adriatica di Navigazione, and that this latter firm will carry out the terms of the charter-party with you dated the 15th Sept. 1913, which, please note"; and on the 13th Oct. Messrs. H. L. Milbourn and Co. replied as follows: "We are duly in receipt of your letter of the 11th inst., and in reply thereto would say it seems to us that Messrs. Fratelli Sorrentino have made no effort so far to perform their contract, and have now put it out of their power so to do; and our friends, Messrs. Buerger and Teper, do not propose to enter into fresh arrangements as to this vessel. Apart from this, perhaps you can inform us the cause of the extraordinary delay of the steamship at Venice. We have been expecting for some time past to hear her reported as passing Constantinople."

On the contents of the last-mentioned letter being communicated to Fratelli Sorrentino and the Adriatica, both of those parties protested against the charterers' statements in this letter and insisted that the contract should be fulfilled. On the 15th Oct. the charterers' agents in London wrote to Messrs. Jackson Brothers and Cory, the brokers for Fratelli Sorrentino, that they considered the contract was at an end, and the charterers went so far as to claim damages therefor and for breach of contract by the owners to proceed with usual dispatch, but on the same day they offered to load the vessel on the berth contract at a reduction in freight of 3*s.* per unit. This offer was not accepted. The umpire awarded that, subject to the opinion of the court upon the points of law raised, the shipowners, Fratelli Sorrentino, recover from the charterers 1012*l.* 14*s.* 3*d.* for damages for breach of the berth contract.

Atkin, J. upon the questions of law decided in favour of the shipowners, and upheld the award for 1012*l.* 14*s.* 3*d.*, and from his judgment the charterers now appeal.

The first point raised by the charterers, and submitted by the umpire as a question of law, is that, by the sale of the steamship, Fratelli Sorrentino put it out of their power and were not able to perform the contract. Counsel for the charterers conceded that a shipowner might sell the ship during the currency of a charter-party, but he contended that he could not give possession of it as thereby he prevented himself from carrying out the contract. But the arbitrator has negatived the fact that Fratelli Sorrentino put it out of their power to carry out the contract. On the contrary, he finds that the vessel was duly tendered to the charterers under the berth contract, and that both Fratelli Sorrentino and the Adriatica were always ready and willing to do all things necessary on their part towards the fulfilment of the contract, and that the sole reason why the vessel was not loaded was that the charterers refused to load her. It is clear from the terms of the contract of sale that the Adriatica had notice of the current berth contract when they agreed to buy the vessel, and as it was a beneficial contract they were desirous of carrying it out and Fratelli Sorrentino were also desirous of carrying it out and between them they could have arranged to carry it out in any manner that the charterers desired, and the umpire finds that they were ready and willing to do so, and when the vessel was tendered there was ample time to make any necessary arrangements by the contract being carried out by Fratelli Sorrentino as the date for cancellation was not until the 25th Oct.

The charterers next contended that the letter of the 11th Oct. from Messrs. Jackson Brothers and Cory amounted to a renunciation of the contract by Fratelli Sorrentino, and that the letter meant that these owners would not carry out the contract, but that the charterers must accept the liability of Adriatica in substitution for that of Fratelli Sorrentino under the contract. I am of opinion that that is not the true meaning and effect of the letter, and that it certainly does not amount to a renunciation by Fratelli Sorrentino. It merely informs the charterers of the sale of the ship, and that the purchasers are willing to carry out the berth contract. This was true. It is an affirmance that the contract will be carried out. There is no ground for the contention that Fratelli Sorrentino by this letter repudiated in any way their own obligation to the charterers, and the latter were not entitled to treat it as a renunciation absolving them from the performance of the contract on their part.

It is true that Fratelli Sorrentino could not have substituted the liability of the Adriatica for their own without the consent of the charterers, for substitution which must be tripartite would have amounted to novation, but there has never been any claim by Fratelli Sorrentino that the Adriatica were substituted for them.

It was urged by the appellants that the finding by the umpire that Fratelli Sorrentino and the Adriatica were always ready and willing to do all things necessary on their part towards the fulfilment of the contract merely meant that so far as Fratelli Sorrentino were concerned they were willing to perform their contract through the Adriatica. I see no ground for thus restricting the finding of the umpire. I read his award as meaning that Fratelli Sorrentino were willing to carry out the contract personally, if the charterers so desired, and not merely vicariously—indeed, that both Fratelli Sorrentino and the Adriatica were each ready and willing to carry out the contract and were desirous of doing so, and that the reason why the vessel was not loaded was not in consequence of any unwillingness or inability of either Fratelli Sorrentino or the Adriatica to carry out the berth contract in any proper manner which charterers might desire, but solely by reason of the charterers' refusal to load her, the fall in freights affording a sufficient explanation of the attitude which they took up. The berth contract had become an onerous one in October, and the charterers by their agents' letter of the 13th Oct. relied not upon any renunciation by Fratelli Sorrentino, or refusal to carry out the contract, but contended that the mere sale of the vessel had put it out of their power to do so.

It has not been contended in this court that the mere sale of the vessel put an end to the berth contract. It is possible that at all material times the legal ownership of the vessel remained in Fratelli Sorrentino, as it appears that a notarial document was necessary to transfer this, and there is no mention of any such document having been executed. However that may be the charterers' defence to the action was that the shipowners had put it out of their power to perform the contract at the date when they refused or omitted to load, and the umpire finds the contrary in fact and decides that the vessel was duly tendered under the berth contract.

The grounds on which the learned judge below decided this case were stated by him as follows: "I have the finding that both vendors and purchasers were ready and willing to perform all the obligations under the contract. It seems to me therefore that the original owners are not precluded from carrying out the contract by the mere transfer of the ship with the benefit of the charter-party."

I agree with this view, and am of opinion that the appeals fails and should be dismissed.

PHILLIMORE, L.J. read the following judgment:—In this case the facts have been fully stated by the Lord Justice. It seems to me that the berth contract into which the brothers Sorrentino entered with Buerger and Teper was one the obligations of which they had to discharge and could not transfer to others. It further seems to me that they could not claim as against the will of the charterers to perform it by somebody else, and that they must retain at all material times the capacity to perform it. If it were a question whether their contract was one which fell within the view of the Divisional Court in *British Waggon Company* v. *Lea* (*sup.*), or which fell within the language of the Privy Council in *Dimech* v. *Gorlett* (*sup.*, at p. 223), I think it falls within the latter category. But if, as I think, Atkin, J. meant to decide otherwise, I must disagree with him.

One has then to consider whether the acts of the brothers Sorrentino amounted to a repudiation or renunciation of the contract. It is

suggested in the case that the sale of the steamship amounted to a repudiation of the contract. I do not think this necessarily follows. A sale coupled with the parting with the possession of the ship would.

But, notwithstanding the sale, the vendor might by arrangement retain sufficient possession to carry out the berth contract, or there might be a redemise of the ship to him.

The second suggestion is that the alleged assignment of the berth note caused the right under it to cease. If the communication made on behalf of the brothers Sorrentino to the charterers by the letter of the 11th Oct. 1913 amounted to a repudiation or renunciation of the contract, the charterers might treat it as a breach within the decision of *Hochster* v. *De La Tour* (2 E. & B. 693). And, if they did so treat it, any subsequent proceedings by the brothers Sorrentino would not deprive the charterers of their right to treat the contract as at an end and claim damages for the breach, a right which they asserted as stated in par. 17 of the special case.

If, however, the letter of the 11th Oct. 1913 did not amount to a repudiation of the contract, then the subsequent proceedings by or on behalf of the Brothers Sorrentino came under par. 19 and have been found by the umpire to be duly taken. This leaves for consideration the question whether the letter amounted to a repudiation. The mere announcement of the sale of the ship did not amount to a repudiation. Whether the rest of the letter amounted to a repudiation is a further question, and *primâ facie* one for the umpire. If it were for me, I might have thought that the language might amount to a repudiation. But I could understand that the expression, "This latter firm will carry out the terms of the charter-party with you," might be treated by the umpire rather as a proposal or suggestion, or at any rate not a positive assertion, that it would be done against the will of the charterers, and that he might look to further correspondence and proceedings, which he may not have set out in full.

The other members of the court think that the finding of the umpire that the Brothers Sorrentino and the Adriatica were always ready and willing to perform their contract amounts to a finding that there was no repudiation; and on the whole I agree. I could have wished that the umpire had set out the documents in full, and more documents. It appears from the shorthand notes of the judgment of Atkin, J. that the whole contract for sale, though not stated in the special case, was by agreement between the parties brought to the judge's attention, and I should like to have seen the protests referred to in par. 16 and to have been informed whether they were communicated, and how, to the charterers. But, if we are left to the special case as it stands, I do not see that we can disagree with the umpire's finding. And I may add that I think that the point which was really insisted upon at the arbitration was that the mere sale of the ship, plus the communication of this sale to the charterers, amounted to a repudiation of renunciation, and this, as I have said, is to lay too great a stress on the bare sale.

On the whole, I agree that the appeal fails.

BANKES, L.J. read the following judgment: — This is an appeal from a decision of Atkin, J. upon a special case stated by an arbitrator.

The respondents were owners of the steamship *Rosalia*. They entered into a berth contract with the appellants whereby they agreed that the said steamer should proceed to a Black Sea port as ordered and there load as ordered a cargo of grain for Rotterdam, Weser, or Hamburg. It is not necessary to consider this contract in detail. It is sufficient for the purpose of my judgment to say that it contained provisions some of which could only be performed by the respondents themselves unless the appellants consented to their being performed by some substitute. At the time the berth contract was entered into the vessel either was at Venice or was expected to arrive there shortly, to discharge. On the 25th Sept. 1913, while the vessel was still discharging, the respondents entered into a contract with an Italian company for the sale of the vessel to that company. The contract is not set out in full in the special case. Extracts only are given. From those extracts it appears that the vessel was sold with the benefit of the berth contract, and that the purchasers undertook "every obligation relating thereto." It also appeared that the vessel was to be opened up to give the purchasers an opportunity of inspection, and that after inspection the purchasers were to declare whether they accepted her or not, and, if they did, "the steamer thereupon became the absolute property of the buyers." The special case finds that the steamer was taken over by the purchasers on the 4th Oct. 1913, after the completion of the discharge of her cargo at Venice. At this time freights were falling and the berth contract was likely to prove a disadvantageous one to the appellants. On the 11th Oct. the respondents' brokers wrote a letter to the appellants' representatives in the following terms: "Under instructions from Messrs. Fratelli Sorrentino we hereby beg to inform you that they have sold their steamship *Rosalia* to Messrs. the Societa Adriatica di Navigazione, and that this latter firm will carry out the terms of the charter-party with you, dated the 15th September 1913, which please note." To this letter the appellants' representatives replied on the 13th Oct. to the effect that they considered that the respondents had put it out of their power to perform the contract, and that the appellants did not propose to enter into fresh arrangements as to the vessel. The cancelling date in the berth contract was not until the 25th Oct. In spite of this letter the vessel was sent to the places indicated in the contract for orders, and the arbitrator has found that she was duly tendered under the berth contract, by which I understand him to mean that she was tendered in due time. The appellants refused to load the vessel, and a claim was made by the respondents for damages for such refusal. Before the arbitrator the appellants contended as a matter of law that by the sale of the steamship the respondents had put it out of their power to perform, and were not able to perform, the contract. The same point was argued before this court. It was said that the obligations undertaken by a shipowner under a charter-party of his ship are in their nature personal obligations and non-assignable, and that a shipowner cannot substitute any other person to fulfil the obligations he has undertaken under the charter-party

and that any sale of a vessel by a shipowner while she is under charter by which the shipowner parts with the possession and control of the vessel is a breach of the charter-party entitling the charterer to rescind. It was further said that the sale of the vessel by the respondents in the present case was a sale of this character.

I do not think that any general rule can be laid down applicable to all charter-parties. Each case must depend upon the language of the charter-party and its own particular circumstances. It can, however, I think, be stated as a general rule that where a charter-party contains obligations which can from their nature only be performed by the party himself who entered into the contract, that party cannot, by parting with the ship or otherwise, do anything which puts it out of his power to fulfil the obligations personally. He has no right to substitute any other person to perform those obligations in his place. It is not, however, every parting with a ship, whether by sale or otherwise, while she is under charter which puts it out of the power of the vendor to perform the obligations (if any) which he has undertaken to perform personally. For instance, possession may not have to be given under the contract of sale until after the charter is performed, or the vendor may by express terms reserve the right to perform personally the obligation of the charter, or the vendor and the purchaser may agree, without precisely defining how it is to be done, that the vendor shall retain the right, in spite of the sale of the vessel, of satisfying any requirement of the charterer as to personal performance by the vendor of any of the obligations of the charter-party.

In my view of what has happened in this case, I do not think that the point taken by the appellants is open to them. The case is peculiar on the facts, because the appellants elected to rescind the contract upon the mere information contained in the letter of the 11th Oct. This letter intimated (as no doubt the intention was) that the purchasers would carry out the charter-party, but it contained no statement to the effect that the respondents would not do so if required, or that they had put it out of their power to do so. It was in the interest both of the vendors and of the purchasers that nothing should be done to jeopardise the berth contract; and there was plenty of time for these parties, had they received an intimation that the appellants objected to the purchasers performing the contract, to have put matters right. What the arbitrator finds in the case is (par. 16) that, on the contents of the letter of the 13th Oct. being communicated to the respondents and to the purchasers, both of these parties protested against the charterers' statements in the letter and insisted that the contract should be fulfilled; and the arbitrator in par. 19 finds that both the respondents and the purchasers were always ready and willing to do all things necessary on their part towards the fulfilment of the said contract, and that the said vessel was not loaded solely by reason of the charterers' refusal to load her. It was argued that these findings only meant that the respondents were ready and willing to perform the contract by the purchasers as their substitutes. I cannot so read the findings, and I do not think that Atkin, J. so read them. The argument in the court below was not confined to the questions which I have so far dealt with. It was no doubt argued that the contract was one of the class that could be performed by deputy. With that argument, so far as it relates to all the obligations in this particular berth contract, I am not prepared to agree, but I do not propose to discuss it because it seems to me to be immaterial. I find Atkin, J. saying (1915) 1 K. B., at p. 313): "If they had sought to put upon the charterers the obligation to have the charter-party performed by the purchasers and by them only, I am inclined to think that the charterers would have been justified in saying that there had been a repudiation of the owners' obligations under the contract. That view, however, is not put forward, and I have not to decide it"; and again later, *ibid.*, at p. 315, the learned judge refers to and relies on the finding of the arbitrator as set out in par. 19. I think that the learned judge only dealt with the argument which was founded on the case cited to him for the purpose of indicating his view that it was not of the essence of the contract that the original owners of a vessel under charter should remain owners until the end of the contract. I read the learned judge's judgment as deciding what I have already indicated—namely, that on the facts of this particular case the point of law taken by the appellants does not arise.

Application was made by the appellants' counsel that we should send the case back to the arbitrator in order that he might state the facts upon which he arrived at his conclusion as set out in par. 19. I think that no case has been made out why this should be done, and, in my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors for the charterers, *Parker, Garrett, and Co.*

Solicitors for the respondents, *W. and W. Stocken.*

Thursday, May 6, 1915.

(Before Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.)

Re United London and Scottish Insurance Company Limited; Newport Navigation Company's Claim. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Marine insurance—Winding-up of company—Total loss—Claim for—Marine or fire policy—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 1, 3, 65, 66—*Assurance Companies Act* 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1 (*b*), 17, 28, *sub ss.* 2, 3, *sched.* 6.

In April 1912 *the applicants insured a steamship for twelve months with an insurance company, and in June* 1912 *a winding-up order was made against the company. Shortly afterwards the steamship was totally destroyed by fire. The policy of insurance covered risk of loss by fire and general average and salvage charges resulting from fire, the company not purporting to carry on the business of marine insurance.*

Held, that the policy was a fire insurance policy within sect. 1, *sub-sect.* (*b*), *of the Assurance*

(*a*) Reported by Geoffrey P. Langworthy and E. A. Scratchley, Esqrs., Barristers-at-Law.

Companies Act 1909, *and was not excluded from the operation of that Act by sect.* 28, *sub-sect.* 3, *thereof.*

Decision of Astbury, J. affirmed.

THE United London, &c., Company, by a policy dated the 11th April 1912, insured the steamer *S. C. McLouth*, belonging to the Newport Navigation Company of Marine City, Michigan, U.S.A., while upon the great lakes of America, against the risks of fire and general average and salvage charges arising from fire, for twelve months from the 15th March 1912, for 10,000 dollars. On the 27th June 1912 the steamer was totally destroyed by fire. The United London &c. Company had, however, been ordered to be wound up by the court on the 18th June 1912, and by an order dated the 27th June 1912 a liquidator was appointed in the winding-up.

On the 15th Oct. 1912 insurance brokers in London received instructions from the agents for the Newport Navigation Company to collect on behalf of that company from the United London &c. Company a total loss on the policy by reason of the destruction of the steamer; and in accordance with such instructions on the 30th Oct. 1912 a proof of debt in the liquidation was lodged.

On the 11th June 1914 notice was sent by the liquidator rejecting the claim against the United London &c. Company on the ground "that the loss occurred after the date of the winding-up order."

The policy and the written slip or form attached to it so far as material were as follows:

The United London and Scottish Insurance Company Limited in consideration of the stipulations therein named and of 71*s.* 7*s.* 1*d.* premium does insure the Newport Navigation Company for the term of twelve months from the 15th March 1912 at noon to the 15th March 1913 at noon against all direct loss or damage by fire except as thereinafter provided, to an amount not exceeding 2053*l.* (10,000 dollars) to the following described property while located and contained as described herein and not elsewhere—to wit: 2053*l.* (10,000 dollars) on the hull, machinery, boilers, and everything connected therewith of the steamer *S. C. McLouth*, valued at 30,000 dollars as per form attached which is to be taken and read as forming part of this policy. . . . This policy covers against the risk of fire only, including general average and salvage charges arising therefrom.

These words were written in red ink.

The following clause was in large print:

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy should be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, and replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

The form attached was headed "Fire policy on vessels."

And clause 5 was as follows:

Warranted by the assured that the vessel shall be equipped and navigated according to law; that no open lights shall be used on board except customary torches in engine and boiler rooms, signal lights, and candles when trimming cargo; that coal only shall be used as fuel, except when kindling fires, without special permission from this company; and that when the vessel is laid up it shall be moored free from specially hazardous exposure.

Then followed a lightning clause, namely:

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado, or windstorm) not exceeding the sum insured nor the interest of the assured in the property. . . .

By another clause, headed "Dynamo clause," loss or damage to dynamos or other apparatus for generating or regulating electricity caused by electric current whether artificial or natural was excluded.

A further clause 9, headed "General average and salvage clause," was as follows:

It is understood and agreed that this policy also covers salvage claims and general average charges when caused by or arising from fire and for which the vessel insured hereunder shall be legally liable.

The port of repair clause provided that:

In the event of damage by fire occurring at a place where repairs cannot be made, this policy shall cover the expense of removal to a port of repair, in proportion as the amount insured bears to the valuation expressed herein, provided, however, that the cost of such removal has been approved by the representative of this company.

This policy of insurance was stamped with a penny stamp only, the usual stamp on fire policies, marine policies requiring a stamp of a higher value; but there was evidence that for many years the practice had been to stamp policies on ships navigating inland waters such as the great lakes of America with a penny stamp only, whatever the perils insured against and irrespective of the amount of the policy.

The United London and Scottish Insurance Company had no books, papers, or forms of policies relating to marine business, and it appeared from their books that they did no business which was considered to be marine business, and the policy in question was classed and entered in all the proper books of the company as a policy of (foreign) fire insurance, and was in the usual form of such policies as issued by the company.

The following sections and sub-sections of the Assurance Companies Act 1909 are material:—

Sect. 1 provided shortly that the Act should apply to assurance companies whether established before or after the commencement of the Act, and whether established within or without the United Kingdom, who carry on within the

United Kingdom assurance business of all or any of the following classes: (*b*) Fire insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by, or incidental to, fire.

There were included four other classes of insurance—namely, life assurance, accident insurance, employers' liability insurance, and bond investment business, but marine insurance was not included.

Sect. 17, sub-sect. 1:

Where an assurance company is being wound-up by the court, or subject to the supervision of the court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding-up shall be estimated in manner applicable to policies and liabilities of that class provided by the sixth schedule to this Act.

The sixth schedule (*b*) was headed:

As respects fire policies.—Rule for Valuing a Policy.—The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

Sect. 28, sub-sect. 2:

This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the eighth schedule to this Act and applicable to business of that class. Sub-sect. 3: Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in sect. 1 of this Act, and a policy shall not be deemed a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy.

The eighth schedule, after setting out certain requirements to be complied with by underwriters, defines for the purpose of those requirements "non-marine insurance business" as the business of issuing policies upon subject-matters of insurance other than the following—namely:—

Vessels of any description, including barges and dredgers, cargoes, freights, and other interests which may be legally insured by, in, or in relation to, vessels, cargoes, and freights, goods, wares, merchandise, and property of whatever description insured for any transit by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit.

The following are the material sections and sub-sections of the Marine Insurance Act 1906 (6 Edw. 7, c. 41):—

Sect. 1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses; that is to say, the losses incident to marine adventure.

Sect. 3, sub-sect. 1: Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance. Sub-sect. 2: In particular, there is a marine adventure where (*a*) any ship, goods, or other movables are exposed to maritime perils. . . . "Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea; that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

The applicants relied on sect. 28, sub-sect. 3 of the Assurance Companies Act 1909, set out above, as excluding this policy of insurance from the operation of the Act, alleging it was such a marine insurance as was there referred to; also, on sect. 28, sub-sect. 2, and sched. 8 of that Act, by which "non-marine insurance business" was defined for the purpose of certain requirements therein set out to be complied with by members of Lloyd's or of any other association of underwriters approved by the Board of Trade as the business of issuing policies upon subject-matters of insurance other than vessels of any description, including barges and dredges, &c., as clearly excluding this policy from "non-marine insurance business." And, further, that this was a marine insurance as defined by the Marine Insurance Act 1906 as set out above.

Under these circumstances the Newport Navigation Company issued this summons on the 31st July 1914, asking that (*inter alia*) the decision of the liquidator be reversed and the claim of the appellant allowed.

On the 17th Feb. 1915 the case came on to be heard before Astbury, J.

MacKinnon, K.C. and *L. C. F. Darby* for the applicants.—The liquidator has rejected our claim for a total loss on the ground that this is a fire policy, and therefore the value in the winding up of the company must be estimated in accordance with the provisions of sect. 17 and par. B. of sched. 6 of the Assurance Companies Act 1909. Prior to that Act and at the present time if the policy is not within its terms under sect. 206 of the Companies (Consolidation) Act 1908 (8 Edw. 7, c. 69), and the decision in *Re Northern Counties of England Fire Insurance Company; Macfarlane's Claim* (44 L. T. Rep. 299; (1880) 17 Ch. Div. 337), a good claim can clearly be made for a total loss. This Act does not apply to marine insurance; this policy is a policy of marine insurance, and therefore the claim is for a total loss as decided in *Macfarlane's claim* (*ubi sup.*). There are two questions in this case to be decided, one whether the Assurance Companies Act of 1909 applies to marine insurance, and, secondly, is this policy a marine or fire insurance policy? It is clear the Act does not apply to marine insurance; all reference to marine insurance is omitted in sect. 1. Sect. 28, sub sect. 3 excludes from the operation of the Act such a marine insurance as this policy constitutes. That sub-section is intended to make sure of excluding marine insurance from the operation of the Act, and provides that a policy shall not be deemed a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy. That clearly aims at preventing such a policy as this from being considered within the Act. In sched. 8 (*b*) and (*c*), which sets out the requirements with which members of Lloyd's must comply if the Act under sect. 28, sub-sect. 2 is not to apply to them. "Non-marine insurance business" is defined as the business of issuing policies upon subject-matters of insurance other than the following—namely, "Vessels of any description, &c.—and from this it is clear this policy is not "non-marine insurance business." The liquidator says we are only entitled under sect. 17 and par. B of sched. 6 of the Act to prove for a proportionate part of the premium, a very different amount to what we claim, namely, 2053*l*. Sect. 1 and sect. 3,

sub-sect. 1 and 2, of the Marine Insurance Act 1906 define marine insurance, and this policy clearly comes within that definition; sects. 65 and 66 deal with general average claims and salvage charges which are included in this policy and are incidents of marine as distinct from fire policies, in fact they would mean nothing in a fire policy and are risks which cannot be other than marine risks. Reading the whole of this Marine Insurance Act of 1906 which codified the law of marine insurance, and especially the sections already referred to and sects. 2, 4, sub-sects. 2, 23, sub-sect. 2, and sect. 30, it becomes abundantly plain that this policy is a marine insurance under that Act, and as such is not covered by the Assurance Companies Act 1909. Fire is included in the Act of 1906 as a maritime peril; therefore this is a marine insurance, and though limited to fire only can still remain a marine insurance. See

Woodside v. *Globe Marine Insurance Company*, 8 Asp. Mar. Law Cas. 118; 73 L. T. Rep. 626; (1896) 1 Q. B. 105;

Imperial Marine Insurance Company v. *Fire Insurance Corporation*, 40 L. T. Rep. 166; (1879) 4 C. P. Div. 166.

On the second point this is a marine policy. The effective form of the policy is contained solely in the beginning part and the yellow slip, the whole of the 108 lines of the printed matter are not an effective part of the policy at all, they are obviously concerned with ordinary fire insurance on land. The yellow clauses prevail. See:

Cunard Steamship Company v. *Marten*, 9 Asp. Mar. Law Cas. 342, 452; 87 L. T. Rep. 400, 403; (1902) 2 K. B. 624, 626, 627.

[For the manner in which a general average claim can arise, *Whitecross Wire and Iron Company* v. *Savill* (46 L. T. Rep. 643; (1882) 8 Q. B. Div. 653) was referred to.] This policy is an insurance of a steamer, and by express terms covers general average and salvage charges, which would mean nothing in a fire policy and are risks which cannot be other than marine risks. [Astbury, J.—Do you say the insurance of a vessel is a marine insurance?] Yes, my Lord, I do. It is said in one of the affidavits that this is a fire policy because it has a 1*d.* stamp only on it; but since a certain correspondence with the Board of Inland Revenue which took place in 1884, the practice of the commissioners and the custom of insurance brokers has been to stamp all these lake risks with 1*d.* only, but not because they are insurances against fire. In conclusion I say that this being a policy insuring a vessel against fire and general average and salvage charges is a marine policy.

Leslie Scott, K.C. and *H. E. Wright* for the liquidator.—In this court we cannot say *Mcfarlane's claim* (*ubi sup.*), which was decided by the Court of Appeal, is wrong, therefore my contention is that this policy ought to be construed as marine insurance, yet for the purposes of the Assurance Companies Act 1909 it is a fire policy, because that is the main business, and the Act of 1909 says that policies of fire insurance in that sense are to be valued in the winding-up in the way provided for by sched. 6, and therefore a total loss is not recoverable and the liquidator rightly objected to the claim. Further this is a policy of fire insurance proper—*i.e.*, one to be interpreted in its incidence according to the rules of law applying to fire insurance, and the proviso for including general average and salvage charges are added as incidents to a fire policy. A policy of marine insurance against fire only would be loss by or incidental to fire within the Assurance Companies Act 1909. Sect. 28, sub-sect. 3 was inserted to prevent ordinary marine policies being brought within the Act. A policy may be both a marine insurance and fire insurance, though the applicant's case is they are mutually exclusive. See

Grant v. *Astua Insurance Company*, 6 L. T. Rep. 735; 1862, 15 Moo. P. C. 516;

Pearson v. *Commercial Union Assurance Company*, 3 Asp. Mar. Law Cas. 275; 35 L. T. Rep. 445; (1876) 1 App. Cas. 498.

We consider that the expressions "general average charges" and "salvage charges" are marine insurance terms, but they are not risks but consequential losses due to the operation of the peril insured against. A marine policy may be limited to fire only; but this is not a marine policy, but a fire policy with a marine incident included in special terms as was necessary, because the subject-matter insured is a vessel. General average and salvage are implied in a marine policy, but here they are specially contracted for. In a fire policy there is no such doctrine as notice of abandonment, in a marine insurance abandonment is a usual incident, and as this was a fire policy on a ship the applicant might possibly have claimed a right to abandon. This is, therefore, expressly negatived, and in a marine policy it would not have been negatived, which shows that this was intended to be and is a fire policy. The Assurance Companies Act, s. 28, sub-s. 3, excludes policies by reference only to the nature of the risk, and not by reference to the subject-matter of the insurance. An ordinary marine policy, including fire as one of the risks, would be a fire policy within sect. 1 (*b*), but it would be excluded by sect. 28, sub-sect. 3; but this exclusion does not apply to such a policy as this is where fire is the only risk covered. Sched. 8, though no doubt part of the Act, refers solely to members of Lloyd's, and was put in for enabling members to exclude themselves from the operation of the Act by complying with certain requirements there set out, and is complete in itself and should not be allowed to assist in the construction of the main provisions of the Act itself.

MacKinnon, K.C. in reply.—According to the argument for the liquidator, if there had been a pure marine policy, as in *Woodside* v. *Globe Marine Insurance Company* (*ubi sup.*), still that would be a fire insurance to which sect. 17 would apply; but that would have singular results, as the insured could go and effect another policy immediately on winding-up. [Astbury, J.—Apart from definitions, sect. 17 and sect. 1 (*b*) are the only relevant sections, except the exclusions under sect. 28, sub-sect. 3. It is difficult to know what exactly sect. 17 means, but if this Act applies to this policy, it is clear only a proportion of the premium is recoverable in the winding-up under the decision in *Re Law Car and General Insurance Corporation; J. J. King and Sons Limited's* case (108 L. T. Rep. 862; (1913) 2 Ch. 113).] Policies which cover all risks come within *Mcfarlane's*

Claim (*ubi sup.*), those against fire only within *Re Law Car and General Insurance Corporation; J. J. King and Sons Limited's* case (*ubi sup.*). When a ship is insured against loss by fire the policy is not a fire policy, but that constitutes a marine risk and insurance. [Astbury, J.—You then go so far as to claim that all insurance of ships from fire are marine insurance.] Yes, my Lord, I do. A fire insurance means an insurance which is subject to well-known laws applicable to fire insurance policies, and marine insurance has its own peculiar laws applicable to it.

Cur. adv. vult.

Feb. 23.—Astbury, J.—This is an application by the Newport Navigation Company of America that a decision of the liquidator in the winding-up of the United London and Scottish Insurance Company, rejecting the applicants' proof of 2053*l.* on a policy of insurance, may be reversed. On the 11th April 1912 the applicants insured with the insurance company the steamship *S. C. McLouth* against loss or damage by fire while on the great lakes of America for 2053*l.*, upon the terms of a policy to which I will refer. The insurance company was ordered to be wound-up on the 18th June 1912, and nine days later the vessel was totally destroyed by fire. The applicants claimed to prove in the winding-up for a total loss. The liquidator has rejected that proof, and this summons has been issued to review his decision. The insurance company did not purport to carry on or transact the business of marine insurance, and the policy in the present case is in the form used by the insurance company in its fire insurance business, with a yellow printed slip attached. The material portions of the policy and slip are as follows: The company insured is the Newport Navigation Company, U.S.A., and it insured against all direct loss or damage by fire except as hereinafter provided to an amount not exceeding 2053*l.* on the hull, machinery, boilers, and everything connected therewith of the steamer *S. C. McLouth* as per form attached thereto, which is to be taken and read as forming part of the policy, and the policy covers against the risk of fire only, including general average and salvage charges resulting therefrom. The yellow slip attached to the policy is headed "Fire policy on vessels." It provided that the policy is to cover the vessel while on the great lakes, and it provides that the policy also covers salvage claims and general average charges when caused by or arising from fire, and for which the vessel insured hereunder shall be legally liable; and in the event of damage by fire occurring at a place where repairs cannot be made, the policy is to cover the expense of removal to a port of repair as therein provided. Nothing turns in this case upon the inconsistency, if any, between the printed conditions of the policy and the contents of the attached slip, the latter clearly prevailing: (*Cunard Steamship Company* v. *Marten*, 9 Asp. Mar. Law Cas. 342, 452; 87 L. T. Rep. 400, 403; (1902) 2 K. B. 624, 626, 627). Sect. 206 of the Companies (Consolidation) Act 1908 provides for the proof of contingent claims in winding-up. In *Re Northern Counties of England Fire Insurance Company; MacFarlane's Claim* (44 L. T. Rep. 299; (1880) 17 Ch. Div. 337) Macfarlane held a policy of fire insurance of the Northern Counties of England Fire Insurance Company for a sum of 500*l.* upon certain buildings. On the 26th Nov. 1879 a winding-up petition was presented, and on the 13th Dec. 1879 a winding-up order was made. Subsequent to that winding-up order—namely, on the 22nd Jan. 1880—the insured premises were burnt down, and Macfarlane thereby suffered loss to the full amount of the policy. It was held that he was entitled to prove in the winding-up for the full amount of loss covered by the policy and sustained by him through the fire, notwithstanding the fact that it occurred after the date of the winding-up order.

If the matter rested here, the applicants would, in this court at all events, be entitled to succeed; but the question I have to decide depends upon whether the provisions of the Assurance Companies Act 1909 apply to the present case. By sect. 1 of that Act it was provided that the Act should apply to all assurance companies carrying on assurance business in the United Kingdom of all or any of the following classes, five of which are specified, one of which is: "(*b*) Fire insurance business—that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire." By sect. 17, sub-sect. 1, "Where an assurance company is being wound up by the court, or subject to the supervision of the court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding-up shall be estimated in a manner applicable to policies and liabilities of that class provided by the sixth schedule to this Act." And sched. 6 (B)—which is headed "As respects Fire Policies. Rule for valuing a Policy"—provides that "The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid." Sect. 28, sub sect. 3, provides that: "Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in section one of this Act, and a policy shall not be deemed a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy." Under this sub-section it is clear that ordinary marine insurance, though not referred to as such, is excluded. Sect. 28, sub-sect. 2, provides that: "This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the eighth schedule." Under this schedule, B and C (*d*), there are special provisions relating only to Lloyd's, one being that "non-marine insurance business" does not include any insurance upon "vessels of any description, including barges or dredges." But the term "non-marine insurance business" does not appear in the Act itself, and the special terms provided in the case of Lloyd's do not, in my opinion, assist in the construction of the main provisions of the Act in this respect. Under the Marine Insurance Act 1906 sect. 1 provides that: "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses—that is to say, the losses incident to marine adventure. Sect. 3, sub-sect. 1, provides that: "Subject to the provisions of this Act, every lawful marine adventure may be the

subject of a contract of marine insurance." Sub-sect. 2 provides that: "In particular, there is a marine adventure where—(*a*) Any ship, goods, or other movables are exposed to maritime perils"; and in that section "maritime perils" are defined as meaning "the perils consequent on, or incidental to, the navigation of the sea—that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils either of the like kind or which may be designated by the policy"; and under sects. 65 and 66 salvage charges and general average loss are dealt with. It is not disputed that all marine perils except one may be struck out of the usual form of a marine policy and the same still remain a "marine policy" within the meaning of this statute: (see *Woodside* v. *Globe Marine Insurance Company* (73 L. T. Rep. 626; (1896) Q.B. 105). The present policy is stamped with a penny stamp only, whereas a marine policy, covering a period of time, requires a stamp of a higher value. The practice under and the interpretation of sect. 92 of the Stamp Act 1891 have been by no means uniform, but the Board of Inland Revenue in 1884 took the view that policies on vessels on rivers, lakes, canals, and other inland waters were chargeable with a stamp duty of 1*d.* only. This matter has been referred to in argument, but is not, in my judgment, very relevant to the decision of the present dispute.

The question I have to determine is whether, although this is a ship insurance, it is an insurance against loss by or incidental to fire, within the meaning of the Assurance Companies Act 1909, in which case the proof must be limited to the amount ascertainable in accordance with sched. 6, which is the liquidator's view, or whether, on the other hand, it is such a marine insurance as is excluded from the operations of the Act by sect. 28, sub-sect. 3. The applicant contends first, that all ship insurances covering transit, even if limited to fire risks, are so excluded; and, secondly, that this is specially the case when the policy covers salvage claims and general average charges, although limited to those caused by or arising from fire, which he says, and truly says, are incidents of "marine" as distinct from "fire" insurance in the ordinary acceptation of those terms. The Assurance Companies Act 1909 raises, no doubt, many difficulties in its application to particular cases, but I cannot think that the mere fact that an insurance is or may be a marine insurance within the definition of the Marine Insurance Act 1906 determines the question at issue in this case. If an ordinary marine insurance form were adopted, with all the usual marine risks except fire excluded, I see no reason for holding that this would not be an insurance against loss by or incidental to fire, or that it would be excluded from the operation of the Assurance Companies Act 1909 by sect. 28, sub-sect. 3, which certainly does not provide that a policy shall not be deemed to be a policy of fire insurance if loss by fire is the only risk covered by it; nor does it exclude policies by reference to the "subject-matter" of the insurance, but only by reference to the nature of the risk. Sect. 28, sub-sect. 3, was required (*inter alia*) to exclude marine policies generally; otherwise they might have been included in, or have been construed as "fire policies" under sect. 1 (*b*). But sect. 28, sub-sect. 3 does not, in my opinion, directly or by inference exclude marine policies limited to fire risks as defined by sect. 1 (*b*). Further, the evidence and the authorities appear to show that ordinary fire insurances of ships are not uncommon or unknown. The remaining point to be considered is whether the fact that the policy covers salvage claims and general average charges, when caused by or arising from fire, is sufficient to exclude the operation of the Assurance Companies Act 1909. In my opinion it is not. The only risk insured against is loss by or incidental to fire, but the subject-matter of the insurance being a vessel the assured is contractually covered for special claims and charges caused by or arising from the occurrence of the risk or event insured against, which would not otherwise form part of the loss covered by the policy. One reason for excluding general marine insurance from the Act of 1909 may well be that in case of vessels at sea and goods carried by them, notice of the winding-up of the insurance company, if it occurs, may not be obtained in time to effect a re-insurance, and notice cannot be given to the company of the occurrence of many of the events insured against within any limited or specified time, as is usually provided for in fire policies; but if the policy in question is in fact a fire policy and that only, as in this case I think it is, the mere fact that the subject-matter is a ship, and subject to inconveniences accordingly, does not, in my judgment, bring it within any of the exceptions in the Act of 1909. For these reasons the application, in my opinion, fails, and must be dismissed.

From that decision the claimants now appealed.

MacKinnon, K.C. and *L. F. C. Darby* for the appellants.

Leslie Scott, K.C. (with him *H. E. Wright*) for the respondent, the liquidator.

He was stopped by the court.

MacKinnon, K.C. replied.

The arguments adduced in the court below were substantially repeated and the authorities there cited were again referred to.

Lord Cozens Hardy, M.R.—I do not see my way in this case to differ from the view which was taken by Astbury, J.

The case arises upon the construction of the Assurance Companies Act 1909. That is a very difficult Act to construe. I had occasion to consider that Act in the case of *Re Law, Car, and General Insurance Corporation Limited* (108 L. T. Rep. 862; (1913) 2 Ch. 103). But I am bound to say that the present case does not seem to me to give rise to any serious difficulty. Fire insurance business is defined by sect. 1, sub-sect. (*b*), of the Act as follows: "The issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire." We have a policy here which undoubtedly falls within that definition. It is an insurance against loss by fire of a vessel while on the great lakes in America or in dry dock where it might be temporarily put for repairs; the loss is by or incidental to fire. This policy also includes salvage claims or losses by reason of general average. Unless there was something else in the Act it seems to me that

every Lloyd's policy would, or certainly might, come within the meaning of fire insurance business, because every Lloyd's policy really includes, amongst other risks insured against, that of fire. But it is taken out of the Act, as is made quite clear by sect, 28, sub-sect. 3, which enacts as follows: "Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in sect. 1 of this Act, and a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy."

That being so, it seems to me that the present case is not within the saving clause of sub-sect. 3. This is not really a policy of insurance of which fire is only, one of the various risks, but is a policy which is solely against loss by or incidental to fire, and the operative and effective clause is therefore sect. 1, sub-sect. (*b*). If that be so, the provisions for the granting of the policy, which are novel and inconsistent with the case of *Re Northern Counties of England Fire Insurance Company; Macfarlane's Claim* (44 L. T. Rep. 299; 17 Ch. Div. 337), must apply to the valuation that takes place. It is not necessary to go through that case. It has not been disputed before us, and could not have been disputed, that if it is a policy of fire insurance within the meaning of the Act, the principle of the case of *Re Northern Counties of England Fire Insurance Company; Macfarlane's Claim* (*ubi sup.*) does not apply and the express provisions of the schedule do apply.

For these reasons, which are substantially those given by Astbury, J., I think that this appeal fails and must be dismissed with costs.

Pickford, L.J.—I agree.

A great part of the argument in this case has been directed to whether this in ordinary parlance would be a fire insurance policy or a marine policy. If it were necessary to decide that, which I do not think it is, I should be inclined to agree with the appellants that this was a marine policy especially looking at the definition of non-marine business in sched. 8 of this Act. But it does not seem to me that that matters at all. We have to see what is the kind of business which is subject to the provisions of this Act, and then see whether this policy does or does not come within these provisions. It is an insurance upon a ship navigating on the great lakes in America, and it is to this effect, so far as it is necessary to read the very long provisions of it: "This policy covers the risk of fire only, including general average and salvage charges resulting therefrom."

The question is whether that comes within the description of fire insurance business in the Act of 1909. The Act says that: "This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established before or after the commencement of this Act, and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following classes":

The only class which relates to and is of importance in the present case is fire insurance business. If it stopped there I suppose we should have had to inquire what in ordinary parlance most insurance people call "fire insurance business." But the section does not stop there. It goes on to define what is meant by that for the purposes of the Act—"that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire."

It does not seem to me possible to look at this policy and say that it does not come within those words. It is the undertaking of liability under a policy which "covers the risk of fire only, including general average and salvage charges resulting therefrom." Therefore it is exactly within the words "the undertaking of liability under policies of insurance against loss by"—that is the direct clause—"or incidental to a fire"—that is the salvage and general average on fire. That being so, it seems to me that what we have to look for in this Act is something that says in effect—if it said it in words there would be nothing to discuss—that this Act shall not apply to policies of marine insurance or to marine insurance business. I cannot find anything of the kind in the Act. The only thing that I find is sect. 28, sub-sect. 3, which says that: "A policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy."

But for that it seems to me that an ordinary policy of insurance would come within the words of sect. 1. It is not, however, intended that it should, or that any other policy of which fire was one of the risks, and only one of the things insured against, should come within the section. Therefore there is that provision. But that provision has nothing to do with this policy at all, because this policy is a policy against fire only, except in so far as it is an insurance against certain claims which are incidental to the fire having taken place.

The only other matter that I need refer to, and it is a matter upon which the greatest stress was laid, is with regard to the words in the eighth schedule. Of course it is always very difficult to know exactly what an Act of Parliament means when the schedules are of greater length than the Act, and do not specially refer to one another or to the provisions of the Act. I need not read the whole of the provision in the eighth schedule. It is a provision relating to "Requirements to be complied with by underwriters being members of Lloyd's or of any other association of underwriters approved by the Board of Trade." It really is a provision introduced for the protection of Lloyd's, who, as we know, are a very powerful body. It provides by (*b*) and (*c*) (2) as follows: "An underwriter who carries on fire insurance or accident insurance business may, in lieu of complying with the above requirements, elect to comply with the undermentioned provisions":

Then there follow certain things that he has to do: "(*a*) All premiums received by or on behalf of the underwriter in respect of fire and accident insurance or re-insurance business carried on by him, either alone or in conjunction with any other insurance business for which special requirements are not laid down in this schedule, shall without any apportionment be placed in a trust fund in accordance with the provisions of a trust deed approved by the Board of Trade: (*b*) he shall also furnish security to the satisfaction of the Board

of Trade (or, if the board so direct, to the satisfaction of the committee of the association), which shall be available solely to meet claims under policies issued by him in connection with fire and accident business, and any other non-marine business carried on by him. . . ." Then there follows a definition of non-marine business.

I think that definition would exclude this policy from non-marine business, and therefore would make it marine business within the meaning of this schedule. But I cannot see that that schedule has anything like the effect contended for, which is this, that it takes all marine business out of the purview of sect. 1. It does not seem to me to have anything to do with that. They are provisions for the benefit of Lloyd's underwriters dealing with non-marine business, and dispensing with their having to comply with requirements which they would otherwise have to comply with.

I think it is of importance, as Mr. Leslie Scott pointed out, to see what is introduced by sect. 28, sub-sect. 2: "This Act shall not apply to a member of Lloyd's, or any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the eighth schedule to this Act, and applicable to business of that class." So that the eighth schedule is introduced simply as supplementary to sect. 28, sub-sect. 2, and really is not of general application at all.

For these reasons it seems to me that there is nothing in this Act of Parliament or in the schedule which is equivalent to saying, as I mentioned before: "This Act shall not apply to any business which is marine." I think that this policy comes within the exact words of sect. 1, sub-sect. 3, and that therefore this Act of Parliament applies to it, and Astbury, J.'s judgment was right.

WARRINGTON, L.J.—I am of the same opinion.

The concrete question which has to be determined is for what amount is the assured entitled to prove in the winding-up of the respondent company in respect of a claim upon a policy effected prior to the winding-up, the claim maturing subsequently to the winding-up.

That question turns upon the right decision of another question, namely, Is the policy in question a fire policy subject to the provisions of the Assurance Companies Act 1909, and in particular to the provisions of sect. 17, sub-sect. 1, and those of the sixth schedule as to the mode of valuation of such a policy?

The Act by sect. 1 defines the class of persons and companies to which it is to be applicable, and amongst others it is to be applicable to those "who carry on within the United Kingdom assurance business of all or any of the following classes." Amongst other classes that which is called fire insurance business is included. Fire insurance business is also included in these terms: "That is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire."

The policy in the present case is a policy of insurance against loss by fire exclusively, and against certain other claims or losses resulting from fire, and which I think come fairly within the expression "incidental to fire." The policy, therefore, so far undoubtedly comes within the class of policies issued by people who are said by the Act to be carrying on fire insurance business. The contention on the part of the appellants is that if a policy of insurance against loss by or incidental to fire is a policy of that nature on a vessel or cargo, which may be stated shortly to be the usual subject of marine insurance, then it is not to be treated as fire insurance for the purposes of this Act. In my opinion it is impossible to find anything in the Act to justify that contention.

The only provision which I can refer to for that purpose is the provision in sect. 28, sub-sect. 3: "Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in sect. 1 of this Act." I pause there for one moment. Marine insurance may be said to be assurance business of a class other than one of the classes specified in sect. 1 of this Act. But it has occurred to the framers of the Act that if you were to leave it there the ordinary policy of marine insurance might be subject to the provisions of the Act, because the risk of fire is one of the risks insured against. Therefore they have placed on the statute the second sentence of that sub-section: "And a policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy."

In the present case loss by fire is the only risk, and short of saying that any policy insuring against fire which is a policy on a vessel or cargo or otherwise, usually the subject of marine insurance, is excluded from this Act, I do not see how it is possible to exclude this particular policy. The provisions of the eighth schedule do not, in my opinion, help the appellants, because they merely enact certain regulations which are to be complied with by the particular class of persons who are referred to in sub-sect. 2 of sect. 28, namely, "a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade."

On the whole, therefore, I think that the judgment of Astbury, J. was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett,* and *Co.*

Solicitors for the respondent, *Wrinsted, Hind,* and *Roberts.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

July 12, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 30, *Aug.* 2, 3, *and Sept.* 16, 1915.

(Before Sir S. T. EVANS, President.)

THE KIM.
THE ALFRED NOBEL.
THE BJÖRNSTERJNE BJÖRNSON.
THE FRIDLAND. (*a*)

Neutral vessels—Contraband goods—Absolute and conditional contraband—Neutral consignors—Ostensible destination of cargoes — Neutral country—Real destination of cargoes—Enemy country—Goods consigned "to order" — No consignee named — Continuous voyage — Continuous transportation — Goods intended for enemy—Evidence—False papers—Tests for condemnation or release.

Four vessels, the property of neutral owners, under time charters to neutral merchants, started on voyages from New York to Copenhagen in October and November 1914, *laden with large cargoes of lard, hog and neat products, oil stocks, wheat and other foodstuffs, rubber, and hides. They were captured and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable under the circumstances, with the exception of one cargo of rubber, which was seized as absolute contraband. On the evidence before the Prize Court, when the Crown asked for the condemnation of the cargoes, it was found that the major portion of the goods were not intended to be incorporated in the common stock of Denmark, but that the same were intended for Germany as their ultimate destination.*

Held, that as the doctrine of continuous voyage and transportation, both as regards carriage by sea and land, was a part of international law at the time of the commencement of the war in August 1914, *and was applicable to conditional as well as to absolute contraband, all goods which were intended for the use of the German Government, although nominally having Copenhagen as their port of destination, must be condemned as lawful prize.*

In arriving at its decision in any particular case, the Prize Court is not limited or governed by the strict rules of evidence which bind the municipal courts of the country; it is entitled to rely upon well known facts which have come to light in other cases, or as matters of public reputation. Strict evidence is often very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents.

THESE were four actions in which the Crown claimed the condemnation of the above-named Scandinavian vessels and their cargoes on the ground that the cargoes consisted largely of contraband goods, absolute and conditional, and also that two of the vessels were carrying false papers, certain consignments of rubber being manifested as gum. The four vessels sailed from New York on various dates in October and November 1914, their ostensible port of destination being Copenhagen, and they were all seized on the high seas during the month of November 1914. The cargoes were made up of very large consignments of lard, hog and meat products, oil stocks, wheat, and other foodstuffs. Two of the vessels had also cargoes of rubber, and one of hides. Most of the goods were consigned from Chicago, and it was alleged on the part of the Crown that the real destination of the cargoes was not Copenhagen, but Germany, where they were to be utilised for the benefit of the armed forces of the German Government whilst that country was at war with Great Britain. The various claimants —the American consignors and the alleged Scandinavian vendees—resisted condemnation on the ground that there was no absolute evidence showing that the goods were intended for the armed forces of the enemy. The judgment in the present instance was confined to the question of the condemnation or the release of the cargoes, the question of the capture and confiscation of the vessels being left over to be dealt with at a later date.

The following articles of the Declaration of London were referred to:—

Art. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land.

Art. 31. Proof of the destination specified in art. 30 is complete in the following cases:

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

Art. 32. Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

Art. 33. Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a Government department of the enemy State, unless in the latter case the circumstances show that the goods cannot in fact be used for the purpose of the war in progress. This latter exception does not apply to a consignment coming under art. 24 (4) (*i.e.*, gold and silver in coin or bullion and paper money).

Art. 34. The destination referred to in art. 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumption set up by this article may be rebutted.

Art. 35. Conditional contraband is not liable to capture, except where found on board a vessel bound

(*a*) Reported by J. A. SLATER, Esq. Barrister-at-Law.

for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

Art. 36. Notwithstanding the provisions of art. 35, conditional contraband, if shown to have the destination referred to in art. 33, is liable to capture in cases where the enemy country has no seaboard.

Art. 37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

Art. 38. A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

Art. 39. Contraband goods are liable to condemnation.

Art. 40. A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

Art. 41. If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the National Prize Court and the custody of the ship and cargo during the proceedings.

Art. 42. Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.

By the Order in Council, dated the 20th Aug. 1914, it is provided (*inter alia*) :—

During the present hostilities the Convention known as the Declaration of London shall, subject to the following additions and modifications, be adopted and put in force by His Majesty's Government as if the same had been ratified by His Majesty.

The additions and modifications are as follows :—

(1) The lists of absolute and conditional contraband contained in the proclamation dated the 4th Aug. 1914 shall be substituted for the lists contained in arts. 22 and 24 of the said Declaration.

(3) The destination referred to in art. 33 may be inferred from any sufficient evidence, and (in addition to the presumption laid down in art. 34) shall be presumed to exist if the goods are consigned to or for an agent of the enemy State or to or for a merchant or other person under the control of the authorities of the enemy State.

(5) Notwithstanding the provisions of art. 35 of the said Declaration, conditional contraband, if shown to have the destination referred to in art. 33, is liable at capture to whatever port the vessel is bound and at whatever port the cargo is to be discharged.

By the Order in Council, dated the 29th Oct. 1914, it is provided (*inter alia*) :—

1. During the present hostilities the provisions of the Convention known as the Declaration of London shall, subject to the exclusion of the lists of contraband and non-contraband, and to the modifications hereinafter set out, be adopted and put in force by His Majesty's Government.

The modifications are as follows :—

(1) A neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage.

(2) The destination referred to in art. 33 of the said Declaration shall (in addition to the presumptions laid down in art. 34) be presumed to exist if the goods are consigned to or for an agent of the enemy State.

(3) Notwithstanding the provisions of art. 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned "to order" or if the ship's papers do not show who is the consignee of the goods in territory belonging to or occupied by the enemy.

(4) In the cases covered by the preceding paragraph (3) it shall lie upon the owners of the goods to prove that their destination was innocent.

2. When it is shown to the satisfaction of one of His Majesty's Principal Secretaries of State that the enemy Government is drawing supplies for its armed forces from or through a neutral country, he may direct that in respect of ships bound for a port in that country art. 35 of the said Declaration shall not apply. Such direction shall be notified in the *London Gazette* and shall operate until the same is withdrawn. So long as such direction is in force, a vessel which is carrying conditional contraband to a port in that country shall not be immune from capture.

3. The Order in Council of the 20th Aug. 1914, directing the adoption and enforcement during the present hostilities of the Convention known as the Declaration of London, subject to the additions and modifications therein specified, is hereby repealed.

All the goods claimed in the present cases, other than rubber and hides, were declared conditional contraband by the proclamation of the 4th Aug. 1914. Rubber was declared conditional contraband on the 21st Sept., and absolute contraband on the 29th Oct. Hides were declared conditional contraband on the 21st Sept.

The *Attorney-General* (Sir E. Carson, K.C.), the *Solicitor-General* (Sir F. E. Smith, K.C.), *Cave*, K.C., *R. A. Wright*, *Pearce Higgins*, and *Wylie* for the Crown.

Sir *Robert Finlay*, K.C., *Laing*, K.C., and *Raeburn* for Messrs. Armour and Co.

Leslie Scott, K.C. and *Dunlop* for Messrs. Morris and Co. and Messrs. Stern and Co.

Maurice Hill, K.C. and *A. Nielson* for Messrs. Sulzberger and Co.

Maurice Hill, K.C. and *John B. Aspinall* for the Cudahy Packing Company.

Pollock, K.C. and *Lowenthal* for Messrs. Hammond and Co. (with Messrs. Swift and Co.).

(The above firms were the consignors of the alleged contraband goods from America.)

Sir *Robert Finlay*, K.C., *Leslie Scott*, K.C. and *Raeburn* for various Dutch consignees.

Dawson Miller, K.C. and *A. Nielson* for Messrs. Allman and Co, consignees of rubber in the *Fridland*.

Douglas Hogg and *Fortune* for the consignees of thirty-nine cases of rubber in the *Kim*.

Brightman for the consignees of 218 cases of rubber in the *Kim*.

Bateson, K.C. and *D. Stephens* for the consignees of certain wheat in the *Kim*.

MacKinnon, K.C. and *Raeburn* for the consignees of certain wheat in the *Alfred Nobel*.

Dumas for the Guarantee Trust Company of New York, certain shippers of grain, and various Danish consignees.

Adair Roche, K.C. and *Balloch* for the owners of the *Kim*, *Alfred Nobel*, and the *Bjornstjerne Björnson*.

Leslie Scott, K.C. and *Balloch* for the owners of the *Fridland*.

Cur. adv. vult.

Sept. 16.—The PRESIDENT.—The cargoes which have been seized and which are claimed in these proceedings were laden on four steamships belonging to neutral owners, but under time charters to an American Corporation, the Gans Steamship Line. Mr. John H. Gans, the president of the company, is a German. He has resided in America for some years, but he has not been naturalised. The general agent of the company in Europe was one Wolenburg, of Hamburg.

The four ships were the *Alfred Nobel* (Norwegian), the *Björnstjerne Björnson* (Norwegian), the *Fridland* (Swedish), and the *Kim* (Norwegian). They all started within a period of three weeks, in October and November 1914, on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat, and other foodstuffs. Two of the vessels had cargoes of rubber, and one of hides. They were captured on the high seas, and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable in the circumstances, with the exception of one cargo of rubber which was seized as absolute contraband.

The court is now asked to deal only with the cargoes. All questions relating to the capture and the confiscability of the ships are left over to be argued and dealt with hereafter.

It is necessary to note the various dates of sailing and capture. They are as follows:—

	Date of Sailing. 1914.	Date of Capture. 1914.
Alfred Nobel ...	20th Oct.	... 5th Nov.
Björnstjerne Björnson	27th „	... 11th „
Fridland	28th „	... 10th „
Kim	11th Nov.	... 28th „

Upon some of those dates may depend questions touching what Orders in Council are applicable. One Order in Council adopting with modifications the provisions of the Convention known as the Declaration of London was promulgated on the 20th Aug. 1914, and another on the 29th Oct. 1914. Proclamations as to contraband, absolute and conditional, were issued on the 4th Aug., 21st Sept., and 29th Oct. 1914. It is useful to note here, in order to avoid any possible misconception or confusion, that the later Order in Council of the 11th March 1915 (sometimes called the "Reprisals Order") does not affect the present cases in any way.

Before proceeding to state the result of the examination of the facts relative to the respective cargoes and claims, a general review may be made of the situation which led up to the dispatch of the four ships with their cargoes to a Danish port. Notwithstanding the state of war, there was no difficulty in the way of neutral ships trading to German ports in the North Sea other than the perils which Germany herself had created by the indiscriminate laying and scattering of mines of all descriptions, unanchored and floating, outside territorial waters in the open sea in the way of the routes of maritime trade, in defiance of international law and the rules of conduct of naval warfare, and in flagrant violation of the Hague Convention to which Germany was a party. Apart from these dangers neutral vessels could have, in the exercise of their international rights, voyaged with their goods to and from Hamburg, Bremen, Emden, and any other ports of the German Empire. There was no blockade involving risk of confiscation of vessels running or attempting to run it. Neutral vessels might have carried conditional and absolute contraband into those ports, acting again within their rights under international law, subject only to the risk of capture by vigilant warships of this country and its allies.

But the trade of neutrals—other than the Scandinavian countries and Holland—with German ports in the North Sea having been rendered so difficult as to become to all intents impossible, it is not surprising that a great part of it should be deflected to Scandinavian ports from which access to the German ports in the Baltic and to inland Germany by overland routes was available. And that this deflection resulted, the facts universally known strongly testify. The neutral trade concerned in the present cases is that of the United States of America; and the transactions which have to be scrutinised arose from a trading, either real and *bonâ fide* or pretended and ostensible only, with Denmark, in the course of which these vessels' sea voyages were made between New York and Copenhagen.

Denmark is a country with a small population of less than three million inhabitants, and it is, of course, as regards foodstuffs, an exporting and not an importing country. Its situation, however, renders it convenient to transport goods from its territory to German ports and to places like Hamburg, Altona, Lübeck, Stettin, and Berlin. The total cargoes in the four captured ships bound for Copenhagen within a period of three weeks amounted to about 73,237,000lb. in weight. (These weights and other weights which will be given are gross weights according to the ships' manifests.) Portions of these cargoes have been released and other portions remain unclaimed. The quantity of goods claimed in these proceedings is very large. Altogether the claims cover about 32,312,000lb., exclusive of the rubber and the hides. The claimants have not furnished the court with any information as to the quantities of similar products which they had supplied or consigned to Denmark previous to the outbreak of the present war. Some illustrative statistics were given by the Crown with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of these and like substances into Denmark before the war; and they give a measure for comparison with the imports of lard consigned to Copenhagen, after the outbreak of war, upon the four vessels now before the court.

The average annual quantity of lard imported into Denmark during the three years 1911 to 1913 from all sources was 1,459,000lb. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000lb. Comparing these quantities, the result is that these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually into Denmark for each of the three years before the war. To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of

Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November 1914 amounted to 50,647,849lb. as compared with 854,856lb. for the same months in 1913, showing an increase for the two months of 49,792,993lb.; or, in other words, the imports during those two months in 1914 were nearly sixty times those for the corresponding months of 1913. One more illustration may be supplied from statistics which were given in evidence on behalf of one of the claimants (Hammonds and Swifts). In the five months, August to December 1913, the exports of lard from the United States of America to Germany were 68,664,975lb. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800lb. On the other hand, during these periods similar exports from the United States of America to Scandinavian countries and to Malta and Gibraltar (which last two places would not materially affect the comparison) rose from 2,125,579lb. to 59,694,447lb. These facts give practical certainty to the inference that an overwhelming proportion—so overwhelming as to amount to almost the whole—of the consignments of lard in the four vessels I am dealing with was intended for or would find its way into Germany.

These, however, are general considerations, important to be borne in mind in their appropriate place, but not in any sense conclusive upon the serious questions of continuous voyages, of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize.

The dates of sailing and capture have been given with an intimation that they may have a bearing upon the law applicable to the cases. The *Alfred Nobel*, the *Björnstjerne Björnson*, and the *Fridland* started on their voyages in the interval between the making of the two Orders in Council of the 20th Aug. and the 29th Oct. 1914. The *Kim* commenced her voyage after the latter order came into force. By the proclamation of the 4th Aug. all the goods now claimed (other than the rubber and the hides) were declared to be conditional contraband. The cargoes of rubber seized were laden on the *Fridland* and the *Kim*. Rubber was declared conditional contraband on the 21st Sept. 1914, and absolute contraband on the 29th Oct. Accordingly the rubber on the *Fridland* was conditional contraband and that on the *Kim* was absolute contraband. The hides were laden on the *Kim*. Hides were declared conditional contraband on the 21st Sept. 1914. No contention was made on behalf of the claimants that the goods were not to be regarded as conditional or absolute contraband in accordance with the respective proclamations affecting them. That is to say, it was admitted that the goods partook of the character of conditional or absolute contraband under the proclamations, and were to be dealt with accordingly.

The law can be best discussed and can only be applied after ascertaining the facts. The details relating to the ships and their cargoes which it has been necessary to examine are very voluminous. I must try to summarise them for the purpose of this judgment, in order to make it intelligible in principle and in the results. To attempt to give even a moderate proportion of the details would tend to bewildering confusion.

The number of separate bills of lading covering the cargoes on the four vessels is about 625. Four large American firms were consignors of goods on each of the four vessels, and a fifth on two of them. According to the figures given to the court by the law officers of the Crown, these five American firms were consignors of lard and meat products to the following extent:—

	lb.
Armour and Co.	9,677,978
Morris and Co. (with Stern and Co.)	6,868,213
Hammond and Co. (with Swift and Co.) ...	3,397,005
Sulzberger and Sons Company	2,602,009
Cudahy and Co.	729,379
Total ...	23,274,584

These figures I accept as substantially correct.

Those portions of the cargoes which have been released, and those which have not been claimed, will be dealt with in a separate judgment. There is some overlapping, as some parts of the cargoes have been claimed by the consignors, and also by some alleged vendees. For these and other reasons some corrections in the figures which follow may become necessary; but they are substantially correct as they stand in the various documents, and as they were dealt with at the hearing, and certainly sufficiently accurate for the purpose of determining all questions relating to the rights of the Crown to condemnation or of the various claimants to relief.

[The learned President then proceeded to analyse the claims put forward by the American consignors and the alleged Scandinavian purchasers. He afterwards dealt with each of the claims in detail, setting out with great minuteness the course of trading before the war and after the outbreak of hostilities, the nature and the volume of the transactions in every instance, and stating the conclusion at which he had arrived upon the evidence adduced as to whether the various cargoes were really intended for an enemy destination or whether their *bonâ fide* destination was Denmark, it being the intention of the purchasers to incorporate the goods on their arrival at Copenhagen into the common stock of the country. In the course of his consideration of the claim of one of the American shippers, his Lordship made the following remarks upon the nature of some of the evidence adduced:]

I have now stated the separate facts affecting the cases of the American shippers, and, before proceeding to the cases of the alleged Scandinavian purchasers, I will refer shortly to what I called the "Ascher" correspondence, which will be found in Exhibit J.P.M. 10 to the affidavit of the Procurator-General. This was a series of intercepted letters written from Hamburg by Ascher and Co. to the last-named claimants, Cudahy and Co., some before the seizures and others afterwards. I read them for general information as to the circumstances in which it was known that the trade in conditional contraband was carried on; and I find in them cogent corroboration of many facts and inferences which are, I think, already sufficiently established without them. They sound almost like a talk between merchants "on 'Change" relating to a trade rendered interesting through the commercial risks which its manipulation involved. If the correspondence could have been completed by the inclusion of the letters from America in reply, it

would have been still more elucidating. The letters show an intimate knowledge of what was being done by the various shippers in reference to consignments of foodstuffs to Copenhagen, with the diffculty of exportation from Denmark to Germany, and with the probable fate of some of the cargoes now before the court.

It was objected that they could not be evidence against any persons other then Ascher and Co. and Cudahy and Co., and that they ought not to be read in any of the other cases. If they stood alone I should not act upon them as affecting those cases. But it must be remembered that Prize Courts are not governed or limited by the strict rules of evidence which bind, and sometimes unduly fetter, our municipal courts. Such strict evidence would often be very difficult to obtain; and to require it in many cases would be to defeat the legitimate rights of belligerents. Prize Courts have always deemed it right to rely upon well-known facts which have come to light in other cases, or as matters of public reputation. In the case of *The Rosalie and Betty* (2 Ch. Rob. 343) Lord Stowell discussed the subject generally and said: "In considering this case, I am told that I am to set off without any prejudice against the parties from anything that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one till the fraud is actually apparent. This is undoubtedly the duty, in a general sense, of all who are in a judicial situation, but at the same time they are not to shut their eyes to what is generally passing in the world." Then he refers to well-known facts and expedients relating to illegal trades and fraudulent practices during war, and adds: "Not to know these facts as matters of frequent and not unfamiliar occurrence would be not to know the general nature of the subject upon which the court is to decide; not to consider them at all would not be to do justice."

I will pause only to give one illustration from the American authorities. In the judgment in *The Stephen Hart* (Blatch. Prize Cases, 387, at p. 403) the court read from a statement made by the Solicitor-General (Sir Roundell Palmer) in the House of Commons, relating to the contraband trade between England and America by way of Nassau, the following passage:—

"The then Solicitor-General of England (Sir Roundell Palmer) stated in the House of Commons on the 29th June last, referring to the case of the *Dolphin* and the *Pearl*, decided by the District Court for the southern division of Florida . . . that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoras had become what it was in consequence of the war." And the learned judge in another passage, at p. 404, said: "The cases of the *Stephen Hart*, the *Springbok*, the *Peterhoff*, and the *Gertrude* illustrate a course of trade which has sprung up during the present war, and of which this court will take judicial cognisance, as it appears from its own records and those of other courts of the United States as well as from public reputation."

The Ascher letters having been written, as it appears to me, of the big shipping companies about and with intimate knowledge of this trading, and being obviously genuine, and, indeed, never intended to see the light in this court, I consider that on general principles the court was entitled to read them, and so to inform itself as to this trade generally, without, of course, allowing any statements in them to affect any claimant injuriously, especially if there was no opportunity for him to deal with them. It is right to add that if I had not been made acquainted with their contents my decision in every case would have been the same. But they do give a sense of mental satisfaction in regard to inferences which have been drawn. [At the conclusion of the investigation of the various claims, his Lordship proceeded:]

The details of all the claims have now been set out. With regard to the general character of the cargoes, evidence was given by persons of experience that all the foodstuffs were suitable for the use of troops in the field; that some—*e.g.*, the smoked meat or smoked bacon—were similar in kind, wrapping, and packing to what was supplied in large quantities to the British troops, and were not ordinarily supplied for civilian use; that others—*e.g.*, canned or boiled beef in tins—were of the same brand and class as had been offered by Armour and Co. for the use of the British forces in the field; and that the packages sent by these ships could only have been made up for the use of troops in the field. As against this, there was evidence that goods of the same class had been ordinarily supplied to and for civilians. As to the lard, proof was given that glycerine (which is in great demand for the manufacture of nitro-glycerine for high explosives) is readily obtainable from lard. Although this use is possible, there was no evidence before me that any lard had been so used in Germany; and I am of opinion that the lard comprised ought to be treated upon the footing of foodstuffs only. It is largely used in German army rations. As to the fat-backs, of which large quantities were shipped, there was also proof that they could be used for the production of glycerine. Mr. Perkin in his affidavit in answer to that of Mr. George Stubbs, of the British Government laboratory (which dealt with lard and fat-backs as materials out of which glycerine was producible), confines his observations to lard and passes by entirely what had been deposed as to fat-backs. In fact, no evidence as against that of Mr. Stubbs was offered for the shippers of fat-backs. Mr. Nuttall, a deponent for one of them (Sulzberger and Sons Company), says the fat-backs shipped by them were not in a condition which was suitable for eating. But he may have meant only that they required further treatment before they became edible. There was no market for these fat-backs in Denmark. The Procurator-General deposed, as a result of inquiries, that the Germans were very anxious to obtain fat-backs merely for the glycerine they contain. In these circumstances it is not by any means clear that fat-backs should be regarded merely as foodstuffs in these cases, and, in the absence of evidence to the contrary, it is fair to treat them as materials which might either be required as food or for the production of glycerine.

The convenience of Copenhagen for transporting goods to Germany need hardly be mentioned. It was in evidence that the chief trade between Copenhagen and Germany since the war has been through Lübeck, Stettin, and Hamburg. The

sea-borne trade of Lübeck increased very largely after the declaration of war. It was also in evidence that Lübeck was a German naval base. Stettin is a garrison town, and is the headquarters of a German army corps. It has also shipbuilding yards, where warships are constructed and repaired. It is Berlin's nearest seaport. It will be remembered that one of the big shipping companies asked a Danish firm to become nominal consignees for goods destined for Stettin. Hamburg and Altona had ceased to be the commercial ports dealing with commerce coming through the North Sea. They were the headquarters of various German regiments. Copenhagen is also a convenient port for communication with the German naval arsenal and fortress of Kiel and its canal, and for all places reached through the canal. These ports may properly be regarded, in my opinion, as bases of supply for the enemy, and the cargoes destined for them might upon that short ground be condemned as prize. But I prefer, especially as no particular cargo can definitely be said to have been sent to a particular port, to deal with the cases on broader grounds.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and to ascertain the legal principles, which are to be applied according to international law, in view of the state of things as they were in the year 1914. While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it: (see *The Jonge Margaretha*, Roscoe's English Prize Cases, vol. 1, 100; 1 Ch. Rob. 189; and Chancellor Kent's Commentaries, p. 139).

Two important doctrines familiar to international law come prominently forward for consideration; the one is embodied in the rule as to "continuous voyage" or "continuous transportation"; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

The doctrine of "continuous voyage" was first applied by the English Prize Courts to unlawful trading. There is no reported case in our courts where the doctrine is applied in terms to the carriage of contraband. But it was so applied and extended by the United States Courts against this country in the time of the American Civil War, and its application was acceded to by the British Government of the day, and was, moreover, acted upon by the International Commission which sat under the treaty between this country and made at Washington on the 8th May 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in *The Peterhoff* (5 Wall. 28), which was the leading case upon the subject of continuous transportation in relation to contraband goods. The other well-known American cases, *The Stephen Hart* (Blatch. Prize Cases, 387), *The Bermuda* (3 Wall. 514), and *The Springbok* (5 Wall. 1), considered and applied the doctrine in relation to attempted breaches of blockade.

The doctrine was asserted by Lord Salisbury at the time of the South African War with reference to German vessels carrying goods to Delagoa Bay, and, as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view, as follows: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified": (Droit International Codifié, par. 813).

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. Neutral traders, in their own interest, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyages.

A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct or entails transhipment, or a subsequent transport by land": (art. 30). As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except where the enemy country had no seaboard: (art. 36). As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages, or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist, the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port was sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached.

In connection with this subject, note may be taken of the communication of the 20th Jan. 1915 from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:—

"The rights and interests of belligerents and neutrals are opposed in respect of contraband articles and trade. . . . The record of the United States in the past is not free from criticism. When neutral, this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent we have contended for a liberal list, according to our con-

ception of the necessities of the case. The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes *bonâ fide* destined to neutral ports. . . . It will be recalled, however, that American courts have established various rules bearing on these matters. The rule of 'continuous voyage' has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'to order,' from which, as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government therefore cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practised as heretofore. . . . The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country."

It is not necessary to dilate further upon the history of the doctrine in question. I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage or transportation, both in relation to carriage of contraband, absolute and conditional, by sea and over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognised legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the court is not restricted in its vision to the primary consignment of the goods in these cases to the neutral port of Copenhagen, but is entitled and is bound to take a more extended outlook, in order to ascertain whether this neutral destination was merely ostensible, and, if so, what the real ultimate destination was. As to the real destination of a cargo, one of the chief tests is whether it is consigned to the neutral port to be there delivered for the purpose of being incorporated into the common stock of the country. This test was applied over a century ago by Sir William Grant in the Court of Appeal in Prize Cases, in the case of *The William* (Roscoe, vol. 1, 505 ; 5 Ch. Rob. 385). It was adopted by the United States Supreme Court in their unanimous judgment in *The Bermuda* (*ubi sup.*), where Chase, C.J., in delivering judgment, at p. 551, said : " Neutrals may convey in neutral ships from one neutral port to another any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country, or of the port."

Another circumstance which has been regarded as important in determining the question of real or ostensible destination at the neutral port is the consignment " to order or assigns " without naming any consignee. In the celebrated case of *The Springbok* (*ubi sup.*) the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground. The part of the judgment dealing with the matter is as follows : " That some other destination than Nassau was intended may be inferred from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assign. Under the circumstances of this trade, such a consignment must be taken as a negation that any such sale was intended to be made there ; for, had such sale been intended, it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading." The same circumstance was also similarly dealt with in *The Bermuda* (*ubi sup.*) and in *The Peterhoff* (*ubi sup.*).

I am not unmindful of the argument that consignment " to order " is common in these days. But a similar argument was used in the *Springbok* case (*ubi sup.*), supported by the testimony of some of the principal brokers in London to the effect that a consignment " to order or assigns " was the usual and regular form of consignment to an agent for sale at such a port as Nassau. The British Government was petitioned to intervene on behalf of the shippers ; but upon this point the British Foreign Office said that " no doubt the form was usual in time of peace, but that a practice which might be perfectly regular in time of peace under the municipal regulations of a particular State would not always satisfy the law of nations in time of war, more particularly when the voyage might expose the ship to the visit of belligerent cruisers," and added that " having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the war in the United States, and to many other circumstances of suspicion before the court, Her Majesty's Government are not disposed to consider the argument of the court upon this point as otherwise than tenable."

The argument still remains good that if shippers, after the outbreak of war, consign goods of the nature of contraband to their own order, without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. It may be here observed that some point was made that in many of the consignments the bills of lading were not made out " to order " *simpliciter*, but to branches or agents of the shippers. That circumstance does not, in my opinion, make any material difference. Other matters relating to destination will be discussed under the second branch of the case—namely, whether the goods were destined for Government or military use.

Wherever destination comes in question, certainty as to it is seldom possible, in such cases as these ; " highly probable destination " is enough in the absence of satisfactory evidence for the shippers : (see per Lord Stowell in *The Jonge*

Margaretha, ubi sup.). Upon this branch of the case, for reasons which have been given when dealing with the consignments generally, and when stating the circumstances with respect to each claim, I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia whose claim are allowed) were not destined for consumption or use in Denmark, nor intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real *bonâ fide* destination, but that the cargoes were on their way, at the time of capture, to German territory as their actual and real ultimate destination.

The second branch of the case raises the question whether the goods which I have decided were on their way to German territory were destined further for the use of the German Government or departments or for military use by the troops, or other persons actually engaged in warlike operations, or should be presumed to be so destined in the circumstances.

As a preliminary, it becomes necessary to consider the two Orders in Council of the 20th Aug. and the 29th Oct. 1914. It was contended on behalf of the claimants that before the seizure of the cargoes on the first three vessels, and while they were still on their respective voyages, the Order in Council of the 20th Aug. (even if it was binding on the court) had been rendered inoperative by the repeal contained in the order of the 29th Oct. It was further contended that the two Orders in Council purporting to give effect with certain additions and modifications to the unratified Declaration of London had no binding effect upon this court, and ought to be disregarded.

As to the first of these two contentions, no doubt if the first order had affected the substantive rights of the neutral—*e.g.*, if it had declared an article as absolute contraband which by the repealing order had been removed from the list of contraband before capture—it could not be said that the order had remained operative so as to justify the seizure of the article. But in reality the only change material to these cases which the order purported to make was in the nature of an alteration of practice as to evidence—namely, by adding certain presumptions to those contained in art. 34 of the Declaration of London; and all these presumptions, whether set up in the interest of the captor or against him, are rebuttable: (see M. Renault's Report on the Declaration). The order had proclaimed to the neutral owners of the cargoes before the voyages commenced how in practice, as matter of evidence and proof, cargoes seized would be dealt with, and it might fairly be argued that they could not complain if their cases were treated in accordance with the order. But it is not necessary for me to pronounce any decision upon the point. I will for the purpose of this case assume that the order of the 20th Aug. had ceased to have any effect upon the promulgation of the subsequent order. The result is that cases relating to the *Alfred Nobel*, *Björnstjerne Björnson*, and the *Fridland* must be decided in accordance with the rules of international law. But the order of the 29th Oct. applies to all the cargoes on the *Kim*.

As to the contention that the order is not binding on this court, I expressed my views on the general question of the binding character of Orders in Council upon the Prize Court in the the case of *The Zamora* (13 Asp. Mar. Law Cas. 144; 113 L. T. Rep. 649). I do not wish to detract anything from what I then said, nor do I deem it necessary at present to add anything as to the general principles. But as to this order, so far as it affects questions arising in these proceedings, it is right to point out that no provision in it can possibly be said to be in violation of any rule or principle of international law. It is true that in a matter of real substance it alters the proposed compromise incorporated in art. 35 of the Declaration of London, whereby if the Declaration had been ratified, the doctrine of continuous voyage would have been excluded for conditional contraband. The provision in art. 35 was described by Sir Robert Finlay as "an innovation in international law as hitherto recognised in the United States, and by Great Britain and other States, introducing an innovation of the first importance by excluding the doctrine of continuous voyage in the case of conditional contraband." What the Order in Council did, therefore, was to prevent the innovation. In this regard, it therefore proceeded not in violation of, but upon the basis of the existing international law upon the subject. It may be well to note, and to record, that at the London Conference which produced the Declaration all the allied Powers engaged in this war, and also the United States, had been in favour of continuing to apply the doctrine of continuous voyage, or continuous transportation, to conditional as well as to absolute contraband—a doctrine which, as we have seen, was nurtured and specially favoured by the courts of the United States. As to the modifications regarding presumptions and onus of proof—as, for instance, where goods are consigned "to order" without naming a consignee—these are matters really affecting rules of evidence and methods of proof in this court, and I fail to see how it is possible to contend that they are violations of any rule of international law.

The effect of the Order in Council is that, in addition to the presumptions laid down in art. 34 of the Declaration of London, a presumption of enemy destination as defined by art. 33 shall be presumed to exist if the goods are consigned to or for an agent of the enemy State, or to a person in the enemy territory, or if they are consigned "to order," or if the ship's papers do not show who the consignee is; but in the latter cases the owners may, if they are able, prove that the destination is innocent.

All the goods claimed by the shippers in the *Kim* were consigned to their own order or to the order of their agents (which is the same thing) and not to any independent consignee; and they have all entirely failed to discharge the onus which lies upon them to prove that their destination was innocent. There was some suggestion that liability to capture in the Declaration of London and Order in Council did not mean liability to confiscation or condemnation. On reference to the various provisions as to absolute and conditional contraband, it is clear that it is used in that sense. I am of opinion that under the Order in Council the goods claimed by all the shippers on the *Kim* were confiscable as lawful prize.

I now proceed to consider the confiscability of the cargoes on all the four vessels apart entirely from the operation of the Order in Council upon the *Kim* cargoes. Having decided that the cargoes, though ostensibly destined for Copenhagen, were in reality destined for Germany, the question remains whether their real ultimate destination was for the use of the German Government or its naval or military forces. If the goods were destined for Germany, what are the facts and the law bearing upon the question whether they had the further hostile destination for the German Government for military use? In the first place, as has already been pointed out, they were goods adapted for such use, and, further, in part adapted for immediate warlike purposes in the sense that some of them could be employed for the production of explosives. They were destined, too, for some of the nearest German ports, like Hamburg, Lübeck, and Stettin, where some of the German forces were quartered, and whose connection with the operations of war has been stated. It is by no means necessary that the court should be able to fix the exact port: (see *The Dolphin*, 7 Fed. Cas. 868; *The Pearl*, 19 Fed. Cas. 54; 5 Wall. 574; and *The Peterhoff*, *ubi sup.*). Regard must also be had to the state of things in Germany during this war in relation to the military forces and to the civil population, and to the method, described in evidence, which was adopted by the Government in order to procure supplies for the forces.

The general situation was described by the British Foreign Secretary in his Note to the American Government on the 10th Feb. 1915 as follows:—

"The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organisation for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and, however much goods may be imported for civil use, it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country. . . . In the peculiar circumstances of the present struggle, where the forces of the enemy comprise so large a proportion of the population, and where there is so little evidence of shipments on private as distinguished from Government account, it is most reasonable that the burden of proof should rest upon claimants."

It was given in evidence that about 10,000,000 of men were either serving in the German army or dependent upon or under the control of the military authorities of the German Government out of a population of between 65,000,000 and 70,000,000 of men, women, and children. Of the food required for the population it would not be extravagant to estimate that at least one-fourth would be consumed by these 10,000,000 adults. Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces—even assuming that they were indiscriminately distributed between the military and civilian population—a very large proportion would necessarily be used by the military forces.

So much as to the probable ultimate destination in fact of the cargoes. Now as to the question of the proof of intention on the part of the shippers of the cargoes. It was argued that the Crown as captors ought to show that there was an original intention by the shippers to supply the goods to the enemy Government or the armed forces at the inception of the voyage as one complete commercial transaction evidenced by a contract of sale or something equivalent to it. It is obvious from a consideration of the whole scheme of conduct of the shippers that if they had expressly arranged to consign the cargoes to the German Government for the armed forces this would have been done in such a way as to make it as difficult as possible for belligerents to detect it. If the captors had to prove such an arrangement affirmatively and absolutely in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory. It is not a crime to dispatch contraband to belligerents. It can be quite legitimately sent, subject to the risk of capture. But the argument proceeded as if it was essential for the captors to prove the intention as strictly as would be necessary in a criminal trial; and as if all the shippers need do was to be silent, to offer no explanation, and to adopt the attitude towards the Crown, "Prove our hostile intention if you can."

In the first place, it may be observed that it is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference. In *The Bermuda* (*ubi sup.*) the Chief Justice of the Supreme Court of the United States, in referring to the decision of Sir William Grant in *The William* (*ubi sup.*), said: "If there be an intention, either formed at the time of the original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port." It is, no doubt, incumbent upon the captors, in the first instance, to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants. Lord Granville, as Foreign Secretary, in 1885, in a note to M. Waddington (the French Ambassador), which had reference to the question of rice being declared contraband by the French Government in relation to China, said: "There must be circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of food are intended for the ordinary use of life, and to show *primâ facie*, at all events, that they are destined for military use, before they could be treated as contraband." And Lord Lansdowne, as Foreign Secretary, in 1904, in a note to the British Ambassador at St. Petersburg, stated the British view thus: "The true test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use." These statements, so qualified, it will be noted, were made when this country was making representations against

the action of foreign Governments concerning conditional contraband. So far as it is necessary to establish intention on the part of the shippers, it appears to me to be beyond question that it can be shown by inferences from surrounding circumstances relating to the shipment of and dealings with the goods. Cargoes are inanimate things, and they must be sent on their way to persons. If that is all that was meant by counsel for the claimants when they argued that "intention" must be proved, their contention may be conceded. But it need not be an "intention" proved strictly to have existed at the beginning of the voyage, or as an obligation under a definite commercial bargain. If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination by the action of the shippers, whenever their project was conceived, or however it was to be carried out; if, in truth, it is reasonably certain that the shippers must have known that that was the real destination of the goods (apart, of course, from any genuine sale to be made at some intermediate place), the belligerent had a right to stop the goods on their way and to seize them as confiscable goods.

In the circumstances of these cases, especially in view of the opportunity given to the claimants, who possessed the best and fullest knowledge of the facts, to answer the charges made against them, any fair tribunal like a jury or an arbitrator, whose duty it was to judge facts, not only might, but almost certainly would, come to the conclusion that at the time of the seizure the goods, which remained the property of the shippers, were, if not as to the whole, at any rate as to a substantial proportion of them, at the time of seizure on their way to the enemy for his hostile uses. The facts in these cases, in my opinion, more than amply satisfy the "highly probable destination" spoken of by Lord Stowell.

Before I conclude I will make reference to an opinion expressed towards the end of last year by a body of men eminent as students and expositors of international law in America, in the Editorial Comment in the American Journal of International Law, to which my attention was called by the law officers. Amongst them I need only name Mr. Chandler Anderson, Mr. Robert Lansing, Mr. John Bassett Moore, Mr. Theodore Woolsey, and Mr. James Brown Scott. It is as follows: "In a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty, and where the non-combatant population is organised so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even if the Government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field." I cite this, not, of course, as having any authority, but as showing how these eminent American jurists acknowledge that international law must have regard to the actual circumstances of the times. I have not in this judgment followed the course thus indicated by them as a likely and reasonable one in the present state of affairs. I have preferred to proceed on the lines of the old recognised authorities.

I wish also to note the opinion recently expressed by the Hamburg Prize Court in the case of the *Maria*, decided in April 1915, where goods consigned from the United States to Irish ports were laden upon a neutral (Dutch) vessel. I refer to it, not because I look upon it as profitable or helpful (on the contrary, I agree with Sir Robert Finlay that it should rather be regarded as "a shocking example"), but because it is not uninteresting as an example of the ease with which a Prize Court in Germany "hacks its way through" *bonâ fide* commercial transactions when dealing with foodstuffs carried by neutral vessels. It is to be remembered, too, that the Hamburg Prize Court was dealing with wheat which was shipped from America before the outbreak of war, and which had also before the war been sold in the ordinary course of business to well-known British merchants, Messrs. R. and H. Hall Limited. This is what the Hamburg court said:

"There is no means of ascertaining with the least certainty what use the wheat would have been put to on the arrival of the vessel in Belfast, and whether the British Government would not have come upon the scene as purchaser even at a very high price, and in this connection it must also be borne in mind that the bills of lading were made out 'to order,' which greatly facilitated the free disposal of the cargo. That at the time of the conclusion of the contract concerning the acquisition of the wheat on the part of R. and H. Hall Limited the possibility of using the same for war purposes had, perhaps, not been contemplated does not affect the question what actual use would have been made of the cargo of wheat after the outbreak of war in August 1914."

For the many reasons which I have given in the course of this judgment, and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption or *bonâ fide* sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination. To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities and to be blinded to the realities of the case. Even if this conclusion were only accurate as to a substantial proportion of the goods, the whole would be affected because "Contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation": (Kent's Commentaries, 12th edit., p. 142). The cases of *The Springbok* (*ubi sup.*) and *The Peterhoff* (*ubi sup.*) are to the same effect, as is also art. 42 of the Declaration of London, upon which M. Renault's Report is as follows: "The owner of the contraband is punished in the first place by the condemnation of his contraband property, and in the second by that of the goods, even if innocent, which he may possess on board the same vessel."

It only remains, in order to conclude these long and troublesome cases, to state the results as applied to each of the claims.

[The learned President then condemned or released the various cargoes according to his findings that they were or were not intended for an enemy destination.]

Solicitor for the Crown, *Treasury Solicitor.*

Other solicitors for the various parties concerned: *W. A. Crump* and *Son*; *Botterell* and *Roche*; *Rawle, Johnstone*, and *Co.*; *Pritchard* and *Sons*, for *Alsop, Stevens, Crooks*, and *Co.*, Liverpool, and for *Batesons, Warr*, and *Wimshurst*, Liverpool; *Windybank, Samuell*, and *Lawrence*, for *Luya* and *Williams*, Liverpool; *Parker, Garrett*, and *Co.*; *Crosley* and *Burn*; and *Thomas Cooper* and *Co.*

House of Lords.

June 29, *July* 1 *and Oct.* 18, 1915.

(Before the Lord Chancellor (Lord Buckmaster), Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

Steamship Beechgrove Company Limited *v.* Aktieselskabet Fjord of Kristiana. (*a*)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Collision — Defence of compulsory pilotage — Collision without compulsory pilotage area, but where pilot was necessarily on board—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 633.

The appellants, the owners of the steamship B., *brought an action of damages against the respondents, the owners of the steamship* F., *in respect of a collision which occurred near Princes Pier, Greenock. Among other defences, the respondents set up the defence of compulsory pilotage under the Merchant Shipping Act* 1894, *s.* 633, *which provides that a shipowner shall not be answerable "for any loss or damage caused by the default or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."*

At the time of the collision the river pilot, although he had not reached the official "river Clyde," was directing the navigation of the F. *The appellants' contention was that the part of the river at which the collision occurred was not a part where, by law, the employment of a licensed pilot was compulsory.*

The sheriff-substitute held that the defence of compulsory pilotage was not open to the respondents, but his decision was reversed by the First Division by a majority (the Lord President and Lord Mackenzie, Lord Skerrington dissenting).

Held, that upon the true construction of sect. 633 *of the Act of* 1894 *the word "district" did not cover an area outside the limits of the river as defined by sect.* 75 *of the Clyde Navigation Act* 1858, *that the pilotage outside these limits was not rendered compulsory by law by the operation of the by-law, and that there was no legal compulsion at common law so as to prevent the relation of master and servant from being established between the master and the pilot.*

Decision of the First Division of the Court of Session (reported 52 *S. L. R.* 244) *reversed.*

General Steam Navigation Company *v.* British and Colonial Steam Navigation (3 *Asp. Mar. Law Cas. O. S.* 168, 237; 20 *L. T. Rep.* 581; *L. Rep.* 4 *Ex.* 238) *and* The Charlton (8 *Asp. Mar. Law Cas.* 29; 73 *L. T. Rep.* 49) *discussed.*

Appeal from an interlocutor of the First Division of the Court of Session in Scotland, reported 52 S. L. T. 244, which reversed an interlocutor of the Sheriff-Substitute of Lanarkshire.

The appellants, the owners of the steamship *Blaenavon*, claimed damages from the respondents, the owners of the steamship *Fjord*, in respect of a collision which occurred on the 2nd July 1914 near Princes' Pier, Greenock, and the question in the appeal was whether at the time of the collision the pilot in charge of the *Fjord* was so in charge by compulsion of law as to relieve the liability for the consequences of the collision.

The *Fjord* was inward bound for Glasgow, and at the time of the collision was in charge of a pilot who had come on board at Greenock, which was the only place at which a river pilot for Glasgow could be obtained. The collision occurred some four miles below the limits of compulsory pilotage as defined by sects. 75 and 136 of the Clyde Navigation Consolidation Act 1858.

By sect. 128 of that Act a pilot board was erected for licensing pilots for navigating ships plying in the river at Firth of Clyde up to the Isle of Little Cumbrae, which was some twenty miles below the western limits of the river, and by sect. 139 the board was empowered to make by-laws for the navigation of all vessels between the western limits of the river and the island of Little Cumbrae. Under these by-laws pilots were to consist of two classes—river pilots between Glasgow and Greenock, and deep sea pilots between Greenock and Cumbrae; and by by-law 37 the pilot when on board was to have sole charge of the vessel.

The appellants contended that so far as compulsory pilotage was required by the Clyde Navigation Consolidation Act 1858, the respondent vessel was not required at the point of collision, nor for four miles further on, to have a pilot on board.

The respondents contended that they were compelled by statute to have a pilot on board when crossing the imaginary line which defined the western limit of the Clyde Trust jurisdiction, and were therefore compelled to approach that line after leaving Greenock with a pilot in charge, and the master was bound to allow the pilot to carry out the obligation put upon him by the by-laws.

The sheriff-substitute held that the defence of compulsory pilotage was not open to the respondents, but his decision was reversed by the First Division by a majority, Lord Skerrington dissenting.

The owners of the steamship *Blaenavon* appealed.

Horne, K.C. and *James B. Paton* (both of the Scottish Bar) for the appellants.

Laing, K.C. and *Raeburn* for the respondents.

(*a*) Reported by W. E. Reid, Esq., Barrister-at-Law.

The House, having taken time for consideration, allowed the appeal.

The Lord Chancellor (Lord Buckmaster). —On the 2nd Feb. 1914, the steamship *Blaenavon* left the port of Glasgow and sailed down the river Clyde on an outward voyage. She reached Greenock, which is outside the statutory limits of the river, at about 6 p.m. At the same time the steamship *Fjord* was sailing up the Firth of Clyde to Glasgow, and a collision occurred between the two vessels outside Princes Pier. The owners of the *Blaenavon* blamed the *Fjord* for the accident, and instituted the proceedings out of which this appeal has arisen, for the purpose of recovering compensation for the damage that they suffered.

The actual question of who was to blame for this misadventure is not before your Lordships' House, for, in answer to the condescendence for the pursuers, the defenders raised certain pleas in law, of which for the present purpose the second is alone material. It is in the following terms:

(2) The navigation of defenders' vessel having been in charge of a pilot whose employment was compulsory within a pilotage district in the sense of the Merchant Shipping Act 1894, the defenders are free from liability in respect of said collision under sect. 633 of the said Act, and should be assoilzied, with expenses.

The record being closed, the parties were heard on the points of law so raised; and on the 11th July 1914, the sheriff-substitute, by an interlocutor of that date, repelled the second plea to which I have referred. On appeal from this decision, their Lordships of the First Division recalled the interlocutor of the sheriff-substitute and remitted the cause to him to allow proof. From this interlocutor the present appeal has been brought before your Lordships' House.

There is no point for your Lordships' decision except the bare question of law raised by the second plea of the defenders, but this is of some difficulty, and in order to make plain the exact circumstances under which it has arisen, it is necessary to state at some length the provisions of the various Acts of Parliament, the interpretation of which is the main subject for your Lordships' consideration.

By the Clyde Navigation Act of 1858 provisions were established to secure the proper navigation of the river and the Firth of Clyde. By sect. 75 the limits of the river were defined as including the whole channel or waterway of the said river down to a straight line drawn from the eastern end at Newark Castle, on the south shore of the said river, to the mouth of Cardross Burn, on the north shore. By sect. 128 a pilot board was appointed for licensing pilots in both the river and the Firth, within a straight line, drawn due east and west from the southernmost point of the island of Little Cumbrae, this island being some twenty miles further down the river than the western limits fixed by sect. 75. By sect. 134 the pilot board established for licensing pilots, was declared to have the exclusive right of granting such licences to pilots for the navigation of vessels in the river and the Firth within the said limits. It should be observed that by these sections there is no distinction established between the pilotage for the river and the pilotage outside the river, for the whole of the pilots are equally under the same jurisdiction throughout the whole length of the river and the Firth up to the island of Little Cumbrae. By sect. 136, however, the statute imposes certain definite restrictions upon the navigation of vessels; and, as much of the present dispute depends upon the effect of this section, it is as well to state its actual terms.

They are as follows:

It shall not be lawful for any person to navigate without a pilot, nor for any person, except the pilots licensed by the existing pilotage authorities or by the pilot board, as hereinbefore provided, to act in piloting any vessel exceeding sixty tons burden in any part of the river as defined by this Act, and every person navigating or piloting or attempting to navigate or pilot any vessel exceeding the said burden in any part of the river without being so licensed shall for every such offence be liable to a penalty not exceeding five pounds.

Sect. 139 of the Act proceeded further, and granted powers to the pilot board, and, indeed, required them to make by-laws and regulations for the proper navigation of all vessels between the western limits of the river and the island of Little Cumbrae, and also for regulating the conduct of the master, pilots, and crews of such vessels. By-laws were accordingly enacted, and by these by-laws the pilots were divided into two classes—the river pilots, who were licensed to pilot vessels between Glasgow and Greenock, and the deep-sea pilots, who were licensed to pilot them between Greenock and the island of Little Cumbrae. It should be observed that the dividing line which separated the one class from the other was not the same as that which divided the river from the Firth of Clyde, Greenock, but was some four miles on the western side of the river boundary. By-law 19 prohibited any person from navigating any ship on any part of the river other than the river pilots; this is the only by-law which imposes a penalty for not using the services of a pilot, and it is in the following terms: "No person shall presume to navigate or to act in piloting any ship or vessel whatever exceeding sixty tons register on any part of the river Clyde other than the river pilots duly licensed by the board under a penalty not exceeding five pounds for each offence besides all damages and expenses." By-law 31 compelled the pilots to reside at Glasgow or Greenock. And by-law 37 enacted that pilots, when on board, should have sole charge of the vessel. Rates were also fixed by these by-laws, and these rates were arranged between Glasgow and Greenock, and were in no way regulated by the river boundary.

In the present case the *Fjord*, being bound for Glasgow, picked up her pilot at Greenock. It was the only place where the pilot could be obtained, and the pilot, when he came on board, took charge of the vessel, and was, in fact, navigating her at the time of the accident.

The *Blaenavon*, on the other hand, had taken her pilot on board at Glasgow and had not exchanged him at Greenock for a deep-sea pilot at the time of the accident. It might be that the pilot held both licences, in which case it would not be necessary that he should be changed.

The position of the vessels, therefore, was this: They were outside the limits of the river,

and outside the area within which it was not lawful, according to the terms of the statute, to navigate without a pilot. The *Fjord* had had no opportunity of obtaining a pilot anywhere except at the spot where he had been taken on board, and, being on board, the by-laws provided that he was bound to have charge of the vessel.

Now, by sect. 633 of the Merchant Shipping Act of 1894 it is enacted that the owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship, within any district where the employment of a qualified pilot is compulsory by law.

The first question, therefore, is: Was the spot where the accident occurred, although outside the western limits of the river, a spot where pilotage was compulsory by law? So far as the terms of the statute of 1858 are concerned, I am clearly of opinion that it was not. That Act gave a perfectly plain definition of the area within which it was unlawful to navigate without a pilot, and the only way of escaping from that difficulty is by deciding that the word "district" in the Merchant Shipping Act of 1894 covers an area wider than that defined by the statute of 1858, and includes at least a convenient place for taking up and discharging a pilot outside the limits of the river, and possibly also the whole area down to Little Cumbrae.

I am unable to accede to this contention, I cannot think that the word "district" in the Act of Parliament was intended to mean neighbourhood or to possess so vague and indefinite a meaning as must necessarily be attributed to it if once the actual statutory and defined limits are exceeded.

Several authorities, however, were quoted to your Lordships to support an extended meaning of the word, and they need careful examination. It is, of course, possible to avoid their effect by saying that this case has arisen in Scotland, and these decisions are all decisions of the English courts. In my opinion, your Lordships ought not to take that course. The Act of Parliament which is the subject of construction applies to Scotland as well as to England. There is nothing in any of the circumstances of this case which requires the application of local custom or local law; and it seems to me unconvincing to decide this question on any considerations that would not be just as applicable to a collision that had taken place under similar conditions in the mouth of the river Thames. I realise that this imposes upon your Lordships the duty, if your view of the section be the same as that which I have expressed, of destroying the authority of two at least of the English cases which were the subject of decision by numerous and eminent judges. I feel the full force of this objection, but I am unable myself to follow the reasoning on which those judgments were based, and it is my view that they reached a wrong conclusion.

The first case to which reference was made was the case of *Lucey and Ingram* (6 M. & W. 302). In that case a vessel in charge of a licensed pilot caused a collision as she was in course of removal from the St. Katharine Dock, in the Port of London. It was alleged that the owners of the vessel were not liable by reason of sect. 55 of the Pilot Act (6 Geo. 4, c. 125), which exempted the owner or master of a vessel from liability for loss or damage occurring from the negligent act of any licensed pilot in the charge of any such ship or vessel, under or in pursuance of any of the provisions of the statute. The statute by its second section provided that all ships and vessels within certain limits there mentioned should be conducted by pilots to be appointed by the Corporation of the Trinity House, and by no other pilots or persons whatever. At the place where the accident happened it was not necessary under the statute that a pilot should be in charge of the vessel, but none the less it was held that the owner of the vessel was not liable for the damage, because the pilot was bound to take charge of the vessel if called on, and he was in charge of the ship under the provisions of the Act. The case depended upon the construction of sect. 55 of the Act of 1823, but the provisions of that section are quite different from those which regulate the liability in the present case, and I see no reason to doubt that this case was correctly decided.

The next case was that of *The Stettin* (6 L. T. Rep. 613; B. & L. 199). That decision, however, is of little assistance, since it was held that in no part of the area where the collision occurred was pilotage compulsory, and consequently the vessel responsible for the accident was not exempted from liability for damage. The two cases which follow are, however, more nearly in point. The first is *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (3 Asp. Mar. Law Cas. O. S. 168, 237; 20 L. T. Rep. 581; L. Rep. 4 Ex. 238). The statute applicable in that case was the Merchant Shipping Act of 1854, sect. 388 of which is to the same effect as sect. 633 of the Act of 1894, although its language differs in certain immaterial respects. In that case it was held as a fact that the vessel was navigating at a spot where pilotage was compulsory, and that the master and owner of the vessel were consequently exempt; but the learned judges further dealt with the case upon the hypothesis that this assumption of fact was not well founded, and on this view they expressed their opinion on two points. The first was that as the pilot had been taken on board in an area where pilotage was undoubtedly compulsory, and was still in charge of the vessel when the accident occurred, the original relationship between the pilot and the master still continued, and no fresh contract of service had supervened.

The second point dealt directly with the meaning of the word "district," and upon this they said that the 388th section of the Act of 1854 "does not require that the pilot should be compulsorily employed where the accident happened, but only that he should have been compulsorily employed within the district where it happened." Although this latter statement was not necessary for the decision of the case, it was treated as an authority, and was followed in the later case of *The Charlton* (8 Asp. Mar. Law Cas. 29; 73 L. T. Rep. 49). This was a decision of the Court of Appeal, who were bound by a decision of the Court of Exchequer Chamber, but they were not necessarily bound by the expressions of opinion of the judges, which were not essential to the case. Notwithstanding this fact, the Court of Appeal, and notably Kay, L.J., treated them as binding, and expressed his own personal concurrence with the underlying principles on which these statements

were based. In this case also the pilot had been taken on at a place where pilotage was compulsory, and the accident had happened outside the compulsory area.

It might be possible to distinguish these cases by reference to this circumstance. It is, indeed, a distinction between the facts of those cases and the facts of the present; but it is a distinction too fine for me to follow. If the liability is to be measured by considering the meaning of the word "district" in sect. 388 of the Act of 1854 or in sect. 633 of the Act of 1894, that meaning must be the same whether the pilot is taken on board within the compulsory area or without.

The learned judges appear to have been much influenced in their view by the inconvenience of holding that a pilot's duties ended immediately the actual boundary was crossed. It seems to me that this is true, there may be great inconvenience, there may even be danger in compelling a pilot actually to assume his duties at a moment when the ship is traversing an intangible and notional line. So far as the Act of Parliament is concerned, however, there can be no exemption, by virtue of its provisions, unless the accident is actually within the district (which I interpret as meaning the defined and fixed area) within which pilotage is compulsory.

It is, however, urged that the pilotage was in fact compulsory although outside the statutory limits, owing to the operations of the by-laws to which I have referred.

Acceptance of this view might result in extending the area of the river Clyde, for the purposes mentioned in sect. 136 of the Act of 1858, to the area bounded on its western limits by the line drawn from the island of Little Cumbrae—a further distance of some twenty-four miles. I cannot think that the by-laws have made or could make pilotage "compulsory by law" throughout the whole of this area, since, if that were so, there was no need for the careful definition of the area where pilotage is made compulsory by sect. 136, and no need for the distinction which the by-laws draw between the area of river within which omission to use a pilot is visited by penalties, and the area outside the river which is not subject to any such penalties.

There remains an argument that is independent of the Act of 1894, and it is this—that even if the point where the accident occurred was not within the district where pilotage was compulsory by the statute or the by-laws, yet, nevertheless, the captain of the ship had no choice but to accept the pilot at Greenock, on terms which compelled him to resign the navigation of the vessel into his hands, that accordingly the *rôle* of master and servant was never established between the owner of the vessel and the pilot, and that consequently he could not be rendered liable for the pilot's act.

It is, I think, open to doubt if this point is raised by the second of the defender's pleas, but it has been fully argued and no objection taken on that ground.

The fallacy of the argument is to be found in the assumption that the captain of the ship was compelled to resign the navigation into the hands of the pilot. There was, in my opinion, no such legal compulsion placed upon him. It is true that the by-laws provide by by-law 37 that the pilot should take charge, but there was no penalty of any kind imposed upon the master if the vessel was not surrendered into the pilot's hands before the boundaries of the river Clyde were reached, nor upon the pilot if he did not assume charge. This omission is significant when it is observed that obedience is enforced to the earlier provision of the same by-law by the imposition of a penalty, and that performance of nearly all the other duties of the pilot is ensured by similar penalties, see, for example, by-laws 30, 32, 33, 35, and 36.

This conclusion takes the present case out of the influence of any of the several authorities to which reference has been made; for, upon examination, they will be found to depend upon whether, having regard to the special provisions applicable in each case, there was in fact compulsion upon the owner to allow the pilot to have charge. The principle which they illustrate is stated at p. 103 of the report of the *Maria* in 1 Rob. Ad. Rep. 95; 1839, M. & Rol. 95, in an extract from Lord Tenterden's work upon shipping, in these words: "Where the master is bound by Act of Parliament under a penalty to place his ship in the charge of a pilot and he does so in compliance with the provisions of such Act, the ship is not to be considered as under the management of the owners or their servants."

Accepting this principle as accurate, the learned judge in the case of the *Maria* examined whether or no the pilotage in that case was in fact compulsory, and found that it was, because the local statute which was applicable provided that the owners of foreign ships or vessels resorting, coming into or departing from the port of Newcastle were "obliged and required" to receive, take on board and employ in the piloting licensed pilots, and in case of their refusal they were none the less compelled to pay the pilotage fees. The learned judge in terms considers that this made the pilotage compulsory, and he so states at p. 108 in these words: "I am most clearly of opinion that the section referred to is compulsory. If it had been enacted simply that a pilot should be taken without providing that in case a pilot was not taken the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanour in refusing to take him, for every breach of an Act of Parliament within British jurisdiction is an indictable offence." And he then considers the argument that the provision as to payment of fees might take away the compulsory effect of the clause, and this argument he rejects, he consequently held that the master of the vessel was free from blame.

In the present case there is nothing in the statute to compel the pilot to be taken on board outside the limits of the river, nor is there anything in the by-laws which in terms imposes on the master of the vessel any duty to use his services outside the area, for the only provision of a compulsory character relating to the use of pilots is that contained in by-law 19, to which reference has already been made.

The case of *The Halley* (2 Asp. Mar. Law Cas. O. S. 556; 18 L. T. Rep. 879; L. Rep. 2 P. C. 193) was also a case where the employment of the pilot was compulsory, and the statement of the common law, which is contained at p. 201, is made in relation to this fact. There is a considerable difference between a boat being in

charge of a pilot properly provided for according to the by-laws made in pursuance of an Act of Parliament and the necessity for compulsory pilotage within a limited area, and the contrast of the provisions of the Acts of 1854 and 1894, with those of the earlier statute of 6 Geo. 4, c. 125, shows, to my mind, that the later statutes were intended to confine exemption from liability within the narrower and take it out of the wider class.

In my view, therefore, the by-laws did not make pilotage outside the area of the river compulsory within the meaning either of the Act of Parliament or the principle of the common law, and for these reasons I think that the appeal should succeed, that the interlocutor of the First Division should be recalled, and that of the sheriff-substitute should be restored.

Lord Dunedin.—I have found this case, to my mind, attended with difficulty and doubt—but that on one point only.

So far as the exemption craved is rested on the statutory words, I am clear that on a just construction of sect. 633 of the Merchant Shipping Act of 1894 there was not here, in view of the circumstances, a fault or incapacity of a qualified pilot acting in charge of the ship within any district where the employment of a pilot is compulsory by law.

I need not develop the subject, for I concur in all that the noble Lord on the Woolsack has said upon it, and I associate myself with the view he has taken of the decided cases.

Now, if I could take the view of Lord Skerrington, that the statutory exemption forms a code and displaces the common law, there would be an end of the matter. But it is not said in the statute that the common law is to be displaced; and hitherto, at least, it has been said again and again by judges and writers of textbooks that the statutory exemption is only declaratory of a result to which, under the circumstances of compulsion, the common law would arrive.

Now, this is not an action against the ship; it is a personal action against the owners, who personally committed no fault. It can, therefore, only be supported upon the ground of *respondeat superior*, or, in other words, of the relationship of master and servant between the owners and the person actually in charge of the ship who commits the fault.

Your lordships are prepared to hold that, though *de facto* the shipowner can only obtain a pilot on the terms that the pilot is to be supreme, yet *de jure* that pilot is the servant of the owners. It is here that I hesitate, and I candidly confess that, if left to myself, I should have come to the same conclusion as the majority of the First Division. But, in face of the unanimity among your Lordships, I do not feel justified in dissenting from the proposed judgment.

Lord Atkinson.—This is an appeal from an interlocutor pronounced on the 18th Dec. 1914 by the First Division of the Court of Session, recalling an interlocutor of the Sheriff-Substitute of Lanarkshire.

The facts and legislative provisions necessary to be considered for the decision of the preliminary question which the parties have raised by their second plea in law, and desire to have determined in the first instance, have been clearly stated by the Lord Chancellor.

The river Clyde, so defined by these enactments, may for convenience' sake be styled in this case the "compulsory area."

The plea in law of the defenders raising the question which it is desired to have first decided runs thus

"The navigation of the defenders' vessel having been in charge of a pilot whose employment was compulsory within a pilotage district in the sense of the Merchant Shipping Act of 1894, the defenders are free from any liability in respect of the collision under sect. 633 of the said Act, and should be assoilzied with expenses."

The question accordingly for decision of this House is whether this is a good plea in law, having regard to the provisions of the Act of 1894, the local Acts dealing with the river Clyde and the by-laws made under these latter.

It is not pretended that pilotage is directly made compulsory on any portion of the waters of the Clyde or its estuary outside the river Clyde as defined, but it is contended on behalf of the respondents that the Clyde Pilot Board have power to frame by-laws having the force of law providing that all river pilots shall board inward-bound vessels at Greenock, and shall on going on board take command of the vessel. Apart from this point upon the by-laws to be hereafter dealt with, the respondents, as I understand, base their claim to immunity from the damage caused on two grounds. They contend (1) that sect. 633 of the Merchant Shipping Act of 1894 should, according to the authorities, be construed as if for the word "where" occurring in the last line but one of the section were substituted the words "in any part of which," so that the section would run thus: "An owner or master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district 'in any part of which' the employment of a qualified pilot is compulsory by law." And (2) that the word "district" in the section so construed means any district for which the pilot in charge may happen to be licensed by the proper licensing authority, however extensive that district may be, and however distant the place of collision from the nearest port of the compulsory area.

The respondent next relied upon the principle stated more broadly, and most recently in the case of *The Charlton* (8 Asp. Mar. Law. Cas. 29; 73 L. T. Rep. 49), decided in the year 1893—namely this, that a pilot who navigates a ship through an area in which his employment is compulsory by law, ceases to be a compulsory pilot as soon as he passes outside that area, but may, nevertheless, if he be treated as if he had continued to be that which in fact he is not, secure to the owners of the vessel he pilots continued immunity from any claim for damages caused by his own negligence.

It was held in *The Maria* (1839, M. & Rol. 95) that sect. 55 of 6 Geo. 4, c. 125, which is somewhat similar to sect. 633 of the Act of 1894, embodied this principle of the common law, that the doctrine of *respondeat superior* cannot apply where the law compels an owner to put and keep in charge of his ship for the purpose of navigating her a person he cannot himself select, and of

whose skill and competence he may know nothing. As long as the statutory compulsion operates, the person in charge of the ship is not the owner's servant, and the owner is therefore not responsible for his acts. Thus at common law the basis of the owner's immunity is the legal compulsion upon him. These two must synchronise in their operation, and are conterminous in their reach. When and where compulsion ceases, immunity ceases, and no agreement, express or implied, which the owner, or his agent, the master, may make with the pilot can, I think, at common law, prolong or renew as regard third parties the one or the other. If the owner or his agent the master should request or permit the pilot to continue in command of the ship beyond the time he is bound by law to permit him so to do, then the relation between the owner and pilot becomes at common law a contractual relation of service, to which the maxim of *respondeat superior* directly applies. In the case of *Clyde Navigation* v. *Barclay* (3 Asp. Mar. Law Cas. 390; 36 L. T. Rep. 379; 1 A. C. 790), Lord Hatherley, at p. 795, lays down the rule as to the burden of proof in cases such as the present, in the words following: "In order to exempt yourself by virtue of the provisions of the statute (*i.e.*, the Act of 1854) from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute, and the burden is therefore thrown upon you to prove that the mischief was occasioned by the pilot. But the other side may prove that although the mischief was occasioned in one sense by the bad management of the pilot, yet there was a default on the part of the owners of the ship, which default conduced to the accident." And Lord Selborne, at p. 796, said: "Your Lordships will observe that there are three things necessary to be proved: first, that a qualified pilot was acting in charge of the ship; secondly, that the charge was compulsory; and, thirdly, that it was his fault or incapacity which occasioned the damage. I apprehend that if a defendant proves all these things, then the burden of proof is on the pursuer." I fancy that in these passages both these noble Lords had in their minds actual not fictional or notional compulsion. As I understood, it was not disputed—it could not, I think, be successfully disputed—that the compulsion which secures immunity from the claims of third parties must be imposed in the first instance by statute, or by by-laws made *intra vires* having the force of a statute. No obligation springing from any agreement, express or implied, entered into between a pilot and the owners of a vessel, either directly or through their agent their master, touching the control or navigation of that vessel, however binding on the parties to it, can, I think, *per se* prejudice in the way suggested the rights of third parties. The main questions in controversy are whether under any, and if so what, circumstances the operation of the compulsion imposed in the first instance in respect of the compulsory area can be extended beyond that area so as to secure continued immunity for the owners; and, second, whether those circumstances exist in the present case. The two authorities most strongly relied upon by the respondents on this point are the *Charlton* case, already referred to, and the case of *British Steam Navigation Company* v. *General Steam Navigation Company* (*ubi sup.*), upon which the decision in the *Charlton* case was based.

Lest if I stated in a condensed form what appears to me to be the result and bearing of the judgments of the distinguished judges who decided that case I might do them an injustice, I venture to quote at length the relevant portions of their judgments. Lord Esher, in the *Charlton* case, at p. 51, expressed himself thus: "A Bristol pilot was compulsory where he (*i.e.*, the master of the ship) took him. When he had come through the port (*i.e.*, the port of Bristol) into the compulsory area outside the port, I have no doubt, myself, that he was no longer a compulsory pilot. Therefore, when the accident happened, he was no longer a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot. And although he has passed out of the limits where he was a compulsory pilot, he was still in charge as pilot, and in charge without any alteration of the relations between him and the master of the ship. He was still the pilot. He was still in charge of the ship, for he had not gone to such a place as he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port where he was a compulsory pilot, it was under such circumstances that the master could not be properly called upon to determine if the compulsion had ceased or not. Then the necessities of the case require that you should not make him a servant of the owners when they had no real opportunity of determining that the relation put upon them had ceased. I have no doubt that it was on that ground—that to decide that the master of the ship was to take charge of the ship under such circumstances would put upon him a dangerous liability and responsibility—that the decision in *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company Limited* (*supra*) was come to. It does not signify where the spot is at which the compulsion has ceased. The mode of treating him by the master as a compulsory pilot had not ceased, and therefore we are to treat the master and the owners of the ship as still having this ship in charge of a pilot, whom they took by compulsion. If so, he was not the servant of the owners, and if so the owners were not liable for the negligence which was solely his negligence. I cannot help thinking that this is the decision of the Court of Exchequer." Kay and A. L. Smith, L.JJ. concurred in and approved of this judgment. The former added: "I cannot think it would be the convenient or proper construction to put upon this section of the Merchant Shipping Act of 1854, and it seems to be reasonable to say that where a pilot has been taken under compulsion to take a ship to a point in the Bristol Channel within the limits of his licence, although the point is somewhat beyond the limits of the Port of Bristol, yet if the pilot goes on taking the ship beyond that limit and the collision happens he should be treated for this purpose as a compulsory pilot, and the master and owners should not be liable for the collision which happened by his fault." And the latter said that, in his opinion, the remarks of

the Court of Exchequer in the above-mentioned case upon this point were not *obiter*.

In fact the district for which the pilot was licensed in that case extended down to Lundy Island, many miles below the Port of Bristol. It was not disputed that over this great reach of the estuary of the Bristol Channel from the Port of Bristol to Lundy Island any ship was free to sail without any pilot, or, again, that if she never had entered into the compulsory area she would not be protected from liability by reason of the presence of a licensed pilot on board and in charge of her; but it appears to have been considered that the mere fact that the pilot she was compelled to take on board while traversing the compulsory area was permitted to remain in charge in effect extended the area of immunity down to the open sea. I own I have considerable difficulty in following Lord Esher's reasoning. I don't quite appreciate what he means by saying that "the owners had no real opportunity of determining when the relation put upon them" had ceased. Surely he cannot have supposed that the owners who might live in Australia or South America should be communicated with by their agent, the master, to ascertain whether the latter would depose the pilot, and himself take command as his ship passed out of the compulsory area. The master is the agent of the owners, with full power on their behalf to employ, hire, or drop pilots.

Again, I am unable to understand how as regard third parties and their common law rights the mode in which the master "treated" the pilot is to determine anything. In my view, if the master had made a specific agreement with the pilot that the latter should navigate the ship to Lundy Island and have absolute control over her till she reached that point, the rights of third parties would not be affected, because it is statutory compulsion, not contractual obligations of service, which deprives them of their rights. The master might, of course, continue the pilot in charge if he desired his assistance. The appellants do not suggest that he should not be entitled to do so, but they do insist, reasonably enough, I think, that the pilot does not carry compulsion with him, and that, if he were continued in charge beyond the compulsory area, he was in precisely the same position as if he had been taken on board at Lundy Island and employed to pilot the ship up to the seaward limit of the Port of Bristol.

I find nothing in the decision to the effect that the master might not have deposed the pilot and have himself taken command of his ship as she passed out of the compulsory area. The very fact that his continued treatment of the pilot as a pilot is regarded as a determining factor would imply that he might have altered the situation by treating him otherwise. There is no such maxim of the mercantile laws as "once a compulsory pilot always a compulsory pilot," and I am quite unable to see how the mere omission by the master to take the command out of the hands of the pilot amounted to treating him as a compulsory pilot, resulting in the forfeiture of the rights of innocent third parties.

The case of *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (L. Rep. 3 Ex. 330; L. Rep. 4 Ex. 238), upon which the decision of the *Charlton* is expressly based, and upon which the respondents so much relied, is somewhat different in character. There the defendants' vessel, registered in and belonging to the Port of London, through the fault of a pilot taken on board at Dungeness, who had actual control of the ship, came into collision with and damaged the plaintiffs' vessel at a point between Yantlett Creek and Gravesend. If the Port of London extended to Yantlett Creek the defendants' vessel was at the time of the collision in her own port; if, on the contrary, it only extended to Gravesend, she was not at that time in her own port. It was admitted that pilotage was compulsory under the Mercantile Marine Act 1854, within the London district, which extended from Dungeness to London Bridge. A pilot taken on board at Dungeness would, in the ordinary course of things, navigate the ship to Gravesend and there be put on shore, receiving for that service a fee fixed by the regulations. By the 59th section of the General Pilot Act (6 Geo. 4, c. 125) it is enacted that the master of any vessel, not being a passenger vessel, may pilot his ship while she is in the waters of the port to which she belongs. The contention of the defendants was that the London district was one entire and indivisible thing, though in practice and for convenience sake licences were never given to the same pilot to pilot ships above and below Gravesend; that Gravesend was the place to which the master was bound to carry the pilot before dropping him; that even if the limit of the Port of London lay seaward of Gravesend, the whole course to Gravesend was one indivisible thing, and that the pilotage having been compulsory when originally commenced at Dungeness, continued so to be up to the point where the pilot was to be dropped.

The question for decision, therefore, was not, as in the *Charlton* case, and as in the present case, the extension of the operation of compulsion beyond the limits of the compulsory area, but the suspension of compulsion within a compulsory area, and it was insisted that the master by taking on board the pilot to carry him to Gravesend, and paying him for piloting the ship to that place, contracted himself and his principals the owners out of, as it were, the statutory exception. The decision turned to some extent on the meaning of the words used in the 59th section of the Pilot Act of 1825. Baron Martin inclined to the opinion that these words only applied to vessels navigating from place to place within the port to which the vessel belongs; but bowed to the existing decisions. He was clear, however, that if the master of the defendants' ship, though signalling all the way from Dungeness for a pilot, had failed to get one before his ship passed into the waters of the Port of London he would not then, though in a compulsory area, be obliged to take a pilot, but he held, nevertheless, that even if Yantlett Creek was the boundary of the Port of London, "as the pilot was taken on board at Dungeness and employed to navigate the ship to Gravesend, the ship did not when she arrived at Yantlett Creek become a ship navigated within the limits of the port to which she belonged so as to constitute the pilot the servant of the owners and render them liable for his default." He was further of opinion that under the provisions of the Acts of Parliament the pilot was entitled if not bound to pilot the ship to Gravesend, and

that no liability was cast upon the defendants by the mere circumstance that the ship had arrived at Yantlett Creek. He refused to recognise the case of *The Stettin* (1 Asp. Mar. Law Cas. O. S. 229; 6 L. T. Rep. 613; B. & L. 199) as an authority in the case, because *Lucey* v. *Ingram* (5 M. & W. 6) had not been cited in it.

Channell, B. concurred in this judgment, and Bramwell, B., who only heard part of the argument, concurred so far as he had heard it. Kelly, C.B., dissented, holding on the facts that Yantlett Creek was the limit of the Port of London, that it was distinctly so decided in *The Stettin* (*sup.*), that it was not compulsory on the master of a ship belonging to the Port of London to employ a pilot at a point within that port, that the case of *Lucey* v. *Ingram* was decided upon the special provisions of the 55 and 72 sects. of the General Pilot Act (6 Geo. 4, c. 123), and not on the Act of 1854 the wording of which was altogether different (in which statement he was perfectly accurate). The case came on Appeal before the Exchequer Chamber (L. Rep. 4 Ex. 238). The court was a very strong one. It was composed of Byles, Keating, Montague, Smith, and Hannen, JJ. The unanimous judgment of the court was on the 4th May 1869 delivered by Byles, J. They held that the Port of London did not extend beyond Gravesend. Consequently, as the collision occurred at a spot further down the river than Gravesend it did not occur in the Port of London, and there was an end of the case. At p. 244 of the report Byles, J. is reported to have expressed himself thus: "Two questions arise: First, whether the accident happened at a spot within the Port of London, for if it did not, then the defendants' captain was bound to have on board a pilot, and the defendants are not responsible for the pilot's want of skill and care. Secondly, whether, assuming the spot where the accident happened to be within the Port of London, the defendants would, they thought, be nevertheless protected from liability, although the vessel belonged to that port, the pilot having been compulsorily taken on board at Dungeness to pilot the vessel to Gravesend." At p. 246 he distinctly states, however, that even if the Port of London extended to Yantlett Creek the court thought the defendants would not be liable. And he gives as his reasons—First, that by the Act of 1854 pilots engaged at Dungeness may be taken first to the Nore or Sheerness and next to Gravesend, but cannot be engaged for any intermediate distances. Secondly, that it was compulsory upon masters to take a pilot for that distance; that the pilot could insist on being paid for all the way to Gravesend, and to be carried there; that there had been, in effect, a contract between the captain and the pilot that the pilot should go to Gravesend, should be paid to Gravesend, and should act as pilot to Gravesend; that during the first part of the transit the relation of master and servant did not exist between the owners of the defendant's vessel and the pilot, and that the court could not see any indication of a fresh contract as to the latter portion of the transit. And the learned judge proceeded to say that "the 388th section of the Act of 1854 does not require that the pilot should be compulsorily employed where the accident happened, but only that he should be compulsorily employed *within the district* where it happened. That is not only the grammatical literal interpretation of the statute, but it obviates all the mischief which might be apprehended from captains unnecessarily and improperly employing pilots to escape the responsibilities of navigation while it preserves the sole responsibility of the pilot in the whole of the district for which he was employed."

It must be remembered that the court was, as I have said, dealing with a case of exemption from compulsion in a compulsory area, and the judgment should be read *secundum subjectam materiam*. I find nothing, however, in the earlier part of it inconsistent with the right of a master to take from a pilot, originally employed in a compulsory area, the command of his ship as soon as she passes beyond that area. It is possible he might be liable to the pilot under such a contract as was made in that case for breach of contract, but nothing more. Nor do I find anything inconsistent with the conclusion that in such a case, from the time the ship passed out of the compulsory area the pilot was no longer a compulsory pilot, but stood to the master and the owners of the ship merely in the relation in which a pilot hired in a non-compulsory area stands to them.

With reference to the construction of the 388th section of the Act of 1854, I am unable, with the most profound respect for the learned and distinguished judges who decided this case, to find anything in reason or justice to sustain their construction of this section. A pilotage district may be very vast. In the *Charlton* case it extended many miles down the Bristol Channel beyond the compulsory area, the Port of Bristol. In the present case it extends at least four miles, perhaps more, beyond the compulsory area. I am quite unable to discover upon what principle the fact that the pilot was originally employed in the compulsory area is to secure to him the privilege of negligently running down or injuring in every part of the district for which he is licensed, the vessels of third parties, without any risk of loss to the owners he serves. In my view, this construction disregards the common law rights of third parties, and ignores the principle upon which the immunity of the owner of the ship in fault is based. I think the construction is erroneous, and I respectfully decline to adopt it. Within one month and two days after the delivery of this judgment, the Judicial Committee of the Privy Council, composed of the then Master of the Rolls, Lord Romilly, Sir William Earl, Sir James Colville, and Sir Joseph Napier, decided the case of *Owners of the Steamship Lion* v. *Owners of the Yorktown* (3 Asp. Mar. Law Cas. O. S. 266; 21 L. T. Rep. 41; L. Rep. 2 P. C. 525), in which was cited not only the decision of the Court of Exchequer, but possibly that of the Exchequer chamber in the last-mentioned case. The collision in that case took place on the river Thames, and was due to the negligence of a licensed pilot in charge of the steamship *Lion* at the time. The owners of this ship were sued for damages. The preliminary question raised was whether the *Lion* was at the time of the collision a passenger ship or not. If she was a passenger ship, then, under the 397th section of the Act of 1854, the employment of a pilot was compulsory; if not, it was

admittedly optional. It was held that the *Lion* was not, at the time of the collision, a passenger ship, and therefore that the employment of the pilot was optional. The cases of *The Stettin* (B. & L. 199) and *Lucey* v. *Ingram* (6 M. & W. 65) were cited. The decision in the former was approved of and followed, and it was pointed out, as it already had been done by Kelly, C.B., that *Lucey* v. *Ingram* was no authority whatever upon the point in dispute, since it was decided upon the special wording of the 72nd section of 6 Geo. 4, c. 125, which are wholly different from those of the 389th section of the Act of 1854. The latter section is identical with the 633rd section of the Merchant Shipping Act of 1894.

Lord Romilly, after criticising at length these several cases and others, at p. 534 says: "According to the principle of these decisions, the owners are exonerated from responsibility for the default of the pilot whom they have selected and placed in charge of their ship, when by law there is no obligation imposed upon them to take such pilot and put him in charge" . . . "and, secondly, that having taken a pilot, even assuming that the pilot was bound to act, this does not in such circumstance exonerate the owners from responsibility for the errors committed by the pilot in a case where they were not compellable to take a pilot and put him in charge."

This last paragraph meets much of the argument that was addressed to your Lordships on behalf of the respondent, based on the following words occurring in the 27th by-law: "And the pilot when on board shall have sole charge of the vessel." These words are of no avail, however, when the act of taking the pilot on board is a voluntary act. No provision such as this was made by the body licensing the pilot, and no stipulation made by the pilot himself when he is being hired, as to his having complete control over the ship, will secure immunity for the owners if the taking of the pilot was not compulsory by law, because compulsion by law is the true basis of immunity, and *cessat ratio cessat lex.*

As the master was not compelled by law to keep on the pilot after the ship passed from the Port of Bristol, I think the decision of Lord Esher on this point is in conflict with the law as laid down by Lord Romilly.

The case of *The Stettin* (B. & L. 199) was decided on 6 Geo. 4, c. 125.

The vessel belonged to the Port of London, and was inward bound from Bordeaux to London. She took on board a Trinity House pilot, by whose negligence she came into collision near Regent's Canal in the river Thames with another ship or barge. By the 59th section of 6 Geo. 4, c. 125, she was relieved from the obligation to take compulsorily a pilot while she was navigating the port to which she belonged. Dr. Lushington held that as she was not bound to have the pilot on board, her owners were not protected, and the Judicial Committee, consisting of Lords Kingsdown and Chelmsford, Sir Edward Ryan, and Sir L. Peel, upheld that decision thinking it was right. Sir Robert Phillimore refers to the case of the *Stettin* in the case of *The Hankow* (4 Asp. Mar. Law Cas. 97; 40 L. T. Rep. 335; 4 P. Div. 197; L. Rep. 4 P. 197), the decision in which, however, turned upon the 59th section of the Pilotage Act 1825 (6 Geo. 4, c. 125). He does not, I think, disapprove of the decision in the *Stettin* case. He also deals with the decision in *General Steam Navigation Company* v. *British Colonial Steam Navigation Company* in these words. He said, "I am unable to extract any assistance from that case, and I find myself rather perplexed in reading the judgment." I confess I share in that perplexity.

Your Lordships' House is not bound by the decision of the Court of Exchequer Chamber or that of the Court of Appeal. In view of this conflict of authority one must rely upon the principle upon which immunity is based. In my view the immunity of the owners of ships for injuries caused by those ships through the negligence of the pilot in charge of them rests upon this, that they are compelled by law to have that pilot in charge at the time and place the collision occurs, that because of that compulsion the pilot is not the servant of the owners, and they are therefore not responsible for his acts. I further think, with all respect for the great judges who decided these cases, that these decisions are unsound in principle and are in conflict with decisions almost, if not altogether, as authoritative as themselves, and I decline to follow them.

It is not contended that these by-laws are *ultra vires.* I concur with Lord Skerrington in thinking that they do not purport to extend the area of compulsory pilotage as fixed by sect. 136 of the Act authorising the making of them. If they did, they would be *ultra vires.* By by-law 31 river pilots are required to reside at Greenock and Glasgow, where they may be picked up and discharged respectively. These arrangements may be very convenient. That, however, is beside the point, and, of course, a master may with great prudence leave the control of his ship to a pilot, both in the river and Firth of Clyde. Nobody contends that he should be deprived of that advantage.

I further concur with Lord Skerrington in thinking that there is nothing in these by-laws to prevent the master of an incoming ship, who picks up a pilot at Greenock, from keeping control of his ship till he reaches the compulsory area. Nor to prevent the master of an outward bound vessel, who has taken a pilot on board at Glasgow, from putting the pilot aside and taking the command of his own ship as soon as she passes out of the compulsory area.

I see none of the dangers to which Lord Esher alludes on the *Charlton* case in enabling him so to do.

Mr. Laing urged that these statutes and by-laws should be reasonably construed and enforced, and it would be very difficult for masters to know precisely when they passed into or out of the compulsory area, or to be prepared for a change of control.

The first difficulty could be got over by buoying or in some other way easily ascertainable marking the boundary of the river. The second is, I think, fanciful.

On the whole I am of opinion that the decision appealed from was wrong and should be reversed, that the decision of the sheriff-substitute was right and should be restored, and this appeal should be allowed, with costs here and below.

Lord SHAW.—The appellants are owners of the British steamship *Blaenavon*, and the respondents of the Norwegian steamship *Fjord*. At a point on the estuary of the river Clyde, nearly opposite Princes Pier, Greenock, these two vessels collided. The present proceedings ensued. The appellants sue for 5500*l*. The respondents counter-claim for 600*l*. Each ship blames the other. The present appeal, however, has arisen in connection with the defence set up by the owners of the *Fjord*, the respondents. Their defence was repelled by the learned Sheriff-Substitute Fyfe, but has been upheld by the majority of the First Division of the Court of Session. I am humbly of opinion that the dissent from that judgment by the learned Lord Skerrington was on all points correct, both in reasoning and result, and that the judgment appealed from should be reversed.

The appellants defenders' plea is as follows: "The navigation of defenders' vessel having been in charge of a pilot whose employment was compulsory within the pilotage district in the sense of the Merchant Shipping Act 1894, the defenders are free from liability in respect of said collision under sect. 633 of the said Act." This is not a common law defence; it is a defence founded upon the statute, and it is that defence which has been upheld.

There has been so much reference to decided cases, both in the courts below and in the argument on this appeal, that it appears to me advisable again to quote sect. 633, which is the groundwork of this plea. It is, as your Lordships are aware, truly a temporary provision. In a few years' time such an exemption from liability will have disappeared from the Merchant Shipping Code.

The section is as follows:

> An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

Geographically the position of the matter is this: a straight line drawn from the eastern end of Newark Castle, on the south shore of the Clyde, to the mouth of Cardross Burn, on the north shore, divides, by sect. 75 of the Clyde Navigation Act of 1858, the river Clyde from the estuary, the "river" being to the eastward of that line up to Glasgow, and the "firth" being to the west of that line down to Little Cumbrae. By the Act a pilot board was created. It had certain powers over the whole of this area, and in particular, under sects. 127 and 134, powers to license pilots for both river and firth. The section dealing with compulsory pilotage applies solely to "any part of the river as defined by this Act." Within that area it is not lawful for any person to navigate without a pilot any vessel exceeding sixty tons burden; to that area—the river—compulsory pilotage extends. Outside of that, as far as the Cumbraes, the pilotage is not compulsory. Geographically the language of the Act of Parliament is as plain and incontrovertible as this.

There is power given for the pilot board to make by-laws *quoad* the river (119) for "regulating the conduct of the owners, masters, pilots, and crews of vessels," and *quoad* the firth or estuary (139), "the good government, police, and proper navigation of all vessels." With regard to the point for decision in this case, there the statutory provisions end. I am humbly of opinion that these sections are not in conflict, but that, upon the contrary, the power of making by-laws was for the purpose of carrying out and in no respect whatsoever of limiting, restricting, or controverting the other provisions of this statute. Sect. 139, defining the geographical limits of the river, stands, and must stand, exactly as the Act has defined them. To the east of the Newark-Cardross line compulsory pilotage is prescribed, and the area so defined could not, without violation of this statute, be extended in any direction by by-law, or apart from statutory amendment, alteration, or repeal.

When sect. 633 of the 1894 Act accordingly speaks of a "qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law," it can, in my humble judgment, not extend, so far as the Clyde is concerned, to any district west of the Newark-Cardross line. To the east of the line and up to Glasgow "the employment of a qualified pilot is compulsory by law"; to the west of that line it is not. With every respect to the English judges who have come to the decisions analysed by your Lordships, I think that this case depends upon statute, and that it ends at this point.

The actual place of collision was at the tail of the bank opposite the Princes Pier at Greenock, four miles west of the Newark-Cardross line, and well within the voluntary pilotage area. The scheme of the by-laws appears to have been to have two sets of licensed pilots—one for the river and the other for the firth. According to the practice which, however, prevails, one man obtains a licence for both districts; and in working out this plan it has been found for the convenience of all parties expedient that pilots should reside in Greenock and be available for call at that port. By-laws appropriate to these topics are made, and one of these by-laws says that when the pilot boards the vessel he should be in charge of the vessel. He might be taken on at Greenock or he might have been taken on as far west as the Cumbraes, but the argument presented to your Lordships' House is that he, being on the the ship and in charge of it, the by-law operates *ipso jure* as an extension of "the district where the employment of a qualified pilot is compulsory by law."

It is fortunately highly inexpedient to elaborate this point, for, in the view which I take, it would be totally incompetent for a pilot board so to act as to extend the district where the employment of a qualified pilot is compulsory by law. And if any by-law has purported to do that it would not be carrying out, but controverting, the express provisions and geographical limitations of the 1858 statute.

There is no Scottish case which gives sanction for doing this, and with regard to the English cases I do not, speaking with respect and for myself, find that (dealing as they do with different statutes and different circumstances) they illustrate this particular Act of 1858 in such a way as to permit me to construe it apart from these geographical limitations to which I have referred. The statutory provision is not affected, or controlled by, and it makes no stipulation on

the subject of the point where the employment of the qualified pilot took place, or the tract of water (a great part of which may lie outside the district in which pilotage is compulsory) for which a pilot's services are engaged. But what the statute has to do with is, I repeat, "the district where the employment of a qualified pilot is compulsory by law."

I put this case during the argument, and I cannot say that I received any satisfactory answer to it:—Assume a vessel outward-bound from Glasgow, and therefore under the charge of a pilot, to reach the Newark-Cardross-line, and to pass, that is to say, from the river, in which the employment of a qualified pilot is compulsory by law, into the firth, where it is not. Assume this vessel to meet an inward-bound steamer, and the inward-bound steamer having sailed to that limit which it can do without any contravention of either statute or by-law without a pilot. Then, being about to enter the river, she requires a pilot, and the pilot from the outward-bound vessel is thereupon transferred to it. He takes charge on or near the actual line which is the western boundary of the river by law.

Is there anything contrary to law in that? Is there anything in any by-law which would compel the vessel in such circumstances to go back to Greenock and go through the form of taking up the pilot there? I humbly do not think there is. The illustration is not fantastic. It would apply to-day in the same way to any vessel sailing from Port Glasgow to Glasgow, a pilot being picked up at the former port. At a point actually three or four miles to the west of that, and down the firth, this collision occurred. It humbly appears to me to have no bearing upon the case to say that the vessel had to pick up the pilot opposite that point—namely, at Greenock. If the meaning of that is that it was an excellent or convenient arrangement and in accord with the by-law, good and well. That cannot affect the statutory limitations. But if the meaning of it is that it so far affected them as to produce a result equivalent to extending the river four miles to the west of its specified boundary, I cannot hold this to be in accordance with law. The respondents' case necessarily involves that the same reason would apply if the pilot was picked up at the Cumbraes. He would be a duly licensed pilot; his district would include a large tract of water within which pilotage was voluntary, and a smaller tract of the river within which it was compulsory. The illustration is merely given to show how strange would be the results of leaving the plain geographical limits set forth by the statute.

With regard to the English decisions, I agree with the analysis and reasoning upon those given in the judgment read by my noble and learned friends who have preceded and are to follow me. I only presume to add to these judgments these two points: First, without differing in any way from Lord Wrenbury's view as to the case of *Lucey* v. *Ingram* (6 M. & W. 302), I must say that the statute there under construction was couched in language very different from the 75th section of the Clyde Act of 1858. In the second place, I think, if I may respectfully say so, that confusion has been introduced into this department of the law by the expression "compulsory pilot." What the statute deals with is a place, area, or district where pilotage is compulsory. But if the word "compulsory" is to be applied to the man, the pilot, then once the licensed pilot is on board of a vessel he carries this adjective or quality with him (such is apparently the inference) in such a way as to put the ship itself under compulsory pilotage and to convert the area into a compulsory area, although with regard to the latter the point of collision was out of bounds, and with regard to the former compulsory pilotage was not prescribed. All this, in my opinion, is concluded adversely by the consideration that the place of employment or the place to which the employment can be extended either before the compulsory pilotage area is reached or after it is left, is truly an irrelevant consideration in view of the clear and very plain language of the Merchant Shipping Acts.

I agree that the appeal should be allowed.

Lord Parmoor.—I concur in the judgment about to be delivered by Lord Wrenbury.

Lord Wrenbury. — The question here is whether at the time of the collision the *Fjord* was in charge of a pilot whose employment was compulsory, with the result that her owners are free from liability. The question has been argued under two heads, (1) whether the owners are within sect. 633 of the Merchant Shipping Act 1894, and (2) whether at common law the relation of master and servant ever arose between the owner and the pilot so as to render the former liable for the negligence of the latter.

Having regard to sects. 136 and 75 of the Clyde Navigation Consolidation Act 1858, the *Fjord* at the moment of the collision was not at a place where she was bound to navigate with a pilot. She was entitled at that place to navigate by her own officers. She had taken a pilot on board at Greenock, which was, under the regulations, a proper place to take him, but she was in waters in which, so far as the Clyde Act of 1858 was concerned, she was entitled to keep charge of the navigation by her own officers, and not to give charge to the pilot.

The Pilotage Board constituted by sect. 128, however, had made (as by sect. 139 they were entitled to make) by-laws for the proper navigation of vessels at places which included the place where the collision occurred, and had by by-law 37 provided that "the pilot when on board shall have sole charge of the vessel." They had also by by-law 17 provided that pilots should be licensed in two classes—namely, river pilots licensed to pilot between Glasgow and Greenock (which was the present case) and deep sea pilots licensed to pilot between Greenock and Little Cumbrae.

The question to be determined upon the Acts and by-laws is whether, for the purposes of sect. 633 of the Merchant Shipping Act 1894, the pilot was in these facts acting in charge of the ship within a district where the employment of a qualified pilot is required by law. Two questions arise—the one on the word "district," the other on the words "required by law."

As regards the latter, in my judgment the employment of a qualified pilot was not, under the circumstances of this case, "required by law." My reasons for this opinion are as follows: First, the law required a pilot in the circumstances

mentioned in sect. 138 of the Clyde Act. The power to make by-laws did not extend to allow of an extension of sect. 138. It empowered only by-laws for the proper navigation of vessels having regard to sect. 138. *The Ruby* (6 Asp. Mar. Law. Cas. 577) is not an authority that the area of compulsory pilotage can be enlarged by by-law under such a power to make by-laws as is contained in the Act of 1858. The decision in the *Ruby* is based upon the fact that the local Act 53 Geo. 3, c. clxxxiii., by its preamble and by sect. 17, contemplated acts and gave power to the commissioners to do acts for establishing and regulating the pilotage of ships, and that the subsequent Act of 1845 gave, by sect. 158, power to make by-laws for regulating the pilotage, and that, having regard to the Act of 1813, this meant establishing pilotage. Under these provisions it was held that a by-law could make pilotage compulsory. That is not this case. The definition of the area of compulsory pilotage is the definition of an area within which third parties will, in case of collision, be deprived of a right which otherwise they would have against the owners. The Clyde Act of 1858 had defined what that area was. The by-laws could not extend it.

Secondly, the provisions in the by-laws by which it is said that they extended the area is found in by-law 37: "The pilot when on board shall have sole charge of the vessel." In my opinion this provision was contractual only, and not compulsory.

Inasmuch as the ship was, under the circumstances mentioned in sect. 138, bound to have a pilot, the pilotage board was, I think, bound reasonably to supply one. They could not attach any conditions they liked to supplying one; they could, I think, attach reasonable conditions. I doubt whether it would be a reasonable condition which they could lawfully impose that the master should give over the charge of his vessel to another, when he was not in law bound to do so. But assuming the condition to be reasonable, its acceptance by the ship created a contractual and not a compulsory obligation. If the pilotage authority says I will give you a pilot if you will give him charge from the time he comes on board, and the ship consents, the result is that a contractual and not a compulsory obligation is imposed upon the ship. Compulsory for the present purpose does not mean the compulsion of necessity, which leads the ship to acquiesce, but the compulsion of law which prevails whether the ship assents or not.

As to the latter point it is contended that sect. 633 is operative not only at the point where the employment of a pilot is compulsory, but in "any district where the employment of a qualified pilot is compulsory by law," and it is argued that "district" means "pilotage district," and that the words mean "within any pilotage district in any part of which the employment" is compulsory. The pilotage district here, it is said, is Greenock to Glasgow, for the pilot's licence was to pilot between those places, and in some part (although not this part) of that district pilotage was compulsory.

To my mind the contention does violence to the language. The rights of third parties are not to be taken away by words which as they stand and without altering "where" into "in any part of which" do not affect them. In the present case, if the contention is right, the whole voyage from Little Cumbrae to Glasgow could have been made the subject of compulsory pilotage, if the pilotage board had elected (as they might) to license a pilot for the whole of that distance, with the result of making it one pilotage district.

Upon the question of sect. 633 of the Merchant Shipping Act 1894 I think the appellants are right.

As regards the common law I am far from clear that there is any separate question. But I will assume that apart from sect. 633 there may be an arguable point. The point, if it exists, is this: When the pilot was taken on board at Greenock, and, in fact, took charge of the vessel, did he take charge by the request or with the assent of the master so as to constitute the pilot the servant of the owner, or did he take charge adversely to the master and because he had the right so to do? This vessel was going from free waters into compulsory waters. As a subsidiary question would the result be different if she had been coming from compulsory waters into free waters?

In my judgment there is no difference between the two cases. In each case it seems to me that at the moment when the vessel is in free waters the pilot can only take or keep charge, and by implication he did take or keep charge by the request of the master. Take the present case; the pilot came on board on the terms (see by-law 37) that he should have sole charge. I have stated my reasons for thinking that that was a contractual term. The pilot takes charge by the contractual consent of the ship. The owners have adopted him as their servant. Take the case of the pilot who had been shipped, say, at Glasgow, had come down the river, had crossed the arbitrary line, and was no longer in the river but in the Firth. When she crossed the line the master (but for the contractual term) could have said, "I shall now take charge," and the pilot could not have said him nay. He did not do so. Why? Because by contract, after the line was crossed, he was to leave the pilot in charge. He was there from that moment by contract, and the relation of master and servant existed.

So far I have abstained from all reference to authorities. I go on to consider what the authorities are.

In *Lucey* v. *Ingram* (6 M. & W. 302) it was held that the owner need not have employed a pilot at all. But he did so. The ship was held to be within sect. 72 of the Pilot Act (6 Geo. 4, c. 125) a ship "wanting a pilot" because she wished for a pilot. Under these circumstances the court held that the pilot was "acting in the charge of such ship under" the provisions of the Act within sect. 55, because under sect. 72 he was bound to take charge. I am unable to agree. The obligation of the pilot to serve arose under the provisions of the Act. But his acting in the charge of the ship arose, not under any of the provisions of the Act, but by reason of the ship's asking him to act, from which it resulted that under the provisions of the Act he was bound to comply. *Lucey* v. *Ingram*, I think, was wrongly decided.

The Stettin (1 B. & L. 199) in the Privy Council was a case in which the vessel inward bound to the Port of London came into collision within her own port, but was at the time being navigated by

a duly licensed pilot. She had passed from an area of compulsory pilotage—had entered an area in which she was not compelled to have a pilot—but remained, in fact, in charge of the pilot. The ship was held liable for damage. This decision concurs with my own opinion. It is applicable to the present case unless a distinction is to be drawn (and I have said that, in my opinion, it is not) between the case of a ship passing from compulsory into free waters and that of a ship passing from free into compulsory waters.

In *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (L. Rep. 3 Ex. 330; 4 Ex. 238), the Court of first instance followed *Lucey* v. *Ingram* and not *The Stettin* (*ubi sup.*). In the Exchequer Chamber it was held that the ship was not at the time of the collision within her own port and that pilotage was therefore compulsory. The point, therefore, did not arise, and what was said upon it was but dictum. I am bound, however, to say that I do not agree with the dictum. The grounds relied upon are two: First, that up to Gravesend pilotage was compulsory and that "we cannot see any indication of a fresh contract as to the latter portion of the transit." Fresh contract there could be none, for the previous relation was not contractual, but compulsory. A contract (not a fresh contract), as I have already said, was, I think, to be inferred so soon as the compulsory relation terminated. Secondly, that the words of the Act are "within the district." I have already expressed my opinion upon the effect of these words. Lastly, the court distinguished *The Stettin* (*ubi sup.*) on the ground with which I have already dealt—namely, that in *The Stettin* (*ubi sup.*) the vessel was passing from compulsory waters into free waters. *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (L. Rep. 3 Ex. 330; 4 Ex. 238) is upon the point before the House dictum only and not decision—and with the dictum I cannot agree.

In *The Charlton* (73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29), however, the case was by inadvertence treated by the Court of Appeal as a decision binding upon that court. The *Charlton* was proceeding from compulsory to free waters. Lord Esher, M.R. decides the case on the ground that the pilot was no longer a compulsory pilot, but that he was still "in charge without any alteration of the relations between himself and the master of the ship." I cannot follow this. The original relation was that the pilot was *dominus*; it mattered nothing whether the master wished him to have charge or not, he was compelled to let him have charge. The subsequent relation was that the pilot was not *dominus* at all. The master could have told him to go below and could, adversely to the pilot, have taken charge himself. Secondly, the Master of the Rolls decides on the word "district." This is the point upon the statute with which I have already dealt. Lastly, he decides it on the ground of expediency, of the difficulty which would arise in determining when the terminus of compulsory pilotage had been reached. The rights of third parties cannot, I think, be taken away on grounds of expediency. Kay, L.J. adds no further ground. A. L. Smith, L.J. decides upon the *General Steam Navigation* case (*ubi sup.*) in the Exchequer Chamber.

In *The Lion* (21 L. T. Rep. 41; L. Rep. 2 P. C. 525) it was held that the vessel was not carrying passengers, and was therefore not bound to take a pilot. The board followed *The Stettin* (*ubi sup.*) and not *Lucey* v. *Ingram*.

These are the authorities. Upon authority the balance is, I think, in favour of the view which I expressed in the earlier part of this opinion. However this may be, I submit to your Lordships that when this collision occurred the ship was in charge of the pilot, not compulsorily against the master, but contractually by the implied request and consent of the master, and that as towards third parties the owners cannot protect themselves from liability upon the ground of compulsory pilotage.

It results that, in my judgment, this appeal succeeds.

Interlocutor of the First Division recalled and that of the sheriff-substitute restored. The respondents to pay the appellants' costs there and below.

Agents for the appellants, *William A. Crump* and *Son*, for *Fyfe, Maclean*, and *Co.*, Writers, Glasgow, and *Campbell Faith*, S.S.C., Edinburgh.

Agents for the respondents, *Thomas Cooper* and *Co.*

July 19 *and Nov.* 5, 1915.

(Before Viscount HALDANE, Lord DUNEDIN and Lord ATKINSON.

STOTT (BALTIC) STEAMERS LINE *v.* MARTEN AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance (*Marine*)—*Time policy*—"*Perils of the sea*"—*Institute time clauses*—"*Inchmaree*" *clause*—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *sect.* 30; *sched.* 1, *r.* 12.

The plaintiffs took out a policy of marine insurance with the defendants on their ship which covered (inter alia) *perils of the seas. The policy included the conditions of the Institute time clauses as attached, clause* 3 *of which provided as follows*:—"*In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions.*" *Clause* 7 *provided*: "*This insurance also specially to cover* (*subject to the free and the average warranty*) *loss of or damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, burstings of boilers, breakage of shafts, or through any defect in the machinery or hull . . .*"

While the ship was lying in the dock a boiler, which was being lifted by a floating crane in order that it might be lifted into a hold, fell, owing to the pin of a shackle breaking, and damaged the ship.

In an action under the policy

Held, (1) *that the loss was not caused by a peril of the sea, and the language of the policy itself showed that the scope of the clause was limited to such perils or perils* ejusdem generis *and* (2) *that neither clause* 3 *nor clause* 7 *of the Institute*

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

Time Clauses extended the genus *of the risk insured against.*

Decision of the Court of Appeal, reported 12 *Asp. Mar. Law Cas.* 555; 111 *L. T. Rep.* 1027; (1914) 3 *K. B.* 1262, *affirmed.*

APPEAL from a decision of the Court of Appeal (Buckley, L.J., Kennedy, L.J., and Phillimore, L.J.) reported 12 Asp. Mar. Law Cas. 555; 111 L. T. Rep. 1027; (1914) 3 K. B. 1262, which affirmed a decision of Pickford J. reported 12 Asp. Mar. Law Cas. 414; 109 L. T. Rep. 899; (1914) 1 K. B. 442.

The action, which was tried as a commercial cause, was brought by the appellants against the respondents, who were underwriters, on a policy of marine insurance on the steamship *Ussa* dated the 16th March 1911, which included the conditions of the Institute Time Clauses as attached.

Leslie Scott, K.C. and *L. F. C. Darby* for the appellants.

Adair Roche, K.C. and *MacKinnon*, K.C. for the respondents.

The facts and arguments sufficiently appear from the judgments which after consideration were delivered dismissing the appeal.

Viscount HALDANE.—I think that the decision of the Court of Appeal was right.

Turning first of all to the well-known language of the policy itself, I am of opinion that it is now settled law that the words of the clause describing the adventures and perils insured against indicate that the scope of this clause is confined to the genus of adventures and perils of the seas, and that the reference to other perils, losses, and misfortunes, with which the clause concludes, is limited to those that are of this genus. Since the judgment of this House in *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.* (6 Asp. Mar. Law Cas. 200; 57 L. T. Rep. 695; 12 App. Cas. 484) I conceive that this point has become a settled one.

Turning next to the Institute time clauses incorporated in the policy, I am of opinion that clause 3 makes it clear that the risks in question extend, among other things, to risks in port, but does not extend the character or genus of the risks. I am further of opinion that clause 7, known as the "Inchmaree" clause, is not to be read as inserted into or as expanding the description of risks contained in the policy, but is to be regarded simply as a supplemental and independent clause, adding to the risks covered loss or damage to hull or machinery arising out of the negligence of those managing the ship, or from, among other things, breakage of shafts or latent defects. Clause 7 does not in this view enlarge the genus, but simply provides that if this kind of accident happens it is to be covered independently as an addition to the perils described in the policy. The words of clause 7 do not, as I shall presently point out, of themselves cover the case which has occurred, and if I am right, they do not alter the construction of the general clause in the policy.

Now what actually happened was that the *Ussa*, the steamer the subject of the policy, was in course of having three boilers loaded into her hold as part of her cargo. These boilers were brought alongside her by means of a steam crane mounted on a mobile floating structure called the *Atlas*, belonging to the Mersey Docks and Harbour Board, and itself a vessel propelled by steam. The boiler which caused the damage was lifted and swung over the *Ussa's* side, and it had to be tilted in order to get it into her hold. As the boiler was being lowered it caught on the hatch coamings, and the weight being thus taken off the jib of the steam crane, a water counterbalance on the other side of the *Atlas* caused her to list away. The result was that the end of the jib of the crane was lifted. The chain fall became taut, the pin of the shackle holding the sling gave, and the boiler fell and damaged the *Ussa*.

Notwithstanding what was said in argument, I think that the *Atlas* was simply a machine independent of the *Ussa*. It was essentially a crane, and for all that appears to the contrary it might have been used for loading trucks by the riverside as well as for loading ships. It therefore did not, for the purposes of the question before us, differ from a crane on the quay, and it was not under the control of the *Ussa's* crew. What happened while it was being used on the face of it does not fall within the words of clause 7 of the Institute Clauses, and the only question is whether the accident comes under the *genus* of the other perils described in the policy. Now, this *genus* is limited, as I have already said, to perils of the seas. No doubt under this policy these include perils of the seas maturing in port. But the accident which occurred was one which might happen in loading a railway truck just as much as in loading a ship, so far as its general character was concerned. I am unable to attach any importance to the nature of the *Atlas*, or to the fact that she sailed about the river and was liable to list by reason of her water-balance. For the present purpose she was, as I have said, a mere machine for loading, and I am of opinion that there is no real analogy between what happened and the infliction of damage by collision or otherwise by one vessel on another at sea. I do not think that the accident which occurred arose out of a peril of the seas within the meaning of the policy.

I therefore move that the appeal be dismissed.

Lord DUNEDIN (read by Lord SUMNER).—I concur. I think this case is practically settled by what was decided by this House in the case of *Thames and Mersey Marine Insurance Company* v. *Hamilton Fraser and Company* (*ubi sup.*).

I need not quote the words of the policy which, apart from the Institute time clauses, in that case and in this are in common form. In both cases it was admitted that what had happened did not fall under the words which enumerate certain specific perils, but reliance was placed on the general words—all other perils, losses, and misfortunes.

The *Thames* case decided first that these general words must be restricted to meaning perils and losses *ejusdem generis* of perils of the sea or the other enumerated perils, and second that it did not make a peril *ejusdem generis* because it was in connection with something which was being done and was necessarily being done for the prosecution of a voyage.

In that case the donkey engine, which had been split, was being used to fill the boilers. Without filled boilers the vessel could not proceed on her voyage, and Lord Halsbury put the point quite plainly when he says (12 App. Cas., at p. 490):

"On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other it is said that the accident, peril, or misfortune had nothing to do with the sea, and was in no sense of the like kind with any of the perils enumerated."

That seems to me to dispose of what the learned counsel called his wider proposition, namely, that all accidents in loading are covered. Loading is a necessary preliminary to the voyage of a freighted ship; but so is the filling of the boiler. In both cases you have to look further and see whether the accident itself had, as Lord Halsbury put it, "anything to do with the sea."

The accident here was that a heavy thing was dropped by a loading crane, partly owing to the pin of a shackle being insufficiently strong, and partly because, owing to the load catching on the coamings of the hatchway, a strain was relaxed and then suddenly put on again with a jerk. As to the pin, obviously no point could be made, but the learned counsel rested what he called his narrower proposition upon the idea that you imparted what one may call a marine character to the accident by saying that hatchways are narrow. Now an aperture is small or not, according as to whether the thing you want to put into it is big or not; and precisely the same difficulty as arose here might and does arise with putting any unwieldy and heavy object into a railway truck. I cannot therefore accede to the smaller proposition; and the fact that the crane itself was water-borne can have nothing to do with it, because that fact had nothing to do with the cause of the accident.

There remains an argument which was founded on clause 7 of the Institute time clauses. That clause adds certain specific causes of loss or accident for which the underwriters make themselves responsible. They may be generally described as causes of loss or accident which are to be found in defects of the ship itself or machinery therein. This clause has no general words attached. To make it available the appellant has first to say that as it is an addition to the enumerated perils clause, it must be read as embodied in that clause, and thus get the benefit of the general words attached to that clause; and secondly, that the cause of loss here is *ejusdem generis* with the causes of loss described therein. I think this argument fails in both branches. I think the new clause comes in its own place, and must have had general words attached to it if such general words were intended to be added; and, further, I think that the breakage of machinery belonging to and introduced by other people is not *ejusdem generis* with the breakage of machinery forming part of the ship.

For these reasons I am of opinion that the appeal should be dismissed.

Lord ATKINSON.—This is an appeal from a judgment of the Court of Appeal, dated the 29th July 1914, dismissing an appeal from the judgment of Pickford, J., dated the 13th Nov. 1913, in favour of the respondents, the defendants in an action brought by the appellants against them to recover, in respect of a loss under a certain time policy effected on the steamship *Ussa*, for twelve months from the 16th March 1911.

The appellants are the owners of the steamship *Ussa*. The respondents are underwriters at Lloyds. During the currency of the policy the *Ussa* was being loaded in dock at Liverpool. Part of her cargo was a large boiler longer than her hatchways. This boiler was carried alongside the *Ussa* by a vessel called the *Atlas*. The two vessels were placed alongside each other starboard to starboard. By means of a crane erected on the *Atlas* the boiler was lifted, swung over the side of the *Ussa*, and was being lowered into her hold through one of her hatchways. The chain, or fall as it is called, of the crane was fixed, and prevented from running out by a pin fixed in a shackle of this chain. The boiler caught in the hatch coamings. The strain on the chain being thus lessened, the movement of the water in the automatic counter-balance caused the *Atlas* to list to port, away from the *Ussa*. The boiler came free with a jerk, the pin of the shackle was carried away, and the boiler fell into the hold, injuring the ship. It was found as a fact that the water in the dock was not agitated.

The clause in the policy was of the usual kind, insuring the ship against perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, &c., &c., and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the goods, merchandise, or ship." And there was a provision that the policy should include the conditions of the Institute time clauses attached. The seventh of these latter is the only one of importance. It runs thus:—

> 7. This insurance also specially to cover (subject to the free of average warranty), loss of, or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

This condition is styled the Inchmaree clause or condition. It was admittedly specially introduced after the decision of this House in the case of *Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser, and Co.* (*ubi sup.*) to cover injuries not caused by perils of the sea, properly so called, or covered by the general words of such policies covering perils akin to, or resembling, or of the same kind as perils of the sea. Mr. Leslie Scott contended that the policy of insurance should be read and construed as if this seventh condition had been inserted in the body of the policy before the general words, so that in effect the policy should be held to cover not only the risks *ejusdem generis* with those specifically mentioned in the body of the policy itself, but also risks *ejusdem generis* with those mentioned in the seventh condition.

In my view that is wholly illegitimate. This seventh clause is merely an addendum to the policy covering risks not covered by the policy as it stood, and cannot by adding to it general words such as are found in the policy itself expand it. Putting the seventh clause aside, there remains the question, Is the accident which caused injury to the ship a peril of the seas or a peril *ejusdem generis* as a peril of the seas? That it is not a peril of the seas properly so called is admitted

So, then, the question is thus, Is it one of the same genus of perils of which true perils of the seas are species. A peril whose only connection with the sea is that it arises on board ship is not necessarily a peril of the seas nor a peril *ejusdem generis* as a peril of the sea. The breaking of the chain of a crane, or of a shackle of that chain, if overloaded or subjected to too severe a strain, is not more maritime in character when it occurs on board a ship than when it occurs on land. Nor is the catching the ends of a lengthy boiler on the coamings when being lowered into the hold of a ship through a hatchway more maritime in its character than would be the catching on land of any piece of machinery on the sides of an opening shorter than itself through which it was being lowered. Neither the winds nor the waves contributed to this accident. Nor did the fact that the ship on which it occcurred was waterborne. The listing of the *Atlas* to port tended to take up the slack of the chain, and to diminish the extent of the drop, and, therefore, of the strain when the boiler got free, rather than the contrary. The statement of Lord Ellenborough in *Cullen* v. *Butler* (5 M. & S. 461), as to the proper construction of general words, such as those used in the present case, in a policy of marine insurance, has been many times approved of. He said due effect would be given to them by "allowing them to comprehend and cover other cases of maritime damage of a like kind to those which are enumerated, and occasioned by similar causes." By the words "maritime damage" Lord Herschell, in the *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.*, took Lord Ellenborough to have meant not only damage caused by the sea, but damages of a character to which a marine adventure is subject.

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

Order accordingly.

Solicitors for the appellants, *Lightbound, Owen, and Co.*

Solicitors for the respondents, *W. A. Crump and Son.*

Oct. 19, 21, *and Nov.* 22, 1915.

(Before Lord ATKINSON, Lord PARKER OF WADDINGTON, and Lord SUMNER (with Nautical Assessors.)

THE PETER BENOIT. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Shipping—Collision—Both vessels to blame—Apportionment of damages—Maritime Conventions Act 1911 (1 & 2 *Geo.* 5, *c.* 57) *s.* 1, *sub-s.* 1.

To judge of the degree of a ship's culpability under sect. 1, *sub-sect.* 1, *of the Maritime Conventions Act* 1911:—

Regard must be had to the relative positions of the two vessels, the view which each had of the other, the signals which passed between them, and the opportunity each had of avoiding the consequences of the other's errors;

Faults in navigation which do not contribute to the collision are not to be taken into consideration;

Where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half and half;

The word "river" in Tees Conservancy By-laws does not include the buoyed channel outside the river mouth, and there is no analogy between this buoyed channel and certain waterways which have been declared to be narrow channels.

Query as to the duty of vessels approaching at a considerable distance to blow whistle signals, and the effect of the omission to do so having regard to the above section.

At the hearing of a suit in the Admiralty Court for damages caused by collision the judge found both vessels were to blame, but that one was much more to blame than the other, and he apportioned the liability at four-fifths and one-fifth.

The Court of Appeal, in construing sect. 1, *sub-sect.* 1 *of the Maritime Conventions Act* 1911, *were of opinion that the fault to the degree of which the liability was to be apportioned must be read as meaning fault causing or contributing to the collision, and being of opinion that there was no evidence on which the blame could be with any certainty apportioned, directed that the liability should be apportioned equally.*

Held, after consideration, that the decision of the Court of Appeal was right.

Decision of Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal (Buckley, L.J., Pickford, L.J., and Bankes, L.J.), with Nautical Assessors, dated the 11th Feb. 1915, allowing an appeal from a judgment of Bargrave Deane, J.

A collision occurred on the evening of the 18th Oct. 1913 at the entrance of the river Tees between the Belgian owned ship *Peter Benoit*

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

and the Spanish ship *Aurrera*. Both vessels sustained damage.

The owners of the *Aurrera* sued in the Admiralty Court to recover for the damage which their ship had sustained, and the owners of the *Peter Benoit* counter-claimed.

Bargrave Deane, J. held that both vessels were to blame, but that the *Aurrera* was the more in fault, and accordingly under sect. 1, sub-sect. 1, of the Maritime Conventions Act 1911 he apportioned the liability at four-fifths and one-fifth.

The Court of Appeal were of opinion that there was no evidence on which the blame could be with any certainty apportioned and directed that the liability should be apportioned equally.

The owners of the *Peter Benoit* appealed.

Aspinall, K.C. and *D. Stephens* for the appellants.

Bateson, K.C. and *Dumas* for the respondents.

The House, having taken time for consideration, gave judgment dismissing the appeal.

Lord ATKINSON.—The appeal in this case arises out of a collision which took place at about six o'clock p.m. on the 18th Oct. 1913 off the mouth of the river Tees, between a Spanish steamship named the *Aurrera*, inward bound into the Tees, and a Belgian steamship, the *Peter Benoit*, outward bound from that river. The case was tried before Bargrave Deane, J., who found both ships to blame, but was of opinion that the culpability of the *Aurrera* so much exceeded that of the *Peter Benoit* that he, in exercise of the jurisdiction conferred upon him by sect. 1 of the Maritime Conventions Act 1911, by his decree of the 26th Jan. 1914 directed that the owners of the *Aurrera* should pay four-fifths of the damage done to each vessel by the collision, and those of the *Peter Benoit* one-fifth.

Both the parties concerned, the plaintiffs, the owners of the *Aurrera*, and the defendants, the owners of the *Peter Benoit*, appealed from this decree to the Court of Appeal, and that court by its decree of the 10th Feb. 1915 varied the decree of Bargrave Deane, J. by directing that the damages arising from the collision, the subject-matter of the action, should be borne equally by the respective owners of the two vessels. This decree was based on the conclusion at which the court arrived that on the evidence it was impossible to ascertain with accuracy what were precisely the relative proportions of culpability of the two vessels, and on the opinion that in such circumstances this statute directed that the damages should be borne equally.

The first section of the statute runs as follows:

> Where by the fault of two or more vessels damage is caused, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault, provided that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

The Court of Appeal in effect held that having regard to the evidence, the present case fell within this proviso.

The owners of the *Peter Benoit* appealed from so much of the decree as apportioned the damage equally. They do not appeal from that portion of it upholding in other respects the decree of Bargarve Deane, J.

The owners of the *Aurrera* have not lodged any cross-appeal against the decree of the Court of Appeal. Hence it must, on this appeal, be taken that both vessels were rightly held to blame, and that the only matter for decision by this House is the apportionment of the damages.

The appellants contend that the culpability of the *Aurrera* so preponderates over that of the *Peter Benoit* that the apportionment made by Bargrave Deane should be restored. The respondents are contented with the apportionment made by the Court of Appeal.

The evidence given by both sides at the trial is vague and in many respects unreliable. The story told by the witnesses for the *Aurrera* was not accepted by the judge at the trial, and the most that could be contended for by the able counsel for the appellants was that the story told by his witnesses was accepted, not in its entirety, but in its material parts.

The navigation of the River Tees is under the control of the Tees Conservancy Commissioners. Their jurisdiction extends to a buoy called the Fairway Buoy, situated over one mile seaward of the South Gare Lighthouse.

The place of collision, though not fixed with accuracy by the evidence, was undoubtedly within the jurisdiction of this body. They had made rules with regard to the navigation, lighting and buoying of the river, Nos. 21 and 23 of which are said to apply to the present case, but the river itself is not defined, nor its seaward limit fixed, in any way. Between the Fairway Buoy and the South Gare Lighthouse is situated a shoal called the Bar, or Middle Ground, and two buoys, one of which, situate near this Bar, is called the Bar Buoy. The other is nearer to the South Gare Lighthouse, and both lie on the eastern or south-eastern side of the middle line of the river prolonged seaward. Buoys are also placed upon the western or north-western side of this middle line, and it is contended by the appellants that these two lines of buoys mark out a narrow channel within the meaning of the by-laws.

According to the physical features of the coast the South Gare Lighthouse would appear to mark the mouth of the river at its south-eastern side. The *Aurrera*, coming up from a southerly or south-easterly direction, designed and attempted to enter this so-called narrow channel by rounding the Bar Buoy. That is not disputed. As she was bound to proceed up the river on the side of the middle line of the channel lying to her own starboard hand, she would be obliged after rounding the Bar Buoy to cross the channel from its southern or south-eastern to its northern or north-western side. She did not attempt to round the Fairway Buoy, and by that means, at a considerable distance seaward of the place of collision, get upon her proper side of the so-called narrow channel. For this omission Bargrave Deane, J. found her gravely to blame. He considered it a distinct breach of the twenty-third by-law made by the Tees Conservancy Board. That by-law is to the following effect:—

> Every steam or other vessel, and whether being towed or towing another vessel, must so approach the river from sea as to enter on that side of the channel reserved for her navigation.

This latter side is, according to the twenty-first of the by-laws,

The starboard side of the river so that the port helm may always be applied to clear vessels proceeding in the opposite direction.

These two rules amount, he held, to this:—

That in the river extending out as far as the Fairway Buoy a vessel coming in must keep to her starboard side, and a vessel going out must keep to her starboard, and under twenty-three rule the incoming vessel, in order to get on this starboard side of the river, must do so before she enters the river.

That is to say, she must approach the river on that side. He censured the pilots for being in the habit of neglecting this rule, and decided that no custom or practice could relieve the owners from the consequence of violating it as the *Aurrera* had done.

It is obvious that in so deciding the learned judge proceeded upon the assumption that the River Tees extended to the Fairway Buoy, a mile to the seaward of what upon the charts used at the trial, at all events, would appear to be the river's mouth. He so held apparently because the jurisdiction of the Commissioners extended down to the Fairway Buoy.

The Court of Appeal most properly, in my opinion, held that there was no evidence whatever in the case to warrant this assumption. Mr. Aspinall contended, however, as I understood him, that though the river might not extend to the Fairway Buoy, or even to the Bar Buoy, yet the channel marked out by the Fairway Buoy, the Bar Buoy, and a third buoy on the south-eastern side called the Chequers Buoy, and certain other buoys on the north-western side, was a narrow channel. And that according to the principle established by certain authorities which he cited, ships were in effect bound to enter such a channel on the same side as if it were a river. These authorities are *The Harvest* (6 Asp. Mar. Law Cas. 5; 55 L. T. Rep. 202; 11 P. Div. pp. 14 and 90), *The Winstanley* (8 Asp. Mar. Law Cas. 154, 170; 75 L. T. Rep. 133; (1896) P. 297), *The Kaiser Wilhelm der Grosse* (10 Asp. Mar. Law Cas. 361, 504; 97 L. T. Rep. 366; (1907) P. 36), and the *Knaresborough*, reported in a note to the last-mentioned case at p. 38 in (1907) P. I do not know whether these cases were cited in the Court of Appeal. They are certainly not referred to in any of the judgments of the Lords Justices.

The answer to his contention is, I think, this, that in these cases the local conditions were entirely different from those existing in the present case, that in two of them, the first and second, the local by-laws were different in their terms from by-laws 21 and 23 of the Tees Commissioners, and that in the last two cases the twenty-fifth of the Rules for Preventing Collisions at Sea 1897 was held to require that as a matter of good seamanship the waterway between two opposite points, as, for example, the ends of a breakwater together with so much of the adjacent water as is necessary for the navigation of the passage, should be treated as a narrow channel within the meaning of this article.

In the present case, although the place of collision is not fixed with accuracy by the evidence, yet both sides put it outside the line of buoys on the south-eastern side of the channel marked by the two lines of buoys, and, therefore, not as in the cases cited within the so-called narrow channel itself. It does not appear to me, therefore, that these authorities are applicable to the present case. The distance between the Bar Buoy and the Fairway Buoy is about half a mile, and our assessors advise us that there was nothing contrary to good seamanship in the *Aurrera*, when coming from the south, attempting, as she undoubtedly did attempt, in accordance with the common practice, to enter this buoyed channel by rounding the Bar Buoy on a starboard helm preparatory to passing over to the opposite side of the channel, which lay on her starboard hand. Her fault does not consist in that, but in continuing to proceed on that starboard helm at a speed of about eight knots—over-starboarding as it has been styled—so that she came round in a curve so sharp that she struck the *Peter Benoit* at an angle more obtuse than a right angle.

In this she was undoubtedly in fault—Mr. Aspinall contends grossly in fault, having regard to the position in which she placed herself when she attempted to enter the buoyed channel by rounding the Bar Buoy. To judge of the degree of her culpability, regard must be had to the relative position of the two vessels, the view which each had of the other, the signals which passed between them, and the opportunity each had of avoiding the consequences of the other's errors.

The *Aurrera* came up from the south on a north-westerly course, heading directly for the Fairway Buoy till, having it about north-west of her and about half a mile distant, she began to starboord her helm in order to get it into the channel and proceed up the river. She got round on that helm to a south-westerly course. She did not keep that course, however, but continued on a starboard helm. The *Peter Benoit* was at that time coming down the channel on its south-western side. That was her proper place. The pilot of the *Aurrera* fixes the place of collision as about two of his own ship's lengths south-west of the Bar Buoy, and states that the *Aurrera* commenced to turn, and while she was still heading north-west he saw the *Peter Benoit* somewhere between the Bar Buoy and the Gare Lighthouse, on her course down the channel, from a mile to a mile and a half distant, and bearing five to six points on the port bow of his ship; that he then commenced to turn on a starboard helm till he got on a south-westerly course, when he steadied his vessel on that course, and got the green light of the *Peter Benoit*, then half a mile off, about two or three points on his starboard bow; that the two ships were then relatively to each other in quite safe positions—green to green, and all clear—that the green light of the *Peter Benoit* continued to broaden on his starboard bow till, when the vessel was about a quarter of a mile distant, it bore three points on that bow, and that the *Peter Benoit* then blew one short blast and ported her helm.

Now, Bargreave Deane, J. rejected absolutely this story as to the bearings of the two vessels. He finds that they never bore green-to-green at all, and that at the time the pilot heard the first one short blast given by the *Peter Benoit* the latter vessel was on her starboard side of the channel coming out (her proper place), and the *Aurrera* was still coming round on her starboard helm. The *Aurrera* answered this signal by giving two short blasts to signify that she was starboarding her helm. This was the first signal she gave. She did not blow her whistle when she first began to starboard to round the Bar Buoy.

Mr. Bateson contends (rightly, we are advised), that as the *Aurrera* was then in the open sea and the *Peter Benoit* one mile and a half away, she was not bound to blow her whistle, yet Bargrave Deane, J. treats the omission to whistle at this point as a fault. It would appear to me, therefore, that the learned judge somewhat exaggerates the culpability of the *Aurrera*. He said "she was badly navigated from start to finish." That conclusion rests upon the assumption that she ought to have gone round the Fairway Buoy, and ought to have whistled when she commenced to starboard; but neither of these matters, even if they amounted to instances of defective navigation, was the *proxima causa* of the collision, and I quite concur with the Court of Appeal in thinking the faults with which the statute is conversant are faults in some way contributing to the collision.

Faults in navigation which do not contribute to the collision are not to be taken into consideration. So that, even if the *Aurrera* in attempting to come into the channel on a starboard helm course in the half-mile space intervening between the Fairway and the Bar Buoys was in fault, she had ample time, as the *Peter Benoit* was one and a half miles away from her, to cross to the north side of the channel and pass the *Peter Benoit* red to red. The fault on her side which contributed to the collision was her continuous starboarding, which brought her round either close to the line of buoys on the southern side of the channel or absolutely outside the channel. She may have expected or assumed that the *Peter Benoit* would starboard her helm and pass her green to green, but there was no reasonable ground for such an expectation, seeing that the only signal given by the Belgian vessel was a port-helm signal. No doubt just before the collision the *Aurrera* gave three short blasts and put her engines full speed astern; but her fault consisted, to use Buckley's, L.J. words, in chasing, as it were, the *Peter Benoit* in the way she did. It was a grievous fault which cannot be excused.

I now turn to the consideration of the navigation of the *Peter Benoit*, and just as Bargrave Deane, J. seems to me to have somewhat exaggerated the culpability of the *Aurrera*, so I think he rather minimises the culpability of the *Peter Benoit*. I think Mr. Bateson was perfectly justified in pressing against the *Peter Benoit* the entries in the log-book to the extent he did. Those entries represent that the vessel steamed down the river at 4.55 p.m., dropped his pilot at 5.25, was abeam of the South Gare Lighthouse at 5.30 on a course N.E. ½ E., abeam of the Bar Bouy at 5.33, when he altered his course (it is not stated how), and was in collision with the *Aurrera* seven minutes later, at 5.40. Mr. Bateson urges that though it might not be reasonable to hold the ship bound to the precise number of minutes stated, yet as the ships were not approaching each other end-on there was ample time for the *Peter Benoit*, after those in charge of her had seen, or if they had kept a proper look-out would have seen, the eccentric course the *Aurrera* was taking, to have starboarded her helm, gone towards the north side of the channel, and so avoided the consequences of the *Aurrera's* negligent navigation.

Jacques Verschueren, the master of the *Peter Benoit*, deposed that, after dropping his pilot, he came down the starboard side of the buoyed channel, that as he was going southward, the proper way to navigate was to turn away on a port helm as soon as the ship cleared the Bar Buoy. that he first saw the lights of the *Aurrera* a little after he passed the South Gare Light, that she was coming in with two masthead lights, wide open broadside, and a red light, and a third light in the port rigging, carried there by incoming vessels, apparently for Customs purposes, that he continued down the channel at a speed of six or seven miles an hour on a course of N.E. ½ E. till he came abreast of the Bar Buoy, that then he gave one short blast on his whistle and gave the man at the wheel an order to port his helm, which was obeyed, and that he kept on at full speed. The *Aurrera* at that time showed the same light, he said, as at first. The ships never were green to green. His ship's green light was to the *Aurrera's* red light. He heard the two short blasts of the *Aurrera* given in answer to his first short blast, informing him she was starboarding. He, in reply, then gave a second short blast and had his helm put hard aport and still kept on his speed. The *Aurrera* replied again with two short blasts. Her light then closed in and she bore upon him. He then saw a collision was imminent. He, however, kept on full speed, thinking to pass under the bows of the *Aurrera*. Three short blasts were then given by the *Aurrera* when only a ship's length away. Before the third of these blasts was sounded the collision occurred. At that moment he was travelling at six or seven miles an hour. He fixes the place of collision about a little over a cable's length from the Bar Buoy, which was then bearing W.S.W. from the *Peter Benoit*.

On cross-examination, however, he stated that when he heard the two short blasts in answer to his first one short blast he thought there must have been some mistake, so he repeated it, that when he first saw the *Aurrera* she was nearly two miles away, that when he was at the Bar Buoy the *Aurrera* was two or three points on his starboard bow and about three-quarters of a mile distant, that he was still on his N.E. and ½ E. course. The *Aurrera* was still this distance away when he ported his helm, and on her original course of N.W. by W.

This is a clear admission that the *Peter Benoit* had the *Aurrera* on her starboard bow from the time he first saw the latter's lights, one-and-a-half miles distant, till she came within three-quarters of a mile of him; that while the *Aurrera* was still keeping her original course, the *Peter Benoit* ported her helm and changed her course to starboard, and that she persisted in doing that, and going at full speed ahead, notwithstanding that she had received two signals from the *Aurrera*—that she, the *Aurrera*, was going to port under a starboard helm. Their courses thus became crossing courses, necessarily involving, if continued, risk of collision. Under 19th and 21st of the Regulations for Preventing Collisions at Sea, the *Peter Benoit* was the ship which ought to have given way. She did not do so. She did the very opposite. She still ported, and persisted in going full speed on a port helm, notwithstanding the signals she had received, intending, as her captain said, to cross the bows of the *Aurrera*.

In my opinion, her culpability, therefore, cannot be confined, as Bargrave Deane, J. has confined

it, to the mere omission on hearing the starboard helm signal given in reply to her port helm signal to "ease her engines and either stop or reverse." She ought, in my view, on first hearing the starboard helm signal, to have kept out of the way of the incoming steamer then bearing on her starboard bow. That consideration tends somewhat to equalise the culpability of the two vessels.

I concur with the Court of Appeal in the conclusion at which, as I understand, they have arrived—namely, that where, as in this case, the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of the damages should be half and half. There is not, in my opinion, any such preponderance proved in this case. Both vessels were to blame; and, in my view, the evidence leaves it very uncertain which was most to blame.

I am therefore of opinion that the judgment appealed from was right and should be affirmed, and this appeal be dismissed with costs.

Lord PARKER.—This is the case of a collision off the mouth of the River Tees, between the Spanish ship *Aurrera*, bound inward from the south, and the Belgian ship *Peter Benoit*, bound outward for the south. Both ships were admittedly to blame, and the only question is whether it be possible under all the circumstances to establish different degrees of blame between the two vessels so as to make the damages apportionable under the first section of the Maritime Conventions Act 1911.

Bargrave Deane, J. thought that it was possible, and accordingly directed that the damages should be borne in the proportion of one-fifth by the Belgian and four-fifths by the Spanish ship. In arriving at this conclusion he was at any rate largely influenced by the construction he placed upon the by-laws made by the Tees Conservancy. He held that according to these by-laws every ship approaching the mouth of the River Tees from the south ought to pass seaward of the Fairway Buoy and could not properly pass between the Fairway Buoy and the Bar Buoy. I agree with the Court of Appeal that this construction of the by-laws is inadmissible. It is quite true that the jurisdiction of the Tees Conservancy extends up to and beyond the Fairway Buoy, but this is no reason for construing the word "river" as used in the by-laws so as to include the buoyed channel outside the river mouth or otherwise than in its ordinary sense. It was argued that the *Aurrera* was precluded, if not by the by-laws, at any rate by considerations of good seamanship, from approaching the river otherwise than round the Fairway Buoy, but having regard to the evidence and the opinions expressed by your assessors, it is, I think, impossible for your Lordships to lay down any such general rule. I fail to find any analogy between the buoyed channel at the mouth of the Tees and the narrow channels which were the subject of the decisions cited in argument. I think it must be taken that in ordinary circumstances it is quite consistent with good seamanship for vessels approaching the river from the south and leaving the river for the south to pass between the buoys in question.

The evidence as to what really happened is very unsatisfactory, but I desire to direct your Lordships' attention to the moment of time when the Belgian vessel, on her outward course, was coming abreast of the Bar Buoy. I think this is the earliest moment which need be considered. No doubt for some time previously each vessel ought to have been aware of the other's position, but before the Belgian vessel came abreast of the Bar Buoy I can hardly think that there was any necessity for either to take action with regard to the other. At this moment of time it appears that the Belgian ship had the Spanish ship two or three points on her starboard bow, and that the Spanish vessel was, and must have been for some little time, under a starboard helm, apparently shaping its course so as to approach the river between the Fairway Buoy and the Bar Buoy. Under these circumstances it was the duty of the Belgian vessel to keep out of the way, and the duty of the Spanish vessel to maintain her course and speed. It seems to me that the Spanish vessel would have been fulfilling her duty by continuing to shape her course for the river mouth, and that she was not bound to continue, or justified in continuing, under a starboard helm more than was necessary for that purpose.

Under these circumstances I do not think the Belgian ship was to blame in porting her helm when abreast of the Bar Buoy. Had the Spanish vessel continued her course for the river's mouth this would have been a perfectly safe manœuvre. When, however, her one-blast signal informing the Spanish vessel that she was porting round the Bar Buoy was answered by a two-blast signal on the part of the Spanish vessel signifying that the latter was still under a starboard helm, it ought to have been obvious that a dangerous situation was in course of development, and she should, I think, have at once slowed down. Instead of doing so she continued full speed under a port helm and again gave a one-blast signal, which was again answered by a two-blast signal on the part of the Spanish ship. Upon receiving this second two-blast signal she ought, undoubtedly, to have stopped and reversed her engines. She failed to do so, and, though the Spanish ship stopped and reversed her engines, it was too late to avoid a collision; the Spanish vessel struck her on the port side just forward of the bridge. At the moment of collision the Spanish vessel had come round under a starboard helm far more than was necessary in shaping a course for the river's mouth. She was, in fact, heading away from the mouth of the river, and, to use Lord Justice Buckley's expression, chasing the Belgian ship.

Under these circumstances it is, I think, impossible to say that one vessel was more to blame than the other. It is a case of two vessels in full view of each other, and with ample time to manœuvre for each other, each taking and persisting in its own course, irrespective of what the other was doing. If under such circumstances a collision is brought about, I do not think that the resulting damage is capable of apportionment under the Maritime Conventions Act. The appeal, in my opinion, fails.

Lord SUMNER.—I agree with the Court of Appeal that the apportionment by Deane, J. of the damage practically rested on a wrong finding that the River Tees extended outwards to the Fairway Buoy. Hence his apportionment should be laid aside, and the Court of Appeal's becomes the first apportionment based on a correct foundation of fact.

The Maritime Conventions Act 1911 enacts that the liability shall be equally divided, if it is not possible to establish different degrees of fault. As the Court of Appeal decided that it was not possible to establish such different degrees, it is for the appellants to prove the possibility by establishing it upon the evidence to the satisfaction of your Lordships.

If the apportionment of Deane, J. be laid aside, there is to-day as much assumption in favour of the Court of Appeal's apportionment as there would otherwise have been in the Court of Appeal in favour of the decision of the trial judge with this added consideration, that the appellant must take the facts (other than that as to the Fairway Buoy) as Bargrave Deane, J. found them, unless he can show very clearly on the evidence that the findings ought to be amended or supplemented. This attempt was made before the Court of Appeal and failed. The evidence must be cogent indeed to constrain your Lordships to fresh conclusions on questions of fact already twice decided adversely to the appellant.

The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do: a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity who was the last. The Act says, "having regard to all the circumstances of the case." Attention must be paid not only to the actual time of the collision and the manœuvres of the ships when about to collide, but to their prior movements and opportunities, their acts, and omissions. Matters which are only introductory, even though they preceded the collision by but a short time, are not really circumstances of the case but only its antecedents, and they should not directly affect the result. As Pickford, L.J. observes: "'The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.' That must be in fault as regards the collision. If she was in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration."

I shall not analyse in detail the facts after what has been already said by your Lordships. The actual and relative positions of the two ships have not been precisely found, nor does the evidence, largely untrustworthy as it was, suffice to determine them. The night was clear, and unmistakably sound signals were exchanged. The *Aurrera's* attempt to enter the channel without first rounding the Fairway Buoy has been attacked. I express no opinion on it. Right or wrong, her manœuvres and intention ought to have been known to those in charge of the *Peter Benoit* long enough before the collision to have enabled them, as was their duty, to keep out of the way. The suggestion that the course of the *Aurrera* would rightly suggest an intention to cease starboarding almost immediately and to straighten up on her right side of the channel so as to make it unnecessary for the *Peter Benoit* to manœuvre, depends on positions for the two steamers, which have not been, and in my opinion cannot now be, determined. I cannot eke out the appellants' case by conjecture. I cannot satisfy myself that it is possible within the meaning of the proviso to establish different degrees of fault. Both ships did wrong, in different particulars and by different steps, but that is all. I agree that the appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Holman, Birdwood, and Co.*

Solicitors for the respondents, *William A. Crump and Son.*

Judicial Committee of the Privy Council.

July 21, 22, 26, 28, *and Nov.* 10, 1915.

(Present: The Right Hons. Lord MERSEY, Lord PARKER OF WADDINGTON, Lord SUMNER, Lord PARMOOR, and Sir EDMUND BARTON.)

THE ROUMANIAN. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE).

Prize Court—British ship—Enemy cargo—Cargo shipped before outbreak of war—Part cargo discharged into oil tanks on wharf—Tanks owned by British company—"In port"—Meaning of term discussed—Liability to seizure of enemy cargo.

A cargo of petroleum oil in bulk owned by a German company was shipped on board a British ship which sailed from a neutral port for a German destination before the outbreak of hostilities between Great Britain and Germany. While on its voyage the ship was ordered to proceed to a British port, where the oil was discharged into tanks of a British company owning the wharf. When the greater portion of the oil had been discharged, the officer of Customs gave notice to the master of the vessel that the whole of the cargo of oil was placed under detention, not only that which was still in the vessel, but also that which had already been pumped into the tanks. The Crown claimed the whole as prize and asked for the condemnation of the oil. The cargo owners objected on the ground that the tanks were "on land" and not "in port," and that the matter was not within the jurisdiction of the Prize Court, and claimed the release of the oil to them, or, alternatively, that it should be sold and the proceeds handed to them at the end of the war.

Held, that the whole cargo had rightly been condemned as droits of Admiralty.

Decision of Evans, P. (13 Asp. Mar. Law Cas. 8; 112 *L. T. Rep.* 464; (1915) *P.* 26) *affirmed.*

APPEAL by the Europaische Petroleum Union and the holders of about nine-tenths of the shares in that union, as the owners of, or the parties beneficially interested in, about 6264 tons of petroleum lately laden on board the British steamship *Roumanian*, from a decree of Evans, P. dated the 7th Dec. 1914 condemning the petroleum as prize or droits in Admiralty.

The Europaische Petroleum Union is a combination of a number of oil-producing companies in Europe, and these companies hold all the shares in the union. The business of the union

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

is controlled by a board or committee composed for the most part of the principal directors of the various shareholding companies. As Germany was a convenient central meeting place for the representatives of the Russian, Roumanian, and Belgian interests, the union was registered in Bremen.

On the 24th July 1914 the Gulf Refining Company, a company incorporated and carrying on business in the United States, shipped on behalf of the union, on board the British tank steamer *Roumanian* at Port Arthur, Texas, a cargo of about 6264 tons of refined petroleum in bulk for carriage to Hamburg. The cargo was intended to be sold in Europe for use as lamp oil, and was shipped without any anticipation of war. The *Roumanian* sailed from Port Arthur on the 24th July 1914.

On the day of the outbreak of the war, Admiral Inglefield, the secretary of Lloyds, wrote to Messrs. Lane and Macandrew, of Great St. Helens, E.C., the manager of the *Roumanian*, the following letter, dated from Lloyds the 4th Aug. 1914:

Dear Sirs,—I beg to inform you that the Lords Commissioners of the Admiralty have suggested that in the national interests your steamers *Terek*, *Danubian*, and *Roumanian*, which according to our records are now on passage to Copenhagen, Amsterdam, and Hamburg, should be diverted to a United Kingdom port.—(Signed) Yours faithfully, E. F. INGLEFIELD, Secretary.

The master was accordingly instructed by the owners of the *Roumanian* to proceed to Dartmouth for orders, where he arrived on the 14th Aug.

On the 15th Aug. a notice was issued by the Board of Trade containing recommendations with regard to the treatment of cargoes of ships which had deviated from their original ports of destination. In the notice it was stated that in the case of a British or friendly belligerent or neutral ship in a British port with cargo belonging to an enemy the cargo should be landed at a dock, legal quay, or sufferance wharf, either in the port at which the steamer had arrived or in some other safe port, and warehoused, subject to shipowners' and other charges, until sale or disposal could be arranged for. If sold, the proceeds should be held for subsequent distribution to those entitled to the cargo, subject to shipowners' and other charges which might at law have priority to the claims of the persons entitled to the cargo or its proceeds.

On the 20th Aug. the *Roumanian* proceeded to London, arrangements being made with the British Petroleum Company Limited, of London, for the oil to be warehoused in their tanks at Purfleet.

At noon on the 21st Aug. the *Roumanian* arrived at the British Petroleum Company's wharf at Purfleet and began to discharge her cargo of oil into the tanks of that company by means of pumps and connecting pipes. The Customs officer visited the ship and tested samples of the oil to see if its specific gravity rendered it liable to duty. The specific gravity was near the dutiable line, and the officer therefore sent the samples to the laboratory to be tested, and the oil was certified as duty free There was some delay before the test note from the analyst was received, and meanwhile the master of the *Roumanian* received a letter from the Customs house at Gravesend which ran: "I have to inform you that your cargo, consisting of about 6,264 tons of refined petroleum oil, is placed under detention." There was nothing in this letter to indicate that the cargo was detained as prize. As no one from the Customs or any other authority came to stop the discharge of the remainder of the oil then left in the steamer, the work of discharging into the tanks went on and was completed at 4 p.m. on the 23rd Aug.

On the 19th Sept. a writ was issued by the Procurator-General and attached to the tanks addressed "to the owners and parties interested in the goods laden on board the *Roumanian* seized and taken as prize by the officers of Customs of the Port of London," and commanded them to enter an appearance.

The suit was heard before the president (Sir Samuel Evans), who, on the 7th Dec. 1914, rejected the claims put forward by the present appellants and condemned the whole cargo as droits of Admiralty.

From that judgment the claimants appealed.

Maurice Hill, K.C., *R. H. Balloch*, and *Dunlop* for the appellants.

Sir *Edward Carson*, A.G., Sir *Erle Richards*, K.C., and *Theobald Mathew* for the respondent.

The cases and the authorities cited sufficiently appear from the considered judgment of the committee, which was delivered by

Lord PARKER.—This appeal relates to the cargo *ex* steamship *Roumanian*. The relevant facts are quite simple and are not in dispute.

The *Roumanian* is a British ship, and on the 4th Aug. 1914, the day on which war broke out between this country and Germany, was on a voyage from Port Arthur, Texas, to Hamburg with a cargo of some 6264 tons of petroleum belonging to the Europaische Petroleum Union, a German company. On the same day the Admiralty, through the secretary of Lloyds, suggested to the owners that the ship should be diverted to some port in the United Kingdom, and the owners accordingly instructed the master to proceed to Dartmouth for orders. The ship arrived at Dartmouth on the 14th Aug. 1914.

On the 15th Aug. the Board of Trade issued a notice containing recommendations with regard to the treatment of cargoes belonging to an enemy in ships diverted from their original ports of destination. These recommendations appear to their Lordships to be so conceived as in no way to prejudice the liability (if any) of such cargoes to be seized as prize. It was recommended that the cargo should be landed at a dock, legal quay, or sufferance wharf, either in the port at which the steamer had arrived or in some other safe port, and warehoused subject to shipowners' and other charges until sale or disposal could be arranged for. If sold, the proceeds should be held for subsequent distribution to those entitled to the cargo, subject to shipowners' and other charges which might at law have priority to the claims of the persons entitled to the cargo or its proceeds. Obviously, if the cargo were liable to seizure as prize, seizure followed by condemnation in the Prize Court would entitle the Crown either to the cargo itself or the proceeds thereof, subject to such shipowners' or other charges as might by law take precedence of the Crown's interest.

On the 20th Aug. the *Roumanian* proceeded to London, arriving at Purfleet at noon on the 21st Aug. Before her arrival arrangements had been made to warehouse the petroleum in the tanks of the British Petroleum Company Limited at Purfleet, and permission had been obtained from the Custom-house authorities for its discharge into these tanks. When so discharged the petroleum would be in the custody of the Custom-house authorities in the sense that it could not be removed therefrom without their sanction.

The work of discharge accordingly commenced at 12.15 p.m. on the 21st Aug., the petroleum being pumped into the tanks, which were situated some 100 to 150 yards from the wharf at which the vessel lay. Meanwhile the Custom House authorities took samples in order to test the specific gravity of the oil and ascertain whether or not it was dutiable.

About 7 p.m. on the 22nd Aug. a letter from the Custom-House at Gravesend was delivered on board the *Roumanian*, addressed to the master, stating that the cargo of about 6264 tons of petroleum was placed under detention. This letter was not received by the master till 11 p.m. Roughly speaking about 1140 tons of oil remained undischarged at 7 p.m. and 570 tons at 11 p.m. on the 22nd Aug. Notwithstanding the letter above referred to, the work of discharging the oil continued. It was completed long before the writ in these proceedings, which did not issue until the 19th Sept., and was served by affixing the same to the tanks in which the petroleum was then warehoused.

It will be observed the letter giving notice of the detention of the cargo did not refer to its detention as prize, and it was accordingly argued on behalf of the appellants that there was no effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the Custom House is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter. The point, however, is of little importance in the view their Lordships take of the points of law, which will be dealt with presently, for if there was no seizure by delivery of the letter, there was admittedly a good seizure when the writ was served.

Under these circumstances three points were raised by counsel for the appellants.

They contended, first, that so far as the petroleum was not afloat at the date of seizure, the Prize Court had no jurisdiction; secondly, that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum so far as at the date of seizure it was warehoused in the tanks of the British Petroleum Company Limited and no longer on board the *Roumanian*; and, thirdly, that enemy goods on British ships at the commencement of hostilities either never were or, at any rate, have long ceased to be liable to seizure at all.

Obviously, if the last point is correct, it is unnecessary to decide the first two points. Their Lordships, therefore, think it desirable to deal with it at once.

The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in the *Miramichi* (13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; (1915) P. 71). Their Lordships have carefully considered the judgment of the President in the last-mentioned case, and entirely agree with it. The appellants' counsel based their contention on three arguments. First, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasizing the fact that in the case of *The Juno* (13 Asp. Mar. Law Cas. 15; 112 L. T. Rep. 471) no authority could be found for the right of the master of a British ship on which enemy goods were seized as prize to compensation in lieu of freight, though if such goods were properly the subject of prize, the question must constantly have arisen. Secondly, they laid stress on certain general statements contained in text-books on international law as to what enemy goods can now be seized as prize. Thirdly, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such declaration.

With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law, the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor as a general rule do cases in which no point of law is raised and decided find their way into law reports. If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any authority which gives colour to this suggestion. There appears, indeed, to be no case in which for this purpose any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war.

Their Lordships, therefore, are not impressed by the argument based on the dearth of actual decisions on the point. Moreover, the decisions, such as they are, certainly do not support, but, indeed, contradict the appellants' contention. It is clear, from the cases cited in the *Miramichi*, that enemy goods embarked on British ships during the hostilities are the subject of prize. See, in particular, *The Conqueror* (2 C. Rob. 303). In these cases the sole question decided has been

the enemy character of the goods, and no stress has been laid on the time at which they were embarked, or on whether any person concerned had or had not been guilty of the common law offence of trading with the enemy. Further, there is the case of the *Venus*, referred to in Rothery's Prize Droits, at p. 129.

Their Lordships have thought it desirable to examine the papers preserved in the Record Office in connection with this case, the facts of which are as follows: The *Venus* was a British ship which at the outbreak of hostilities was on a voyage to Hamburg. Its cargo had been shipped at Genoa, Ancona, and Mentone. The master, hearing of the outbreak of war and desiring to avoid the risk of his ship being captured by the enemy, put into Plymouth. The receiver of Admiralty droits at Plymouth, suspecting upon information given by the master that part of the cargo belonged to enemy subjects, seized both ship and cargo. The shipowners put in a claim for the release of the ship on the ground that it was British and also for freight expenses and demurrage. The ship was ordered to be released. The claim for freight and expenses was allowed, there being a reference to the proctor to ascertain the proper amount, which was declared a charge on the cargo. The claim for demurrage was disallowed. The amount to be allowed for freight and expenses was in due course certified by the proctor, and apparently paid out of the proceeds of the cargo which had been appraised and sold under the direction of the court. Parts of the cargo or its proceeds were subsequently claimed by and released in favour of neutrals. The residue of the cargo was condemned as the property of enemy subjects.

The case of the *Venus* appears, therefore, to be an authority against the appellants' contention. They say, truly, that the point does not seem to have been raised, but it is far more likely that the point was not raised because it was thought to be untenable than that the court overlooked what, according to the appellants' contention, must have been a well-known principle of prize law. Further, the *Venus* is certainly an authority in support of the President's decision in *The Juno* (*sup.*). Curiously enough, the master of the *Venus*, though a British subject, is in the proctor's report in the last-mentioned case referred to as the "neutral master," a fact which is only consistent with the practice of the court in allowing freight being the same whether the enemy goods were seized on neutral or on British ships.

With regard to the general statements contained in text-books on international law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these statements in detail. They will take one example only, that cited from Westlake's International Law, Part 2, p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows: "We may therefore conclude that enemy ships and enemy goods on board them are now by international law the only enemy property which as such is capturable at sea."

In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken apart from the context as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that because the writer in the present case uses the expression "capturable at sea," he must have thought that enemy goods in neutral ships lying in British ports or harbours were, notwithstanding the Declaration of Paris, still subject to capture.

Such statements are in any case more than counterbalanced by statements contained in other well-recognised authorities. Thus, in addition to the passages quoted in *The Miramichi* (*sup.*) from Dana's edition of Wheaton's International Law, it will be found that Halleck (International Law, vol. 3, p. 126) states that whatever bears the character of enemy property (with a few exceptions not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods and not the nationality of the ship on which they are embarked or the date of embarkation which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in *The Rebeckah* (1 C. Rob. 227), of the manner in which the order of 1665 defining Admiralty droits has been construed by usage.

Passing to the appellants' third argument, that based on the Declaration of Paris or the principle supposed to underlie such Declaration, it may be stated more fully as follows: Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbours of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognises that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (p. 145, Int. Law, Part 2), it assimilates neutral ships to neutral territory, recognising that on both the authority of the neutral State ought (except possibly in the case of contraband) to be exclusive. So far, the argument proceeds logically, but its next step is, in their Lordships' opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of the war. This part of the argument is, in their

Lordships' opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilates neutral ships to neutral territory, but it is impossible to base on this assimilation any argument for the immunity of enemy goods in British ships.

The cases are not *in pari materia*. If the Crown has ceased to exercise its ancient rights to seize and appropriate the goods of enemy subjects on land, it is because the advantage to be thus gained has been small compared with the injury thereby entailed on private individuals, or in order to insure similar treatment of British goods on enemy territory. But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right to seize and appropriate enemy goods on the high seas or in territorial waters or the ports or harbours of the realm has never been allowed to fall into desuetude. In order in the fullest degree to attain this advantage of sea power our courts have always upheld the right of seizing such goods even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war or because on some future occasion they themselves might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice where no question of international comity can possibly arise.

Their Lordships hold therefore, on this part of the case, that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, always were, and still are, liable to be seized as prize, either on the high seas or in the ports or harbours of the realm. It follows that the petroleum seized on board the *Roumanian* was properly condemned as prize.

The next point to be considered is the jurisdiction of the Prize Court so far as the petroleum in question was, when seized as prize, warehoused in the tanks of the British Petroleum Company, Limited, and no longer on board the *Roumanian*. The appellants contended that it is the local situation of the goods seized as prize which determines the jurisdiction of the Prize Court. If such goods be, at the time of seizure, on land and not afloat, it is not, they contended, the Prize Court but some court of Common Law which has jurisdiction to determine the rights of all parties interested. In their Lordships' opinion, this contention also fails. The chief function of a Court of Prize is to determine the question, "prize or no prize," in other words whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question, the local situation of the goods at the time of seizure may be of importance, but it is the seizure as prize and not the local situation of the goods seized which confers jurisdiction. If authority be needed for this proposition, it may be found in Lord Mansfield's judgment in the case of *Lindo* v. *Rodney*, reported in a note to *Le Caux* v. *Eden* in 2 Douglas at p. 612. It must be remembered that the jurisdiction of the Prize Court is based in every case upon a commission under the Great Seal. Lord Mansfield pointed out that in the case before him, the commission under which the court derived jurisdiction conferred jurisdiction in all cases of prize whether the goods sought to be condemned were taken on land or afloat. The same may be said of the commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the Court of Admiralty as a Court of Prize and its jurisdiction apart from the commission which constitutes it a Court of Prize. To give the Court of Admiralty as such jurisdiction, the matter complained of must have occurred on the high seas, but in all matters of prize it was not the Court of Admiralty as such, but the Court of Admiralty by virtue of the commission which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat. The only authority which, at first sight, appears to be in conflict with Lord Mansfield's decision is the case of the *Ooster Ems* (1784, 1 Ch. Rob 284n.), to which, for the reasons hereinbefore mentioned, no great weight can be given.

Their Lordships will now proceed to consider the appellants' contention that, even if the Prize Court had jurisdiction it ought nevertheless to have decided against the condemnation of the petroleum in question so far as it was not actually afloat on board the *Roumanian* at the time of the seizure. They admitted that during the war no order for restitution or release could properly be made in favour of the German owners, but they suggested that the proper course was to hand the petroleum over to the public trustee or some other official for safe custody until the restoration of peace. No case where any such course has been pursued was cited.

The real question is whether the petroleum in question is, according to law administered by prize courts in this country, properly the subject of maritime prize, although locally situated on shore. All enemy ships and cargoes which may, after the outbreak of the war, be found afloat on the high seas or in territorial waters or in the ports or harbours of the realm are liable to seizure as maritime prize. The petroleum in question was undoubtedly enemy property. It was undoubtedly on the high seas at and after the declaration of war. It became liable to seizure as prize as soon as war was declared. It did not cease to be so liable by being carried into Dartmouth or thence to Purfleet. It clearly remained so liable while still afloat. Did it cease to be so liable when pumped into the tanks of the British Petroleum Company Limited? In the course of the argument counsel were asked to suggest some intelligible reason why it should cease to be so liable. No satisfactory reason was

suggested, and their Lordships have been unable to discover one for themselves. The argument of counsel was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize, unless possibly they could be considered as locally situate within a port or harbour, and that the tanks of the British Petroleum Company Limited could not be considered as part of the Port of London. There is, in their Lordships' opinion, no ground for this assumption. The test of ashore or afloat is no infallible test as to whether goods can or can not be lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize.

The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of *Brown and Burton* v. *Franklyn*, quoted in Lord Mansfield's judgment above referred to. Brown and Burton, the masters of a vessel belonging to the East India Company, seized enemy goods on land. They had no letters of marque. The King's Proctor instituted proceedings in the Prize Court, and having obtained a condemnation of the property as prize, proceeded against Brown and Burton for an account. The latter instituted proceedings at common law for a prohibition on the ground that the goods taken were on land, but relief was refused. Moreover, Lord Mansfield, in *Lindo* v. *Rodney* (*supra*), expressly approves an admission made by counsel in that case to the effect that it would be "spinning very nicely" to contend that if the enemy left their ship and got on shore with money and were followed on land and stripped of their money this would not be a lawful maritime prize. If this be, as it seems to their Lordships to be, good law, the present is an *a fortiori* case. In the case put by counsel the landing of the goods was made by the enemy with the object of escaping capture afloat. In the present case such landing was by British subjects who had the enemy goods in their possession and did not know what else to do with them, and were pursuing a course recommended by the Board of Trade, and in no way intended to prejudice the Crown's rights.

With regard to the authorities quoted in this connection they have, in their Lordships' opinion, with one possible exception, no real bearing on the point. In *The Hoffnung* (No. 3), 1 Eng. Prize Cases, 585) the cargo seized on shore had been landed and sold prior to the declaration of war. These goods, therefore, even if enemy goods at all, were never liable to seizure as prize. They were not, in fact, seized, nor was any proceeding taken against them, but an attempt was made to recover against the ship which had brought them the value of the goods so sold, the ship itself belonging to a neutral. This claim was rejected by the court. It was held that unless it could be shown that the hand of capture had been employed on these goods in quality of cargo the court could not go back to affect them in any other character. The same principle was recognised in *The Charlotte* (1 Eng. Prize Cases 585 n.), in which it was held that the proceeds of goods landed and sold prior to the seizure of the ship, and never themselves seized, were not amenable to the jurisdiction of the court.

In *Brown* v. *The United States* (8 Cranch, 110) it was decided on the facts that the goods in question were in the position of enemy goods found on American soil at the commencement of hostilities, and not, therefore, the subject of maritime prize. That case, therefore, is clearly distinguishable from the present.

The only case which raises any difficulty is that of *The Ooster Eems* (*sup.*). There is no satisfactory report of this case. It is mentioned in the note on p. 284 of 1 C. Rob. and in the preface to Hay and Marriott's Decisions, p. 27. Their Lordships have, however, examined the papers relating to it preserved in the Record Office. The *Ooster Eems* was a Prussian and therefore a neutral vessel. It was stranded on the Goodwin Sands on a voyage from Texel to the East Indies. Before it broke up, part of its cargo was sent ashore, including some boxes of silver coin. The latter were deposited by the master with the Prussian Consul at Deal. One Jeremiah Hartley, an officer of the Court of Cinque Ports, acting under an order of attachment issued by such court sitting as an Admiralty Court, seized and obtained possession of the goods so landed, including the boxes of silver, on behalf of the Warden of the Cinque Ports. The seizure may have been intended to be a seizure of enemy goods as maritime prize, though their Lordships have been unable to ascertain that the Court of Cinque Ports had any jurisdiction in prize. The warden took no proceedings either in his own or any other court with a view to having the goods lawfully condemned. The master, therefore, obtained from the High Court of Admiralty in England a monition requiring Jeremiah Hartley and the warden and all others whom it might concern to appear and proceed to the legal adjudication in that court whether the goods seized were lawful prize or not. The King's Proctor subsequently intervened. Certain depositions were filed which appear to raise some suspicion that the goods were Dutch and therefore enemy goods, but there was no real evidence to that effect. The master deposed that he did not know to whom the goods belonged, and under these circumstances one would have expected that the court would have acted on the presumption arising from the fact that the ship was a neutral ship. The court, however, made an interlocutory decree condemning the goods on the ground that the goods which apparently were assumed to be enemy goods were not at the time of seizure "in a privileged vehicle or on neutral territory."

All questions between the Crown and the warden were reserved. The master appealed to the Lords Commissioners of Appeal in Prize, and on such appeal the order for condemnation was discharged, not on the merits, but, in the words of the Privy Council Journals, on the ground that "the High Court of Admiralty in England, the court appealed from, had not a jurisdiction over the goods seized and proceeded against in this cause."

The records of the Privy Council do not contain any note of the reasons which led to this decision. It would appear, however, from the case of the *Two Friends* (Roscoe, vol. 1, 130

1 Ch. Rob. 271) that Lord Stowell had before him some note of these reasons, for he represents Lord Thurlow as saying that "the goods in question had never been taken on the high seas, but had only passed in the way of civil bailment into civil hands, and were afterwards arrested as prize."

If this be correct, it may mean that in the opinion of the Lords Commissioners it is the local situation of the goods seized as prize, and not the seizure as prize which determines the jurisdiction of the Prize Court, a decision diametrically opposed to the judgment of Lord Mansfield in *Lindo* v. *Rodney* (*sup.*), which had been pronounced only three years previously. On the other hand, it may mean that the goods in question were not liable to seizure as prize because they were not on the high seas but on land, in which case Lord Thurlow was deciding the very point which he held the Court of Admiralty had no jurisdiction to decide, and he ought to have ordered the restitution of the goods to the master instead of leaving that somewhat hardly-used individual to his remedies at common law, in the assertion of which he would have in some way or other to get over Lord Mansfield's judgment to the effect that prize or no prize could only be determined in a Prize Court.

Moreover, it is almost impossible to suppose, in the then state of the authorities, that Lord Thurlow thought that to constitute lawful prize, the seizure must have been on the high seas. It was already well settled that enemy ships and goods in the ports or harbours of the realm were the subject of maritime prize. It was equally well settled that enemy goods on enemy territory seized by the maritime forces of the Crown, or persons having letters of marque, could properly be condemned as prize. If, therefore, he used the expressions attributed to him by Lord Stowell, some other explanation must be found.

In their Lordships' opinion a reasonable explanation of the case and of Lord Thurlow's words may be found in the following consideration. It appears that the Court of the Cinque Ports in its capacity as an Admiralty Court had taken possession of the goods at the instance of the Lord Warden. There was, therefore, a matter pending in the Cinque Ports which, so far as their Lordships can discover, was not a Court of Prize. The effect of the monition was to remove this matter to the High Court of Admiralty for trial there. In so trying it the High Court would be exercising an Admiralty and not a prize jurisdiction. As appears by Lord Mansfield's judgment in *Lindo* v. *Rodney* (*supra*), in order to found an Admiralty jurisdiction the complaint must be made of something done on the high seas. This explanation would fully account for the words used by Lord Thurlow, though it must be admitted that Lord Stowell took a different view as to what he meant.

In any event their Lordships do not consider that the *Ooster Eems* has any value as an authority. It has never been followed, and, apparently, has been cited twice only, and in each case distinguished. It is so cited and distinguished in the *Two Friends* above referred to and also in the *Progress* (Edwards's Admiralty Reports 210).

In the last-mentioned case certain British ships with their cargoes had been captured by the French. It is not clear whether they were captured at sea and taken into Oporto after the French occupation, or whether the French found them in the harbour of Oporto when they took possession of it. The French appear to have landed part of the cargoes, which was warehoused on shore at the time when the military forces of the Crown took Oporto. It was, however, held upon the facts that there had been a capture by the French and a recapture by the military forces of the Crown of both ships and cargoes.

Lord Stowell allowed a claim for salvage on the part of the military authorities in respect of that portion of the cargoes which had been landed as well as of the ships and that portion of the cargoes remaining on board. He distinguished the *Ooster Eems* on the ground, as their Lordships understand the decision, that the master of the *Ooster Eems*, in landing the goods, was acting within his authority derived from the owners of the goods, whereas the landing in the case he was considering had been effected by persons acting without authority from and contrary to the interests of the owners. The same ground of distinction would appear to be applicable to the case their Lordships are considering. The petroleum was not warehoused pursuant to any authority given by the owners, but in breach of the contract for its carriage to Hamburg, and so far as the owners were concerned this was as much a hostile act as the landing of the goods by the enemy captors in the case of the *Progress* (*supra*). In neither case, to use Lord Stowell's expression, was the continuity of the character of the goods landed as cargo in any way interrupted.

There are only two other cases which need to be referred to in this connection. The first is that of the *Marie Anne*, cited in Rothery's Prize Droits at p. 126. In this case, at the outbreak of the war with France on the 16th May 1803, the *Marie Anne*, a French ship, was under repair at Ramsgate, and certain parts of her cargo had been landed and were warehoused. Both the ship and the goods so landed were seized as prize, and in due course condemned as such. There is no record of the reasons which influenced the court. It may be that the warehouses in which the goods were deposited were considered as part of a harbour or port of the realm, so as to bring the case within the ordinary definition of goods liable to seizure as prize. It may be that the goods having been temporarily landed while the vessel was repaired, were still considered as part of the cargo though not actually on board. The case, however, is clearly inconsistent with the proposition that goods seized on land cannot be lawful prize. The same may be said of the case of the *Berlin Johannes* (Rothery, p. 125), if, as would appear to be the case, the goods already landed were seized and condemned as prize.

If these decisions turned on the question whether the goods so landed were still in port they are authorities against the appellants, for no valid distinction can be suggested between a warehouse for the receipt of goods brought into harbour by sea and the tanks in which, in the present case, the petroleum was stored.

Their Lordships, therefore, have come to the conclusion that the petroleum on board the *Roumanian*, having from the time of the declaration of the war onwards been liable to

seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Company, Limited, for safe custody, and that therefore its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm, but it is unnecessary to decide this point.

For the reasons hereinbefore appearing their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Ince, Colt, Ince*, and *Roscoe*.

Solicitor for the Crown, *Treasury Solicitor*.

July 19, 20, 21, 28, *and Nov.* 11, 1915.

(Present: The Right Hons. Lord MERSEY, Lord PARKER OF WADDINGTON, Lord SUMNER, Lord PARMOOR, and Sir EDMUND BARTON.)

THE ODESSA.

THE WOOLSTON. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE) ENGLAND.

Prize Court—Enemy cargoes—Cargo shipped in enemy ship—Cargo shipped in British ship—Neutral bankers advance against cargoes—Rights as pledgees under bills of lading—Seizure and condemnation—Bounty of Crown—Civil List Acts.

Enemy goods on board both British ships at the commencement of hostilities are alike the proper subject of maritime prize.

If the legal property in goods captured at sea on a ship, whether British or enemy, is at the time of the capture in an enemy subject, such goods are lawful prize and will be condemned in spite of any claim made by persons who assert that they are pledgees or are otherwise entitled to any rights in them. The Prize Court cannot recognise the claim of pledgees in such circumstances in any shape or form.

The power of bounty by way of redress of hardships still exists in the Crown, and has not been affected by the Civil Lists Acts.

Decision of Evans, P. (reported in the case of The Odessa, 13 *Asp. Mar. Law Cas.* 27; 112 *L. T. Rep.* 473; (1915) *P.* 52, *which decision was followed by the learned judge in the case of the* Woolston) *affirmed.*

CONSOLIDATED appeals from two decrees of the President (Sir Samuel Evans) sitting as judge of the Prize Court, that as to the *Odessa* being reported 13 Asp. Mar. Law Cas. 27; 112 L. T. Rep. 473; (1915) P. 52.

Cargoes of nitrate of soda were sold by neutrals in Chili to a German company carrying on business at Hamburg. They were shipped before the outbreak of the war at Valparaiso in the German vessel *Odessa* and in the British vessel *Woolston*.

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

The appellants, J. Henry Schroeder and Co., of Leadenhall-street, London, a firm of which Baron von Schröder, a naturalised subject of this kingdom, and Frank C. Tiarks, a British born subject, were partners, accepted bills of lading in favour of the sellers against the cargoes respectively, and at the date of their claim had paid or were liable to pay large sums thereunder.

In the case of each vessel the bill of lading made the cargo deliverable to the appellants or their assigns. By the respective bills of lading the *Odessa* was "bound for Channel for orders" and the *Woolston* for "Las Palmas for orders."

After the outbreak of war the *Odessa* and her cargo were captured at sea, and the cargo on the *Woolston* was seized at Liverpool, to which port she had been directed to go by the appellants. The claimants in both cases sought to assert their rights to the cargoes as pledgees.

The learned President in his considered judgment, dated the 21st Dec. 1914, rejected the claims of the claimants and condemned the cargo *ex Odessa* as lawful prize, and following that decision he on the 16th March 1915 condemned the cargo *ex Woolston*.

The claimants appealed.

Sir *Robert Finlay*, K.C., *Mackinnon*, K.C., and *Dunlop* for the appellants.

Sir *Edward Carson* (A.-G.), *Maurice Hill*, K.C., *Theobald Mathew*, and *T. H. T. Case* for the respondent.

The considered opinion of the committee, in which all the material facts are fully set out, was delivered by

Lord MERSEY.—These are appeals from two judgments of the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice sitting in Prize.

There is very much in common in the points arising in both cases, but, as the facts and arguments are not identical, it is desirable to consider each case separately.

THE CARGO *ex* ODESSA.

The facts in this case are as follows: The appellants, Messrs. J. H. Schroeder and Co., are bankers carrying on business in London. The partners are Baron Bruno von Schroeder, a naturalised British subject, and Frank Tiarks, a natural-born British subject. In the ordinary course of their business, the appellants had in March 1914 agreed with a German Company in Hamburg called the Rhederei Actien Gesellschaft von 1896 to accept the drafts of Weber and Co., a firm carrying on its business in Chili, for the price of a quantity of nitrate of soda to be sold and shipped by Weber and Co., to the German Company.

The drafts were to be drawn at ninety days' sight, and the appellants, upon acceptance of them, were to receive by way of security the bill of lading for the cargo, together with a policy of marine insurance. The consideration for this accommodation was to be a commission of one quarter per cent. payable by the German company to the appellants. In due course Weber and Co. shipped a cargo of nitrate on board a sailing ship called the *Odessa*, belonging to the German company, and took from the captain a bill of lading dated the 8th May 1914, in which

the voyage was described as from Mejillones (the port of shipment in Chili) to the "Channel for orders," and by which the cargo was made deliverable to the appellants or their assigns. This bill of lading incorporated the terms of a charter-party (of which there is no copy), and made the chartered freight payable by the consignees upon delivery of the cargo. Drafts for a total amount of 41,153*l.* 1*s.* 5*d.* (said to be the full price of the cargo) were drawn by Weber and Co. upon the appellants, and accepted by them on the 9th June 1914, they receiving in exchange the bill of lading. War broke out between Great Britain and Germany on the 4th Aug. 1914, the *Odessa* being then on her voyage to the Channel. On the 19th the ship was captured on the high seas by H.M.S. *Caronia* and brought into Bantry Bay, and on the 31st a writ was issued against ship and cargo at the suit of the Procurator-General claiming condemnation of both as lawful prize. On the 10th Sept. the drafts of Weber & Co. fell due, and were paid by the appellants. The ship was duly condemned, and no question arises with reference to her condemnation, but in respect of the cargo the appellants intervened, and by their claim alleged it to be their property as holders, for full value of the bill of lading therefor and as British property not liable to condemnation. The case was heard by the learned President on the 7th and 14th Dec. 1914, with the result that he condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that the appellants were merely pledgees, and as such not entitled to any precedence over the Crown.

Their Lordships are of opinion that the learned president was right in the inferences which he drew from the facts—namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees thereof at the date of the seizure. This indeed is hardly disputable, having regard to the case of *Sewell* v. *Burdick* (52 L. T. Rep. 445; 10 App. Cas. 74). The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge was perfected when the appellants accepted the drafts and received the bill of lading.

The appellants indeed did not dispute the correctness of these inferences, but what they say is this, though correct, they do not justify a decree which has the effect of forfeiting their rights as pledgees. Thus the question in the appeal is whether in case of a pledge such as existed here a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellants' claim to be paid out of the proceeds to arise from the sale thereof.

It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilised nations up to the present time have recognised the right of a belligerent to seize with a view to condemnation by a competent Court of Prize enemy ships found on the high seas or in the belligerents' territorial waters and enemy cargoes. But such seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit *in rem*, and the function of the court is to inquire into the national character of the thing seized. If it is found to be of enemy character the duty of the court is to condemn it, if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it as from that date to the Sovereign or to his grantees. The thing—the *res*—is then his for him to deal with as he thinks fit, and the proceeding is at an end.

As the right to seize is universally recognised so also is the title which the judgment of the court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of municipal law. Thus it has come about that in determining the national character of the thing seized, the courts in this country have taken ownership as the criterion, meaning by ownership the property or *dominium* as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of everyone who might claim to be directly or indirectly interested in the vessel or goods seized, and if in addition it had to investigate the particular facts of each case (as to which it would have few, if any, means of learning the truth), the court would be subject to a burthen which it could not well discharge.

There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognised in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender and create in favour of such lender a charge or lien or mortgage on the goods in question. He would thus stand to lose nothing in the transaction, for the proceeds of the goods if captured would, if recovered by the lender, have to be applied by him in discharge of his

debt. Again, if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt instead of being left to recover it in the enemy's courts the door would be opened to the enemy for obtaining fresh banking credit for his trade, to the great injury of the captor belligerent.

Acting upon the principle of this rule Courts of Prize in this country have from before the days of Lord Stowell refused to recognise or give effect to any right in the nature of a "special" property or interest or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by contract stand on a different footing and involve different considerations; but even as to these it is doubtful whether the court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien, it appears to have been the practice of the court to make an equitable allowance to the national or neutral lienholder in respect of such services. In the judgment in *The Frances* (8 Cranch, at p. 419), speaking of freight, it is said: "On the one hand the captor by stepping into the shoes of the enemy owner of the goods is personally benefited by the labour of a friend and ought in justice to make him proper compensation, and on the other, the shipowner by not having carried the goods to the place of their destination, and this in consequence of the act of the captor, would be totally without remedy to recover his freight against the owner of the goods."

It is, however, unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation. The case of *The Tobago* (Roscoe, vol. 1, 456; 5 Ch. Rob. 218) is in point. There the claimant was a British subject. In time of peace he had honestly advanced money to a French shipowner to enable the latter to repair his ship which was disabled, and by way of security he had taken from the owner a bottomry bond. Afterwards war broke out with France and the vessel was captured. In the proceedings in the Prize Court for condemnation, the holder of the bottomry bond asked that his security might be protected, but Lord Stowell (then Sir William Scott), after observing that the contract of bottomry was one which the Admiralty Court regarded with great attention and tenderness, went on to ask: "But can the court recognise bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize?" and he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel, and says: "If there is no change of property there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and, amongst the rest, the chances of war."

The decision in *The Mary* (9 Cranch, 147) is to the same effect. Similarly in *The Aina* (1 Spink's Prize Cases, 8) the court refused to recognise or give effect to a mortgage on the ship captured, and the same point arose and was similarly decided in *The Hampton* (5 Wall. 372). Again, in *The Battle* (6 Wall. 498) the court refused to recognise a maritime lien for necessaries, a decision which was followed in *The Rossia* (2 Russian and Japanese Prize Cases, 43). *The Ariel* (11 Moo. P. C., cap. 119) was the converse case of an attempt to obtain condemnation, not of enemy goods, but an enemy lien on goods; it failed on the same principle. In that case Sir John Patteson said: "Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

All these cases were fully discussed by the President in *The Marie Glaeser* (12 Asp. Mar. Law Cas. 601; 112 L. T. Rep. 251; (1914) P. 218).

Passing to cases which in their circumstances more resemble the present case, there is *The Marianna* (6 C. Rob. 24), in which the court refused to give effect to a contract of pledge on goods consigned to the agent of the pledgee. Sir W. Scott in that case says: "Captors are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist it would be quite impossible for captors to know upon what grounds they were proceeding to make seizure. . . . The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the court a perfect knowledge of the law of covenant and the application of that law in all countries under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property with scarcely any exceptions."

There is *The Frances* (8 Cranch, 418), in which the Court refused to recognise or give effect to the rights of a consignee under the bill of lading for advances against the goods to which the bill of lading related. In that case the court laid it down that "in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors and even upon the Prize Courts in deciding upon them and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants have excluded such cases from the consideration of those courts.

There is another American case, *The Carlos F. Roses* (177 U. S. Rep. 655) in, which the claim put forward by a neutral who had advanced money upon a cargo on a captured ship and who had received bills of lading covering the shipment was rejected.

It is difficult to distinguish the facts in any of the three cases last mentioned from the facts of the present claim by Messrs. Schroeder and Co. Some stress was laid by the appellants upon the dissenting judgments in *The Carlos F. Roses*, but a perusal of these judgments will show that they proceeded upon the assumption that in the circumstances the general property in the goods had passed to the holder of the bills of lading. The case was decided before the judgment in

Sewell v. *Burdick* (*sup.*). Finally, *The Hampton* (5 Wallace, p. 372) is a case in which the claim of a mortgagee on a ship was rejected.

Before adverting to the arguments by which the appellants seek to displace this weight of authority it is necessary to deal with a contention put forward by them to the effect that by their title as pledgees they are clothed with a sufficient ownership to bring their case within the rule. This contention is based upon the right of sale accorded to a pledgee by the law of England by which in the event of default by the pledgor in payment of his debt, the pledgee can sell the pledge without first having recourse to a court of law for authority to do so. This right it is said creates a "special" property in the pledge in favour of the pledgee and is a right *in re* constituting or equivalent to ownership and distinguishable in character from the mere right *in rem* possessed by a lien holder. It is first to be observed of this right to sell without recourse to a court of law that it is peculiar to the English law of pledge. It is thus precisely one of those matters which a Prize Court should leave out of consideration when applying to its decision general principles common to all systems of law to the exclusion of principles of municipal law.

The subject was very fully examined by Chancellor Kent in Lord Stowell's time in 1805, in a learned judgment declaring the decision of the Supreme Court of the State of New York (*Cortelyou* v. *Lansing*, 2 Cairnes' Cases in Error, p. 202). He said: "I believe that there is no country at present, unless it be England, that allows a pledge to be sold but in pursuance of a judicial sentence."

And secondly it is to be observed that if the right clothes the pledgees with ownership it precludes the court from making any decree at all of condemnation.

The ownership by which a Court of Prize is guided cannot subsist both in the pledgees and in the pledgors.

If it exists in the appellants in the present case no decree can be made against them, for they are British subjects, and the interest left in the enemy subject cannot be condemned for *ex hypothesi* it is not an interest which includes ownership. See *The Ariel* (11 Moo. P. C. 119), in which it was laid down that as a Court of Prize ignores a lien in favour of a neutral on an enemy's ship, so will it ignore a lien in favour of an enemy on a neutral ship.

But when the nature of the right of a pledgee to sell is examined it will be seen that the so-called "special" property which it is said to create is in truth no property at all. This has been recognised by many judges who have used the expression "special interest" as a substitute for "special property": (see *Moses* v. *Conham*, Owen 123, 7 Jac. 1, and *Donald* v. *Suckling*, 14 L. T. Rep. 772; L. Rep. 1 Q. B., at p. 613).

If it were not for the somewhat unfortunate peculiarity of English terminology involved in the established use of the words "special property" when "special interest" would seem better, it is difficult to see how an argument could be maintained which would effectively distinguish pledge from lien for present purposes.

The very expression "special property" seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own. He must appropriate the proceeds of the sale to the payment of the pledgor's debt, for the money resulting from the sale is the pledgor's money to be so applied. The pledgee must account to the pledgor for any surplus after paying the debt. He must take care that the sale is a provident sale, and if the goods are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing himself the advance which he has made. He cannot use the goods as his own. These considerations show that the right of sale is exerciseable by virtue of an implied authority from the pledgor and for the benefit of both parties. It creates no *jus in re* in favour of the pledgee; it gives him no more than a *jus in rem* such as a lien holder possesses, but with this added incident that he can sell the property *motu proprio* and without any assistance from the court.

Returning to the authorities the appellants attempt to displace them in the following way. They say, in the first place, that Lord Stowell in *The Tobago* was referring only to "secret" liens, which they interpret to mean liens not appearing on the ship's papers, and they contend that theirs was not secret, for that it appears on the ship's papers—namely, on the face of the bills of lading. But when the judgment in *The Tobago* is examined it will be found that Lord Stowell used the term "secret liens" as equivalent to liens created by the act of the parties as opposed to those arising under the general law merchant. Further, it cannot in the present case be said with any truth that Messrs. Schroeder's lien is disclosed on the ship's papers. It is true that the bill of lading was made out in favour of them or their assigns, but this is quite consistent with their having no charge at all, and the consignment having been made to them merely as the factors or agents of the enemy owner. The contract of pledge under which alone their claim arises, however probable in the ordinary course of commerce, is nowhere disclosed in the ship's papers. Again, such as it was, the disclosure was certainly no more than existed in the cases of *The Marianna*, *The Frances*, and *The Carlos F. Roses*.

Secondly, the appellants contend that being by virtue of the bill of lading in possession of the goods in question there can be no reason in principle why the court should not recognise an interest arising out of such possession just as it recognises the carrier's possessory lien for freight. But such possession as the appellants had is not an actual possession such as forms the basis of a possessory lien at common law, but merely such possession as according to the law relating to pledge arises out of constructive or symbolical delivery. There is not, to use the words of Lord Stowell in *The Tobago* (*sup.*), that "interest directly and visibly residing in the substance of the thing itself" which is to be found in the actual possession held by a carrier. Further, it will be found that a possession, similar in character to that which Messrs. Schroeder had, existed in several of the cases already referred to on the part of lien holders whose claims were rejected by the court.

Thirdly, the court was asked to accept the suggestion that the practice of making advances on the security of bills of lading had arisen after the decisions referred to had been pronounced and that in the interest of commerce the adverse decisions should now be disregarded. With regard to this argument, it is to be observed that at any rate *The Carlos F. Roses* was decided at a time when the practice referred to was well known, and although the decision cannot bind an English court, still the considered judgment of the Supreme Court of the United States is entitled to the greatest possible weight. Further, it is difficult to see how any change—if there has been any change—in commercial practice—invalidates the reasons which led to the decisions in question.

Lastly, the appellants urged that if the court now applies the principles illustrated by the cases above referred to very serious injustice will be done to and serious loss incurred by neutrals or subjects who, before the commencement of the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been occasioned by the application of the same rules in the eighteenth and early nineteenth centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to be applied internationally to circumstances arising out of a state of war it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilised nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens or other rights arising out of private contracts would so seriously interfere with the belligerent right of capture that the courts have refused to recognise such liens or rights in spite of the hardship which might be occasioned to individuals from such want of recognition. It is said that in Lord Stowell's time there was a possibility of redressing any individual hardship which might be caused to neutral or subject by an appeal to the bounty of the Crown, and that in some way or other the Crown has lost its power of bounty in the matter. It is true that Lord Stowell, when pressed with the individual hardship of decisions he was about to pronounce, sometimes referred to the fact that any apparent injustice might be met by an exercise of the Crown's bounty. See *The Belvidere* (1 Dods. 353) and *The Constantia Harlessen* (Edward's Adm. 232).

Whether his judgments were in any way based on that consideration or whether they would not have been the same if the possibility of the exercise of the Crown's bounty had not existed is an arguable point.

In their Lordships opinion, however, it is unnecessary to decide this point, for after hearing the Attorney-General they have come to the conclusion not only that the Crown had and was accustomed to exercise a power of bounty by way of redress of hardships, but that such power still exists unimpaired.

Perhaps the most notable instance of the exercise of such power was the Order in Council made at the commencement of the war with Denmark in 1807. It was thereby ordered that in case any advances should have been made before the then late embargo (viz., the 2nd Sept. then last passed) by any British subject upon the credit and security of any ship, freight, or goods belonging to Danish subjects which might be condemned as prize to His Majesty, the amount of such advances so actually made (but without further compensation) should be paid to the British subjects out of the proceeds of the property so condemned upon the credit of which the advances were respectively made upon due proof thereof to the satisfaction of the High Court of Admiralty.

If the Crown could order this generally, it must also have had the power to order it in particular instances. Further, if it could make such an order in favour of British subjects, it must also have had the power to make it in favour of neutrals, and circumstances can easily be imagined in which the exercise of such a power in favour of neutrals might as a matter of policy be deemed desirable.

If the Crown had and was accustomed to exercise the power of redressing hardship by way of bounty such right must still exist unless taken away by Act of Parliament, and it must be remembered that the Crown's prerogative can only be abridged by express words or necessary implication. The argument of the Attorney-General to the effect that the power in question has ceased to exist is solely based on the effect to be given to the statutes which have been from time to time passed in reference to the Civil List. The first Civil List Act which affects droits of Admiralty and droits of the Crown is the Act of 1 Geo. 4, c. 1. By sect. 2 of this Act the produce of certain Crown revenues (which did not include droits of Admiralty or droits of the Crown or other small casual revenues) were for the life of King George IV. carried to the Consolidated Fund. It was provided that an account of all moneys to be received in respect of the casual revenues of the Crown including droits of Admiralty and droits of the Crown and of the application thereof should annually be laid before Parliament. By sect. 2 of 1 Will. 4, c. 25, the casual revenues of the Crown including droits of Admiralty and droits of the Crown were treated in the same way as the other hereditary revenues and carried during the life of King William IV. to the Consolidated Fund, it being provided that all such revenues should after his death be payable to his heirs and successors. The 12th section of this Act provides that nothing therein contained should impair or prejudice any rights or powers of control, management, or direction relative to (*inter alia*) the granting of any droits of Admiralty or any droits of the Crown as a reward or remuneration to any officer or officers or other person or persons seizing or taking the same or giving any information relating thereto, it being the true intent and meaning of the Act that the said rights and powers should not in any degree be prejudiced in any manner but only that the moneys accruing to the Crown after the full and free exercise and enjoyment of the said rights and powers should during His Majesty's life be carried

to the Consolidated Fund. It was obviously the intention of this clause that the Crown's right of making grants out of droits of Admiralty and droits of the Crown in favour of captors or persons giving information leading to the capture should be preserved, but nothing being expressly said as to making grants in order to redress hardships, it is arguable that on the principle of *expressio unius est exclusio alterius* the Crown's right in this respect was intended to be taken away. Further, the same argument is open upon the construction of 1 & 2 Vict. c. 2, which in effect re-enacts the Act of 1 Will. 4, c. 25 during the reign of Queen Victoria. It is unnecessary actually to decide the point and their Lordships will assume for the purpose of this case that during the reigns of King William IV. and Queen Victoria the right of the Crown in respect of Admiralty droits and droits of the Crown was confined to rewarding captors and persons giving information leading to the capture. It seems clear, however, that on the death of Queen Victoria her successor, King Edward VII., became entitled to droits of Admiralty and droits of the Crown to the same extent as if there had never been a surrender in favour of the Consolidated Fund. In other words, any restriction created during the lives of King William IV. and Queen Victoria ceased to apply. If, therefore, the ancient right of the Crown to dispose of these droits is now curtailed it must be by virtue of some statute passed subsequently to the death of Queen Victoria. In other words, it must be by virtue of the Civil Lists Acts 1 Edw. 7, c. 4, and 1 Geo. 5, c. 28.

By 1 Edw. 7, c. 4, s. 1, it is provided that the hereditary revenues which were by sect. 2 of 1 & 2 Vict. c. 2 directed to be carried to and made part of the Consolidated Fund should, during the life of King Edward VII. and six months afterwards, be paid into the Exchequer and made part of the Consolidated Fund. By sect. 9 (2) it is provided that nothing in the Act contained should affect any rights or powers for the time being exercisable with respect to any of the hereditary revenues which were by the Act directed to be paid into the Exchequer, and by sub-sect. 3 of the same section the 1 & 2 Vict. c. 2 was with immaterial exceptions repealed. The Act of 1 Geo. 5, c. 23 re-enacts in the same terms the Act of 1 Edw. 7, c. 4, for the life of his present Majesty and six months afterwards.

The question therefore is as to the meaning and effect of the reservation contained in the two last-mentioned Acts of the rights and powers of the Crown for the time being exercisable. It should be noticed, in contrast to the Acts of 1 Wil. 4, c. 25 and 1 & 2 Vict. c. 2, that the reservation is not specific but general in its terms. It should be noticed also that it is not a reservation of rights and powers which were or might have been exercised by some former Sovereign or Sovereigns (the form of reservation in some of the earlier Civil Lists Acts), but a reservation of rights and powers "for the time being" exercisable. This must mean powers which have not at the date of their proposed exercise been taken away by Act of Parliament. To acertain the nature of the rights and powers intended to be reserved it is permissible to consider the object for which the Acts themselves and the earlier Acts hereinbefore mentioned were passed.

The objects of each of these Acts is a surrender by the Crown of its hereditary revenues in consideration of a fixed grant from Parliament. Each Act has been intended to carry to the Consolidated Fund revenue which would otherwise have gone to the Sovereign, and not revenue which because of the exercise of some right or power in the Crown would never have gone to the Sovereign at all. This object was in the Acts of George IV., William IV. and Victoria sought to be obtained by a specific enumeration of the rights reserved. In the Acts of Edward VII. and George V. it is sought to be attained by a general reservation of all rights. It could hardly be contended that the rights and powers expressly reserved in the earlier Acts are not included in the general reservation contained in the latter Acts. If such a contention were well founded, the Crown would have lost many rights, the existence of which is of great importance in the public interest. It would have lost, for instance, the right to make grants to the natural children of a bastard intestate or to reward captors or persons giving information leading to the capture of enemy goods. It is of equal importance in the public interest, and indeed of friendly relations with neutral powers, that the Crown should retain the power of making in the interests either of British subjects or of neutrals such an Order in Council as was done at the outbreak of the Danish war in 1807. The only distinction is that no such power was expressly reserved in the earlier Civil List Acts. It is in their Lordships' opinion much more reasonable to suppose that the general words were used to cover such a case than to confine the words themselves, in spite of their generality, to rights and powers expressly reserved by the earlier Acts. If the words of reservation now in force are sufficient to cover a right of so important and useful a nature, it would, in their Lordships' opinion, be wrong to hold that it had been destroyed merely because it had ceased to be exercisable during the reigns of King William IV. and Queen Victoria. Their Lordships therefore hold that the power in question still exists. They desire, however, to state that they express no opinion as to whether the present case is one in which the power ought to be exercised.

There were two other points suggested in argument which deserve some consideration. First it was said that the difficulty of recognising liens on captured enemy goods might be less in the case of a lien holder being a subject than in the case of his being a neutral. In the case of a neutral it is obvious that the payment of the lien out of the proceeds of a sale of the goods would enure directly to the benefit of the enemy. The enemy debt would thus be paid at the expense of the captors instead of the neutral being left to recover it in the enemy courts. A right of capture at sea would thus be deprived of its national advantage. On the other hand, if the lien holder be a subject his right of proceeding in the enemy courts is, if not lost, at any rate suspended by the existence of a state of war. If the right be lost the recognition of the lien would not, it is said, enure to the advantage of the alien enemy but merely to one of His

Majesty's subjects. If the right be merely suspended it could not enure to the advantage of the alien enemy, at any rate until after the war, and the court it is said should only consider the existing state of war and not be guided by what will happen when the war is over. There may be some force in these considerations, but, on the other hand, it is to be remembered that by international comity the Courts of Prize in this country have, in general, extended to neutrals the same advantages as they afford to His Majesty's subjects, and it would be difficult to make an exception. Moreover, both in the case of a neutral and of a subject the lien holder may have in his hands assets belonging to the enemy to which he can have recourse for the payment of his debt; and into such a matter the courts have no means of inquiring.

The second suggestion does not involve the same difficulty. It is that the rules laid down in the cases referred to should be confined to transactions originating during the war, and that liens created *bonâ fide* before the war began might well be recognised whether held by subjects or neutrals. There is, however, no authority for such a distinction; indeed, authority is the other way: (see *The Tobago, ubi sup.*).

Neither of the above suggestions was seriously pressed on their Lordships, nor could either of them be accepted.

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

THE CARGO *ex* WOOLSTON.

The above judgment in the case of the cargo *ex Odessa* applies equally in the case of the cargo *ex Woolston*. The only difference between the two cases is that the *Odessa* was an enemy ship and the *Woolston* was a British ship. Their Lordships are of opinion that enemy goods on board both British ships at the commencement of hostilities are alike the proper subject of maritime prize. The point has been more fully dealt with in the judgment in the case of *The Roumanian* (*ante*, p. 208). The fact that the *Woolston* was a British ship can therefore have no importance unless it be necessary for the court to act upon some presumption arising from the character of the ship. It is unnecessary to act on any such presumption where, as in the present case, the whole facts are in evidence and the enemy character of the cargo is fully established.

In this case, also, their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for the appellants, *Stibbard, Gibson, and Co.*

Solicitor for the Crown, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 4 *and* 5, 1915.

(Before SWINFEN EADY, PHILLIMORE, and PICKFORD, L.JJ.)

THAMES AND MERSEY MARINE INSURANCE COMPANY LIMITED *v.* BRITISH AND CHILIAN STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Policy — Valued policy — Total loss—Subrogation—Right of paying underwriters to be subrogated.

The plaintiffs insured the defendants' ship H. *for one year from the 20th May* 1912 *for* 45,000*l. against ordinary sea perils by a policy dated the 6th June* 1912 *in which the* H. *was valued at* 45,000*l. During the currency of the policy the* H. *came into collision with the* E. *and was totally lost. A collision action was brought by the shipowners, and both vessels were held to blame and the blame was apportioned, the owners of the* H. *having to pay seven-twelfths and the owners of the* E. *five-twelfths of the damage. The registrar of the Admiralty Court took the value of the ship as at the 15th Nov.* 1912, *the end of the current season, and fixed it at* 65,000*l. He took the loss of hire up to the same date and assessed it at* 2000*l.*

The shipowners appealed, and the President held that the value of the ship should be taken in Nov. 1917, *and the hire assessed to that date, which was the date of the expiry of the charter-party under which the* H. *was chartered, and remitted the report to the registrar for reconsideration of the figures on that basis.*

On coming before the registrar the parties compromised, and agreed on a lump sum of 67,000*l. for the two items under consideration, being the same total as the registrar had awarded without apportioning it. The owners of the* E. *had no interest in the apportionment. Five-twelfths of the* 67,000*l. was accordingly paid, being some* 26,900*l. The underwriters, who had paid for a total loss of the* H., *then claimed to be subrogated to the payment received for the loss of that ship from the owners of the* E.

Held, that the underwriters were entitled to recover to the extent to which they had paid in respect of the subject-matter insured any sum which the defendants had received in respect of the loss of the same subject-matter, although that sum was based on a larger value than the insured value.

Decision of Scrutton, J. (113 *L. T. Rep.* 173; (1915) 2 *K. B.* 214) *affirmed.*

APPEAL by the defendants from a decision of Scrutton, J. in an action tried by him without a jury, reported 113 L. T. Rep. 173; (1915) 2 K. B. 214. The plaintiffs' claim was for a sum of money which they alleged was due to them by virtue of a right of subrogation to the defendants in respect of what the defendants had received in respect of the loss of a vessel.

The facts are sufficiently stated in the judgments.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Scrutton, J. held (1) that the underwriters were entitled to recover to the extent to which they had paid in respect of the subject-matter insured any sums which the defendants had received in respect of the loss of the same subject-matter, although that sum was based on a larger value than the insured value; and (2) that, as the underwriters only insured the ship for one year, they were not concerned with the value of the ship in 1917, and that, as on the evidence the value of the ship at the time of the loss must be taken to be 65,000*l.*, in respect of which the defendants had received from the owners of the *E.* 26,900*l.*, the underwriters were entitled to be subrogated to the defendants to the full amount of 26,900*l.*, and to recover from the defendants the difference between that sum and the amount payable under the running-down clause, and judgment was accordingly given for the plaintiffs.

The defendants appealed.

Leslie Scott, K.C. and *Raeburn* for the appellants.

Maurice Hill, K.C. and *D. Stephens* for the respondents.

Swinfen Eady, L.J.—This is an appeal by the defendants from the judgment of Scrutton, J. at the trial of an action in which the Thames and Mersey Marine Insurance Company were plaintiffs and the British and Chilian Steamship Company Limited were the defendants. The facts out of which the present action arises are shortly these: The plaintiffs under a valued policy insured the ship for the sum of 45,000*l.* The ship was under charter to the Dominion Coal Company for a period of seven St. Lawrence seasons, commencing with the spring of 1911 and expiring, therefore, in 1917.

There was a collision between the steamship *Helvetia*, the subject of the insurance, and the *Empress of Britain*, with the result that the *Helvetia* was sunk, and the plaintiffs have paid as for a total loss 45,000*l.* Proceedings were taken in the Admiralty Court to determine the responsibility for the collision, and the result of the proceedings was that both vessels were pronounced to blame, and the share of the loss to be paid by the *Empress of Britain* was fixed at five twelfths. Under the collision clause the plaintiffs are liable in respect of the loss and damage arising from the collision to pay a sum of 19,660*l.* In the proceedings taken to ascertain the amount payable by the *Empress of Britain* an inquiry was directed, and in the first instance the registrar reported purporting to follow the case of *The Racine* (95 L. T. Rep. 597; 10 Asp. Mar. Law Cas. 300; (1906) P. 273), and he took the value of the ship as at the 15th Nov. 1912, which was not the date of the collision, but the end of the current season, and he fixed it at 65,000*l.*, and he took the loss of hire up to the same date and assessed that at 2000*l.* There was an appeal from that. The shipowners appealed, and the matter came before the President, and he held that on the true effect of the *Racine* the value of the ship should be taken as at November, when the charter would expire, and that the hire should be assessed to that date, and accordingly he remitted the report to the registrar to reconsider the matter upon that basis. The parties then went again before the registrar, and the result was that the parties, then being the *Helvetia* on the one side and the *Empress of Britain* on the other, agreed upon a lump sum of 67,000*l.* without dividing the amount as between ship and charter. For five-twelfths of that sum the *Empress of Britain* was held to be liable, and she has paid a sum of, roughly, 26,900*l.* The present action is brought by the underwriters claiming to be subrogated to the position of the shipowners in regard to the sum recovered in respect of the ship and to obtain payment of the amount.

The first question which was raised in the action and which has been raised before us on this appeal is, what is the right of the underwriters, the plaintiffs, to recover in respect of that amount? The whole of the insured value being covered by insurance, the claim of the plaintiffs is to recover from the defendants the whole of the amount recovered by them in the collision action up to 45,000*l.*, the amount of the policy; on the other hand, the defendants have contended that by the decree of the Admiralty Division they were held entitled to recover in the collision action five-twelfths of their loss, and they say that as between the plaintiffs and the defendants that loss must be treated as 45,000*l.*, and that it is to their rights in that respect that the plaintiffs are subrogated, and that they are consequently entitled only to recover five-twelfths of 45,000*l.* Scrutton, J. decided in favour of the plaintiffs on that point. He held that the underwriters were entitled to recover to the extent to which they paid in respect of the subject-matter insured any sum which the shipowners had received in respect of the loss, although that sum was based on a larger value than the insured value. By sect. 27 of the Marine Insurance Act 1906 (6 Edw. 7, c. 41) it is provided that: "(1) A policy may be either valued or unvalued. (2) A valued policy is a policy which specifies the agreed value of the subject-matter insured. (3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and the assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial." By sect. 79 it is provided: "(1) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured" (here the insurer has paid for a total loss of the ship) "he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss." Now, what the underwriters here are really saying is this: that, according to the true construction of the statute, they are entitled to be subrogated to all the rights and remedies of the assured in and in respect of the subject-matter of the ship, and not to part of it only. In my opinion the Act embodies the law as laid down in *North of England Steamship Insurance Association* v. *Armstrong* (3 Asp. Mar. Law Cas. O. S. 330; 21 L. T. Rep. 822; L. Rep. 5 Q. B. 244) and the judgment below was right on this point, and the plaintiffs are entitled to recover from the shipowners all the sums which the shipowners received in respect

of the ship up to the 45,000*l.*, the amount of the insurance.

The second point is a different one. The appellants contend that in apportioning the sum recovered in the collision action the learned judge was wrong in fixing 65,000*l.* as the value of the subject-matter insured at the time of the loss—that is to say, as the value of the ship. Now, the sum recovered was recovered as a lump sum and there was no apportionment, and there has as yet been, apart from the learned judge's judgment, no apportionment of this sum as between ship and charter. It was a compromise, and the parties agreed to a lump sum. The President laid down in his judgment on appeal from the registrar the basis upon which the figures were to be arrived at. [His Lordship then dealt with this point and concluded.] In my opinion the proper way to deal with the matter is to refer it back, having decided that the underwriters are entitled to recover the whole amount recovered by the shipowners in respect of the ship, and to direct an inquiry how the sum of about 26,000*l.*, the larger sum, ought to be apportioned as between the ship and the charter upon the basis of the President's judgment.

PHILLIMORE, L.J.—I agree. I think that the learned judge's decision on the first point was right, and I have nothing to add to what the Lord Justice has said.

PICKFORD, L.J.—I agree.

Appeal dismissed. Reference to referee.

Solicitors for the appellants, *Rawle, Johnstone,* and *Co.*, agents for *Hill, Dickinson,* and *Co.*, Liverpool.

Solicitors for the respondents, *Alfred Bright* and *Sons*, agents for *Batesons, Warr,* and *Wimshurst*, Liverpool.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Oct. 28, 29, *and Nov.* 8, 1915.

(Before Sir S. T. EVANS, President.)

THE SORFAREREN. (*a*)

Neutral sailing ship—Cargo—Contraband—Order in Council of the 29th Oct. 1914*—Property of enemy—Condemnation—Compensation—Art.* 43 *of Declaration of London—Shipowners' claim for freight—Loss by delay—Contribution to alleged general salvage loss.*

By the Declaration of London Order in Council, No. 2, 1914, *dated the 29th Oct.* 1914, *it was declared that during the present hostilities the convention known as the Declaration of London should, subject to certain additions and modifications therein specified, be adopted and put in force by His Majesty's Government. Art.* 43 *of the Declaration of London, which provides* (inter alia) *that if a vessel is encountered at sea while unaware of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation, was not excepted by the terms of the Order in Council. By the said order chrome ore was declared to be absolute contraband.*

Under the terms of a contract entered into in 1913 *between an English company and a German company, the former shipped certain chrome ore in June* 1914 *from a foreign port on a Norwegian sailing vessel chartered by the German company. The bills of lading were made out in favour of the English company, the sellers, or order, the port of delivery being Rotterdam. The buyers paid to the sellers, at the date of sailing, in accordance with the terms of the contract,* 50 *per cent. of the purchase price of the chrome ore, together with a sum of* 1000*l. advanced by the sellers for the ship. On the voyage the vessel put into Pernambuco, in Sept.* 1914, *where the master first heard of the outbreak of war, and acting upon instructions received by cable he changed the course of the vessel from Rotterdam to Gothenburg, in Sweden, via the North of Scotland. The vessel was captured in Nov.* 1914 *by a British cruiser, and taken to Glasgow. At the date of the seizure of the vessel the master was unaware of the Order in Council of the 29th Oct.* 1914.

In the prize proceedings for the condemnation of the cargo, two claims were put in, one by the English company, the sellers, and another by a Swedish company, which alleged that the chrome ore had been purchased by them from the German company. No claim was made on behalf of the German company. The shipowners also put in a claim for freight, for remuneration for the use of the ship or loss by delay, and for contribution from the cargo to alleged general average loss.

Held, that, on the facts of the case, the cargo was the property of the German company, the same having passed to them from the English company; that the German company were not the agents of the Swedish company; and that as the German company had put in no claim the question of compensation did not arise.

Quære, whether in any case art. 43 *of the Declaration of London applies under any circumstances to prevent the condemnation of contraband property of the enemy without compensation.*

Held, also, that the shipowners were entitled to freight, the amount to be ascertained by a reference to the registrar and merchants, that they were not entitled to any compensation for the use of the ship or loss by delay, and that they were entitled to a contribution from the cargo to general average loss provided they could establish a claim to the same.

IN this case the Crown claimed the condemnation of a cargo of chrome ore laden in the Norwegian sailing ship *Sorfareren*, which sailed from Pagonmene, New Caledonia, in June 1914, before the outbreak of the war between Great Britain and Germany.

The facts of the case and the arguments adduced are sufficiently set out in the headnote and in the judgment.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Stuart Bevan* for the Crown.

Leck, K.C. and *Raeburn* for the Chrome Ore Company Limited.

Macaskie for the Aktiebolaget Ferrolegeringer, the Swedish company, the alleged purchasers of the chrome ore.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Dunlop for Stray and Co., agents for the shipowners.

Cur. adv. vult.

Nov. 8, 1915.—The PRESIDENT.—This is a case of considerable importance, both on account of the quantity and the character of the cargo seized, and also on account of one of the legal questions which are involved in it. The *Sorfareren* was a Norwegian sailing vessel which was chartered by a German company, the Gesellschaft für Electrometallurgie, of Nürnberg. Her cargo consisted of about 3,850 tons of chrome ore, and she started on her voyage to Europe from Pagoumene, New Caledonia, in the month of June 1914. The bill of lading was made out in favour of the Chrome Ore Company Limited, of St. Swithin's-lane, in the City of London, or order, for delivery at Rotterdam. Chrome ore is used for the manufacture of ferro-chrome, an essential ingredient in the making of armour plates and armour-piercing projectiles. For many years past vast quantities of chrome ore have been imported for Krupp's works at Essen, and the usual place of entry for the ore which is intended for these works has been Rotterdam. The cargo in the present case was shipped in pursuance of a contract entered into on the 13th Dec. 1913, made between the Chrome Ore Company Limited as sellers and the German company as buyers. The contract was for a certain quantity, which was dependent upon whether the buyers chartered a sailing vessel or a steamship for the purpose of carrying the ore. The price was a fixed price of so much per ton, f.o.b. at Pagoumene, upon certain bases of analysis, with *pro rata* variations, depending again upon whether the buyers chartered a sailing vessel or a steamship upon which the cargo was to be shipped.

Under the contract the ore was to be discharged at one, two, or three ports, provided that no additional expense to the sellers was incurred beyond the analysis. The bills of lading were to be made out by the shippers to the order of the sellers. Payment of 50 per cent. of the value of the ore at a certain standard was to be made immediately on shipment, and the balance immediately after arrival at the port of discharge. Insurance of the goods was to be effected by the buyers at a value of 6*s.* 6*d.* per ton over the purchase price. The buyers were to pay the premium and to hand over the policies to the sellers at Pagoumene. Any necessary advances to the ship were to be made by the sellers at the port of loading, but the buyers were to reimburse to the sellers in New Caledonia such advances on cable advice of the amounts advanced. For other items it is sufficient to refer to the contract. The buyers paid to the sellers in the month of June 1914 the sum of 3987*l.* 12*s.* 6*d.*, made up of 2987*l.* 12*s.* 6*d.*, the 50 per cent. of the purchase price of ore, in accordance with the terms of the contract, and 1000*l.*, being the amount advanced by the sellers for the ship at New Caledonia.

The vessel put into Pernambuco, on her voyage, on the 6th Sept. 1914. It was at that port that the master first heard of the outbreak of the war. He cabled at once to the agents for the shipowners for instructions, and in reply received orders to proceed to Gothenburg instead of to Rotterdam, the voyage to be made by the north of Scotland. According to the affidavit of the secretary of the Chrome Ore Company Limited, the order to proceed to Gothenburg instead of to Rotterdam was given by the buyers—that is, by the German company.

On the 29th Oct. 1914, by an Order in Council, chrome ore was declared to be absolute contraband. About eight o'clock p.m. on the 2nd Nov. 1914 the vessel was boarded by British naval officers, and the vessel and cargo were taken by a prize crew into the port of Glasgow. It appears that the vessel had been boarded by the German cruiser *Karlsruhe* on the 15th Sept., and that the boarding officer of the German cruiser had ordered the master not to make any entry as to this visit in his log. At the time of the capture by the British cruiser the vessel had sailed about 14,700 miles, and had a further distance of about 530 miles to cover before arriving at Gothenburg.

In due course the writ in prize was issued, claiming condemnation of the cargo as prize, as enemy property or as contraband of war. In the prize proceedings the cargo was sold and realised over 16,000*l.* Two claims were made to the cargo. One was made on the 18th Jan. 1915 by the Chrome Ore Company Limited. The other was made on the 28th Jan. 1915 by the Atkiebolaget Ferrolegeringer, of Stockholm, a Swedish company, hereinafter referred to as the Swedish company. No claim has been made by or on behalf of the buyers, the German company. These claims are, of course, mutually destructive. Broadly speaking the ground of the claim of the Chrome Ore Company Limited is that at the time of the capture they were the owners, because, according to their contention they had reserved the right of disposal of the goods. They alleged a further ground, which I confess I find it difficult to understand, which they state in their claim as follows: "The claimants further say that by reason of the outbreak of war on the 4th Aug. 1914 between Great Britain and Germany the contract for the sale of the goods became and was annulled; and further that by reason of the Royal Proclamation against trading with the enemy it became and was illegal and impossible for the claimants to deliver the goods to the German purchasers."

As to this, the goods at the time of capture were on their way to the port of discharge for delivery, and no steps were taken by the sellers to try to prevent or to put an end to the voyage. I conceive that the real question upon their claim is whether under the contract the property in the goods had passed from them to the buyers.

The ground of the claim of the Swedish company, again broadly speaking, was that the goods were their property, having been bought for them by the German company as their agents. An essential ingredient in this claim is that the property had, at any rate, passed from the sellers.

I will deal in the first place with the claim of the British company. They contracted only with the German company and knew nothing whatever of the Swedish company in relation to this transaction. I cannot find that they knew even of the existence of the latter company before the date of the capture. The terms of the contract between the British company and the German company, and the dealings between them, have been sufficiently set out to enable the question of the transfer of the ownership to be determined, and there is, therefore, no necessity to repeat them.

I deem it to be quite clear that the property passed to the German company on the shipment and part payment, and that there was no reservation whatsoever by the sellers of the right of disposal of the goods. Their whole conduct showed that there was no intention upon their part to reserve such a right. The result, in fact, of giving effect to their claim would be strange indeed. It would mean that in addition to 2987*l.* 12*s.* 6*d.* already paid to them by the buyers in part payment of the purchase price, a sum of over 16,000*l.* (the proceeds of the sale of the goods) would also be released and paid over to them, and they would thus be receiving nearly 19,000*l.* instead of the unpaid balance which they estimate at some figure between 3000*l.* and 4000*l.* If the strict application of the law involved this result, the court could not and would not prevent it. But, as I have said, in my opinion, according to law the Chrome Ore Company Limited had transferred their property in the goods to the German buyers, and the extraordinary result above described does not ensue. Their holding of the bill of lading, and of the policies of insurance, did not preserve the property in them in the circumstances. Their object in obtaining and holding these documents was simply to secure greater protection for themselves for the payment of the balance.

It is a source of satisfaction to the court, and may possibly be some consolation to the claimants in the face of an adverse decision, to find that this view appears to have been entertained by themselves before the prize proceedings were instituted, as is shown by the following letter, which was written for them by their secretary to the Lords of the Admiralty:

Chrome Ore Company Limited, Sept. 23, 1914. —My Lords,—s.v. *Sorfareren.* In view of the present situation, the directors of this company deem it their duty to disclose to you the following particulars in regard to the cargo of chrome ore on the above vessel, such cargo being undoubtedly intended for an alien enemy, and chrome ore being used in the manufacture of armour-plates. The vessel, which is a Norwegian sailing vessel, was tendered to us at Pangoumene, New Caledonia, by the Gesellschaft für Elektrometallurgique m.b.H., Nürnberg Knauerstrasse 10, Nürnberg (Germany), in fulfilment of a contract we entered into with them in Dec. 1913 to supply 3000/6000 tons of chrome ore f.o.b. Pagoumene. The quantity loaded is said to be 3855 tons, and the vessel left Pagoumene on the 9th June 1914 for Rotterdam. Under the terms of the contract, the price of the ore was payable as to half (approximately) on shipment and the balance on arrival at port of discharge in Europe, the exact value of the cargo being dependent on the chromium contents of the ore as ascertained by analysis on this side and its actual weight on arrival, exclusive of moisture. The provisional payment—amounting to 2987*l.* 12*s.* 6*d.*—was duly made on shipment, and, for our protection, pending receipt of the balance, the bills of lading were in the terms of the contract made out to our order and are now, together with the marine insurance policy, in our possession. Being interested in the cargo to the extent of the unpaid balance, which we estimate to be about 3700*l.*, we made inquiries from time to time as to the movements of the vessel, with a view to obtaining possession of the ore, and only recently heard that she arrived at Pernambuco on the 8th Sept., and was there ordered to proceed direct to Gothenburg, although the bills of lading are made out for Rotterdam. The charter-party, dated the 5th March 1914, stipulates, it is true, Rotterdam, Hamburg, or Gothenburg as the destination. So far as we know, however, there is no other cargo on board necessitating her calling at Gothenburg. In the event of your Lordships taking steps to seize the vessel and cargo as prize, and the cargo being condemned as contraband of war, we may lose the above-mentioned 3700*l.* My directors therefore beg that you will take into consideration our interest as above set forth and regard in a favourable light our efforts to prevent the ore falling into the hands of the enemy, and we should be glad to hear whether your Lordships could see your way to pay us out of the proceeds of the sale what would be due to us under normal circumstances and to give us the preferential right of buying the cargo. We hear, unofficially and incidentally, that the orders to the captain of the vessel are to proceed to Gothenburg by way of the North of Scotland. I would add that the vessel left Pagoumene on the 9th June 1914, so that she has taken about three months to get from there to Pernambuco, whither she went direct, so far as we know. If any further information is desired, I shall be happy to call at the Admiralty by appointment.—I have the honour to be your Lordships' obedient servant, (signed) H. W. C. DERMER, Secretary.—The Lords Commissioners, H.M. Admiralty, Whitehall, S.W.

The claim of the Chrome Ore Company Limited must be disallowed.

The other claimants to the cargo are the Swedish company, the Aktiebolaget Ferrolegeringer. Appearance was entered on their behalf on the 21st Dec. 1914. So far as the court has been informed, nothing was heard of the Swedish company in connection with the transaction, or with the German company until a couple of days before. The solicitors for the Swedish company wrote a letter on the 19th Dec. 1914 to the solicitors for the Chrome Ore Company Limited, in which they said: "Your clients were the vendors of certain chrome ore, of which our clients are the derivative purchasers."

According to their formal claim, which was made on the 28th Jan. 1915, the ground of their claim was that the German company acted in the purchase as the agents of the Swedish company. It was alleged in the claim that "by an instrument in writing dated the 29th Sept. 1914, the German company formally and solemnly placed on record the fact that the said cargo of chrome ore was bought by them at the request of and as agents for and on behalf of these claimants (the Swedish company) under an agreement made between them as early as the month of Oct. 1913, or thereabouts."

A copy of this document was produced. It purports to be a contract or agreement. It contains various terms (to which it is not necessary to refer in detail) which are entirely inconsistent with the agreement of the 13th Dec. 1913, for the purchase by the German company from the sellers. I doubt whether this contract or agreement was made on the date or dates given. The arrangement, whatever it was, is suspicious; it savours greatly of a scheme set afoot to try and show that the goods belonged to neutrals and not to enemy subjects. It purports to give effect to some agreement between the two companies of a year earlier, when, according to the account given by the managing director of the Swedish company, the two companies "were in very intimate connection with each other," in consequence of which no arrangement was made with the German company with reference to the price and the terms, "leaving it to the German company to act in the

best possible way, and, the purchase being made, afterwards to settle our mutual transaction."

An extraordinary document purporting to be dated the 31st Oct. 1914 was referred to as having passed between the German company and the Swedish company. I refrain from attempting to state its contents or its operation, and will accordingly set it out, in translation, in full:—

Nürnberg, Oct. 31, 1914.—Transfer.—Aktiebolaget Ferrolegeringer, Stockholm. According to the receipt issued by the firm of Chalas and Sons, Finsbury Pavement House, Finsbury-pavement, London, E.C., dated the 19th June 1914, we have against this firm a claim of 3987*l.* 12*s.* 6*d.* The above-mentioned claim we hereby transfer to you unconditionally and with full title. We have accordingly debited your account with the same amount.—Yours truly, Gesellschaft für Elektrometallurgie mit beschrankter Haftung.—Max Loewi, Dr. Forchheimer.

As already stated this amount consisted of a part payment of the purchase price to the sellers, and of a repayment of an advance made by the sellers to the ship. It is difficult to understand how it could be regarded as a claim against the sellers or their agents, Chalas and Sons, which could be transferred to the Swedish company.

No correspondence or accounts between the Swedish and the German companies relating to this or any similar business dealings have been produced. No satisfactory explanation has been given as to why the Swedish company wanted its goods shipped to Rotterdam, or as to why the destination was afterwards, and during the course of the voyage, changed to Gothenburg. In forming my judgment upon the facts I cannot come to any other conclusion than that the alleged agency was an invention, and that the pretended arrangement was made merely in order to attempt to cover up enemy goods by a transfer *in transitu* to neutrals.

As I intimated during the course of the trial, I accordingly disallow the claim of the Swedish company. I find that at the time of the capture the goods were enemy property belonging to the German company and destined for Germany.

It remains to be considered how they should be dealt with by this court. Art. 43 of the Declaration of London was referred to. As an article of the declaration it has no force, but it will be remembered that it was not excepted when the Order in Council adopted and applied with modifications and alterations some of the terms of the declaration. The article is as follows:

If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in art. 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband. A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities, or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

It will be observed that the vessel is personified, and the knowledge under consideration is that of the vessel. The *Sorfareren*, when encountered at sea, was aware of the outbreak of hostilities, but was not aware, or, at any rate, there was no evidence that she was aware, of the declaration of contraband affecting her cargo. The declaration of contraband was made on the 29th Oct. 1914. What is the meaning of the provision that the contraband in such a case cannot be condemned except on payment of compensation? Who has the right to claim compensation, or to resist condemnation without compensation? Of course, contraband may be not only carried on neutral vessels, but may also be the property of neutrals. The Declaration of Paris excepted contraband of war from the protection agreed to be afforded to enemy goods on neutral vessels, and to neutral goods on enemy vessels, even when the contraband goods were neutral property. The aim and object of these articles of the Declaration of Paris were the safeguarding in favour of neutrals of their shipping and their property. In my opinion art. 43 of the Declaration of London was not intended to save from condemnation contraband belonging to the enemy. If the article was construed strictly, it might be contended with some force that the only protection intended was in favour of neutral vessels against the consequences to them of the condemnation of the cargo or certain proportions of it. It is silent as to the effect of knowledge or want of knowledge of the contraband nature of the goods on the part of the owners of the goods.

I express no final opinion upon this point. But at the most I think that the article was only intended to give, and only does give, protection to neutrals whose goods were being carried at sea when their owners were unaware of the declaration of contraband, by awarding to them compensation on condemnation of their goods which were, in fact, although not with their knowledge, contraband at the time of capture. This is an intelligible extension in favour of neutrals of the provisions in their favour in the Declaration of Paris.

Having given the matter my best consideration, I decide that contraband belonging to the enemy remains liable to condemnation without compensation. It will be remembered that the report of the Drafting Committee to the Naval Conference, which consisted of representatives of Germany, the United States of America, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands, and Russia—which is generally known as Monsieur Renault's report—is declared by the Order in Council already mentioned to be an authoritative report, to which this court is directed to have regard. That report says as to art. 43: "This provision is intended to spare neutrals who might, in fact, be carrying contraband, but against whom no charge could be made."

This confirms me in the opinion that I have expressed, which, indeed, I should have formed, and did form, without reference to the report. If this opinion should not obtain the approval of the appellate tribunal, there are other grounds which I will state briefly, why in any event in this case

the contraband should be condemned without compensation. The first is, that compensation could only be given to the owners of the goods, and the owners, according to my decision, are not before the court to ask for it. And no claim having been made by the true owners within six months of the capture, the goods are subject to condemnation according to the Prize Rules. The other ground is, that even if the owners were before the court, their conduct would preclude them from obtaining an award for compensation from the court. I am prepared to decide that compensation should only be given to owners who acted not only in ignorance, but innocently and honestly, both in relation to the shipment and to the presentation of their claim and their case before the court. Here there has been, as I find, a dishonest attempt, in which the German company acquiesced and took part, to persuade the court that the German company only acted in the purchase as agents of a neutral company. This is not a case of honest mistake on their part. There is no place for error in such a simple business transaction and on such a pure question of fact. In thus deciding I conceive that I am acting in accordance with the old established principles of the court, which has consistently and effectively set its face against attempts to impose upon it—I shall not elaborate the principle by discussing the authorities. It is sufficient for me to refer in illustration of it to such cases as *The Odin* (1 Ch. Rob. 249), *The Eenrom* (2 Ch. Rob. 1), *The Rosalie and Betty* (2 Ch. Rob. 343), and *The Richmond* (6 Ch. Rob. 126).

For the reasons stated I pronounce judgment of condemnation against the cargo as lawful prize.

The shipowners have made a claim for freight for remuneration for the use of the ship or loss by delay, and for contribution from the cargo to alleged general average loss. As to the first head of claim I order a reference to the registrar and merchants to ascertain what ought to be paid in lieu of freight, according to the rule laid down in the case of *The Juno* (13 Asp. Mar. Law Cas. 15; 112 L. T. Rep. 471). As to the second head, as I intimated at the trial, there are no circumstances in this case upon the principles which the court applies to justify any part of the claim. Until a late date, according to the evidence, the shipowners' agents refused to allow the cargo to be discharged. It was not suggested that there had been any misconduct or unnecessary delay on the part of any of the authorities. As to the third head, the claim raises a question of principle which this court has not heretofore been called upon to decide. It is whether captors of cargo take it with the burden of a proportionate contribution to general average loss incurred before the capture.

Counsel for the shipowners stated that there was a general average loss arising from the vessel putting into Pernambuco. There are not sufficient facts before me to justify my expressing any definite opinion upon that point, but I entertain considerable doubt upon it. I do not, by dealing with the legal aspect of the claim in these prize proceedings, wish to encourage the shipowners to proceed with it. If they are advised to do so it will be at their peril as to costs, which would be deducted from any sum allowed in respect of freight. But assuming a general average loss to exist, and as the position of shipowners in such a case raises a question of general importance in regard to captures of cargo as prize, I will pronounce my opinion upon the principle of law involved.

I have dealt in other cases—*e.g.*, *The Marie Glaeser* (12 Asp. Mar. Law Cas 601; 112 L. T. Rep. 251; (1914) P. 218) and *The Odessa* (13 Asp. Mar. Law Cas. 27; 112 L. T. Rep. 473; (1915) P. 52)—with the general question affecting liens on ships and cargoes captured, and with the authorities relating to them in this and in other countries. I refrain from again traversing the same ground. The main distinction is between liens imposed by the general law of the mercantile world independent of any contract, and those which arise from private engagements or contractual relations between parties: (see *The Tobago*, Roscoe's English Prize Cases, vol 1, 456; 5 Ch. Rob. 218, *The Frances*, 8 Cranch. 418, and *The Carlos F. Roses*, 177 U. S. Rep. 655).

The nature of a claim for general average was described clearly by the Privy Council in the case of *Cleary* v. *McAndrew*; *cargo ex Galam* (2 Moo P. C. New Series 216) as follows: "On principle the claim for general average seems to stand on the same reason as freight. It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably. And for this claim the master who has incurred the expenses has a lien on the goods. It is a possessory lien at common law, by virtue of which he is entitled to hold the goods till his lien be satisfied." And the Privy Council decided that the claim for freight and general average stood upon the same footing and had the first right against the funds in court.

There is also a statement by Lord Stowell in a case of prize in *The Hoffnung* (Roscoe, vol. 1, 583; 6 Ch. Rob. 383) to the effect that cases of average on the part of the ship against the cargo were not infrequent in his time.

On principle it appears to me to be right that where a claim of general average by the ship against the cargo exists before the cargo is captured, the captors take *cum onere* of the cargo's contribution to the general average loss. On the assumption that the shipowners can establish a case of general average loss I order a reference to the registrar and merchants to assess the portion to be borne by the captured cargo, and order payment of the sum assessed, if any, out of the proceeds of the prize.

Leave to appeal.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the Chrome Ore Company Limited, *Ingle, Holmes, Sons*, and *Pott.*

Solicitors for the Swedish company, *Nicholson, Graham*, and *Jones.*

Solicitors for the agents of the shipowners, *Botterell* and *Roche.*

Nov. 4, 5, *and* 22, 1915.

(Before Sir S. T. EVANS, President.)

THE EUMÆUS. (*a*)

Prize—Neutral commercial domicil—English and German partners—Partnership established in Shanghai—Firm registered at German Consulate—Goods of firm—Consignment to Germany—Seizure at sea—British ship—Claim as prize—Status of firm—Condemnation of share of German partners—Conditions under which share of English partners liable to condemnation.

A partnership firm composed of British and German partners, and registered at the German Consulate at Shanghai, cannot acquire a neutral commercial domicil, but is on the same footing as a German firm established in Germany. The goods of such a firm are liable to condemnation as prize if captured at sea on board a British vessel, but the shares of the English partners in the goods will be released if satisfactory evidence is given showing that the English partners broke off their connection with the partnership business as soon as possible after the outbreak of war

THIS was a claim by the Crown for the condemnation as prize of a certain cargo of feathers, consigned by the firm of Arnhold, Karberg, and Co., of Shanghai, in the British steamship *Eumæus* to Bremen, in Germany. The firm was composed of four persons, two British and two German, and the partnership was registered at the German Consulate at Shanghai as a German firm, in accordance with the treaty stipulations between Germany and China. The two British partners lived at Shanghai, one of the German partners was resident in London, and the other was settled in Berlin. In the proceedings in the Prize Court the firm claimed the goods on the ground that they were the goods of neutrals, the partnership having acquired a neutral commercial domicil, and that there was no right to condemn them. There was also an alternative claim, on the ground that the shares of the respective partners were the property of British and neutral subjects respectively.

Maurice Hill, K.C. and *A. Neilson* for the Crown.

Stuart Bevan for the claimants.

Cur. adv. vult.

Nov. 22, 1915.—The PRESIDENT.—In this case the claimants describe themselves as Arnhold, Karberg, and Co., of Shanghai, in the republic of China, importers and exporters. Up to the time of the outbreak of the war between Great Britain and Germany they were a firm consisting of four partners—Harry Edward Arnhold, Charles Herbert Arnhold, Ernst Goetz, and Max Niclassen. The first two of these four are British subjects, the other two are Germans. The shares of the British subjects were 43 per cent., and those of the German subjects 57 per cent. in the partnership. The two British subjects had lived at Shanghai for a number of years. Goetz lived in London and various other places, and according to the terms of the deed of partnership he was to reside abroad at such places as Harry Edward Arnhold should direct. After the war he was interned in this country as a German. Niclassen lived in Berlin, and up to the date of the outbreak of war he attended to the business of the firm there. The claim was made on the footing that the business of the firm was carried on from Shanghai as the head office. The firm was registered at Shanghai in the German Consulate as a German firm. It was admitted that at the time of the seizure the goods seized, and now claimed, were the property of the firm at Shanghai.

The goods were claimed: (1) As the property of the Shanghai firm in a character of neutral subjects, and (2), alternatively, the shares of the respective partners were claimed as the property of neutrals and British subjects respectively.

As to claim (1), it was contended that the firm had a neutral domicil at Shanghai. As to claim (2), apart from the alleged commercial domicils, it was admitted that the two German partners were subjects of the German Empire, and that the other two partners were subjects of this country.

The claim has to be considered both from the point of view of the firm and of its constituent partners in reference to the law of prize.

As to the firm, it was contended that its trade was carried on in neutral territory, and that it ought therefore to be treated as a neutral house of trade, and that in consequence its property was exempt from confiscation by capture at sea or seizure in port. Assuming only for the purpose of dealing with this argument that the firm could be treated as a separate entity apart from its four members, it is conceded that it was a firm registered at the German Consulate in accordance with German law, and that so far as the business and assets or any of the partners were within the jurisdiction or control of the German Consular authorities in China, the firm was liable to be treated in all respects as subject to German law. The firm itself after the war broke out took up the position in reference to some British merchants that it was registered as a German firm, and that as such it was prohibited by the German authorities in Shanghai from carrying out its contracts with a British customer.

Shanghai is a treaty port in the East, and German merchants are, like the merchants of Great Britain and other countries, governed by the law of their own country in their commercial business carried on in that locality. I shall refer more particularly to the relationship of Europeans trading or resident in Oriental countries hereafter, when considering the question of the commercial domicil of subjects of Western States carrying on business at the present day in Eastern countries. Having regard to the establishment of registration of the firm of Arnhold, Karberg, and Co., in Shanghai, as a German firm subject to German laws under treaty with China, and with ex-territorial rights and privileges, I am of opinion that the firm should be treated in all matters relating to the jurisdiction of a Prize Court in time of war as if it was established in Germany itself. In other words, the business at Shanghai must be regarded as enemy business carried on in an enemy house of trade.

A similar result must, in my view, follow from a consideration of the position of the firm, not

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

as a separate entity, as was contended, but from the more accurate position of a partnership of the four individual partners. They, although subjects of different States, agreed to carry on the business in co-partnership in Shanghai, and as such were the joint owners, in varying shares or proportions, of the goods now claimed.

What were their individual national characters in relation to this business? Had such of them as were enemy subjects acquired commercial domicils in a neutral country, so as to give exemption to their property from confiscation *jure belli*? Had such of them as were British subjects acquired such a domicil as would protect them if engaged in business with enemy partners? Had the partners only joined in a house of trade entitled to be regarded as a neutral house of trade? Or were the British subjects partners in an enemy house of trade, with the obligations of withdrawing, and subject to the penalties of not withdrawing, in proper course on the outbreak of war?

The case of *The Indian Chief* (3 Ch. Rob. 12) was referred to as the great authority upon the doctrine of the immiscible character of merchants of western countries residing and carrying on trade in Oriental lands. For the spirit of the doctrine, discussed with such felicity, dignity, and wealth of language, that classical judgment will always be referred to. But it must be remembered that the case dealt with what was known as the "factory" system, which has long since passed away. The "factory" (to use the words of Sir Francis Piggott, ex-Chief Justice of Hong Kong) "was an establishment tolerated by the State in which it was set up, which, apparently for the convenience of all parties, was withdrawn, as well as all persons therein residing, from the operation of local laws." The law applicable to this archaic and obsolete system is that which was laid down by Lord Stowell in *The Indian Chief* (*ubi sup.*), and it is sufficiently stated in this passage from his judgment, at p. 28: "It is to be remembered that wherever even a mere factory is founded in the Eastern parts of the world, European persons trading under the shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on this commerce. It is a rule of the law of nations applying particularly to those countries. . . . In China, and I may say generally throughout the East, persons admitted into a factory are not known in their own peculiar national character; and, being not admitted to assume the character of the country, they are considered only in the character of that association or factory."

Since the days of *The Indian Chief* (*ubi sup.*) a vast change has come over the conditions of commerce between Western and Eastern States. Sir William Scott quoted the line *Doris amara suam non inter-miscuit undam*. But the sea, never changing, and yet ever changing within the limits set to the waters, has ceased to be a separating influence between distant lands in times of peace, especially since the advent and with the development of steam transit. It has rather become a means of union than of separation in the world of commerce. And Eastern nations have long grown out of the state of necessity for the factory system. Commerce has been fostered and the great States of the East have been willing to grant to subjects and citizens of the European nations exterritorial privileges of an extensive kind under treaties and otherwise, which relieve those to whom they are granted from obedience to the laws of the Oriental States in which they reside and carry on business; and permit them to be governed, more especially in relation to their commerce, by the laws of their own States.

Under treaty, China has accorded the rights and privileges of exterritoriality to the chief European States. In Shanghai there is a British Supreme Court. In other parts of China there are the usual Consular Courts. It is not necessary to give any details of the privileges. The British communities are now regulated by the China and Korea Order in Council of 1904. Similar regulations exist for other European countries, including Germany; and it may be stated shortly that the effect of these is that not only are the respective European communities governed by their own national laws among themselves, but that the Chinese authorities are precluded from exercising any authority in any disputes between the subjects or citizens of the European States respectively, and other foreigners. Every British subject is required to register himself annually in the prescribed Consulate (see China Order in Council, s. 163). The subjects of other States have to do likewise. As one writer has said: "The register is essential in order that the protecting duties of the Minister may be properly exercised; it would be essential even if there were only the national and the British communities; it is ten times more important when the foreign community is composed of many nationalities. If the sheep upon the mountains are not marked, how shall the shepherds know their sheep?"

In the present case the two British subjects registered themselves in the British Consulate. They appear, however, to have been prevailed upon to allow the firm to be registered in the German Consulate as a German firm. This has been explicitly stated in the affidavits in the present case. The fact and the results were more fully stated in an affidavit by the chief partner, Mr. Harry E. Arnhold, in certain prize proceedings in the Colonial Prize Court of Alexandria in the s.s. *Derfflinger* (cargo ex) as follows:

> The firm of Arnhold, Karberg, and Co., for the purposes of its business in China, has been and remains registered at the German Consulate General at Shanghai, in accordance with German law, as a German firm, and, so far as the business and assets or any of the partners in the said firm are within the jurisdiction or control of the German consular authorities in China, the said firm is liable to be treated in all respects as subject to German law. In particular, the said German consular authorities will not, so far as their jurisdiction extends, permit the said firm to be dissolved, or wound up, or its property or assets to be dealt with in derogation of the rights of the German partners in the firm, and will not permit the British partners to take over the property and assets of the said firm, or to carry on its business otherwise than for the benefit of all partners in the firm.

That was the character which the partners, by their action, gave to the firm. In this case I am

not called upon to express any opinion upon the question whether at the present day a British subject can acquire a civil domicil in an Oriental country like China. In *Re Tootal's Trusts* (48 L. T. Rep. 816; 23 Ch. Div. 532) may or may not be good law. It has been much criticised by jurists and has recently been dissented from in a judgment of the Supreme Judicial Court of Maine in *Mather* v. *Cunningham* (105 Maine Reports 326; 74 Atlantic Reporter 809). The decision in the case now before the court does not involve that question. Neither of the British partners claim to have acquired such domicil. They assert their British citizenship. The two German partners likewise do not seek to renounce their German domicil.

Nor is it necessary to pronounce a decision upon the general question whether for purposes of the law of prize a commercial domicil can be acquired by Europeans in Eastern countries. I think it must depend upon circumstances. For instance, it is difficult to find any good reason why a British subject might not have a commercial domicil in a country like Japan, where consular jurisdiction and exterritorial privileges have been abolished for some years. Domicil is a term which eludes scientific definition. But the definition of Profes or Dicey of commercial domicil as "such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it therefore reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country" (Dicey's Conflict of Laws, 2nd edit., p. 742) is sufficiently clear and accurate for practical purposes.

Neither of the German partners was resident in Shanghai. One of them had his residence in Berlin. The latter's share of the goods claimed would therefore be liable to capture and confiscation as prize in any event, even if the partnership constituted a neutral house of trade. The former's share is also confiscable as belonging to an enemy, as he did not reside where it is suggested he might have acquired a commercial domicil. In any event, having regard to the exterritorial conditions of European traders in Shanghai, I am of opinion that neither of the partners, British or German, did acquire, or could have acquired, a neutral commercial domicil in Shanghai in the circumstances of the present case.

I have already stated that the partnership, which was registered as a German firm under the exterritorial privileges granted to Germany, cannot be said to be a neutral house of trade in Shanghai. I fail to see how the business can be regarded except as an enemy concern. It is in my view to be treated as an enemy house of trade, just as much as if the German authorities and community under and among which it was established were within a German colony or within the precincts of Germany itself.

This being so, I condemn the 57/100 shares of Goetz and Niclassen in the goods as enemy property to be forfeited to the Crown as droits of Admiralty.

Whether the 43/100 shares of H. E. Arnhold and C. H. Arnhold should be condemned depends upon whether they took proper steps in due time to dissociate themselves from the business. Unfortunately, the facts placed before the court as to what part, if any, they took in the firm's business since the war are meagre, and the matter is left in doubt even upon their own showing. The second affidavit of C. H. Arnhold states that he and his brother "in the month of May 1915 both ceased to have anything to do with or to take any part in the affairs of the business of Arnhold, Karberg, and Co. at Shanghai or elsewhere in China." It is explained that they started a business of their own in Jan. 1915, and that from January they only collected assets and paid the liabilities of the old firm's business. They appear to have been in some communication with the British Board of Trade. The period from the 4th Aug. 1914, the date of the outbreak of war, to Jan. 1915 is not illuminated by any evidence.

The Procurator-General relied upon a letter of the 25th Sept. 1914, written in the name of the firm to Weis and Co. I ascertained that the letter was written by Goetz. I do not think that that letter is sufficient to show that the British partners continued to take part in the business. Mr. Bevan, for the claimants, said he would tender Mr. C. H. Arnhold as a witness, but he was not called.

In this state of the evidence I do not propose to pass final judgment as to the shares of the British partners. If on further investigation by the Procurator-General he is satisfied that they did not continue to carry on the business in conjunction with their German partners after the war in such a way as to subject their shares to risk of confiscation, an application can be made to the court to release the shares to them. If otherwise, then H. E. Arnhold and C. H. Arnhold must produce evidence before the court within a reasonable time to explain what they did to break off their connection with the business after war began.

I accordingly give the Procurator-General and Messrs. H. E. and C. H. Arnhold liberty to apply as to the separate shares of the latter.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Coward* and *Hawksley, Sons,* and *Chance.*

Thursday, Oct. 28, 1915.

(Before Sir S. T. EVANS, President.)

THE GERMANIA. (*a*)

Enemy ship—Private yacht of alien enemy—Outbreak of war—Seizure in port—Hague Convention 1907—*Convention VI., art.* 1—*"Merchant ship"—Non-applicability of Convention to private yacht—Condemnation—Repairs to yacht after seizure—Indulgence of Crown—Position of Germany as to Hague Convention.*

By the Hague Convention 1907, *No. VI., it is stated* (inter alia), *in art.* 1, *that it is desirable that any merchant ship belonging to one of the belligerent Powers which is in an enemy port at the commencement of hostilities should be*

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

allowed a certain number of days, if necessary, to depart to its port of destination, or to any other port indicated to it.

A racing yacht, the private property of a German subject, was in a British port at the time of the outbreak of the war between England and Germany on the 4th Aug. 1914. *It was seized and an order for detention was made. After the seizure, leave was given for certain repairs to be executed upon it to prevent the deterioration in value of the vessel; but it was expressly stipulated that the contractors were to have no lien or claim as against the marshal in respect of the costs of such repairs. The Crown subsequently asked for the condemnation of the yacht, and claims were then put in against the Crown for the sums expended in repairs.*

Held, that a racing yacht was not a merchant ship so as to be entitled to the privileges accorded by the Hague Convention 1907, *No. VI., art.* 1, *and was therefore lawful prize as having been seized in a British port after the declaration of hostilities.*

Held, also, that apart from any indulgence on the part of the Crown, there was no legal claim for the sums expended in repairs to the yacht subsequently to the date of seizure.

Owing to the acts of Germany since the outbreak of war, in violation of the terms of the Hague Convention to which she was a party, it is doubtful whether she can demand their observance by any of her belligerent enemies.

THIS was a case in which the Crown asked for the condemnation of the yacht *Germania*.

The *Germania* was a steel racing yacht of the estimated value of 45,000*l*., the property of a German subject, Herr Gustav Krupp von Bohlen, and arrived at Cowes, in the Isle of Wight, on the 27th July 1914, with the idea of taking part in the Cowes Regatta. War broke out between Great Britain and Germany on the 4th Aug. 1914, and two days later the yacht was seized. A writ was issued on the 26th Aug., and on the 24th Sept. an order was made by the Prize Court for the detention of the vessel, pending an inquiry as to its status under the Hague Convention. The Crown now asked that the order for detention should be superseded by an order for condemnation.

Between the date of seizure and the date of the detention order, an application had been made by the agent of the owner, Baron von Bulow, at present interned in England, that certain repairs should be executed in order to prevent a deterioration in value of the vessel, and permission was given to dry-dock and paint the yacht. When the permission was granted, however, there was an express stipulation that the work to be done was to be at the expense of the claimant, and that the contractors were to have no lien or claim of any kind as against the Admiralty marshal.

By the Hague Convention 1907, No. VI., it is provided:

Art. 1. When a merchant ship belonging to one of the belligerent Powers is, at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it.

The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war, and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

The *Solicitor-General* (Sir F. E. Smith, K.C.) and *A. B. Marten* (for *G. T. Simonds*, at present serving with His Majesty's forces) for the Crown. —There was no ground for contending that the *Germania* was protected by the terms of the Hague Convention. The Convention dealt and was intended to deal solely with merchant vessels —*navires de commerce*. The yacht should therefore be condemned as lawful prize. As to the claims put forward by Messrs. Ratsey and Lapthorn Limited and Messrs. Pascall, Atkey, and Son Limited, these were in respect of work done and materials supplied before the outbreak of war. The Crown did not admit any liability as to these, but was prepared, as an indulgence, to allow that the claims should be referred to the registrar and merchants for assessment. As to the claim of Messrs. Summers and Payne Limited, this was in respect of necessaries supplied and moneys advanced. The claimants by their affidavit had contended that they had a lien on the yacht for the amounts expended, on the ground that what had been done was necessary for the preservation and maintenance of the *Germania*. Such a claim had been entirely disposed of by the judgment of the court in the case of *The Marie Glaeser* (12 Asp. Mar. Law Cas. 601; 112 L. T. Rep. 251; (1914) P. 218), in which it was laid down that liens, whether in favour of a neutral on an enemy's ship or in favour of an enemy on a neutral ship, were equally to be disregarded in a Prize Court.

Raeburn, for the claimants, Messrs. Ratsey and Lapthorn Limited and Messrs. Pascall, Atkey, and Son Limited, assented to the course proposed by the Solicitor-General.

Bateson, K.C. and *Dunlop* for Messrs. Summers and Payne Limited and for Baron von Bulow. —The yacht ought not to be condemned. It was true that it did not fall within the category of merchant vessels; but as being a racing yacht it could not be contended that it possessed any naval or military value. Vessels of this kind had not been specially mentioned in the Hague Convention, but it was certainly a principle underlying the Convention that pleasure vessels like the *Germania* should be allowed to depart without molestation on the outbreak of hostilities: (see Westlake's International Law. Part 2, War, 2nd edit., pp. 42 and 43; and Pitt Cobbett's International Law, Part 2, War, p. 167). If the yacht was condemned, Messrs. Summers and Payne Limited ran the risk of losing all the money which they had expended. Before the outbreak of war they had done work to the extent of about 176*l*., and had advanced 400*l*. for the payment of wages. And since the seizure of the yacht a further sum of about 252*l*. had been expended on dry-docking, painting, &c. [THE PRESIDENT.—You are basing your claim upon the Hague Convention. I am not sure that a serious question may not arise some day as to the alleged violation of the Hague Convention. Germany was a party to the Convention. But when there is a contract between States, as between individuals, its terms must be observed

by both sides, and someone may have one day to consider whether or not Germany, on account of her conduct during the war, has placed herself in such a position that she will be disentitled to complain of any violation of it.] The claimants had a lien upon the yacht for the work done, which ought to be allowed.

The *Solicitor-General* in reply.—Any claim for a possessory lien was disposed of by the judgment in *The Marie Glaeser* (*ubi sup.*). Without admitting any liability, the Crown was prepared to agree to a reference to the registrar and merchants as to the 176*l.* in respect of the work executed before the outbreak of war, and as to the 252*l.* for dry docking and painting subsequently to the seizure.

The PRESIDENT.—In this case the Crown asks for the condemnation of the German yacht *Germania*, which was, at the outbreak of hostilities between this country and the German Empire, the property of a German subject, Herr Gustav Krupp von Bohlen. The yacht arrived at Cowes in the month of July 1914, and when war broke out on the 4th Aug. 1914 it was seized by the Customs authorities on behalf of the Crown as a droit of Admiralty. A writ was issued in prize on the 26th Aug., and a month later, on the 24th Sept., an order was made by this court for its detention. That order was not a final one, and the present application is that the order then made should be extended by another order—namely, that the yacht should be condemned as enemy property.

The yacht is a racing yacht, and it is quite clear that it does not come within the terms of the Hague Convention, No. VI., which, according to the preamble, is a Convention dealing only with matters relating to commerce, and is intended to protect those vessels only which are engaged in commerce. The words used in describing the vessels to which the Convention applies are, in the authoritative French language, *navires de commerce*, and Mr. Bateson has not suggested—indeed, no one could suggest—that the yacht comes under these terms. It is perfectly clear, therefore, that there can be no defence whatever to the application for the condemnation of the vessel on the ground of the Hague Convention. It has been urged that according to the spirit of the Hague Convention this yacht ought not to be regarded as liable to confiscation, and ought not, therefore, to be condemned. I do not see how I can deal with the matter otherwise than according to the principles of ordinary law, and according to ordinary law this vessel, the property of a German subject, being in port at the time of the outbreak of hostilities, is clearly liable to be confiscated. I therefore condemn it as a droit of Admiralty as belonging to an enemy subject and as being enemy property.

There is a claim put forward by Messrs. Summers and Payne Limited on account of certain work executed upon the yacht before the date of seizure—that is, towards the end of July 1914. Their claim amounted to about 176*l.* There had also been other work done by them to the yacht subsequently, and they have housed some of its fittings. It was expressly arranged, however, as to the later work that the claimants should not look to the marshal for any reimbursement of the sums expended in keeping the yacht from deterioration, but that the work must be done at their own risk, and that if any claim was to be made it must be against the owner of the yacht at some future time. In other words, it was made perfectly clear that whatever sums were expended were not to be the foundation of any claim either against the marshal or against the Crown. So far as the housing of the yacht is concerned and the protection of the various parts of the yacht, the suggestion that this should be done came from Messrs. Summers and Payne, in their letter of the 9th Oct. 1914 to the Customs authorities of Southampton: "Will you permit us to suggest that the topsails, rigging, and blocks of this yacht, main gaff, spinnaker boom, and boats be brought on shore and housed with other gear which we have belonging to this yacht? The *Germania* is a very high-class racing yacht, and if neglected will very quickly deteriorate. We already have an account against the yacht. The owner is an old and esteemed customer, and we should be prepared to do this work, as we feel sure we should receive the cost from him, when, at the end of the war, matters of ownership are settled." Subsequently the suggestion was acceded to by the marshal, but upon the distinct understanding that there was to be no liability on his part. There were also certain other sums expended. I should have been prepared on legal grounds to decide against the claim which Messrs. Summers and Payne have put forward, but I am not sorry that the legal advisers of the Crown have met Messrs. Summers and Payne, and that an arrangement has been arrived at between them that a reference shall be had by consent, without raising any question of legal obligation at all, to the registrar to ascertain what sum ought to be allowed in respect of the claims for 176*l.* and 252*l.* respectively, which have been put in by Messrs. Summers and Payne. This will dispose of their claim against the captors and against any other person connected with this court; but of course it does not prevent them from prosecuting any claim which they may have against the owner of the yacht. I venture to express a hope that at some future time whatever money has been expended by the claimants they may recover, but, so far as this court is concerned, no assistance can be given beyond what is granted to them by the consent order.

The order of the court is that the yacht be condemned as enemy property, and that it be sold by the marshal.

Order for condemnation and sale of yacht.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the claimants, *Kenneth Brown, Baker, Baker,* and *Co.*

Solicitors for the owner, *Lowless* and *Co.*

Judicial Committee of the Privy Council.

Nov. 22, 23, 24, *and Dec.* 15, 1915.

(Before Viscount HALDANE, Lord PARMOOR, and Lord WRENBURY.)

UNION INSURANCE SOCIETY OF CANTON *v.* GEORGE WILLS AND CO. (*a*)

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australia—Marine insurance—Floating policy—Declaration as to interest—Warranty—Commonwealth Marine Insurance Act (*No.* 11 *of* 1909), *ss.* 35 *&* 39.

The respondents effected a contract of marine insurance in Western Australia with the appellants, by which they insured all shipments of goods between a large number of ports against usual marine risks. The contract, which was treated as a floating policy throughout the proceedings, contained this clause: Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches."

The respondents sued to recover a total loss of a shipment of goods as to which they had made a declaration of interest, but not as soon as possible after the vessel sailed. There was, however, no suggestion that the delay arose from want of good faith on their part.

Held, allowing the appeal, that the condition as to the making of declarations amounted to a promissory warranty within sect. 39 *of the Commonwealth Marine Insurance Act* 1909 (*which is similar in terms to sect.* 33 *of the Marine Insurance Act* 1906), *and as it affected the question of reinsurance it constituted a substantive condition of the contract, the failure of the respondents to comply with it disentitled them to recover in respect of the loss.*

APPEAL from a judgment of the Supreme Court of Western Australia dated the 13th July 1914, affirming a decision of McMillan, C.J. in an action raised by the present respondents against the appellants which raised the question whether a promise to make a declaration of interest as soon as possible after the sailing of the vessel to which interest attached was a warranty in the marine insurance policy.

The facts are fully stated in the judgment.

Leck, K.C. and *Raeburn* for the appellants.

Sir *Robert Finlay*, K.C., *Leslie Scott*, K.C., and *Mackinnon*, K.C. for the respondents.

The following authorities were cited during the argument in addition to those referred to in the judgment:

Behn v. *Burness*, 1 Mar. Law Cas. O. S. 178, 329; 8 L. T. Rep. 207; 3 B. & S. 751;
Harman v. *Kingston*, 3 Camp. 150;
Stoneham v. *Ocean Railway and General Accident Insurance Company*, 57 L. T. Rep. 236; 19 Q. B. Div. 237;
Barnard v. *Faber*, 68 L. T. Rep. 179; (1893) 1 Q. B. 340;
Imperial Marine Insurance Company v. *Fire Insurance Corporation*, 4 Asp. Mar. Law Cas. 71; 40 L. T. Rep. 166; 4 C. P. Div. 166.

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

The considered judgment of their Lordships was delivered by

Lord PARMOOR.—On the 28th Feb. 1911 the respondents effected a contract of marine insurance with the appellants, which was issued by their office at Perth in Western Australia. This contract has been treated throughout the proceedings as a policy, and it covered all shipments of merchandise of every description commencing to load at first port of loading, on or before the 28th Feb. 1912, with the exception of full cargoes, at and from certain specified ports. There are differing rates of premium, but the rate applicable in the present instance was 10*s.* per cent. The policy contains a clause:

> Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches.

The ship *Papanui* sailed from ports Liverpool, Glasgow, Avonmouth, and London, leaving London on the 21st Aug. 1911. The respondents loaded cargo at each of these ports. On or about the 12th Sept. 1911 the *Papanui* was destroyed by fire at or near St. Helena, and all the respondents' goods were totally lost. The respondents did not forward a declaration of interest as soon as possible after sailing of the vessel, but there is no suggestion of any want of good faith on their part, or that the reasons assigned by them for the delay are not genuine. The declaration of interest was forwarded on the 13th Sept. 1911, the day after the loss of the vessel.

By their writ issued on the 12th Feb. 1912 the respondents claim the sum of 5225*l.* for a loss under the policy. In their defence the appellants plead that the policy contained a condition or promissory warranty that a declaration of interest should be made, and that such declaration was not made as soon as possible after the sailing of the steamship *Papanui*. Alternatively they counterclaimed for damages, but this point was not argued before their Lordships, and it is unnecessary to refer further to it. The Acting Chief Justice of Western Australia gave judgment in favour of the respondents, and this judgment was affirmed by the Full Court of the Supreme Court of Western Australia on the 13th July 1914.

The question to be determined in this appeal is, whether the promise by the assured to make a declaration of interest as soon as possible after sailing of the vessel is a warranty, as that word is used and understood in the law of marine insurance, or a collateral stipulation, the breach of which would not avoid the contract, but would only found a right to bring a cross-action, or to counter-claim, for damages. If the promise amounts to a warranty it is immaterial for what purpose the warranty is introduced. The parties had a right to determine for themselves if they desired to introduce a warranty clause as a term of the policy. It has long been established in the common law of England that there is no liability on the insurer unless a warranty is exactly complied with. This principle is made statutory by sect. 39 of the Commonwealth Marine Insurance Act, No. 11, 1909, which corresponds with sect. 33 of the English Act 1906. This section enacts that a warranty,

as therein defined, is a condition which must be exactly complied with, whether it be material to the risk or not, and that if it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from his liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date. Sub-sects. (1) and (2) of the same section enact that a warranty, in the following sections, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts, and that it may be expressed or implied. This provision does not operate to bring within the category of warranty, promises which in the construction of the contract are not intended by the parties to amount to warranties. In the present policy the assured undertakes to do a particular thing—namely, to make a declaration as soon as possible after the sailing of a vessel, and the question is whether this undertaking amounts to a warranty. An express warranty may be in any form of words from which the intention to warrant can be inferred.

The policy is an open or floating policy under which the liability of the insurers in the first instance attaches before the sailing of the vessel, and therefore at a time before the declaration of interest is due to be made. It was referred to as "a warehouse to warehouse policy," but in any case it is clear that the declaration of interest is not a condition precedent in the sense that a non-compliance therewith vitiates the whole policy *ab initio*. If, for instance, the merchandise insured had been destroyed by fire in port before the sailing of the vessel, the promise to make a declaration after the sailing of the vessel would not avoid the policy, and the insurers would be liable, if in other respects the conditions of the policy had been complied with. A condition, however, is not the less a warranty because it is a condition subsequent, and, unless such a subsequent condition is complied with at the time when its performance is due under the contract, the insurer is discharged from liability as from the date of the breach. Their Lordships have already referred to sect. 39 (3) of the Commonwealth Marine Insurance Act, No. 11, 1909, which affirms the common law principle that this discharge is without prejudice to any liability incurred by the insurer before that date. This provision does not apply in the present case, since no liability had been incurred before the date at which the declaration of interest was due to be made.

In the present policy the word "warranty" is not used, but their Lordships are of opinion that, on the construction of the contract as a whole, the parties did intend that the promise to make a declaration as soon as possible after sailing of the vessel should be a warranty, and that, in the events that have happened, there is no liability upon the insurers. There is no difficulty in construing the terms of the promise which the assured have made, and there is no question that this promise has not been complied with. The object of the promise is to protect the interests of the insurer. The question arises whether this object is so material to the risk, and has such a material bearing on the bargain, that it forms a substantive condition of the contract as contrasted with a collateral stipulation for the breach of which damages—if they could be proved—might be claimed by cross-action or by way of counterclaim. If evidence is necessary, the underwriter of the appellants in London, whose evidence was taken on commission, states that the insurers can only arrive at their line of insurances if the declarations of interest are promptly made, and that this information is required to enable insurers to regulate what line they wish to keep, and what amount they may desire to reinsure, and that the amount of line varies very much by particular vessels. It is true that insurers are automatically protected by handing on to other people the excess of liability beyond a certain amount by a class of steamers; but this does not affect their practice of further reducing the amount of their liability in respect of special vessels by effecting special reinsurances. It was suggested that the business might be carried on in some different way which would render the promise to make prompt declarations of less materiality, but the witness denied that the suggestion was practical, and there is no reason for thinking that the business is not carried on according to business experience, so as to avoid, as far as possible, unnecessary risks. It is immaterial to the construction of the contract to consider subsequent events. The intention of the parties must be gathered from the language of the contract, the subject-matter and the circumstances in existence at the time it was made. It appears to their Lordships that the declaration did directly affect the question of reinsurance, and in this respect was clearly material to the risk and constituted a substantive condition of the contract. It follows that the non-fulfilment of the warranty discharges the insurer from liability as from the date of the breach, and that the insurer is not relegated to such remedy as might be open to him by way of cross-action or counterclaim.

A number of cases were referred to in the course of the argument before their Lordships, but it is only necessary to refer to three of them. It is unnecessary to analyse them in detail, since they mainly depend on the terms of the particular policy on which the litigation has arisen. In *Thomson* v. *Weems and others* (9 App. Cas. 671) the question arose, on a life policy, whether the policy was void on a warranty. Lord Blackburn, in giving his opinion, makes the following general statement of law: "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material. In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, *primâ facie*, at least that the

compliance with that warranty is a condition precedent to the attaching of the risk."

There is no difference in principle in this respect between a statement of fact and an undertaking that some particular thing shall be done. Their Lordships have already stated their opinion that the promise to make a declaration as soon as possible after sailing of a vessel is a matter bearing upon the risk, and therefore a warranty within the opinion expressed by Lord Blackburn.

Counsel for the respondents referred at some length to the case of *Davies and another* v. *National Fire and Marine Insurance Company of New Zealand* (65 L. T. Rep. 560; (1891) A. C. 485). In this case it was held that under the terms of the contract two declarations were necessary, and their Lordships cannot find that it supports in any way the contention put forward on behalf of the respondents.

In the case of *Stephens* v. *Australasian Insurance Company* (27 L. T. Rep. 585; L. Rep. 8 C. P. 18), it was held that in accordance with the custom therein stated, and according to the usage of merchants and underwriters as recognised by the courts without formal proof in each case, a declaration of interest, which it is the right of the assured to make without the consent of the underwriters, may be altered even after the loss is known, if it be altered at a time, when it can be, and is, altered innocently and without fraud. This principle is now recognised by statute in sect. 35 (3) of the Commonwealth Marine Insurance Act, No. 11, 1909, and in the corresponding sect. 29 (3) of the English Act:

> Unless the policy otherwise provides, the declarations must be made in order of despatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

The provision that an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration has been made in good faith, does not apply to the circumstances which exist in the present appeal. It is not a case of omission or error in a declaration which may be rectified even after loss or arrival if there is good faith, but a case in which no declaration has been made within the terms of the contract. To extend the provision to a case like the present would be in effect to deprive the insurers of the benefits of an express warranty in such cases and to abrogate the principle that the insurers are not liable unless the warranty has been exactly complied with.

Their Lordships will humbly advise His Majesty to allow the appeal with costs here and in the courts below, and that judgment be entered for the appellants.

Solicitors for the appellants, *Sharpe, Pritchard, and Co.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 9, 13, *and* 14, 1915.

(Before SWINFEN EADY, BANKES, and WARRINGTON, L.JJ.)

ARNHOLD KARBERG AND CO. *v.* BLYTHE, GREEN, JOURDAIN, AND CO. LIMITED.

THEODOR SCHNEIDER AND CO. *v.* BURGETT AND NEWSAM. (*a*)

APPEALS FROM THE KING'S BENCH DIVISION.

Contract—C.i.f.—Tender of bill of lading with or without policy of insurance after outbreak of war—Buyers not bound to accept.

Certain goods were sold under a c.i.f. contract before the outbreak of war between Germany and this country to be shipped in a German ship from China to Naples. The sellers and buyers were both English firms. The price was to include freight as per bill of lading and insurance, payment net cash in London on arrival of goods at port of discharge in exchange for bill of lading and policies; but payment to be made in no case later than three months from date of bill of lading. The goods were shipped before the war, after which the vessel took refuge in a neutral port. The sellers sought to recover (in one case) on a tender of a German bill of lading and an English policy of insurance and (in another case) on a tender of a German bill of lading and German policy of insurance.

Held, that the documents were not such as the sellers were entitled to tender to obtain payment of the price of the cargoes shipped, the documents at the date of the tender not being valid and effective; and that therefore the sellers were not entitled to recover payment of the goods against the documents.

Decision of Scrutton, J. (13 *Asp. Mar. Law Cas.* 94; 113 *L. T. Rep.* 185) *affirmed.*

ARNHOLD KARBERG AND CO. (sellers) *v.* BLYTHE, GREEN, JOURDAIN, AND CO. LIMITED (buyers).

BOTH sellers and buyers were English firms.

The sellers sold to the buyers on a c.i.f. contract a quantity of horse beans to be shipped from China to Naples.

In July 1914 the beans were shipped on the German steamer *Gernis* for conveyance to Naples, the bills of lading being dated the 6th and 11th July respectively.

At the end of July the buyers insured part of the cargo against war risk; the remainder neither buyers nor sellers were able so to insure.

A declaration of one shipment was made on the 29th July and a provisional invoice was sent to the buyers on the same day.

The receipt of the declaration was confirmed by the buyers on the 13th Aug.

A declaration of the other part was made on the 1st Aug.; the provisional invoice was sent on the 12th Aug.; and receipt of the declaration was confirmed by the buyers on the 13th Aug.

On the 11th Oct. the German bills of lading and an English policy of insurance were tendered to the buyers, who refused to pay.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

The *Gernis* was in a port of refuge in the Dutch East Indies.

The question arose whether the sellers were entitled to payment against such documents at the expiration of three months from the date of the bills of lading.

Theodor Schneider and Co. (sellers) *v.* Burgett and Newsam (buyers).

Both sellers and buyers were English firms.

The sellers sold to the buyers on a c.i.f. contract a quantity of horse beans for shipment from China to European ports.

In July the sellers shipped beans in accordance with the contract by the German steamer *Camilla Rickmers* from Shanghai to Rotterdam, the bill of lading being dated the 21st July 1914.

Apparently no war insurances was effected.

On the 24th Aug. the sellers sent a declaration of the shipment to the buyers, who acknowledged receipt.

The court was not informed as to the date of provisional invoice.

On the 21st Oct. the sellers tendered to the buyers a German bill of lading and a German policy of insurance.

The buyers refused to pay.

The *Camilla Rickmers* was in a port of refuge in the Philippines.

The only differences between the two cases were that in *Karberg's* case the policy was English, while in *Schneider's* case it was German, and that in the former case two declarations and one provisional invoice were before the outbreak of the war, while in the latter case neither declaration nor provisional invoice was before the outbreak of the war. In both cases the acknowledgment of receipt of declaration was after the outbreak of the war.

It was decided by Scrutton, J. (13 Asp. Mar. Law Cas. 94; 113 L. T. Rep. 185) that after the outbreak of war the sellers in both cases were not entitled to tender either the German bill of lading or the German bill of lading and the policy of insurance and to recover the price of the goods.

From that decision the sellers in both cases respectively now appealed.

George Wallace, K.C. and *Stuart Bevan* for the sellers in the first case; *Maurice Hill*, K.C. and Hon. *Malcolm Macnaghten* for the buyers.

R. A. Wright for the sellers in the second case; *Raeburn* for the buyers.

The following authorities were referred to in the course of the arguments:

Sanday and Co. v. *British and Foreign Marine Insurance Company Limited*, 13 Asp. Mar. Law Cas. 116; 113 L. T. Rep. 407; (1915) 2 K. B. 781, at p. 788;
Parker v. *Schuller*, 17 Times L. Rep. 299;
Biddell Brothers v. *E. Clemens Horst Company*, 103 L. T. Rep. 661; (1911) 1 K. B. 214; reversed on appeal, 12 Asp. Mar. Law Cas. 1; 104 L. T. Rep. 577; (1911) 1 K. B. 934; reversed on appeal, *sub nom. E. Clemens Horst Company* v. *Biddell Brothers*, 12 Asp. Mar. Law Cas. 80; 105 L. T. Rep. 563; (1912) A. C. 18;
Groom Limited v. *Barber*, 12 Asp. Mar. Law Cas. 594; 112 L. T. Rep. 301; (1915) 1 K. B. 316;
Orient Company Limited v. *Brekke and Howlid*, 108 L. T. Rep. 507; (1913) 1 K. B. 531;
Tregelles v. *Sewell*, 7 H. & N. 574;
Shipton v. *Thornton*, 9 Adol. & Ell. 314;
Esposito v. *Bowden*, 7 Ell. & Bl. 763;
Taylor v. *Caldwell*, 3 B. & S. 826;
Ireland v. *Livingston*, 1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 E. & I. App. 395;
Janson v. *Driefontein Consolidated Mines Limited*, 87 L. T. Rep. 372; (1902) A. C. 484;
Landauer and Co. v. *Craven and Speeding Brothers*, 12 Asp. Mar. Law Cas. 182; 106 L. T. Rep. 298; (1912) 2 K. B. 94, at p. 105;
Duncan, Fox, and Co. v. *Schrempft and Bonke*, 12 Asp. Mar. Law Cas. 591; 112 L. T. Rep. 298; (1915) 1 K. B. 365;
Sanders Brothers v. *Maclean and Co.*, 5 Asp. Mar. Law Cas. 160; 49 L. T. Rep. 462; 11 Q. B. Div. 327.

Swinfen Eady, L.J.—In these cases there are two appeals from the judgment of Scrutton, J. upon cases stated by arbitrators. There was an arbitration between sellers and buyers, and the learned judge decided in favour of the buyers that they were not obliged to pay against the documents tendered, and from that judgment the sellers now appeal.

The two cases before us closely resemble each other. But there are one or two points of difference. I think perhaps that it will be convenient to deal first with the case of *Arnhold Karberg and Co.* v. *Blythe, Green, Jourdain, and Co.*, and then to mention the respects in which the second case differs from the first.

In the case of *Arnhold Karberg and Co.* v. *Blythe, Green, Jourdain, and Co.* the question arises upon two contracts made for the sale of 200 tons of China horse beans. They are c.i.f. contracts in the form approved by the London Corn Trade Association for use in Chinese and Manchurian cereal transactions. One is a contract in a printed form whereby the sellers, Arnhold Karberg and Co., of China, agreed to sell to Blythe, Green, Jourdain, and Co., of London, about 100 tons, of 2240lbs. English, of China horse beans. The two contracts related to 100 tons each, but they are both in the same form.

Then there is a provision for a small deficiency or a small excess. Then follow certain stipulations with regard to the quality, admixture of dirt, and so on, which are immaterial. Then as to shipment, it is provided that: "Shipment, to be shipped . . . from Hankow, and (or) port or ports on the Yangtse River . . . and bill or bills of lading to be dated . . . July 1914," —I should have said that the contract was made in May 1914—at the price of 6*l.* 6*s.* per ton gross weight delivered "shipped in good merchantable bags, gross weight"—bags included—"including freight, as per bill or bills of lading, and insurance" to Naples. So that the goods are to be shipped from Hankow to Naples at the price of 6*l.* 6*s.* per ton, cost, freight, and insurance.

Then comes "Payment, net cash in London, on arrival of the goods at the port of discharge, in exchange for bill or bills of lading and policies of insurance (free of war risk) on Lloyds' conditions, and including the London Corn Trade Association, F.P.A. clause, effected with approved underwriters, for whose solvency seller is not to be responsible. But payment to be made in no case later than three months from date of bill of

lading, or upon the posting of the vessel at Lloyds as a total loss." Then follows this clause, upon which the appellants laid much stress: "In the event of war, should sellers not have received from buyers approved underwriters' policies and (or) certificates (with losses payable in England) for approximate invoice amount covering war risk three days prior to time of shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers. If war risk is incurred during time of shipment sellers are empowered to insure same at the buyers' cost, if the latter fail to do so within twenty-four hours of the sellers' request for this to be done."

What happened was that the goods in question were shipped on a German ship, the *Gernis*, at Hankow, the bills of lading being dated the 6th and 11th July 1914. The ship after leaving Hankow, and after the outbreak of hostilities, took refuge in some Dutch East Indian port, where she remains. The next thing that happened, or that is treated as having happened, is that on the 11th Oct., being three months from the date of the bills of lading, there was a tender of the bills of lading and policy of insurance to the buyers, who refused to pay, and thereupon the sellers proceeded with this arbitration.

In the court below the date was fixed as being the 11th Oct., when there was a tender of the shipping documents. It does not appear whether the tender was ever actually made or not. It does not appear in the special case that such tender was made. I only mention the point to pass it by, because the parties are agreed that whether there was or was not a tender the tender was dispensed with. I mention it therefore in order to show that the point has been noticed. But nothing turns upon it, because it is treated as if there were a tender on the 11th Oct. whether there was an actual tender of these documents or not.

A second point which I should mention is this: According to the award of the arbitrators, it is adjudged that in the one case the sellers are to receive the whole price. Again, after the buyers had refused to pay, and refused to take up the documents, the cargo was at the disposal of the sellers, who have apparently dealt with it, and that would be a matter of adjustment of figures. If the sellers were wrong, they would be liable in damages. Again, I only mention that point in order to put it out of the question, because the parties are agreed that the sellers cannot recover the whole price, and that if they are entitled to recover they are quite able to adjust the figure themselves out of court, and they have not come here upon any dispute as to those figures. That, again, I only mention so that it may be put on one side.

The real contest between the parties is this: The sellers insist that first, according to the true construction of the particular contract with which we have to deal, the contract of May 1914, the buyers took upon themselves all risks of what might happen in the event of an outbreak of war. That is if the effect of the outbreak of war was to terminate the contract of affreightment it was at buyers' risk. If the contract of insurance should be with a foreign underwriter it was at buyers' risk whether it was valid or not. The point is that, according to the true construction of the clause, war and any consequences of war were at buyers' risk, and it was the duty of the buyers to take up and pay for the documents when tendered, because the events that have happened consequent upon the war were at their risk, and that was the contract between the parties. That is their first point, and that first point is dependent entirely upon the true construction of this particular contract.

The second point is of more general importance because it is independent of the construction of the particular contract. That second point is that in contracts c.i.f. all that the seller has to do is to ship goods in accordance with the contract, obtain proper bills of lading, effect proper insurances pursuant to the contract, and having done that, having once acquired documents that are proper and in order, thenceforward those documents are at the risk of buyers, and buyers must pay against tender of those documents. If before tender on the happening of any event those shipping documents become inoperative in any way that is at buyers' risk. And it is said that that is the ordinary consequence of a c.i.f. contract quite irrespective of the particular terms of any individual contract. Those are the two points that arose for discussion.

Before construing the clause upon which the first point turns, beginning "In the event of war," it will be observed that the previous clause providing for payment provides for the nature of the insurance which sellers are to effect. This is the insurance which is part of the terms of the contract included in the price: "In exchange for . . . policies of insurance (free of war risk) on Lloyd's conditions, . . . effected with approved underwriters, for whose solvency seller is not to be responsible." That means that the insurance for which the sellers are to pay, and which is included in the lump sum price, is to be an insurance on ordinary Lloyd's conditions, but with a warranty free of capture and seizure.

Those words there, "free of war risk," mean that it will be a sufficient compliance with this provision as to insurance if the sellers effect a policy in the ordinary Lloyd's form, the capture and seizure being an accepted peril. That is as if the policy contained the warranty in the settled form: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat (piracy excepted), and also free from all consequences of hostilities or warlike operations, whether before or after declaration of war."

In my opinion that is the meaning of the phrase there, "free of war risk." That throws light upon what follows, because the next clause is, in my opinion, directed solely to the excepted perils: "In the event of war, should sellers not have received from buyers approved underwriters' policies," and so on, "for approximate invoice amount covering war risk"—now that means covering the risk that is excepted in the previous insurance—"sellers shall have the right, if they think fit and are able, to cover war risk for account and risk of buyers." That means that on the happening of that event it is open to the sellers, who themselves, of course, would run some risk in the matter because their buyers may not be in a position to accept and take up the shipping documents, to protect themselves by

effecting an insurance against war risk at the cost of the buyers. Then "If war risk is incurred during time of shipment, sellers are empowered to insure same at the buyer's cost, if the latter fails to do so."

In my opinion the true construction of this clause, upon which so much reliance is placed by the appellants, is that it provides only for the war risk, that it is an excepted peril from the previous insurance, and that it provides that sellers may effect that insurance at the cost of buyers. But it has no further or other effect, and it does not, as the appellants contend, extend to throwing the risk of all consequences of the war and what may happen to any of the documents upon the buyers. In my opinion that point made by the appellants fails.

Then the larger and wider point remains, as to whether, quite apart from the special terms of the contract in the present case, it is sufficient for sellers, having once obtained documents which were valid shipping documents at the time when they were obtained, to tender those documents at the proper time and insist upon payment of the price. I say "to tender them at the proper time," but in my opinion no question really turns here upon what is the proper time, because by the terms of the contract the time is provided. Payment is to be made net cash in London, that is, payment against shipping documents, first, on arrival of the goods at the port of discharge (and that event has not happened); then, upon the posting of the vessel at Lloyd's as a total loss (and that has not happened); and then "in no case later than three months from the date of the bill of lading," or bills of lading. As the bills of lading are dated the 6th and 11th July the three months would expire on the 11th Oct., and that was the date at which, according to the contract, if everything else had been in order, the sellers were entitled to tender the documents and ask for payment. So that no question arises with regard to the proper date at which the sellers were entitled to require payment.

The real point is upon whom the loss is to fall where documents which were originally valid have become invalid before they were tendered. In my opinion, although there is no direct authority on the point, the decisions which have been given as to the effect of c.i.f. contracts and the language which is used in those cases, make it reasonably clear what the obligation of the seller is. In *Ireland* v. *Livingston* (27 L. T. Rep. 79; L. Rep. 5 E. & I. App. 395, at p. 406) Lord Blackburn—Blackburn, J. as he then was—in giving his opinion to the House of Lords, put it in this way: "The terms at a price 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice." Then after dealing with certain details which I need not read, he says: "Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way." He deals with it as if in consequence of non-delivery through some misconduct of the master or mariners not covered by the policy there would be a right of action in the purchaser against the shipowner.

In considering what the actual position of the parties here was, there can be no doubt that the effect of the war upon the bills of lading was this, that as from the outbreak of war the contract with the German shipowners became dissolved. In the case of *Esposito* v. *Bowden* (7 Ell. & Bl. 763, at p. 783) the point was expressly dealt with. In that case Willes, J., in giving judgment in the Exchequer Chamber, said: "As to the mode of operation of war upon contracts of affreightment made before but which remain unexecuted at the time it is declared, and of which it makes this further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it."

So that the effect was that as from the outbreak of war the owner of the German ship *Gernis* was absolved from the further performance of the contract evidenced by the bills of lading to carry the goods in question from Hankow to Naples. When he had put into the port in the Dutch East Indies he was under no further continuing liability to proceed with the voyage to Naples. The buyers would not obtain by delivery of the shipping documents to them a valid contract or undertaking to carry goods to Naples; that contract was at an end.

Willes, J. proceeds as follows: "Lord Tenterden also, in his work on shipping, states the law thus: 'Another general rule of law furnishes a dissolution of these contracts' (that is, for the carriage of goods in merchant ships) 'by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage.'"

A little later on he says (at p. 787 of 7 Ell. & Bl.): "The argument which was again urged in this case, that, apart from any considerations affecting the shipowner only, the defence was valid by reason of the law also forbidding the charterer to load a cargo, and, as a consequence of that prohibition, dissolving the charter-party and absolving both parties from further performance, remains to be considered."

In the case of *Janson* v. *Driefontein Consolidated Mines Limited* (87 L. T. Rep. 372; (1902) A. C. 484) Lord Lindley said (at p. 509 of (1902) A. C.): "War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal

licence, and dissolves all contracts which involve such trading." Therefore the effect of the war was that at the time of the tender there was no subsisting contract for the carriage of the goods to Naples, and no subsisting contract upon which the buyers would have been able to maintain an action, seeing that the shipowner was a German subject.

In my opinion the cases which have had to deal with c.i.f. contracts have all proceeded upon the footing that upon delivery of the shipping documents the purchaser will obtain a right either to the goods or, if the goods are lost or damaged, to such claims in respect of the goods as the shipping documents may entitle him, not necessarily covering every loss or damage, but they were to be effective documents. And I think that the language used by the judges in dealing with c.i.f. contracts is only consistent with the view that the documents tendered are to be effective shipping documents, and that where the bill of lading becomes avoided by war it is not a sufficient compliance with the contract to tender it.

For instance, in *Biddell Brothers* v. *E. Clemens Horst Company* (104 L. T. Rep. 577; (1911) 1 K. B. 934) it was put in this way by Kennedy, L.J. (at p. 956 of (1911) 1 K. B.), whose judgment was approved in the House of Lords (105 L. T. Rep. 563; (1912) A. C. 18). "But the vendor, in the absence of special agreement, is not yet in a position to demand payment from the purchaser; his delivery of the goods to the carrier is, according to the express terms of sect. 32"—that is, of the Sale of Goods Act 1893—"only '*primâ facie* deemed to be a delivery of the goods to the buyer'; and under sect. 28 of the Sale of Goods Act, as under the common law (an exposition of which will be found in the judgments of the members of the Exchequer Chamber in the old case of *Startup* v. *Macdonald* (6 M. & G. 593), a tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary be a tender of possession."

How could the endorsement and delivery of a bill of lading which has become ineffective and which is at an end as evidencing a contract of affreightment be a tender of possession? Then the learned judge proceeds as follows: "How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied, in case the goods have been lost in transit, by the policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser." He is dealing there obviously with a bill of lading which in law and in fact does represent the goods. That is not so in this case. He says: "Possession of the bill of lading places the goods at the disposal of the purchaser."

It does not do so in this case. The goods here are in the hands of the German shipowner. Then a little later the learned judge cites with approval a well-known passage from Bowen, L.J.'s judgment in *Sanders Brothers* v. *Maclean and Co.* (5 Asp. Mar. Law Cas. 160; 49 L. T. Rep. 462; 11 Q. B. Div. 327) where Bowen, L.J. said (at p. 341 of 11 Q. B. Div.): "And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

How can that language be applied to a bill of lading which has ceased to be effective, and where the contract evidenced by it has become dissolved? How does it carry with it all rights created by the contract of carriage between the shipper and the shipowner? The contract is at an end. The contract itself is dissolved. In my opinion the language used in dealing with these c.i.f. contracts points to the fact that at the date of the tender the documents must be valid and effective documents.

In addition to that there is this further point, that the effect of requiring the buyers to accept the bill of lading in the present case might involve their entering into a contract with an alien enemy, and having to make payments to an alien enemy. If the endorsement of the bill of ladings were effective under the circumstances to make a valid transfer, it might make the buyers directly liable to the German owners for freight under the bill of lading.

Another point was urged. It was said that at all events no trading with the enemy not permitted by the proclamation would exist in the present case having regard to the terms of the proclamation of the 25th Sept. 1914. I really do not think that that proclamation touches the point. That proclamation of the 25th Sept. 1914 merely enables the owners of cargoes then lying in a neutral port in a ship owned by the enemy to pay the freight and other charges to the agent of the shipowner at that port to obtain possession of the cargo. In other words, the then holders of the bill of lading at the time of this proclamation—the shippers in this case—could have availed themselves of this proclamation to obtain delivery of the cargo at the port in the Dutch East Indies where the vessel was, by paying whatever charges had to be paid to obtain possession of the cargo without incurring the penalties of trading with the enemy. That is the only effect of that proclamation.

In my opinion the judgment below was right that the documents were not such documents as the sellers were bound to tender to obtain payment of the price; they had become ineffective, and the buyers were entitled to refuse to pay against them.

In the second case there is little difference. Certainly there is no difference in favour of the appellants, the difference is the other way. The cargoes are similar, but the dates are a little different. In the second case, the ship, the *Camilla Rickmers*, took refuge in the port of Manilla. But the main difference is that in that case there is an additional objection to the appellants succeeding, because the policy of insurance was effected with German underwriters, so that not only was there a German bill of lading, which was avoided by the war, but a German policy of insurance, which was also avoided by the war, and at the date of the tender the contracts evidenced

by both of those documents were dissolved, and they were not subsisting contracts at the date of the tender.

For these reasons I am of opinion that the judgment below was right in both of the cases before us, and that the sellers were not bound to pay against the documents, and that accordingly the decision of Scrutton, J. ought to be affirmed.

Bankes, L.J.—We have had in these two cases a very full and interesting discussion on the question of the effect of the outbreak of war upon certain c.i.f. contracts entered into before the outbreak of war. I need not refer to the facts of the cases, which have been dealt with by Swinfen Eady, L.J. In my opinion the answer to the question which the court has to decide is to be found on the face of the contract in each case, and upon consideration of what the terms of that contract provides.

The contract on the part of the sellers is a contract for the sale of goods whereby the sellers also undertake (*inter alia*) to enter into a contract of affreightment to the appointed destination, which contract will be evidenced by the bill of lading; and secondly, to take out a policy or policies of insurance upon the terms current in the trade, but which policy or policies were not in this case to include war risks. On the buyers' part they undertook to pay net cash in London in exchange for the bill or bills of lading and policies of insurance, either on arrival of the goods at the port of discharge, or at the expiration of three months from the date of the bills of lading should the goods not sooner arrive, or on the posting of the vessel at Lloyd's as a total loss. In any case, however, the payment is to be in exchange for the bill or bills of lading and policy or policies of insurance.

What is the meaning of the buyers' contract thus expressed, that he is to pay in exchange for a bill of lading? In my opinion it means what it says, that in exchange for the price he is to receive a bill of lading which is still a subsisting contract of affreightment of the goods to the port of destination, and a policy or policies of insurance which is, or are, still, a subsisting contract, or subsisting contracts, of insurance. It is said that this construction, which seems to me so obviously the natural construction, ignores the fact that in a contract of this kind certain risks fall upon the buyer. I quite accept the contention that certain risks do fall upon the buyer. For instance, in the present cases all war risks fell on the buyers as the parties have agreed that the sellers shall be under no obligation to obtain policies covering war risks. I agree also that the condition of the goods at the time of the tender of the shipping documents is not material, nor is the value of the documents at the time of tender material. In all such matters the risk is on the buyer. He may be obliged to pay for goods although they may be at the bottom of the sea, or although through some unforeseen circumstance they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy. All these risks, however, are risks affecting the goods.

In effect the contention of the appellants appears to me to be a contention that one of the risks undertaken by the buyers is a risk affecting their contract and not the goods the subject-matter of the contract. I cannot agree with this view. It appears to me that the question of the construction of the contract must depend upon the language used, and not upon any such considerations as these. In the present case it is not disputed that the outbreak of war dissolved the contract of affreightment, and that so far as any further prosecution of the voyage was concerned the bill of lading was no longer an effective document. Under those circumstances, in my opinion, that bill of lading was not a bill of lading within the meaning of the contract in respect of which the sellers were under an obligation to pay cash in exchange.

Scrutton, J., in his judgment has used one expression with which I do not agree. The expression is the one in which he says that "the key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods." I am not able to agree with that view of the contract, that it is a sale of documents relating to goods. I prefer to look upon it as a contract for the sale of goods to be performed by the delivery of documents, and what those documents are must depend upon the terms of the contract itself. The conclusion at which Scrutton, J. arrives he expresses in this way. He says, "It is clearly not essential that if the goods do not arrive the buyer should have a good claim on one of the contracts"—I have already dealt with that, and with that I fully agree—"but I think it is essential that each contract should be one into which he can legally enter as a contracting party, and when the legal relations of the seller under the contract of affreightment tendered have become void, and it is illegal for the buyer to enter into any similar legal relations with shipowner or insurer, I cannot hold that such documents are good tender."

He puts there two grounds upon which he bases his decision, and in so far as the first ground depends upon the construction of the contract I entirely agree with him. But the second ground he bases upon the contention apparently that it was illegal for the buyers to enter into any similar legal relation with the shipowner or the insurer, and upon that point we have had an extremely interesting discussion. Mr. Wright has contended that the taking of the bill of lading by the buyers in this particular case would not have involved him in any illegal contract, and he based it upon this ground that the bill of lading has ceased to be an operative contract of affreightment at all, and that the taking of it would not involve the buyers in any legal relations with the shipowner at all, and that it really remains a document of title in respect of the goods, which may or may not at some time or another be a valid one.

But Mr. Wright's answer to the contention that if the buyers took the bill of lading in this particular case it would involve them in an illegal contract with the shipowner seems to me to be a very strong ground for arriving at the conclusion that the contract is not a contract to take a perfectly valueless document, but it is a contract to take a bill of lading—an effective document. A document if it were really a bill of lading would involve the entering into of a contract with the German shipowner, and the fact that it is not that, and the fact that in consequence Mr. Wright's

client could escape the consequences indicated here by Scrutton, J. seems to me to be a strong and conclusive argument against his contention that it satisfied the contract, and that this document, which no longer constituted a contract of affreightment, could be a good tender.

Mr. Wright further contended that it is not true to say that it is a piece of waste paper, because in so far as it covered the period from the time of shipment until the time this vessel took refuge it was an effective document, and some rights may still exist in respect of that period which may be evidenced by this bill of lading. How that may be I am not prepared to say. The contract has come to an end. It has not come to an end in the sense that Mr. Wright refers to where the goods are lost; it has not come to an end in the sense that although it is a perfectly good and enforceable contract it is valueless; but it has come to an end in the sense indicated by Willes, J. in *Esposito* v. *Bowden* (7 Ell. & Bl. 763). He says the contract is dissolved, which seems to me to be an entirely different thing and to involve entirely different consequences.

In my opinion this appeal fails, and the judgment of Scrutton, J., subject to the point which I have indicated, was correct.

WARRINGTON, L.J.—I am of the same opinion, and but for the extreme general importance of the question that we have to determine, I should have added nothing to what has been said by my learned brethren.

The question arises between the sellers and the buyers of goods under a c.i.f. contract, the question being whether in the events which have happened the sellers are by virtue of the contract entitled to be paid the contractual price for the goods. Scrutton, J. has held that they are not so entitled.

The first thing in dealing with a question of such a nature is to ascertain what is the true meaning and effect of the contract. The contract in the present case is an ordinary c.i.f. contract, that is to say, it is a bargain made by sellers of goods abroad for their shipment, for providing for their carriage to the port of destination, and for insuring the goods during the voyage, the buyers having to pay the cost of the goods, the freight, and the cost of the insurance. The provisions in the particular contract with which we have to deal with reference to the payment of the purchase money are that payment is to be: "Net cash in London, on arrival of the goods at port of discharge, in exchange for bill or bills of lading and policies of insurance (free of war risk) on Lloyd's condition . . . but payment to be made in no case later than three months from date of bill of lading or upon the posting of the vessel at Lloyd's as a total loss."

The effect of that provision is that the purchase money is to be paid in exchange for the shipping documents, to use a short expression, on the happening of the earliest of three events: either the arrival at the port of discharge, or the posting of the vessel at Lloyd's as a total loss, or the expiration of three months from the date of the bill of lading. In the present case the event which happened was the expiration of three months from the date of the bill of lading. On the happening of that event the payment was to be made in exchange for bill or bills of lading and policies of insurance. The sellers—I am dealing at present with *Karberg's* case only—tendered a policy of insurance with English underwriters, and so far there is no question. But they tendered a bill of lading signed on behalf of German shipowners, the goods having been laden on board a German ship prior to the outbreak of war, which ship on the outbreak of war or shortly afterwards took refuge in some port of the Dutch East Indies, and of course never arrived at her destination, which was Naples.

Was the tender of the bill of lading under those circumstances sufficient to entitle the sellers to receive payment of the goods? It is conceded, and it is undeniable that the effect of the outbreak of war was to dissolve the contract of affreightment. It is stated in terms in the judgment of Willes, J. in *Esposito* v. *Bowden* (7 Ell. & Bl. 763, at p. 783) in this way: "As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at the time it is declared, and of which it makes the further execution unlawful and impossible, the authorities establish that the effect is to dissolve the contract and to absolve both parties from further performance of it."

So far there is no question. But it is contended that the tender of a bill of lading which was properly obtained by the sellers at the time when it was obtained, notwithstanding that the contract of affreightment which is evidenced by it is dissolved, is a sufficient tender to entitle the sellers to the purchase money. The effect of such a contract, or rather the obligation of the seller under such a contract, is expressed by Hamilton, J. (as he then was) in *Biddell Brothers* v. *E. Clemens Horst Company* (103 L. T. Rep. 661; (1911) 1 K. B. 214) in the following terms; and that judgment of Hamilton, J. was ultimately affirmed by the House of Lords (12 Asp. Mar. Law Cas. 80; 105 L. T. Rep. 563; (1912) A. C. 18), adopting the minority judgment of Kennedy, L.J. in the Court of Appeal.

Hamilton, J. said this, at p. 220 of (1911) 1 K.B: "A seller under a contract of sale containing such terms"—that is, a c.i.f. contract—"has firstly to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade, which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J. in *Ireland* v. *Livingston* (1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 E. & I. App. 395, at p. 406) or in some similar form; and, finally, to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

Incidentally I desire to say that I entirely agree with Bankes, L.J. in the remarks he has uttered about the statements made by Scrutton, J. that such a contract as this is a contract for the sale of documents. I need not say that it is with much deference that I express my disagreement with a statement of that sort made by a judge with such extensive knowledge of commercial matters as Scrutton, J. But it seems to me that it is not in accordance with the facts relating to these contracts. The contracts are contracts for the sale and purchase of goods. But they are contracts which may be performed in the particular manner indicated by that passage from the judgment of Hamilton, J. which I have just read; in particular that the delivery of the goods may be effected first by placing them on board ship; and, secondly, by transferring to the purchaser the shipping documents.

Is the obligation of the sellers which they have to fulfil performed by delivering what they have purported to do in the present case; a document which does not entitle the buyers to obtain delivery of the goods because it has ceased to be an effective contract of affreightment? In my opinion quite plainly not. In order truly to perform his contract he has to deliver documents by virtue of which the buyer may, if the goods are in existence, obtain delivery of the goods, and by virtue of which, if the shipowner has not fulfilled his obligation imposed by the contract of affreightment, he, the buyer, may have such remedies as the contract of affreightment would give him. Neither of those conditions is fulfilled by the delivery of a document evidencing a contract which has been dissolved by the outbreak of war, and the further performance of which has become impossible.

But then it is said that, however, that may be in the case of an ordinary c.i.f. contract, one not containing such provisions, it does not apply to the present case because this contains a special provision throwing upon the buyers all risks arising from the outbreak of war. In my opinion that is not the case on the true construction of this contract. The obligation of the sellers is to effect a marine insurance for the ordinary risks—that is to say, excluding war risks. The reference to the further policy against war risks is inserted for the further protection of the sellers, so that if they please, and if the event falls within the specification in the contract, at the buyers' risk, they may further protect themselves by effecting a policy against war risks; but that is all. It does not affect in any way the true construction and effect of the contract as to what is the sellers' obligation in order effectively to transfer to the buyers the goods if they are in existence, or an effective policy of insurance should the goods be lost by any of the events covered by this policy. In my opinion in *Karberg's* case the bill of lading not being an effective contract of affreightment at the time of the tender, the delivery of that, or the tender of that, was not a sufficient tender of a bill of lading to entitle the sellers to recover the price of the goods.

In *Schneider's* case, the second of the two cases, it is unnecessary to add anything, because that case is less favourable to the sellers than *Karberg's* case, inasmuch as not only was the bill of lading a contract with a German, but the policy of insurance was a contract with a German.

There is only one other point, and that is the point that under the licence of the Board of Trade of the 25th Sept. 1914, the buyers were released from all illegality there might otherwise be in any possible dealings they might have with the shipowner. In my opinion that is not the true effect of the Board of Trade licence. The Board of Trade licence in my judgment only effects this, that it enables the owner of the goods, whoever he may be, without infringing the law against trading with the enemy to go to the neutral port where the ships are, and there make such bargain as he can with the owner of the ship in which the goods are placed in order to obtain possession of his goods or payment of freight and other necessary charges.

But more than that, I think it is established by *Esposito* v. *Bowden* (7 Ell. & Bl. 763), both by the judgment of the Court of King's Bench and by the judgment of the Court of Exchequer Chamber, that such a licence of the Board of Trade could not set up again a contract which had become dissolved according to the well settled principles of law by the outbreak of the war.

On the whole, in my judgment, the present appeals ought to be dismissed. *Appeals dismissed.*

Solicitors: *Coward* and *Hawksley, Sons*, and *Chance; Armitage, Chapple*, and *Macnaghten; Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, Dec. 9, 1915.

(Before Bailhache, J.)

Weis and Co. Limited *v.* Credit Colonial et Commercial. (a)

Contract—Charter-party—Delivery of documents after outbreak of war—Goods in English ship captured by enemy—Whether documents properly tendered.

The question of the validity of documents tendered depends upon their validity at the date of tender and not upon the question whether or not they comply with the contract and declaration.

By a contract dated the 23rd June 1914 the plaintiffs sold to the defendants certain Manchurian Soya bean oil c.i.f from Eastern ports to Antwerp. There were two ships concerned, the G., an English ship, in respect of which the cargo was declared on the 3rd July, and the U. R., a German vessel, the cargo in which was declared on the 31st July. At the outbreak of war the latter ship became the ship of an alien enemy. The relative bills of lading and insurance policy were never tendered, but the date of their tender was taken to be at the 18th Aug. As to the G., she and her cargo were seized by the enemy on the high seas and taken to Hamburg, so that at the time when the documents were tendered to the buyers the contract had become impossible owing to the seizure.

Held, that, so far as the cargo on the German vessel was concerned, the tender of documents was

(a) Reported by W. V. Ball, Esq., Barrister-at-Law.

bad; that as to the goods on board the English ship the tender of the documents was a good tender inasmuch as the performance of the contract as between buyer and seller would not at the time have been illegal. There was no illegality in calling on the buyer to deliver at Antwerp, because if he could have got his ship to Antwerp it would have been perfectly legal. The buyers were therefore liable.

Award stated in the form of a special case:—

1. By a contract dated the 23rd June 1914, Messrs. Charles Weis and Co. Limited, hereinafter called the "sellers," sold to Messrs. Credit Colonial et Commercial, Antwerp, hereinafter called the "buyers," about 10,000 cases Manchurian and Japanese bean oil of fair average quality in cases containing two tins of about 37lb. each, shipped afloat from an Oriental port by steamer or steamers direct or indirect and with or without transhipment at the price therein named, cost, freight, and insurance, to Antwerp.

2. By clause 2, particulars of shipment, with date of bill or bills of lading, marks, and numbers of cases, if any, were to be duly declared by the original seller in writing with due dispatch, and under no circumstances later than the arrival of the steamer. Should the vessel arrive before receipt of appropriation and extra expenses be incurred, such expenses were to be paid by sellers. . . . In case of resale, copy of original appropriation should be accepted by the buyers if passed on without delay. . . . Provisional invoice to be computed on net shipping weights. Each shipment to stand as a separate contract.

3. By clause 4, buyers were to pay the full amount of provisional invoice made out on net shipping weights by cash without discount against shipping documents on or before arrival of steamer and (or) steamers in Antwerp, or three months after notice of arrival of documents in London, whichever may happen first.

4. By clause 10, any dispute on the contract was to be settled by arbitration in London as soon as it might arise in accordance with the rules endorsed on the contract, such arbitration to be claimed within fourteen days from the final date of discharge.

5. By rule 1, endorsed on the said contract, any dispute arising out of the contract should be referred to arbitration in London, each party appointing one arbitrator, to be a person engaged in the oil and (or) tallow trades, and such arbitrators should have the power to appoint an umpire, to be a person engaged in the oil and (or) tallow trades, whose decision in case of disagreement was to be final in the absence of appeal. A true copy of the said contract with the rules endorsed and of the acceptance by the buyers of the said contract are annexed hereto, and can be referred to as part of this award and special case.

6. Prior to the shipment herein mentioned the said contract had to be fulfilled to the extent of 4500 cases, and no question arises in respect of them.

7. On or about the 3rd and 10th days of July 1914 the sellers declared to the buyers 1000 and 2000 cases respectively of bean oil (which had been shipped on or about the 11th May 1914 on the steamship *Glenearn*, a British vessel, for Antwerp), in part further fulfilment of the said contract, and also rendered to the buyers provisional invoices showing the amount due computed in accordance with the contract.

8. On or about the 31st day of July 1914 the sellers declared to the buyers 2000 cases and 500 cases respectively of bean oil (which had been shipped on or about the 1st May 1914 on the steamship *Ursula Rickmers*, a German vessel, for Antwerp) in further fulfilment of the said contract, and also rendered to the buyers provisional invoices showing the amount due computed in accordance with the said contract. Three copies of the said declaration and invoices are annexed hereto and can be referred to as part of this award and special case.

8a. On the 31st July 1914 war broke out between Belgium and Germany, and on the 4th Aug. 1914 between this country and Germany.

9. On or about the 5th Aug. 1914 the sellers notified the buyers in writing that the documents relating to 3000 c/s bean oil per steamship *Glenearn* c/d 23rd June No. 4532 had arrived in London on the 27th May, and asking for payment on the 27th Aug. in accordance with the contract, and on the 18th Aug. the sellers asked the buyers if they claimed moratorium, in which case interest would be claimed at 6 per cent. per annum, and on or about the 5th Aug. the sellers notified the buyers in writing that documents relating to 2500 c/s bean oil per steamship *Ursula Rickmers* c/d 23rd June No. 4532 had arrived in London on the 18th May, and asking for payment on the 19th Aug., in accordance with the said contract, and on the 18th Aug. they asked the buyers if they claimed moratorium, in which case interest would be charged at 6 per cent. per annum.

10. On the 27th Aug. the buyers replied to both communications of the 18th Aug. that they claimed moratorium, and agreed the rate of interest at 6 per cent. per annum. . . .

11. On the 25th Aug. the sellers informed the buyers that with respect to the 2500 c/s bean oil per steamship *Ursula Rickmers*, they granted the buyers one month's extension according to the moratorium then prevailing, and enclosing debit note for one month's interest.

12. On the 28th Aug. the sellers wrote to the buyers a similar letter with respect to the 3000 c/s bean oil per steamship *Glenearn*, and enclosed debit note for interest.

13. On the 16th Sept. 1914 the sellers, referring to the shipment by the steamship *Ursula Rickmers*, wrote to the buyers stating that as they had heard nothing from them they presumed they wished to have the moratorium extended for another month, and inclosed debit note for interest thereon up to the 18th Oct. 1914, and on the 4th Nov. the sellers wrote to the buyers inclosing further debit note for interest up to that date with respect to the shipments both by the *Glenearn* and the *Ursula Rickmers*, and calling upon them, as the moratorium expired on that date, to take up the documents for all the above goods. Some further correspondence took place between the parties, a copy of which, together with a copy of the letters hereinafter mentioned, is attached hereto, and can be referred to as part of this award and special case.

13a. The *Glenearn* has since war broke out been seized and taken to Hamburg. The *Ursula Rickmers* was in Hamburg at the outbreak of war.

14. The buyers did not take up the said documents in accordance with the said letter of the 4th Nov. 1914.

15. A dispute has arisen between the sellers and the buyers, the buyers claiming that the documents were not a good tender, and did not comply with the provisions of the contract that in any event they were entitled to avail themselves of the moratorium declared in Belgium and to postpone payment for the said bean oil until the end of that moratorium, the sellers on the other hand claiming that the tender was good and that payment became due on the expiration of the British moratorium.

The said dispute was referred to arbitration in accordance with the terms of the said contract, and Mr. Alexander Knight, of 4, St. Mary Axe, E.C., was appointed arbitrator on behalf of the buyers, and Mr. C. Knight, of Exchange Chambers, St. Mary Axe, E.C., was appointed arbitrator on behalf of the sellers, and the said arbitrators having failed to agree appointed me, the undersigned John Westall Pearson, of 29, Great St. Helens, in the City of London, umpire.

Subject to the opinion of the court on the case hereinafter stated, I do hereby award and determine that the tenders made by the sellers were good, and that the buyers were only entitled to claim the benefit of the British moratorium, and not the Belgian; and I further award that the buyers do forthwith take up the said documents and pay to the sellers the sum of 2374*l.* 7*s.* 5*d.* in respect of the bean oil shipped on board the steamship *Glenearn* with interest thereon at the rate of 6*l.* per cent. per annum from the 27th day of August 1914 to the 4th day of November, and at the rate of 5*l.* per cent. per annum from that day until payment, and the sum of 1293*l.* 14*s.* 6*d.* in respect of the bean oil shipped on board the steamship *Ursula Rickmers*, with interest thereon at the rate of 6*l.* per cent. per annum from the 18th day of November, and at the rate of 5*l.* per cent per annum from that date until payment.

I further award and determine that the costs of this award, which I hereby assess at 70*l.*, shall be borne and paid by the buyers, and if the sellers should in the first instance pay the same, the amount so paid shall be forthwith repaid by the buyers to the sellers.

The parties requested me to state my award in the form of a special case for the opinion of the court, and I accordingly stated the following case:—

Case.

The sellers contended on the reference:—

(*a*) That the contract was an English contract made in London, and the parties intended thereby to submit themselves to English law. (*b*) That by the contract the place at which the shipping documents were to be taken up was London, where payment was to be made up in British sterling. (*c*) That in the alternative, by the usage of the trade, the shipping documents are always taken up in London against payment in London in sterling cash, and are then transmitted to agents in Antwerp to enable the Antwerp buyer to obtain delivery of the goods from the ship on her arrival without delay. (*d*) That an agreement was entered into as appears by the said correspondence that the British moratorium was to be the moratorium to be applied to this contract.

The buyers contended on the reference: (*a*) That at the time the contract was entered into they carried on business only in Antwerp. (*b*) That by the terms of the contract payment was to be made by cash against shipping documents, which in every case were tendered in Antwerp, and payment was made, therefore, in that city. (*c*) That they were entitled to claim the benefit of the Belgian moratorium, which was still in force, and that therefore the time for payment had not arrived. (*d*) That, the *Ursula Rickmers* being a German ship, the documents tendered were void at the date of tender by reason of the war. (*e*) That the declaration of the *Ursula Rickmers* was not made within forty-two days of the date of the bill of lading. (*f*) That the provisional invoice in the case of the *Glenearn* did not contain the date of the bill of lading and was therefore defective. (*g*) That there was no evidence to support the alleged usage of trade, that it was contrary to the whole course of dealing between the parties. (*h*) That the sellers' claim for interest after the 4th Nov. 1914 was only consistent with the Belgian moratorium being alone applicable. (*i*) That the contract was signed by the buyers in Antwerp. (*j*) That by reason of the seizure of the *Glenearn* by the Germans the buyers are discharged from taking up the documents, as otherwise trading with the enemy would be involved.

I find as facts: (*a*) That the cases of bean oil were duly shipped in accordance with the contract, and were afloat at the time the contract was made. (*b*) That all the particulars of the respective shipments required by the contract, including the date of the bill of lading in the case of the *Glenearn* (although the said date was not given in the said particulars), were given with due despatch. That proper insurances were effected and that provisional invoices were rendered in accordance with the terms of the said contract. (*c*) That the tender in the case of the *Glenearn* did not contain the date of the bill of lading. That, the contract being for the sale of goods afloat, the omission of the date of the bill of lading was a matter of importance. That the buyers made no objection to the said tender or to the omission of the date of the bill of lading until May 1915. I find that the buyers waived their right (if any) to make any objection to the tender on the ground aforesaid or at all. (*d*) That according to the usages of the trade the original Oriental shippers' draft is attached to the shipping documents; that such documents are then taken up in London or before the arrival of the steamer at destination by the English merchant (who appears on the contract as seller) and paid for by him in London in cash, and which documents are then transmitted by him through his bank to Antwerp, when they are handed over to the Antwerp buyer in exchange for payment in equivalent Belgian currency. (*e*) That the British moratorium which fixed the rate of interest at 6*l.* per cent. per annum expired on the 4th day of November 1914, and the buyers agreed to pay interest at the rate of 6*l.* per cent. per annum. (*f*) That the Belgian moratorium is still in existence, having been established on the second day of August 1914, modified on the 6th day of August 1914, and renewed thereafter from time to time. The rate of interest provided by the said moratorium was fixed at the legal rate in Belgium, which is 5½ per cent. in all commercial matters. (*g*) That the original contract was signed by the sellers in London, and that the acknowledgment thereof was signed by the buyers in Antwerp. (*h*) That the *Ursula Rickmers* was a German vessel.

The questions of law for the opinion of the court on the facts found by me are: (1) Whether the tender of the documents in the case of the *Ursula Rickmers* was void at the date of the tender by reason of the war. (2) Whether the buyers were discharged from taking up the documents in the case of the *Glenearn* by reason of her seizure by the Germans. (3) Whether the buyers were entitled to claim the benefit of the Belgian moratorium.

If the court should answer the first question in the affirmative, then my award so far as it relates to the said sum of 1923*l.* 14*s.* 6*d.* is to be set aside, and I award in the event that nothing is due from the buyers to the sellers in respect of the shipment by the *Ursula Rickmers*, but otherwise my award is to stand. If the court should answer the second question in the affirmative, then my award so far as it relates to the said sum of 2374*l.* 7*s.* 5*d.* and interest thereon is to be set aside, and I award in that event that nothing is due from the buyers to the sellers in respect of the shipment by the *Glenearn*, but otherwise my said award is to stand.

If the court should answer the first two questions in the negative and should answer the third question in the affirmative, then any award so far as it relates to the times at which the said documents should be taken up and payment made is to be set aside, and in that event I award and determine that the said buyers do take up the said documents and pay the said sums of 1923*l.* 14*s.* 6*d.* and 2374*l.* 7*s.* 5*d.* respectively on the termination of the said Belgian moratorium with interest thereon in the meantime after the rate of 6*l.* per cent. per annum until the 4th Nov. 1914, and thereafter at the rate fixed by the Belgian moratorium, but otherwise my said award is to stand.

Maurice Hill, K.C. and *Douglas Hogg* for the plaintiffs.

Leslie Scott, K.C. and *Stuart Bevan* for the defendants.

The arguments sufficiently appear in the judgment of the court.

Bailhache, J.—This is an arbitration between the buyer and the seller of certain parcels of soya bean oil, some barrels of which were shipped on board an English ship called the *Glenearn* and some other barrels of which were shipped on a German ship called the *Ursula Rickmers*. Both shipments were made before the declaration of war, and they were made pursuant to a contract between the parties dated the 23rd June 1914. The contract was a c.i.f. contract, and the port of delivery was Antwerp. Declarations were made in due course of these barrels of oil, the one on board the *Glenearn* being made on the 3rd July and the one on board the *Ursula Rickmers* rather later, on the 31st July. These declarations were accompanied by the provisional invoices. So far everything was in order, and everything would have been in order but for the outbreak of war on the 4th Aug. The result of the outbreak of war was that the *Ursula Rickmers* became a ship of an alien enemy. The documents, the relative bills of lading and policies of insurance, were not tendered, perhaps never tendered at all, but the date of tender must be taken to be the 18th Aug. 1914. It seems to be settled law that the question of the validity of the documents tendered depends on their validity at the date of the tender, and not upon the question whether or not they comply with the contract and declaration. The result of that was that by the 18th Aug. the documents, so far as they related to the German ship, were documents which it was not permissible to tender. The matter is covered by authority (see *Arnhold Karberg and Co.* v. *Blythe, Green, Jourdain, and Co. Limited*, 13 Asp. Mar. Law Cas. 94; 113 L. T. Rep. 185; 13 Asp. Mar. Law Cas. 235; 114 L. T. Rep. 152); and, as the cases stand at present, I am governed by authority. Therefore, without applying my own mind to the matter at all, I hold that, as far as the tender of the documents relating to the oil on board the German ship is concerned, the tender was bad. That answers the first question put to me by the arbitrators in the affirmative: "Whether the tender of the documents in the case of the *Ursula Rickmers* was void at the date of the tender by reason of the war." To that I say, "Yes."

The next question they ask relates to the documents in the case of the *Glenearn*, the English ship seized by the Germans. So far as that vessel is concerned, the matter stands on a different footing. The *Glenearn* was and, of course, after the war, continued to be an English ship. Unfortunately, before the documents were tendered, she was seized somewhere on the high seas and brought to Hamburg. Therefore at the time the documents were tendered to the buyers the contract between buyer and seller had become impossible of performance by reason of seizure of the *Glenearn* with the barrels of oil on board. The question is as to whether that made the tender of the documents by the *Glenearn* a bad tender. It has been argued by Mr. Maurice Hill on behalf of the buyers that the tender was bad on the ground that it involved a trading with the enemy, the trading with the enemy being a transhipment from Hamburg to Antwerp of these barrels of oil; but upon the whole I have come to the conclusion that the tender of these documents was a good tender notwithstanding the fact that the *Glenearn* had been seized and taken to Hamburg. It is quite true that at the time of the tender the contract had become impossible of performance by reason of the seizure of the *Glenearn*, but in considering whether there was any illegality in the contract I have to consider, I think, whether there was any illegality as between the two parties thereto. As between the buyer and the seller clearly there was no illegality in tendering the documents which called for delivery at Antwerp. Antwerp at the time had not fallen; it was still in the possession of the Belgians. There was no illegality in calling upon the shipowner to deliver at Antwerp either, because if he could have got his ship to Antwerp it would have been a legal thing to do. The trouble was that there was an impossibility of performance. I do not think the impossibility of performance prevents the tender of the documents from being a valid tender. The real truth of the matter is that the trouble about the tender was that the policy of insurance which the sellers had to offer was a policy which contained the usual f. c. & s. clause, and of course such a policy gave the buyers no opportunity of recovering their money from anybody. They were not in the least likely to get delivery, and they had no policy under which they could recover from the underwriters. That is the real explanation of the trouble. But when one comes to consider the position as regards the policy of insurance, it appears that this is a matter which really does not help the buyers in the present case. It is most unfortunate for them; but it gives them no right to decline to pay. It is quite obvious that in the case of a ship sailing before the war broke out, as the *Glenearn* did, that a policy with the f. c. and s. clause was a sufficient policy for the sellers to procure. If the buyers desire to have protection against war risk, they might have taken out a war risk policy. Had they done so this trouble would never have arisen. I should long hesitate to say that the buyers ought to take such a precaution in a case where they are unaware of the ship on which their goods are loaded, or unaware of the position of that ship. In this particular case, however, the buyers well knew and had notice early in July that the particular vessel which was carrying their oil was the *Glenearn*, and they had the opportunity to cover themselves against war risk had they been so minded. In my judgment the mere fact that the goods had in the meantime been seized by the Germans is no answer to the liability of the buyers in this case; it is a liability against which they could, if they liked, have provided and protected themselves by insurance. So far as the *Glenearn* is concerned, I think the arbitrator's decision is right, and I therefore answer the question as to the *Glenearn* by saying that the buyers were not discharged from taking up the documents in the case of the *Glenearn* by reason of her seizure by the Germans.

There is a third question put to me—namely, whether the buyers were entitled to claim the benefit of the Belgian moratorium. That depends upon the construction of two letters—one from the sellers to the buyers dated the 18th Aug. 1914, and the reply from the buyers to the sellers dated the 27th Aug. 1914. I have no hesitation in saying that the moratorium of which the buyers were desirous of obtaining the protection was the British and not the Belgian moratorium. I therefore answer the question by

saying that the buyers were not entitled to claim the benefit of the Belgian moratorium. I do not mean to say that they would not, under any circumstances, have been entitled to claim it, but here they did not claim it in fact, and they agreed with the sellers that the moratorium of which they did claim the benefit should be the British one. Mr. Leslie Scott asked me to say that these two letters constituted a contract between the buyer and the seller by which the buyer undertook to take the documents both in the case of the German ship and in the case of the *Glenearn*, and to pay what was due upon those documents at the expiration of the moratorium. It is quite possible, of course, that such a contract might be made, and it is quite possible that such a contract might be made by both parties in ignorance of the law as to the German ship: but I should myself require very plain words in letters passing between buyer and seller to induce me to hold that such a contract was in fact made. When those letters were written neither party had his mind directed the least bit in the world to the validity of the document; and the whole point that they had in view when they wrote these letters was the question of the delay in payment on the assumption that the documents were valid documents when tendered. I am quite clear that the buyers did not by those letters enter into a contract to render themselves liable to pay in respect of the documents relating to the oil on board the German ship. The result is that the sellers lose so far as the German ship is concerned, and the buyers lose so far as the English ship is concerned.

Order accordingly.

Solicitors for the plaintiffs, *Waltons.*

Solicitors for the defendants, *Armitage, Chapple,* and *Macnaghten.*

Dec. 14, 15, *and* 20, 1915.

(Before BAILHACHE, J.)

ADMIRAL SHIPPING COMPANY LIMITED *v.* WEIDNER, HOPKINS, AND CO. (*a*)

Charter-party—Time charter—Restraint of princes—Whether charterers relieved from hire—Whether commercial object of voyage frustrated.

The commercial frustration of an adventure by delay means the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed as that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time when they made the contract, and for the accomplishment of which object or objects the contract was made.

In June 1914 *a ship was chartered for two Baltic rounds. Having left Hull, laden with coal, she was sub-chartered for a voyage from Finland to Blyth, Northumberland. The hire of the steamship was paid by the charterers to the owners in advance up to the* 14*th Aug. On the* 2*nd Aug. the vessel was detained by the Russian Government, war having broken out on the* 1*st Aug. between Russia and Germany. On the* 14*th Aug the owners directed the captain to remain in port at Kotka, and on the* 28*th Aug. the British Consul at the same place was directed to repatriate the crew, which was done. The charter-party contained a clause providing in what events payment of hire was to cease, but did not include restraint of princes, rulers, and people, although that was in the general exceptions clause. The hire was paid up to but not since the* 14*th Aug.* 1914.

Disputes having been referred, arbitrators, by a first award, found that in the circumstances no time hire was due, but subject to the opinion of the court as to the meaning of the words "restraint of princes," &c., in the charter-party. By a second award the arbitrators found that at no time between the 14*th Aug. and the* 20*th Oct.* 1914 *was there any reasonable probability of the vessel proceeding on her chartered voyage, and that no voyage could have been undertaken between those dates which would not have involved risk of capture, and that the commercial adventure had been frustrated.*

Held, that the charterers were liable for hire; that the telegram of the owners directing repatriation of the crew did not amount to a withdrawal of the ship; that even if the vessel was detained by "restraint" that did not excuse payment of hire; and that in finding "frustration" as a fact the arbitrators had misdirected themselves, inasmuch as delay due to a cause contemplated and provided for by the charter-party, even though the delay itself is protracted beyond what might have been expected, does not amount to frustration of the adventure.

AWARD stated in the form of a special case:—

1. Differences having arisen between the Admiral Shipping Company Limited (hereinafter called "the owners") and Weidner, Hopkins, and Company of Newcastle-upon-Tyne (hereinafter called "the charterers") under a contract of affreightment dated the 2nd June 1914, for the hire of the steamship *Auldmuir*, as to whether any time hire is due by the charterers to the owners during the time the said vessel has been and is stopped at the port of Kotka in the Gulf of Finland, such differences and any other matters incidental thereto were by agreement dated the 25th Sept. 1914, and made between the owners of the one part and the charterers of the other part, referred to the arbitrament, &c., of Thomas Walter Purchas and George Morrel Stamp, and an umpire, if necessary, appointed by the said arbitrators, whose decision, or the decision of any two of them, should be final and binding upon all parties.

2. [Reciting disagreement of arbitrators and appointment of umpire.]

3. And whereas Thomas Walter Purchas, George Morrel Stamp, and William Robertson Heatley, having on the 21st Oct. 1914 heard and considered the evidence and arguments of both parties, find that the following facts were proved or admitted: (*a*) By the said charter-party dated the 22nd June 1914 the owners agree to let and the charterers to hire the said steamship *Auldmuir* for two Baltic rounds, commencing as therein mentioned. The said charter-party and the copy bills of lading which were put in evidence at the said hearing are fastened together and appended hereto and are to be deemed part of this case. (*b*) The said steamship was delivered to the charterers on the 29th June 1914. She

(*a*) Reported by W. V. BALL, Esq., Barrister-at-Law.

left Hull on the 4th July for Cronstadt with a cargo of coals. (*c*) By a charter-party dated the 9th July 1914, and made between the charterers as time-chartered owners of the said steamship and Pyman, Bell, and Co. as charterers, the said steamship was chartered for a voyage from Sorfs, in Finland, to, amongst other places, Blyth, in Northumberland. (*d*) On the 17th July, having discharged her cargo of coals at Cronstadt, the said steamship left for Viborg and Kotka to load a cargo of wood goods for Blyth. (*e*) The said steamship arrived at Viborg on the 18th July and there loaded part of her cargo. She left Viborg on the 25th July and arrived at Kotka on the 26th July for the purpose of receiving the balance of her cargo. (*f*) On the 30th July 1914 the agents of the owners, by telegram addressed to the said steamship at Kotka, instructed the captain of the said steamship to hurry departure from Kotka. (*g*) On the 1st Aug. the loading of the said steamship was completed at Kotka, and bills of lading in respect of the cargo were duly signed, and the said steamship was on that day ready to sail for Blyth. (*h*) On the 1st Aug. the customs authorities at Kotka refused to allow the said steamship to be cleared or to authorise her to leave Kotka. On the same day a state of war came into existence between Russia and Germany. (*i*) Notwithstanding the said refusal of the said customs authorities, the captain of the said steamship sailed with the said steamship from Kotka on the 1st Aug. (*j*) When the said steamship arrived in the neighbourhood of Revel (in the Gulf of Finland) she was stopped by the Russian naval authorities and ordered back to Kotka, where she returned on or about the 2nd Aug. (*k*) The hire for the said steamship had been paid by the charterers to the owners in advance up to and including the 14th Aug. 1914, and no hire has since been paid. (*l*) On the 14th Aug. the agents of the owners, by telegram addressed to the said steamship at Kotka, instructed the captain of the said steamship to remain in port and await further orders, and on the 19th Aug. the said agents telegraphed to the British Consul at Kotka that the said steamship must remain in port. (*m*) On the 25th Aug. the said agents of the owners by telegram instructed the British Consul at Kotka to repatriate the crew of the said steamship (other than the captain and chief engineer). (*n*) The said steamship has been detained at Kotka by or in consequence of the Russian naval authorities as aforesaid, and at the date of the hearing of the evidence herein—namely, the 20th Oct.—the said steamship was still so detained.

4. A copy of the correspondence put in evidence is appended hereto for the purpose of reference in the event of the point of law being argued before the court and for the purpose of identification is marked "b" and initialled by the undersigned William Robertson Heatly.

5. On behalf of the owners it was contended that the words "restraints of princes, rulers, and people" contained in the charter-party of the 22nd June did not under the circumstances above mentioned relieve the charterers from the obligation to pay hire, and that they continued liable for the hire of the said steamship notwithstanding the detention of the said steamship at Kotka. They further contended that the charter-party contained a clause providing in what events payment of hire was to cease, and, "restraints of princes, of rulers, and people" not being one of such events, the exception of "restraints of princes, rulers, and people" contained in the general exceptions clause must be disregarded in connection with the cessation of hire. They also contended that as the said steamship was burdened with obligations to third parties by reason of the presence of cargo on board shipped under the charter-party of the 9th July, and in respect of which bills of lading had been signed, the charterers were liable for the hire of the said steamship. It was further contended on behalf of the owners that the owners by communicating with the captain of the said steamship did not commit a breach of the charter-party, but that they were justified in so communicating, having regard to the circumstances, and that though the crew, with the exception of the captain and chief engineer, had been repatriated, the said steamship was still efficient and efficiently manned for the purpose required of her—viz., lying at Kotka. Further, that repatriation of the crew as aforesaid took place after the initial breach of the charter-party by the charterers in failing to pay the hire due on the 14th Aug. 1914.

6. On behalf of the charterers it was contended that the meaning and intention of the parties to the charter-party of the 22nd June 1914 must be ascertained at the time the charter-party was entered into. That both parties at the time meant and intended by the expression "restraints of princes, rulers, and people . . . always mutually excepted" that this had relation to the use and hire of the said steamship, and that in the event of the use of the said steamship being restrained by princes, rulers, or people, no hire was due from the charterers during such restraint. They further contended that the owners had committed breaches of the said charter-party of the 22nd June: (*a*) By instructing the captain by the telegram of the 13th July to hurry his departure from Kotka. (*b*) In ordering by the telegram of the 14th Aug. the captain to remain in port. (*c*) By removing the crew from the said steamship, and that under no circumstances could hire be due on and after the 14th Aug.

7. Now we, the undersigned arbitrators and umpire, find and award (subject to the opinion of the court if either of the parties should decide to take it upon the question of law hereinafter mentioned) that no time hire is due by the charterers to the owners during the time the said vessel has been at the said port of Kotka under the circumstances aforesaid.

8. (Provision as to costs.)

9. If either of the parties should decide to take the opinion of the court then the question for the court is whether upon the facts herein stated and the true construction of the charter-party of the 22nd June, we are right in finding an award or whether the charterers are liable to pay any hire to the owners during the time the said vessel has been and is stopped at the said port of Kotka under the circumstances aforesaid.

10. If the court should hold that the charterers are liable to pay hire to the owners during the time the said vessel has been stopped at the said port of Kotka under the circumstances aforesaid then we find the amount hereof to be the sum of 1897*l.* 8*s.* 4*d.* up to and including the 20th Oct. 1914 (being the date of the hearing of the said arbitration), and we award that the charterers do pay that sum to the owners with interest at 5*l.* per cent. per annum from the date of this award until payment.

11. If the court should hold that the charterers are liable to pay hire to the owners during the time the said vessel has been and is stopped at the said port of Kotka under the circumstances aforesaid then we award and direct that the owners and the charterers shall bear and pay their own costs and expenses of and incidental to the reference, and that the charterers do pay the costs, amounting to 74*l.*, relating to this award, including our fees as arbitrators and umpire respectively.

12. In any event we leave to the court the costs of all proceedings subsequent to this award.

By a supplementary award dated the 21st Sept. 1915 the arbitrators found—

(*a*) That at no time between the 14th Aug. and the 20th Oct. was there any reasonable probability of the steamship *Auldmuir* proceeding with the chartered voyage in such a time as that the commercial adventure would not have been frustrated; (*b*) that no voyage could have been taken from Kotka between the 14th Aug. and the 20th Oct. 1914 which would not have involved risk of seizure or capture by a foreign ruler;

(*c*) that neither the charterers nor their agents had been given any information as to or were aware of the facts contained in the telegram of the 30th July 1914 (referred to in clause 3 (*f*) of the special case), in the telegrams of the 14th and 19th Aug. 1914 (referred to in clause 3 (*l*) of the special case), and in that of the 28th Aug. 1914 (referred to in clause 3 (*m*) of the special case) before the 19th Oct., the day previous to the day on which the matter first came before the arbitrators.

Leck, K.C. (*Raeburn* with him) for the owners:—Under a time charter such as this, the charterers are entitled to the vessel for the time. Here they have sub-charterered, and while they or their sub-contractors continue to use the ship the adventure is not frustrated. The ship is merely detained. [BAILHACHE, J.—Delay may cause very effective frustration.] The case of *Hadley* v. *Clark* (8 T. R. 259) is in point. There there was a delay of two years. The delay was caused by an embargo which, it was held, did not dissolve but only suspended the contract. [BAILHACHE, J.—Why is not "restraint of princes" an answer to your claim? Such a restraint may excuse payment of hire if the adventure is frustrated.] They referred to:

Brown v. *Turner, Breitman, and Co.*, 12 Asp. Mar. Law Cas. 79; 105 L. T. Rep. 562; (1912) A. C. 12;
Hough v. *Head*, 5 Asp. Mar. Law Cas. 447, 505; 53 L. T. Rep. 809;
Aktieselskabet Loria v. *Turnhill and Co.*, 1907, Sess. Cas. 507;
The Santora, 152 Fed. Rep. 517.

Mackinnon, K.C. (*R. A. Wright* with him) for the charterers.—*Jackson* v. *Union Marine* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789) must be overruled if the charterers are wrong. This is really a voyage charter-party, inasmuch as it was for two Baltic rounds. The freight is paid according to a computation of the time. [BAILHACHE, J.—Such charters are usually described as time charters.] In *Brown* v. *Turner, Breitman, and Co.* (*sup.*) the charterers might have selected the voyage. Here the adventure is described as a voyage out and home. Under a time charter the charterers may lay the ship up. It is doubtful whether they could do so under this charter-party, because the owners might have an interest in getting the adventure over as soon as possible. In *Embiricos* v. *Sydney Reid and Co.* (12 Asp. Mar. Law Cas. 513; 19 Com. Cas. 263) it was contended that the doctrine of "frustration" by unreasonable delay laid down in *Jackson* v. *Union Marine Company* (*sup.*) did not apply if the shipowner had cargo on board, so that the contract was part executed. Scrutton, J. points out (at p. 270 of 19 Com. Cas) that this argument was untenable, having regard to *Bensaude* v. *Thames and Mersey Marine Insurance Company* (8 Asp. Mar. Law Cas. 179, 204, 315; 77 L. T. Rep. 282), where the vessel had a cargo on board, and yet the charter was held by the House of Lords to be avoided and the freight lost by such delay as frustrated the adventure. [BAILHACHE, J.—If it was "restraint of princes" which kept you at Scandinavia you are wrong. *Aliter* if it was frustration of the commercial adventure.] It was a set of circumstances which involves delay. In *Brown* v. *Turner, Breitman* (*sup.*) there was no question raised as to commercial frustration, because it was decided that delay was due to the act, although not the default, of the charterers. It is also suggested that the charterers were keeping the cargo on board. One talks of the re-delivery of the ship, but that in point of fact never happened. The charterers were in ignorance of what was going on in the Baltic, and the owners were keeping them in the dark. Had the charterers been told that the voyage had been temporarily suspended, they might have insisted upon the sub-charterers unloading and taking delivery. Moreover, the owners treated the charter-party as at an end. Without any communication to the charterers they have sent out and brought home the whole crew, and that step, having regard to the terms of the charter-party, can only have been taken on the basis that the charter-party was at an end. *Hadley* v. *Clark* (*sup.*) is overruled. In *Jackson* v. *Union Marine* (*sup.*) there was a dissenting judgment based upon *Hadley* v. *Clark* (*sup.*), but that was distinguished by the other judges who pointed out that there was there no finding that the objects of the parties were frustrated. The difficulty of deciding between "restraint of princes" and "frustration of the commercial object" of the voyage is got over by this, that there was an exception clause in *Jackson's* case. [BAILHACHE, J.—As between the charterers and the sub-charterers there is no doubt there was frustration.] The point is found as a fact in my favour.

Raeburn in reply.—The essential difference between a time and a voyage charter is payment of hire. The "adventure" was the payment of 1700*l.* a month. There was no adventure there in the contemplation of both parties which was frustrated. He referred to

Braemount Steamship Company v. *Andrew Weir*, 1910, 11 Asp. Mar. Law Cas. 345.

As to the return of the sailors the vessel has only to be efficient for the purposes for which she is required. The sailors were not wanted when the vessel was lying up in Scandinavia. Moreover the crew was withdrawn after the charterers had intimated that the hire was suspended. There cannot be frustration of an adventure which is mapped out by a time charter. [BAILHACHE, J.—It is difficult to see how the owners could more effectually terminate the hire than by taking away the crew.] *Hadley* v. *Clark* (*sup.*) is bad law. In the days of *Hadley* v. *Clark* wages depended on freight.

Cur. adv. vult.

BAILHACHE, J.—This case comes before me on an award of lay arbitrators stated in the form of a special case. The dispute arises under a time charter-party, and is whether the charterers are or are not liable to pay for the charter-party hire.

The facts and the contentions of both sides before the arbitrators are set out in the case, and I cannot detail them better than by reading the case. The case, after certain preliminary recitals, says: [His Lordship read the first case as above set out, and continued:]

Then the arbitrators find, subject to the opinion of the court: "That no time hire is due by the charterers to the owners during the time the said vessel has been and is stopped at the said port of Kotka under the circumstances aforesaid," and the question for me to determine is whether that finding is right or wrong."

The matter, in this form, came before Scrutton, J., who remitted the award to the arbitrators to find whether under the circumstances there had been a commercial frustration of the adventure, and by a second award they so found. It does not appear from the first award why the arbitrators decided in favour of the charterers, nor did the learned judge express any opinion on that award, or as to what his judgment would be if commercial frustration were found. I have therefore to give my judgment as best I can, both on the case as presented in the original award and upon the subsequent finding of commercial frustration.

In order to do this, it is necessary to examine with some minuteness the provisions of the charter-party under which the dispute arises.

It is upon a time charter-party form, and although it is expressed to be for two Baltic rounds it is in fact a time charter-party, the period not being measured by months but by the indefinite standard of two Baltic rounds. Under the charter-party the charterers could if they pleased lay the *Auldmuir* up or never send her to the Baltic at all, but employ her in trading between safe ports in the United Kingdom and the Continent of Europe, with certain exceptions as appears from lines 13 to 16 of the charter-party. The hire was payable half-monthly in advance and was to continue payable until the steamship was re-delivered to her owners (unless lost) at a coal port in the United Kingdom.

The charter-party provided for cessation of hire in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours (lines 49 to 53). There was a mutual exception clause (lines 58 to 62), the only exception material to the case being restraints of princes. The carriage of contraband and the undertaking of any voyage involving risk of seizure or capture were forbidden, and the charterers had the option of cancellation in the event of Great Britain or other European Powers being involved in war affecting the working of the steamship at the commencement or during the currency of the charter-party, excluding civil war with Ireland (lines 71 to 75).

It appears to me that under a charter-party in this form and upon the facts as found in the original award the charterers are liable for hire. The telegrams of the owners referred to in the case did not amount to a withdrawal of the steamship, nor did the repatriation of the crew other than the captain and the chief engineer cause any time to be lost through deficiency of men. The *Auldmuir* has been detained at Kotka, not for want of a crew, but because either of restraint of princes, or because she cannot undertake the voyage for which she is sub-chartered without risk of capture, or for both reasons, and, inasmuch as the liability for hire is the same whichever is the cause of her detention at Kotka, it is not necessary to distinguish, and for brevity and convenience I will treat her detention there as due to restraint of princes, or, shortly, restraint.

Now restraint is not one of the enumerated reasons for cessation of hire, and I take it to be settled law that in the absence of conduct amounting to withdrawal of the steamship or of her actual loss, and apart from any question of commercial frustration, where a charter-party specifies the causes which are to excuse payment of hire, no other cause can be relied upon by the charterers. (See *Hough* v. *Head*, 5 Asp. Mar. Law Cas. 447; 52 L. T. Rep. 861; 5 Asp. Mar. Law Cas. 505; 53 L. T. Rep. 809; *Braemount Steamship Company* v. *Weir*, *sup.*; and *Brown* v. *Turner*, *Breitman*, and *Co.*, *sup.*).

It remains to consider the effect of the second award, that the detention of the *Auldmuir* at Kotka has frustrated the commercial object of the venture, and that therefore no hire is payable.

Frustration is doubtless a question of fact, and the finding of the arbitrators is *primâ facie* binding upon me. I fear, however, that I cannot shift the responsibility of considering the point quite so easily. It may be that the arbitrators have misdirected themselves either from a misunderstanding of what frustration means, or from a misconception of the applicability of the doctrine to the contract in this case. In order to see whether this is so, it is desirable to state what the doctrine of frustration is.

The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed as that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made. Now if this definition is at all accurate, as I trust it is, I doubt whether delay due to a cause contemplated and provided for by the charter-party, even though the delay itself is protracted beyond what might have been expected, ever amounts to frustration of the adventure. If it were so one would have to hold in this case that restraint of princes does or does not absolve the charterer from payment of hire according to its duration, and this would be to make a new contract for the parties, which the court must not do, and would be contrary, I think, to the reasoning of the House of Lords in *Brown* v. *Turner*, *Breitman*, *and Co.* (*sup.*). Again, delay to amount to frustration, must prevent the fulfilment of the only objects for which both parties must have known that each of them entered into the contract. It is easy to see how this applies in a voyage charter-party for the carriage of goods by a named ship from one place to another. The charterer's only object must be to have his goods carried within a reasonable time, and the owner's only object is to earn his freight by this carriage in the like time. Undue delay defeats the charterer's only object and the owner's contract, and the owner's offer to carry the goods at some undefined and distant date is in effect an offer to perform a different contract, and the charterer may refuse it. The extent of the delay which so changes the character of the contract will naturally depend upon the circumstances of each particular case. In a time charter-party the position is quite different. In this case, for example, the charterers might if they pleased have laid up the *Auldmuir*, and if it is said that that is unlikely, they might have sent her to continental ports, in neither of which circumstances would any diffi-

culty have arisen. There was in fact no object in common contemplation between the parties except that the charterers should have the services of the steamship for some legitimate purpose within the terms of the charter-party. Those services they have; if in a restricted and unremunerative way, the reason is that unfortunately they sent her to the Baltic instead of to the Mediterranean, as they might have done. The owners are in truth giving the charterers all that they contracted to give—namely, such services of the *Auldmuir* as she was capable of rendering, subject to the excepted peril of restraint of princes. It seems to me impossible to apply the doctrine of frustration to a case where one of the parties to the contract is fulfilling his part of the contract according to its terms.

Once more in this case the charter-party makes provision for war affecting the working of the steamer at the commencement or during the currency of the charter-party. This is precisely what has happened in this case, and where the contract makes provision for a given contingency, it is not for the court to import into the contract some other and different provision for the same contingency called by a different name. The provision in this charter-party is an option to the charterers to cancel, and this must remain their only remedy. If this option is not open to them it is because the *Auldmuir* is lying at Kotka under sub-charter from the charterers with a cargo on board. I express no opinion as to whether these facts prevent the exercise of the charterers option to cancel, but if they do the fact that the charterers have put it out of their power to exercise the option does not entitle them to claim some other remedy which the contract does not give them, and it certainly makes it difficult for the charterers to say that they are not in fact receiving the services of the steamship.

I observe with some interest that the arbitrator whose award came before Bray, J. in *Braemount Steamship Company* v. *Weir* (*sup.*) was of opinion that the doctrine of frustration could have no application in a time charter-party. I think he was probably right, and is supported by the House of Lords decision in *Brown* v. *Turner, Breitman* (*sup.*), but it is sufficient for me to say that it cannot be successfully invoked under the circumstances of this case and under this charter-party.

I think the arbitrators have misapprehended or misapplied the legal doctrine of frustration by delay, and that I ought to disregard their finding in their second award, and I hold that the charterers are liable for the hire.

Before I part with this case and to prevent any misconception in the unlikely event of this judgment being referred to on any subsequent occasion, I desire to point out that nothing I have said has any application to or bearing upon a case in which the chartered vessel is either lost actually or taken out of the possession and control of the owners by one of the excepted perils so that the owners are unable to give the charterers the use of their vessel for any purpose whatever.

The result is that the award will be set aside.

Judgment for the owners.

Solicitors: *Botterell* and *Roche*; *Thos. Cooper* and *Sons*.

House of Lords.

Dec. 6, 7, 1915, *and Jan.* 21, 1916.

(Before Earl LOREBURN, Lords ATKINSON, SHAW, PARMOOR, and WRENBURY.)

HORLOCK *v.* BEAL. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Seaman—War—Detention in enemy port—"Loss" of ship—Claim for wages—Internment of crew—Hague Conventions 1907, *No. VI.—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 143, 158.

A British ship, owned by the appellant, during a voyage, for which the respondent's husband, who was a British seaman, had signed articles, was in a German port when war was declared between the United Kingdom and the German Empire and was detained by the German authorities, but no proceedings for her confiscation were known to have been instituted. Her officers and crew were at first kept prisoners on board, and subsequently, on the 2nd Nov. 1914, *were taken ashore as prisoners, and later, from the 8th Nov.* 1914, *were interned at Ruhleben.*

The ship and crew were still detained and imprisoned when the respondent brought her action claiming an allotment of wages made her by her husband.

Held (*Lord Parmoor dissenting*), *that the shipowner was not liable to pay wages to the crew after the 2nd Nov.* 1914, *as from that date it was impossible for them to render any services contemplated by the contract of service.*

Decision of the Court of Appeal reversed.

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

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

The material facts appear from the judgments.

Neilson for the plaintiff.

Raeburn for the defendant.

June 4, 1915.—ROWLATT, J. delivered the following considered judgment:—This was an action by the wife of a seaman, second mate of a British ship, who was the holder of an allotment note properly issued in every way entitling her during the period of his service to be paid a certain sum, the amount of which is immaterial for the purpose, out of his wages. By sect. 143 of the Merchant Shipping Act it is provided that "the person in whose favour an allotment note under this Act is made may, unless the seaman is shown, in a manner in this Act specified, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, recover the sums allotted, when, and as, the same are made payable, with costs from the owner," and so on, with other provisions that are not necessary to read.

The plaintiff was paid under her allotment note up till the 14th Aug., and has not been paid since.

(*a*) Reported in the King's Bench Division by L. O. THOMAS, Esq., in the Court of Appeal by EDWARD J. M. CHAPLIN, Esq., and in the House of Lords by W. E. REID, Esq., Barristers-at-Law.

The ship on which her husband was serving, on, I think, the 2nd Aug., or some such date, had the misfortune to put into the port of Hamburg, where the ship was detained, and plaintiff's husband was imprisoned, first on, I think, the ship at Hamburg, and afterwards, in the month of November, I think, at a prison a long way from there—Ruhleben, near Berlin.

There is a convention applicable to belligerent ships which are in an enemy port at the outbreak of war called The Hague Convention No. VI. of 1907 the first and second articles of which are as follow:

(1) When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination, or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

The first article only points out that it is desirable that the ship should be treated in this way. Then comes the second article—

(2) A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

This second article seems to me to contemplate the case where, notwithstanding that it is, as it is stated to be, not desirable it should take place, where in point of fact the ship has been prevented from departing from the port, when she has been prevented and not allowed to leave, the article provides that she may not be confiscated.

The belligerent may detain it, restoring it at the end of the war without paying compensation, or requisition it on paying compensation. There is no evidence before me that this ship has been requisitioned. Therefore I must take it that she is merely detained, and not confiscated or requisitioned at present. I think I am bound to assume that the Convention is being applied to the ship. I am not at liberty to conjecture that the Convention is torn up or thrown to the winds; I must assume it is being applied to the ship, and under these circumstances the ship is still the property of her owners; the destination to which she is looking at the present moment is release at at the close of the war. In the meantime she is immobilised at the port of Hamburg.

Under these circumstances it was first argued on behalf of the defendant, the owner of the ship—who, I should mention in passing, raised this point for the purpose of getting a legal decision upon a question which is of great importance, because it is essential to see what the legal position is, and he must be absolutely acquitted of taking it up in any spirit of meanness at all against his employee or his wife—that within the meaning of sect. 158 of the Merchant Shipping Act the services of the seaman had terminated before the date contemplated in the agreement by reason of the loss of the ship, so that under this section his title to wages ceased at the time of such termination. What I have stated in regard to the ship at Hamburg under The Hague Convention, if it is right, negatives any question of the loss of the ship. She is there. The property in her is not changed; she is simply detained, and, apart altogether from what was stated in the case of *Sivewright* v. *Allen* (10 Asp. Mar. Law Cas. 251; 94 L. T. Rep. 778; (1906) 2 K. B. 81), it is impossible to hold that the ship is lost.

Then it was stated that sect. 158 was not exhaustive in regard to the causes which may put an end to the engagement of seamen. I think the contention on this section is correct. When this section is looked at it is not a section which declares that in a certain event the seaman's agreement is terminated—all it does is to say that when the agreement is terminated from the causes mentioned in the section, then certain results shall follow.

So far I agree with the argument for the defendant when he says that the agreement may be terminated from causes other than those mentioned in sect. 158. It is not very difficult to see causes which might terminate the agreement. For instance, the death of the seaman clearly terminates the agreement. Death is not mentioned in the section though there are other sections which point out cases of death. But there are other circumstances which terminate the agreement analogous to it.

As was shown in the case of *The Friends* (4 C. Rob. 143) a seaman may be taken out of a ship by a belligerent ship. The ship might be a neutral, and the seaman might be a subject of the nation to which the visiting ship belonged, or a subject of a neutral to which the belligerent ship belonged. and taken out either as the enemy of the visiting warship or impressed by the visiting warship. I do not think that in that case I can say that his services were not terminated. Or again, his services might be terminated under circumstances which were mentioned in the case of *Melville* v. *De Wolf* (4 E. & B. 844) where he was sent home by the act of the British Government for a court-martial

So I think we must consider that the services of a seaman can be terminated clearly by causes which are not mentioned in sect. 158. Whether they are terminated in that way, or if they are terminated under circumstances as in the present case, whether within the meaning of sect. 143, as applicable to an allotment note, it can be shown, "in manner in this Act specified," to have terminated, is perhaps rather a difficult matter. I do not know whether the Act contains machinery for showing a termination of that kind to satisfy the requirements of sect. 143, but I do not think it necessary to go into that point.

It seems to me that the service is not on any ground terminated at all as yet by what has happened in regard to this ship. It is not merely that it cannot be shown "in manner specified in this Act" to have been determined. It is not only that it cannot be shown in the manner specified in the Act that the seaman has ceased to be entitled to wages, but I do not think he has in fact or law ceased to be entitled to wages.

The position with regard to this ship at the present moment and of the husband of the plaintiff is exactly what it was during the detention of the ship and the imprisonment of the

plaintiff in the case of *Beale* v. *Thompson* (4 East, 546). At the time when this decision was given the question whether the engagement had determined could not be tried in an action for wages during the period of the detention, because no such action could then be brought until the voyage had been completed. But sect. 143 of the Merchant Shipping Act now compels me to decide that to-day we are to assume that the seaman has been entitled to wages without waiting for an after event. The seaman's engagement point was referred to by Kennedy, L.J. in *The Olympic* (12 Asp. Mar. Law Cas. 318; 108 L. T. Rep. 592; (1913) P. 92). In the present state of affairs I must hold that the engagement of the plaintiff's husband is not at any rate yet at an end.

Under these circumstances I must give judgment for the plaintiff for the amount of the allotment note up to the date of the writ. I shall not make any declaration, because it would be troublesome to frame, and circumstances may alter at any moment, and I have only decided on the facts before me at the moment. The defendant will appreciate that the reason for which I give judgment for the plaintiff up to the date of the writ obliges him to pay until circumstances alter. I give, therefore, judgment for the plaintiff.

From that decision the defendant appealed.

Wallace, K.C. and *Raeburn* for the appellant.

Greer, K.C. and *Neilson* for the respondent.

The arguments sufficiently appear from the judgments.

The following cases were referred to:—

Hadley v. *Clarke*, 8 Term Rep. 259;
Beale v. *Thompson*, 4 East. 546, affirmed in the House of Lords, 1 Dow. 299;
Ford v. *Cotesworth*, 23 L. T. Rep. 165; L. Rep. 5 Q. B. 544;
Geipel v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361;
Jackson v. *Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125;
Cunningham v. *Dunn*, 3 Asp. Mar. Law Cas. 595; 38 L. T. Rep. 631; 3 C. P. Div. 433;
Embiricos v. *Reid and Co.*, 12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45;
The Boedes Lust, 5 C. Rob. 233, 246;
The Teutonia; Duncan and others v. *Köster*, 1 Asp. Mar. Law Cas. 214; 26 L. T. Rep. 48; L. Rep. 3 A. & E. 412;
Melville v. *De Wolf*, 4 E. & B. 844;
The Friends, 4 C. Rob. 143;
Esposito v. *Bowden*, 29 L. T. Rep. O. S. 295; 7 E. & B. 763;
The Olympic, 12 Asp. Mar. Law Cas. 318; 108 L. T. Rep. 592; (1913) P. 92;
Sivewright v. *Allen*, 10 Asp. Mar. Law Cas. 251; 94 L. T. Rep. 778; (1906) 2 K. B. 81;
Austin Friars Steam Shipping Company v. *Strack*, 10 Asp. Mar. Law Cas. 70; 93 L. T. Rep. 169; (1905) K. B. 315;
Andersen v. *Marten*, 11 Asp. Mar. Law Cas. 85; 99 L. T. Rep. 254; (1908) A. C. 334;
Goss v. *Withers*, 2 Burl. 683, 694;
Polurrian Steamship Company v. *Young*, 13 Asp. Mar. Law Cas. 39; 112 L. T. Rep. 1053; (1915) 1 K. B. 922;
Thompson v. *Rowcroft*, 4 East, 34, 43;
Pratt v. *Cuff*, cited, in *Thompson* v. *Rowcroft*, 4 East. at p. 43;
Delamainer v. *Winteringham*, 4 Camp. 186;
Lloyd v. *Sheen*, 10 Asp. Mar. Law Cas. 75; 93 L. T. Rep. 174;
Palace Shipping Company v. *Caine and others*, 10 Asp. Mar. Law Cas. 529; 97 L. T. Rep. 587; (1907) A. C. 386;
Curling v. *Long*, 1 Bos. & P. 634;
The Elizabeth, 2 Dods. 403;
Button v. *Thompson*, 20 L. T. Rep. 563.

Cur. adv. vult.

July 30, 1915.—SWINFEN EADY, L.J. read the following judgment:—This is an appeal from the judgment of Rowlatt, J. in an action brought by the wife of a seaman upon an allotment note. She obtained judgment for the amount due to her up to the issue of the writ, and from this judgment the defendant appeals.

No question is raised as to the regularity of the allotment note, but the action has been brought to determine the liability of a shipowner whose ship has been detained in Germany, for the payment of the wages of the crew who have been removed from their ship and are now interned in Germany.

The plaintiff's husband, Tom Rea Beal, signed articles as second mate on board the *Coralie Horlock* on the 21st May 1914 at Hull. The articles were for a voyage of not exceeding two years' duration, to any ports or places within the limits of 75deg. north and 60deg. south latitude, commencing at Hull, proceeding thence to Alexandria, and (or) any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as might be required by the master. His wages were 9*l.* 10*s.* a month, and he stipulated for an allotment note of 4*l.* 15*s.* monthly, which was issued and is payable to the plaintiff.

The vessel sailed from Hull at the end of May 1914 and proceeded to Alexandria and thence to other ports, arriving at Hamburg on the 2nd Aug. 1914. At the outbreak of war on the 4th Aug. 1914 the vessel was still at Hamburg. She has ever since been detained by the German Government. The crew remained on board as prisoners until the 2nd Nov., when they were transferred with the crews of other vessels in a like position to three lodging ships; they were removed thence to Ruhleben, near Berlin, on the 8th Nov., and have since remained there.

The plaintiff contends that she is entitled to recover upon the allotment note, and that the wages of her husband are payable under the articles until he shall be discharged in accordance therewith and pursuant to the provisions of the Merchant Shipping Acts. The defendant contends that he is not liable for the payment of any wages after the 4th Aug. 1914, on which date he contends the loss of the ship occurred.

Arts. 1 and 2 of The Hague Convention, No. VI., of 1907 are applicable to the ships of belligerents which are in an enemy port at the outbreak of war. They are as follows:

Art. 1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its

last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

Then art. 2:

A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

Thus art. 2 provides that a ship in the position of the *Coralie Horlock* may not be confiscated. In the absence of any evidence to the contrary, it must be presumed that she is merely detained on condition of being restored after the war. There is no evidence of any proceedings against the ship, in prize, in the German courts.

The provisions with regard to the advance and allotment of seamen's wages are contained in sects. 140 to 143 of the Merchant Shipping Act 1894, and sect. 62 of the Merchant Shipping Act 1906. The plaintiff has proved, pursuant to sect. 143 (2), that she is the person mentioned in the note, and that the note was given by the owner or by the master or some other authorised agent. Her husband, therefore, is to be presumed to be duly earning his wages, unless the contrary is shown to the court, as provided for by sub-sect. 2. The only clause of sub-sect. 2 alleged to be applicable is clause (*d*):

By such other evidence as the court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid.

The question, therefore, is: Has it been shown satisfactorily that the seaman has ceased to be entitled to his wages?

A seaman may be discharged abroad, pursuant to sect. 30 and following sections of the Merchant Shipping Act 1906, but it is not suggested that such discharge has taken place in the present case.

The discharge of seamen in the United Kingdom is provided for by sects. 127 to 130 of the Merchant Shipping Act 1894, but it is not suggested that the seaman has been discharged in manner provided by these sections. The time of payment of wages in the case of foreign-going ships is provided for by the Merchant Shipping Act 1894, s. 134, and by clause (*c*):

In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof.

The defendant does not even allege that the seaman's wages have been paid or settled, in manner mentioned in the section, or indeed at all, even for the period expiring on the 4th Aug. 1914. The right to wages has not been suspended under sects. 159 and 160, nor has the court been asked to exercise the power of rescinding contracts conferred by sect. 168. It has been contended that the service of the seaman has terminated, by the "loss of the ship," as provided for by sect. 158, and that the seaman was only entitled to wages up to the time of such termination. It is urged that there was a "loss of the ship," either when it was first detained, with the crew on board as prisoners, or, if not, when the crew were removed to the lodging ships, or, if not, when the crew were removed to Ruhleben. There has been a detention of the ship, but there is no evidence of confiscation or attempted confiscation, and it would be directly contrary to art. 2 of The Hague Convention, No. VI. of 1907, for the ship to be dealt with. In the case of a German ship, detained under similar circumstances in England, *The Chile* (12 Asp. Mar. Law Cas. 598; 112 L. T. Rep. 248; (1914) P. 212), the President made an order for "detention," but abstained from adjudging that the vessel "be condemned and sold," and until it is known what course is being taken by the German Government with regard to ships detained, it cannot be decided whether the *Coralie Horlock* is lost or not. It is well settled that when a ship is detained under an embargo, although for a lengthened period, the contract with the seaman is not at an end. The ship, although detained, cannot be treated as lost. In *Hadley* v. *Clarke* (*sup.*) the shipper was held entitled to recover damages against the shipowner for non-performance of his contract to carry goods from Liverpool to Leghorn, on the ground that the embargo placed on the vessel only suspended, and did not dissolve or put an end to, the contract between the parties. The ship was detained at Falmouth by an Order of His Majesty in Council of the 27th July 1796, placing an embargo on all ships bound for Leghorn, until the further order of the Board of Privy Council. It was not until the 24th Oct. 1798 that the embargo was wholly taken off so far as related to ships bound to Leghorn, so the embargo lasted about two years and three months. Lord Kenyon said: "It would be attended with the most mischievous consequences if a temporary embargo would put an end to such a contract as this; because if it were to have that effect, it must also have the effect of putting an end to all contracts for freight and for wages." Lord Kenyon also referred to other events which might occasion a long interruption of a voyage, but which would not put an end to the contract, and the language used by him both at the commencement and the end of his judgment is applicable to the present case. At the commencement of his judgment he said: "Whenever a case comes before us that is likely to be attended with hardship to the parties, a struggle naturally arises in our minds to find out, if possible, some way of extricating all the parties from it. In the present case both parties are innocent, and whatever may be our decision, one party or the other must suffer. In such a situation we must explore our way as well as we can; but we must determine according to the principles of law." At the end of his judgment he says: "I cannot feel myself justified by any principle of law to say, that the contract was put an end to by this temporary embargo; but I am of opinion that, however hard or inconvenient it may be to the defendants, the plaintiff is entitled to recover." And Grose, J. said: "If the embargo dissolved the contract, when did the dissolution take place? The mere stating of the question puts an end to all further inquiry; and the defendants' counsel could not show at

what precise time the contract was dissolved; and if this contract were dissolved by the embargo, it would be followed by the very alarming consequence stated at the Bar, that all the contracts between the owners and the mariners would also be put an end to."

Again, *Beale* v. *Thompson* (*sup.*) (affirmed in the House of Lords (*sup*)) shows that, although a vessel be detained for a long period under an embargo, on ultimate release and return home the seamen are entitled to their wages. In this case the men had been taken from their ship by the Russian Government and interned for upwards of six months, but established their right to wages for the whole period they were so detained.

Again, in *Delamainer* v. *Winteringham* (*sup.*) the same point was raised. The ship had been detained in Russia under the Emperor Paul's embargo, and the men interned in the country. On the release of the ship and crew, the crew returned with the ship to this country, and a seaman sued for his wages, the declaration containing counts for work and labour. It was urged that the plaintiff could not recover the wages under counts for work and labour, as during the whole of the time in question he had been at a distance from the ship, and had done no service as a mariner. Lord Ellenborough, however, decided that the plaintiff's return to the ship and completion of the voyage removed all difficulty. He said: "The action is maintainable on the ground that there was no severance of his services; and therefore in contemplation of law, he was working and labouring for the defendant, from the commencement to the conclusion of the voyage."

It is true that these cases were determined when the rule of maritime law that "freight is the mother of wages" was the law of this country, and by statute it is now provided that the right to wages shall not depend on the earning of freight; but the alteration of the law is in favour of the seaman.

In the case of the *Olympic* (*sup.*), which was a claim by the crew for wages, although Kennedy, L.J. differed from the other members of the court upon the question of fact, whether the damage occasioned to the *Olympic* was sufficient to amount to "the wreck of the ship" within sect. 158, his judgment contains a careful statement of the law with regard to the effect of an embargo. He said: "The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded." He then refers to a passage in Lord Tenterden's Law of Merchant Ships and Seamen, and adds: "In this sentence one of the greatest of judicial authorities on matters of shipping clearly indicates his opinion even in the case of the embargo on a laden ship—*i.e.*, in the case of an obstacle to the prosecution of the voyage imposed by the Government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not)—that, while, in his own interest and in order to save himself the risk of expense, it may be a reasonable and indeed very prudent step on the part of the shipowner to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship." He then continues: "And I may add that what is true of an embargo by the Government to which the ship belongs is true also of seizure for a temporary purpose by a hostile Power." The present detention more resembles an embargo, or a seizure for a temporary purpose, than a capture and condemnation. In the case of *The Friends* (*sup.*) where the seaman failed to maintain his claim to wages, the ship in which he had been serving was captured by the French, and Sir William Scott said: "Nothing can be better settled than that the act of capture defeats all rights and interests." But that was a capture at sea, as prize, by an enemy ship.

In the recent case of the *Polurrian Steamship Company* v. *Young* (*sup.*) the steamship *Polurrian* was captured by Greek men-of-war, her cargo removed from her and used for coaling the Greek Fleet, and the ship was detained from the 25th Oct. 1912 until the 8th Dec. 1912, when she was released without having been brought before a Prize Court. The shipowners failed in their claim upon the policy for a constructive total loss, based upon "the capture," and certainly the mariners' wages did not cease to be payable.

In the present case, the defendant has in my judgment failed to establish the loss of the ship.

It was then contended that there had been a "wreck or loss" of the ship within sect. 158 of the Merchant Shipping Act 1894, and that the word "loss" ought to bear a meaning somewhat similar to that of the word "wreck," and for the purpose of showing the meaning of the word "wreck" in the section, reliance was placed upon a passage in the judgment of Buckley, L.J. in the case of *The Olympic* (12 Asp. Mar. Law Cas. 318; 108 L. T. Rep. 592; (1913) P., at p. 107). He there said: "The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into." It was urged that by the detention of the ship for nearly twelve months there was a loss of the adventure. But in this passage Buckley, L.J. is obviously referring to something physical happening to the ship which injures and damages her, so as to make the ship unseaworthy for so long a time as to make a continuance of her voyage useless as a commercial adventure. In my judgment there has not been any loss of the ship within sect. 158 of the Merchant Shipping Act 1894.

Nor was the contract with the seamen at an end and dissolved by law on the ground that the further prosecution of the venture could not proceed without trading with the enemy. If the ship were released, it would be the duty of the seaman to assist in bringing her home. And it is manifest that the occurrence of a state of war, whereby the further prosecution of a voyage becomes illegal, cannot at once determine the contract of the seaman. In many, probably most of, such cases the vessels engaged in the voyage would, at the outbreak of war, be on the high seas, where the services of the mariners could not possibly be dispensed with. The mere detention

of the ship, without its confiscation, does not in my opinion *ipso facto* determine the engagement of the mariners.

For these reasons I am of opinion that it has not been shown that the plaintiff's husband has ceased to be entitled to the wages out of which the allotment is to be paid, and that the judgment of Rowlatt, J. was right, and that this appeal should be dismissed.

PHILLIMORE, L.J. read the following judgment:—The plaintiff is the wife of a seaman who was serving as second mate on board the *Coralie Horlock*, and she is the holder of an allotment note covering half his wages. The defendant is the shipowner.

The facts have been agreed between the parties.

We are told that it is a test case and a friendly action.

On the 21st May 1914 the husband signed articles for a voyage not exceeding two years from Hull to Alexandria and other ports within certain limits, trading in rotation, and to end at such port in the United Kingdom or on the Continent within home trade limits as might be required by the master.

The vessel sailed from Hull, went to Alexandria and thence to other ports, arriving at Hamburg on the 2nd Aug. On the 4th Aug. war broke out between Great Britain and Germany. What followed is thus stated in pars. 8 and 9 of the agreed statement of facts.

(8) The said vessel was then and still is in the port of Hamburg, and is unable to leave the said port by reason of detention by the German authorities. The defendant has been since the 4th Aug. 1914 and still is deprived of the possession of this said vessel, and the said Tom Rea Beal with the officers and other members of the crew were on or about the 2nd Nov. removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th Nov. were interned at Ruhleben, near Berlin. (9) The defendant has paid to the plaintiff under the said allotment note 4*l.* 15*s.* on the 23rd June, 4*l.* 15*s.* on the 22nd July, and 1*l.* 13*s.* 8*d.* on the 2nd Aug. 1914 and no more.

The husband's wages and the plaintiff's allotment were both payable monthly. The plaintiff has been paid up to the 2nd Aug., and the defendant contends that he is not liable to pay wages to the husband or any allotment to the plaintiff after the 4th Aug.

The plaintiff as an allottee has the same rights as her husband; she has even certain advantages in the matter of proof if her claim is disputed. Under sect. 143 of the Merchant Shipping Act 1894 she is to recover, "unless the seaman is shown, in manner in this Act specified, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid" . . . "and the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the court. . . ."

On the other hand, the section goes on to provide certain modes of proof available to the shipowner. Sect. 144, which provides for the times of payment, has been repealed by the Merchant Shipping Act 1906, and a new provision was made by sect. 62 of that Act; but the alterations are not, I think, material.

We have, therefore, to inquire whether the plaintiff's husband has forfeited or ceased to be entitled to his wages. It is contended on behalf of the plaintiff that if special cases provided for in sects. 159, 160, and 161 are put aside and they have no application to this case, the only instance in which a seaman forfeits or ceases to get his wages are those provided in sect. 158: "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

It is, I think, clear that this section is not exhaustive. Rowlatt, J. in his judgment points out several cases in which a seaman would cease to get his wages and which are not covered by this section. It may be a section only dealing with the case of ceasing to be entitled, but, even so, some of Rowlatt's, J. instances would show it not to be exhaustive.

As to forfeiture, it has been held by the Court of Appeal in a case which I cannot find reported, but which I remember arguing, that the common law power of dismissal for insubordination—such dismissal working a forfeiture—was not excluded by the earlier Act of 1862, and it is known that the Act of 1894 was intended to be a codification Act only.

But I am not sure that these observations carry the case for the shipowner much further. If, indeed, the word "loss" meant some form of physical destruction so that the word "wreck" would be confined to the case where the ship struck ground, and the word "loss" applied to foundering, burning, or crushing by ice, then it would be necessary to invoke the doctrine that the section was not exhaustive. For loss to the owner by reason of capture and condemnation by a Power at war with Great Britain would certainly cause the seaman to cease to be entitled, as was stated by Kennedy, L.J. in the *Olympic* (*sup.*), at p. 117, on his own authority and that of Dr. Lushington in *The Florence* (16 Jur., 572). I may add that several cases, English and American, are cited in Pritchard's Admiralty Digest, 2nd ed., pp. 2158 to 2305, to the same effect.

I should be prepared to hold that seizure by pirates was a loss either within sect. 158 or by the common law, as indeed Dr. Lushington thought.

This leaves us to determine whether this ship has been so lost, or to such an extent lost to her owner that the seaman has ceased to be entitled to his wages either on the 4th Aug., or, if it be of importance to consider it, at some later period.

In the *Olympic*, to which I have referred, the majority of the court construing the word "wreck" gave it an extended meaning. They looked at the consequences to the shipowner and held that the vessel had, by reason of her injuries, ceased to be seaworthy for so long a time "as to make the continuance of the voyage useless as a commercial venture"—those are the words of Vaughan Williams, L.J.; or that she ceased to be "a ship of service for the purpose of the adventure"—those are the words of Buckley, L.J It may be that in considering the word "loss" we ought to import similar considerations. What has happened to this ship? The agreed statement is that she is unable to leave port by reason of detention by the German authorities, and that the shipowner has been deprived of his possession

of her. Rowlatt, J. has taken it that she was detained in accordance with the provisions of The Hague Convention, No. 6, of 1907.

The material clauses of this convention relative to the status of enemy merchant ships at the outbreak of hostilities are as follows: [His Lordship read arts. 1 and 2 and continued:]

If it is to be taken that it is not a detention within Article 2 of The Hague Convention just set forth, then it is an extremely hostile act, because it is contrary to what is expressed to be desirable by Article 1, and to the international practice which before The Hague Convention had been established for at least fifty years. (Pearce-Higgins, The Hague Peace Conferences, pp. 300-304).

If it is to be taken, as Rowlatt, J. has held, that the detention was under article 2 of the Convention, it opens a wholly new question.

It has been suggested in argument that this detention might be likened to an embargo which, according to the decided cases, if afterwards removed so that the voyage is ultimately accomplished, does not work a forfeiture of wages and indeed further entitles the seaman, if paid by time, to his monthly wages during the period of the embargo even if he is taken away from the ship and imprisoned: (see *Pratt* v. *Cuff*, cited in 4 East, p. 43; *Delamainer* v. *Winteringham* (*sup*); and the most authoritative case of all, *Beale* v. *Thompson* (*sup.*) affirmed in the House of Lords (*sup.*). But the embargo cases are not, I think, in point.

First, as it was observed by Sir William Scott in the *Boedes Lust* (*sup.*) and by Sir Robert Phillimore in *The Teutonia* (*sup.*) (at p. 412) and in his Commentaries on International Law (vol. iii., pt. 9, ch. 3), an embargo is distinct from an act of war. It is, to use Sir William Scott's language, an equivocal act, and if the two nations come to terms without going to war, the ships and crews are restored and it is treated, as he says, as a mere civil embargo: whereas, if the end of the controversy is war, the original seizure for embargo purposes may be turned into a capture and result in condemnation.

Secondly, during the operation of the old law that freight was the mother of wages, which prevailed till the General Merchant Seamen's Act (7 & 8 Vict., c. 112, sect. 17), made the first inroad on the old law, and till the Merchant Shipping Act 1854 finally abrogated it, no action for wages could be begun till the voyage was finished, and therefore the point never arose except in cases where the embargo had been raised, the ship restored and brought back, and the claimant restored to her, so that he contributed to finishing the voyage. That this last condition is a necessary one is shown by the case of *The Friends* (*sup.*). The only difficulty the courts had in these circumstances was to determine whether the seaman should get his pay during the period of embargo and imprisonment.

There have been cases where vessels were seized before the declaration of war, and where ultimately on the conclusion of peace there was mutual restoration. This would be much more like the present case, but I am not aware that there are any decisions as to seamen's claims in such cases. In the present case there is a seizure operating after war has been declared, "War the end of which cannot be foreseen," per Willes, J., delivering judgment of the Exchequer Chamber in *Esposito* v. *Bowden* (*sup.*). This phrase is repeated by Sir Robert Phillimore in the *Teutonia*. In *Geipel* v. *Smith* (*sup.*) Lush, J. expresses himself as follows: "If the impediment had been in its nature temporary I should have thought the plea bad, but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."

During the argument I thought that some light might be thrown upon the meaning of The Hague Convention by the decisions of our own Prize Court on German vessels in a similar position in this country. There is a reported case of *The Chile* (12 Asp. Mar. Law Cas. 598; 112 L. T. Rep. 248; (1914) P. 212), where the form of the sentence of the court is set out. There is an important distinction between this form of sentence and the form where the ship is condemned as prize out-and-out and ordered to be sold. I have obtained a copy of the sentence in the following case of *The Marie Glaeser* (12 Asp. Mar. Law Cas. 601; 112 L. T. Rep. 251; (1914) P. 218), and there is a great difference. In fact, the prize rules provide for two different forms of sentence—Form 53, Nos. 1 and 2.

This argument, it must be admitted, makes so far in favour of the seaman.

The sentence of the Prize Court, however, puts the ship at the disposition of the Crown. As we know, and as the article of The Hague Conference provides, ships so sentenced are subject to requisition and have been taken. Anyhow, they are detained till "after the war."

The consequences of holding that the seaman's engagement remains are very serious. If the war, which is approaching the end of its first year, were to last many years—which God forbid!—the shipowner might be ruined by the payment of pensions for many years and the payment of the accumulated balance at the end.

A contrary conclusion is hard upon the allottees, but we may reasonably hope that some provision may be made for them out of public funds.

On the whole, I think that this detention, whether it is to be taken as being under The Hague Convention or otherwise, is of the nature of a hostile capture and not only puts an end to the voyage but further creates a loss of the ship; and if it is necessary so to decide, a loss under sect. 158. I am fortified in this conclusion by the way in which the majority of the court in the case of the *Olympic* dealt with the parallel word "wreck."

An argument for the respondent was based upon sect. 134. This supposes that the engagement has come to an end, and that the seaman has not been paid. Whether an allottee of wages could claim a portion of the "sharp penalty" provided by this section may be doubtful. It is enough to say that the non-payment of wages, if it has occurred, has not been "the wrongful act or default of the owner or master."

I think that the appeal should succeed.

BANKES, L.J. read the following judgment:—This is the defendant's appeal from a judgment of Rowlatt, J.

The plaintiff is a person in whose favour an allotment note was given by the master or owner

of the steamship *Coralie Horlock* at the instance of the plaintiff's husband, who was engaged as second mate on that vessel.

The vessel was unfortunately in the port of Hamburg at the time of the declaration of war with Germany. All the information given to the court as to what has since happened to the vessel, and her crew, is that contained in an agreed statement of facts, in which it is stated (par. 8) that the vessel is unable to leave the port "by reason of detention by the German authorities, and that the defendant has been, since the 4th Aug. 1914, and still is deprived of the possession of the said vessel," and further that the plaintiff's husband "with the officers and other members of the crew was, on or about the 2nd Nov., removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th Nov. was interned at Ruhleben, near Berlin." Upon this state of facts the defendant contends that he is under no obligation to pay to the plaintiff any moneys under the allotment note after the 4th Aug. 1914 upon the ground that he was not liable to pay the plaintiff's husband any wages after that date.

The position of a person in whose favour an allotment note has been made is a statutory one. Sect. 143 of the Merchant Shipping Act 1894 provides that such a person may, unless the seaman is shown, in manner in this Act specified, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, recover the sums allotted when and as the same are made payable. The section further provides that in any proceeding for such recovery on proof of certain facts (which facts are admitted in the present case) the seaman shall be presumed to be duly earning his wages unless the contrary is shown to the satisfaction of the court in certain ways set out in detail in the sub-paragraphs to the section.

The defendant rests his case entirely on sub-paragraph (*d*) which provides for the case where satisfactory proof is given that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid. If this can be made out it affords an answer to this action. In my opinion the evidence before the court is wholly insufficient to establish it. Long periods of detention of a vessel under orders of embargo, even when accompanied by imprisonment of her crew, have been held insufficient to deprive a seaman of his right to payment of his wages for the full period of detention where the voyage is ultimately resumed and completed: (see *Beale* v. *Thompson* (*sup.*); *Hadley* v. *Clarke* (*sup.*). In *Beale* v. *Thompson* (*sup.*) and similar cases the question did not arise until after the voyage had been resumed, and in that respect they differ from the present case. They establish the principle, however, that mere detention is not sufficient to deprive a seaman of his wages where the voyage has ultimately been resumed and completed, and it seems to follow that in a case of mere detention it is no answer to a claim for wages to say that it seems uncertain whether the voyage will be resumed.

In the present case the plaintiff issued her writ in the month of April last, and the learned judge has directed payment of the amount of the allotment note up to the date of the issue of the writ. The circumstances which it is material to consider, therefore, are the circumstances existing at that date. The agreed statement of facts affords the very minimum of information. It does not even state whether the vessel is detained under the terms of The Hague Convention. The case was argued on the footing that she was so detained, and if she was I agree with that part of the judgment of Rowlatt, J. in which he says that he is not at liberty to conjecture that the convention is torn up or thrown to the winds, and that consequently he must come to the conclusion that the vessel is merely detained, and is not confiscated or requisitioned at present. I am prepared to go further in the same direction as the learned judge, and to say that we are not at liberty to conjecture on any of the points on which the defendant relies. It is said on the defendant's behalf that the vessel has been lost, and that the adventure has come to an end in a commercial sense, and that on one or other of these grounds the plaintiff's husband has ceased to be entitled to his wages. The mere fact that the vessel is detained owing to a state of war, and that the crew are interned in Germany, is not, in my opinion, sufficient proof that either event had occurred at the date of the writ, or indeed has yet occurred. There is at present, in my opinion, no evidence before the court which would justify a conclusion in the defendant's favour. It may eventually turn out that he is in the right in his contention, but he cannot, in my opinion, establish it on the present evidence. The result is that, under these circumstances, the seaman must, under the provision of the statute, be presumed to be duly earning his wages.

Mr. Greer has contended that unless and until the defendant can satisfy the court that the engagement of the plaintiff's husband has either terminated under sect. 158 of the Merchant Shipping Act, or that he has been discharged in the manner indicated by sect. 127 and the following sections, the amount payable under the allotment note must continue to be paid. In the view I take of the evidence in this case it is not necessary to express any opinion on these points. I agree that the appeal should be dismissed.

The shipowner appealed.

George Wallace, K.C. and *Raeburn* for the appellants.

F. A. Greer, K.C. and *Neilson* for the respondent.

The House, having taken time for consideration, allowed the appeal.

Jan. 21, 1916.—Earl LOREBURN.—This is a case of great importance at the present time. A seaman had the misfortune to be serving on a British ship which entered the port of Hamburg on the 2nd Aug. 1914. The ship was detained by the German authorities when, on the 4th Aug., war broke out.

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

In these circumstances this seaman's wife sues on an allotment note. Her right to recover admittedly depends on the question, Was the seaman entitled to his wages for the period from

the 2nd Aug. to the 10th April 1915? His contract of service required him to serve on the ship *Coralie Horlock* for a voyage not exceeding two years in duration. These articles were signed on the 21st May 1914. An allotment note was issued in favour of the present plaintiff for a monthly payment of 4*l.* 15*s.*

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

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

Assuming this to be so, does that impossibility of performance dissolve the contract of service and disentitle the seaman to wages from that time onwards? The law, both as it is found in the Statute Book and as it has been administered in Admiralty courts, has always been in some respects peculiarly tender and benevolent towards seamen in regard to their contracts of service, though in earlier days with a notable exception embodied in the maxim that freight is the mother of wages. That was a cruel exception, which has been removed now by Act of Parliament. Yet it has always to be remembered in scrutinising the older decisions, because what prevented freight from being earned might prevent wages from being recoverable.

Is there, then, either in any Act of Parliament or in Admiralty law, any rule which prescribes the effect of such a detention by the enemy as makes the performance of a contract of service impossible? There is no proof of condemnation by a court.

We were referred to sect. 158 of the Merchant Shipping Act. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion these words refer to physical loss. It is true that a ship is lost to her owner in a real sense when she has been captured and condemned by a competent court. It was argued that she may be equally lost to her owner by a prolonged detention. I should be disposed to say that where the property remains his, and ultimate recovery is to be expected, she is not lost even to him. But if I am right in thinking that both the words used in this section —namely, "wreck" and "loss"—refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in the *Olympic* did not decide anything inconsistent with this view. They merely used the frustration of the voyage as a test by which to determine whether or not the physical injury inflicted amounted to "wreck."

Coming to the law as administered in Admiralty, three cases were cited with a view of showing that prolonged detention of a ship and its crew by a foreign Power did not dissolve a seaman's contract of service. Two of these authorities are in 4 East—namely, *Beale* v. *Thompson* and *Pratt* v. *Cuff*—the former of which was affirmed in this House more than 100 years ago, but there is no record to show on what grounds. The third is a case at Nisi Prius. *Delamainer* v. *Wintringham*, in 4 Camp. Rep. 186. All of them are cases in which ships and crews were confined for a long time but were ultimately released, and the interrupted voyage completed so as to earn freight, and therefore wages. It was held that wages continued to be payable throughout. This could be supported, and was supported in the judgments, on the ground that both employers and employed treated the service as not terminated by the tempoary interruption, though there are passages in the judgments which admit of a broader interpretation. There is no distinct authority for the proposition that if a seaman is willing to fulfil his contract he is still entitled to wages, though the performance of it has been made impracticable on both sides by a prolonged captivity.

Accordingly neither statute nor Admiralty law provides special guidance, and I must recur to common law. The contract was for service on a ship for a voyage within a period of two years. Both ship and crew were forcibly detained, the contemplated service became impracticable, so far as I can judge, on the 2nd Nov. 1914. Had the ship and crew been released on the 2nd Nov. I do not think common law would have treated the contract of service as ended, and I do not think the chance of her release was ended before the 2nd Nov.

In my opinion, neither party was any longer bound by that contract from that date. If they were bound it must mean that wages were to be paid, without any service in return, for the entire duration of this war, or, in the present case, till the expiry of two years from the commencement of the service. The Napoleonic war after the rupture of the Peace of Amiens lasted for eleven years. I think it was an implied term of this service, subject to any special law affecting seamen, that it should be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure.

Accordingly I think that the appeal should be allowed in respect of the period after the 2nd Nov. I learned with satisfaction that provision is to be made for cases of this kind from public funds. It cannot, of course, affect the decision of a court of law, but it is in accordance with the spirit which has always influenced both courts of law and the Legislature in dealing with a deserving class of men. The shipowners in this case have

brought it before the courts in order to settle the law, which has been in doubt, and are not open to any reflection.

Lord ATKINSON.—The main facts have been already stated by my noble and learned friend who has preceded me. The *Coralie Horlock* sailed from Hull at the end of May 1914 on the contemplated voyage to Alexandria, and from thence to other ports, and arrived at Hamburg, a port within the limits, on the 2nd Aug. 1914. War having broken out between Great Britain and the German Empire on the 4th Aug. 1914, this ship has from that date up to the present time been detained in Hamburg by the German Government. The appellants have entirely lost the use of her. Her officers and crew were upon the 2nd Nov. removed to a lodging ship in Hamburg, and on the 8th Nov. were interned at Ruhleben, near Berlin, where they still remain.

The Hague Convention makes certain provisions touching the fate of a ship belonging to one of the belligerents found at the commencement of hostilities in the port of another belligerent. If Germany should observe these provisions the ship will not be confiscated. I utterly refuse to assume that she will do so. The respondent has failed to prove that the ship has been confiscated. What has happened to her since her detention began has not been proved. She may have been destroyed, or sent elsewhere, or devoted to some particular use. The only thing certain about her fate is that the appellants have been absolutely deprived of the use of her since the 4th Aug. 1914, and that her crew have been interned as prisoners of war.

The sole question for decision on this appeal is whether the admitted facts establish satisfactorily that the respondent's husband, Thomas Beal, ceased to be entitled to 9*l.* 10*s.* per month on the 4th Aug. 1914, or if not then at what later date if at all.

The ancient doctrine that freight was, as it was said, the mother of wages, that the crew and the owners of the ship were co-adventurers in the enterprise of earning freight out of which the seaman was to be paid, has been abolished by sect. 157 of the Merchant Shipping Act 1894, and the seaman is now entitled to be paid his wages whether freight be earned or not. Still his contract is a contract to render his service for the achievement of the adventure or adventures upon which it is contemplated by both parties to his contract the ship is to embark, and though, undoubtedly, many provisions of the Merchant Shipping Act are framed to protect sailors from the result of their well-known improvidence, still there is no reason whatever why a rule of law applicable to contracts in general should not be applied to the contracts of seamen, where these latter are not expressly or impliedly excluded from its operation. The rule I refer to is laid down by Lord Blackburn in the case of *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826) in these words: "Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract may become unexpectedly burdensome or even impossible. . . . But this rule is only applicable where the contract is positive and absolute, and not subject to any condition express or implied; and there are authorities which, as we think, establish the principle, that where from the nature of the contract, it appears the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract they must have contemplated such continuing existence as the foundation of what there was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible by the perishing of the thing without default of the contractor." This principle applies not only to contracts in their executory stage, but when they have been in part performed.

In *Appleby* v. *Meyers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651) the rule was, by the judgment of the Exchequer Chamber, applied to the case where the plaintiff contracted to erect certain machinery on the defendant's premises, and to keep it in repair for two years, the price to be paid on the completion of the work. After some portions of the work had been finished, and others were in the course of completion, the premises and all the machinery and materials were destroyed by an accidental fire.

It was held that both parties were excused from the further performance of the contract, and that the provision as to the payment of the price only after completion, disabled the plaintiff from recovering anything in respect of the work done by him.

In *Howell* v. *Coupland* (33 L. T. Rep. 832; 1 Q. B. Div. 258) it was applied to a case where a crop which was sold perished by disease.

In *Baily* v. *De Crespigny* (19 L. T. Rep. 681; L. Rep. 4 Q. B. 180) the performance of a covenant was rendered impossible by an Act of Parliament, and the covenantor was held to be discharged.

In *Krell* v. *Henry* (89 L. T. Rep. 328; (1903) 2 K. B. 740) it was applied to a case where a flat in Pall Mall was hired in order to see the contemplated procession on the occasion of the coronation of his late Majesty King Edward the Seventh, which ceremony was postponed. The contract of hiring did not contain any express reference to the procession, but it was held that the proper inference to be drawn from the surrounding circumstances was that both parties to the contract contemplated the taking place of the procession along the proclaimed route as the foundation of the contract.

In *Melville* v. *De Wolf* (4 E. & B. 844) the impossibility arose from an act of State as the primary cause. The plaintiff in the action was a seaman who had signed articles to serve on a voyage to the Pacific and back to a port in the United Kingdom for a term of three years at 7*l.* per month. The captain was sent home from Monte Video by a naval court, constituted under the Mercantile Marine Act of 1850, to be tried for shooting one of the crew. The plaintiff was sent home by the same court as a witness against him, and he attended the trial in this country in

that capacity. When the trial was over the ship was in the Pacific, and it was practically impossible for him to return to her. The plaintiff claimed wages at the above rate up to the time the trial terminated. The defendant paid into court a sum sufficient to cover the plaintiff's wages up to the time he left his ship. It was held that he was not entitled to any wages after he left the ship. Lord Campbell, on delivering judgment, said: "After he was sent home from Monte Video to England he neither served under the articles actively or constructively, and as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must be considered to be dissolved by the supreme authority of the State, which is binding on both parties."

It will be observed that the contract so dissolved was not a mere executory contract, but a contract in part performed.

In the case of *The Friends* (4 C. Rob. 143) the impossibility was the result of the act of a hostile State. The plaintiffs' ship, a British ship, manned by a British crew, was, in the course of a voyage from London to Newcastle and back, captured by a French privateer. The plaintiff and some members of the crew were taken, as prisoners of war, to France, not because of their special connection with this particular ship, but because they were British subjects. While they were in custody the ship was recaptured, which as far as possible, according to law, restored the antecedent condition of things; but a new hand had been hired to fill the plaintiff's place. The ship continued her homeward voyage and reached the port of London.

The plaintiff sued for the wages which would have been due to him had he served on the homeward journey. Sir William Scott (as he then was), in giving judgment, said: "Nothing can be better settled than that the Act of Capture defeats all rights and interests, but it is contended that the former interests revive on recapture The claimant was not on board at the time of recapture, and the owners were obliged to hire another to fill his place. Under these circumstances the utmost that could be demanded, with any show of reason, would be, that the small portion of his wages earned prior to the capture, two days' service, subject to salvage, were due. Beyond that it is impossible to advance a pretension; for what right can a person in captivity have to demand the benefit of the labour of those who carried the ship to London, and still more of those who were hired in his place for the return journey?"

The contract in this case also was in part performed, but the service in aid of the adventure which the parties to the contract contemplated the seaman should render in return for his wages was made impossible by his incarceration, and each party to the contract was held, therefore, to be relieved of the obligation it imposed.

In my opinion the provision contained in the 158th section of the Merchant Shpping Act of 1894 to the effect that the service of a seaman and his title to wages cease when his ship is lost is but a statutory application of this same principle.

I think that the loss referred to in this section does not mean merely the loss of the use of the ship, but physical loss. Physical loss, however, is not to be confined to the foundering of the ship, or such like, but physical loss as defined in the judgment of Maule, J., in *Moss* v. *Smith* (9 C. B. 94, 103), applicable generally to mercantile contracts, and approved of by Lord Blackburn in *Dahl* v. *Nelson* (4 Asp. Mar. Law Cas. 392; 44 L. T. Rep. 381; 6 App. Cas. 38, at p. 52). Maule, J. said: "It may possibly be physically possible to repair the ship, but at an enormous cost, and then also the loss would be total; for in matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. If a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repair would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." Lord Blackburn points out that, though these words were used in the case of a policy of insurance, they were spoken generally of mercantile contracts, and that it was on the principle thus laid down that *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404, and *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125) were decided. It was contended that this sect. 158 is exhaustive, and that no loss other than the physical loss there referred to can terminate the seaman's contract, or his right to wages. In my opinion that is wholly erroneous. It leaves out of consideration effective capture by a belligerent which transfers the property in the ship from its owners to the captor and enables that captor to give an effective title to his vendee, and it also leaves out capture by pirates, which transfers the possession and custody of the ship, though not her ownership.

The above-mentioned cases are clearly distinguishable from *Beale* v. *Thompson* (4 East, 546) as was pointed out by Lord Campbell in *Melville* v. *De Wolf* (4 E. & B. 844). In the former case the ship went out in ballast from England to St. Petersburg to bring cargo from thence to London, and was to be paid freight by the ton. The Emperor Paul of Russia, though at peace with England, had this ship, with others, seized and her crew imprisoned. On his death, in six months, the ship and crew were released. They were taken back on board of their ship, got her cargo, navigated her back to England, and earned the proper freight. Lord Ellenborough, in delivering judgment, approved of, and relied upon the doctrine laid down in different words by Lord Hardwick in *The King* v. *Castle Church* (1 Bur. 5, c. 70), and in *The King* v. *Eaton* (p. 40 of same report), respectively, to the effect in the first place, "that where a servant returns and the master receives him, it is always esteemed a dispensation of the master, and helps the discontinuance, and works in the nature of a remitter," and in the next: "the absence of the servant for three weeks was purged by the master's receiving him again, which ought to be received in that case as a dispensation, and in strictness of law, he still continues in the service of the master, notwithstanding such absence."

Lord Ellenborough held that owing to the terms upon which the ship was released, and the property belonging to the ship and the crew

restored or compensated for, under the order of the Russian Government (551), there was no capture, notwithstanding the hostile nature of the seizure, and laid it down that the right of a mariner to wages depends, first, on his earning freight for his owners on that voyage for which he was hired, and secondly, upon the performance by the mariner of the service he has agreed to perform, in respect of his owners during the voyage.

The jury found that the plaintiff had performed his services properly, and the freight was admittedly earned. And taking these three facts into consideration, the reception back of the plaintiff by the owners into their service. the earning of the freight, and the proper performance by the plaintiff of his service it was held that he was entitled to his wages during the time of his captivity and until he reached London on the return voyage. *Delamaine* v. *Winteringham* (4 Camp. 186) is to the same effect.

In the present case the owners have not taken back the seaman Beal into their service. On the contrary they insist that the contract with him is at an end, and that his right to wages has been determined.

In *Wiggins* v. *Ingleton* (2 Ld. Raym. 1211), a seaman, after serving three months on a voyage from Carolina to London, was impressed, under the Queen's authority, before reaching the delivery port. It was held that even though the ship reached that port he was only entitled to wages *pro tanto* for the time he actually served.

In *Dahl* v. *Neilson* (*ubi sup.*), Lord Blackburn at p. 53 said that it was "held in *Geipel* v. *Smith* by the whole court, and in *Jackson* v. *Union Marine Insurance Company* by the majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber that a delay in carrying out a charter-party caused by something for which neither party are responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end." Lord Watson, on pp. 61 and 62, analysed these two cases at length, and approved of the decisions in them, and Lord Selborne stated he had read the judgments of his two colleagues and concurred in them.

In the first of these cases the defendant vessel had been chartered by the plaintiff to load at a particular place a cargo of coals to be taken to Hamburg. Before any breach of the agreement the port of Hamburg had been blockaded by the French fleet, and the Queen of England had by proclamation enjoined her subjects to strict neutrality and not to commit any violation of the Law of Nations. Thereupon the voyage to Hamburg became illegal. The defendant refused to load his ship, and it was held he was justified in so doing, as the charter-party was for a single adventure to commence at once, and the contract being executory the further performance of it within a reasonable time was prevented by an excepted cause—the blockade, which was a restraint of princes. Lush, J. in giving judgment put the pith of the case thus. He said: "If the impediment had been in its nature temporary I should have thought the plea bad, but a state of war must be presumed to be likely to continue long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this." It is not necessary, therefore, in such a case to wait till the delay has occurred. It is legitimate to come to the conclusion that the delay caused by war will be long, and so disturbing to commerce as to defeat the adventure and to act accordingly at once.

In the second case, the plaintiff, a shipowner, entered into a charter-party dated in Nov. 1871, by which his ship was to proceed with all despatch from Liverpool to Newport and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight. The ship sailed from Liverpool on the 2nd Jan. and ran aground on the following day in Carnarvon Bay. On the 15th Feb., while she was aground, the charterers threw up the charter-party and chartered another ship. On the 18th she was floated, but the necessary repairs could not be effected till Aug. The plaintiff sued on the policy for the chartered freight. The jury found that the time necessary for getting the ship off, and repairing her, was so long as to put an end to the adventure in a commercial sense.

This, according to Bramwell, B., as he then was, amounted to finding that the voyage the parties contemplated had become impossible, and that a voyage undertaken after the ship had been repaired would have been a different voyage, a different adventure, and held that there was an implied condition precedent in the contract that the ship should arrive at the port of loading in a reasonable time, the non-performance of which not only gave the charterer a cause of action, but released him from the contract, that he was not bound to load the ship, and that there was therefore a loss of the charterer's freight by perils of the sea.

The charterer did not wait till a reasonable time had elapsed before he repudiated the contract. He did that at once when a long delay in the process of repairing was reasonably probable.

In a case tried before Sir William Scott, as he then was, he practically applied, many years earlier, the same principle to an executed contract, namely, the case of *The Elizabeth* (2 Dods. 403). This vessel sailed from London to St. Petersburg, took in cargo there, and started on her return voyage. She grounded on a reef of rocks at Gothland, was floated, and brought to Ostergman, where she was beached in order to examine her injuries. She was so damaged that she could not be repaired within the Baltic season—*i. e.*, when the Baltic was sufficiently free from ice to be navigable. Though it is a general rule that a captain cannot discharge his crew in a foreign port, it was held that, under these circumstances, and having regard to the anticipated delay, he was clothed with authority in this case to do so. He did discharge them against their will (as it was taken to be), at once, making provision for their passage home to England. The ship returned to England in the month of April following, manned by a new crew. The plaintiff sued for wages up to the time of the return of the ship to the home port. It was held that he was only entitled to wages up to the date of his discharge. At p. 408 of the report, the learned judge, Lord Stowell, said: "The ship proceeded on the original voyage under the expectation entertained on both sides that she would return in the ordinary course of such voyage. A total loss by

wreck happens. This operates as a total loss of wages. There may be cases much short of this semi-naufragium which were not occasioned by the default of either party, but where it has originated from *vis major*, the act of God, which neither party had in contemplation at the time of the contract. . . . I am, therefore, clearly of opinion that they have no right to claim, as they have done, wages up to the time of the return of the *Elizabeth*. If they had obstinately stayed with the ship they would have done wrong, both with respect to the owners and to themselves. I think the master had a right to dismiss them under this extreme pressure."

Here the contract of the seamen was not executory; it was in part performed. The time necessary to make the repairs had not elapsed. The delay had only been anticipated when the dismissal took place. It was the prospect that a long time must elapse before the ship was rendered fit for use, not the actual lapse of that time, which justified the captain in treating the adventure for which the crew contracted to serve as at an end, and their contracts as terminated.

This case was cited in the case of *The Olympic* (12 Asp. Mar. Law Cas. 318; 108 L. T. Rep. 592; (1913) P. 92), and commented upon by Buckley, L.J., as he then was. In that case, as in the case of the *Elizabeth* and as in the present case, the contract of the seamen was in part performed. *The Olympic*, though very seriously injured, was well worth repairing, but it was the prospect of the delay necessary to effect the repairs required to render her seaworthy which in the opinion of the court rendered her a wreck within the meaning of this sect. 158 of the Act of 1894 and justified her owners in treating the particular adventure for which the crew contracted to serve as ended, and justified their dismissal.

In my view the provision touching wreck contained in the 158th section of the Merchant Shipping Act of 1894 is merely a statutory application of the principle first laid down in the case of the *Elizabeth* to cases when the ship sustains physical injury, not so grave as to amount to loss, yet sufficiently serious to render her unseaworthy until repairs, requiring a substantial time to effect, are carried out upon her.

In the present case it does not appear that the ship is physically injured. Once interned by this enemy power, the prospect of being interned for a length of time to which nobody can place a limit opened up to her owners. Moreover, any day something may be done which would transfer the property in the ship from them to her captors.

In *Beale* v. *Thompson* (4 East, at p. 561) Lord Ellenborough said: "Seizure, even hostile, is not necessarily capture, though such is its usual and probable result. The ultimate act or adjudication of the State by which the seizure has been made assigns its proper and conclusive quality and denomination to its own original proceeding. If it condemns in such case it is a capture *ab initio*. If it awards restitution as an act of justice as the Order of the 5th June 1801 expressly does, it pronounces upon its own act as not being a valid act of capture, but as a temporary seizure and detention upon grounds not warranting the condemnation of the property or the dealing with it as captured. It seems to make no material difference for this purpose whether the restitution were awarded by the government of the country as an act of State, as in this case it was, or by any of the ordinary courts of civil judicature to which the administration of justice on these subjects is usually dedicated." The meaning of that passage I take to be this, that seizure *per se* is an equivocal act that whether it shall amount to capture or not depends upon the intention of the captor in making it, that this intention may be shown by acts subsequent, namely, either the condemnation in the proper judicial tribunals of the State of the property taken as lawful prize, or by an act of the government of the country of the captors as an act of State, and that when that intention is shown it operates by relation back to the original seizure, turning it either into a capture *ab initio*, or into a temporary detention *ab initio* not amounting to capture. Thus the circular of the 5th June 1801 was held to determine the character and purpose of the seizure made over six months previously.

In *Goss* v. *Withers* (2 Bur. 683), Lord Mansfield, at pp. 693-695, deals with the principles adopted and practices followed by different European countries on this question of prize. He leaves the matter, in many respects, quite undecided. And consistently with everything that has been laid down in these two authorities, it may well be that any act of the Government of a belligerent Power indicating that they have treated a seized ship as their own property, such as the sale of it, for instance, would be sufficient to determine the character and purpose of the original act of seizure so as to make it either a capture proper with all its consequences or mere detention.

We are deciding this case without knowing whether anything of the kind has occurred in this instance. The fact, however, that it might occur at any moment after seizure, renders it all the more reasonable, just, and natural for the owners to have come to the conclusion on the 4th Aug. 1914 that the adventure upon which their ship was embarked was put an end to, and the contracts of the crew, and their right to wages determined. They acted upon that conclusion in the only way, and to the only extent possible under the circumstances, by refusing to pay the allotment. In reference to *Hadley* v. *Clarke* (8 T.R., 263), it has been already pointed out that the embargo imposed by the Order in Council appeared only to contemplate a temporary detention, as it was made till "further order." And the point was never made that an embargo, even if originally intended to be temporary, might not put an end to the contract of affreightment if it were prolonged (see Lord Kenyon, 265). All that was, in fact, decided was the abstract point that a *temporary* interruption of a voyage by an embargo does not put an end to such a contract.

Moreover, the judgments of Grove, J. and Laurence, J., especially that of the latter, rather indicate that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time—the dangers of the seas only excepted. The latter learned judge says, p. 267, they—"absolutely engaged to carry the goods, the dangers of the seas only excepted; that, therefore, is the only excuse which they can make for not performing

the contract. If they had intended that they should be excused for any other cause they should have introduced such an exception into the contract."

Of course, if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become.

The contract with the crew in this case was not a positive and absolute contract, and the above case does not appear to me to touch the present case.

Sect. 134 of the Act of 1894 does not, I think, touch this case. It obviously does not refer to the forcible act of an enemy.

No point was raised as to the two days which elapsed between the 2nd Aug, the day of arrival, and the 4th Aug., the day of the outbreak of war.

In my opinion, therefore, the judgment of the Court of Appeal, as well as that of Rowlatt, J. was erroneous and should be reversed.

Lord SHAW.—The respondent is the wife of a seaman who signed articles as second mate on board the *Coralie Horlock* on the 21st May 1914. He agreed to serve "on a voyage of not exceeding two years' duration," within certain limits, "trading in any rotation and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master."

His wife, the respondent, was duly made allottee of one-half of his monthly wages. The papers are in order, and there is no question of her right to be paid the one-half of the wages which her husband has earned or to which he is entitled. She founds upon sect. 143 of the Act of 1894, conferring the right to sue and recover on allotment notes. By sub-sect. 2 it is provided that the seaman shall be presumed to be duly earning his wages unless the contrary is shown *inter alia* by such "evidence as the court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages."

The question in the case, accordingly, is whether Beal has become entitled to wages from and after the time when a state of war existed between Great Britain and Germany.

The declaration of war took effect as from 11 p.m. on the 4th Aug. 1914. The *Coralie Horlock* was then in the port of Hamburg, where she had arrived on the 2nd. The ship still remains there. Apart from exceptional or provisional rules or directions agreed to by the belligerent States, for her owners or master to trade with the enemy was, of course, illegal; for her crew it was equally illegal to assist in trading with the enemy; to attempt an escape, whether with or without cargo, may have been physically impossible; in any case it would have exposed the ship to risk of destruction.

In *Esposito* v. *Bowden* (29 L. T. Rep. O. S. 295; 7 E. & B., p. 779), Willes, J., reviewing the case law and referring especially to *Potts* v. *Bell* (8 T. Rep. 548), and to the judgment of Lord Stowell in the *Hoop*, stated the law in terms which have never since been doubted: "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal."

Without fault on the part of either party to the contract of service, law and force combined to stop the prosecution of this voyage; and the adventure was consequently lost. In my humble opinion that stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure.

I say this advisedly, in consequence of the argument presented to the House, and founded on the possiblity that after a declaration of war peace may be concluded within a short time, ships may be released and voyages and shipping adventures be resumed. As the cases show, such resumption does of consent take place, and courts of law pay respect to the terms upon which the resumption was made. But apart from the private arrangements of parties, the contracts are, in my opinion (and subject to the point as to a period of grace hereafter dealt with), brought to an end by a declaration of war, and all interested are entitled to have affairs settled upon that footing. And I am further of opinion that the contract of service between owners and crews is also terminated in the same way, because it is a contract whose incident stand or fall with the adventure with which it was bound up.

I do not think that any other rule would be in accord with law or would work. When a ship is put under detention by a declaration of war, I cannot see room for a condition of affairs which would leave parties in suspense, feeling that they are bound if the war be short but free if the war be long. In the case of a vessel in an enemy port, the war descends upon master and crew alike, taking no regard of either contract rights or obligations, but putting all alike on the common footing of British citizens, and as such placing their liberty completely at the disposal of the enemy Power. Germany made no lesser claim in the present case. From the 4th Aug. the owners "were deprived of the possession of this said vessel, and the said Tom Rea Beal, with the officers and other members of the crew, were on or about the 2nd Nov. removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th Nov. were interned at Ruhleben, near Berlin," where they still remain.

While the general question as to the effect of a declaration of war should, in my opinion, be resolved as stated, I should also feel entirely free to hold that the circumstances of the present case leave no doubt as to disruption of the contract relations of parties and the loss of the adventure.

Germany allowed no period of grace for loading or unloading, or for departure with freedom from capture on transit. The practice of nations in this particular has greatly varied. I refer with much satisfaction to the treatment of this subject in Mr. Higgins' valuable work on The Hague Peace Conferences. On the outbreak of the Crimean War in 1854, enemy trading ships were allowed a period of six weeks, by Russia on the one hand and Britain and France on the other. In 1866 Prussia made the same allowance to Austria.

Very liberal concessions on this head were made by the United States of America to the ships of Spain on the outbreak of war between those countries in 1898. Since that time the instances show less indulgence to peaceful commerce. On the occurrence of the Russo-Japanese War in 1904, Japan allowed a week, Russia forty-eight hours. In the present instance no allowance was made. The circumstances are specially notable. Great Britain was manifestly willing that the spirit of The Hague Convention should be obeyed and that days of grace should be allowed. On the day of the declaration of war—namely, the 4th Aug. 1914—an Order in Council was issued referring to the practice in the past and to the terms of the Convention. It provided that a period of grace for loading, unloading, and departure should be allowed to all German vessels in British ports—namely, until midnight of the 14th Aug. This was subject to information being received not later than the 7th, that "the treatment accorded to British merchant ships and their cargoes which, at the date of the outbreak of hostilities, were in the ports of the enemy, or which subsequently entered them, is not less favourable than the treatment accorded to enemy merchant ships" by the Order in Council. Germany did not accept this overture.

The uncertainties and hesitations of nations upon the question are reflected in art. 1 of The Hague Convention of 1907, in which the international consent was reduced to the mere proposition that "it is desirable" that a merchant ship in an enemy port should "be allowed to depart freely, either immediately or after a reasonable number of days' grace." As applied to the case of the *Coralie Horlock* at Hamburg the enunciation of this sentiment has proved worthless.

I observe, however, that sect. 2 of the Convention is also founded on in the courts below. It provides that such a ship "may not be confiscated. The belligerent may detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

I am not in a position to say whether this head of The Hague Convention will be respected by the Government of Germany. That learned judge Swinfen Eady, L.J. says that "in the absence of any evidence to the contrary it must be presumed that she is merely detained on condition of being restored after the war."

It is not necessary, in the view which I take, to discuss the point at length. I have already referred to the action of Germany in regard to the subject of days of grace. Other circumstances might also have to be considered on the point of whether The Hague Convention afforded any presumptive aid in the construction of rights or obligations, or in regard to the action of the present belligerents. Whether even—conventions having been disregarded—rights would have to be determined as in pre-convention days—the days, according to Lord Mansfield (2 Douglas, 614*a*), of confiscation "if no reciprocal agreement is made"—on such points no opinion need be indicated. But they do bear on the question of presumption from the terms of The Hague Convention, which is referred to in the courts below.

I must express the gravest doubt whether any such presumption is in place in the present case. Speaking for myself I should not feel justified upon the terms of this international convention in allowing my mind to be swayed by such presumptions as would be appropriate to an inviolate document or to one which is backed by the sanctions of municipal law. What, in short, during the course of the war or under the stress of circumstances, may happen to this ship, no one can foresee: destruction, confiscation, or return—any of these things may occur; and all are involved in the overwhelming uncertainty both as to time and circumstance which follows from the present state of war. With regard to the effect of a declaration of war there is certainly, however, one presumption. It has been expressed in various decisions, but was clearly stated by Lush J. in *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361): "A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."

The judgments of the courts below proceed upon the two propositions—(1) that the ship is *in esse*—she is neither wrecked nor lost, and (2) she is temporarily detained, and therefore that the principle of the old embargo cases applies. I again take leave to refer to this second point. I think an analysis of the embargo cases shows that they depended largely if not altogether on these considerations. In the first place, in the working of the old rule that freight is the mother of wages, the question as to whether wages were due could not be adjusted until after the voyage was over and the freight was earned. Accordingly, in the leading case of *Beale* v. *Thompson* (4 E. 546), the essential fact founded on was this, that after an embargo laid on by the the Tsar Paul had been taken off by that erratic Sovereign the voyage was resumed, the same ship and the same men employed, and all the men taken on to complete the same voyage, under circumstances which showed "a recognition on the part of the master that he and the sailors then stood in their original relative situation to each other under the articles by which that relation was constituted": (4 East, 565). The rule as to the dependency of wages on freight has long ago been abolished by statute; and while, of course, it might be possible under special bargain to continue or resume contract relations upon special terms, I have great doubt whether the embargo cases to which I have referred can be now relied upon in support of any part of the modern law of seaman's wages. These observations apply in terms to other cases cited —*e.g.*, to *Delamainer* v. *Winteringham* (4 Camp. 186).

Upon, however, the proposition that the ship is neither wrecked nor lost, I argree with the learned judges in the courts below. Upon the other hand, I cannot see my way to hold that there is therefore an indefeasible right to recover, under sect. 158 of the Act, unless and until such wreck or loss occurs. I venture respectfully upon that subject to adopt the judgment of my noble and learned friend, Lord Wrenbury.

I now come, accordingly, to what is by far the most important point in the case. Granted that a state of war exists, with consequences which include the stoppage of the voyage and the

internment of officers and crew, are wages due for a period subsequent to the declaration of war, the ship itself having been neither wrecked nor lost, and being still in the port of Hamburg?

It may be conceded that the continued existence of the subject-matter of the contract has formed a large part in the consideration of such a question. Under the law of Rome the illustration of the solution of a contract obligation was frequently given from the case of a promise with regard to a slave. In such a case, if the slave died or was manumitted before being handed over, the contract was at an end. The vendor, however, remained, of course, answerable if he was responsible for what had occurred—if he had himself killed the slave or set him free. In all cases, however, where no fault attached, the failure of the *corpus certum* released the contracting parties.

Several of the citations from the Digest on this subject are made by Lord Blackburn in the leading case of *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826), and one can entirely assent to that very learned judge's view that the principle is adopted in the civil law as applicable to every obligation of which the subject is a thing certain. He cites Pothier in support of a definition of much precision as follows: "The debtor *corporis certi* is freed from his obligation when the thing has perished neither by his act nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred."

In another passage of this judgment Lord Blackburn remarks: "In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance: but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

In the course of laying down these principles the cases which had occurred in the English courts were referred to, and that of *Williams* v. *Lloyd*, reported in W. Jones, Rep. 179, was especially founded on.

It is manifest that the principle last adumbrated was capable of a wider practical and logical application than to the failure of a *certum corpus*. The underlying ratio is the failure of something which was at the basis of the contract, in the mind and intention of the contracting parties.

This ratio has, I am humbly of opinion, been properly developed in recent years. I do not go through all the decisions, but I think it right to mention that of *Krell* v. *Henry* (89 L. T. Rep. 328; (1903) 2 K. B. 740), in which I desire to attach my respectful and pointed concurrence in the opinion delivered by Vaughan Williams, L.J. in these passages: "Whatever may have been the limits of the Roman law, the case of *Nickoll* v. *Ashton* (84 L. T. Rep. 804; (1901) 2 K. B. 126) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract." This view is fully discussed by the learned judge. I think it to be in entire accord with that doctrine of frustration of voyage which has become fully accepted since the case of *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125), with the doctrine underlying *Taylor* v. *Caldwell* (*sup.*), and with sound legal principle.

Lord Blackburn, in discussing the civil law, only cited Digest 45, 1, 33 and Digest 45, 1, 23, and confined his survey of that law to the failure of a *corpus certum*, developing the doctrine, as it were from that point. And Vaughan Williams, L.J. reasons upon the same limited premises, stating that "the Roman law dealt with obligations *de certo corpore*." The passages cited are from the book "de verborum obligationibus." The subject is too large for treatment here, but it may be said that the same principle appears in book 18, "de contrahendue emptione." Even in regard to book 45, however, another text shows that the development and wider application of the principle was not unknown to Roman jurists and was approved. It is Digest 45, 1, 91. After dealing with the case of a slave, the ordinary illustration of a *certum corpus*, and of his death, the review of the principle is broadened thus: "Si sit quidem res in rebus humanis, sed dari non possit, ut fundus religiosus (puta) vel sacer factus, vel servus manumissus, vel etiam ab hostibus si capiatur"—then in each of these instances liability under the obligation flies off, if the occurrences do not arise from the promissor's fault. Mr. Hunter in his invaluable work thus paraphrases the dictum as to the sale of a piece of land: "Sempronius promises to give a small plot of ground to Maevius. After doing so he buries a dead body in the place and thus makes the land *extra-commercium*. Sempronius must pay its value. If the land had belonged to another who had buried a body in it, he would have been released." The illustration is not inapt even to the present case, for it shows that it was no answer to say "the land, the *certum corpus*, is there," for the land having through no fault of the promissor become *extra-commercium*, by burial of the dead, then the basis of the transaction, the root of the contract as that had been contemplated by the parties, had gone, or had suffered such an alteration as to release them from the obligation itself. This was a case analogous to that of the slave who was still alive but had been manumitted or had been captured by the enemy. It is thus not without interest to observe that not only had the principle been laid down, but its modern development had been foreshadowed in Roman times.

The application of the principle in the present case can, in my opinion, lead to only one result, namely, that a dissolution of the relation of master and servant occurred in the case of the *Coralie Horlock* upon the declaration of war between Germany and Britain. The vessel being then in the port of Hamburg, remains there; her master, officers, and crew are interned as prisoners; the voyage and adventure contemplated have been brought to an end. No light is thrown upon the question by illustrations

of contracts of service which have been terminated, say, by a bankruptcy or a cessation of business; in such cases the servant, having lost his employment, is able to say, "I am here, willing and able, to render the service contracted for." In the present case these ideas would be fictional; the ship cannot be navigated, no orders in that regard by the master could be obeyed, and the crew, unhappily, is prevented by hostile force from rendering the ship any service whatsoever. In such circumstances I do not see my way to hold the seaman to be entitled in law to wages which, through no fault of the owners, he is entirely unable to earn by service. Such cases, no doubt, will take their rank among the many desolating circumstances which demand remedial attention at the hand of Parliament or the executive power.

I think that the appeal should succeed.

Lord PARMOOR.—In this appeal, involving a question of great general importance, I agree with the decision of Rowlatt, J. and of the majority in the Court of Appeal.

The plaintiff in the action and the respondent in the appeal is the wife of Tom Rea Beal, who signed articles as second mate on board the *Coralie Horlock* on the 21st May 1914. On the same day an allotment note was duly signed in favour of the respondent, for the sum of 4*l*. 15*s*. to be paid monthly by the appellant during the period of the articles. On the 4th Aug. 1914, at the outbreak of the war, the *Coralie Horlock* was in the port of Hamburg, and was then, and still is, unable to leave by reason of detention by the German authorities. The appellant paid to the respondent, under the allotment note, certain sums up to the 2nd Aug. 1914, but contends that he is not liable to pay to Tom Rea Beal any wages after the 4th Aug. 1914, and in consequence is not liable to make any further payment to the respondent.

The case was tried on an agreed statement of facts. The contract of service as a mariner by Beal was, "on a voyage of not exceeding two years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Hull, proceeding thence to Alexandria, and (or) any other ports within the above limits; trading in any rotation and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master." The decision of the appeal depends upon the construction of this contract.

The material facts are contained in paras. 7 and 8 of the statement:

> On and after the 4th Aug. 1914, a state of war existed between the United Kingdom of Great Britain and Ireland and the Empire of Germany. The said vessel was then and still is in the port of Hamburg, and is unable to leave the said port by reason of detention by the German authorities. The appellant has been since the 4th Aug. 1914, and still is, deprived of the possession of his said vessel, and the said Tom Rea Beal, with the officers and other members of the crew, were on or about the 2nd Nov. removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th Nov. were interned at Ruhleben, near Berlin.

It is not allowable to make conjectures in favour of the appellant outside the facts contained in the statement and any inferences deducible therefrom. I agree in this respect with the views expressed in the judgments of Rowlatt, J. and Bankes, L.J.

In the course of the argument arts. 1 and 2 of The Hague Convention, No. 6 of 1907, were referred to. They are as follows:

> When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a number of days' grace, and to proceed, after being furnished with a pass, direct to its port of destination or any port indicated to it. The same principle applied in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

Then art. 2:

> A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it on condition of restoring it after the war without payment of compensation, or he may requisition it on condition of paying of compensation.

The case appears to have been argued on the footing that the vessel was detained in accordance with the conditions of these articles. These articles could not be referred to if they contained provisions inconsistent with the agreed statement of facts, but I think that they are in accord with the said statement, and that there is no objection to the reference which has been made to them in the judgments of the courts below.

The respondent has proved, pursuant to sect. 143 (2) of the Merchant Shipping Act 1894, that she is the person mentioned in the allotment note, and that the note was given by the owner or by the master or some other authorised agent. Her husband, therefore, is to be presumed to be duly earning his wages, unless the contrary is shown under sub-sect. 2 (*d*): "by such other evidence as the court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid." The question is whether this onus has been discharged. The writ was issued on the 10th April 1915, and judgment has been given in favour of the respondent for the amount of the allotment note up to the date of the writ. It is important that this limitation should be observed. My opinion is based on the conditions as they then existed—namely, a detention which had operated from the 4th Aug. 1914 to the 10th April 1915, and of which the subsequent length was indeterminate and not capable of exact definition.

The first question to be decided is whether under the conditions stated in the agreed statement of facts, the matter is determined by statutory enactment. It is not suggested that Tom Rea Beal has been discharged abroad under the provisions of the Merchant Shipping Act 1906 or that his right to wages has been suspended under the Merchant Shipping Act of 1894. The relevant section is sect. 158, which enacts that where the services of a seaman terminate before the date comtemplated in the agreement by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided

by that Act of his unfitness or inability to proceed on the voyage, the seaman shall be entitled to wages up to the time of such termination, but not for any longer period. If there has been a loss of the ship within the meaning of this section the appellant is not liable.

It is not necessary to attempt to define exhaustively all the cases which might be included within the term "loss of the ship," but, in my opinion, it does not include such a case as that of the *Coralie Horlock*, of the possession of which the appellant has been deprived since the 4th Aug. 1914 by reason of its detention in the port of Hamburg. The ship has not been lost by any physical accident, such as might have caused a wreck, and there is no evidence that it has been requisitioned by the German authorities, or that there has been any confiscation of ownership. The use of the vessel has been lost for an indeterminate time. I doubt whether the loss of the use of a vessel comes in any sense within the words "loss of the ship" in sect. 158 of the Act of 1894. It is not necessary to decide this point. There is no finding in the agreed statement of facts which could justify the inference that, owing to its detention, the ship has no longer a commercial value, or that the expense incurred, or to be incurred, in not abandoning her, is such that no man as a matter of business would incur the outlay.

I am in agreement with Rowlatt, J. when he said: "Now, what I have stated with regard to the position of the ship in Hamburg under The Hague Convention, if it is right, negatives any question as to the loss of the ship. She is there; the property in her has not changed; she is simply detained, and apart altogether from what was said in the case of *Sievright* v. *Allen*, which was cited to me, it is impossible to hold that the ship is lost." It was argued on behalf of the appellant that, although sect. 158 was not exhaustive of the cases in which a seaman was entitled to wages up to a given time, but not for any longer period, yet that the section did cover and was intended to cover, a case such as the present, in which if the seaman is no longer entitled to his wages it is by reason of the alleged loss of the ship. I think that there is good reason for this contention, but I prefer to place my opinion on wider grounds. Assuming that sect. 158 has no application, Tom Rea Beal was, in my opinion, entitled to the payment of his wages up to the date of the issue of the writ on the construction of the contract of service, and the respondent succeeds in her claim as allottee.

The articles, which contain the contract of service, make no express reference to the contingency which has happened, and which is said to have dissolved the contract and to have defeated any claim to wages.

The detention of the vessel, and the imprisonment of the mariners, did render it impossible in fact for Tom Rea Beal to be in a position to perform the duties of his service as a mariner, but this condition was not brought about by any default on his part, and there is no suggestion of disobedience to any command or to any refusal on his part to do his duty. Whether under such circumstances the contract is dissolved, or a claim to wages under the contract is defeated, depends on the bargain of the parties as expressed or implied in the contract which they have made. If the events which have happened subsequent to the date of the contract, and which operate to make its performance no longer possible, are of such a nature and character that they can reasonably be supposed to have been within the contemplation of the contracting parties at the time when the contract was made, then the subsequent contingency does not dissolve the contract, or release either party from a continuing liability under the contract. Even though the general liability under the contract continues, the claim of a plaintiff may be defeated by proof of non-compliance with any one or more of the special contract stipulations. An illustration arises in the leading case of *Beale* v. *Thompson* (4 East, 456). One of the arguments urged on behalf of the defendant in that case was that the articles contained a special stipulation against mariners going on shore, under any pretence, before the voyage was ended, without the leave of the commanding officer on board, and that the plaintiff had gone on shore in contravention of this stipulation. Lord Ellenborough having found that the freight had been earned, and that the contract had not been dissolved, says "that the only remaining question necessary to be decided in order to perfect the plaintiff's claim to have his wages paid out of that fund (*i.e.*, freight) is: Has his service under the articles been duly performed by him?" The special verdict of the jury had found that the plaintiff did his duty as a seaman during the voyage, but it was said that the facts stated in the special verdict showed that during a considerable period of the time, for which the wages are claimed, the master was out of possession of the vessel, and the crew were all marched up the country and detained as prisoners.

Lord Ellenborough held that the stipulation in the articles that the plaintiff should not be on shore under any pretence, before the voyage was ended, without the leave of his commanding officer on board, did not apply to a case of imprisonment, and must be understood as being on shore by the party's own unauthorised act. In the present case there is no question of the breach of a special stipulation in the articles, such as would defeat the claim to wages, if the contract is not dissolved. It was further held in *Beale* v. *Thompson* (*sup.*) that if the imprisonment on shore could be considered as a breach of the stipulations in the articles, such breach had been remedied by the subsequent action of the master, but this alternative finding does not affect the principle of the decision, and is not applicable in the present case.

The question, therefore, to be determined is whether the detention of the vessel and the imprisonment of the mariners have dissolved the contract of service. The general rule of the common law is that a contract is not dissolved, or the parties excused from their obligations, in cases in which the performance has become impossible, owing to conditions which have only become operative subsequent to the contract date. The object of this rule of construction is to give effect to the intention of the contracting parties as expressed in their contract, and it is not applicable if a contrary intention is expressed or implied in a particular contract. In a mariner's contract for wages it has been held in a decision confirmed in this House (*Beale* v. *Thompson*, *sup.*)

that the hostile detention of the vessel and the internment of the crew do not of themselves dissolve the contract of service, and this decision appears to have been uniformly recognised.

In *Beale* v. *Thompson* (*sup.*) the vessel was detained by hostile seizure for a period of about six months and then released. The voyage was continued, and the freight had been specifically earned and received by the owners of the vessel. At this date the doctrine that freight was the mother of wages prevailed, and it was necessary that freight should be earned before a claim to wages could be made good. This condition having been fulfilled, it became necessary to decide whether the detention of the vessel and the imprisonment of the mariners dissolved the contract of service on which the seaman relied for his claim. Lord Ellenborough, in his judgment, draws a distinction between detention and capture, and holds that detention, as distinguished from capture, did not defeat the plaintiff's claim to wages. It should be noted that this decision was given in reference to a detention which had lasted for a period of about six months and had terminated; but if the detention of the vessel and the imprisonment of the mariners had of themselves operated to dissolve the contract, such contract would have been dissolved as at the date of the commencement of the detention and imprisonment, and there would have been a severance between such contract and any contract subsequently entered into by the master when the vessel was released. This decision was brought before this House by writ of error, and confirmed. The Journals of this House contain the Order made: "That the said judgment be in all things affirmed, and that it stand in full force and virtue notwithstanding the causes and matters aforesaid as above assigned in error."

I am unable to draw any material distinction between the relevant facts in the case of *Beale* v. *Thompson* and the agreed facts of this case. In *Beale* v. *Thompson* the vessel was unable to leave the port and continue her voyage by reason of hostile detention by the Russian authorities, and in this case by reason of hostile detention by the German authorities. In each case there is a hostile seizure, which Lord Ellenborough distinguishes from capture. In *Beale* v. *Thompson* the mariners were removed from the ship and imprisoned on land; in the present case the crew were first removed to a lodging ship at Hamburg, and subsequently, on or about the 8th Nov., were interned at Ruhleben, near Berlin.

The earlier case of *Pratt* v. *Cuff* is referred to in *Thompson* v. *Rowcroft* (4 East, 43). In this case a vessel was captured by the Dutch and carried to Delfziel. The plaintiff was confined on board ship for seven months and subsequently in Haerlingen prison until the 23rd Jan. in the following year, when the vessel and plaintiff were released. The jury found in favour of the plaintiff for wages during the period of his imprisonment, subject to the opinion of the court. At a subsequent trial the jury found that the freight had been received by the defendant. Lord Kenyon is said to have expressed so strong an opinion for the plaintiff that the case was never afterwards pressed by the defendant.

In *Hadley* v. *Clarke* (8 Durn. & East. 259) the defendants had contracted to carry goods from Liverpool to Leghorn. On the arrival of the vessel at Falmouth an embargo was laid on her for an indeterminate period, "until the further Order of Council." It was held that even after two years, when the embargo was taken off, the defendants were answerable in damages for the non-performance of the contract. The report shows that it was argued on behalf of the defendant that the case fell within the rule that when a contract which was possible and legal at the time of making it becomes afterwards impossible by the act of God, or illegal by an instrument of the State, the obligation is discharged. This argument was not accepted by the court as referable to a contract of this character, and Lord Kenyon bases his judgment on the general proposition "that a temporary interruption of a voyage by an embargo does not put an end to such a contract as this." Lord Kenyon further expresses the opinion that no line can be drawn dependent on the duration of the embargo; but it is not necessary to indorse so wide a proposition in the present instance. This decision was given on a contract of carriage, and not on a contract of service, but the principle and reasoning are equally applicable to a contract of service.

This case was referred to both in the judgment of Bramwell, B. and in the dissentient judgment of Cleasby, B. in the case of *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125), but its authority is not impugned. In the judgment of Bramwell, B. it is said: "It may safely be said that there the question was wholly different from the present." Cleasby, B. quotes with approval a passage from the judgment of Bovill, C.J. in the court below: "I have no difficulty in subscribing to the doctrine laid down in *Hadley* v. *Clarke* that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise thereon, unless they have provided against it by the terms of their contract. . . . The principle of *Hadley* v. *Clarke* is that an embargo is a circumstance against which it is equally competent for the parties to provide as against dangers of the sea, and, therefore, if they do not provide against it, they must abide by the consequences of their contract."

In the case of *Delamainer* v. *Winteringham* (4 Camp. 186), the plaintiff claimed to receive wages during a hostile embargo in a foreign port, while he was imprisoned on shore on proof—which was then necessary—that the voyage had been completed and the freight earned. Objection was taken that the nature of the embargo had not been proved. Lord Ellenborough, however, gave judgment for the plaintiff, presuming the fact that the embargo was not of such a nature as to put an end to the contract between the master and owners of the ship and the mariner, and finding that there was no severance of service.

I am unable to find any case in conflict with the principle laid down by Lord Ellenborough and confirmed in this House in the case of *Beale* v. *Thompson*, but I have not overlooked the cases quoted in the argument before your Lordships.

In the case of *Melville* v. *De Wolfe* (4 Ell. & Bl., 844), it was held that where a seamen had been sent home as a witness against his captain on a

trial for shooting one of the crew, there was a complete dissolution of the contract of service, and no claim for wages could be maintained. In this case, however, a distinction was drawn between such a dissolution of the contract of service and a temporary detention. Lord Campbell, in his judgment, expressly approves *Beale* v. *Thompson*: "We are certainly bound by the case of *Beale* v. *Thompson* . . . we entirely approve of that decision; for there nothing had occurred to dissolve the contract; and the relation constituted between the parties when the ship's articles were signed might well be considered as enduring till the return of the ship to England. The ship was only detained under an embargo, which in its nature is only a temporary act, and it might have been removed at any time from day to day."

In the case of *The Friends* (4 Rob. 143), Sir W. Scott says in his judgment, "Nothing can be better settled than that the act of capture defeats all rights and interests: but it is contended that the former interest revives on recapture." In the case of the *Governor Raffles* (2 Dods. 17), Sir W. Scott says: "The moment the capture is effected by an enemy the crew are discharged from their duty to their employers." It is not necessary, however, to refer to further cases of a similar character, since, whatever may be the result of a hostile capture, Lord Ellenborough in *Beale* v. *Thompson* draws the distinction between the case of capture and the case of detention.

The opinion above expressed finds strong confirmation in a passage from the judgment of Kennedy, L.J. in *The Olympic* case (12 Asp. Mar. Law Cas. 318; 108 L. T. Rep. 592; (1913) P. 92), which is quoted in the judgment of Swinfen Eady, L.J.: "The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded." Kennedy, L.J. then refers to a passage in Lord Tenterden's Law of Merchant Ships and Seamen, and says: "In this sentence one of the greatest of judicial authorities, on matters of shipping, clearly indicates his opinion, even in the case of the embargo of a laden ship, *i.e.*, in the case of an obstacle to the prosecution of the voyage imposed by the Government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not), that, while in his own interest, and in order to save himself the risk of expense, it may be a reasonable and, indeed, a very prudent step on the part of the shipowner, to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship," and adds, "that what is true of an embargo by the Government to which the ship belongs is true also of the seizure for a temporary purpose by a hostile Power."

I think that the claim of the allottee is good, and that, up to the date of issue of the writ, there was no severance of service under the contract, and that the judgment of the Court of Appeal should be affirmed.

Lord WRENBURY.—The respondent is entitled to one-half her husband's wages if any. The question for decision is whether after the 4th Aug. 1914, or some later date, the husband is entitled to wages. The appellant denies that he is entitled to wages after the 4th Aug. 1914. He founds himself upon either sect. 158 of the Merchant Shipping Act 1894 or upon the common law or the law merchant as applicable to the case of a seaman if, as he contends, the statute has not rendered that law inapplicable.

I may dispose of the question upon sect. 158 in few words. It was decided in *The Olympic* (*sup.*) that there is a "wreck of the ship" within the section where the vessel has suffered such physical damage by a casualty in the nature of wreck as that she has ceased to be in a seaworthy condition to continue within a reasonable time the adventure as a commercial adventure. The same, I think, is true of the word "loss" in the section. If there have been such a loss as that the adventure has failed as a commercial adventure the section, I think, applies.

But it remains to determine the meaning of the word "loss." It is confined, I think, to physical loss. The wreck and the loss referred to in the section I understand to be a physical injury if it be a wreck and a physical loss if it be a loss. Upon the evidence in this case the ship was at Hamburg on the 4th Aug. She was still there on the 2nd Nov; there is no evidence as to what has happened to her since. She may be there, she may not. She may be in existence, she may not. She has not, so far as appears, been confiscated. If Germany has obeyed The Hague Convention she will not have been confiscated. I make no assumption that Germany will have obeyed The Hague Convention. It suffices to say that the appellant has not proved confiscation. The result is that the appellant has proved not that the ship has been physically destroyed, or injured, or that the property in the ship has been taken from him, but only that from the 4th Aug. 1914 to the present time he has been deprived of the use of her.

In my judgment detention or deprivation of use is not loss within sect. 158. It follows that in my opinion sect. 158 does not apply. So far I think the respondent is right.

The respondent next began by contending that sect. 158 is exhaustive; that if that section offers no defence the seaman is entitled to his wages. This seems to me an impossible contention. When a statute provides that in certain events a certain result shall ensue, it is plainly not enacting what is to result in other events. The contention was then modified, and was that the section is exhaustive in the cases with which it deals. This may be, and I think is true, but it leaves the matter where it was. Upon my view of the word "loss" the section does not deal with the case before the House. It follows that the section does not exclude the common law or the law merchant in the case of seamen.

Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause he is liable if it occurs, because by the very hypothesis

he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding. The leading case on the subject is *Taylor* v. *Caldwell* (3 B. & Sm. 826). *Krell* v. *Henry* (89 L. T. Rep. 328; (1903) 2 K. B. 740) is an illustration of the application of the principle.

On the 4th Aug. 1914 there occurred, in the case of this ship, a supervening cause which resulted in the impossibility of continuing that adventure which was the subject of the seaman's contract of the 21st May 1914, and that impossibility has continued for such a time as that its character, which might have proved to be temporary, is now known to be for a time so indefinite and so long that the adventure which was the whole basis of the contract has failed. The case falls, I think, within the principle of *Taylor* v. *Caldwell* (*sup.*). *Melville* v. *De Wolf* (4 Ell. & Bl. 844) is a like case. The plaintiff there was taken from his employment and sent home by the order of a court, and, as Lord Campbell, C.J. put it, the contract was "dissolved by the supreme authority of the State." The plaintiff was not entitled to wages from the date when he was taken away from the ship and his services closed.

The respondent's counsel was, I think, not prepared to contend that if this had been the case, not of a mariner but of a commercial traveller, subsequent wages could have been claimed. But the case of the mariner, he contends, stands in a different position. *Chandler* v. *Grieves* (2 H. Bl. 606n.) was a case of a seaman disabled by accident while on board, who was held entitled nevertheless to payment of his wages for the whole voyage. The case establishes very little for the present purpose. Sect. 160 of the Act 1894 seems to assume—and, I think, to assume rightly—that a seaman incapable by illness to perform his duty is nevertheless entitled to his wages during the continuance of the adventure in which, by the terms of the employment, he took part.

On the other hand *The Friends* (4 C. Rob. 143) is authority that when the ship is captured and the seaman taken from the vessel his wages cease, and that even if the ship be recaptured his case is not bettered if he has been taken from the vessel and renders no service after the recapture. *Wiggins* v. *Ingleton* (2 Ld. Raym. 1211), which was the case of a seaman taken by the press gang, and *The Governor Raffles* (2 Dods. 14), where the ship had been taken by mutineers, are authorities to the same effect, although the latter is in point only for the dictum of Sir Wm. Scott that "the moment capture is effected the crew are discharged from their duty to their employers, and the contract between the parties is at an end."

Reverting to the statute, the respondent relies on sect. 134. I fail to see that the section helps her. Sect. 134 (*a*) speaks of the event that the seaman "lawfully leaves the ship at the end of his engagement." These words do not cover the event of the seaman being forcibly removed by the enemy from his employment and from the ship. Sect. 134 (*c*) provides that the seaman's wages shall continue to run unless the delay to make payment of his wages is due "to any other cause not being the wrongful act or default of the owner or master." The cause here was an extraneous and supervening cause, and was not any wrongful act or default of the owner or master.

Then sect. 143 is cited. By that section it is provided in favour of the allottee of wages that "the seaman shall be presumed to be duly earning his wages unless the contrary is shown to the satisfaction of the court either . . . (*d*) by such other evidence as the court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid." This simply throws the onus of proof on the employer.

Beale v. *Thompson* (4 East, 546; 1 Dow. 299) was a case decided when the doctrine prevailed that "freight is the mother of wages," a doctrine which has been brought to an end by statute (see 7 & 8 Vict. c. 112, s. 17; Merchant Shipping Act 1854, s. 183; and now sect. 157 of the Merchant Shipping Act 1894), and it was a case in which the seaman—after the detention of the vessel was over—took part in her voyage home. The decision involves no more than this, that if the adventure is ultimately carried to a conclusion the seaman is entitled to his wages for the whole period. *Delamainer* v. *Winteringham* (4 Camp. 186) is similar.

In *Hadley* v. *Clarke* (8 T. R. 259) there was no finding that the adventure had been frustrated. For the purpose of the decision I may take it that the plaintiff did not care when his goods reached Leghorn so long as they got there. The defendants contracted to take them there and failed to do so. The plaintiff, therefore, recovered damages. In *Jackson* v. *Union Insurance Company* (2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125, 146) Bramwell, B. points out the grounds upon which the decision can be supported. It is, I think, no authority for the general proposition, that a contract of marine adventure remains binding when a supervening cause has rendered it impossible to perform it within such a time as that the adventure can be fulfilled as a commercial adventure.

When this vessel was detained at Hamburg on the 4th Aug. the owner was deprived, and he has ever since remained deprived, of the use of her. On the 5th Aug., if her current charter had been at an end, he could not have offered her to a new charterer for he could not have ensured that he could deliver possession of her under the charter, and events have shown that in fact he could not have done so. The contract with the seaman for employment on the ship for not exceeding two years from the 21st May 1914 was a contract which the owner from no fault of his own was unable to fulfil. As from the 4th Aug. the adventure had become impossible and the contract, in my judgment, ceased to be binding. It is unnecessary, therefore, to consider the latter date of the 2nd Nov., when the seaman was removed from the vessel to another vessel for detention or that of the 8th Nov., when he was removed to Ruhleben. If anything more was wanted, I think it clear that the seaman (for no fault of his own

it is true) was at those dates taken by superior authority from the place of his employment and from the possibility of performing his service. *Melville* v. *De Wolf* (4 E. & B. 844) is authority against his claim as from those dates.

From what I have said it follows that I cannot agree with the learned judge who tried the case or with the majority in the Court of Appeal. In my judgment this appeal must be allowed.

Solicitors for the appellant, *Holman, Birdwood,* and *Co.*

Solicitors for the respondent, *Ellis, Davies, Roberts,* and *Co.*, for *Miller, Taylor,* and *Holmes,* Liverpool.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

June 9 and 11, 1915.

(Before BAILHACHE, J.)

WALL v. REDERIAKTIEBOLAGET LUGGUDE. (a)

Charter-party—"Penalty for non-performance"—Limitation of liability—Construction.

A charter-party contained the following clause:—"Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight."

Held, that this constituted a penalty clause and not a limitation of liability.

COMMERCIAL COURT.

Action tried by Bailhache, J.

The plaintiffs claimed to recover damages for a loss in consequence of the defendants' refusal to carry out a contract of charter-party.

Mackinnon, K.C. and *R. A. Wright* for the plaintiffs.

Roche, K.C. and *A. Neilson* for the defendants.

The facts and arguments are sufficiently stated in the written judgment.

BAILHACHE, J.—This is an action by charterers against shipowners for damages for the admittedly wrongful refusal of the owners to perform their part of a charter-party dated the 5th June 1914. The charter-party was one for three consecutive voyages of the steamship *Atos,* with coal from Goole to Oporto, the first voyage to begin in Jan. 1915. The owners in January declined, upon a ground they do not now support, to make any of the voyages, and have paid into Court, in satisfaction of the charterers' damages, 1125*l.* It is admitted that the actual damages suffered by the charterers amount to 3000*l.*, but the owners claim that they are not liable for more than the sum paid in by them, and for this they rely on clause 15 of the charter-party, which runs thus: "Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight."

The owners contend that this clause is a limitation of liability clause, and is effective to limit their liability to the estimated amount of the freight which would have become payable to them had the charter-party been performed. If this construction is right, the owners have paid enough into court.

The charterers contend that clause 15 is a penalty clause which they may disregard. If this construction is right the sum claimed by the charterers is due to them. I have to decide between these two constructions.

Voyage charter-parties have in countless instances, and for very many years, contained a clause which has always been called a penalty clause. The commonest form of that clause has been: "Penalty for non-performance of this agreement estimated amount of freight." The clause in this form is obviously and admittedly a penal clause.

Many charter-parties have in recent years contained a limitation of liability clause. The form of this clause varies considerably, but is substantially like the clause in *Baxter's Leather Company* v. *Royal Mail Steam Packet Company* (11 Asp. Mar. Law Cas. 98; 99 L. T. Rep. 286; (1908) 2 K. B. 626), as to owners or agents not to be accountable for any goods of whatever description beyond 2*l.* per cubic foot for any one package unless shipment be made upon a special order containing a declaration of value, and extra freight as may be agreed upon to be paid.

Clause 15 of the present charter-party is in point of form very like the common penalty clause, and unlike the limitation of liability clause, but the owners say that as the effect of it is that the charterers can only recover proved damages, and further to limit liability to the estimated amount of freight when the damages exceed that sum, I must treat clause 15 as a limitation and not as a penalty clause.

Where a contract contains a clause which is in form indisputably a penalty clause the position of the parties is thus described by Lord Mansfield in *Lowe* v. *Peers* (4 Burr., at p. 2228): "There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of covenant for the penalty and recover the penalty (after such recovery of the penalty he cannot resort to the covenant because the penalty is to be a satisfaction for the whole), or if he does not choose to go for the penalty he may proceed upon the covenant and recover more or less than the penalty *toties quoties.*"

This as a general statement of the law is no doubt correct, but when one goes into the matter more closely, one must qualify it by reference to the Act of Will. 3, 8 and 9 Will. 3, c. 11, the effect of which statute is that in an action upon a bond (and this includes a penalty clause in a contract), conditional for the performance of a contract, the plaintiff must assign a breach, or as many breaches as he thinks fit, of the condition, and although he is entitled, on proving a breach, to judgment for the full amount of the penalty, he can only recover by execution the amount of the damage proved to have been sustained by the breach or breaches assigned. The result of suing for the penalty is therefore that the plaintiff recovers proved damages, but never more than the final sum fixed: (see *Hardy* v. *Bern,* 5 T. R. 636; *Branscombe* v. *Scarbrough,* 6 Q. B. 13, and *Dimech* v. *Corlett,* 12 Moo. P. C. 199).

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The right to sue, either for the penalty or damages, for breach of contract, disregarding the penalty, or, in archaic phraseology, to sue in debt or *in assumpsit* is again expressly asserted by Lord Ellenborough in *Harrison* v. *Wright* (13 East 343). That was an action *in assumpsit* on a charter-party containing the clause, "Penalty for non-performance 1300*l*."—a clause not distinguishable in legal effect from the clause, "Penalty for non-performance, estimated amount of freight." Lord Ellenborough says at p. 348: "The penalty therefore is auxiliary to the enforcing performance of the contract, and the party aggrieved may either take the penalty as his debt at law and assign his breach, under the statute of William, or he may bring his action for damages upon the breach of the contract." And he adds the important words: "Though to be sure the advantage of taking judgment for the penalty as the debt at law is very much cut down by the statute of King William." The operation of that statute I have already described.

This being the state of the law as I understand it, one easily sees why—in charter-party cases—no one sues on the penalty clause now. You cannot under it recover more than proved damages, and if the proved damages exceed the penalty sum you are restricted to the lower amount. As the penalty clause may be disregarded, it always is disregarded, and has become a dead letter, or, from another point of view, a *brutum fulmen*, as Blackburn, J. called it in *Godard* v. *Gray* (24 L. T. Rep. 89; L. Rep. 6 Q. B., at p. 148). At p. 147 he cites a passage from the fifth edition of Abbott on Shipping, who says quite clearly and shortly what I have been expressing at great length.

There is just one possible exception to the rule, that where a plaintiff sues in debt for a penal sum he must prove his damages, and that is when the breach relied upon is complete failure to perform any part of the contract. See *Dimech and Corlett* (*sup.*) I am not at all clear, however, that there is such an exception, and I rather think that in that case it was common ground that the damages actually suffered were at least equal to the amount claimed.

Having got so far, I ask myself: If I desired to perform the task of inserting a penalty clause into a charter-party and at the same time desired to express in words the true legal effect of such a clause instead of leaving the legal effect to be supplied by the parties themselves from their no doubt intimate knowledge of the statute of William; if at the same time I desired to conciliate the conservativeness with which commercial men always regard their familiar commercial documents, how could it be done? Well, I must obviously take the common form and work upon that. I must add something—as little as possible—to it. And the common form, then, very naturally takes this shape: "Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight"—that is clause 15 of the charter-party. Clause 15, therefore, is nothing more than the common form writ larger. This seems to me to solve the question I have to decide, and to solve it in favour of the plaintiffs. Clause 15 is a penal clause and not a limitation of liability clause, and the plaintiffs are right in disregarding it.

There are additional reasons why the estimated amount of freight in clause 15 should be regarded as a penalty. One excellent reason is that it is so called, a reason which I am aware is not conclusive, but is certainly weighty.

Another reason is the entire dissimilarity between clause 15 and the ordinary limitation of liability clause. Upon this I should like to observe that I should require the strongest arguments to move me to hold that a clause so like the common or undoubted penalty clause has been transformed by the addition of a few words into a limitation of liability clause to which in form it has no resemblance. It would be unfair to the charterers, in this or any similar case, to do so unless the few additional words were of compelling force.

Business men are familiar with usual charter-party clauses. They do not read, apparently, common form clauses carefully. They know the penalty clause is of no effect, and when they see a clause beginning "penalty for non-performance" they assume it is their familiar negligible penalty clause, and they pass on. It would never strike them that a clause beginning in that way was a limitation of liability clause, the very appearance of which is usually totally different, and one to which they know they must pay attention or put up with the consequences. I am not at all sure that a shipowner who desires to limit his liability must not bring that desire home to the charterer in some clearer way than by a slight change in the phraseology of a clause which is so well known as the common penalty clause is.

Again, clause 15, though not the commonest form, is by no means unusual, and counsel did not refer me to any case, nor was I, from my own limited experience, able to remember any case in which the clause in this form had been relied upon for any such purpose as is put forward in this case.

I decide this case, however, upon the ground stated in the earlier part of this judgment, and not upon the additional reasons which I have indicated.

The charterers took a further point, based upon the decision of *Jureidini* v. *National and Irish Millers' Assurance Company* (112 L. T. Rep. 531; (1915) A. C. 499), where the House of Lords held that the defendants, having repudiated the contract, cannot rely on a submission to arbitration contained in the contract. It is not necessary for me to decide the point, but I do not think that case can be treated as going the length of saying that a shipowner who erroneously supposes a charter-party to be not binding upon him, and who therefore refuses to perform it, could not rely upon a limitation of liability clause in the charter-party.

My judgment is for the plaintiffs for 3000*l*., to include the money in court and costs.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendants, *Botterell and Roche.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 9 *and July* 31, 1914.

(Before Sir SAMUEL EVANS, President.)

July 15 *and* 16, 1915.

(Before SWINFEN EADY, PHILLIMORE, and BANKES, L.JJ.)

THE LEON BLUM. (a)

Salvage—Tugowners' claim against cargo owners—Towage contract—Agreement by tugowners with shipowners not to claim salvage—Protection of seamen against abandonment of right to salvage—Merchant Shipping Act 1894 (57 & 58 *Vict.* c. 60), *s.* 156.

Where salvage services (which must be voluntary) supervene upon towage services (which are under contract), the two kinds of services cannot coexist during the same space of time. There must be a moment when towage ceases and salvage begins. If the tug remains at her post of duty there may come a moment when salvage would end and towage would be resumed. During the intervening time the towage contract, in so far as the actual work of towing is concerned, is suspended.

Tugowners contracted with the owners of a ship carrying cargo for a towage on the terms of "No cure, no pay; no salvage charges." In the course of the towage the tug rendered salvage services to the ship and cargo:

Held, by the Court of Appeal, affirming the judgment of the President, that the owners, master, and crew of the tug were not precluded from maintaining an action for salvage remuneration against the owners of the cargo.

Query, whether there is any good answer in law to a salvage claim by the master and crew of a tug against a ship and her freight where tugowners are precluded from claiming salvage from ship and freight owing to their contract with the shipowners.

The protection afforded to seamen under the Merchant Shipping Act 1894 *in respect of their right to salvage considered.*

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the steam tug *Vanquisher*; the defendants were the owners of the cargo lately taken on board the sailing ship *Leon Blum*, the owners of the *Leon Blum* being subsequently added by order of the court.

The *Leon Blum*, a full-rigged ship of 2733 tons register, belonging to the port of Nantes, was on the 9th Dec. 1913 being towed from Falmouth to Liverpool by the tug *Vanquisher*, in the course of a voyage from Pisagua to Liverpool with a cargo of nitrate. The plaintiffs alleged that in the course of the towage, and when off the Formby lightship the *Leon Blum* found herself in a position of great danger, owing to her port anchor suddenly and without warning dropping and the chain running out; that the tug *Vanquisher* thereupon at great risk succeeded in holding the *Leon Blum* while the anchor was hove up, and thereby saved her from grounding; and that the tug subsequently prevented the ship from going ashore while proceeding up the dredged channel to Liverpool and saved the cargo from being lost.

The plaintiffs having issued a writ claiming salvage from the owners of the cargo, the owners of the ship, La Société Nouvelle d'Armément, applied for an order that all further proceedings be stayed on the ground that the tug owners had contracted with the shipowners to tow the *Leon Blum* and her cargo from Falmouth to Liverpool upon the terms that no claim for salvage should be made in respect of any salvage services which the tug might render during the towage to the *Leon Blum*, her cargo, or freight.

On the 7th April 1914 the motion to stay came before Bargrave Deane, J., who directed that, upon an undertaking being given on their behalf to find security for costs, the owners of the *Leon Blum* be added as defendants to the action and furnish their defence within fourteen days, and that the action be placed in the list for argument on the point of law arising on the construction and effect of the towage contract.

On the 9th May 1914 the Court of Appeal (Buckley, J. and Kennedy, L.J.) dismissed, with costs, the plaintiffs' appeal from this order.

On the 28th May two witnesses were examined before the President with reference to the alleged agreement to make no claim for salvage services, and on the 9th June 1914 the preliminary point of law was argued before the President.

Bateson, K.C., *H. C. S. Dumas*, and *C. R. Dunlop* for the plaintiffs.

Laing, K.C., *A. R. Kennedy*, and *L. F. C. Darby* for the defendant cargo owners and shipowners.

Cur. adv. vult.

July 31, 1914.—Sir SAMUEL EVANS (the President).—The matter for decision upon this hearing of the point of law is an important one. Shortly stated, the question is whether, when a vessel containing cargo is being towed under a towage contract made between the owners of the tug and the owners of the vessel in tow, on the terms of "no cure, no pay; no salvage charges," and when before the towage has come to an end the vessel is in danger and salvage services are rendered by the tug to ship and cargo, a claim for such salvage services can be recovered against the owners of the cargo. The towage contract must be more fully stated later. The question arises in a salvage action originally brought by the owners, master, and crew of the steam tug *Vanquisher* against the owners of the cargo on the *Leon Blum*. In the defence it was pleaded (*inter alia*) that "the plaintiffs contracted to tow the *Leon Blum* and her cargo from Falmouth to Liverpool for reward upon terms that the plaintiffs should make no claim for salvage reward in respect of any salvage services rendered by their tug to the *Leon Blum* her cargo or freight," and, further, that "the owners of the *Leon Blum* in entering into the said towage contract were acting as well for the defendants as for themselves, and by the said towage contract the plaintiffs impliedly contracted with the defendants to make no claim against the defendants for salvage services, and/or the defendants are entitled to the benefit of the said contract, and the defendants object that the plaintiffs cannot maintain this action."

(a) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

This defence having been delivered, La Société Nouvelle d'Armément, the owners of the vessel, moved the court to stay all further proceedings in the action, and an order was made, upon certain terms, that the latter owners be added as defendants to the action, and that the action be first heard for argument on the point of law only. Thereupon these added defendants delivered their defence, and pleaded that it was a term and condition of the said towage contract that no claim should be made for salvage reward for any salvage services which might be rendered to the vessel, cargo, or freight. The plaintiffs in their reply traversed this allegation, and pleaded that the first defendants were not parties to the contract, and that they were not entitled to any benefit therefrom.

It is necessary first of all to ascertain the facts before entering upon a consideration of the principles which are applicable. The towage contract is dated the 2nd Dec. 1913. It is partly in writing and partly printed. It reads as follows:

London, Dec. 2, 1913.—To Messrs. Société Nouvelle d'Armément, Nantes.—We beg to confirm arrangement for towage of ship *Leon Blum*, of 2316 tons register, by one tug from Falmouth to Liverpool, including use of tug's hawser, for the sum of 65*l.* (sixty-five pounds). Notice of readiness must be given . . . days before vessel leaves the docks. The owners do not hold themselves responsible for any damage occurring or occasioned by vessels while in tow of steam tug.—For the Elliott Steam Tug Company Limited, (signed) Jno. Page, Jun. See conditions on other side.

On the other side, as indicated, various conditions are set out in print. Fifteen lines of printed form usually adopted by the tugowners, commencing, "The acceptance," &c., and ending "total loss" were deleted. The deletion was made pursuant to an arrangement come to in the previous months of June and July, which was to be applicable to towing contracts generally between the tug-owners and these shipowners. The arrangement was the result of correspondence, which was produced in evidence, and an interview had between M. Jouteau and Mr. Page, jun., on the 17th July 1913. The result of the interview is embodied in a letter dated the 17th July 1913, which reads as follows:

Messrs. Société Nouvelle d'Armément, Nantes.—Dear Sirs,—We have to-day had the pleasure of a visit from M. Jouteau and we confirm the verbal arrangement which we came to, whereby it is agreed whenever our tugs are engaged to tow any of your vessels, whether the contract be made by your good selves or by one of your masters, it shall be on the basis of "No cure, no pay; no salvage charges." Trusting this may lead to a good business between the two companies. Yours faithfully, for the Elliott Steam Tug Company Limited (Signed) Jno. Page, jun.

Verbal evidence of this interview was given by the persons referred to. In my view the result did not, and ought not to be taken to, modify the contract further than is stated in the letter of the 17th July 1913. The contract which was entered into with reference to the *Leon Blum* I find is that contained in the document of the 2nd Dec. already referred to, with the addition to the contract of the words "No cure, no pay; no salvage charges," or, as I prefer to put it, the contract for towing the *Leon Blum* was that contained in the said document, with the collateral contract embodied in the words "No cure, no pay; no salvage charges." The parties to the contract were the tugowners and the shipowners, and no others. The shipowners acted only for themselves, and not as agents for the owners of the cargo. The ships of the shipowners which were towed by the tugowners were apparently often in ballast. At any rate, there was no reference to the *Leon Blum* carrying any cargo in the negotiations leading up to the contract of the 2nd Dec. 1913; and there was no evidence and no suggestion that the tugowners were aware that the vessel was laden with cargo. Further, the cargo owners had no knowledge of the terms of the contract or collateral contract. Again, there was no evidence, or suggestion, that the tugowners in entering into the contract, or at any time, gave any intimation to the shipowners that the business of the tugowners was carried on, or that their charges were made, upon the basis that in cases of towage they had provided for "No cure, no pay; no salvage charges." For the purposes of this argument it is admitted that before the towage was completed the tug *Vanquisher*, her master and crew, rendered salvage services to the vessel, cargo, and freight, in respect of which, apart from any towage contract, they would be entitled to salvage remuneration.

What are the legal principles to be applied to these facts? In order to clear the ground, I note that Mr. Laing, counsel for the cargo owners, did not contend (or, if at one time he appeared to do, he gave up the contention) that the contract was entered into by the tugowners as agents on behalf of the cargo owners in any sense. But he did put forward the contention that the contract with the shipowners nevertheless inured for the benefit of the cargo; and that under the contract the tugowner had to transport the ship and its contents, the cargo. He also argued that the shipowners were bailees of the cargo, and were therefore entitled either to contract for the cargo owners or for themselves for the carriage of the cargo. No evidence was given as to the contract for carriage between the shipowners and the cargo owners. If the services for which remuneration is claimed were rendered to the cargo in the process of the execution of the towage contract, and while the tug was towing the ship under the contract, there could not, in my opinion, be any valid claim for salvage remuneration against the cargo owners. Voluntariness is of the very essence of salvage services. In *The Neptune* (1824, 1 Hag. Adm. 227, at p. 236) Lord Stowell said: "What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship."

And Kennedy, L.J., in his work on "The Law of Civil Salvage" (2nd ed. 1907) at p. 2, describes a service as a salvage service "if and so far as the rendering of such service is voluntary, and attributable neither to legal obligation nor to the interest of self-preservation, nor to the stress of official duty."

The services in respect of which the claim is now made were, *ex concessis*, salvage services. But they were rendered in the course of events which occurred at a time when the tug was towing under the towage contract. Can they be

separated from what was done in pursuance and performance of the obligations of the tug under the contract? If they cannot, then no salvage can be recovered against the cargo: (see *The Solway Prince*, 74 L. T. Rep. 32; (1896) P. 120). If they can, and if they are services outside and beyond those required under the contract, salvage is recoverable: (*Sappho*, 1 Asp. Mar. Law Cas. 65; 23 L. T. Rep. 711; L. Rep. 3 P. C. 690). What are the obligations of a tug towards a tow under a towage contract? Tugs which have been engaged to tow have certain duties to remain by the tow in circumstances of danger, and to render such assistance as they can, or perhaps such as it would be fair and reasonable to expect them to render without running undue risks to themselves and their crew. Apart from such duties arising from the contract they would have others of a moral kind, which must be distinguished from the former. Thus the duties of tugs may be only of such a character as are common to all honest seafaring persons, apart from any legal obligations: such moral duties as were in the mind of Lord Stowell when he said: "It is the duty of all ships to give succour to others in distress; none but a free-booter would withhold it (*vide The Waterloo*, 2 Dod. 437), or they may be such duties as are obligatory by law on persons who have contracted to tow. The line between these may be difficult to draw, and the use of the word "duties" as common to both classes must not be allowed to confuse them.

As to the duties of the legal kind, the language employed in the decisions seems to raise some difficulties and to cause some perplexity. It is necessary to examine these decisions, and the language used in the judgments, with some particularity. In the well-known and leading case of *The Minnehaha* (1 Mar. Law Cas. O. S. 111; 1861, 4 L. T. Rep. 810; 1 Lush. 335) Lord Kingsdown, in the Privy Council, speaks of the "supersession" of the towage contract; of its being "implied in the contract that the tug shall be paid at such higher rate"; and of the towage contract "being so far suspended as to entitle her to a larger remuneration." See the following passages in the Privy Council, per Lord Kingsdown (4 L. T. Rep. 811; Lush 347): "But if in the discharge of this task by sudden violence of wind or waves or other accidents the ship in tow is placed in danger and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage whether this larger remuneration is to be considered as in addition to, or in substitution for the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject the towage contract is generally spoken of as superseded by the right to salvage." And (4 L. T. Rep. 811-12; 1 Lush. 347-8): "The tug is relieved from the performance of her contract by the impossibility of performing it; but if the performance of it be possible, but in the course of it a ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate. To hold on the one hand that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself to take the ship to her destination; or, on the other hand, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate, would be alike inconsistent with the public interests. The rule as it is established guards against both inconveniences, and provides at the same time for the safety of the ship, and the just remuneration of the tug. The rule has been long settled; parties enter into towage contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it."

And (4 L. T. Rep. 813; 1 Lush. 353): "We are satisfied that the breaking of the ship's hawser placed the ship in danger; that when she drifted over the shoal, and as long as she lay there, such danger continued; that she was rescued from such danger by the exertions of the steam tugs; that as to the *United Kingdom*, the towage contract was so far suspended as to entitle her to a larger remuneration under the head of salvage."

When *The Minnehaha* came before Dr. Lushington in the Admiralty Court, he spoke of the towage agreement being "vacated" when superior danger and service superior to towing supervened. In *The Annapolis* (1 Mar. Law Cas. O. S. 127; 5 L. T. Rep. 37; 1 Lush. 355), decided in the Privy Council on the same day as the *Minnehaha*, Lord Kingsdown says (5 L. T. Rep. 39; Lush. 373): "She (the tug) was justified in looking to her own safety in the first instance, but that consideration did not exonerate her from the obligation of following the vessel in tow to complete her engagement, and from doing what she could to prevent the mischief which might arise from the temporary interruption of her service."

When the same case was in the Court of Admiralty Dr. Lushington (1 Lush., at p. 361) said: "A contract for mere towing does not include the rendering of any salvage service whatever. If it happens by reason of unforeseen occurrences in the performance of the contract to tow, that new and special services are necessary, the contract is not at once rendered void, nor is the tug at liberty to abandon the vessel, for that would be most detrimental; nor, on the other hand, is the tug bound to perform the new service for the stipulated reward agreed for the original service; but the law requires performance of the service, and allows salvage reward. There is no such thing as salvage on land; and we must look at things done on the sea with a very different eye to those which are done on land. It was therefore the duty of the tug, after the collision took place, to render every sort of assistance she could to the vessel in order to rescue her from the danger immediately arising in consequence of the collision."

Within a week before delivering this judgment, Dr. Lushington decided the case of *The Saratoga*

(1 Lush. 318), and there expressed himself (at p. 321) as follows: "The law I have laid down in more than one instance upon this point is, that if, in the performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance; and thereupon is entitled to salvage reward. I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties, and the true interest of the owners of ships."

In *The White Star* (1886, L. Rep. 1 A. & E. 68) Dr. Lushington again dealt with this subject, and in the course of his judgment said: "The question is, Whether the agreement (*i.e.*, the towing contract) was rendered invalid by anything which afterwards happened. No doubt the principles laid down by the Privy Council in *The Minnehaha* (*sup.*) are the true ones, and those which I have endeavoured to act upon for nearly thirty years. When I first came to the bench I found considerable difficulty in determining whether a vessel engaged to tow another was bound, notwithstanding change of weather, to adhere to her, and perform services—not the service she originally engaged for—but a service which happened by accident to be superadded; and the doctrine I then held was, that she was bound to adhere to the vessel, and do all in her power to rescue her from danger, and she was to receive something additional, and not merely the remuneration originally agreed upon . . . that the contract must be adhered to, and is not to be broken hastily, unless it be shown that circumstances have occurred which could not have been within the contemplation of the parties, and that such is the state of circumstances that to insist upon the contract and to hold it binding would be contrary to all principles of justice and equity. It would be utterly impossible to define all such circumstances, but I think we should never have any doubt in saying in any particular case what they were which would give a right to abandon the contract."

Sir Robert Phillimore, in *The J. C. Potter* (3 Mar. Law Cas. O. S. 506; 23 L. T. Rep. 603; L. Rep. 3 A. & E. 292), speaks of the supervening circumstances justifying the tug in "abandoning" her contract. The following are his words: "It is not disputed that circumstances may supervene which engraft upon an original towage agreement the character of a salvage service; and to this proposition of law I must add another, which has an important bearing on my decision, viz.: That when the supervening circumstances, from stress of weather or otherwise, are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel for the purpose of rendering her assistance, but that for such assistance she is entitled to salvage reward." And: "Counsel for the ship contended that the principle underlying all the cases in which salvage services have been engrafted upon a towing engagement has been that the new service was of a different class, and the original service interrupted; and it is urged that in this case the service was not of a different class, but remained towage, and was not interrupted, as by the breaking of a hawser or other circumstances. But I cannot assent to this opinion. I think the true criterion by which it is to be ascertained whether the towing vessel has become a salvor is whether the supervening circumstances were such as to justify her in abandoning her contract."

In the case of *The Five Steel Barges* (6 Asp. Mar. Law. Cas. 580; [1890, 63 L. T. Rep. 499; 15 Prob. Div. 142) Sir James Hannen stated his conclusion from an examination of the authorities, thus: "The first question in this case is whether . . . the services which were rendered by the tug were of such a character, and were rendered under such circumstances, as to take them out of the towage contract? From the examination I have given to the decisions in point, it appears to me that it is not necessary, in order to become entitled to salvage, that the supervening danger should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably supposed to have been contemplated by the parties entering into such a contract. It depends on the circumstances of each case whether or not the services are advanced in this way to a higher degree, so as to establish a right to salvage. The character of the contract is, of course, to be looked at and the circumstances to which it related before we arrive at the point from which we have to start in estimating the value of the higher class of services."

I will only cite one other judgment, which was delivered by Sir Gorell Barnes. It is not in the authorised reports, and the language accordingly was not revised, but it has the ring of an accurate transcription. It was in the case of *The Thalatta* (*Shipping Gazette*, the 26th May 1905): "The law is perfectly well known: A tug is entitled to recover salvage if the services are outside the scope of the contract, but at the same time the fact that there is a contract cannot be left out of consideration altogether, because the vessel is entitled to have the assistance of the tug; in other words, the tug cannot desert the vessel. The tug is liable to render some assistance when the services cease to be salvage."

I have now cited the chief authorities upon the subject. The right conclusion to draw from the authorities, I think, is that where salvage services (which must be voluntary) supervene upon towage services (which are under contract) the two kinds of services cannot co-exist during the same space of time. There must be a moment when the towage service ceases and the salvage service begins; but if the tug remains at her post of duty there may come a moment when the special and unexpected danger is over, and then the salvage service would end, and the towage service would be resumed. These moments of time may be difficult to fix, but have to be and are fixed in practice. During the intervening time the towage contract, in so far as the actual work of towing is concerned, is suspended. I prefer the word "suspended" to some of the other words which have been used, such as "superseded," "vacated," "abandoned," &c. If this conclusion be correct, then it follows, from the concession that salvage services were rendered in this case, that the work of which those services consisted was not done under the towage contract.

It also follows, in my opinion, that although the tugowners have by the collateral agreement

referred to agreed not to make any salvage charges against the ship and freight, they are not precluded from claiming and recovering salvage remuneration in respect of the cargo against the cargo owners who were not in any way parties to the towage contract. This argument might be enforced, and the fallacy of the argument that there could be no salvage of the cargo because what was done was done to the ship in which it lay might be shown by an illustration: Assume that the cargo had been jettisoned, and, while still in the sea, had been salved by the tug, could it be said that no salvage would be payable by the owners? Could the agreement not to claim salvage against the shipowners—the other parties to the contract—absolve the owners of the jettisoned cargo salved in the case supposed from liability to remunerate the salvors? The conclusion above stated appears to me to be in harmony with the general policy of our law in regard to salvage services. It has been said with authority that "salvage is a mixed question of private right and public policy." For obvious reasons of public policy salvors are looked upon with favour and are encouraged by our maritime law; and the whole history of the subject, and the authorities, attest that a clear case must be made out before salvors can be deprived of remuneration for salvage services.

There are also other aspects of this case to which I think it well to advert. It has been argued that the shipowners could make a contract as to salvage with the tugowners by which the cargo owners are entitled to benefit, although the shipowners did not purport to act, and were in no sense acting, as agents for the cargo owners. So far as liability is concerned, it has been held that in regard to the owners of the cargo on board a salved ship neither the owners of the ship, nor the master, have authority to bind the cargo or its owners by any salvage contract (*Anderson, Tritton, and Co.* v. *Ocean Steamship Company* (1884, 5 Asp. Mar. Law Cas. 401; 52 L. T. Rep. 441; 10 App. Cas. 107). If the cargo owners would not be bound, can it be said that the other party, viz., the tugowners, are bound? Are the cargo owners to have the benefit, and not to be subject to the obligations of such a contract? There is another difficulty in the way of the defence of the shipowners and cargo owners to some parts of the plaintiffs' claim. The claim in the action is made not only by the tugowners who entered into the towage contract, but also by the master and crew of the tug. There is no evidence whatever that the agreement, "no salvage charges," was entered into by the tugowners with the assent or knowledge of the master or crew. It is clear that the owners, in the circumstances in which such an agreement was made (viz., in anticipation of future contracts of towage of the defendants' ships) had no authority to bind the master and crew by any agreement fixing the amount of salvage; certainly not by an agreement depriving them of salvage remuneration altogether (*The Margery*, 9 Asp. Mar. Law Cas 304; 86 L. T. Rep. 863; (1902) P. 157).

In any event, therefore, the master and crew are entitled to recover salvage from the cargo owners, and, although it is not necessary to decide it, I do not see that there is any good answer in law to a claim by them against the ship and freight. It has been settled that the master and crew of a salvage ship may recover salvage against cargo, although the owners of the salving ship, by reason of their relation to the salved ship or cargo, may not: (*The Agamemnon*, 1883, 5 Asp. Mar. Law Cas. 92; 48 L. T. Rep. 880; *The Sappho*, 23 L. T. Rep. 711; L. Rep. 3 P. C. 690); and *The Glenfruin*, 1885, 5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. 769; 10 P. Div. 103).

There is a still further point with regard to the rights of the crew. Seamen—always the favourites of the Legislature—have protection under sect. 156 of the Merchant Shipping Act 1894. In accordance with the policy of the law in casting its protection over seamen, and stimulating them to put forth efforts and to face risks to save life and property, the section provides, as to salvage, as follows: "156. (1) A seaman shall not . . . by any agreement abandon any right that he may have or obtain in the nature of salvage; and every stipulation in any agreement inconsistent with any provision of this Act shall be void." Therefore, even if the seamen had been persuaded to join in the agreement by which it is said they abandoned or precluded themselves from claiming salvage reward, such an agreement would be wholly inoperative. On this ground also the seamen have a right to salvage against the cargo owners.

I am accordingly of opinion that upon the preliminary point of law as to the validity of the claims of the plaintiffs against the owners of the cargo for salvage services rendered (if any) in respect of the cargo, the plaintiffs succeed and the defendants fail. The amount of the salvage remuneration would, of course, be in proportion to the value of the salved cargo when compared with the value of the ship, freight, and cargo. I order the defendants to pay to the plaintiffs the costs of and incidental to the motion to add the second defendants, and of and incidental to the addition of the defendants, and to the hearing of the point of law.

Leave to appeal.

Judgment for plaintiffs on preliminary point of law.

The defendants appealed.

Laing, K.C. and *A. R. Kennedy* for the appellants.

Bateson, K.C. and *C. R. Dunlop* for the respondents.

July 16, 1915.—Swinfen Eady, L.J.—This is an appeal from a judgment of the President on a point of law which was directed to be set down and put in the list for hearing. The proceedings were taken in Admiralty by the owners, master, and crew of the steam-tug *Vanquisher* against the owners of the cargo of the sailing ship *Leon Blum*, to whom by order the owners of the latter ship were afterwards added, claiming salvage. Originally the action was brought against the owners of the cargo only. Then a motion was made to stay the action on the ground that the plaintiffs, the owners of the tug, had entered into a contract with the owners of the sailing ship before the towage began that the plaintiffs should make no claim against the owners of the cargo on the ship for salvage services by the tug to the ship, her cargo, or freight during the towage. On that motion an order was made that the owners of the ship should be added as

defendants, and that the action should be put in the list for argument only on the point of law as to the construction and effect of the contract. The point of law has not been otherwise defined than by the motion to stay. The point of law was not formulated in terms, but only raised in the manner I have mentioned. After the order on the motion to stay the owners of the ship were made parties to the action and put in their defence, and thereupon the point of law came on for hearing before the judge. The only point of law would therefore appear to be whether, having regard to the terms of the contract, the claim against the cargo on the ship, first, by the owners of the tug, and, secondly, by the master and crew of the tug, is excluded. That is the point of law. Although the action was directed to be heard on this point of law, evidence was gone into and witnesses were examined and cross-examined, but I pass that evidence by because our attention has not been directed to it and because it is inadmissible on the point of law raised.

The contract in question is contained in two documents, which have to be read together. In July 1913 correspondence took place between the owners of the ship and the owners of the tug as to the terms upon which the towage contract was to be entered into. On the 17th July 1913 the owners of the tug wrote a letter containing the words on which the defendants rely: "We have to-day had the pleasure of a visit from M. Jouteau, and we confirm the verbal arrangement which we came to, whereby it is agreed whenever our tugs are engaged to tow any of your vessels, whether the contract be made by your good selves or by one of your masters, it shall be on the basis of 'No cure, no pay; no salvage charges.' Trusting this my lead to a good business between the two companies, yours faithfully . . ." The effect of that was to import these last words into the subsequent towage contract. More than four months afterwards, on the 1st and 2nd Dec. 1913. the contract was made as to this particular ship, the *Leon Blum*. An arrangement was made for the towage of the ship from Falmouth to Liverpool by one tug for 65*l*.; and then follow the conditions of the contract. It is conceded that on the voyage circumstances arose which, but for some special terms of the contract, would have entitled the tug to be paid for salvage services. The details of the occurrence are not material. The President stated in his judgment that: "For the purposes of this argument it is admitted that, before the towage was completed, the tug *Vanquisher*, her master, and crew, rendered salvage services to the vessel, cargo, and freight in respect of which, apart from any towage contract, they would be entitled to salvage remuneration." A little later he said: "The services in respect of which the claim is now made were, *ex concessis*, salvage services." So that the details of the service are not material, and the only question we have to consider is: Whatever these services were, does the contract exclude liability to the owners, master, and crew of the tug in respect of a claim against the cargo?

The defence set up, and the notice of motion to stay, in effect stated that the plaintiffs contracted to tow the ship and her cargo upon the terms that "the plaintiffs should make no claim for salvage reward in respect of any salvage services rendered by their tug to the *Leon Blum*, her cargo, or freight." That is not the language of the contract. The words of the contract upon which the pleader relies are the words "no salvage charges," and he expands them to mean that neither against the ship nor her cargo shall any claim be made by the tug for salvage. It is not suggested that the owners of the tug had any special authority to bind the master or crew in respect of any claim they might have for salvage.

As regards the crew, the appellants have conceded that they have no right to abandon any claim they may have for salvage, having regard to the Merchant Shipping Act 1894, s. 156, of which sub-sect. 1 provides that: "A seaman shall not by any agreement . . . abandon any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement inconsistent with any provision of this Act shall be void"; and sub-sect. 2 provides that: "Nothing in this section shall apply to a stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by that ship to any other ship." It was not contended by the appellants that there was any agreement binding the crew not to claim salvage.

Then, as regards the master, there was no evidence that the contract was entered into with his assent or knowledge. The original contract was entered into in July 1913, and the language "No cure, no pay; no salvage charges" was employed without reference to this particular towage contract.

There was thus no authority in the owners to bind either the master or the crew, not as to the amount of the salvage remuneration, but that they should not receive any such remuneration. As regards the master and crew, therefore, there is nothing to disentitle them to sue the owners of the cargo.

The next question is: Can the owners of the tug sue the owners of the cargo? It is not suggested that there was any authority from the owners of the cargo to the shipowners to enter into the contract on their behalf. The President said as to that: "The cargo owners had no knowledge of the terms of the contract or collateral contract. Again there was no evidence or suggestion that the tug owners in entering into the contract or at any time gave any intimation to the shipowners that the business of the tug owners was carried on, or that their charges were made, upon the basis that in cases of towage they had provided for 'no cure, no pay; no salvage charges.'" There has been no contention here that the shipowners entered into this contract as agents of the cargo owners. It was contended, however, that the cargo is on the ship, and that the agreement enures for the benefit of the cargo. The references to the cargo in the printed towage contract do not assist the appellants on this point. The first reference to the cargo in the conditions of that contract occurs in a stipulation that the plaintiffs are not to be responsible for loss. A subsequent reference to the cargo is in a stipulation that the owners of the cargo shall indemnify the plaintiffs against liability for certain matters therein mentioned. Whatever may be the form and effect of that

provision, it has no bearing upon the point which we have to decide. Except for that provision there is no reference to cargo in the contract. The mere fact that the shipowner stipulates in a towage contract for "no cure, no pay; no salvage charges" does not import that, if the tug renders salvage services to the cargo, the cargo shall be under no liability to pay for them. It is a stipulation entirely outside this contract. The determination of these two points is sufficient to dispose of the case.

No question has been raised as to the effect of this clause on the liability of the ship to the tug, and therefore I do not refer to it. I deal only with the two points that were material for our decision—namely, the claim by the owners of the tug against the cargo, and the claim by the master and crew of the tug against the cargo. There is, I think, nothing in the contract to exclude either of these claims.

On these grounds I am of opinion that this appeal should be dismissed.

Phillimore, L.J.—I am of the same opinion. It is somewhat difficult to extract the point of law which is raised by the defence, and which has been set down for argument. I take it to be that, given that the services alleged by the plaintiffs, the owners of the tug, in their statement of claim were in fact rendered by the tug to the ship and to the cargo loaded upon her, yet the plaintiffs cannot recover, inasmuch as the action is either barred by the contract originally made between the plaintiffs and the owners of the ship, or was brought in breach of that contract.

The first question that arises is whether the contract can be regarded as having been entered into by the owners of the ship as agents for and on behalf of the defendants, the owners of the cargo. As appears from the circumstances, it cannot have been entered into either by the express authority of the cargo owners or by their implied authority. Can it be said to arise incidentally from the relationship between the cargo owners and the shipowners who had in fact entered into it, by virtue of which relationship the shipowners became the bailees of the cargo for the cargo owners? I very much doubt it. It is unnecessary, however, to decide the point, because even if the contract be treated as that of the cargo owners, it does not as against them bar any of the plaintiffs, either the tug owners or the master or crew of the tug, from claiming salvage, if the services alleged were rendered by them. Take first the case of the master and crew of the tug. As to the crew, it seems impossible, having regard to the Merchant Shipping Act 1894, s. 156, sub-sect. 1, that a member of the crew could make a contract binding him to give up his right to salvage. As to the master, it was not impossible for him to make such a contract, but there is here no evidence that he authorised the tug owners to make it on his behalf. So far, therefore, as the master and crew are concerned the action must proceed.

Then consider the case of the tug owners. The shipowners might have contracted in terms with the tug owners that the latter should not claim against the cargo owners for salvage, but they have not so contracted. Counsel for the defendants contended that there was here no salvage, the ground of his contention being that salvage must be the voluntary act of the salvor, while a tug is bound to do what the tug did in this case. Why was the tug bound to do that? Not because it was so provided in the towage contract, but because of the rule of law laid down in the cases of *The Minnehaha* (4 L. T. Rep. 811; Lush. 335), *The White Star* (L. Rep. 1 A. & E. 68), and *The J. C. Potter* (23 L. T. Rep. 603; L. Rep. 3 A. & E. 292)—namely, that even if the circumstances be such that the tug would be justified in abandoning the contract of towage, it is still under the further duty of standing by the towed vessel to render assistance. These same cases, however, lay down that if in such circumstances the tug does render assistance, she is entitled to claim for her services. Therefore, whether in the present case the tug rendered the salvage services voluntarily, or because she was bound to do so in accordance with the rule laid down in the cases, she is equally entitled to claim salvage reward.

The contention of counsel for the defendants that the plaintiffs are not, as against the defendants, entitled to salvage fails, and the appeal should be dismissed.

Bankes, L.J.—I agree. The towage contract is a contract between two classes of persons—on the one hand the plaintiffs, the tugowners, and on the other hand the defendants, the shipowners. So far as the terms of that contract are concerned there is nothing in it to prevent the plaintiffs from making a claim for salvage services against the cargo owners. The original contract of a general character which was entered into between the tugowners and the shipowners did, however, contain a stipulation that any future towage contract should be upon the basis of no salvage charges. *Primâ facie* that earlier contract would refer only to the rights and duties of the parties to it—namely, the tugowners and the shipowners—and I can see nothing in it to extend it beyond its *primâ facie* meaning. It refers to the tugowners and the shipowners only. If this view is sound, it is conclusive of the point of law which we have to decide, for it means that it does not lie in the mouth of the cargo owners to say that the tugowners cannot as against them claim salvage, but only towage.

Appeal dismissed.

Solicitors, *Thomas Cooper* and *Co.*, for plaintiffs; *Pritchard* and *Sons*, agents for *Simpson, North, Harley*, and *Co.*, Liverpool, for defendants.

Dec. 8 *and* 9, 1915.

(Before Swinfen Eady, Bankes, and Warrington, L.JJ.)

Holland Gulf Stoomvaart Mattschappij *v.* Watson, Munro, and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Marine insurance — War risk "for charterers' account—Duty to insure.

The plaintiffs were the owners of a steamship that was chartered by the defendants under a charter-party which provided (inter alia) *that the owners were to pay and provide for insurance; that the charter-party was not to be construed as a demise of the ship; and that the owners were to remain responsible for insurance. The charter-party also contained the following*

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

written clause: "War risk, if any required, for charterers' account. It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy."

On the 21st Sept. 1914, while on a voyage the steamship was sunk by a German cruiser. The plaintiffs brought an action to recover damages for the defendants' failure to insure the steamer against war risk after having been requested by the plaintiffs so to do.

Held, that on the true construction of the charter-party the charterers were to bear the costs of the insurance; but that the insurance was to be effected by the owners and not by the charterers.

Decision of Bailhache, J. (ante, p. 92; 113 *L. T. Rep.* 178) *reversed.*

Appeal by the defendants and cross-appeal by the plaintiffs from the decision of Bailhache, J. (*ubi sup.*).

Roche, K.C. and *Alexander Neilson* for the defendants.

Leck, K.C. and *R. A. Wright* for the plaintiffs.

Swinfen Eady, L.J.—This is an appeal by the defendants, Watson, Munro, and Co., against a judgment of Bailhache, J. at the trial of the action in Middlesex without a jury whereby the plaintiffs recovered against the defendants judgment for a sum of 24,000*l.*

It is an action upon a charter-party and the contest turns upon the true construction and meaning of a very short clause in that charter-party. The charter-party is dated the 17th Sept. 1912. It was a time charter for five years on the steamship *Maria*, which belonged to the plaintiffs, the Holland Gulf Stoomvaart Maatschappij. The *Maria* was a Dutch ship and she sailed before the beginning of the present war from Portland in Oregon with a cargo of wheat consigned to British merchants at Belfast. The cargo was therefore occasional contraband. On or about the 21st Sept. 1914 the ship was stopped by the German cruiser *Karlsruhe* and sunk in the Atlantic.

The first question in the action is based upon this, that there was a contract, as the plaintiffs allege, contained in the charter-party whereby it was the duty of the defendants to insure the ship against war risk. The defendants have failed in that, and the damage arising thereon to the plaintiffs as they contend is the sum of 24,000*l.*, and that is the sum which the plaintiffs have recovered in the court below.

According to the terms of the charter-party which I have said is for five years, the first material clause is clause 2 and by that clause the owners were to provide and pay for certain matters and they were to pay and provide for the insurance on the vessel, such insurance to cover ship's proportion in all general average; and then they were to pay for certain stores and so on. Then the charterers were to provide and pay for other things such as bunker coal and so on. Then by clause 23 it is provided that: "Nothing herein named is to be construed as a demise of the steamer to the time charterers. The owners remain responsible for the navigation of the steamer, insurance, crew, and all other matters, same as when trading for their own account."

At the end is this clause written in: "War risk, if any required, for charterers' account. It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy." Almost immediately after the breaking out of war, the plaintiffs intimated to the defendants that the war risk ought to be covered by insurance. There is a letter of the 6th Aug. 1914 from the owners to the charterers in which they said: "Considering the actual political situation, we must ask you to satisfy us that the war risk on the steamship *Maria* is covered, or we must instruct the captain at his coal port to wait the developments. It is, under the circumstance that you are at war, probable that a cargo with destination of Belfast or Dublin will be captured." That was the first demand for a war risk. The defendants do not see any need for any such insurance. It is pointed out that the vessel is a neutral vessel.

There is correspondence between the parties throughout August and September. The plaintiffs, in their correspondence, refer on several occasions to the risk of war between this country and Holland, and that seems to trouble them. In fact, if one can judge from the correspondence, that appears to be the risk against which they are specifically desirous of being covered. But it includes also the general war risk. The correspondence went on in October and on the 5th Oct. the plaintiffs still claiming to be covered, the defendants say that in their view there is no need to insure against war risk. Then they raise this point by their letter of the 5th Oct.: "The *Maria* being a neutral ship, we cannot see any necessity to insure her against war risk. Apart from this we would remind you that you have not put us in a position to insure if the necessity did arise, by your not giving us the necessary information regarding your valuation."

On the same day, the 5th Oct., there is a letter from the plaintiffs, apparently crossing that giving or purporting to give particulars. On that date the plaintiffs wrote to the defendants: "We have further telegraphed you asking you to insure the ship for war risk according to the charter." That is only a telegram asking for insurance, and not mentioning any figures. The letter mentions: "Her insuring value is 30,500*l.*" That letter of the 5th Oct. was apparently received by the defendants in England on the 9th Oct. and they acknowledge the receipt of the letter of the 5th Oct. on the 9th. Oct. They say: "Messrs. Howard Houlder have sent us a copy of your letter to them dated 5th instant"—that is another letter—"and we note that you require the ship insured against risk of war between Holland and England. We think that this risk is a very remote one. In the meantime, we are very sorry to observe that the steamer is considerably overdue at St. Vincent, so much so that we are beginning to fear that she has been lost in the gale which was reported to be raging down the Argentine and Patagonian coasts about the beginning of September."

So that on the 9th Oct., when they received the figure of 30,500*l.*, they feared that the ship had been lost.

The correspondence goes on and on the 16th Oct. it is suggested as follows: "It is scarcely worth while discussing this matter at present, and the steamer is so hopelessly overdue that we fear she has gone to the bottom." The truth was that

she had been sunk many weeks before this letter was written and it was not known.

That being so the plaintiffs claim that, the ship being lost, the defendants are liable for, first, they say, 30,500*l.*, and in the alternative 24 000*l.* because according to the true construction of the charter-party it was the duty of the defendants to effect an insurance from the perils excepted by the clause in the original insurance. That depends upon what is the true construction of this contract. "War risk, if any required, for charterers' account."

"War risk" is an elliptical phrase which obviously refers to insurance. It is an insurance against war risk. "War risk, if any required." Both sides adopt the view that that means if, under the circumstances, any war risk insurance is reasonably requisite. What does "for charterers' account" mean? Does that mean that the cost of the insurance—the premium payable—is to be borne by the charterers or does it mean that the charterers are to provide and pay; that they are to effect the insurance and pay for it? In my opinion, having regard to the construction of the charter-party as a whole, and especially having regard to clauses 2 and 23, the true construction of those words is that the charterers have to bear the cost of the insurance, but the insurance is be effected by the owners and not by the charterers. Under clause 2 the insurance is to be paid and provided for by the owners. Under clause 23, the owners remain responsible for, amongst other things, insurance "same as when trading for their own account."

If that were all, it is obvious that if the owners wished to insure against war risk, they would have to do so themselves and bear the cost. But the effect of the subsequent clause is to throw the cost upon the charterers. The words are: "War risk, if any required, for charterers' account." That is to say, although the owners must provide for the insurance, the cost must be borne by the charterers. I think that the words "for charterers' account" rather point to the work being done by someone else, the insurance being effected by the owners, but for the account of the charterers.

The view that the learned judge in the court below took of the matter was this: He said: "I think the words 'war risk, if any required, for charterers' account,' mean that the charterers are to provide and pay for the war risk policy. The words 'for charterers' account' are a business form of expressing the fact that the charterers were to provide and pay for a war risk policy, just as by clause 2 the owners are to provide and pay for the ordinary insurance."

In my opinion that view is erroneous, as the construction of this charter-party and the language "for charterers' account" means only that the cost has to be borne by the charterers, and does not affect the liability of the owners to provide the insurance. I am confirmed in that view by the remaining portion of this last clause: "It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy."

The value stated in the owners' annual policy was a matter within the knowledge of the shipowners, but not within the cognisance of the charterers. Apart from the war risk they had nothing to do with any insurance. They had nothing to do with any annual policy. It was the owners' annual policy, and the information as to value remained with the owners alone. In fact it was not until the letter of the 5th Oct., received by the defendants on the 9th Oct., that any information was given at all with regard to the amount for which the owners had taken out a policy of insurance. As a matter of construction, I am of opinion, contrary to the view taken by the learned judge in the court below, that the insurance had to be provided and effected by the owners at the charterers' charge, and therefore the defendants were not in default in not effecting the insurance.

Reference was made to the subsequent correspondence between the parties, but the correspondence after the date of this charter-party cannot be referred to in order to construe the true meaning of it. It is not suggested that there was any conduct on behalf of the defendants to estop them in any way from contending that it is the duty of the owners to effect the insurance. It is not suggested that the effect of the correspondence was to raise any new contract between the parties. Therefore, in my opinion, the correspondence is irrelevant with a view of showing what is the true construction of the charter-party.

A further point raised by the defendants was this. Even assuming that their obligation was to effect the insurance, they never were supplied with the information which was necessary in accordance with the contract, and their contention was that it was a condition precedent to their being bound to effect the insurance that they should be informed as to the value stated in the owners' annual policy; and they contend that they never were in fact so informed. The only time when any figure is given is in the letter to which I have already referred of the 5th Oct., which was received by the defendants on the 9th Oct That is the letter in which the plaintiffs say that "Her insuring value is 30,500*l.*" That is an ambiguous expression. "Her insuring value"—the language of the contract is "values stated in owners' annual policy."

It appears that the position of the insurance was this: The owners had effected policies in the usual and proper form—part in England and part in Holland—upon the hull and machinery; policies amounting altogether to a little over 20,000*l.*—12,000*l.* in this country, and a little over 8000*l.* in Holland; roughly, as I say, over 20,000*l.* The policies were value policies, in which the value of the ship hull and machinery were given as 24,000*l.* The effect of that would be, treating the insured value as 20,000*l.*, that the owners were their own insurers with respect to the difference between 20,000*l.* and 24,000*l.* But in addition the owners had effected policies amounting in English money to 6530*l.* Those were P.P.I. polices; they were not policies on disbursements, but the terms used in the policies are "on excess value." In neither of those two policies was any sum mentioned as being the value of the ship.

In my opinion, according to the true construction of this charter-party, the insurance "based on values stated in owners' annual policy, means in the value policy of 24,000*l.* That was the value stated in the owners' annual policy, and that figure was never supplied by the plaintiffs to the

defendants. In my judgment even if the defendants were liable to effect the insurance, it was a condition precedent that the plaintiffs should supply them with the true amount for which the policy was to be effected—that is to say, they should supply them with the true amount; should give them the true value. That they never did; so the plaintiffs, if they were right in other respects, had not complied with the conditions precedent under which the defendants would have been bound to effect the insurance.

On this ground alone, without considering the other matters, I am of opinion that the judgment in the court below was wrong, and ought to be reversed, and that judgment should be entered accordingly.

Bankes, L.J.—I agree.

This was an action which was brought by the owners of the vessel against the time charterers, claiming damages for breach of the charter-party in not having effected a policy against war risk, and the damages claimed were the amount which would have been recovered under some war risk policies if the defendants had, in pursuance of their said obligation, duly effected the same, and which came to a considerable amount.

The defence was twofold: The defendants said, first of all, that they were under no obligation to effect a policy at all, although they were under an obligation to pay for it if it had been effected. Secondly, they said that, even if the obligation to effect the policy had been upon them, the plaintiffs did not give them the required note of the amount for which they were under an obligation to insure. The learned judge in the court below decided against the defendants on both grounds.

The ground upon which he gave judgment on the first point against the defendants was stated in his own words in these terms: "The words for charterers' account' are a business form of expressing the fact that the charterers were to provide and pay for the war risk policy, just as by clause 2 the owners are to provide and pay for the ordinary insurance. I do not agree, with respect to the learned judge, with that statement, generally stated in that way. If in a contract two parties agree that a particular thing is to be on account or for the account of one of them, in my opinion, *primâ facie*, that has reference to who is to pay for the particular thing.

But of course if a contract be silent as to who is to do a certain thing, and you infer from all the surrounding circumstances and from the silence of the document that the parties intended or contemplated that the thing must be done by the persons who have to pay for it, then I should take the same view as the learned judge in the court below did. In this contract, however, in my opinion, the paying for the particular thing in question—which is the insurance—and the doing of the particular thing—that is to say, the effecting of the insurance—has been clearly dealt with in the charter-party, and dealt with as two separate matters, and possibly two separate obligations. I think this also must be borne in mind, that the insurance had reference to the owners' property, the ship, in which of course the charterers had no direct concern, although they had a concern in the charter.

Clause 2 expressly deals with the double question. First of all, who is to pay for the thing and who is to provide the thing? And with regard to the insurance, as one would expect, both the provision of the insurance—that is to say, the effecting of it on the vessel—and the paying for it, are the obligations of the owners. And when you come to clause 23, that only emphasises it, because with regard to insurance, in my opinion, it adds nothing to what the charterers have already said in clause 2.

But, in order to make assurance doubly sure, there is a provision that: "Nothing herein named is to be construed as a demise of the steamer," which means that not only she belongs to the owners, but the possession remains in the owners, and the owners remain responsible for, amongst other things, insurance, as when trading for their own account. If the charter had stopped there, it is plain that any insurance against war risk, not only the paying for it but the effecting of it, was the obligation of the shipowners.

In addition to the printed form there is the written clause which was inserted for the express purpose of dealing with the question of the war risk, and there were two things to be provided for. It is quite plain that the parties understood it and contemplated it. Those two things were the effecting of the war risk and the paying for it; and words were used which, in my opinion, having regard to the earlier part of the charter-party, are quite plain to show that the obligation to insure was upon the owners, and the obligation to pay was to be upon the charterers; and those are the words that were used. They are not very clear; they are a short way of expressing what was in the minds of the persons who prepared the charter-party, and it was put quite shortly. They speak of "war risk" of course meaning war risk so far as it affected the vessel.

Then they say, "if any required." That has been treated as if those words meant if any, under the circumstances, is reasonably necessary. I am not at all sure myself that that is the true construction of those words. It seems to me rather to point to "if required by the owners." But however that may be, I do not think that it makes any material difference to the construction of the charter-party. Then comes "for charterers' account"—no indication so far as I can see, having reference to what has already been done in the document, that it is to be for anything else than the charterers' account—that is to say, the charterers are to pay for it. Then comes the last part of the clause: "It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy."

The object of that clause, in my opinion, was this, that there should be no dispute as to whether the amount for which the vessel was insured was the correct amount or not, after it had been done. It was a provision as to the amount for which the person, whoever it was, was under an obligation to insure, or had a right to insure, might insure the vessel and so that there should be no dispute as to whether the amount was right or not right. It is not necessary to decide what is meant by "to be based on values stated." No question arises about that, but it is quite plain that it cannot be more than the value stated in owners' annual policy.

Assuming that the view that I have taken about the construction on the question of the obligation to insure is wrong, the question would arise whether in the events which happened

allowing the obligation to be upon the charterers, the charterers were, under the circumstances, guilty of a breach of the contract in not having effected the insurance. That depends, first of all, upon the construction of this last clause, and, in my opinion, this is one of that class of cases in which the knowledge of what is required to be done being entirely in the possession of one party, it is obligatory upon that party to give notice to the other of what it is he requires to be done, before the other party comes under an obligation to perform his part of the contract. The rule is well stated in *Vyse* v. *Wakefield* (6 M. & W. 442 at p. 452) where Lord Abinger says this: "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."

Here the matter which was material to be known was the value stated in the owners' annual policy, and that knowledge was in the possession of the owners and the owners alone. Therefore in my opinion, even assuming the obligation to insure was upon the charterers, it was a condition precedent to the performance of the obligation on their part that the ship owners should tell them, and tell them truly (because it is not telling at all unless it is told truly) the amount for which they had to insure.

The learned judge in the court below has treated apparently as a sufficient statement of what the amount was, a statement which appears in the letter of the 5th Oct. that the insuring value was 30,500*l*. I cannot agree with the learned judge on that point either. The correspondence when looked at as a whole, clearly shows that the charterers never did refuse to insure this vessel. Of course, if they had definitely taken up the position "Never mind what you say, or what you do, we do not and shall not insure the vessel," it may be that would have excused the shipowners from furnishing the necessary information about the value stated in their policy; but upon the correspondence it is plain that the charterers never took up that position. They did say they did not think it was necessary to insure her, but the letters which have been referred to, and relied upon, as assisting the construction of the contract which the learned judge in the court below has adopted, are letters in which they do not dispute their liability, but they say that the occasion has not arisen for the performance of it, and those two letters are the letter of the 2nd Sept. and the letter of the 5th Oct.

Never having taken up the position that they were under no obligation to insure under any circumstances, but rather indicating that if the conditions were different they might possibly be under an obligation, but without admitting it, what happened? What happened was that the owners supplied information which was wrong information as to what the amount stated in their annual policy was, and in those circumstances, in my opinion, we are compelled to take a different view from the learned judge in the court below on this second point, and say, even if the obligation were upon the charterers, the shipowners had not fulfilled the condition precedent which rested upon them, and that the charterers are on that ground also entitled to judgment.

In the circumstances, I think the appeal succeeds.

Warrington, L.J.—The first question, the answer to which disposes of the plaintiffs' claim, is whether the charter-party creates a liability on thepart of the charterers themselves to effect an insurance of the ship against war risk. The charterers contend that though if an insurance were properly effected by the owners they would have to pay the premium, this is a full extent of their liability.

In my opinion, the contention of the charterers on this point is correct. There is in clause 2 a general provision as to several matters which are to be provided and paid for by the owners and the charterers respectively. Amongst these which are to be provided and paid for by the owners is the insurance of the vessel. This provision, it is stated, extends only to the ordinary marine insurance, but, of course, the owners might, if they had pleased, insure against war-risk, and if they had done so, and there had been nothing more in the contract, they would have had to bear the expense themselves. The ship was their property, and the loss, if it occurred, would be their loss.

Passing over clause 23 in the charter-party which, in my opinion, carries the matter no further, we come to the clause in question, which is appended at the end of the printed document, and is in these terms: "War risk, if any required, for charterers' account. It is understood and agreed that value for war risk at all times to be based on values stated in owners' annual policy." The effect of this clause it seems to me is this, that it alters what I have said would have been the result of the provision in clause 2 if there had been no special provision in the contract. The option of insuring against war risk would remain with the owners. If the owners exercised that option and properly effected a war risk insurance, then they are not, as they would have been if there had been no provision to the contrary, to bear the expense themselves, but it is to be charged to the charterers.

So far I have said what, in my opinion, would have been the true construction of this clause if it had turned only on the words "for charterers' account," but it seems to me that that is the true construction is abundantly clear by the additional words. Those words are intended to limit, and have the effect of limiting the liability of the charterers. The owners are not to insure against war risk for any amount they may choose and charge the charterers with the expense, but the latter are to be charged only with the expense of a policy for a limited sum, and the facts which enable the amount of that limited sum to be ascertained are in the knowledge not of the charterers but of the owners of the ship, and the clause contains no provision that the owners, for the purpose of enabling the charterers to effect the policy, if that were to be their liability should communicate to them the value stated in their (the owners') annual policy.

If the construction is that put upon those words by the learned judge in the court below, some such provision must be implied. But if the

construction is that which I have said I think it is, then nothing need be implied at all. It seems to me that construction confirms the view that the true construction is that the option of insuring—it is not an obligation but an option—against war risk is with the owners, but the liability to bear the expense, if that option is exercised, is on the charterers.

On the other point I agree with my brethren, and do not desire to add anything.

Appeal allowed.

Solicitors for the appellants, *Botterell* and *Roche.*

Solicitors for the respondents, *William A. Crump* and *Son.*

Nov. 25 *and Dec.* 15, 1915.

(Before Lord Cozens-Hardy, M.R., Bankes and Warrington, L.JJ.)

Re Arbitration between F. A. Tamplin Steamship Company Limited and Anglo-Mexican Petroleum Produce Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Time charter-party—Oil tank steamer—Period of charter unexpired—Ship requisitioned by Government as transport for troops—Structural alterations to adapt her for that purpose—Whether contract determined by act of Government.

By a charter-party dated in May 1912 *the owners of a ship designed to carry cargoes of oil in bulk agreed to let and the charterers agreed to hire the ship for the period of sixty calendar months commencing from the day at which the ship should be placed at the disposal of the charterers—which period would expire in Dec.* 1917*—to be employed in lawful trades for voyages between certain specified ports for the carriage of refined petroleum and (or) crude oil and (or) its products, as the charterers or their agents should direct.*

The charterers were to pay as freight a fixed sum of 1750*l. per month. Under certain restrictions the carriage of other suitable cargo than oil was to be allowed. Power was conferred on the charterers to underlet the ship on Admiralty or other service, but without prejudice to the charter-party. There was an exception of (amongst other things) "restraints of princes, rulers, and people."*

The ship was requisitioned by the Government in Dec. 1914*, and was for some time employed in carrying water. In Feb.* 1915 *she was altered by the Government to adapt her for the transport of troops. The charterers had paid and were willing to continue to pay the stipulated freight.*

In these circumstances the question arose whether the charterers were entitled to treat the contract as subsisting or whether the owners were right in contending that it was put at an end.

Held, that the adventure on the part of the owners was that the ship should earn the freight for the entire term of the charter, the adventure on the part of the charterers being that they should have the use of the ship; that the adventure on the part of the owners had not been frustrated; and that it could not therefore be said that the entire adventure had been frustrated.

Held, also, that the event which had happened was within the meaning of the exception "restraints of princes, rulers, and people."

Decision of Atkin, J. affirmed.

Award stated in the form of a special case for the opinion of the court.

On the 18th May 1912 S. Pearson and Son Limited, by a time charter of that date, chartered a British tank steamer, the *F. A. Tamplin*, which was then building for the F. A. Tamplin Steamship Company Limited.

On the 4th Dec. 1912 the vessel was at the disposal of the charterers, the charter period to run for sixty months from that date, expiring, therefore, on the 4th Dec. 1917.

According to the charter-party, the steamship was "to be employed in such lawful trades for voyages between any safe port in the United Kingdom and (or) the Continent of Europe, and (or) any safe port or ports in the United States of America, and (or) Mexico, and (or) North and South America, and (or) Africa, and (or) Asia, and (or) Australasia, and back finally to a coal port in the United Kingdom, for the carriage of refined petroleum and (or) crude oil and (or) its products, but warranted no B.N.A. on Atlantic, except for coaling, warranted no Baltic between the 1st Oct. and the 1st April, warranted no White Sea between the 1st Oct. and the 1st April, as charterer or his agents shall direct, on the following (*inter alia*) conditions:—

1. That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew. Shall pay for the insurance of the vessel, also for all stores (excluding fresh boiler water, which is to be paid for by charterers), and maintain her in a thoroughly efficient state in hull, machinery, and equipment for and during the service; but owners not to be responsible for leakage of oils from any cause, but they are to make good any defects in compartments as soon as practicable on receiving notice thereof."

3. That the charterers shall pay for the use and hire of the said vessel at the rate of 1750*l.* per calendar month (which was at the expiration of the first twelve months to be reduced to 1700*l* a month).

20. The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers and people, collisions, stranding, and other accidents of navigation always excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner.

22. No goods contraband of war to be shipped, and the steamer not to be required to enter any port that is in a state of blockade or where hostilities are in progress. In the event of a country to which steamer trades being at war with any other country, charterers agree to insure (for owner's benefit) the steamer against all war risks.

25. No voyage to be undertaken or goods or cargoes loaded that would involve risk of seizure, capture, or penalty by British or foreign rules or Government; and no acids or cargoes injurious to the steamer to be shipped.

26. Charterers to have the option of shipping in all tanks and in "'tween decks, and (or) any other suitable space available, such quantity of turpentine or naphtha in cans, cases and (or) barrels and (or) drums or other suitable cargo, but quantity to be at the discretion of the master."

(*a*) Reported by W. V. Ball and E. A. Scratchley, Esqrs., Barristers-at-Law.

Clause 34 provided that the charterers should have the liberty of sub-letting the steamer on Admiralty or other service without prejudice to the charter-party, but the charterers remaining responsible.

Early in Feb. 1915 notice was given to the Anglo-Mexican Petroleum Company Limited (who by agreement had taken the place and thereafter stood in the shoes of the charterers) by the director of transports that the *F. A. Tamplin* was requisitioned by the Admiralty "from the time she arrives, has discharged, and is ready."

On the 10th Feb. she arrived at Cardiff, and on the 15th Feb., in obedience to the requisition she proceeded to Liverpool. At the instance of certain transport officers in the employment of the Government she then under went certain structural alterations and was fitted for transport of troops. She was afterwards used as a transport.

Disputes which arose between owners and charterers as to the effect of this upon the charter-party were referred to arbitration.

The owners contended that the fact that the vessel had been requisitioned by the Government made it impossible for them to continue to allow the vessel to be user under the charter-party, and that that agreement was put an end to or suspended by "restraints of princes." The requisitioning of a vessel in such circumstances was not and could not be treated as a sub-letting, because the terms of the charter-party did not permit of the vessel being structurally altered.

On behalf of the charterers it was contended before the arbitrator that in the events which had happened the charter-party had not been determined or put an end to, and that the requisition should be treated as a sub-letting. Structural alterations made by the British Government did not amount to a breach of contract by the charterers. Finally, they contended that inasmuch as they contract to accept the terms offered by the Government, this was, in effect, a sub-letting by them.

The arbitrator awarded that the charter-party had come to an end on Feb. 1915, but subject to the opinion of the court.

In July 1915 the special case came on to be heard before Atkin, J.

MacKinnon, K.C. and *R. A. Wright* for the charterers.—Clause 34 of the charter-party (*sup.*) is relied on. The requisition led to an involved something which was a sub-letting. The clause which mentions "restraints of princes" is for the protection of the owners, but they cannot use it as a weapon of offence against the charterers. The charterers are entitled to receive the hire paid by the Government and to continue to pay the sums due under the charter-party. No breach of contract by the shipowners is complained of.

George Wallace, K.C. (with him *Raeburn*) for the shipowners.—As soon as the vessel ceased to be fit for carrying oil the charter-party came to an end, as it was an implied condition that she should remain in that condition. This was not a charter for general purposes. He referred to

Nickoll v. *Ashton*, 84 L. T. Rep. 804; (1901) 2 K. B. 126;

Krell v. *Henry*, 89 L. T. Rep. 328; (1908) 3 K. B. 740, 748;

The alterations having been made, the vessel ceased to be a tank steamer, and as those alterations were made by virtue of the Royal prerogative the contract was terminated.

MacKinnon, K.C., in reply, referred to

Brown v. *Turner, Brightman, and Co.*, 12 Asp. Mar. Law Cas. 79; 105 L. T. Rep. 562; (1912) A. C. 12.

ATKIN, J. stated the facts and continued:—No question arises before me as to the complete power of the Admiralty to require the use of the vessel to be given up to them. The dispute between the parties appears to have risen some time after Feb. 1915 in consequence of the owners claiming that the contract was suspended during the time the vessel was requisitioned by the Admiralty, and that they were the persons who were entitled to deal with the Admiralty in respect of her, and to have, therefore, the rate of freight which the Admiralty were paying. That contention was not accepted by the charterers, and in that way the dispute originally seems to have come before the arbitrator. The learned arbitrator, who has dealt with the case as a pure question of law, has awarded that the charter-party came to an end in Feb. 1915, and the question as he states it is whether he is right in so awarding or not. I have great respect for the opinion of the arbitrator. He is a very well known legal gentleman whose opinion is entitled to the very greatest weight on questions of this kind, but I do not agree with his opinion. There is no doubt that there was a contract in existence for five years, and if the shipowners wish to put an end to it, or to successfully contend that it is at an end, they must show some legal principle upon which it is put an end to. It was not argued before me that there has been any breach of contract by the charterers, and it could not be so contended. In my judgment the requisitioning by the Admiralty is an act which is altogether independent of the charterers, and, further, even if it were an act of the charterers or anything which could be said to be a breach of contract by them, I think there is very little doubt that they would be protected by the exceptions if those exceptions were available in their favour. Indeed, it was not contended on behalf of the shipowners that there was any breach of contract by the charterers. There has therefore been no breach going to the root of the contract which would entitle the shipowners to put an end to it.

In those circumstances, what ground is there for saying that the contract is put an end to? It was said that an implied condition in the contract had not been fulfilled, and that the contract was therefore at an end. This was based upon the principle which had been laid down in various authorities and formulated by Vaughan Williams, L.J. in *Krell* v. *Henry* (*ubi sup.*) in language which, although perhaps somewhat vague, I think, in the terms in which it is couched, expresses the principle of law. He said: "I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from the necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things.

If it does, this will limit the operation of the general words, and in such case, if the contract became impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited."

On behalf of the shipowners, Mr. Wallace contended that it is an implied term of this charter-party that the ship shall always continue to be fit to carry oil, and that if she does not continue to be fit to carry oil—that being a state of things the assumption of which is the foundation of this contract—the contract is thereupon at an end. It is a little difficult to conceive that state of things as being necessarily that which both parties were contemplating. It is not, and I do not think it could be, suggested that if in fact the ship became unfit to carry oil by reason of the default of either of the parties, the contract would be at an end. Either the charterers might be in default in not exercising reasonable care, or the shipowners might be responsible and have to make good the default if the charterers were not to blame for it, and in those circumstances the condition of things would be due to the default of either one or the other of the parties. Therefore the contention of the shipowner is necessarily limited to the suggestion that it is only when the ship continues to be unfit for the carriage of oil, without the default of either of the parties, that the contract is to be deemed to be brought to an end.

I see no reason for assuming that to be a necessary condition of this contract. What the charterers have to do is to pay the freight. They need not use the ship for the carriage of oil. Under the charter-party, if the carriage of oil became unremunerative, they could (using reasonable care to preserve the ship so as to be able to hand her over in a reasonable condition at the time when the charter-party comes to an end) lay the ship up, and, moreover, they have the power under it of carrying cargo other than oil, subject to certain conditions. So far as the owners are concerned, the main obligation of the charterers is to pay the freight, and I therefore see no ground for suggesting that there is a condition of the contract that, when without default of either party the ship ceases to be fit for the carriage of oil, the contract is to be treated as at an end. If that is not a condition of the contract, and there is no breach by either party, I cannot see upon what ground the contract can be said to be at an end. The charterers having the use for five years of that which is of value to the Government, the Government have taken it away and are using it for national purposes. During that period (the Government having the right to do what they have done) there is no breach of the contract by the charterers, and it appears to me that there is nothing in respect of which the owners can complain. They cannot say to the Admiralty: "Pay to us the money for the use of the ship for which you have, in fact, deprived the charterers. As I cannot see any legal ground upon which this contract has come to an end, I am unable to answer the question except by saying that, in my opinion, the arbitrator was not right in holding that the charter-party came to an end or was suspended. The charterers should have the costs of the references and award and the costs of the hearing before me.

From that decision the Steamship Company now appealed.

George Wallace, K.C. and *Raeburn* for the appellants.

MacKinnon, K.C. and *R. A. Wright* for the respondents.

George Wallace, K.C. replied.

The arguments adduced in the court below were substantially repeated and the authorities there cited were again referred to with the addition by the appellants' counsel of

Jackson v. *Union Marine Insurance Company Limited*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;
Horlock v. *Beal*, *ante*, p. 250; 114 L. T. Rep. 193;
Cunningham v. *Dunn*, 3 Asp. Mar. Law Cas. 595; 38 L. T. Rep. 631; 3 C. P. Div. 443;

and by the respondents' counsel of

Taylor v. *Caldwell*, 3 B. & S. 826.

Cur. adv. vult.

Dec. 15. 1915.—The following written judgments were delivered:—

BANKES, L.J.—The Master of the Rolls has desired me to state that he has perused and that he agrees entirely with the judgments which are about to be delivered in this case by myself and Warrington, L.J.

The question in dispute between the parties in this case is whether a time charter of the steamship *F. A. Tamplin* has been determined owing to the vessel having been requisitioned by the Government.

The matter was referred to arbitration. The arbitrator, who stated his award in the form of a special case, decided in favour of the shipowners, the present appellants, that it had been determined. Atkin, J. before whom the special case was argued took the opposite view.

In the special case the arbitrator sets out the facts and the contentions of the parties, and he states what his decision is. But he does not state the grounds of his decision or whether he draws any particular inference of fact from the facts stated. No application was made to this court that the case should be remitted to the arbitrator. And from this I assume that the parties desire that the proper inference to be drawn from the facts should be treated as a question of law and dealt with accordingly.

The material facts can be quite shortly stated. The charter-party is dated the 18th May, 1912, at which time the *F. A. Tamplin* was in course of building. She was constructed as a tank steamer designed to carry cargoes of oil in bulk. The charter was for the long period of sixty calender months from the day at which the vessel was placed at the disposal of the charterers. This period does not expire till the 4th Dec. 1917.

The charty-party is not a demise of the ship, but it places the ship at the disposal of the charterers for the purposes, and with the limitations, indicated in the charter-party. These may be briefly stated as follows: The vessel was to be employed in such lawful trades for voyages between any safe port or ports in the United Kingdom and (or) Continent of Europe, and (or) any safe port or ports in the United States of America and (or) Mexico, and (or)

North and South America and (or) Africa, and (or) Asia and (or) Australasia and back finally to a coal port in the United Kingdom for the carriage of refined petroleum and (or) crude oil and (or) its products as the charterers should direct but warranted no B. N. A. or Atlantic except for coaling, and warranted no Baltic between the 1st Oct. and the 1st April; warranteed no White Sea between the 1st Oct. and the 1st April.

Though this class of trading was the one which was mainly in the contemplation of the parties, the charterers had the right to ship other suitable cargo to a certain extent; and had also the right to sublet the vessel on Admiralty or other service, but without prejudice to the charter-party. One or the express conditions of the charter-party was that no voyage should be undertaken, or goods, or cargoes, loaded that would involve risk of seizure, capture, or penalty by British or foreign rulers or Governments. The charter-party also contained an exemption clause which included "restraint of princes."

The hire payable was at the rate of 1750*l.* sterling per calendar month, the owners had to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew. The captain, though appointed by the owners, was to be under the orders and direction of the charterers.

On the 15th Feb. of this year the Government requisitioned the vessel for the purpose of carrying troops, and they caused certain alterations to be made in order to adapt her for that purpose. The Government also required certain members of the crew who were foreigners to be replaced by Englishmen, and this appears to have been done or assented to by the owners. No serious question was raised by the appellants in relation to this dealing with the crew. The respondents appear to receive from the Government a substantially increased hire over and beyond what they pay to the appellants, and they not unnaturally claim to be entitled to receive this, and retain it, as they were not allowed to employ the vessel for their own trade, which they were anxious to do.

The shipowners contend that in the events which have happened the charter-party has been determined, and that they are entitled to withdraw the vessel from the charterers; or in other words to receive the Government hire themselves. There is no doubt that if the charterers had themselves done what the Government have done, their action would have constituted such a breach, or a series of breaches, going to the root of the contract as would have entitled the shipowners to rescind the contract and withdraw the ship.

That, however, is not the question which has to be decided. In the events which have happened the charterers have done nothing. It is the Government who have stepped in and requisitioned the ship, and have caused her to be altered and employed her on work not authorised by the charter-party. What has been done has been done by "restraint of princes" within the meaning of the exception, which is in my opinion an exception in its nature mutual, and of which either party is therefore entitled to the benefit. It is not, I think, contended that what was done by the Government was not a "restraint of princes." But if authority is wanted it will be found I think in the recent case of *Sanday and Co.* v. *British and Foreign Marine Insurance Company Limited* (*ante*, p. 116; 113 L. T. Rep. 407; (1915) 2 K. B. 781).

The real point in the present case is whether what the Government have done has rendered the commercial enterprise, entered into by the parties, and evidenced by the charter-party, impossible. It it has, then each of the parties has the right to say that the contract cannot be carried out, and to treat it as at an end: (see *Geipel* v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404, per Blackburn, J. at p. 413; and *Jackson* v. *Union Marine Insurance Company Limited*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125, per Bramwell, B. at pp. 144-145. See also per Brett, J. in *Hudson* v. *Hill*, 30 L. T. Rep. 555; 43 L. J. 273, C. P.)

The arbitrator decided that the contract came to an end directly the Government requisitioned the vessel—that is to say, on the 15th Feb. 1915, and that is the position now contended for by the appellants. So far as the alterations of the vessel are concerned, I attach no importance to these. If done by the charterers they would no doubt have amounted to serious breaches of contract, justifying rescission by the shipowners. But in their nature they did not and do not render the commercial enterprise impossible. At the time they were carried out the charter had about two years and nine months still to run. The vessel can easily be restored to her former condition as a tank steamer, though possibly her value may have been somewhat diminished by what the Government have done.

The fact that so long a period of the time for which the vessel was chartered was still unexpired when the vessel was requisitioned by the Government is to my mind an all important feature in this case; and one which distinguishes it at once from the series of decisions in which the fulfilment of some condition precedent has been held to be destructive of the commercial enterprise. This point was referred to in the judgment of Blackburn, J. in *Geipel* v. *Smith* (*ubi sup.*) (at p. 414 of L. Rep. 7 Q. B.).

In the present case the commercial enterprise as contemplated by the parties has undoubtedly been interrupted, and seriously interrupted by the action of the Government. The interruption, however, is of a nature which was contemplated by the parties and provided for by the introduction of the exception relating to restraint of princes. That mere interruption of a commercial enterprise, though long prolonged, is not necessarily a determination of the contract under which the enterprise was undertaken is shown by the embargo cases of which I may refer to *Hadley* v. *Clarke* (8 T. R. 259), and the other cases cited in the recent judgment of Swinfen Eady, L.J. in *Beal* v. *Horlock* (*ante*, p. 250; 114 L. T. Rep. 193).

Looking at the commercial enterprise in the present case from the point of view of each of the parties to the contract, as was done by Brett, J., in *Hudson* v. *Hill* (*ubi sup.*) (at p. 279 of 43 L. J. C. P.), what is the position? From the point of view of the shipowners, the commercial enterprise was mainly the earning of the hire of the vessel. This the shipowners have not lost, as the charterers either have paid, or are willing to pay the hire. The obligations of the charterers re-

main untouched, and the rights of the shipowners in reference to any breach of the charter-party by the charterers are undiminished.

From the point of view of the charterers, the commercial enterprise was the earning of profit by the use of the vessel or by sub-letting her. This the charterers have not lost. It is quite true that the intervening act of the Government has displaced for the time being the control of either party over the vessel, but meanwhile each party is deriving in substance—though not in form—the benefit, or a substantial part of the benefit, which each contemplated getting out of the enterprise, and there is nothing to prevent the charterers resuming control of the vessel and completing the time charter if and when the Government restore the vessel to them.

Under these circumstances the true inference, in my opinion, to be drawn from the facts is that the requisitioning by the Government of the vessel has not destroyed the foundation of the commercial enterprise, and has not, therefore, determined the time charter.

The appeal, in my opinion, fails and must be dismissed with costs.

Warrington, L.J.—The question in this case is whether a time charter the period of which is still unexpired has been determined by the act of the Government in requisitioning the ship as a transport and making certain structural alterations necessary to fit her for that purpose. The question was referred to arbitration, the owners contending that the charter is determined, the charterers that it is still in force.

The arbitrator has made his award in the form of a special case expressing his own opinion in favour of the owners. This view has been overruled by Atkin, J., and the owners appeal.

The charter is dated the 18th May 1912. By it the owners agreed to let and the charterers agreed to hire the ship in question described as a tank steamer then building for sixty months commencing from the day at which she should be placed at the disposal of the charterers—this day was in fact the 5th Dec. 1912—to be employed in lawful trades for voyages between the ports specified for the carriage of refined petroleum and (or) crude oil and (or) its products, warranted no B.N.A. or Atlantic except for coaling and warranted no Baltic and no White Sea between certain dates as the charterers or their agents should direct on the conditions specified.

It is unnecessary to mention these in detail. It is sufficient to say that the only direct obligation on the part of the charterers was to pay the freight—a fixed sum of 1750*l.* per month. The other conditions either imposed obligations on the owners or regulated the extent of the charterers' right to the services of the ship. They allowed under certain restrictions the carriage of other cargo than oil. They gave power to underlet without prejudice to the charter-party and they contained an exception of (amongst other things) restraints of princes, rulers, and people.

The steamer was originally requisitioned by the Admiralty in Dec. 1914 and was for some time employed in carrying water. In Feb. 1915 on arriving at Cardiff she was ordered by the Admiralty to Liverpool, where she was altered to fit her for the transport of troops. On the 30th March 1915 she left Liverpool on Government service and she is still employed thereon. The term of the charter expires on the 4th Dec. 1917. The charterers have paid and are willing to continue to pay the freight of 1750*l.* a month.

The charter-party was plainly not a demise of the ship. Its true effect appears to me to be to entitle the charterers during the specified term to enjoy the use of the ship for the particular purposes, and the benefit of the specified services to be performed by the owners, the charterers being under an obligation to pay the agreed freight whether they actually used the ship or not.

The effect of the action of the Government is to deprive them for the time being of the actual services of the ship. They contend that they are nevertheless entitled to treat the contract as subsisting. It is the owners who insist that it is not.

It was contended before the learned judge in the court below and before us that the contract was subject to the implied condition that the ship should at all times be and remain a tank steamer and that the alterations had occasioned the non-fulfilment of that condition. I can only say as to this that I agree with Atkin, J. that there is no ground for implying such a condition.

It was further contended before us that the mercantile adventure at first contemplated by both parties was entirely frustrated by the events which have happened and that therefore the contract is determined and cannot be enforced by either party, reliance being placed on the judgment of Bramwell, B. speaking for the majority of the court in *Jackson* v. *Union Marine Insurance Company Limited* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125). But in order to determine what is the mercantile adventure contemplated it must be looked at from the point of view of both parties to the contract: (see per Brett, J. in *Hudson* v. *Hill*, 30 L. T. Rep. 555; 43 L. J. 273, C. P., at p. 279).

In the present case the adventure on the part of the owners was that the ship should earn the freight for the entire term of the charter; that of the charterers that they should have the use of the ship. The adventure on the part of the owners has not been frustrated, and it cannot therefore be said that the entire adventure has been frustrated. *Jackson's* case (*ubi sup.*) is plainly distinguishable on the grounds that in that case the court held that the commercial adventure—a single voyage—had wholly failed.

It is true that the action of the Government has imposed upon the owners obligations as to the equipment voyages and use of the ship during its present employment different from and more onerous than those imposed by the charter. This circumstance may give them a claim to the generous consideration of the Government, but does not, in my opinion, enable them to say that as between themselves and the charterers the object of this long time charter is entirely defeated.

So far I have said nothing about the exception of "restraint of princes," and I should have been of the same opinion had it been absent. But if, as at present advised I think is the case, the event which has happened is within the meaning of that expression, the exception assists the

view I have expressed above, inasmuch as it shows that the event was one contemplated by the parties in the inception of the contract.

For these reasons I am of opinion that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Holman, Birdwood, and Co.*

Solicitors for the respondents, *Thomas Cooper and Co.*

House of Lords.

Nov. 30, Dec. 2, 3, 1915, and Jan. 27, 1916.

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

British and Foreign Marine Insurance Company Limited *v.* Samuel Sanday and Co (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance — Policy — Constructive total loss of goods—Restraint of princes—State of war—Frustration of contemplated adventure—Restraint by Government of assured—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 26, 60, 91 (2).

The plaintiffs, who were British merchants, in July 1914 *shipped merchandise for sale in Germany on two British vessels in the River Plate for carriage to Hamburg. They had insured the goods on both vessels by identical voyage policies in the ordinary form, and the perils insured against included restraint of princes. War was declared by Great Britain on Germany on the 4th Aug., and proclamations forbidding trading with the enemy were issued on the 5th Aug. and the 9th Sept. One of the two vessels, when in the Channel, received a signal from a French cruiser that she should go to Liverpool for safety, and the other, on the suggestion of the Admiralty, was diverted by her owners to Glasgow. The cargo owners warehoused their goods, and gave notice of abandonment, claiming on a constructive total loss.*

By sect. 60 (1) *of the Marine Insurance Act* 1906 "*there is a constructive total loss when the subject-matter insured is reasonably abandoned on account of the actual total loss appearing to be unavoidable.*"

By rule 10 *of the rules for construction of policy in the schedule to the Act,* "*the term 'arrests, &c., of kings, princes, and people' refers to political or executive acts and does not include a loss caused by ordinary judicial process.*"

Held, (1) *that the old rule that on an insurance of goods under a marine policy at and from the port of loading to the port of destination the frustration of the adventure by an insured peril was a loss recoverable against the underwriters had not been altered by the Marine Insurance Act* 1906, *and therefore the detention of the goods for an indefinite time in the warehouses still entitled the plaintiffs, on giving notice of abandonment, to recover as for a constructive total loss; and*

(2) *that the destruction of the adventure was directly caused by His Majesty's declaration of war, which was a restraint of kings, princes, and people within the meaning of the policies.*

Decision of the Court of Appeal (ante, *p.* 116; 113 *L. T. Rep.* 407; (1915) 2 *K. B.* 781) *affirmed.*

Appeal by the defendants from an order of the Court of Appeal affirming a judgment of Bailhache, J. in the Commercial Court.

The facts fully appear from the considered judgments of their Lordships.

The question was whether under the circumstances as outlined in the headnote the plaintiffs were entitled, as they claimed to be, to recover the sum of 44,800*l.* under policies of marine insurance, dated the 31st July 1914, with the defendants on linseed and wheat per the steamships *St. Andrew* and *Orthia*. The action was tried on an agreed statement of facts as a commercial cause.

Bailhache, J. held that there was a constructive total loss of the goods, and gave judgment for the amount claimed, and the Court of Appeal by a majority (Lord Reading, C.J. and Bray, J., Swinfen Eady, L.J. dissenting) affirmed his decision.

Sir *Robert Finlay*, K.C. and *Leslie Scott*, K.C. (with them *F. D. MacKinnon*, K.C.) for the appellants.

Adair Roche, K.C. and *Robertson Dunlop* for the respondents.

Leslie Scott, K.C. in reply.

The following cases were referred to:

Finlay v. *Liverpool and Great Western Steamship Company*, 23 L. T. Rep. 251;
Miller v. *Law Accident Insurance Company*, 9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712;
Hadkinson v. *Robinson*, 1803, 3 Bos. & P. 388;
Lubbock v. *Rowcroft*, 1803, 5 Esp. 50;
Kacianoff v. *China Traders' Insurance Company*, 12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121;
Stephens v. *Australasian Insurance Company*, 1 Asp. Mar. Law Cas. 558; 27 L. T. Rep. 585; L. Rep. 8 C. P. 18;
Mackenzie v. *Whitworth*, 3 Asp. Mar. Law Cas. 81; 33 L. T. Rep. 655; 1 Ex. Div. 36;
Barker v. *Blades*, 1808, 9 East, 283;
Anderson v. *Wallis*, 1813, 2 M. & S. 240;
Cologan v. *London Assurance Company*, 1816, M. & S. 447;
Roux v. *Salvador*, 1836, 3 Bing. N. C. 266;
Rodoconachi v. *Elliott*, 2 Asp. Mar. Law Cas. 399; 31 L. T. Rep. 239; L. Rep. 9 C. P. 518;
Angel v. *Merchants' Marine Insurance Company*, 9 Asp. Mar. Law Cas. 406; 88 L. T. Rep. 717; (1903) 1 K. B. 811;
Macbeth and Co. v. *Maritime Insurance Company*, 11 Asp. Mar. Law Cas. 52; 98 L. T. Rep. 594; (1908) A. C. 144;
Hall v. *Hayman*, 12 Asp. Mar. Law Cas. 158; 106 L. T. Rep. 142; (1912) 2 K. B. 5;
Esposito v. *Bowden*, 7 E. & B. 763;
The Hoop, 1799, 1 C. Rob. 196;
East Asiatic Company v. *Steamship Tronto Company*, 31 Times L. Rep. 543;
Rotch v. *Edie*, 1795, T. R. 413;
Inman Steamship Company v. *Bischoff*, 5 Asp. Mar. Law Cas. 6; 47 L. T. Rep. 581; 7 App. Cas. 670;
Cory and Sons v. *Burr*, 5 Asp. Mar. Law Cas. 109; 49 L. T. Rep. 78; 8 App. Cas. 393.

(*a*) Reported by W. E. Reid, Esq., Barrister-at-Law.

The House took time for consideration.

The following written judgments were read :—

Earl Loreburn.—When the present war commenced the *St. Andrew* and the *Orthia*, both of them British ships, were on a voyage from the Argentine to Hamburg, a German port, laden with merchandise. On learning that war had broken out between Great Britain and Germany, whereby the taking of these goods to Hamburg had become unlawful, the masters properly desisted from the voyages, and the cargo owners warehoused their merchandise, and gave notice of abandonment to their underwriters, claiming on a constructive total loss. These notices were not accepted, and this action is brought to enforce the claim. There is no distinction between the two ships, and both policies are of a like tenor.

Two questions have been argued before your Lordships. Other contentions, raised in the courts below, have not been raised here. The first question is whether the old rule still prevails, that upon an insurance on goods, substantially in the words of these policies, the frustration of the adventure by an insured peril is a loss recoverable against underwriters. though the goods themselves are safe and sound. The second question is whether, under the circumstances, there was here a loss by restraint of kings, princes, and people, which is one of the perils insured against in these policies.

In 1906 it was well settled that when goods are insured in a policy worded as these policies are, at and from the port of loading to the port of destination, there is a loss if the adventure is frustrated by a peril insured. It is not merely an insurance of the actual merchandise from injury, but also an insurance of its safe arrival. There is no doubt that this was the rule which had been acted upon for very many years. Was it altered by the Marine Insurance Act 1906? Swinfen Eady, L.J. thought it was, and he cited instances in which this Act, though a Consolidation Act, had in his opinion altered the law in other respects. I will not pursue that subject, because it has no bearing on the question whether or not there has been an alteration in this respect, but I do not think it will appear, on an examination of the cases to which he refers, that the Act has altered what, at the time of its passage, was the highest judicial interpretation of the law. Howbeit, I do not think the Act altered the law in the particular now under consideration, namely, in regard to the old rule I have mentioned.

Sect. 60 of the Act says, "there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable." Sect. 57 (1) says, "where the assured is irretrievably deprived" of the subject-matter assured there is an actual total loss. Now here the subject-matter assured, as the law stood in 1906, included the adventure and not merely the goods, and the assured was irretrievably deprived of it because all prospect of safe arrival on the voyage to Germany was hopelessly frustrated by the outbreak of war. Therefore the assured reasonably abandoned because actual total loss appeared to be unavoidable. So far I see nothing in the Act to alter the law, but I do see that under the old decisions there is a constructive total loss.

The argument, however, is that the "subject-matter insured" on such a policy no longer included the adventure. There is not a line in the Act which says so, and, if it were relevant, many reasons might be urged against the probability of so inconvenient a change being made. But it is conclusive to point out that sect. 66 says: "The subject-matter must be designated in a marine policy with reasonable certainty," and further, "In the application of this section regard shall be had to any usage regulating the designation of the subject-matter assured." There are many things that may be at risk, and in respect of which insurance may be effected—ship, goods, freight, profits, and so on. There are also familiar, even antique, expressions constantly used from long ago in marine policies, and continued because they are well understood in the business, or have been interpretated by judges. This section says that regard is to be had to any usage regulating the designation of the subject-matter assured. The words of this policy have for generations been understood and held by judges to designate not merely the goods but also the adventure. So far from abrogating this designation of subject-matter I should have thought the Act took pains to preserve it and others like it.

I will merely in a sentence refer to sect. 91 (2) of the Act which preserves the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act. It seems to me that Parliament has triply guarded against the danger that the Act should be construed in the sense urged upon us by Sir Robert Finlay. It has refrained from saying that the old rule shall be altered, which of itself would suffice. It has twice warned us that we are to regard and preserve rules and usages in terms that are applicable to this rule.

Accordingly, I take with me the conclusion that the adventure was a subject-matter insured, when I proceed to inquire whether or not the loss of it is to be compensated under the clause protecting the assured against restraint by kings or princes.

We were told that this question has never been judicially determined. It is a difficult question, and I have been much struck by the cogent reasoning of Swinfen Eady, L.J., but the argument has in the end satisfied me that the decision of the Court of Appeal ought to be affirmed.

A declaration by His Majesty that there was a state of war was issued on the 4th Aug. 1914, and thereupon a number of things theretofore lawful became unlawful. Among other things, trading to German ports became unlawful, and an instant duty arose for these two ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offence, and, in fact, impracticable. That the declaration was an act of State cannot be doubted. The real point made by the underwriters was that the declaration of war did not directly restrain the ships from proceeding to Hamburg, or the owners of goods from taking them there. They argued that the declaration set up a state of war, and the general law applicable to that state thereupon came into force, and it was not the declaration but the consequence of it which destroyed their enterprise.

To hold otherwise, they said, would be to throw upon underwriters an insurance against the consequences of war. In their contention, though the actual exercise of force might not be necessary, yet the fear of its being used must be present if there is to be a loss by restraint of princes, and here there was neither force nor the fear of it, for the voyage was abandoned simply because it had become unlawful, and the assured obeyed the law. Tho proximate or direct cause of the loss was, they said, simply the law of the land.

I am not pressed by the circumstance that force was neither exerted nor present, for force is in reserve behind every State command. And it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted, till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey, and which he might have successfully resisted either by violence or by process of law, a question might arise whether or not there had been in fact a restraint. But that is outside the present case, and I say nothing of it. What has given me some anxiety is the argument that His Majesty's declaration was not the direct cause of these adventures being destroyed. The maxim *causa proxima non remota spectativi* has been strictly applied in marine insurance cases. And properly so, for there are a variety of perils that may lead to a loss either partial or total, some of them it may be covered and others not covered by a policy, and a variety of events or causes that may contribute to a loss, so that without straining language it will be possible to treat it as due either to an insured or to an excepted peril.

That, I take it, is the reason why this maxim is pushed to considerable lengths in marine insurance law. In view of that, ought we to say that His Majesty's declaration was the direct cause of these adventures being frustrated, or ought we to say that it merely created a state of war which brought into activity a new set of duties and prohibitions, and that one of them, the prohibition against trading with the enemy, necessitated the adventure being wholly given up. Did the interruption directly come from the declaration or from the law which it awakened? In a sense it came from both, but we must choose which was the proximate cause, for one is the subject of insurance and the other is not.

I can see how far-reaching a decision in the former of these senses may prove, but I think it is the right decision. I do not see my way to separating the act of State from its sequel, and treating the advent of war conditions as a last distinct link in the chain of causes which brought these voyages to an end. No new law or ordinance was made after the risk commenced. No event occurred to impede the adventure except the declaration of war.

In my opinion the clause insuring these goods insures their safe arrival at Hamburg, and the destruction of that adventure was directly caused by His Majesty's declaration. It was therefore a loss within the clause which insures these goods at and from losses against restraint by kings, princes, or peoples.

In my opinion the order appealed from ought to be affirmed with costs.

Lord Atkinson.—I concur.

The question in this case is novel and important. It is, I think, in effect this: Whether British merchants who have insured goods with British underwriters against the usual perils in a marine policy (including restraints of princes) upon a British ship for a voyage to the port of Hamburg can, upon war being declared by His Majesty the King of England, whereby the further prosecution of the insured voyage to that port becomes illegal, give notice to the underwriters of abandonment, and recover as for a constructive total loss of the goods by restraint of princes, though the goods themselves remain unharmed and in the actual possession of the assured. The facts have been sufficiently stated by my noble and learned friend who has preceded me. It is unnecessary to recapitulate them.

The respondents were insured against loss arising from "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever."

The appellants contend that the law as to the constructive loss of goods on a voyage, as distinguished from the ship which carried them, is entirely altered by the Marine Assurance Act of 1906. And the ships and the cargo are, by that statute, impliedly placed upon the same level.

The first question I desire to deal with, then, is whether this contention is right, but to determine it one must first consider what was the state of the law on the subject before the passing of this statute, and then examine how far, if at all, the provisions of the statute conflict with that law. It is only necessary to refer to three cases upon the point, namely, *Anderson* v. *Wallis* (9 East, 283), *Baker* v. *Blakes* (2 M. & S. 240), and *Rodoconachi* v. *Elliott* (2 Asp. Mar. Cas. 399; 31 L. T. Rep. 239; L. Rep. 9 C. P. 518).

In the first, decided in 1808, Lord Ellenborough, at pp. 293-294 of 9 East, laid it down that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may properly be considered a loss of the voyage, and such a loss of voyage upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of that voyage, provided the loss be followed by a sufficiently prompt and immediate notice of abandonment.

In the second case the same learned judge said: "I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner, a total loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage. That is a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure and throwing the burden on the underwriters. It is unnecessary to pursue the subject further, as there is not any case or principle which authorises an abandonment, unless where the loss has been actually a total loss or in the highest degree probable at the time of abandonment."

In the third case Bramwell, B., as he then was, in delivering the judgment of the Exchequer Chamber, said: "It is well established that there may be a loss of the goods by a loss of the voyage on which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, to a destruction of the contemplated adventure."

For this he cites the two cases above mentioned.

Mr. Roche has suggested that this loss of voyage means a loss of market for the goods. Not a loss of profit, but a loss of market. And that what the assured insures against is not merely the loss sustained by injury to or destruction of the goods, but in addition the loss resulting from a failure to transport the goods to their destination, that failure being established by a detention of them through one of the perils insured against, so prolonged as to amount to a destruction of the contemplated adventure. This may be so. It is a rational explanation. I think none other was given.

The next matter to consider is whether there is any provision to be found in the statute 1906, either expressly or implied, inconsistent with the law as settled by the above-mentioned authorities.

First, the statute of 1906 purports to be an Act merely to codify the law relating to marine insurance; sect. 91 provides that the rules of the common law, including the law merchant, save so far as they are inconsistent with the provisions of the Act, shall continue to apply to contracts of marine insurance. A comparison between sub-sects. 2 and 3 of sect. 60 shows that, in the case of the insurance of goods, the cost of bringing the goods to their destination is to be taken into account in estimating whether or not a constructive total loss of them has occurred. Thus the old rule of law has been preserved: (*Rosetto* v. *Gurney*, 11 C. B. 176).

Constructive total loss is, subject to any express provision in the policy, defined to occur when the subject-matter insured is reasonably abandoned on account of actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

By sect. 57 it is provided that actual total loss occurs where the subject-matter insured is destroyed, or so damaged, as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof. Those provisions make it necessary to determine what is the subject-matter insured in these policies. There is no definition of the word subject-matter. Sect. 26 (1) provides that the subject-matter insured must be designated in a marine policy with reasonable certainty, and sub-sect. 4 that in the application to this section regard shall be had to any usage regulating the designation of the subject-matter. By the word designation is, I think, meant identification or description.

The subject-matter in the case of the *Orthia* is stated in the policy to be linseed, valued at 11,000*l*. That, however, is only part of its description or designation or identification. Its full description, as shown by the policy itself, is, linseed, valued at 11,000*l*., shipped on board this vessel to be transported on a voyage at or from a port on the River Plate to Hamburg. Such a description in such a policy connotes rights and characteristics attached by the insurance law to goods so placed, one of which is this, that they may be treated as constructively totally lost if by one of the perils insured against, as the proximate cause, the adventure of taking them to their destination be destroyed.

If that be so, as I think it is, then if the loss of the voyage, the loss of the chance of arriving at the port of destination, and the consequent loss of the market appears to be unavoidable, there would be a constructive total loss of the subject-matter. I am, therefore, of opinion that, in the insurance of goods, the law as it stood before the Act of 1906, in reference to the subject of constructive total loss, remains unchanged.

Two questions remain. First, were these vessels diverted from the contemplated voyage by "the restraint of kings or princes"? And, second, if they were, was this restraint in each case the proximate cause of the diversion within the meaning of sect. 55?

It was contended that the declaration of war merely altered the status of the inhabitants of the German Empire, changing them from friends to enemies, and that it was the common law acting on that condition of things, not anything done by the Sovereign, which prevented the voyages of the ships to their respective destinations, owing to the obligation felt by their masters, as good citizens, to obey the common law of the country. That the vessels were, therefore, not subject to any restraint of kings or princes, and that, even if they were, that restraint was not the proximate cause of the loss of the voyage.

In the case of *Rodoconachi* v. *Elliott* (2 Asp. Mar. Law Cas. 399; 31 L. T. Rep. 239; L. Rep. 9 C. P. 518), Bramwell, B., said that the court considered that these words, "restraints and detainments of all kings and princes and people of what nation, condition, or quality whatsoever," are wider and more comprehensive than the words which immediately precede them—*i.e.*, the words "taking at sea, arrest"; that the word "restraint" as applied to goods must mean a restraint of those having the custody of the goods; that it was not necessary that there should be any specific action on the goods themselves, and that as the effect of the Siege of Paris (at which city the goods had arrived) was to cut off all foreign connection and correspondence, the goods were restrained and prevented from leaving Paris by the operation of that siege, and therefore restrained and "detained by kings and princes" within the terms of the policy. It was accordingly held that the "contemplated venture" was destroyed, and that there was a constructive total loss of the goods.

In this case the trading with Germany was lawful up to the 4th Aug. 1914. On that day, by the act of the Sovereign, it became unlawful. No executive, person, or body, no moral or physical agency, intervened between the act of the Sovereign, proclaimed in his declaration of war, and the abandonment of the intended voyage.

As soon as information was conveyed to the captain of the *St. Andrew* he sailed for Liverpool. On the 5th Aug. the owners of the *Orthia* telegraphed to her to St. Vincent to return. The common law which made it illegal to go to Hamburg was brought into immediate operation by the act of the Sovereign. By the warning he

gave it must be taken that he meant to have that law enforced against those who neglected his warning.

I do not think, therefore, that the operation of the common law can be separated from the act of the Sovereign which called it into action, and treated as an intervenement between that act and the abandonment of the voyage. The act of the Sovereign in declaring war and the calling of the common law into operation formed, I think, two parts of one act—one single exercise of the Royal prerogative.

This was the proximate cause of the diversion of the respective courses of the two ships and their ultimate abandonment of the original voyage.

The question remains, Did the exercise by the Sovereign of his Royal prerogative in this respect impose upon each of these ships a restraint of a king and prince within the meaning of the policies?

By the 10th rule in the first schedule to the Act it is provided that the term "arrest, &c., of kings and princes," refers to political or executive acts, and does not include a loss caused by riot or ordinary judicial process.

Well, the act of the Sovereign in making war and by his proclamation declaring it, and thus calling common law into operation, was clearly an executive act—an act of State done by virtue of the Royal prerogative. The declaration carries with it all the force of a law prohibiting intercourse with the enemy save with licence of the Sovereign. It has the executive forces of the Crown behind it to enforce obedience to it: (*Esposito* v. *Bowden*, 7 E. & B. 781).

Every subject must be taken to be aware that if he attempts to send or bring a ship and cargo to an enemy port, the ship can be prevented from entering that port by His Majesty's ships of war, and he himself be liable to be prosecuted for trading, or attempting to trade, with the enemy. If the possible infliction of those penalties deters him from making the attempt, is he not restrained from making it? And if not, must the restraint be physical either of the persons in possesion of the goods, or of the goods themselves, by the taking of the custody of them?

According to Lord Bramwell's judgment in *Rodoconachi* v. *Elliott* (*sup.*) this latter is not necessary. And *Miller* v. *Law Accident Insurance Company* (9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712) is a direct authority that potential as distinguished from actual physical force is sufficient to constitute a "restraint."

The cases of *Hadkinson* v. *Robinson* (3 Bos. & P. 388) and *Lubbock* v. *Rawcroft* (7 Esp. 50) are distinguishable from the present. In each of these cases the only deterrent was the risk of ultimate capture if the ships proceeded to their destination. The vessels prudently resolved not to incur that risk. In the present case the deterrent were the penalties incurred by the violation of the criminal law. This was present and immediate, if the ship proceeded at all towards her destination with a view of trading with the enemy.

Actual capture was in these cases the peril insured against. The apprehension of capture is an entirely different thing and was not insured against. Well, it is clear that the war is of uncertain duration. Nobody could with any confidence conjecture when it would terminate A long delay appeared most probable before the voyage could be resumed.

On the whole, therefore, I am of opinion that the judgment appealed from was right, and that this appeal should be dismissed with costs.

Lord Shaw.—So completely do I agree with the judgment of Bailhache, J. that I desire respectfully to adopt in its entirety the opinion delivered by that learned judge. I think the law laid down by him so plainly sound, and his statements and reasoning so unanswerably cogent, that, seeing that I also approach and view the case from the same standpoint, I gladly feel free to indorse and adopt his judgment.

I think that the appeal should fail.

Lord Parmoor.—Two questions arise for decision in the present appeal. The first is, whether there has been a constructive total loss of the subject-matter insured. The second, whether the loss (if incurred) is proximately due to the restraints of kings, princes, and people, of what nation, condition, or quality soever, which is one of the perils insured against.

The facts are agreed. The respondents are a British firm of corn merchants. They contracted to sell to German merchants at Hamburg certain linseed and wheat, shipped in July 1914 on board the British steamship *St. Andrew*, at the ports of Rosario, St. Nicholas, and Buenos Ayres, to be carried to Hamburg. In the same month they contracted to sell to German merchants certain linseed, shipped at Rosario on the British steamship *Orthia*, to be carried to Hamburg. For the purpose of this case there is no distinction between the two shipments.

By a policy of marine insurance dated the 31st July 1914 the respondents insured the said linseed and wheat shipped on the *St. Andrew* at and from port or ports, of the River Plate, and (or) tributaries or Hamburg. On the 4th Aug. 1914 a declaration was made that a state of war existed between this country and Germany. The effect of the outbreak of war was to interdict and render illegal all trading with the enemy without the permission of the Sovereign. On the 5th Aug. a proclamation was issued warning all persons not to permit any British ship to leave for, enter, or communicate with any port or place in the German Empire without the permission of the Sovereign, and that any person acting in contravention of the proclamation would be liable to such penalties as the law allows. The penalty for trading with the enemy after the declaration of the 4th Aug. and the proclamation of the 5th Aug. would include the imprisonment of the master and the confiscation of goods and ship. On the 9th Aug, as the *St. Andrew* was approaching the Lizard, a French cruiser signalled her to stop and to go to Falmouth. The master at Falmouth received orders through the examining officer at Falmouth from the chief naval transport officer at Devonport to go to Liverpool, and upon arrival the linseed and wheat were duly discharged.

The policy, on which the claim is made, is in the common form of a Lloyd's policy, and the frustration of the contemplated adventure would constitute a total constructive loss of the goods insured in transit, unless an alteration of law has been introduced by the Marine

Insurance Act 1906. A notice of abandonment of the goods insured was made on the 7th Sept. 1914, and the appellants do not raise any question that the notice was not valid or out of time.

On the first question I think that the Act of 1906 has not introduced any alteration in the law, and that there has been a total constructive loss of the goods insured. The Act of 1906 is an Act to codify the law relating to marine insurance. There is, however, no difference in the canons of construction applicable to a codifying Act or to any other Act of Parliament. It is said that in certain respects the Act of 1906 has altered the law. I give no opinion upon this point, and it has no relevance whatever to the question before your Lordships in this appeal.

By sect. 60 (1) a constructive total loss is defined: "Subject to any provisions in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual loss appearing to be unavoidable or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure has been incurred." If the subject-matter insured in the present case includes the contemplated adventure, it was no doubt reasonably abandoned on account of its actual loss appearing to be unavoidable, and a case of constructive total loss arises. Sect. 26 deals with subject-matter and sect. 26 (4) enacts that "In the application of the section regard should be had to any usage regulating the designation of the subject-matter insured."

When the Act was passed the common form Lloyd's policy of marine insurance on goods in transit from one port to another designated by usage that the contemplated adventure was part of the subject-matter, so that if the contemplated adventure was frustrated by a peril insured against, the insurers became liable to pay the insured the amount due under the policy. This position is not altered but preserved by sub-sect. 4. The usage of the law merchant that a policy in the present form did designate that the subject-matter included the contemplated adventure is applicable now in the same way as it was before the Act was passed.

In addition to the sections above referred to, reference may be made to sect. 91 (2), which provides that the rules of the common law, including the law of merchants, saving so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts of marine insurance.

If there has been a constructive total loss, the second question arises whether the restraint of "kings, princes, &c.," was the proximate cause of such loss. The Marine Insurance Act 1906 contains in the schedule "rules for construction of policy," which apply, subject to the provisions of the Act, and where the context does not otherwise require. These rules are said to record the interpretation which by law or usage has been placed on some of the more important terms in a common Lloyd's policy. Rule 10 states that the term "arrests, &c., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process. It could not be suggested in the present case that the loss was caused by ordinary judicial process, and there is no question of riot.

The case of *Finlay* v. *Liverpool and Great Western Steamship Company* (23 L. T. Rep. 251) sufficiently illustrates what is meant by the words "ordinary judicial process." It was adjudged a bad plea by way of answer to a claim for not delivering goods in accordance with the bill of lading that the defendants were prevented by acts or restraints of princes "that they had been sued in New York by the true owner of the goods and had been ordered by a court of competent jurisdiction to give up the goods to him."

It was argued that "restraint," coming in a context between the words "arrest" and "detainment," implied that this term in the policy did not attach and render the insurers liable unless force was either used or threatened. A similar argument was urged in the case of *Miller* v. *Law Accident Insurance Company* (9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712). In that case, in consequence of a decree of the President stopping the discharge of all cattle from the United Kingdom until further notice, the captain took the vessel outside the port and transhipped the cattle. It was held in the Court of Appeal that there had been a restraint of princes, and Stirling, L.J. says: "It seems to me that there was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or of the police force intervened."

I agree in the opinion expressed by Stirling, L.J. If the restraint in the present case has been imposed by political or executive acts, it is not the less a restraint, within the terms of the policy, because the master submits without opposition and without the presence of either actual or threatened force. I cannot doubt that the declaration of war on the 4th Aug. 1914, and the proclamation "relating to trading with the enemy" on the 5th Aug. 1914, are in the ordinary sense acts of the executive, or, in the words of the rule, executive acts. The declaration of war by the Sovereign has equal force to an Act of Parliament prohibiting intercourse with the enemy except with the King's licence: (*Esposito* v. *Bowden*, 7 E. & B., p. 781). The proclamation of the 5th Aug. stands on the same footing and has the same authority. It follows that all the conditions necessary to establish a restraint of kings, princes, &c., are operative in the present case, but the question has still to be determined whether the restraint was the proximate or immediate cause of the frustration of the contemplated adventure, and of the consequent constructive total loss.

After the declaration of war, and in accordance with the terms of the subsequent proclamation, all trading of British ships with the enemy was interdicted, and it became illegal to prosecute the voyage to Hamburg unless with the permission of the Sovereign. When, therefore, the French cruiser signalled the *St. Andrew* to go to Falmouth, the master could not have proceeded to Hamburg without rendering himself liable to all the consequent penalties. On receiving the signal the master submitted to the restraint which the conditions had imposed upon him, and took his vessel to a home port. He did not deviate from his course in order to avoid a future

peril to which he might become liable, but because the peril was actually present and operative at the time when he turned his vessel from Hamburg to the home port.

I agree in the reasoning and conclusion of Bailhache, J., "when once it is admitted that force is not necessary to constitute restraint of princes it is clear that, when a shipowner keeps his vessel at home or directs her to a home port in obedience to such a declaration, he is not taking steps to avoid that particular peril, but is submitting to its operation, and that in such a case restraint of princes is a proximate cause of loss." I have not overlooked the case of *Hadkinson* v. *Robinson* (3 Bos. & P. 388), and similar cases, but they appear to me to have no application. There is a clear distinction between a deviation to avoid a peril and a deviation due to its presence and immediate operation.

In my opinion the decision on appeal is right, and the appeal should be dismissed with costs.

Lord WRENBURY.—There arise here two questions for decision. The first is whether His Majesty's declaration of war against Germany operated as a restraint falling within the words in the policy "restraints of all kings, princes, and people." The second is whether the consequent detention for an indefinite time of the goods insured amounted to a constructive total loss. The two questions are wholly distinct, and each is, no doubt, of great importance.

On the 4th Aug. 1914 His Majesty declared war against Germany. The insured goods were then at sea on voyages, the one from the River Plate and the other from Rosario, to be delivered at Hamburg. The one vessel, being off the Lizard, was signalled by a French cruiser to put to put into Falmouth, and obeyed. The other vessel, on calling at St. Vincent, was directed by her owner, at the suggestion of the Admiralty, to go to Glasgow, and did so. The order in each case was due to the existence of a state of war. The owners gave notice of abandonment. Was there "restraint of kings, princes, and people" within the meaning of the policy? In my opinion there was.

A declaration of war by the Sovereign is a political or executive act, done by virtue of his prerogative, which creates a state of war. A state of war is a lawful state, and is one in which every subject of His Majesty becomes an enemy of the nation against which war is declared. The declaration of war amounts to an order to every subject of the Crown to conduct himself in such way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy. There is "a general rule in the maritime jurisprudence of this country by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is forbidden": (*The Hoop*, 1 C. Rob. 198). A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and such intercourse, except with the licence of the Crown, is illegal": (*Esposito* v. *Bowden*, 7 E. & B. 779). We have heard considerable argument to the effect that war is not unilateral—which, no doubt, is true—that you must have at least two nations engaged in hostilities, and so on. All this to my mind is beside the mark. Immediately the Royal prerogative is exercised and war is declared against another nation every subject of His Majesty is bound to regard every subject of that nation as an enemy, and the consequences ensue which I have mentioned.

If I ask myself what stopped the voyage to Hamburg? What made the adventure illegal? What destroyed the venture? The answer is—the declaration of war. That executive act *ipso facto* made the venture illegal. If the master had continued his voyage in defiance of the law the ship and goods could have been confiscated, and the master himself prosecuted and sent to prison. It is argued that the illegality, and not the declaration of war, was the *causa proxima* of the destruction of the adventure. This is not so. The common law was not a new actor which came into action when war was declared. The law was always one and the same, namely, that in one state of circumstances (namely, peace) the adventure was, and in another state of circumstances (namely, war) the adventure was not, legal. *Hadkinson* v. *Robinson* (3 Bos. & P. 388) and *Kacianoff* v. *China Traders' Insurance Company* (12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 407; (1914) 3 K. B. 1121) are not in point. The adventure there remained legal. All that happened was that, in pursuit of a lawful adventure, the master did not go into a position of peril. He never was restrained. His own country did not restrain him, and he took care not to put himself in danger of being restrained by another country. Illegality according to the law of another country does not affect the merchant. In the present case the adventure was illegal according to the law of the country of the owner of the goods. And it was the declaration of war that made it illegal.

It is not necessary that force should be employed, or even that force should be immediately available for employment. Every State ultimately enforces obedience to its laws by force. Restraint is equally imposed when obedience is given by reason of the existence of force in reserve as when it is given by reason of force employed. Neither is it necessary that there should be any specific action upon the goods themselves. The master was restrained, and the adventure was restrained, by the fact that illegality supervened as the immediate result of the declaration of war. In my opinion there was in this case restraint falling within the words "restraint of kings, princes, and people."

Upon the second question the matter stands thus: Before the Marine Insurance Act 1906 authority is uniform that where goods are insured at or from one port to another port the insurance is not confined to an indemnity to be paid in case the goods are injured or destroyed, but extends to an indemnity to be paid in case the goods do not reach their destination. This may be variously described as an insurance of the venture, or an insurance of the voyage, or an insurance of the market, as distinguished from an insurance of the goods simply and solely. Goods delivered at the port of destination may be of value very different from their value at the port of loading. The underwriter's obligation is to pay money in the event of the goods failing to

arrive at their destination uninjured by any of the perils insured against. Bramwell, B. in *Rodoconachi* v. *Elliott* (2 Asp. Mar. Law Cas. 399; 31 L. T. Rep. 239; L. Rep. 9 C. P., at p. 522) says: "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported if it amounts, in the words of Lord Ellenborough, 'to a destruction of the contemplated adventure.'" The insurance is on the venture, and the loss of the venture is a constructive total loss of the goods.

I cannot find that the Act of 1906 has in any way altered this. On the contrary, it seems to me to have preserved it. The Act is expressed by its title to be an Act to codify the law relating to marine insurance. Attention has been called to certain particulars in which nevertheless the Act alters the law. That is true. But it remains that the Act is a codifying Act. That being so, I should look more carefully in a codifying Act to see whether any existing law is altered by express words, and should not hold that the Act is going beyond codification unless it puts the matter beyond dispute.

I can find nothing which upon this matter has any such effect. On the contrary, sects. 5, 26, 60, and 91 seems to me plain the other way. Sect. 5 (2) contemplates that an assured "may benefit by the safety or due arrival of insurable property." Sect. 26 (4), which relates to subject-matter, enacts sub-sect. 1, that the subject-matter insured must be designated with reasonable certainty. "Designated" must here plainly mean described or identified. Sub-sect 4 then enacts that "in the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured." By usage regulating the designation must be meant a customary nomenclature of identification. Such, for instance, as that in the trade of a livery-stable keeper the word "carriage" by usage means "carriage and horses." If then, in marine insurance, a policy on goods means by usage a policy on the safe arrival of goods, that meaning is by sect. 26 preserved. Sect. 60 is as to constructive total loss, and sub-sect. 2 (iii.) provides that in the case of damage to goods there is a constructive total loss when the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival. Lastly, sect. 91 (2) enacts that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

These provisions seem to me ample to support the conclusion at which I have arrived, that the Act of 1906 has not altered but has preserved the law upon this point as it stood before 1906, and that law was that under a policy on goods at and from a port to a port, the venture and not the goods merely was the subject-matter insured.

For the foregoing reasons the decision under appeal is, in my judgment, right on both points. It follows that this appeal should, in my opinion, be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Waltons* and *Co.*

Solicitors for the respondents, *Pritchard* and *Sons*, for *Andrew M. Jackson* and *Co.*, Hull.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 15 *and* 20, 1915.

(Before BAILHACHE, J.)

WULFSBERG AND CO. *v.* OWNERS OF STEAMSHIP WEARDALE. (*a*)

Charter-party — Withdrawal by owners before expiration of term—Subsequent issue of writ for hire due—Whether withdrawal waived.

A vessel was chartered in June 1914 *for five months at so much per month, payable in advance. On the* 13*th Aug., a month's hire being due and unpaid, the owners telegraphed to the charterers, saying that they withdrew the steamer pursuant to a clause in the charter-party. Half an hour later they issued a writ in an action to recover the month's hire. Arbitrators found as a fact that the ship was properly withdrawn, but they reserved for the opinion of the court the question whether the notice of withdrawal, if properly given, was withdrawn or waived by the subsequent conduct of the owners in issuing the writ.*

Held, that in the circumstances of the case the notice of withdrawal had been properly given, and that it had not been withdrawn by the subsequent conduct of the owners.

AWARD stated in the form of a special case.

By a time charter, dated the 19th May 1914, Messrs. Wulfsberg and Co. (hereinafter referred to as the charterers) chartered the steamship *Weardale* to be employed in, amongst other places, the Baltic, at the rate of 690*l.* per calendar month, for a period of about five months as from the 1st June 1914.

On the 3rd July the vessel was sub-chartered for a voyage to Archangel with a cargo of wood pulp, and on the 23rd July she sailed on this voyage, losing a propeller blade by the way.

On the 3rd Aug. loading was commenced.

On the 4th Aug. war broke out between the United Kingdom and Germany, the loading being stopped on that day by order of the harbour master.

On the 5th Aug. the owners wired to the master not to sail, but loading was resumed on the 6th Aug., and again stopped on the 8th Aug., on which day a month's hire in advance became due.

Loading was continued for a short time on the 10th Aug., stopped, resumed again on the 15th Aug., and, after various interruptions, was finally completed on the 26th Aug.

On the 27th Aug. the vessel sailed for home, and was injured in the North Sea, arriving in tow at Aberdeen in September, and at Hartlepool on the 30th Sept.

On the 13th Aug., the hire being still unpaid, the owners telegraphed to say that in consequence they withdrew the steamer under a power so enabling them in clause 5 of the charter-party. Half an hour after the telegram was received

(*a*) Reported by W. V. BALL, Esq., Barrister-at-Law.

they issued a writ in an action to recover the month's hire, which was payable in advance.

On the 25th Aug. the charterers paid the hire claimed in the action.

Arbitrators, to whom questions in dispute were referred, found that the owners did in fact withdraw the steamer from the service of the charterers as from the date of the notice of the 13th Aug., and reserved for the opinion of the court the question whether the notice of withdrawal, if properly given on the 13th Aug., was withdrawn or waived by the subsequent conduct of the owners in issuing a writ.

The following findings of the arbitrators are material to this report:

We find as follows . . . (*d*) that the owners did in fact withdraw the steamer from the service of the charterers from the date of their said notice of the 13th Aug. 1914. (*e*) That the steamer completed her voyage from Archangel and West Hartlepool and delivered the sub-charterer's cargo at the last-named ports and the owners collected the freights thereon, and that while not admitting that they were liable to account to the charterers for the amount of the said freight, the owners have in fact accounted to the charterers for the same without prejudice to their rights and to the charter-party. (*f*) That the owners have not in issuing the said writ or by receiving payment of the hire money thereunder or by completing the said voyage and collecting the freight thereunder or by accounting for the said freight in the circumstances aforesaid to the charterers or otherwise waived or abandoned their notice of withdrawal of the said steamer.

By clause 26 of the award the arbitrators found as a fact that the solicitor's telegram of the 13th Aug., which reached the owners before the writ in the action was issued, was in fact a withdrawal of the steamer.

Leck, K.C. (*R. A. Wright* with him) for the owners read the special case and submitted that the owners were entitled to withdraw the vessel.

Roche, K.C. (*Whitehead* with him) for the charterers.—The withdrawal of the vessel has been waived by the subsequent conduct of the owners. Waiver is a question of law, not a question of fact. He referred to:

Clough v. *London and North-Western Railway*, 25 L. T. Rep. 708.

An election can be changed by agreement or abandoned and the abandonment acquiesced in:

Jones v. *Carter*, 15 M. and W. 718.

As a result of the writ the charterers paid the hire and the costs. It is true that there was hire due on the 13th Aug. unless the owners were wrong in withdrawing. Hire is not apportionable; but there was hire enough due to justify withdrawal. If the owners withdrew on the 13th Aug. the sum due up to the 8th Aug. ceased to be due. An owner must withdraw at once. If there was a withdrawal hire ceased to be due, because the owners ceased to give possession of the vessel which was the consideration for the hire. They got a month's hire and costs from the charterers by legal process. They cannot now turn round and merely bring that into account:

Croft v. *Lumley*, 857 L. Rep. 6; H. L. 672.

If a landlord takes rent and there is a dispute as to the terms upon which it is paid, it must be taken to have been paid on the payer's terms. If a party insists by process of law on the payment of something similar to rent, he is estopped from saying that it is not rent. *Davenport* v. *The King* (37 L. T. Rep. 727) shows that where money is received as rent no protest will avail the payee. He referred to

Langford v. *Canadian Forwarding and Export Company*, 96 L. T. Rep. 559;
Tyrer and Co. v. *Hessler*, 6 Com. Cas. 143.

Leck, K.C. in reply.—Waiver is always a question of fact. In *Croft* v. *Lumley* (*sup.*) the House of Lords came to the conclusion that there had been no breach of covenant, and therefore there could be no waiver. That is clear from the judgment of Lord Bramwell. The arbitrators have found as a fact that the steamer was withdrawn on the 13th Aug.

R. A. Wright followed.—The facts were fully gone into before the arbitrator, and they cannot be questioned.

Cur. adv. vult.

BAILHACHE, J.—This case comes before me upon an award stated by arbitrators in the form of a special case.

The dispute arises under a time-charter dated the 19th May 1914, and relates to the steamship *Weardale*. The question in the case is whether the steamer was rightly withdrawn by the owners from the time-charterers in the month of Aug. 1914.

That turns upon whether the notice of withdrawal to the charterers which the owners gave on the 13th Aug. 1914 was waived first of all by the fact that on the same day, but an hour or two after the time-charterers had received the notice, the owners issued a writ for a month's hire, and also by the subsequent conduct and action of the parties.

The facts appear shortly and quite sufficiently for my purpose from the case itself. It appears that the hire under this charter-party was payable monthly in advance, and that on the 8th Aug. 1914 there was a month's hire due. The steamer had been on hire to the time-charterers for some time, and on the 3rd July 1914 the claimants had sub-chartered the steamer to John Flemming and Co. Limited, of Aberdeen, for a voyage from Archangel to Aberdeen and West Hartlepool with a cargo of pulp wood and props. On the 23rd July 1914 the steamer sailed from Archangel for Aberdeen under the charter-party and sub-charter. On the 27th Aug. she sailed from Archangel for Aberdeen, and on the 4th Sept., while the vessel was in the North Sea on that voyage she struck some submerged obstacle and lost the three remaining blades of her propeller. She was taken in tow by H.M.S. *Bellona*, and arrived on the 5th Sept. at Lerwick, and was subsequently towed to Aberdeen, where she arrived at her discharging berth on Tuesday, the 15th Sept., and she ultimately arrived at West Hartlepool on the 30th Sept. Then the case proceeds: "In consequence of the nonpayment of the month's hire which became due on the 8th Aug. 1914, correspondence took place between the parties and their solicitors, and on the 13th Aug. 1914, the said hire being still unpaid, the owners' solicitors telegraphed to the charterers as follows: 'Instructed by owners of steamship *Weardale* to intimate that, in consequence of nonpayment of hire due under charter dated the 19th May 1914,

they now withdraw the steamer under the power contained in clause 5 of the charter.'

"On the same day the owners issued a writ against the charterers claiming 690*l.* hire due under the time-charter dated the 19th May 1914, and then unpaid." That sum of 690*l.* was for the hire payable in advance. As I have said, it was ascertained in the course of the argument before me that this notice of the 13th Aug 1914 reached the charterers about an hour or so before the writ in action was issued. On the next day, the 14th Aug, the owners telegraphed to the British Consul at St. Petersburg: "Kindly wire British Consul, Archangel, asking him instruct master steamer *Weardale* as follows: Telegraph position fully immediately if loading not commenced sail Barry Roads forthwith if only partially loaded sail destination when finished and wire prospects completion ship withdrawn time-charter account non-payment hire." That telegram was received by the captain on the 19th Aug.

The substantial dispute before the arbitrators between the parties was whether the owners were entitled on the 13th Aug. to withdraw the steamer from the service of the charterers under clause 5 of the charter which they purported to do by their solicitors' telegram of that date; and whether if the owners were entitled to give such notice of withdrawal, the withdrawal was in fact made, and whether by the subsequent conduct of the parties it was withdrawn or waived.

On the 25th Aug. 1914 the charterers paid the hire claimed. Then the arbitrators say [his Lordship read the findings of the arbitrators as above set out, and continued:] There are some other findings which do not affect the matter as it was argued before me, and the question upon those findings is whether the arbitrators were right or wrong in holding that there was no waiver of the notice of withdrawal.

I have come to the conclusion that the arbitrators were right, and that there was no waiver of the withdrawal.

I come to the conclusion on two grounds: first of all, the arbitrators find as a fact (and that fact is binding upon me) that the solicitors' telegram of the 13th Aug. which reached the owners before the writ in the action was issued was in fact a withdrawal of the steamer. The subsequent conduct of the parties, apart from the issue of the writ, clearly, in my opinion, was no waiver at all. All those acts were done by agreement between the parties, and by that agreement it was arranged that those acts should be done without prejudice to the legal position, whatever that was. Those acts, therefore, do not affect the matter one way or the other. I have already said that one reason why I find there was no waiver was that the arbitrators found that the withdrawal was complete before the writ was issued. The reason is this: by the terms of the charter-party the hire was payable in advance, and there was, before the notice of withdrawal, one month's hire due and payable.

It seems to me that under those circumstances it was no waiver of the notice of withdrawal for the owners to issue their writ in respect of hire which had become due and payable before notice of withdrawal was given. Whether in that action they would have recovered more than the five or six days that were actually due I do not stop to inquire, because it is not necessary for me to express any opinion upon it. I have come to the conclusion for the two reasons I have given that the finding of the arbitrators is right, and that their award must be upheld.

The question which they put to me in par. 24 of their award must be answered in the affirmative. That question is: "Whether our findings of law stated in par. 26 hereof are correct?" I find that those findings are correct, and that the award must stand. The owners will have the costs of this argument before me, and of the proceedings subsequent to the award.

Award in favour of the owners.

Solicitors: *Winn Jones* and *Co.*; *Crump* and *Sons.*

Wednesday, Dec. 15, 1915.

(Before Ridley, Lush, and Low, J.J.)

O'Reilly (app.) *v.* Dryman and others (resps.). (*a*)

Merchant Shipping—Seamen—Refusal to sail—Disobedience to lawful commands—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 225, *sub-s.* 1 (*b*).

The respondents were nine seamen who signed articles as members of the crew of a steamship.

The crew at the time of signing the articles consisted of sixteen members, but afterwards the owners transferred the second mate to another ship, and thus reduced the crew to fifteen.

On being formally requested by the master, the appellant, to go to sea the respondents refused, giving as the reason that there were not sufficient men to man the lifeboats or to keep a proper look-out.

On an information for wilful disobedience to lawful commands within the meaning of sect. 225 (1) (*b*) *of the Merchant Shipping Act*, 1894, *the magistrate dismissed the information on the ground that the commands of the appellant were unreasonable, as the perils of the voyage were increased by the reduction of the crew.*

Held, that as the magistrate had found as a fact that the commands of the appellant were unreasonable, the respondents were not guilty of wilful disobedience to a lawful command, and his decision must be affirmed.

Case stated by a metropolitan magistrate sitting at the Thames Police Court.

1. An information was preferred on the 3rd May 1915 by the appellant J. J. O'Reilly, as master of the steamship *Starling*, under sect. 225 (*b*) of the Merchant Shipping Act 1894, against the respondents, for that they being seamen lawfully engaged on the said steamship *Starling* were guilty of wilful disobedience to lawful commands. The information was dismissed by the magistrate.

2. The following facts were proved or admitted:

(*a*) On the 20th April 1915 the nine respondents had signed articles as members of the crew of the steamship *Starling*.

(*b*) At the time of signing the articles the crew consisted of sixteen members, but on the

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

30th April 1915 the second mate was transferred to another ship by the owners and the crew were thereby reduced to fifteen.

(*c*) On the 1st May 1915 the appellant tried to get another hand, but could not do so, and he tried again on the morning of the 2nd May, but without success.

(*d*) In the ordinary course of events the *Starling* would have started to Holland at an early hour on the 2nd May, but on the morning of the 1st May and again at midnight the respondents through their spokesman refused to go on the voyage with one man short.

(*e*) On the afternoon of the 2nd May the respondents were formally requested to go to sea, but they refused to do so, saying, "We are only fifteen men instead of sixteen, and there are not sufficient men properly to man the lifeboats, and not sufficient to keep a proper look-out."

(*f*) At the time of the aforesaid refusal a voyage to Holland was perilous, and a full complement was more desirable than at ordinary times.

3. The magistrate dismissed the information, being of opinion that in the circumstances the respondents were not guilty of wilful disobedience to lawful commands within the meaning of sect. 225 (1) (*b*) of the Merchant Shipping Act 1894, and that the commands of the appellant were unreasonable in fact, because the perils of the voyage were increased by the crew being one man short.

By the Merchant Shipping Act 1894, s. 225, sub-s. 1, it is provided that:

> If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows (that is to say): . . . (*b*) If he is guilty of wilful disobedience to any lawful command, he shall be liable to imprisonment for a period not exceeding four weeks, and also, at the discretion of the court, to forfeit out of his wages a sum not exceeding two days pay. . . ."

Stuart Bevan for the appellant. — If the magistrate were right in dismissing the information on the ground that the commands of the appellant were unreasonable, there was still no evidence on which such a finding can be supported. On the other hand, assuming there was such evidence, the finding does not excuse the respondents for disobeying the appellant's commands. If it be urged for the respondents that each of the crew only signed on the implied term that he would perform the voyage if the others performed it, the articles do not bear that construction. If it were so the owner could not substitute another man for one who wished to be transferred to another ship. The only ground of justification for a seaman who has signed articles not performing his contract is, that something has happened which has rendered the voyage dangerous to life:

Hartley v. *Ponsonby*, 1857, 7 El. & Bl.; 26 L. J. 322, Q. B.;
Harris v. *Carter*, 1854, 3 El. & Bl. 559; 23 L. J. 295, Q. B.;
The Araminta, 1856, Swabey 81; 2 Jur. N. S. 310;
Listor v. *Owners of Steamship Carpathian*, *ante*, p. 70; 112 L. T. Rep. 994; (1915) 2 K. B. 42.

A decrease in the number of the crew will only justify a refusal to perform the contract if the number has been reduced so as to make the contemplated voyage dangerous for the rest.

D. O. Evans (with him *Clement Edwards*) for the respondents. — Whether the command was reasonable was a question of fact for the magistrate. To constitute an offence the disobedience must be wilful:

Caroe v. *Bayless*, 1908, 72 J. P. 525; 25 Times L. Rep. 22.

[He was stopped by the Court.]

Ridley, J.—This is a case stated on the hearing of an information against nine members of the crew of a steamship. The information was preferred under sect. 225 (1) (*b*) of the Merchant Shipping Act 1894, and it charged them with having been guilty of wilful disobedience to lawful commands. There were sixteen of a crew and two mates and a captain, and the second mate was transferred to another ship, and when the respondents were ordered to go to sea they said that there were only fifteen men instead of sixteen, and that there were not sufficient men properly to man the lifeboats and keep a proper look-out. In some cases it has been held that orders to go to sea were not lawful because the circumstances had altered or the voyage had been changed or the crew had had their strength or competence diminished. It may be doubtful in this case whether there had been a serious alteration in the terms on which the voyage was undertaken, but I am inclined to think that the absence of one of the mates was a more important matter than the absence of one of the ordinary members of the crew would have been. It was surely desirable that there should be two mates, as they have to take turns on watch. What we have to consider is whether it was so clearly wrong on the part of the magistrate to dismiss the summons that we ought to interfere. We are not in a position to say that he was wrong in the conclusion at which he arrived. The person objecting to his decision must show that it was wrong. The appeal must therefore be dismissed.

Avory, J.—I am of the same opinion. I only wish to make it clear that the court is not deciding that in all circumstances the members of a crew are justified in refusing to go to sea because the crew is one man short. In this case it must be taken that the magistrate has accepted the reason given by the respondents as being well founded, and has found that with only fifteen men there were not enough to man the lifeboats properly or to keep a proper look-out. Having come to this conclusion he was entitled to hold that in the circumstances the command was unreasonable, and if it was unreasonable on the ground that the ship was not seaworthy with a crew of fifteen only, the command was not lawful, and the men were not guilty of wilful disobedience to a lawful command.

Lush, J.—Before arriving at a conviction the magistrate must have been satisfied that there was wilful, *i.e.*, intentional, disobedience to a lawful command. The magistrate has not in terms found that the command was not lawful, but he has found that it was not reasonable, and he has given his reason—namely, that the men had signed on at a time when there were sixteen hands, but the number had subsequently been reduced to fifteen. If the objection of the men

had been capricious there would have been a lawful command and intentional disobedience, but the magistrate has said that the refusal of the men was justified because the command was unreasonable. I do not see how we can interfere with his decision.

Appeal dismissed.

Solicitors for the appellant, *Batham* and *Son.*
Solicitor for the respondent, *Alexander Smith.*

Jan. 27, 28, *and Feb.* 1, 1915.

(Before BAILHACHE, J.)

MITSUI AND CO. *v.* WATTS, WATTS, AND CO. (*a*)

Charter-party—Exception of "restraint of princes" — Reasonable anticipation of restraint — Breach by shipowner—Liability—Measure of damages.

A breach of contract is not excused by reasonable anticipation of the happening of an event which, if it happens, will excuse the performance of the contract.

A charter-party excepted "arrests and restraints of princes." The shipowners refused to provide a ship which by the charter-party they had agreed to provide on the ground that there was reasonable apprehension that if they fulfilled the charter the ship would be seized by the King's enemies.

Held, that the shipowners were guilty of a breach of the charter-party.

The plaintiffs chartered a vessel from the defendants to enable them to fulfil a contract by which they agreed to buy a cargo of sulphate of ammonia from a Belgian firm. The defendants having failed to perform the charter, the plaintiffs were forced to repudiate the contract of sale and purchase, and as a result of arbitration paid the Belgian firm 4500l. In an action by the plaintiffs against the defendants for damages for breach of the charter:

Held, that the plaintiffs could not recover from the defendants the 4500l., such damage being too remote.

The estimated profit of a venture, to carry out which the plaintiffs chartered the defendants' vessel, was 3800l. The defendants failed to provide their vessel in breach of the charter-party. In an action by the plaintiffs against the defendants for damages for the breach the defendants contended that, assuming there had been a breach, the plaintiffs had suffered no loss thereby, since, if the defendants had performed their part of the charter and provided a vessel, the vessel with the plaintiffs' cargo on board would inevitably have fallen into the hands of the King's enemies.

Held, that the plaintiffs were entitled to recover the 3800l. from the defendants, since, although the arguments of the defendants might have been true, the vessel and its cargo would have been insured by the plaintiffs for a sum sufficient to cover the cost of the goods, the freight, the cost of insurance, and a reasonable sum for profit (which would not have been less than 3800l.), and that they would have had a claim on their underwriters as for a total loss.

(*a*) Reported by L. C. THOMAS Esq., Barrister-at-Law.

ACTION.

By a contract dated the 23rd April 1914 between the sellers, Evence Coppée and Co., of Brussels, and the buyers, Mitsui and Co., of Lime-street, in the City of London, the sellers, sold to the buyers 3500 tons of Russian sulphate of ammonia. The ammonia was to be delivered in bulk by the sellers free on board at Mariupol at the rate of 125 tons (minimum) per hatchway, with a maximum of 500 tons per weather working day, Sundays and holidays excepted. It was provided that any dispute or difference whatsoever at any time arising under the contract should be referred to arbitration.

By a charter-party dated the 5th June, 1914, between Watts, Watts, and Co. as owners and Mitsui and Co. as charterers, it was agreed that a steamer, whose name was to be declared at least twenty one days before expected date of readiness, should with all possible despatch proceed to Mariupol and there load, always afloat, a full and complete cargo of the 3500 tons of sulphate of ammonia in bulk specified in the contract of sale, and being so loaded should therewith proceed to Japan and there deliver the same. Freight at the rate of 20*s.* per ton delivered. The cargo to be loaded at rate of 125 tons per hatch, but not exceeding in all 500 tons per weather working day, Sundays and holidays excepted. Loading time not to commence before the 1st Sept. except by consent of the charterers, who had also the option of cancelling the charter if the steamer was not ready to receive cargo before noon on the 20th Sept. 1914.

"Arrests and restraints of princes" were included in the exception clause, and it was provided that the penalty for non-performance of the agreement should be proved damages not exceeding the estimated amount of freight.

Early in Aug. 1914 war was declared by Germany and Austria on the one hand and Great Britain, France, and Russia on the other. On the 1st Sept. the plaintiffs wrote asking the defendants to declare a steamship to load under the charterparty, as they had not done so. The defendants declined to comply with this request, giving as their excuse the prevailing state of war. The plaintiffs attempted to recharter, but were unsuccessful. There was some suggestion of a possible steamer at 60*s.* a ton, and had the plaintiffs secured the vessel at that price their loss would have been 7000*l.* The plaintiffs thereupon repudiated their contract with the sellers and paid them, as the result of arbitration proceedings, 4500*l.* The plaintiffs then commenced this action claiming damages. They alleged:

1. By a charter-party, dated the 5th June 1914, between the plaintiffs as charterers and the defendants as owners or deponents, the defendants agreed that a steamer to be named twenty-one days before expected date of readiness should with all possible despatch proceed to Mariupol and there load a full and complete cargo of sulphate of ammonia, not more than 3500 tons nor less than 3500 tons, and so loaded proceed *viâ* Suez Canal to one port south side Middle Islands or South Island, Japan, and deliver the same on being paid freight at the rate of 20*s.* per ton. Loading time was not to commence before the 1st Sept. 1914, and the plaintiffs were to have the option of cancelling if steamer should not be ready to load before the 20th Sept. 1914.

2. The defendants have wholly failed to perform the said charter-party. By letter dated the 3rd Sept. 1914 the plaintiffs gave notice that they would hold the defendants liable for the loss resulting from their repudiation of the contract.

3. As the defendants knew at the date of the said contract, the plaintiffs made the said charter for the purpose of taking delivery of a cargo of sulphate of ammonia purchased by them, under a contract in writing dated the 23rd April 1914, from Evence Coppée et Cie., by reason of the defendants' said breach of contract the plaintiffs failed to take up the said sulphate of ammonia and have reasonably compromised the consequent claim against them by the said sellers by paying 4500*l.* and 30*l.* for costs. The plaintiffs have also lost the enhanced value (or profit) on the said goods had they been delivered at Japan in accordance with the said charter-party, and have incurred legal charges in connection with the claim of the said Evence Coppée amounting to 97*l.* 11*s.* 2*d.*

The defendants by their defence said:

1. The said charter-party is admitted and referred to for its terms, which included an exception of arrests and restraints of princes, rulers, and people.

2. The defendants admit that they did not send a vessel to load at Mariupol under the said charter-party, but say that, owing to piratical seizures of cargoes by the Turkish Government and reasonable apprehension of Turkey becoming involved in the European war and of the Dardanelles being thereupon closed, they were justified, by reason of the exception of arrests and restraints of princes, in not sending a vessel to load.

3. None of the allegations in par. 3 of the points of claim is admitted. In any event the defendants will contend that the damages therein specified are too remote and are not recoverable from the defendants.

4. The defendants will further, if necessary, rely upon clause 13 of the said charter-party and will contend that the damages (if any) recoverable by the plaintiffs are limited to the estimated amount of freight.

Leslie Scott, K.C. and *R. A. Wright* for the plaintiffs.

Leck, K.C. and *Raeburn* for the defendants.

The arguments appear sufficiently in the judgment.

Feb. 1.—BAILHACHE, J. read the following judgment:—This is an action by charterers against shipowners for damages for breach of a charter-party dated the 5th June 1914.

By this charter-party the defendants were to provide a steamer (name to be declared at least twenty-one days before expected date of readiness) to proceed to Mariupol, a port in the Sea of Azov, and there load a cargo of 3500 tons of sulphate of ammonia and to carry the cargo to Japan. The cargo was to be loaded at the average rate of 500 tons per weather working day, Sundays and holidays excepted, loading time not to commence before the 1st Sept., and the cancelling date was noon on the 20th Sept. 1914. The exceptions clause included restraints of princes, and clause 13 ran: "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight." The freight was 20*s.* per ton.

The plaintiffs had bought the sulphate of ammonia under a contract dated the 23rd April 1914, and under the sale contract the sellers were to deliver f.o.b. a maximum quantity of 500 tons per weather working day, Sundays and holidays excepted. As the defendants had not declared a steamship to load under the charter-party, the plaintiffs wrote asking for the name of the steamship on the 1st Sept. 1914. The defendants replied on the same day declining to name any steamship, and giving as a reason that the British Government had prohibited steamers going to the Black Sea to load. The Government had, in fact, issued no such prohibition. The plaintiffs accepted the defendants' refusal as a repudiation of the charter-party and such refusal is the breach complained of.

It appears that the defendants had at one time intended to perform the charter-party by their steamship *Henley*, and she was at the end of August discharging a cargo at Garston. She is a slow boat, making eight knots in ballast and seven and a half knots loaded. The Dardanelles were closed by the Turks on the 26th or 27th Sept. 1914, and have remained closed ever since.

The defendants, in answer to the claim for damages, make three points. First, no breach; second, no damage; third, if damage, their liability limited to estimated amount of freight. This last point was not argued before me, as I had already decided in another case that a clause in the same form as clause 13 of the charter-party is a penalty clause and not a limitation of liability clause; but the point was taken to keep it open to the defendants in the event of my deciding the other points against them, and it is sufficient to say that as to this third point I adhere to my former opinion.

Turning now to the other points, the defendants contend there was no breach of charter-party by them upon the grounds set out in paragraph 2 of their points of defence, except that they did not rely upon the allegation of piratical seizure of cargoes by the Turkish Government. The paragraph reads thus:

> The defendants admit that they did not send a vessel to load at Mariupol under the said charter-party, but say that, owing to piratical seizures of cargoes by the Turkish Government, and reasonable apprehension of Turkey becoming involved in the European war, and of the Dardanelles being thereupon closed, they were justified, by reason of the exception of arrests and restraints of princes, in not sending a vessel to load.

No authority was cited to me in support of the defendants' proposition that a breach of contract is excused by reasonable anticipation of the happening of an event which, if it happens, will excuse the performance of the contract, and, in my opinion, such a proposition will not bear examination. The closing of the Dardanelles was too late for the defendants, whether one treats their refusal to send the *Henley* as a repudiation of this contract accepted by the plaintiffs, or whether one regards the contract as still open down to Sept. 20. The defendants were entirely without excuse, and the breach alleged is proved.

The defendants' next point, and the only one now left to be dealt with, is that the breach caused no damage. What in fact happened was that the plaintiffs, through their brokers, tried the market with a view to chartering against the defendants. No tonnage was available. There was some suggestion of a possible steamer at 60*s.* a ton, but nothing came of this, and after the 26th Sept. chartering for Mariupol was hopeless. Had the plaintiffs secured a boat at 60*s.* a ton, their loss would have been 7000*l.* As they failed to recharter, the

plaintiffs, in their turn, repudiated their contract with their sellers, and paid them, as the result of arbitration proceedings, 4500*l.* for so doing. The plaintiffs satisfied me that if they could have got the sulphate of ammonia to Japan they would have sold it on the market there at a profit to themselves of some 3800*l.*

The plaintiffs say the normal measure of damages against a shipowner who fails to load a cargo is the extra cost of chartering against him, and, where that is impossible, the cost of replacing the goods at their destination at about their own date of arrival, less the value of the goods at their loading port and the cost of transport, including insurance, and they say the price they would have got for the goods in Japan, selling them in the market, is a fair criterion of the price they would have had to pay to replace them—or, putting the matter in a rather different form, is the fair criterion of the value of the goods to them in Japan. I agree that this measure of damage, whichever way it is expressed, is a sound alternative to the extra cost of rechartering, and is, I think, well within the reasoning, and indeed the decision, of the House of Lords in *Ströms Bruks Aktie Bolag* v. *Hutchison* (93 L. T. Rep. 562; (1905) A. C. 515).

The plaintiffs further say as they did not and could not charter against the defendants, and as the extra cost of so doing, had it been possible, would have been 7000*l.*, they are entitled to all the damages they actually suffered up to that sum, even though some of the damages may be in law too remote, and they seek to add to the sum of 3800*l.* the 4000*l.* they paid their sellers as damages for their breach of contract, but admit that they cannot recover more than 7000*l.* in respect of those two amounts. The point tempts one to discussion, but as I have by no means done with the case I refrain and content myself with saying I cannot accept it. The damages the plaintiffs paid for breaking their contract with their sellers were and must remain too remote.

The plaintiffs' claim for damages is thus reduced to 3800*l.* The defendants do not object to this claim as being in theory the wrong measure of damages, nor do they challenge its accuracy in amount, but they say those damages do not in this particular case flow from their breach of contract. They say if they had performed their contract to the letter the plaintiffs would be no better off. They put their case in this way: The defendants would have performed their contract by having the *Henley* at Mariupol on the 20th Sept. The cargo was 3500 tons to be loaded at 500 tons per weather working day (Sundays and holidays expected). Assuming fine weather, that gave her at least eight days for loading. For a boat of the *Henley's* speed, it is from four to five days' sail from Mariupol to the Dardanelles. The *Henley* would, therefore, without any breach of contract, have arrived at the Dardanelles on, say, the 2nd Oct., only to find that the Dardanelles had been shut for a week, and the only result of sending the *Henley* to Mariupol would have been that the *Henley*, with the plaintiffs' cargo on board, would still be in the Black Sea, if not at the bottom of it.

It was suggested by the plaintiffs that the matter must be considered from the point of view of the *Henley's* position when the defendants repudiated the charter-party and that if she would have been at Mariupol before the 20th Sept. calculations as to time must be based upon such earlier date. I am satisfied, however, that the *Henley*, even if sent straight from Garston, would not have done more than keep her cancelling date. I am prepared to assume in the plaintiffs' favour that there might possibly have been by a judicious expenditure of money some acceleration of the loading time, but I cannot bring myself to believe that had the *Henley* arrived and begun to load at Mariupol by noon on the 20th Sept. she could have got down to the Dardanelles in time to get through.

The suggestion of acceleration by "backsheesh" is indeed irrelevant, when the question is, as here, what would have been the position if the defendants had fulfilled their contract to the letter. Nor, I think, can the plaintiffs say that if longer notice of refusal to send the *Henley* had been given they could have secured an earlier boat. The defendants were only bound to declare their steamship twenty-one days before the 20th Sept. Their refusal was on the 1st Sept., and I am satisfied that had it been on the 29th or 30th Aug. the plaintiffs' position would have been no better. It must further be borne in mind that if the defendants had kept the *Henley's* cancelling date and taken the cargo on board, her failure to reach the Dardanelles on her outward voyage to Japan, before the passage was closed, would have been no breach of contract, as the charter-party contains the usual exceptions of restraint of princes.

If one pauses at this point, it looks as though the defendants had made out their answer, and as if the damages suffered by the plaintiffs did not flow from the defendants' breach of contract, but from the closing of the Dardanelles, an event for which the defendants are in no way responsible. In arriving at this interim conclusion, I have not forgotten that the burden of proving that this breach caused no damage lies upon the defendants, who must prove it, not as a matter of possibility or even of probability, but as a practical certainty. The plaintiffs say, however, that the matter does not stop here. They contend that the damages ought to be assessed at the date of the breach, without regard to subsequent events.

I see great difficulties in accepting this proposition in a case of this kind. It seems to me that when the plaintiffs ask for substantial, as opposed to nominal, damages they must show that the damages they claim did in fact result from the defendants' breach of contract, and that if before those damages are ascertained, in some process of litigation, it can be shown that they did not so result, the defendants are entitled so to do. The plaintiffs make one last point, and say that if subsequent circumstances are to be taken into account all the circumstances must be looked at, and that insurance has been so far forgotten. They point out that, even assuming their cargo would still be on the wrong side of the Dardanelles, it would be there in the defendants' steamship, and would be covered by insurance, that the closing of the Dardanelles for so long a period would have operated to defeat the adventure, and that they would have had a claim, on their underwriters, as for a total loss. See the recent case of *British and Foreign Marine Insurance Company* v. *Sanday* (*ante*, p. 289; 114

L. T. Rep. 521; (1916) A. C. 650) in the House of Lords.

The plaintiffs proved that the venture was insurable, and I am satisfied that it would have been insured for a sum sufficient to cover the cost of the goods, the freight, the cost of insurance, and a reasonable sum for profit. The plaintiffs would have taken and paid for the goods if the *Henley* had duly arrived at Mariupol, and would have recovered in full under their policy, less, of course, the freight.

I am further satisfied that the profit insured would not have been less than 3800*l*. The value of the cargo was somewhere about 40,000*l*. This right of recovery under their insurance policy they have lost by the defendants' failure to provide a steamship to load the cargo, nor can this loss, in my opinion, be said to be too remote. Insurance is now a universal accompaniment and an important part of every trading venture involving carriage by sea.

The plaintiffs have not paid for the goods, nor have they paid freight or insurance, and I shall therefore put them in the same position as if the *Henley* had arrived in due course if I give them 3800*l*. This is just what the courts endeavour to do when awarding damages in a commercial case to a person whose contract has been broken without excuse.

I may add that I should have been prepared to go further if the plaintiffs had taken the goods and paid for them. I should have favourably considered a claim for storage charges and loss of interest.

As this has not been done, my judgment is for the plaintiffs for 3800*l*., with costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Waltons* and *Co.*

Solicitors for the defendants, *Holman, Birdwood*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

March 20 *and April* 3, 1916.

(Before Sir S. T. EVANS, President.)

THE PONTOPOROS. (a)

Neutral ship—Capture by belligerent—Recapture by other belligerent—Salvage—Right to claim same—Rule as to salvage on recapture of neutral ship—Exception to rule—Conduct and character of captor—Right to destroy—Promise to release—Bona fides—German naval code.

Although it is a general rule of the law of nations that no salvage is due for the recapture of neutral ships, there is an exception to this rule, that is, salvage is payable if the ship when recaptured was practically liable to be confiscated or destroyed by the enemy captor, whether rightfully or wrongfully.

The P., *a neutral ship laden with coal which was the property of British subjects, was captured by a German cruiser shortly after the outbreak of war in* 1914. *A large quantity of the coal was taken by the cruiser, the crew of the* P. *were made prisoners, a German prize crew was put on board, threats were made to destroy the* P. *by the Germans, and the ship was compelled to accompany the German cruiser wherever required. About five weeks after the date of the capture the* P. *was recaptured by a British cruiser, and a claim was put in for salvage remuneration by the captain, officers, and crew of the British cruiser. The shipowners resisted the claim on the ground that the* P. *had never been in presumptive peril.*

Held, that, having regard to the fact that the commander of the German warship was "entitled" under German law to destroy the captured vessel and the likelihood that he would have done so, the opinion of the court was that the recapture of the ship both saved the ship from condemnation if brought before a Prize Court and from almost certain risk of destruction on the high seas if she was not.

Held, consequently, that restitution to her Greek owners on recapture should have been upon payment of reasonable salvage. Award 7333*l*., *or one-sixth of the value of the salved property.*

THIS was a claim made by Captain Henry Lake Cochrane, of H.M.S. *Yarmouth*, and the officers and crew of the said ship, for salvage remuneration in connection with the recapture of the Greek steamship *Pontoporos*, after she had been captured by the German cruiser *Emden*. The case was contested as an ordinary Admiralty action, but, by the direction of the President, it was treated as a matter of prize. The full details as to the voyage of the *Pontoporos* are set out in the judgment of the President. On behalf of the plaintiff it was contended that, by reason of the salvage and recapture of the vessel, the *Pontoporos* had been rescued from total loss to her owners. On behalf of the shipowners it was contended that, in accordance with the terms of a promise made by the captain of the *Emden*, the *Pontoporos* was never in danger of destruction, but would have been released as soon as all the coal required by the German cruiser had been taken out of her.

Laing, K.C. and *Lewis Noad* for the claimants.

Dawson Miller, K.C. and *D. Stephens* for the shipowners.

The following authorities were cited during the course of the arguments:

The War Onskan, Roscoe, vol. 1, 239; 2 Ch. Rob. 279;
The Eleonora Catharina, Roscoe, vol. 1, 367; 4 Ch. Rob. 156;
The Carlotta, Roscoe, 5 Ch. Rob. 54;
The Huntress, Roscoe, 6 Ch. Rob. 104;
The Maria (referred to in the case of the *Kim*), 13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215;
Pitt-Cobbett's Cases and Opinions on International Law, vol. 2, 220;
German Prize Code.

Cur. adv. vult.

April 3.—The PRESIDENT.—This is a claim for prize salvage on the recapture of a neutral ship from an enemy captor. The claim is made by the captain and the crew of H.M.S. *Yarmouth*, and it is made with the approval of the Lords Commissioners of the Admiralty. The ship which was recaptured was the *Pontoporos*, a steamship, registered at the port of Andros, in the kingdom of Greece, and the property of a

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Greek company. The value of the ship is 44,000*l.* This is the first case in which proceedings for prize salvage have been taken during the present war. The claim is made only against the owners of the vessel, and not against the owners of the cargo.

By the law of nations it is a general rule that no salvage is due for the recapture of neutral ships. This rule is founded on the principle that the liberation of a *bonâ fide* neutral from the hands of the enemy is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unlawfully seized. (See Wheaton's International Law, Dana's edition, par. 364.) To this general rule, however, there is an important exception, which has been in force for more than a century, in the case of a ship recaptured when that ship was practically liable to be confiscated by the enemy, whether rightfully or wrongfully. Lord Stowell explains the foundation of the rule and the ground of the exception in his judgment in the case of the *Sansom* (6 Ch. Rob. 410), where he says: "The general practice of this court is not to decree salvage on neutral ships recaptured, upon the presumption that no peril had been incurred, but that, on being carried into the courts of the original captor, they would have been restored. This is a presumption which is to be entertained in favour of every State, which has not sullied its character by a gross violation of the law of nations. But the contrary presumption takes place if States hold out decrees of condemnation, however unjust, and decrees on which the tribunals of the country are enjoined to act and of which there is every reason to suppose that they will be carried into execution. The reasoning on which the general rule has been founded is then done away with; the peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation." This exception has been stated by Lord Stowell in earlier cases, and has been generally recognised since that time: (see Wheaton, par. 366, and Wildman's International Law, vol. 2, 286).

It appears to me that other circumstances may be conceived as creating other exceptions to the general rule. I only state this lest it might be supposed that the court would only have regard to the exception above mentioned. But this latter is the only one which need be considered in the present case.

Does the general rule, or the exceptional rule, apply to the facts of this recapture? The recaptured ship started from Calcutta on the 5th Sept. 1914 on a voyage to Karachi, laden with about 6000 tons of coal, consigned by British merchants at Calcutta to British merchants at Karachi. On the morning of the 10th Sept. the *Pontoporos* was captured by the German cruiser *Emden* in the Bay of Bengal. A German prize crew was put on board. An entry recording the search and capture was made in the logbook by the prize officer. It reads as follows:

Sept. 10, 1914, 2.30 a.m., Gulf of Bengal, 10′ 22″ N. lat., 84° east long.—The Greek steamer *Pontoporos* has been seized by order of the commander of the German cruiser S.M.S. *Emden*, because in accordance with her charter-party she was to convey contraband of war (coal) for the British Empire from Calcutta to Bombay or Karachi. No manifest or (indecipherable word) were found on board. The captain was aware of the war between Germany and England. The captain offered no objection to seizure and search.—F. LAUTERBACH, 1st Lieutenant, Prize Officer, S.M.S. *Emden*.

After some conversation with the captain, the prize officer proceeded to placard in various places in the ship a notice in German, English, and French.

The English and the French versions were as follows:

Notice.—During the occupation of this ship by a detachment from a German man-of-war, the ship's crew and passengers are subject to German martial law. Whosoever forwards the interests of Germany's enemies or harms the German navy during the occupation incurs death. During this time every offence and every neglect of orders and directions issued on this ship will be punished according to the penal law of the German Empire. Moreover, every hostile movement or even the attempt of such an action by any of the crew or passengers may have the most serious consequences for the whole ship, crew and passengers. All arms and ammunition must be handed over immediately. Whosoever will be found to be in possession of arms or ammunition in the course of half-an-hour will be arrested and punished according to the law. Everybody of the ship's crew is obliged to attend to his usual work until he is dismissed or expressly released therefrom.

Avis.—Pendant l'occupation de ce navire par un détachement d'un vaisseau de guerre allemand l'équipage et les voyageurs sont soumis aux lois martiales allemandes. Celui qui pendant cette occupation favorise les ennemies d'allemagne ou qui fait dommage aux forces navales allemandes a à attendre la peine de mort. Toute action punisable et chaque contravention aux ordres et décrets émis à bord de ce temps sera punie selon les lois pénales de l'Empire allemand. En outre une action hostile ou l'essai de la commettre pourrait avoir les conséquences les plus graves pour le vaisseau, son équipage et les voyageurs. Les armes et la munition doivent être délivrées sur le champ. Celui qui aura encore une arme ou de la munition après une demi-heure, sera arresté et puni selon la loi. Chacun de l'équipage doit remplir ses fonctions jusqu'à sa démission ou jusqu'à ce qu'il soit acquitté exprès.

It is as well to give the account of these and of subsequent events in the words of the captain of the *Pontoporos* himself. On the 3rd Dec. 1914 he wrote from Singapore to his owners as follows:

Dear Sirs,—As you are doubtless aware, five days after our departure from Calcutta, and on the 10th Sept., 2.30 a.m., we were seized by the German warship *Emden*, lat. 10.25 N. and long. almost 84 E. As soon as the Germans came on board, about twenty-five to thirty of them, that is two officers, one engineer, and the others sailors, all fully armed with Mannlicher fusils and revolvers, carrying in the same time five or six cases of cartridges and different explosives, and after they took and examined all the documents on board, declared to us that the cargo belonging to British merchants, and in view of the state of war existing between Germany and England, same is considered as contraband of war, and consequently it will be seized and be used by the warship. I have protested repeatedly to them saying that the steamer belongs to a neutral nationality and that she was fixed before the declaration of war, &c., but to no avail. Seeing after all that any further resistance on my part would be fruitless and very probably dangerous, I was obliged to yield. They proposed, whether I agreed to stay on board our steamer with the crew and continue to perform the usual work on the steamer well, otherwise they (the Germans) would be obliged to remove us on board the warship and bring

on board our steamer their own crew, and finally, when they would have taken all that they need out of the cargo of the steamer, they would sink her necessarily, having no port where to bring her for safety, and consequently save her from the necessary sinking. I have considered it my duty therefore, and in accordance with my crew accepted to stay on board our steamer until her release and salvage. Their first steps after our acceptance was to declare the German martial law, which they placarded in the steamer, to take all the steamer's documents generally, weapons, and money, which amounted to 50*l*. When I told them it was my own money they returned same to me. German officers armed have taken command of the ship afterwards, and a detachment of fifteen to twenty armed men have been settled on the lower bridge, and who guarded the steamer alternatively, especially the engine and boiler rooms, up to the end of our capture. We followed the warship up to the 16th of the same month, and in the meantime she had sunk many British steamers, and in the morning of the 16th she came alongside and bunkered out of our cargo 500-600 tons, and then she left us. The Germans on board our steamer conducted her towards the island of Simolo, where, apparently, the warship would have come later. We stayed there under steam up to the 6th Oct., when the German cargo boat *Markomannia* came, in order to take as much as she could from our cargo up to the 13th same month, when she would have released us, as, as we understood, the warship met an English steamer laden with Welsh coal, and which she captured in preference, and kept her in order to bunker from her. I cannot describe how I suffered all this time through oppression, sorrow, famine, brutal treatment of the Germans, and the daily rioting among the crew for food, as the provisions which the Germans had in their possession had been nearly exhausted, and all the time I was fearing that the crew, exasperated, would by force try to take a little food. This terrible state of affairs lasted up to the 12th Oct., the eve of our release from the Germans, when suddenly appeared the British warship *Yarmouth*, which, after she had sunk the *Markomannia*, took us to Penang, and thence to Singapore. This is all about our capture by the *Emden*.

As to what happened on and after the approach of H.M.S. *Yarmouth*, the following facts were admitted by the defendants in their pleadings:

At about 6.10 a.m. on the 12th Oct. 1914 those on board His Majesty's ship *Yarmouth*, being in about lat. 2 53½ N. and long. 96 6 E., while patrolling the north coast of Sumatra, sighted the *Pontoporos*, lashed alongside the German steamship *Markomannia*. The *Yarmouth* at once bore down upon the vessel, and it was seen that the *Markomannia*, which vessel was acting as supply ship to the German cruiser *Emden*, was taking in coal from the *Pontoporos*. As the *Yarmouth* approached the *Markomannia* cast off and attempted to escape to territorial waters, but was stopped by a shot fired across her bows by His Majesty's ship *Yarmouth*. At 7.5 a.m. the *Markomannia* was boarded, and after her officers and crew had been removed she was sunk. Meanwhile officers from His Majesty's ship *Yarmouth* proceeded on board the *Pontoporos*, where they found a prize crew consisting of Sub-Lieutenant Mayer, Imperial German Navy, Sub-Engineer Freund, Imperial German Navy, together with nine German seamen and three German stokers, all belonging to the German cruiser *Emden*, as well as an officer belonging to the *Markomannia*. The aforenamed German officers and crew were thereupon made prisoners of war and sent on board His Majesty's ship *Yarmouth*. The *Pontoporos* was searched, and her master, who had for some time been a prisoner in his berth, but had afterwards been released by the German prize crew, was interviewed by Captain Cochrane, who was informed that the *Pontoporos* at the time of her capture was on a voyage from Calcutta to Bombay or Karachi laden with coal, that the vessel had been captured by the *Emden* on the 10th Sept. off the coast of Ceylon, that after the capture of the *Pontoporos* by the *Emden* the prize crew had not only confined the captain to his cabin as aforesaid, but threatened the Greek crew with revolvers when work was required of them.

It will be observed that from her capture on the 10th Sept. the *Pontoporos* was kept in attendance upon the *Emden* or her supply ship, the *Markomannia*, until the 12th Oct., a period of nearly five weeks. During a part of this time, for ten or twelve days or more, the captain had been imprisoned or confined in his cabin, according to his statement to Lieutenant Edelston. He and his crew had been in turn threatened, bribed, or cajoled into working according to the orders of the prize crew.

On the 12th Oct., when sighted by H.M.S. *Yarmouth*, the *Pontoporos* was lashed alongside the *Emden's* supply ship *Markomannia*, to which some of the cargo of coal was being transhipped.

On the approach of the *Yarmouth* the German officer threw overboard cyphers, confidential documents, and their own and their crew's arms. The German prize crew were transferred to H.M.S. *Yarmouth*. The *Yarmouth* remained in the vicinity, anticipating the arrival of the *Emden*, until about 6 p.m. on the 12th Oct. She then put to sea with the *Pontoporos*. On the 14th Oct., as the orders of the *Yarmouth* necessitated her proceeding at a greater speed than the *Pontoporos* was capable of, the *Pontoporos* was transferred to the charge of the French cruiser *D'Iberville* for conveyance to Penang, the vessels being then in lat. 5 30 N. and long. 100 E. (approximately). The *Pontoporos* was subsequently brought safely into port and restored to her owners.

Upon these facts the defendants contended that the proper conclusions were:

1. That the *Emden* would have released the *Pontoporos* on or about the 13th Oct., and that she was therefore in no presumptive peril.

2. That if the vessel had been taken before a German Prize Court she would not have been condemned.

3. That if she was not taken to such a court she would not have been sunk, or appropriated by the German cruiser.

The consequential contention was that she should be restored to the owners without payment of salvage.

On the 12th Oct. (the day before the master of the vessel was said to have expected a release) she had been a captured vessel in charge of a prize crew for over a month. She had thus lost in freight a very substantial sum. She had between 4000 and 5000 tons of coal still on board, consigned to British merchants. If a promise to release was made, it was for some ulterior purpose of quieting the crew, or compelling them to work for the German cruiser and the supply ship. The court declines to believe that any such promise was honestly made, or was intended to be kept. There had already been threats to sink the ship; and if it had suited those in charge of the German cruiser, after taking away all the cargo, and after making any further use they wished of the vessel and her crew, the ship would have been sunk.

As to the rest, the German cruiser never intended to take or to send the neutral ship to a German Prize Court for a judicial determination as to whether she ought to be condemned. If otherwise, by some remote fortuity, her case had ever come to be adjudicated upon before such a court, enough has come to the knowledge of this court from the cases cited in argument, and from other cases, to satisfy the court that the chances of her owners of obtaining restitution would be as nothing. The "presumption which is to be entertained in favour of every State which has not sullied its character by gross violations of the law of nations"—to quote the words of Lord Stowell in the judgment of *The Sansom* (*ubi sup.*) to which I have referred—can no longer be expected to avail the State of the original captors.

If the vessel would not have been taken before any Prize Court in Germany, or belonging to the German Empire, what, then, would have happened? This is more than indicated by art. 113 of the German Prize Code. It has been noted that on the capture the cause given was that the neutral vessel was carrying contraband. However that may have been in fact or in law, the officer of the capturing cruiser would no doubt deal with her accordingly.

Under art. 113 the commander of the cruiser would be entitled to destroy the neutral vessel if he considered it subject to condemnation for carrying contraband, and if bringing the vessel into port would subject the cruiser to danger or be liable to impede the success of its operations; and this would be assumed if the captured vessel could not follow the war vessel and was therefore liable to recapture; or if the proximity of the enemy forces gave ground for a fear of recapture or if the war vessel was not in a position to furnish an adequate prize crew to take the vessel to a German port.

If the commander of the cruiser was "entitled" under German law to take the course of destroying the captured vessel, I prefer to express the opinion that he would have taken that course rather than to speculate as to what would have been said to him by his State if he had not.

The opinion of the court is that the recapture of the *Pontoporos* in these circumstances saved the ship for its owners from condemnation in any prize proceedings, and from the almost certain risk of destruction if she were dealt with upon the high seas without even the opportunity of placing its case before any judicial tribunal. Upon the strictest legal grounds, as well as upon every ground of equitable dealing, I decide that restitution to the Greek owners on recapture should have been upon payment of reasonable salvage. For such salvage I award one-sixth of the value, which is 7333*l.*

Solicitor for the claimants, *Arthur Tyler.*

Solicitors for the shipowners, *Downing, Handcock, Middleton,* and *Lewis.*

March 27 *and* 30, 1916.

(Before Sir S. T. EVANS, President.)

THE EDEN HALL. (*a*)

Prize Court—British ship—Enemy cargo—Cargo shipped before outbreak of war—Discharge in British port before outbreak of war—Storage in bonded warehouse in port—Declaration of war—Seizure of cargo—"In port"—Right of condemnation.

A cargo of goods, the property of a Turkish merchant, were shipped from a Turkish port and landed in London prior to the declaration of war between Great Britain and Turkey. The goods were conveyed in a British ship and, after landing, were stored in a bonded warehouse at the port of London, where they still were at the date of the outbreak of hostilities.

Held, that the goods were liable to seizure and condemnation as prize in accordance with the principles laid down in The Roumanian (ante, *p.* 208; 114 *L. T. Rep.* 3; (1916) *A. C.* 124).

THIS was an application on the part of the Crown for the condemnation of a quantity of tobacco as prize and droits of Admiralty.

The *Eden Hall* was a British steamship, which sailed from Smyrna on the 3rd Oct. 1914. Included in her cargo were twelve bales of tobacco consigned to London by a Smyrna house, and six cases of eight bales consigned from another firm. There were other goods on board which had since been released, and as to which no question arose. There was no appearance entered as to the six cases of eight bales, and the whole question in the case was as to the twelve bales, which were shipped by one Platon Macri, a Turkish merchant at Smyrna, the same being consigned to his order at London, which was the destination of the *Eden Hall.* The steamship arrived at the port of London on the 23rd Oct. 1914. Five days later, on the 28th Oct., the tobacco was discharged at the Victoria Docks, and was stored in a bonded warehouse within the port of London under the control of the Commissioners of Customs.

On the 5th Nov. 1914 war broke out between Great Britain and Turkey. On the 10th Nov. the goods were placed under detention, and on the 11th Dec. they were formally seized as prize. On the 7th Jan. 1915 an appearance was entered on behalf of Platon Macri, who was described as of Athens, but no affidavit was then sworn. At a later date, the 27th March 1915, a claim to the tobacco was filed, and Platon Macri was then properly described as a Turkish merchant of Smyrna.

The claimant contended that the tobacco could not be legally seized as prize, on the ground that it had been discharged on the 28th Oct. 1914, before the outbreak of war between Great Britain and Turkey, and was therefore not the subject of confiscation, although it was still in port.

The *Solicitor-General* (Sir George Cave, K.C.) and *Maxwell Anderson* for the Procurator-General.—The goods were rightly seized as enemy cargo in a port of this country and found there after the outbreak of hostilities. The case was similar to that of *The Marie Anne* (Rothery's Prize Droits, 126), and the right to seizure and

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

condemnation in a case like the present had been established by the judgment of Lord Parker in *The Roumanian* (*ante*, p. 208; 114 L. T. Rep. 3; (1916) A. C. 124).

Neilson for the claimant.—The goods ought not to be condemned and were not the subject of maritime prize. There was a distinction between the present case and that of *The Roumanian* (*ubi sup.*). Here the goods were landed prior to the outbreak of war between Great Britain and Turkey, and as being in the territory of a belligerent they were not the subject of prize. This was clearly borne out by the case of *Brown* v. *United States* (8 Cranch, 110). If the principle of the right of seizure was applied in a case like the present, it might lead to a startling result, because goods which had been warehoused for a considerable time might be condemned—for instance, tobacco which had been in a bonded warehouse for years. To hold that goods could be condemned under such circumstances was an extension of the doctrines laid down in *The Roumanian* (*ubi sup.*), for which there was no authority.

The *Solicitor-General* in reply.—The warehouse was a part of the port, and the goods were therefore liable to seizure and condemnation, as in the case of the oil in *The Roumanian* (*ubi sup.*). They could not be removed until the duty had been paid, and the voyage was incomplete. There had been no delivery of the goods so as to present the right of the Crown to claim their condemnation as prize.

THE PRESIDENT.—In this case there is an application by the Crown as to two parcels of tobacco. With regard to one parcel—namely, six cases of eight bales—there is no appearance. This parcel was shipped from Smyrna to the order of the shippers. The matter is now about twelve months old, and I have no doubt whatever concerning it; the goods must be condemned.

As to the other part of the cargo—namely, twelve bales of tobacco shipped by Platon Macri, of Smyrna, to his own order—a claim has been put forward by a person who claims to be entitled to have the goods restored to him on the ground that they were seized on land and in a bonded warehouse, to which they had been removed prior to the outbreak of war between Great Britain and Turkey.

As to the facts of the case there is no dispute. The tobacco was put on board the steamship *Eden Hall*, which sailed from Smyrna on the 3rd Oct. 1914, and arrived in London on the 23rd Oct. 1914. On the 28th Oct. the goods were discharged and put into a bonded warehouse in the port of London. It is admitted that the warehouse was a bonded warehouse approved by and under the control of the Customs authorities, and situated within the port of London. The goods remained in the bonded warehouse until the outbreak of war between Great Britain and Turkey on the 5th Nov. 1914. Five days later the goods were seized and were detained by the Customs authorities on behalf of the Crown. Notification to that effect was given some time afterwards, and on the 11th Dec. 1914 there was a more formal seizure of the goods as prize. An appearance was entered on behalf of Platon Macri, of Athens, which was and is a neutral city; but although Platon Macri is described as of Athens, he appears to be a Turkish merchant of Smyrna, and the claim now made on his behalf is put forward honestly as the claim of a person who was an enemy at the date of the seizure. The only question, therefore, which I have to decide is whether this case can be distinguished in any way from that of *The Roumanian* (*ubi sup.*). Some of the facts are different, but applying the principles which have been explained and declared by the Privy Council in *The Roumanian* (*ubi sup.*) to the present case, I fail to see that there is really any distinction between them. Upon the broad ground that these goods were in port—in a warehouse belonging to the port—at the time of the outbreak of hostilities, I think it follows that they were goods which were the proper subject of maritime prize. In fact, I am of opinion that the present case is entirely governed by the case of *The Roumanian* (*ubi sup.*).

Of course, if the tobacco had been dealt with in the ordinary way of commerce, by bills of lading assigned to some other person, or had been warehoused for some other person as purchaser, the case might have been different. These goods, however, were put into a warehouse and remained there up to the date of seizure as the goods of the Turkish merchant, that is, of an enemy subject. They must, therefore, be condemned as prize and droits of Admiralty.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimant, *W. A. Crump* and *Son.*

Dec. 6, 1915, *and March* 22 *and* 23, 1916.

(Before Sir S. T. EVANS, President.)

THE PRINZ ADALBERT.

THE KRONPRINZESSIN CECILIE. (*a*)

Prize Court—German ship—Entry into British port prior to outbreak of hostilities—Entry as a place of refuge—Not in furtherance of commercial enterprise — Detention — Subsequent release—Order to leave port—Outbreak of war—Seizure — Condemnation — Hague Convention 1907, *No. VI., arts.* 1 *and* 2, *and Preamble.*

By the preamble of the sixth Hague Convention 1907, *the contracting parties stated that they had come to certain agreements on the ground, as therein stated, that they were "anxious to ensure the security of international commerce against the surprise of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities," and accordingly arts.* 1 *and* 2 *of the Convention were drawn up. By the first of these articles it is stipulated* (inter alia) *that an enemy merchant ship which is in a port of a belligerent at the date of the outbreak should be allowed a reasonable number of days of grace in which to depart, and by the second it is provided that if owing to circumstances beyond her control the vessel cannot depart within that period, she may not be confiscated but merely detained.*

A German liner bound from Philadelphia to Hamburg, hearing of the outbreak of war between France and Germany, put into F. on the

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

3rd Aug. 1914, *in order to avoid possible capture by French cruisers. On the morning of the 4th Aug.* 1914 *the master was told that his vessel would be detained, but later in the day she was released and ordered to leave the port. She made no attempt to depart, and on the morning of the 5th Aug., war having broken out between Great Britain and Germany in the meantime, she was seized as prize.*

Held, even assuming that the Hague Convention was binding upon Great Britain as far as Germany was concerned, that the vessel did not enter and was not in the port of F. in pursuance of a commercial enterprise, that ample opportunity had been given to her to depart, and that arts. 1 *and* 2 *of the Convention did not protect her from condemnation as prize.*

IN these cases the Crown asked for the condemnation of two German liners which were seized at Falmouth on the 5th Aug. 1914. The facts were similar in the two cases, and for the sake of convenience the first alone was fully gone into by the court.

The *Prinz Adalbert* was a German screw steamship, belonging to the Hamburg-Amerika line, of 3769 tons register, and prior to the outbreak of war between the Allies and the Powers of Central Europe she was on a voyage with cargo and passengers from Philadelphia to Hamburg. On the 3rd Aug. 1914 the captain of the vessel, who was then entering the English Channel, heard of the declaration of war between France and Germany, and instead of proceeding on his course he decided to put into Falmouth Harbour for orders. He entered the harbour shortly after midnight. Early on the morning of the 4th Aug. an officer of Customs went on board the *Prinz Adalbert*, ordered the master to dismantle his wireless apparatus, and informed him that if he attempted to leave the harbour he would be stopped. Later in the day, however, acting upon Admiralty instructions, the master was informed that his vessel was unconditionally released, and that he was free to leave. No effort was made to depart, and in the early morning of the 5th Aug., war having been meanwhile declared between Great Britain and Germany, the vessel was seized as prize.

The case first came before the court on the 6th Dec. 1915, when an adjournment was granted in order that further evidence might be obtained. At the hearing in March 1916 the master was called as a witness, and he then stated that he did not enter the harbour of Falmouth for the purpose of refuge, but as a result of an appeal by a number of American and German passengers, who expressed a desire to be landed in England owing to the outbreak of war between France and Germany.

The question involved was whether under the circumstances arts. 1 and 2 of the sixth Hague Convention 1907 applied, which are as follows:—

1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination, or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

2. A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

The *Attorney-General* (Sir F. E. Smith, K.C.), *Pearce Higgins*, and *Murphy* for the Crown.—The *Prinz Adalbert* was not within the protection contemplated by the sixth Hague Convention. This was not a case of ensuring the security of international commerce against the surprise of war, which was what was contemplated and was shown by the wording of the preamble of the Convention. The vessel came into Falmouth as a place of refuge, and, as she remained there after the date of the declaration of war, in spite of her having been ordered to depart, the seizure was quite regular. It was true that an order for detention was made on the morning of the 4th Aug.; but, if there was any illegality in that, a remedy would have been found by way of action after the termination of the war.

Aspinall, K.C. and *Dunlop* for the shipowners, the claimants.—The vessel was within the protection of the Hague Convention and should be restored to the owners. She was engaged in a commercial enterprise before the outbreak of war, and there was nothing irregular in her entering the harbour of Falmouth. There had been an irregularity in the order for detention in the first place, and that had led in part to her not departing before war broke out. It would be contrary to the principles acted upon by the Prize Court if advantage was taken of an irregularity. It could not be said that the vessel had ever had a real opportunity of departing.

The *Attorney-General* in reply.—It was contrary to fact to assert that the *Prinz Adalbert* had not been treated with the utmost consideration. The treatment afforded by this country had been very much better than that afforded by Germans to British ships.

The PRESIDENT.—The steamship *Prinz Adalbert* was a ship belonging to the Hamburg-Amerika line, and, at the end of July and in the beginning of Aug. 1914 was on a voyage from Philadelphia to Hamburg with a cargo of general goods. She was seized in Falmouth Harbour. The claim made on behalf of the owners of the vessel is that she should be released absolutely from seizure, which was made on the morning of the 5th Aug. 1914, or, in the alternative, as I gather from counsel for the claimants, that at any rate she should not be subject to confiscation, but only to an order for detention during the war, on the condition of being delivered up at the end of the war, or that compensation should be paid if the vessel was not delivered up.

For the purpose of this case, and for the purpose of this case only, I assume that the sixth Convention of The Hague Conference of 1907 is binding. That has been done in other cases, though there has not been a final decision upon the matter in this country as yet. The matter has been elaborately argued recently before the Privy Council,

but no decision has been given. Assuming that the sixth Hague Convention is binding, the question arises, therefore, whether the vessel entered the port of Falmouth under the circumstances contemplated by the Convention, and in circumstances the existence of which would give her the privileges of arts. 1 and 2 of the Convention.

The facts are not to any very great extent in dispute, and therefore the statement that I shall make as to them need only be short. On the 3rd Aug. 1914, the day before war was declared between Great Britain and Germany, the *Prinz Adalbert* was approaching the English Channel. As I understand, the master, soon after the ship had passed the Scilly Isles, learned that a state of war existed between France and Germany. Having heard of this, the master, according to the affidavit which he has made and according to the protest which he made on the 8th Aug., decided to proceed to a neutral port. In the one he says that he decided to do this for orders, and in the other he says that he did it so that his ship might be in a port of refuge. This case came before me on the 6th Dec. 1915, and was then part heard, being adjourned in order that further evidence might be given as to what had taken place. Now, as the Attorney-General has pointed out, it is the fact that on the 6th Dec. nothing was said by or on behalf of any claimant, either verbally or in writing, that the reason—or, indeed, a reason—for the ship's proceeding to Falmouth was a desire to comply with the wishes of the passengers.. Yesterday the court heard, for the first time, from the *vivâ voce* evidence given by the master, that a deputation from the passengers, consisting chiefly of Americans and Germans, waited upon the master and requested him to take the vessel carrying them to an English port, so that they, Americans and, strange to say, Germans too, might not proceed on their voyage to Hamburg, but might return from England to American soil. I do not know what took place, but the master cannot blame the court for coming to the conclusion that the statement as to the deputation of passengers, and particularly the statement that he only went into Falmouth by reason of the request of that deputation, is an afterthought. I do not forget that in the postscript to the letter to the senior naval officer at Falmouth there is reference to a desire to land passengers and take in coal. That is perfectly consistent with the original story of the master, which was that he went into Falmouth himself, having decided for himself, for orders, and having got there I daresay there was naturally a request from the passengers, or some of them at any rate, that they might be allowed to land, and there may have been a request by the master to take coal on board, because he might decide, having received orders, to proceed to Hamburg, not through the English Channel in the ordinary way, but through the Irish Channel and round the North of Scotland.

On the 4th Aug. the vessel was told that she must not leave the port. That might be regarded as an embargo, and I think that the authorities were quite within their rights, if there was a war or a prospect of war, in telling the vessel that she must not leave. If nothing else had been done, when a state of war came to exist, the vessel would have had to remain in the port as if she had been under an embargo. Another circumstance, however, intervened, which I think makes that unimportant, and that is, that after the detention by the Customs officer, permission was given on the 4th Aug. by the commander-in-chief, acting upon instructions received from the Admiralty, for the vessel to leave. I think that the steps taken by the commander-in-chief, which were communicated to the German Consul and afterwards to the vessel, were something more than a mere permission to depart. They were, in effect, an intimation that the ship had no right to use the port, and that there was an opportunity for her to go and that she must do so. In spite, however, of this intimation, the ship remained where she was until after the outbreak of hostilities between Great Britain and Germany, at 11 p.m. on the night of the 4th Aug. 1914.

The *Prinz Adalbert* was arrested on the morning of the 5th Aug. 1914. If the vessel was allowed to leave, or if it was intimated to her that she must leave about 4 p.m. on the 4th Aug., I do not think that she would have a right to rely in any event upon the Hague Convention. She had no right to call upon the authorities at Falmouth to allow her to remain there in order to see what might happen. They had a perfect right to tell her that she must leave the port.

Now, what was done by the master? I find no indication whatever in the evidence or in the affidavits that he ever intended to avail himself of the opportunity of leaving, or to obey the order to take his vessel out of the port. He says in his affidavit that it would take twelve hours to raise steam. Perhaps that is quite true, but if he had intended to go he could have raised steam in the time at his disposal. But nothing whatever was done on the vessel to show that there was any intention of leaving the port. On the contrary, I am satisfied beyond all doubt in my own mind that the master never intended to avail himself of the permission. What would have been the result if he had? I find that he went into port in order to avoid the risk of being captured by French cruisers. If he had left on the afternoon of the 4th Aug., or if he had left on the morning of the 5th Aug., the risk would still have been staring him in the face. Indeed, there would have been a further risk after eleven o'clock on the night of the 4th Aug. that in proceeding from Falmouth to his home port he might have been captured also by a British cruiser.

Having intended from the first to avoid the first of these risks by entering Falmouth, he further intended to remain in this port, to avail himself of it as a port of refuge, and to try to avail himself of the protection which he thought he would have under the Hague Convention. No doubt the time was short, as we know the facts now—from four o'clock until the declaration of war at eleven o'clock—but, as I put it to the master in the box, he did not know that war was to be declared as from eleven o'clock that night. Moreover, I have no hesitation in saying that if the master had shown any signs or expressed any wish to leave the port after the permission had been given, and had so told the authorities, even at eleven o'clock when war was declared, saying that he had not had sufficient time, and would like more time, I have no doubt the authorities would have said that it was only fair that he should have had a reasonable time for getting his vessel ready.

Nothing was done, for the reason that, as I have stated, the master of the vessel never intended to leave Falmouth.

The preamble of the sixth Hague Convention shows clearly what its object was, and I have already had occasion to make some remarks upon it. The words of the preamble are as follows: "Anxious to ensure the security of international commerce against the surprise of war, and wishing, in accordance with modern practice, to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities," the contracting parties "have resolved to conclude a convention to this effect." There is no doubt that this provision was made in the interest of commerce. Now the *Prinz Adalbert* was not in the port of Falmouth pursuant to any commercial undertaking at all. The object was not to take part in a commercial undertaking, but the ship was in port for a totally different purpose, and one which was not contemplated by the signatories of the sixth Hague Convention. The Convention was never intended, in my opinion, to afford protection for a vessel using a port either as a place of refuge from capture by a belligerent or for obtaining orders from any other belligerent or its subjects.

Under the circumstances, therefore, I have come to the conclusion that I ought to condemn this vessel as enemy property in favour of the Crown. I understand that the vessel has already been requisitioned. She will be handed over to the Crown as prize, and there will be no necessity for the marshal to proceed to the sale.

It is apparently agreed that there is no distinction between the case of the *Prinz Adalbert* and that of the *Kronprinzessin Cecilie*. I therefore make a similar order with regard to the latter vessel and condemn her as enemy property.

Solicitor for the Procurator-General, *Treasury Solicitor*.

Solicitors for the claimants, *Stokes* and *Stokes*.

Friday, April 14, 1916.

(Before Sir S. T. EVANS, President.)

THE STIGSTAD. (*a*)

Prize Court — International law — Reprisals — Neutral ship — Cargo, not contraband, with enemy destination—Ship ordered to British port — Unloading — Detention — Compensation for detention—Order in Council of the 11*th March* 1915*—Validity.*

Art. 3 *of the Order in Council of the* 11*th March* 1915*—reprisals restricting German commerce—is valid by international law, and the owner of a neutral ship which is detained in a British or an allied port, having been ordered thither for the purpose of discharging goods on board other than contraband which are the property of the enemy or intended for an enemy destination, has no legal right to compensation for the detention of the ship through such discharge.*

The Order in Council does not impose any unreasonable inconvenience on neutrals considering the special circumstances of the case.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

THIS case was before the Prize Court in Aug. 1915 with respect to the cargo, but the sole question which now arose was as to the validity of the Order in Council of the 11th March 1915, the shipowners having made a claim for expenses and for damages for the ship's detention during the period that the cargo was being discharged at the port of Middlesbrough.

The facts are sufficiently set out in the judgment of the learned President.

MacKinnon, K.C. and *Hull* for the Procurator-General.

Dawson Miller, K.C. and *R. A. Wright* for the shipowners.

The PRESIDENT.—In this case a very important question has been raised, which affects the validity of the Order in Council of the 11th March 1915, the order which has become commonly known as the Retaliatory Order. The argument upon it has not been very full, and if it had been more exhaustive on both sides I think that it would have been of the greatest assistance to me; but inasmuch as a doubt has been thrown upon the validity of this particular Order in Council of the 11th March, it seems to me to be only right and proper that I should express my opinion upon it now, so as to put an end, once for all, to that doubt as far, at least, as this court is concerned. Should there be a desire on either side to appeal, I think it would be only right for me to put the reasons for my decision more fully into writing; but having regard to the nature and to the importance of the point raised, I must at once proceed to pronounce my opinion upon it.

The *Stigstad* is a Norwegian steamship, and she set sail from a Norwegian port on the 10th April 1915. She was bound for Rotterdam. She had a cargo on board which consisted of metallic ore, and it is quite clear from what has been stated that even if the shipowners did not in fact know that the ore was destined for Germany, they would have been able to discover that such was the case if they had made any inquiries. It is admitted that the cargo was of the description to which art. 3 of the Order in Council of the 11th March 1915 applied. That article is as follows:

> Every merchant vessel which sailed from her port of departure after the 1st March 1915 on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the court, upon such terms as the court may in the circumstances deem to be just, to the person entitled thereto.

Although no question arises in the present case under art. 5 of the order, I should like to read it here in order to point out that the latter deals only with claims in respect of goods which are required to be discharged under the provisions of the other articles of the order in question. Art. 5 is as follows:

> (1) Any person claiming to be interested in or to have any claim in respect of any goods (not being contraband of war) placed in the custody of the marshal of the Prize Court under this order, or in the

proceeds of such goods, may forthwith issue a writ to the Prize Court against the proper officer of the Crown, and apply for an order that the goods shall be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require. (2) The practice and procedure of the Prize Court shall, so far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this order.

The question which is now before me is whether or not, as a matter of law, the owners of this vessel, the *Stigstad*, are entitled to damages for detention, or to be compensated by a payment in money for the detention of the vessel following upon the demand made upon her that she should enter a British port and remain there until her cargo was discharged. There is no need for me to go through the dates, because it has been expressly admitted by counsel on behalf of the shipowners that there was no further or other delay and no inconvenience caused to the shipowners than was inevitable and necessary in carrying out in proper fashion the rights which are conferred by art. 3 of the Order in Council. According to my view of the whole matter, it appears to me that I do not possess any right in law to compensate neutrals for any loss which they may sustain if the provisions of the Order in Council are properly carried out. If there should be any undue delay or any unnecessary expenses caused, I think that the probability is that I should have the right, in accordance with the principle applied in days past against the captors, to say that where there has been undue delay or unnecessary expense compensation should be awarded.

The Order in Council is issued, as is shown by the preamble, as a reprisal order, and, according to the decision recently given by the Privy Council in the case of *The Zamora* (see *post*; 114 L. T. Rep. 626; (1916) 2 A. C. 77), any Order in Council authorising reprisals will be conclusive as to the facts which are recited as showing that cause for reprisals exists. There is no need to read the preamble. It is enough for me to say that the preamble states that cause has arisen for reprisals, and the facts recited therein are conclusive according to the decision of the Privy Council as showing that a cause for reprisals exists.

It has been argued on behalf of the shipowners that the Order in Council of the 11th March 1915 is unlawful because it entails upon neutrals undue inconvenience. Any interference with the trade of a belligerent, in so far as that trade is carried on by the ships of neutrals, must necessarily cause inconvenience. In the case of contraband and particularly in the case of a breach of blockade, the inconvenience to neutrals is bound to be very great. It has been pointed out already in public that the Order in Council, if it is a lawful order, deals very gently with neutrals who are engaged in trade which this country thinks it has a right to try to put a stop to, because, whereas in the case of a breach of blockade or of an attempted breach of blockade there is a complete confiscation of the vessel, nothing of the kind results from the operation of the present Order in Council. All that is done is to take the enemy property to be dealt with in accordance with the terms of the Order in Council and the ship is at once set free. The judgment already given in the case of *The Zamora* (*ubi sup.*) is that, although the recitals as to the case for reprisals are conclusive, the court is not actually bound to hold that the means of meeting an emergency by way of reprisals are the best or the only means. The Privy Council further declare that no party aggrieved is precluded from contending that these means are unlawful "as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case." If I have to express an opinion as to that, I express it without doubt, that the means adopted in this Order in Council do not entail upon neutrals a degree of inconvenience unreasonable considering all the circumstances of the case, and that therefore it cannot be said by reason of the means which have been adopted that the Order in Council is in itself unlawful.

In the result I am of opinion that the Order in Council is lawful and that I must obey it. If the Order in Council is lawful, as an order permitting reprisals is lawful, and is lawful, therefore, in accordance with international law, the result of it, in my opinion, is further this—that whatever delay or inconvenience may inevitably or necessarily be caused, as in this case, the neutrals must suffer that delay and that inconvenience because it is the result of the exercise of legitimate belligerent rights on the part of this country.

I repeat that I should have been glad to have had fuller arguments, and to have had time to put my reasons into better form by reference to cases of authority; but, as the matter is very important, I think that it is right that I should express my opinion now, as I hope that I have done very clearly, that there is nothing invalid in this Order in Council, and that it is an order to which this court ought to give effect.

The claim of the shipowners will be disallowed.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitor for the shipowners, *Botterell* and *Roche.*

April 10, 12, 13, *and May* 5, 1916.

(Before Sir S. T. EVANS, President.)

THE ALWINA. (*a*)

Prize Court—Neutral ship—Contraband cargo—Cargo intended for enemy destination—Enemy agent on board vessel—Question of fact whether neutral ship becomes enemy vessel—Frustration of adventure—Sale of cargo to persons other than enemies—Return voyage—Capture—Right of condemnation.

Whether a neutral vessel is or is not acting in such a manner as to be held to be an enemy vessel is a question to be decided upon the special facts of each case.

If a neutral vessel carries contraband goods, even though her papers are false, and the goods are intended for an enemy destination, and the original intention to carry and deliver the contraband goods to the enemy has been frustrated and abandoned, and the goods themselves have been sold and delivered to other buyers before the vessel has been seized, the vessel is freed from any liability to condemnation as prize.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

THIS was a case in which the Crown claimed the condemnation as prize of the Dutch steamship *Alwina*, on the ground, as was alleged, that at the time of her seizure she was "on her return passage from taking a direct part in hostilities and supplying, or attempting to supply, coals to warships or to the naval forces of the enemies of the Crown in violation of her neutrality."

The *Alwina* was a Dutch steamship, belonging to the Holland Gulf Stoomvaart Maatschappij, of Rotterdam, and her managing owner was Mr. Joseph de Poorter, a Dutch subject, who resisted the claim put forward by the Crown. Mr. de Poorter was a gentleman who had very close connections with Germany, trading and otherwise, and he possessed an estate on the Rhine. Moreover he had at one time been the owner of a vessel which had been condemned as prize by the Prize Court of the Falkland Isles. In the middle of the month of Oct. 1914 the *Alwina*, which had been mainly engaged in trading between Holland and South Wales, left Rotterdam and proceeded to Newport (Mon.), where she shipped a cargo of steam coal, purchased by Mr. de Poorter, and ostensibly consigned to Messrs. A. M. Delfino y Hermano, of Buenos Ayres, Argentina. The vessel purported to be under charter to the firm of Buenos Ayres, yet there was no documentary evidence in existence to this effect. The *Alwina* cleared from Newport on the 27th Oct. 1914, having on board a person named Van Dongan, who was at first described as a "steward," and subsequently as a "passenger," but who was in fact a supercargo of either German or Dutch nationality. The vessel arrived at Teneriffe, on her alleged voyage to Buenos Ayres, on the 6th Nov. 1914, and there the supercargo left her. Owing to the inability of the master of the vessel to obtain bunker coal, and also owing to the fact of there being an unwillingness for some reason or other to use any of the coal which formed a part of the cargo for the navigation of the vessel, she remained at Teneriffe until the end of Dec. 1914 During this period the battle of the Falkland Islands, which resulted in the destruction of the German cruisers, had been fought. Whilst the *Alwina* was at Teneriffe, suspicions were aroused that the cargo of coal was really intended for the German cruisers which were then at large in the Atlantic Ocean, and under the circumstances, which are fully detailed in the judgment of the learned President, the major portion of the cargo of coal was eventually sold to a firm of British merchants. Later on, acting under naval orders, the *Alwina* put into Gibraltar on her return journey, then called at Huelva to take in a cargo of sulphur ore, and finally arrived at Falmouth, where she was seized.

Art. 46 of the Declaration of London, as adopted by the British Orders in Council, is as follows :—

A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel :

1. If she takes a direct part in the hostilities.

2. If she is under the orders or control of an agent placed on board by the enemy Government.

3. If she is in the exclusive employment of the enemy Government.

4. If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interests of the enemy.

In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.

Bateson, K.C. and *H. L. Murphy* for the Procurator-General.—Upon the facts of the case it was clear that the *Alwina* was an enemy ship with an enemy cargo. It was not the case of a neutral ship carrying contraband. The vessel was simply wearing the mask of neutrality, and was to all intents and purposes a German ship. A ship which lent itself to a belligerent lost its neutral character. That principle was laid down by Lord Stowell in the case of *The Caroline* (Roscoe's English Prize Cases, vol. 1, 385; 4 Ch. Rob. 256). In addition the shipowner under the circumstances was acting as an enemy. It was true that the intention of the shipowner had been frustrated by the vigilance of the British fleet, but that fact did not relieve Mr. de Poorter from the consequences of his act. If a neutral allowed his ship to be used for the purpose of assisting the enemy, he was to be considered as an enemy. In the present case there were the suspicious circumstances connected with the presence of Van Dongan on board. There was no doubt that he was a German agent. Everything connected with him pointed to it—his appearance, his description, and his action after arriving at Teneriffe. The *Alwina*, therefore, fell within the first two sub-sections of art. 46 of the Declaration of London, if not within the third. There were grave doubts as to the firm of Buenos Ayres. The very papers of the vessel were false. Everything pointed to the coal being intended for the use of the German cruisers, and if that was so, some contract must have been entered into for the supply. There was nothing in existence. The *Alwina* could not, therefore, be treated as a neutral carrying contraband with the risk of capture attached. She was a vessel actively associated with the enemy. She ought to be treated, therefore, as an enemy ship; and she was liable to seizure on her return and to condemnation as prize, in spite of the fact that the original intention of the shipowner had been frustrated.

Maurice Hill, K.C. and *Bisschop* for the shipowner.—At the time of the seizure of the *Alwina* she was not liable to condemnation. Whatever suspicious circumstances were connected with the ship on her outward voyage, even though she had carried false papers, and whatever her liability to capture on the ground that she carried contraband whilst proceeding to Teneriffe, the offence was over when she started on her homeward journey. There was no doctrine of international law which made a neutral ship the subject of capture as prize when there was no offence being committed. The facts did not in any way show that she was an enemy ship as contended for by the Crown. The true principle was that a neutral ship could not be condemned unless taken *in delicto*. As the *Alwina* had disposed of practically the whole of her cargo —it was not material in any case how she had disposed of it—she was perfectly free on her return journey.

Bateson, K.C. in reply.

Cur. adv. vult.

May 5.—The PRESIDENT.—The steamship *Alwina* is a neutral vessel of Rotterdam, and the property of a Dutch company. She was seized at Falmouth. The claim of the Crown, as it appears by the writ, is that the ship should be condemned as prize on the ground or grounds that at the time of seizure she was on her return passage from taking a direct part in hostilities and supplying or attempting to supply coals to warships, or to the naval forces of the enemies of the Crown, or otherwise being in the employment of the enemies of the Crown in violation of the neutrality of the ship. Before considering and applying the law by which the case must be governed, it is essential to find what are the facts and to determine the nature of the conduct of the vessel and her owner and master in relation to the voyage which it is alleged rendered her subject to seizure and confiscation on her "return passage."

The *Alwina* belonged to the Holland Gulf Stoomvaart Maatschappij, of Rotterdam. The managing directors were the firm of Jos. de Poorter, of Rotterdam, of which Mr. Joseph de Poorter, a Dutch subject, was the sole partner. Mr. de Poorter acted throughout as her owner, and he will hereinafter be so described and treated. The vessel was a steamship of a tonnage of 1115 tons gross and 660 tons net. Her speed was 8-9 knots, with a consumption of fuel of about 9 tons a day. She carried a crew of about seventeen hands. She was a cargo vessel and had no accommodation for passengers. Until the outward voyage to be referred to she had been employed in a Western European trade, chiefly between Holland, England, and France. But suddenly, and without any previous negotiations of which the court has been given any information, on the 16th Oct. 1914 her owner entered into, or purported to enter into, a time charter with a firm described as Messrs. A. M. Delfino y Hermano, of Buenos Ayres, at 700*l.* per month, under which the vessel was "to be employed in such lawful trades between any port or ports in the United Kingdom and (or) the continent of Europe and America (not West) and back finally to a neutral and safe port of America (not West) or Europe as charterers or their agents shall direct."

Apparently the charter-party was signed at Rotterdam. It was signed by Mr. de Poorter, and it was also subscribed with the name of the firm of Messrs. A. M. Delfino y Hermano, the charterers. By whom the name of the latter was signed is not known. There appears to be a firm of the name of Messrs. A. M. Delfino y Hermano who carry on business at Buenos Ayres as shipping agents, and they have acted for (among other shipowners) the Hamburg-South America and the Norddeutscher Lloyd Lines. But it may be stated at once that in the transactions relating to this vessel and her charter and voyages there is no trace in the evidence, except in name only, of any such firm, or of anything done by it, or of any person representing it from first to last.

The charter-party was in evidence, and can be referred to. Under clause 3 the charterers were to provide and to pay for coals, port charges, pilotages, and loading and unloading expenses. Under other clauses of the charter-party they were to pay for the hire in cash every two months in advance, to furnish the master with all requisite instructions and sailing directions from time to time, and they agreed to insure the steamer against all war risks for 17,000*l.* The steamer left Rotterdam on the 19th Oct. 1914, bound for Newport (Mon.). On the same day Mr. de Poorter was apparently in this country. He bought a cargo of Welsh steam coal (about 1500 tons) on that date from Messrs. E. T. Agius and Co., coal merchants, at Newport, to be shipped on the vessel f.o.b.

In his answer to interrogatories, Mr. de Poorter deposed that payment for the coal was received from Messrs. A. M. Delfino y Hermano on or about the same day. This was a bare statement without any particulars. There was no evidence or trace of any such payment. On the 21st Oct. Mr. de Poorter made a declaration before a commissioner in London that he had made all necessary inquiries as to the ultimate destination of the coal shipped by him on the vessel, and that it was not intended for consumption "in any State at present at war with His Majesty." On the next day, the 22nd Oct., the vessel arrived at Newport.

In due course she loaded 1606 tons of steam coal. She also took on board 43 tons of bunker coal to add to the 100 tons already in her bunkers. This was only a comparatively small portion of the fuel required for a voyage to Buenos Ayres. The bill of lading was given on the 26th Oct. The port of delivery was Buenos Ayres, and the consignees were Messrs. A. M. Delfino y Hermano or their assigns, who were to pay freight "as per arrangement." There were three bills of lading in the set. None was produced except the captain's copy. The vessel was cleared from Newport as for Buenos Ayres, and sailed on the 27th Oct. In the crew list from Newport a person named L. A. van Dongan appeared as "steward." In the crew list from Rotterdam this man's name does not appear at all, although he shipped there. In the wage and provision list later he is entered as a "passenger." This man, it was suggested, was on board as supercargo, and there was evidence of this which was not contradicted.

On the 6th Nov. the vessel arrived at Teneriffe on the alleged voyage towards Buenos Ayres. She could not get to her alleged destination, of course, without replenishing her bunkers. The master found it impossible to get coal for that purpose. He tried through Mr. de Poorter. The charterers, whose duty it was to supply the coal, do not appear to have been disturbed by any appeals to provide it. For some reason (unexplained because no evidence was forthcoming for the owner, charterers or master) the master did not venture to deplete his cargo even to the extent of giving his steamer the necessary fuel for the rest of her voyage, although the cargo coal was supposed then to have been the property of the steamer's charterers.

The vessel remained at Teneriffe (Santa Cruz) until the end of December 1914. Almost immediately after her arrival there the master discovered that he was suspected of having on board coal for German cruisers. According to a statement he made to Admiral de Robeck, he and the crew also after they reached Teneriffe had come to the conclusion that the probable object of the voyage was to coal a German warship or German warships. Mr. de Poorter wrote to the British Consul-General at Rotterdam later that the con-

signees (Messrs. A. M. Delfino y Hermano) gave instructions direct to the master. No evidence of any such instructions was given to the court. Probably by reason of the failure to obtain bunker coal, Mr. de Poorter instructed the master by cable about the 25th Nov. that the hire had not been paid, that the charter had therefore been cancelled, and that he should sell the coal. Various attempts were made to sell it. A contract seems to have been made through Van Dongan to sell to a Spaniard.

The log of the vessel has two pages, namely, 55 and 56, missing, which would have contained entries from the 23rd Nov. to the 11th Dec. Ultimately the coal was sold on the 19th Dec. to British merchants, Messrs. Hamilton and Co. Terms were made that a certain quantity should be left for bunkering purposes. It is unnecessary to point out in detail the inconsistent and uncorroborated accounts given in the correspondence and the answers to interrogatories of alleged arrangements made between Mr. de Poorter and Messrs. A. M. Delfino y Hermano about the voyage, the payment of the hire, the cancellation of the charter-party, the sale of the coal, and so forth. They are worthless and wholly unreliable. Van Dongan left the vessel at Teneriffe. The court has not been informed what became of him. While still on the ship he appears to have advanced the master some money for expenses. The latter described him in a letter written in Dutch as "old charterer's agent" (in English and in inverted commas), and in others as the "passenger we have on board" and "our time charterer." Whether he was a Dutchman or a German has been left in doubt. Whether he was acting for Mr. de Poorter or Messrs. A. M. Delfino y Hermano, or both, can only be a matter of conjecture; but that his part in the transaction was not an honest commercial one is obvious.

The cargo was delivered in due course by the master to Messrs. Hamilton and Co., and was paid for by them. It was declared by the master at the time of the sale to have been the property of Mr. de Poorter.

The vessel left Teneriffe on the 30th Dec. for Madeira for orders. She was boarded by British naval officers off Funchal on the 2nd Jan. 1915, and her papers were examined. The admiral ordered her to go to Gibraltar for further examination, accepting the undertaking of the master to take her there, as there was no accommodation for a prize crew. She arrived at Gibraltar on the 6th Jan. 1915, and was again boarded by British naval officers. Her master and the papers were further examined. The boarding officer signed a certificate as follows on the 7th Jan.:

> I hereby certify that I have examined the papers and questioned the master of the ship about his cargo, he having been sent into this port by H.M.S. *Argonaut* for further examination. I have reported to the senior naval officer all details, and I have given the said master permission to proceed to sea.

The ship accordingly proceeded to sea on a voyage to Huelva, pursuant to orders from her owner to load a cargo of sulphur ore, shipped by the Rio Tinto Company Limited, and consigned to the Netherlands Government on behalf of the purchasers, the Centrale Guano Fabrieken, at Rotterdam. The charter-party had been arranged by Mr. de Poorter at Rotterdam. It was dated the 31st Dec. 1914, and it was made between his company and the Centrale Guano Fabrieken. The bill of lading was dated the 10th Jan. 1915. The ship called at Falmouth, arriving on the 20th Jan. The authorities at the port seem at first to have suspected the cargo of sulphur, but on the 23rd Jan. the seizure was made on the grounds already referred to and set out in the writ. I may briefly state that another ship of the same type belonging to the same owner, the *Josephina*, carrying coal from Cardiff to Buenos Ayres under a similar charter-party between Mr. de Poorter and Messrs. A. M. Delfino y Hermano, started a few days before the *Alwina*, and got to various places on the South American coast, and was finally captured and condemned by the Prize Court of the Falkland Islands for carrying contraband, namely, coal, with the object of coaling German war vessels. Neither Mr. de Poorter nor Messrs. A. M. Delfino y Hermano, nor the ship's master, appeared in those proceedings.

The material question of fact which I have to decide is what was the character of the outward voyage on which the *Alwina* was engaged up to the time when she discharged the coal at Teneriffe. On behalf of the Crown it is claimed that the evidence established that the vessel was taking a direct part in the hostilities, or that she was under the orders or control of an agent placed on board by the enemy Government, or was in the exclusive employment of the enemy Government, and that she should be regarded and treated on these grounds as an enemy vessel under art. 46 of the Declaration of London as adopted by the British Orders in Council. In any event, it is claimed that if she was to be regarded as a vessel engaged in carrying contraband to the enemy she could be captured on her return voyage and subjected to condemnation for her offence on the outward voyage. In my view, there is no evidence which would warrant the court in finding that she came within either of the categories specified in art. 46. It may be noted that the words "in the exclusive employment of the enemy Government" in head 3 are in the official French "affrété en totalité par le Gouvernement ennemi." The correct finding, in my view, is that the vessel, being a neutral vessel, was carrying contraband—namely, coal—intended to be delivered to enemy agents, or enemy vessels of war encountered on the voyage, and that she was so carrying the contraband with false papers, with a suspicious super-cargo, with a false destination, and in circumstances amounting to fraud in regard to belligerents. It matters not for the purpose of this decision who acted for Messrs. A. M. Delfino y Hermano, the alleged charterers and consignees and purchasers, if any one did. Their name may have been used with their consent by Mr. de Poorter for his own purposes and for his sole profit, or for the joint profit of both. What is clear is that Mr. de Poorter, the shipowner himself, was an active party in the attempt to convey the contraband to the enemy by the false and fraudulent tricks and devices which were adopted.

Upon this finding the matter of law for decision is whether the *Alwina* was subject to confiscation at the time of her seizure at Falmouth on the 23rd Jan. 1915. The general rule which has been acted upon is that when a neutral vessel carries

contraband goods they are confiscable if captured *in delicto*; and that the vessel also, if it belongs to the same owner, or if the owner has been implicated in a transaction veiled over with false papers or other deceitful devices, is subject to the same penalty. But when the goods have been deposited at the port or place of destination, the ship and cargo upon the return voyage are exempt from the penalty: (*The Imina*, Roscoe's English Prize Cases, vol. 1, 289; 3 Ch. Rob. 167). But exceptions were made at the beginning of the last century where the outward voyage was made under false papers or with a false destination, or in circumstances where the voyage has been conceived and contrived so as to deceive and to practise a fraud upon a belligerent. In these latter cases the vessel and cargo have been held to be affected upon the return voyage also.

It was, however, strenuously argued before me that, according to the Law of Nations as now understood, the vessel and her cargo upon the return voyage are free from the risk of capture in respect of the carriage of contraband goods on the outward voyage, however that voyage was conceived or carried out. In one aspect of the present case, no question relating to the law applicable to the return voyage would arise. In the other it would; and I will therefore consider the question later.

The aspect first referred to is this: The original intention of the owner was to carry contraband goods to and to deliver them to the enemy. That intention continued until the vessel failed to obtain bunker coal at Teneriffe, and possibly until the sale to Messrs. Hamilton and Co. But, in fact, the goods were never carried or delivered to the enemy at all; on the contrary, they were sold and delivered to a British firm. This course was no doubt forced upon the vendor. But in these circumstances could any penalty afterwards attach to the ship, arising out of the original intention and its attempted performance?

The terms "offence" and "penalty" have often been used in reference to the carriage of contraband goods, and their use does no harm as long as it does not produce confusion of thought. But it must be borne in mind that neutral merchants have the right to supply the enemy with such goods, subject only to the risk of losing their property. Using the word "offence" in this way, it is clearly committed from the beginning of the voyage, and continues as long as it is in process of being carried out. But, according to the principles of prize law, if the intention and voyage have been clearly abandoned before seizure or capture, the offence is dissipated and purged, and neither the goods nor the carrying instrument are subject to the penalty of confiscation, the *delictum* being over. This is the reason, I think, why no authority can be produced to the contrary. A similar principle applies where vessels have intended to run a blockade.

Two cases may be referred to in illustration of the application of the doctrine in reference to blockade and contraband respectively, even where the voyage had been abandoned, or its character changed by force of circumstances outside the voluntary intention of those responsible for the vessel and goods. Both were decided by Sir William Scott in 1807. They are *The Lisette* (Roscoe, vol. 1, 587; 6 Ch. Rob. 387) and *The Twende Sostre* (*ibid.*, in a note at p. 390).

In the latter case the vessel was carrying contraband goods to the Cape of Good Hope while it was Dutch, but was not captured as prize until after it had been surrendered and became a British possession. Sir William Scott in his judgment said: "If the port had continued Dutch, a person could not, I think, have been at liberty to carry thither articles of a contraband nature under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination; but before the ship arrives a circumstance takes place which completely discharges the whole guilt, because, from the moment when the Cape became a British possession the goods lost their nature of contraband. They were going into the possession of a British settlement, and the consequence of any pre-emption that could be put upon them would be British pre-emption. It has been said that this is a principle which the court has not applied to cases of contraband, and that the court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction, because the principle on which the court proceeded was that there must be a *delictum* existing at the moment of seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing, and so it might be with respect to the design of the party, and if the seizure had been made while the offence continued, the property would have been subject to condemnation. But when the character of the goods is altered, and they are no longer to be considered as contraband, going to the port of an enemy, it is not enough to say that they were going under an illegal intention. There may be the *mens rea*, not accompanied by the act of going to an enemy's port. I am of opinion, therefore, that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade. I am not aware of any cases in which the penalty of contraband has been inflicted on goods not *in delicto*, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded? On this, that the right of capture having been defrauded in the original voyage, the opportunity should be extended to the return voyage. Here the opportunity has been afforded till the character of the port of destination became British. Till that time the liability attached; after that, though the intention is consummated, there is a material defect in the body and substance of the offence, in the fact though not in the intent. I am of opinion that it is a discharge, and a complete acquittal, that long before the time of seizure these goods had lost their noxious character of going as contraband to an enemy's port."

The same principle has been adopted and acted upon in the most recent wars by the Prize Courts of other countries. In the case of the *Lydia*, tried in 1906 in the course of the Russo-Japanese War, the decision of the Prize Court of Sasebo, and of the Higher Prize Court of Japan on Appeal, proceeded upon the ground that a ship transporting contraband of war to an enemy port was liable to confiscation so long only as her intention to proceed to such a port had not been abandoned at

the time of the capture: (Takahashi's International Law, 674-683). In the case of *The Lincluden* or *Rincluden* (1905) the Prize Court at Sasebo found that the ship had intended to take contraband goods to Vladivostock — an enemy naval base—and also that her papers were false. Nevertheless, as the result of the court's investigation was that the ship had actually abandoned her first object of going to Vladivostock at the time of capture, and was steaming for a Japanese port to deliver the goods there, the court released the ship and cargo: (Takahashi, 741). The *Sishan* is also an instance where a similar principle was applied in the case of an original intention—which was abandoned before capture—of running a blockade and delivering contraband goods at a blockaded port: (Takahashi, 742).

It will be observed also from the authorities and from the provisions of the Declaration of London as modified and adopted, which will be cited and considered hereafter in reference to the outward voyage of contraband cargo, and the effect upon the ship's homeward voyage if false papers were carried on the outward voyage, that the assumption has always been that the contraband goods have been captured *in delicto* while upon the intended voyage to the enemy destination, or, in case of a capture of a vessel on her return or homeward voyage, that the contraband goods had actually been delivered to the enemy, or carried to the enemy destination.

Upon this aspect of the present case, I am of opinion that the result, according to the principles and rules of international law, is that inasmuch as the original intention to carry and deliver the contraband goods to the enemy had been frustrated and abandoned, and the goods themselves had been sold and delivered to other buyers when the vessel was seized, she had become freed from any liability to confiscation.

If this conclusion should be brought to the examination of the Tribunal of Appeal, and should not meet with approval, it may be necessary to consider the case in its other aspect. The question argued is of substantial practical importance. It is whether, according to international law as now understood, and as it should be administered in this court, a vessel which may have been subject to capture and confiscation for carrying contraband goods on an outward voyage remains subject to capture and confiscation upon the return voyage, if on the outward voyage the ship carried false papers or had a false destination, or was otherwise engaged in a deceptive and fraudulent transaction for the purpose of defeating legitimate belligerent rights.

It will be remembered that in his judgment in *The Tvende Sostre* (*ubi sup.*) Sir William Scott referred to "the recent class of cases repecting the proceeds of contraband carried outward with false papers." The reported cases of that class commence about 1800 with *The Nancy* (3 Ch. Rob. 122). A couple of years later (1802) the Lords Commissioners of Appeal in Prize Cases lent their high authority to the legal proposition that the carriage of contraband outward with false papers would affect the ship as well as the return cargo with condemnation: (see the *Rosalia* and *Elizabeth* mentioned in a note to the Table of Cases in front of vol. 4 of Ch. Rob.). On reference to the record it will be seen that the *Rosalia* had sailed outward from Hamburg in June 1798 with contraband under a fraudulent destination to Tranquebar, but being actually destined to the Isle of France, where she delivered it. The vessel was captured on the 25th May 1799 on a return voyage from the Isle of France to Hamburg. Both the vessel and the cargo (said to have been the proceeds of the outward voyage) were condemned.

As to *The Elizabeth* (*ubi sup.*), the record shows similarly that she sailed outward from Hamburg in May 1798, and carried contraband cargo to the Isle of France, where it was delivered, whereas her papers falsely showed a destination to Tranquebar. She was captured on the 30th March 1799 on the return voyage from the Isle of France to Hamburg. In this case also both the vessel and the cargo were condemned. Subsequently the Lords of Appeal in *The Baltic* in 1809 (1 Acton, 25) and in *The Margaret* in 1814 (1 Acton, 333) regarded the matter as settled, even if the return cargo did not represent the proceeds of the outward contraband. Sir William Grant, who presided and delivered the judgment in the *Margaret*, said: "The principle upon which this and other Prize Courts have generally proceeded to adjudication in cases of this nature (that is where there were false papers) appears simply to be this: that if a vessel carried contraband on the outward voyage she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal; the sentence of the court below (which was one of condemnation of both ship and cargo) being perfectly valid, and consistent with the acknowledged principles of general law."

It is worth noting that in that case the outward voyage had taken place over three years before the capture, the vessel being engaged in various parts from 1804 to 1807.

The doctrine of these decisions has been criticised by jurists. The criticism began early by Wheaton in 1815. He called it an innovation not founded upon principle, and argued that to subject the property to confiscation while the offence no longer continued would be to extend it indefinitely, not only on the return voyage but to all future voyages of the same vessel, which could never be purified from the contagion communicated by the contraband articles: (see Wheaton's Maritime Captures, 183). This criticism has been repeated literally by many since—but it does not appear to be sound, nor does the conclusion drawn seem to be warranted.

Quite the opposite view was taken and expressed by the Supreme Court of Mr. Wheaton's own country many years later, when Marshall, C.J. and Story, J. were members of the court. The Supreme Court passed under review the cases already referred to (with others) in 1834 in *Carrington* v. *Merchants' Insurance Company* (8 Peters, 518). Of them Story, J., in delivering the judgment of the court, said: "We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust that there is great soundness in the doctrine as a reasonable interpretation

of the law of nations. The belligerent has a right to require a frank and *bonâ fide* conduct on the part of neutrals in the course of their commerce in times of war, and if the latter will make use of fraud and false papers to elude the just rights of the belligerents and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated."

This country in practice has certainly never given up in such cases the right of capture on the return voyage. In Wildman's International Law (1854) and in his Plain Directions to Naval Officers as to the Law of Search, Capture, and Prize (1854) after the outbreak of the Crimean War, the doctrine is maintained.

In Godfrey Lushington's Manual of Naval Prize Law, published with the authority of the British Admiralty in 1866, the paragraph relating to the matter is as follows: "A vessel which carried contraband goods becomes liable to detention from the moment of quitting port with the goods on board and continues to be so liable until she has deposited them. After depositing them, the vessel, in ordinary cases, ceases to be liable; and therefore, as a general rule, a commander should not detain a vessel for carrying contraband goods unless he finds them actually on board. But simulated papers are an aggravation of the offence. If, therefore, a commander meets with a vessel on her return voyage, and ascertains that on her outward voyage she carried contraband goods with simulated papers, he should detain her; and the fact that the return cargo has not been purchased by the proceeds of the outward contraband cargo makes no difference." The paragraph in the manual edited by Mr. Holland in 1888 (par. 80) is in identical terms. It is right in passing to mention the cases of *The Allanton* (Russian Cases in Russo-Japanese War, 1) and *The Eastry* (Takahashi, 739). These decisions, however, proceeded in accordance with the written code of prize regulations of Russia and Japan respectively, made for that war.

In 1908 the memorandum issued by the British Foreign Office by way of instructions to the British delegates to the London International Naval Conference of that year deals with the matter as follows:

(6) A ship carrying contraband as defined in sect. 1 may be seized at any moment throughout the whole course of her voyage, so long as she is on the high seas or in belligerent waters. The liability to seizure is not affected by the fact that the vessel is intending to touch at some neutral point of call before reaching the hostile destination. When the contraband goods have been discharged the liability to seizure is at an end. In exceptional cases it has been held that a ship which has carried contraband to the enemy on her outward voyage under circumstances aggravated by fraud and simulated papers is still liable to capture and condemnation on her return voyage.

I may finally mention that, according to the present German code, if the vessel carried contraband to the enemy contrary to the indications of the ship's papers, she is liable to capture and condemnation until the end of the war.

In these circumstances, whatever may have been written by jurists, I am not prepared to pronounce that the rule of international law upon the subject, which has been declared and acted upon in this country by the highest Prize Courts, as also in those of America, has ceased to be in force. The ease with which in the circumstances of modern maritime trade papers and destination can be falsified and frauds can be carried out, in no way minimises the obligations of neutrals engaged in such trade in time of war to act with frankness, straightforwardness, and good faith.

I accordingly should hold that a vessel which had been used by its owner by means of false papers, with false destination, and any deceitful practices intended to elude the right of capture by belligerents, to carry contraband goods to the enemy, and which had delivered such goods on an outward voyage, remains confiscable upon the return voyage also. What would constitute the return voyage would depend upon all the circumstances of the particular case.

I have stated my view of the law at this stage before considering the effect of the Orders in Council in reference to the provisions of the Declaration of London, by reason of the doctrines as to the force of the Orders in Council which were declared by the Privy Council in the recent case of *The Zamora* (see *post*; 114 L. T. Rep. 626; (1916) 2 A. C. 77).

I will deal shortly with these Orders in Council. That of the 28th Aug. 1914 affected the voyage of the *Alwina* when it began. That of the 29th Oct. came into force while the voyage was still in progress, and the offence in the sense mentioned was continuing.

Art. 38 of the Declaration said:

A vessel is liable to capture for carrying contraband, but not for having done so.

That provision was not ratified. It was modified by the Order in Council of the 30th Aug. by the following:

A neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having carried such contraband, if she is encountered before she has completed her return voyage.

For this the Order in Council of the 29th Oct. substituted the following provision:

A neutral vessel, with papers indicating a neutral destination, which notwithstanding the destination shown on the papers, proceeds to an enemy port, she is liable to capture and condemnation if she is encountered before the end of her next voyage.

If the law was as I have stated, these provisions do not operate in extension of it, but, if anything, as a mitigation of the captors' rights. Therefore, according to *The Zamora* (*ubi sup.*), they are not invalid. It is not necessary in the present case to decide which is applicable. It is only if the vessel succeeded in carrying contraband to the enemy in the one case, or if she proceeded to an enemy port in the other, that the penalty on the return, or next voyage, would attach.

For the reasons given, in any view of the present case, as the goods were never delivered to the enemy, the vessel was immune when she was captured, and an order must be made that the owner was entitled to her restitution. By reason of his conduct, however, I order that he do bear and pay the costs and expenses of and

incident to the capture and detention, and also of and incident to these prize proceedings.

As it appears that the vessel was delivered up on bail, the form of the judgment will be a declaration of the right to restitution on payment of such costs and expenses, and an order that the bail be released upon such costs and expenses being paid into court.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Tarry, Sherlock,* and *King.*

Supreme Court of Judicature.

COURT OF APPEAL.

April 10, 11, 12, *and May* 12, 1916.

(Before Swinfen Eady, Pickford, and Bankes, L.JJ.)

Becker, Gray, and Co. *v.* London Assurance Corporation. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Perils — "Men-of-war" — "Restraints of princes"—"Enemies"—British goods on enemy vessel—Ship putting into neutral port to avoid capture—Legality of further performance of contract on outbreak of war—Loss of venture—Whether proximately due to perils insured against.

In June 1914 *the plaintiffs sold certain goods to a German firm, the property not to pass until the goods arrived at the port of destination. The goods were loaded on the German steamship* K. *for a voyage from Calcutta to Hamburg.*

While the K. *was on her voyage, war broke out between Great Britain and Germany. The master of the* K. *thereupon put into Messina. The plaintiffs gave notice of abandonment to the defendants, the insurers, on the 1st Sept. and again on the 15th Dec. Bailhache, J. found that the voyage from Messina to Hamburg could not be continued, that the master had no intention of prosecuting the voyage until after the war, and that the voyage was practically abandoned when the vessel put into Messina. The policy of insurance covered the usual perils, including "men-of-war . . . enemies . . . takings at sea, arrests, restraints, and detainments of all kings, princes, and people . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises." The plaintiffs' claim was for a total loss under the policy.*

Held, that there was no loss by the perils insured against. The ship was never in peril of capture, for her commander resolved not to incur that risk; the loss was not due to "enemies," for the refusal of the commander to deliver up the goods at the port of refuge was not a peril from "enemies" within the meaning of the policy; nor was there a loss due to "restraints of princes."

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

British and Foreign Marine Insurance Company *v.* Samuel Sanday and Co. (ante, *p.* 289; 114 *L. T. Rep.* 521; (1916) *A. C.* 650) *distinguished.*

Judgment of Bailhache, J. affirmed.

Plaintiffs' appeal from a judgment of Bailhache, J. in the Commercial list.

The facts appear sufficiently from the headnote and the judgments.

Butler Aspinall, K.C., *Leck,* K.C., and *R. A. Wright* for the plaintiffs.

Leslie Scott, K.C., *Adair Roche,* K.C., and *T. Mathew* for the defendants.

July 5, 1915.—Bailhache, J.—This is an action against underwriters on goods, the goods being a part cargo of jute under a policy which is dated the 28th June 1914 and on a voyage from Calcutta to Hamburg in a German steamer, the *Kattenturm.* This particular part of the cargo, the portion with which I am concerned, was sold on the 11th June 1914 to a German firm, but it is conceded that on the material dates the property in the goods remained in the plaintiffs in this case, the sellers. The *Kattenturm* left Calcutta in July. Finding that war had broken out, the master on the 5th or 6th Aug. put into the Italian port of Messina, and afterwards shifted from Messina to Syracuse, and was in Syracuse from the 4th Sept. onwards. The shifting from Messina to Syracuse is of no importance so far as the point which I have to decide in this case is concerned. When the ship put into Messina, and afterwards again while she was at Syracuse, the plaintiffs gave notice of abandonment. They gave their first notice on the 1st Sept., they gave the second notice on the 16th Dec., and they issued their writ on the 17th Dec. The underwriters declined to accept either notice of abandonment, but in both cases stated that they would treat the matter as though a writ had been issued in this case. I have to consider, therefore, what the state of affairs between these parties was at the beginning of September in the year 1914. On that date the *Kattenturm* was with this jute on board in Messina or in Syracuse. The master put into Messina because he thought that was a prudent thing to do. His was a German ship; the French and English fleets were watching the seas, and he felt, and quite rightly felt, that if he had proceeded on his voyage the ship was in grievous danger of capture. A letter has been put in, and is to be treated by me as evidence in this case, from the Admiralty, in which they say; "I am commanded to inform you that any German steamer proceeding on or after the 5th Aug. last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral territorial waters"; and I have no doubt that the master, from his point of view, did a very prudent and the most prudent thing that he could do when he put into Messina. The plaintiffs made many attempts to get possession of this portion of the cargo which belonged to them. The master was willing to give it up, but he was only willing to give it up on certain terms, the most material of which was that he demanded the payment of his freight in full. In the result, and after many efforts and threats of legal proceedings, the master was induced to give the cargo up, and the cargo was ultimately sold by the plaintiffs to an Italian buyer, for a sum of

a little over 1000*l*. I am not concerned with that matter very much, because the question which I have to determine is not what happened to the cargo afterwards, but what was the position of affairs in September; and, moreover, it was agreed, and quite rightly agreed, between the cargo owners and underwriters that the efforts which the cargo owners made to secure possession of the cargo and to realise it for the best price that they could obtain for it should not in any way prejudice their rights if they had any under the notice of abandonment which they had long before that given. It is, of course, abundantly clear that the voyage from Messina to Hamburg could not in fact be continued. A letter has been read to me in which the agents of the Hansa Line, who are the owners of the steamer, say that the master had not given up all thoughts of prosecuting the voyage, but I have no doubt myself that the master had no thought of prosecuting the voyage at all until the termination of the war. When the termination of the war will be nobody knows, and at any rate it is certain to be so long and indefinite a period that the voyage was taken to be abandoned, and was no doubt for all practical purposes abandoned, when the master put into Messina.

The policy contained the usual restraints of rulers and princes clause, and Mr. Butler Aspinall has argued that the loss of the venture—not the loss of the goods, because the goods were not themselves lost; they were sold for a considerable sum of money, but the loss on the venture—which, as the law now stands, constitutes a constructive total loss of the goods, is due to one of the risks insured against; and he refers more particularly to the words "men-of-war." He refers, of course, to the whole of the clause, but the words which he most particularly relies on are the words "men-of-war." The plaintiffs put their case in two alternative ways. They say in addition that after the vessel put into Messina to have allowed this cargo to go on would have been trading with the enemy contrary to English law and contrary to the proclamations which were in force at the time; and then they say that the goods were further lost because they were in possession and the control of alien enemies, namely, the master and owners of the *Kattenturm*, and that the alien enemies declined to give the goods up. So far as the last alternative is concerned, it is sufficient to say that that was not pressed by Mr. Butler Aspinall; it was not withdrawn by him, but so far as I can see there is nothing at all in that point. As to the trading with the enemy point, I do not think that really arises in this case because if there was any loss at all it must be put that there was a loss of the venture, and a complete loss and destruction of the venture, when the *Kattenturm* put into Messina. I find as a fact that the master, notwithstanding his owners' letters or his agent's letters, had no intention of prosecuting the voyage further than Messina within a time which would have been commercially practicable at all, and that the voyage was there and then abandoned. The loss of goods, so far as they were lost, was due to the fact that the voyage was abandoned at Messina, and that there was a destruction of the commercial adventure there. I do not think, therefore, that the second alternative upon which Mr. Butler Aspinall relied, but not strongly, is a matter which I need seriously consider.

What I have seriously to consider is whether the goods were lost within any of the words of the restraints of princes clause in the policy, and in particular whether they were lost owing to men-of-war. The position was that, when the master arrived at Messina, if he had prosecuted his voyage he would have been in serious danger of capture, and it is quite likely, and I anticipate, that if he had in fact prosecuted his voyage and gone much further he would have been captured either by the French or the British fleets. He put into Messina because he was afraid of that event happening. Does that bring him within the words of the policy? Whether the avoidance of a peril, or an attempt to avoid a peril, is in substance the same thing as a loss by the peril depends very much on what the nature of the peril is, and it seems to me quite clear upon the cases that an attempt to avoid capture is not the same as a loss by capture. I do not think it is absolutely necessary that there should be a *de facto* capture; I think that appears from the case of *Butler* v. *Wildman* (3 B. & Ald. 398), the case of the Spanish dollars. On the other hand, it is quite clear that the avoidance of a peril under most circumstances is not the same as loss by the peril itself. That appears from a number of cases; it appears from the case of *Hadkinson* v. *Robinson* (3 Bos. & P. 388) and from the case of *Kacianoff* v. *China Traders' Insurance Company Limited* (12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121), and also from an intermediate case between those two, *Nickels and Co.* v. *London and Provincial Marine and General Insurance Company*, a decision of Mathew, J. (6 Com. Cas. 15).

That being the state of the authorities, and bearing in mind that actual capture or actual seizure by men-of-war is not necessary, bearing in mind that the peril must have begun to operate, to use the expression in the *Kacianoff* case (*sup.*), and, to use another expression which is in *Hadkinson* v. *Robinson* (*sup.*), that the peril must be operating directly and not circuitously, what one has to consider is, What is the true view to be taken upon the facts in this case? It is quite obvious to me that is a question of degree, and, that being so, the dividing line between one case and another must often be very thin and very subtle. It appears from the *Kacianoff* case that if the *Kattenturm* had been chased into Messina the peril of capture would have begun to operate, and I think in that case it might be said that the abandonment of the voyage, the constructive total loss of the goods by the destruction of the venture, was caused by a peril within the policy. If one looks at *Butler* v. *Wildman* (*sup.*) precisely the same thing happened there, only in an accentuated degree. In that case there not only was the ship chased by a hostile man-of-war, but the chase was so hot that the master of the ship preferred to throw the valuable cargo that he had, the Spanish dollars, into the sea rather than that they should fall into the hands of the enemy. Therefore the dollars were not actually captured by the enemy, but there was clearly a loss by capture and the courts so held. In this case there was no chasing by a hostile man-of-war at all. There was no sighting of a hostile man-of-war. The *Kattenturm* was not driven

by either the chasing or the sighting or the intelligence of a particular man-of-war into Messina. The master went into Messina because he feared, and rightly feared, that if he prosecuted his voyage the ship would be captured. The truth of the matter is that he went into Messina to avoid the peril of capture. To use the words upon which Mr. Butler Aspinall most relied, he went into Messina to avoid the peril from "men-of-war" which he would have incurred if he had proceeded upon his voyage.

Those being the considerations on one side and the other, which was it? Had the peril of capture, the peril of "men-of-war," begun to operate, or was this a case where the master had in time gone into a port to avoid the commencement of the operation of that peril? Of course, obviously, that is a point about which different people will have different views. My own view about it, and I entertain quite a clear view, is that the master went into Messina to avoid the peril of men-of-war and to avoid the peril of capture. He went in, not that the peril was not a very real one, but he went in time to avoid the beginning of the peril of capture. The peril of "men-of-war," to use the words of the Lords Justices in the *Kacianoff* case (*sup.*), had not begun to operate, and the master very prudently went into Messina. It may very well be that the assured would have desired to insure himself against that very event. So far as he was concerned, except that he got considerable salvage out of it—apart from that—the goods were lost to him, and were equally lost to him as they would have been if the ship had been captured. I am reminded that in this case the goods were English goods, and that if the ship had been captured by a British or French ship there would have been no loss of the goods; but in the ordinary case except for salvage the goods would be just as much lost where a ship puts into port to avoid the commencement of the peril as if they are lost by the peril itself. But I have to construe the words in this policy, and I have to say whether the risks which are mentioned in the policy were risks which in fact caused the loss. In view of the decisions in those cases, I am unable to say that the goods were lost, that the venture was destroyed, by any risk insured against. There was a case of very considerable importance which came first of all before me and afterwards before the Court of Appeal. The name of it is *Sanday and Co.* v. *British and Foreign Marine Insurance Company* (*sup.*). There was a division of opinion in the Court of Appeal, but my judgment was affirmed by a majority. I discussed this very point in that case, and although I am reluctant to refer to any decision of my own, yet it does express the view that I entertained at that time, and the view which I still entertain, of the law applicable to this case. I say on p. 788 (1915) 2 K. B.: "One last point remains: Was the restraint of princes the proximate cause of the loss? The defendants say no, and refer me to a line of cases of which *Hadkinson* v. *Robinson* (*sup.*) is an early example, and *Kacianoff* v. *China Traders' Insurance Company* (*sup.*) is, I think, the latest. The plaintiffs, on the other hand, refer me to *Miller* v. *Law Accident Insurance Company* (9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712). It is, I think, correct to say that the *Hadkinson* v. *Robinson* line of cases proceeds upon the principle that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so avoided. In deciding within which set of authorities a given case falls it must always be borne in mind that much depends upon the character and description of the particular peril which has to be alleged and relied upon as the cause of the loss." Notwithstanding that it is my own expression of the law, I think that is sound, and being of the same opinion, and applying the same test to the facts of this case, I have come to the conclusion that this case is not like but is the opposite of *Sanday's* case, and that these goods were not lost by a peril insured against.

The result must be that my judgment is for the defendants with costs.

The plaintiffs appealed.

Sir *John Simon*, K.C., *Leck*, K.C. (*Butler Aspinall*, K.C. and *R. A. Wright* with them) for the plaintiffs.—The adventure was frustrated by the perils insured against—namely, (1) "men-of-war," (2) "restraints of princes," and (3) "enemies." In *British and Foreign Marine Insurance Company Limited* v. *Samuel Sanday and Co.* (*ante*, p. 289; 114 L. T. Rep. 521; (1916) A. C. 650) British goods were on a British ship, while here they were on an enemy ship, but the principle of that case applies. The declaration of war put an end to the subject-matter of the adventure assured, as British subjects were forbidden to be concerned with the adventure for an indefinite period. The declaration of war therefore amounted to a restraint of princes, the adventure was destroyed, and there was a constructive total loss. Secondly, the German master of the *Kattenturm* was in immediate peril of capture when he put into Messina. Whether a loss is due to capture or fear of capture is a question of degree. Here the peril operated directly, causing the loss. It was not a case of a ship remaining in port from fear, but of putting into port. Thirdly, the goods were on an enemy ship in control of an enemy master, who, by order of his Government, was debarred from dealing with the assured or delivering up the goods, and that is a peril of "enemies," a loss by the restraint of an enemy prince. As to "restraint of princes," this case depends on *British and Foreign Marine Insurance Company* v. *Samuel Sanday and Co.* (*sup.*) and falls within that decision. The British owners of the goods were prevented from further pursuing the adventure. The contract of affreightment was automatically terminated by the outbreak of war. Even if that were not so, it was impossible to tender the goods to German purchasers as that would have involved dealing with the enemy. The fact that the ship here was German does not distinguish this from *Sanday's* case. The duty of the owners of the goods was to prevent the adventure being carried through, and he could not tender the shipping documents. The adventure was that of the plaintiffs' goods to Hamburg and not that of the ship, and by a peril insured against the goods could go no further. When the war broke out there was a destruction of the owners' adventure entitling them to give the defendants notice of abandonment, and there was a constructive total loss. If the goods had reached Hamburg, even then there would have

been a loss, because they would have been seized by the enemy. If the jute had belonged to a neutral, the adventure would not have been destroyed, which shows that the loss was by "restraint." They referred to

Kurberg (Arnhold) and Co. v. *Blythe, Green, Jourdain, and Co., ante*, p. 235; 114 L. T. Rep. 152; (1916) 1 K. B. 495;

Arnould on Marine Insurance, vol. 2, sect. 1142.

As to "capture," *Rodocanachi* v. *Elliott* (31 L. T. Rep. 239; L. Rep. 9 C. P. 518) is closely analogous. The peril of "men-of-war" operates here directly, not circuitously. In these days of steamships and wireless telegraphy, capture may be regarded as certain, while in the days of sailing ships there was no certainty of capture. They referred to

Kacianoff v. *China Traders' Insurance Company*, 12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121;

Hadkinson v. *Robinson*, 1803, 3 Bos. & P. 388;

Phillips on Insurance, 3rd edit., sect. 1115, p. 657.

Sir *Robert Finlay*, K.C. and *T. Mathew Leslie Scott*, K.C. and *Adair Roche*, K.C. with them) for the defendants.—The contention of illegality in the further performance of the contract fails, for it is contrary to the findings of Bailhache, J., who found that the venture became impracticable on account of the fear of capture. What was insured was the transit of goods to Hamburg and of the goods for fifteen days after, but not the commercial venture of selling the goods. The "restraint" in any case was not the proximate cause of the loss, but the desire of the German master not to lose his ship. The plaintiffs are not entitled to take advantage of what might have been a good reason for abandoning the venture if they had acted upon it. If the jute had belonged to a neutral owner, he would have acted just as the plaintiffs did. [They referred to the judgment of Bailhache, J. (*sup.*) and *Sanday's* case (*sup.*).] As to "capture," *Hadkinson* v. *Robinson* (*sup.*) and *Kacianoff* v. *China Traders' Insurance Company* (*sup.*) are perfectly sound law, and Bailhache, J. was right when he said the ship was not driven in port by peril of capture, but went into port before the peril was incurred. To avoid danger is not to incur loss through that danger. In sect. 1115 of Phillips on Insurance, the learned author was trying to overthrow the decisions in *Hadkinson* v. *Robinson* and similar cases, but since the date of his book (1854) such cases have been recognised here as good law, and sect. 1115 is in opposition to English law. His contention is also contrary to *Kacianoff* v. *China Traders' Insurance Company* (*sup.*), which case is a conclusive answer to Phillips. *Rodocanachi* v. *Elliott* (*sup.*), though in point in *Sanday's* case, has little bearing on the present case. As to the peril of "enemies," there is no evidence of any prohibition by the German Government against giving up the goods to a British subject, nor is there any need to assume that the German law in this respect is like the English. It is clear that the plaintiffs did not found their claim on any illegality, but on the refusal of the German captain to deliver up the goods to British subjects. They referred also to

Nobel's Explosive Company Limited v. *Jenkins*, 8 Asp. Mar. Law Cas. 181; 75 L. T. Rep. 163; (1896) 2 Q. B. 326; 1 Com. Cas. 436.

Sir *John Simon*, K.C. in reply.—The facts here are practically the same as in *Rodocanachi* v. *Elliott* (*sup.*). In *Kacianoff's* case (*sup.*) Lord Reading, C.J. says at p. 1127 of the Law Reports: "The fact of the vessel remaining in port and discharging the cargo there and then was preventing the peril from operating; it was making it impossible that the peril should operate. It would have been a totally different state of things if the vessel had left, and then, outside, had been met and threatened, or if approaching Nagasaki she had been in some danger." That passage applies here, for the ship when at sea put into port owing to the certainty of capture if she proceeded. We do not say here that the voyage of the German ship was illegal, but that the commercial adventure was terminated by illegality. It is plain that if the owner of the jute had been neutral he could not have succeeded against the underwriters as regards "restraint." A notice of abandonment is not good or bad according to whether its giver gives the right reason; the object of the notice is to give information for the benefit of the insurer, not reasons of abandonment. The plaintiffs are entitled to recover because this was a case of British goods going to Germany and the venture was frustrated by "men-of-war," "restraint of princes," and enemies. He referred to

Marine Insurance Act 1906, ss. 60, 61, 62, 63;

Zinc Corporation Limited v. *Hirsch*, 114 L. T. Rep. 222; (1916) 1 K. B. 541;

Vagliano v. *Bank of England*, 64 L. T. Rep. 353; (1891) A. C. 107;

Geipel v. *Smith*, 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404.

Cur. adv. vult.

May 12, 1916.—Swinfen Eady, L.J. read the following judgment:—The facts which give rise to the dispute in this case may be very shortly stated.

The plaintiffs are British merchants, and in June 1914 they sold in Calcutta to German buyers 500 bales of jute for shipment to Hamburg, upon the terms that the property was not to pass until arrival of the goods at port of destination and payment of the price. Part of this quantity—namely, 218 bales—was shipped on board a general ship, the German steamship *Kattenturm*, for carriage from Calcutta to Hamburg, and a policy of marine insurance dated the 28th July was effected with the defendants. The clause "warranted free from capture, seizure, &c." is struck out, in consideration of an additional premium. The perils which the insurers are contented to bear include "men-of-war, enemies, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever."

The ship sailed from Calcutta at the end of June, or early in July 1914. She was at Malta, we are told, on the 1st Aug., and left about the 2nd or 3rd Aug. On the 4th Aug., at 11 p.m., a state of war arose between this country and Germany. On the 5th or 6th Aug. the *Kattenturm* put into Messina, then a neutral port. At some later date, which is not material, she left Messina and went to Syracuse. The master put into Messina because he thought it was a prudent thing to do, having regard to the state of war between Germany and the allies. His was a German ship, and the French and English fleets were watching the seas.

By agreement between the parties a letter from the Admiralty has been put in, and is to be treated as evidence in this case. The letter is as follows: "I am commanded to inform you that any German steamer proceeding on or after the 5th Aug. last through the Mediterranean on a voyage to Hamburg would in their Lordships' opinion have been in peril of capture by British or allied warships when outside neutral territorial waters." Bailhache, J. said that he had no doubt that the master, from his point of view, did a very prudent thing, and the most prudent thing that he could do, when he put into Messina. He further found that the master had no thought of further prosecuting the voyage until the termination of the war; that the period of the war is certain to be long and indefinite, that the voyage must be taken to have been abandoned, and was for all practical purposes abandoned, when the master put into Messina. This is the judge's finding of fact with which I agree. On the 1st Sept. the plaintiffs gave notice of abandonment to the defendants, and claimed that the goods were a constructive total loss, but the defendants declined to accept the abandonment.

On the 28th Oct. 1914 a decree was made by the Italian Government prohibiting the exportation of raw jute; this was published in the Official *Gazette* of the 4th Nov. 1914, and came into operation on the 5th Nov. 1914. After this last-mentioned date the jute could not be exported from Italy.

On the 11th Nov. 1914 a written communication was made (through the British Consul at Rotterdam and with the sanction of the Board of Trade) to the Hansa Company at Bremen (which owns the ships of the Hansa Line, to which the *Kattenturm* belonged), in order to ascertain whether the company was willing to deliver up such portions of the cargo of the steamship *Kattenturm* as belonged to the plaintiffs (amongst others), and, if so, upon what terms.

The company answered on the 30th Nov. that the German Government, by way of retaliation against measures taken by the British Government, had issued a prohibition against delivering goods to British subjects.

This was communicated to the defendants, and on the 16th Dec. 1914 a further notice of abandonment was given to them, and on the 17th Dec. 1914 the writ herein was issued. Subsequently further steps were taken to obtain the cargo and dispose of it in Italy, but these steps were taken by arrangement for the benefit of whomsoever it may concern, and are not to affect the rights of the parties.

On behalf of the plaintiffs it is first contended that the venture of the carriage of the goods to Hamburg was lost by one of the perils insured against—namely, men-of-war; that it was solely owing to the presence of hostile men-of-war in the Mediterranean that the ship was unable to continue her voyage; that actual capture or seizure was not necessary, as appears from the case of the Spanish dollars, *Butler* v. *Wildman* (3 B & Ald. 398); and reliance was placed on Phillips on Insurance, 3rd edit., sect. 1115, at p. 657, where in a section dealing with the risk of capture and restraints it is said: "Where, after the risk has begun, the voyage is inevitably defeated . . . by a hostile fleet being in the way rendering the proceeding upon it utterly impracticable . . . an assured in the cargo has the right to abandon."

On the other hand, it was contended on behalf of the defendants that the *Kattenturm* was never in danger of capture, and ran no risk from men-of-war, because she determined to avoid all risk by entering and remaining in a neutral port.

It is well established in the English law of marine insurance that in many cases the loss of an adventure by a resolution not to incur a particular peril is not the same as and does not occasion a loss by the peril itself: (*Hadkinson* v. *Robinson*, 3 Bos. & P. 388; *Nickels and Co.* v. *London and Provincial Marine and General Insurance Company*, 6 Com. Cas. 15; *Lubbock* v. *Rowcroft*, 5 Esp. 50; and the recent case of *Kacianoff* v. *China Traders' Insurance Company* (12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121). In *Lubbock* v. *Rowcroft*, Lord Ellenborough said that the abandonment was from an apprehension of an enemy's capture, and not from any loss within the terms of the policy. That if such was allowed, every ship about to sail from the Port of London for a port which had fallen into the hands of the French might be abandoned.

It was urged that these authorities, except *Kacianoff's* case, were old ones, and were not applicable to the way in which commerce was conducted at the present time, and that the chance of avoiding a blockading squadron, or the risk of being captured at sea, was very different in the days of sailing ships from the present days of rapid steaming and wireless telegraphy. It was contended that if the *Kattenturm* had attempted to proceed through the Straits of Gibraltar to Hamburg there was a practical certainty that she would have been captured, and that as the subject-matter insured was reasonably abandoned on account of its actual total loss appearing to be unavoidable, there was a constructive total loss within sect. 60 of the Marine Insurance Act. In the recent case of *Sanday* v. *British and Foreign Marine Insurance Company Limited* (*sup.*) the House of Lords referred to *Hadkinson* v. *Robinson* and *Lubbock* v. *Rowcroft* without disapproval, and as existing authorities. Lord Atkinson pointed out that in each of those cases the deterrent was the risk of ultimate capture, if the ships proceeded to their destination, and that the vessels prudently resolved not to incur that risk. It is not difficult to draw a line between vessels which determine not to run a particular risk, and vessels which persevere in their voyage and enter a zone in which they are in peril, persisting until it becomes clear that in the existing circumstances they cannot complete the voyage and escape from the peril, and that the only course is either to desist and abandon the voyage, or inevitably incur a loss by the particular peril. There may be difficulty in applying the distinction to the facts of each case, where the case is brought near the dividing line.

In my opinion, the *Kattenturm* was never in peril of capture by men-of-war. Her commander prudently resolved not to incur that risk. There appears to be some ground for believing that she arrived at Messina earlier than the 5th Aug., but taking the 5th as the accurate date, only one hour would elapse between a state of war at 11 p.m. on the 4th Aug. and the early morning of the

5th, and the time of her arrival on the 5th or the period during which she had been in neutral Italian waters off the Sicilian coast does not appear. Indeed it does not appear that she was at any time outside neutral territorial waters after a state of war had arisen. She left Malta not later than the 3rd Aug., and the distance to Sicily is only about fifty miles. Under these circumstances I am of opinion that no loss by men-of-war was incurred.

It was urged, nevertheless, that, having regard to the construction placed by the House of Lords on the Marine Insurance Act 1906, the plaintiffs were entitled to succeed; that the subject-matter insured included the adventure, and not merely the goods, and that the party assured was irretrievably deprived of it, because all prospect of safe arrival on the voyage to Germany was hopelessly frustrated when the *Kattenturm* desisted from her voyage and sought refuge in Sicily. It was said that the case came directly within sect. 60 of the Act, as interpreted in *Sanday's* case (*sup.*), and that the subject-matter insured (*i.e.*, the adventure) was reasonably abandoned on account of its actual total loss from capture or men-of-war appearing to be unavoidable.

But to entitle the assured to recover under sect. 60, the actual total loss must appear to be unavoidable from the peril insured against, and to use the language of Lord Atkinson in *Sanday's* case at p. 665: "Actual capture was . . . the peril insured against. The apprehension of capture is an entirely different thing and was not insured against."

The next question is: Was there a loss by restraint of princes? It is said that immediately on the outbreak of war it became unlawful for the plaintiffs, as British subjects, to trade with the enemy, by sending goods to Hamburg; the sale made by the plaintiffs was to a German firm, on terms of cash in London against documents, within twenty-four hours of the official arrival of the steamer at port of destination; final settlement on average landed weights, at port of discharge, expenses of weighing to be paid by seller. The contention of the plaintiffs is that on the outbreak of war the further prosecution of their venture became illegal; the declaration by His Majesty that a state of war existed was an act of State, making it thenceforward illegal for British subjects to trade with Germany; that the declaration of war amounted to an order to every subject of the Crown to conduct himself in such a way as he is bound to conduct himself in a state of war; that every State ultimately enforces obedience to its laws by force; that restraint is equally imposed whether force is immediately available or not; and that in this case the venture was rendered illegal and was destroyed by restraint falling within the words "restraint of kings, princes, and people."

In support of this argument the case of *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (*sup*) was relied upon; it was urged that the effect of that decision was to render every British venture on the high seas, which involved trading with the enemy, a constructive total loss by the peril of a "restraint of kings, princes," &c, whether such peril in fact occasioned the loss or not. It is true that in that case the owners of the goods took no steps to countermand the venture, but, after the cargoes had been landed by the shipowners at British ports, the owners of the goods gave notice of abandonment to the underwriters. After the goods had been landed and warehoused at the instance of the shipowners, and after the owners of the goods had subsequently established to the satisfaction of the Customs authorities that the goods were not enemy goods, they were dealt with for the benefit of whomsoever it might concern. But it was the action of the shipowners in diverting their ships, and landing the cargoes, that prevented the voyage to Hamburg being continued. This clearly appears from the agreed statement of facts upon which the case proceeded, and was decided.

It must be admitted that there is a close resemblance between the present case and *Sanday's* case, looked at from this point of view. But, on the other hand, it has never yet been held in England that by the mere force of the existence of a state of war all goods owned by British subjects on their way to ports which during the voyage have become enemy ports, even though in neutral ships, or enemy ships, become constructive total losses, on the ground that trading with the enemy is restrained by what is to be deemed to be a "restraint of princes." Now, the maxim *Causa proxima non remota spectanda est* has been strictly applied in marine insurance cases. Is it true to say that in point of fact what frustrated the adventure in the present case and prevented the goods from being carried to Hamburg was the fact that trading with the German enemy had become unlawful for British subjects? Certainly not. In my judgment, the fact that the adventure had become illegal by the British common law had no weight whatever with the German master of the *Kattenturm*. The inference which I should draw from the facts proved in this case, including the letter of the 4th Sept. 1914, written by this German master to Baylis Haynes, Lloyd's agent at Messina, is that if he could have been sure of evading all hostile cruisers, and of arriving safely at Hamburg with the goods, he would certainly have proceeded upon the voyage, and given himself the pleasure of taking to Hamburg and landing safely there all British goods. Again, the possibility of forwarding the goods from Italy by some other vessel was effectually prevented by the Italian decree prohibiting jute from being exported from the country even if such a course had previously been practicable, of which there is no evidence whatever. The plaintiffs as owners of the jute on board, did not, and could not, take any steps to prevent the voyage being continued if the master of the ship decided to continue it. The master of the vessel acted as to him seemed best, both with regard to the ship and the goods on board; if the jute had belonged to a neutral owner, not affected by the consideration of trading with an enemy, the position would have been the same; the voyage in the *Kattenturm* would not have been continued, and transhipment and forwarding by another vessel, even if otherwise practicable in fact, was prevented by the law against the re-exportation of jute.

The ground of the decision in *Sanday's* case is thus stated by Lord Loreburn: "Among other things, trading to German ports became unlawful, and an instant duty arose for those two

ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offence, and in fact impracticable. . . . The destruction of the adventure was directly caused by His Majesty's declaration." That language has no application to the present case. The British shipowner was bound to obey the British law, and he did so. The German captain was not so bound. The continuance of the voyage was illegal for the British captain; perfectly legal for the German captain. The illegality in fact prevented the British captain from proceeding with his voyage to Hamburg; it did not prevent the German captain, or indeed influence him in the very slightest. Except for the risk from a different peril, the German ship might, and probably would, have proceeded on her voyage and arrived safely at Hamburg, and the goods would have been landed from the ship and safely warehoused. Restraint of princes operating to frustrate an adventure by rendering it illegal had no operation in the present case, and in my opinion the plaintiffs cannot succeed on that ground. The mercantile venture of the plaintiffs was frustrated by the detention of the goods for an indefinite time in Italy, but such detention was not occasioned by any peril insured against, not by a restraint of princes rendering illegal the further prosecution of the voyage.

I cannot arrive at a conclusion of fact that the actual total loss of the adventure, from that peril, appeared to be unavoidable within sect. 60, when that peril did not prevent or affect the continuance of the voyage, and when, if the voyage had proceeded, the adventure would probably have been frustrated by a different peril, capture of the German ship, and when in such a case the underwriter would have been in a different position, as these goods on the ship were British goods.

The third ground upon which the plaintiffs relied was that a loss from the peril of "enemies" had arisen, since the master of the *Kattenturm* and the Hansa Company of Bremen, German subjects and therefore enemies, had refused to give up the goods at Messina when requested to do so. It will be sufficient to say that the goods were given into the possession of the master by the true owners, and a refusal to redeliver them at a port of refuge during the voyage, even if wrongful, is not a peril from "enemies" within the meaning of the policy.

In my judgment Bailhache, J. came to a right conclusion, and this appeal should be dismissed.

PICKFORD, L.J. read the following judgment:—

This was an action upon a policy of insurance effected by the plaintiffs with the defendants upon jute shipped by the plaintiffs upon the German steamer *Kattenturm* at and from Calcutta to Hamburg, and by the London Jute Association insurance clauses extending to a period not exceeding fifteen days after final discharge of vessel. The policy included war risks and was against the usual perils, of which I need only mention "men-of-war, enemies, takings at sea, arrests, restraints, and detainments of all kings, princes, and peoples."

The facts are stated in the judgment of the court below and of Swinfen Eady, L.J., and I shall only state them generally. At the time of the declaration of war between Great Britain and Germany, the *Kattenturm* was in the Mediterranean proceeding on her voyage, and about the 5th or 6th Aug. she put into Messina, and afterwards shifted to Syracuse. The plaintiffs did not at the time of the declaration of war know exactly the position of the *Kattenturm*, but they knew she was on her voyage, and on the 18th Aug. wrote to the defendants mentioning her name as one of the German steamers in which they were or might be interested. Later in the month they seem to have obtained information that she had put into Messina, and on the 1st Sept. they gave notice of abandonment, as a constructive total loss through consequence of hostilities, of the jute on board the steamship *Kattenturm* stopped at Messina. The defendants declined to accept the abandonment, but agreed to put the plaintiffs in the same position as if a writ had been issued.

There was a dispute with the master of the vessel as to his giving up the goods, which he at first refused to do except upon terms to which the plaintiffs would not agree, but eventually they went to an Italian buyer without prejudice to the rights of the parties to the policy of insurance. In the meantime the plaintiffs had given a second notice of abandonment on the 16th Dec., on another ground. The defendants declined to accept this abandonment also.

Upon these facts the plaintiffs claimed payment from the defendants as for a constructive total loss on the following grounds: that the frustration of the venture was a loss of the goods; that the venture was frustrated by the restraint of princes because the declaration of war rendered it illegal for the plaintiffs to carry it out by sending the goods on to Hamburg and delivering them to an alien enemy; that there was a loss by capture of men-of-war because the *Kattenturm* at Messina could not continue her voyage without certainty of capture by reason of the proximity of French and English cruisers; that there was a loss by enemies because the goods were in the hands of an alien enemy on an enemy ship. I agree with Bailhache, J. that the master had no intention of prosecuting the voyage further than Messina within a time that would have been commercially practicable, and that if he had in fact prosecuted his voyage, and gone much further, he would almost certainly have been captured by the French or English fleets, and that the voyage was then and there abandoned. I also agree with him that by the abandonment of the voyage there was a destruction of the adventure.

It was argued before us that this was not the fact, and that the adventure was destroyed because the goods were the property of British subjects, because if they had belonged to neutrals they could have been transhipped into a neutral vessel, and carried to their port of discharge. This may well be so theoretically, but there was no evidence that it could have been done within a time that would have been commercially practicable, and I shall not, without evidence, assume a state of facts which I do not think existed. I therefore think that the act of the master in putting into Messina and remaining in Italian waters was a destruction of the adventure, whether the goods belonged to a British owner or not.

I think it is decided by the case of *Sanday* v. *British and Foreign Marine Insurance Company* (*sup.*) that the frustration of the adventure is a

loss of the goods, and that the Marine Insurance Act of 1906 has not altered the law in that respect. That case also, I think, decides that a declaration of war by the Sovereign, by making it illegal to have any commercial relations with the enemy, is a restraint of princes, and that if either the cargo owner or the shipowner, by reason of the declaration, terminates the adventure of sending goods to an enemy port, that is a loss by restraint of princes. It is true that in that case the restraint was exercised on the action of the shipowners who gave up the voyages, but I think the principle applies equally to the cargo owner, and if he terminates the adventure by reason of the proclamation, I think the authority of that decision shows that there is equally a loss by restraint of princes. This, I think, is the effect of that decision, and we must accept it.

The respondents, however, contended that in this case the plaintiffs had not terminated the adventure on that ground, but that it was terminated by the act of the master in breaking off the voyage at Messina, and so making it impossible to carry out the venture. It is not necessary to state any reason for abandonment in the notice, and the plaintiffs did not state any, except the wide ground of consequences of hostilities, but I think the only inference to be drawn from the facts is that they intended to abandon because of the breaking off of the voyage, and consequent inability to carry out the venture. I have already said that I think the breaking off of the voyage did frustrate the venture, irrespective of the nationality of the owners of the goods.

The declaration of war did not prevent the master of the German ship from carrying the goods on to Hamburg, if he could escape the enemy cruisers, and the plaintiffs could have done nothing to prevent him, but they could have given notice of abandonment, and they did not do so during the whole of the month of August, but only after they had heard that the *Kattenturm* had stopped at Messina, and when they repeated the notice it was on the ground that they could not obtain the goods because the master had been prohibited by the German Government from giving them up. I am satisfied that in giving notice of abandonment they were not acting in any way on the declaration of war, and had not it present to their minds in any way. The point was stated to be a new one in insurance law by Lord Reading, C.J. in *Sanday* v. *British and Foreign Marine Insurance Company* (20 Com. Cas. 399), and it obviously did not occur at that time to the plaintiffs. If it had, they would have given notice of abandonment at once, if they wished to act on it.

It was, however, argued for the plaintiffs that the declaration acted automatically, as it is called by Bailhache, J. at p. 311 of the report above mentioned, or *ipso facto*, to use the words of Lord Wrenbury, and immediately destroyed the adventure without any action or exercise of volition on the part of the plaintiffs. I do not think this is so. The adventure is carrying the goods to Hamburg. I think there may be cases in which the adventure would not be frustrated by the declaration of war, and the cargo owner might not be able to prevent the cargo being carried on to the port of destination and delivered, and the maritime adventure so completed, although the result might be the loss of the goods by capture when they arrived. I do not think the decision in *Sanday's* case did go so far as the contention of the appellants; it decided that after the declaration of war it was the duty of shipowner and cargo owner not to pursue the adventure, and if either in consequence terminated the adventure there was a loss by restraint of princes.

In this case, as I have said, the adventure was in fact terminated for another reason altogether, that is, because the master put into Messina and discontinued the voyage, and it was not possible to send on the goods, whatever the nationality of the owners, within any commercially possible time. It seems to me that this termination of the adventure was the proximate cause of the loss, and that it is not open to the plaintiffs to say that they might have terminated it for another reason, and if they had done so it would have brought the loss of the adventure within another peril. I think, therefore, that there was not a loss from restraint of princes.

On the other two points I agree with the judgment of Bailhache, J., and do not think it necessary to discuss them at length.

I agree with the argument of the appellants that, in considering the series of cases from *Hadkinson* v. *Robinson* (*sup.*) to *Kacianoff* v. *China Traders' Insurance Association* (*sup.*), regard must be had to the changed conditions of war, and that such questions are always one of degree, but I can see no reason for differing from the conclusion of Bailhache, J. that the master in this case put into Messina to avoid a peril, and not in consequence of a peril.

I think the appeal should be dismissed.

BANKES, L.J. read the following judgment:— This is an appeal from a judgment of Bailhache, J. The appellants are merchants in London. In June 1914 they entered into a contract to sell 500 bales of jute to a German firm. The contract provided that the jute was to be shipped from British India to Hamburg between the 1st June and the 30th June of that year, and that payment was to be made in cash in London within twenty-four hours of the official arrival of the steamer of the port of destination in exchange for bill of lading and freight release, and policy or approved letter of insurance. The contract also contained provisions as to the weighing of a certain percentage of the bales at the port of destination. In part fulfilment of this contract the appellants shipped 288 bales on board the German steamer *Kattenturm* at Calcutta, and took out a policy of insurance with the respondents covering the goods on the voyage from Calcutta to Hamburg, and for a period not exceeding fifteen days from the first discharge of the vessel, if the goods were temporarily placed on quay or in barge at Hamburg awaiting delivery being taken by the consignee.

The *Kattenturm* sailed from Calcutta on some date in July, and on the 4th Aug, the date when war was declared between this country and Germany, she was in the Mediterranean. On either the 5th or 6th Aug. the vessel put into Messina, and later she was moved to Syracuse. The learned judge came to the conclusion, on the evidence before him, that the

master of the vessel, when he put into Messina, did not intend to continue the voyage, and that from a commercial point of view the voyage must be treated as having been abandoned at that time. I agree with the view taken by the learned judge. The immediate effect upon the appellants' position of the declaration of war, coupled with the action of the master of the vessel, and the impossibility of transhipping the goods on to another vessel, was undoubtedly to put an end both to their commercial adventure of selling the goods to the German firm, and to their maritime adventure of having the goods conveyed from Calcutta to Hamburg for delivery to consignees there. It is with the latter adventure only that the respondents are concerned, and their concern in it is limited by the terms of the policy which they issued to the appellants. The risks against which the respondents, by the terms of their policy, undertook to indemnify the appellants, included "men-of-war, enemies, takings at sea, arrests, restraints, and detainments of all kings and princes."

The question raised by the action and in this appeal is, to use the language of sect. 55 of the Marine Insurance Act 1906, whether the loss which the appellants undoubtedly suffered was proximately caused by a peril insured against. The learned judge decided that it was not.

The appellants put their case in a number of different ways, and endeavoured to support it on a number of quite different grounds. They contended, in the first place, that when the *Kattenturm* put into Messina she was in the zone of peril, and in risk of capture by English and French men-of-war, and that consequently the loss of the adventure was due to a peril insured against. This appears to have been made the main argument in the court below. The learned judge decided against the appellants' contention on the facts. He came to the conclusion that the master of the *Kattenturm* put into Messina, and afterwards into Syracuse, to keep out of harm's way, and to avoid any peril of capture, and in this view I agree. It was argued before us that modern conditions required a different view to be taken of what constitutes being in actual peril from what was taken in former times under quite different conditions. I do not agree that this argument goes the length contended for. Conditions have certainly entirely altered, but there must still always be a dividing line between the case of a vessel which is in real peril of capture, and the case of a vessel whose master has taken sufficiently early and sufficiently complete steps to keep altogether out of harm's way. In my opinion the earlier authorities on this point are still good law, and I think that this was recognised as being so in the recent decision in the House of Lords in *Sandays'* case. Upon this first point, therefore, the appellants fail.

A second point taken was that there was a loss caused by "enemies," and this was based upon the contention that the master of the *Kattenturm* refused to hand over the goods, either at Messina or at Syracuse, and that this refusal amounted to a seizure of the goods by an enemy. In the court below the learned judge treated this as a point which was not proved, and it is sufficient to say with regard to it that when the facts are considered they do not, in my opinion, establish the contention.

The last point is the one which was most pressed in this court, and was put in the forefront of the argument. It was contended that the effect of the declaration of war rendered it unlawful and impossible for the appellants to complete the adventure, and that even if the master had determined to continue the voyage, and had landed the goods at Hamburg, their seizure there by the enemy was inevitable, and that on these grounds there was, within the meaning of sect. 60 of the Marine Insurance Act, a constructive total loss of the subject-matter insured, because that subject-matter had been reasonably abandoned on account of its actual loss appearing to be unavoidable. In support of this contention the decision in *Sanday's* case was much relied on. There is, however, this essential distinction between the facts in *Sanday's* case and the facts in the present one. In *Sanday's* case there was no dispute that the masters of the vessels did in fact desist from their respective voyages because of the declaration of war, and the illegality of proceeding to their destinations, and that the owners of the goods gave notice of abandonment because of the action of the masters in thus determining the adventures. In the present case both points are in dispute. This point Bailhache, J. appears to have dealt with very shortly in the court below. In the report of his judgment in 31 Times L. Rep. 538, he says that the question does not arise having regard to the decision at which he had arrived on the first point. In this conclusion of the learned judge I agree. Having regard to the stress laid upon this part of the appellants' case, I think it necessary to state my reasons. The appellants have insisted upon their right to have attention focussed upon their position and their action as cargo owners, and claim that their position must not be prejudiced by a consideration of the action of the shipowner or his master, over whose actions they have no control, and whose actions do not bind them. They complain that sufficient attention has not been paid to their position and their action in the decision at which the learned judge has arrived. It appears to me that the weak part of the appellants' case on this point is that it fails to pay sufficient attention to what, in my opinion, was the real position and action of the appellants. It is an essential condition of a constructive total loss that there shall have been an abandonment by the assured to the insurer, and abandonment involves an election by the assured. The assured has an option whether he will or will not elect to treat any given set of circumstances as a constructive total loss. If he does so elect he must, in a case like the present, give notice of abandonment within a reasonable time after the receipt of reliable information of the loss: (sect. 62 (3) of the Marine Insurance Act 1906). When once the assured has exercised his option and given notice of abandonment, he must, I think, be bound by his election; further, to render the insurer liable upon a policy, the assured must show that the circumstances which he has elected to treat as a constructive total loss were the proximate cause of the loss sustained. If these conclusions are correct, how do they apply to the present case? They appear to me to put the appellants in this difficulty. If

the appellants elected to treat the action of the master, in abandoning the voyage at Messina, as a constructive total loss, then they exercised their option in respect of circumstances which, upon the finding of the learned judge, and in my opinion also, were the proximate cause of the loss sustained, but which, on the other hand, were not brought about by a peril insured against. If, on the other hand, they seek to found their election on some other set of circumstances, they must prove (1) that they did so elect, and (2) that the circumstances were the proximate cause of the loss sustained. As I understand the decision in *Sanday's* case in the House of Lords, it is an authority for the proposition that had the assured, immediately on the declaration of war, elected to treat that circumstance with its attendant consequences, not only of the illegality but the possibility of completing the adventure, as a constructive total loss, they would have been entitled to recover in this action. In my opinion there is no evidence that the appellants did so elect. On the contrary, I think the evidence is conclusive the other way. No notice of abandonment was given until the 1st Sept., which seems to me very late, if not too late, if the election was founded on the declaration of war, but in any event is quite inconsistent with the idea that the appellants were exercising their option because of the declaration of war, the effects of which were immediate, and required no investigation. In the second place, the notice, when sent, refers to the fact that the *Kattenturm* was stopped at Messina. The third fact that appears to me to be very material on this point is that a second notice of abandonment was given as late as December, and the ground is stated to be that the owners of the *Kattenturm* had definitely stated on the 20th Nov. last that the German Government had prohibited any delivery of the goods to British subjects. If this is the true inference from the facts, it seems to me impossible for the appellants to ignore the action of the master in abandoning the voyage as he did; that action did in fact frustrate the adventure, and, unless the appellants can show that they took advantage of some circumstances anterior in date to the action of the master, his action must be the proximate cause of the loss, and any subsequent action of the assured becomes immaterial.

For these reasons I think that the judgment of Bailhache, J. was correct.

Appeal dismissed.

Solicitors: for the plaintiffs, *Rehder* and *Higgs*; for the defendants, *Waltons* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Jan. 21 *and* 24, 1916.

(Before BAILHACHE, J.)

CROSSFIELD AND CO. *v.* KYLE SHIPPING COMPANY. (*a*)

Bill of lading inconsistent with charter-party—Prevalence of bill of lading—"Perils of the sea."

By a charter-party dated the 28th May 1913 *the plaintiffs chartered the steamship* K., *belonging to the defendants, to proceed to Grindstone Island, New Brunswick, and there load a cargo of timber and therewith proceed to certain ports (including Manchester) as ordered. Freight was to be payable on measurement of quantity delivered as ascertained at port of discharge, and all responsibility of the charterers under the charter was to cease as soon as the cargo was alongside. The mutual exceptions included "perils of the sea." The captain or his agent was empowered to sign bills of lading which, it was agreed, should be "conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The plaintiffs gave instructions that the vessel when loaded should proceed to Manchester. The* K. *was loaded from lighters, the contents of which was checked by surveyors as it left the shore. Owing to rough weather, a quantity of the timber fell between the lighter and the ship and was lost, but despite this the master of the vessel signed a bill of lading in this form: "Shipped in good order and well conditioned on board the steamship* Kylestrome" *the quantities of timber contained in the surveyors' reports. The result was that on arrival at Manchester the cargo was found to be short. In an action by the plaintiffs for damages for short delivery the defendants contended that the timber was lost through perils of the sea, since by the charter-party the terms of which must be incorporated in the bill of lading, the responsibility of the charterer ceased as soon as the cargo was alongside, whereby the responsibility of the defendants commenced and the exception of "perils of the sea" came into operation.*

Held, that the words in the bill of lading, "shipped . . . on board the steamship Kylestrome," *were inconsistent with the provision in the charter-party that the cargo was only to be delivered alongside, and must prevail; that, in consequence, the exception of "perils of the sea" never came into operation, and the plaintiffs were therefore entitled to succeed.*

Lishman *v.* Christie (57 *L. T. Rep.* 552; 19 *Q. B. Div.* 333) *followed.*

Pyman *v.* Burt (1 *Cab. & E.* 207) *discussed.*

ACTION tried by Bailhache, J.

On the 11th April 1913 the plaintiffs, Crossfield and Co., timber merchants, of Barrow-in-Furness, entered into a contract with J. Nelson Smith, of St. John, New Brunswick, to buy a cargo of wood which was to be shipped at Grindstone Island for Manchester on c.i.f. terms.

On the 28th May J. Nelson Smith chartered the steamship *Kylestrome* to load the cargo in question. By the charter-party it was agreed that the steamship *Kylestrome* should, with all

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

convenient speed, sail and proceed to Grindstone Island, New Brunswick, and there load a cargo of timber, and being so loaded should therewith proceed to a number of named ports (including Manchester) as ordered on signing bills of lading.

The charter-party continued in these terms:

2. Freight payable on measurement of quantity delivered as and when ascertained at the port of discharge. . . . All responsibility whatsoever of the charterers hereunder ceases as soon as the cargo is alongside.

3. The act of God, perils of the sea, &c., always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

13. Captain or agent to sign bills of lading as per surveyors' return for the cargo, and, if required, for separate parcels and deliver accordingly.

14. Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to ship as stated therein. The captain's or agent's signature to be accepted in all cases as binding on owners.

On the 28th June the *Kylestrome* arrived at Grindstone Island and moored at the buoys at the back of the island. On the 30th June loading commenced, which was performed from lighters which carried their cargo stowed athwartships. The captain's agent signed the bills of lading in these terms:

Shipped in good order and well conditioned by J. Nelson Smith on board the steamship called the steamship *Kylestrome* . . . one hundred and seventy-seven thousand two hundred and eighty-one pieces of deals, battens, &c., containing three million one hundred and seventy thousand five hundred and fifty-five superficial feet . . . in accordance with charter-party dated May 28, 1913, the terms, conditions, and exceptions (including negligence clause) contained in which are herewith incorporated and form part hereof. In witness whereof the master of the said vessel hath affirmed to two bills of lading all of this tenor and date, one of which being accomplished, the other to stand void. — (Signed) J. F. KNIGHT AND CO., Agents.— Harvey, N.B., July 16, 1913.

On the 17th July the *Kylestrome* left Grindstone Island. On arrival at Manchester it was found that the cargo was short by eighty-five standards. The plaintiffs in consequence brought this action against the defendants to recover 558*l.* damages for non-delivery of cargo which they alleged had been lost. The defendants in their defence said that the cargo was lost while alongside the ship; that the loss was therefore due to perils of the sea; and that responsibility on their part was in consequence excluded by the exceptions clause in the charter-party.

F. D. MacKinnon, K.C. and *W. A. Jowitt* for the plaintiffs.

A. A. Roche, K.C. and *R. A. Wright* for the defendants.

BAILHACHE, J.—The *Kylestrome* was chartered on the 28th May 1913 to proceed to Grindstone Island, New Brunswick, and there load a cargo of timber, and bring it to some port or other in the United Kingdom It brought the cargo to the Manchester Ship Canal, where it arrived on the 31st July 1913, going into berth the same or the next day. So far as the ship was concerned, the cargo was completely discharged on the 9th Aug., and the ship went away.

The cargo was established on a bill of lading, which stated the number of pieces of wood on board and the number of superficial feet. The charter-party, or more particularly the bills of lading, were to be "conclusive evidence against the owners as establishing the quantity delivered to the ship."

When the cargo was discharged—the discharge being entirely by the Manchester Ship Canal Company—it turned out that there was a shortage of eighty-five standards. There was no loss of cargo after it had been received on board, but there was this shortage between the amount said to have been established by the bills of lading and the Manchester out-turn reports.

It is suggested that there may have been some serious mistake in the report of the out-turn from the Manchester Ship Canal Company. It is true that where a tally passes through several hands there is always a liability to error, but in this case nothing has been given to show that there was any error. The method of tallying is most elaborate. I do not propose to go into all its details, but the circumstances of the system are that no tally is made at the ship's side. When the ship arrives, she is allocated a berth, and alongside her on the quay there is a clear space on to which the cargo is taken from the ship. Some of the cargo in the course of discharge goes straight away to customers who have bought it. The goods are delivered either by railway truck or by lorry. When the cargo goes away in this way the cargo is tallied into the truck and into the lorry. When it goes by railway truck a statement of the number of pieces in the truck is given to the railway company, who have an opportunity of checking it. When it goes away by lorry a similar statement is given to the lorry driver.

The rest of the cargo is first of all put on the quay in the space opposite the ship, and tallied. If it is not wanted for delivery it is removed to a storing ground some one and a half miles away, inside a walled area, which is part of the Manchester Ship Canal Company's premises. When it arrives there it is tallied, and stacked in various stacks according to its lengths. These stacks are counted over and tallied there by the persons in charge. When it does go away from there it is also tallied into trucks or lorries. It is true to say that the full basis of the thing is the correct tally, which is made in the first instance by the persons who tally either into the truck or lorry or into this storing ground.

Having regard to the very careful way in which it is done, and the elaborate system which prevails at the Manchester Ship Canal, I should be quite unable to hold that they had made anything like so serious a mistake as would be represented by a deficiency of eighty-five standards of this timber, unless there was some positive evidence that some mistake had in fact been made.

I have come to the conclusion upon the facts of the case that the quantity which the Manchester Ship Canal Company show by their out-turn and the quantity on this steamer is the correct quantity. That being so, it is agreed that that quantity is eighty-five standards short of the quantity mentioned in the bills of lading. The ship is liable for the quantity mentioned in the bills of lading, as conclusively on board the ship.

Whether it is conclusively on board ship depends upon the construction of the bills of lading and the charter-party. Before I come to the construction of the bill of lading and the charter-party, I want to say a word as to what happened at the other end.

The cargo was put into lighters and taken in the lighters to the ship's side. As the cargo was put into the lighters it was tallied by surveyors. The figures in these surveyors' reports are all collected together, and ultimately, when they have been all collected together, are put into the bill of lading which is presented to the master for signature, together with a synopsis of the surveyors' reports as to figures. The master of the ship has an opportunity, if he likes, of seeing the reports.

In the present case the captain did not sign. He wanted to get the ship away, and he gave his agent authority to sign. The agent signed the bill of lading after seeing the reports, or after having an opportunity of seeing the reports. From the master's protest it appears that after the cargo had been delivered into lighters alongside this ship there was one day during the loading which was rough, and a good deal of the timber was battered about, and some of it was lost between the lighter and the ship. Whether that quantity was as much as eighty-five standards I do not know; but plaintiffs, who had a policy which covered the cargo during the loading as well as on the voyage, put the matter before their underwriters, and their underwriters paid for this loss. These are the circumstances on the other side.

By the charter-party the cargo is to be brought alongside, and freight is payable on the quantity delivered as and when ascertained at the port of discharge, less the value of cargo short delivered, if any, and all responsibility of the charterers ceases as soon as the cargo is alongside. Mr. Roche says that shows quite clearly that, so far as the ship is concerned, the ship takes the responsibility for the cargo when the cargo is delivered into lighters alongside the ship and before the cargo has, in fact, reached the ship's deck. It goes on further:

> Captain or agent to sign bills of lading as per surveyors' return for the cargo, and if required for separate parcels, and deliver accordingly. Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to ship, as stated therein. The captain's or agent's signature to be accepted in all cases as binding on owners.

By the contract of sale, dated the 11th April 1913, the goods were deliverable by the sellers to the vessel at Grindstone Island, and "the seller is not to be responsible for any deterioration of quality or condition after the goods have been sent alongside the vessel."

Mr. Roche said that if you look at the matter and trace it out all the way through you will find that these documents fall into line thus: He says the responsibility of the seller to the buyer finishes when the goods are alongside the ship. So far as the ship is concerned, the only duty of the shipper is to deliver the goods alongside the ship in lighters, and the ship from that time takes the responsibility.

The ship, taking from that time the responsibility, the exceptions clause in the charty-party comes into play before the wood, so far as the ship is concerned, reaches the ship's deck, and while the goods are in the lighters alongside at the ship's responsibility. He points out that the surveyors' report, the tally made by surveyors on the other side, does not purport to be a tally of anything at the ship's side, and only purports to be figures of the tally of the wood as it is put into the lighters.

He says, seeing how the facts stand, that the bill of lading is to be conclusive evidence of the quantity delivered to the ship, not delivery to the ship in the sense that it actually reaches the ship's deck, but delivery to the ship in this sense, that it is delivered to the ship alongside in a position in which from that time onwards the ship takes full responsibility; that being the case, it is only natural the ship is prepared to take the tally made by the surveyors of the cargo going into the lighters, because they know quite well that if there is any loss by any of the excepted perils they will not be responsible for the cargo so lost.

The shipper's liability ends at a particular place, and the ship's responsibility begins at the same place, the statement in the bill of lading takes effect from the same place, and the buyers know perfectly well that is so because in their policy of insurance they are careful to insure from that point also during the loading and during the voyage. There is, of course, a great deal to be said in favour of this proposition, and of that line of argument. It does seem to make everything, as Mr. Roche says, fall into line and make everything perfectly reasonable.

There is, however, this very serious difficulty in the way. There is the difficulty of the bill of lading itself. The bill of lading says: "Shipped in good order and well conditioned on board the steamship *Kylestrome*."

It is true the bill of lading incorporates the charter-party, but it is also true to say that where the bill of lading incorporates the charter-party, if there is any inconsistency between the charter-party so incorporated and the bill of lading, the bill of lading must prevail, and any inconsistency in the charter-party must go. It is difficult to see how "shipped in good order and well conditioned on board the *Kylestrome*" can mean anything else than that the goods which are mentioned in the bill of lading have in fact reached the ship's deck, and if it means that, that the goods have in fact reached the ship's deck, then it is quite clear that the exceptions in the bill of lading relating to what happens to the goods before they reach the ship's deck cannot be incorporated into the bill of lading because *ex hypothesi* the goods are already on the ship's deck.

However, I should myself, I think, have been so attracted by Mr. Roche's argument and the business sense of it, that I should very likely have acceded to it and come to the same conclusion as that come to by Hawkins, J. in *Pyman* v. *Burt* (1 Cab. & E. 207).

But it appears to me this case is distinguishable in principle from the case of *Lishman* v. *Christie* (57 L. T. Rep. 552; 19 Q. B. Div. 333). In that case *Pyman* v. *Burt* was cited to the court, and the court seems to have thought the circumstances were in some way distinguishable. Lord Esher says they are not distinguishable, and that *Pyman* v. *Burt* was wrong.

In *Lishman* v. *Christie* (*sup.*) Lindley, L.J. said: "The question in this case seems to me to

turn entirely on the effect of the clause in the charter-party which provides that the bill of lading shall be conclusive evidence against the owners of the quantity of cargo received as stated therein. The reasons for the insertion of such a clause are tolerably obvious. The shipowner in the present case desires to do exactly what he has agreed not to do—viz, to show that the ship did not receive so large a quantity as by the bill of lading it is stated to have received. I cannot see on what principle, in the face of that provision, he can claim to do so. If there had been any fraud the question would have been different, but there can be no suggestion of fraud here. The shipowner has agreed to be bound by the statement in the bill of lading, and by that he must stand or fall. The whole object of such a provision as this is to prevent such a dispute as has here arisen. For these reasons I agree that the appeal should be dismissed."

Inasmuch as the charter-party in that case is practically identical with the charter-party in question here, it seems to me I should be going wrong if I followed *Pyman* v. *Burt* or if I yielded to what I think is very likely the business reason of the thing, and followed my own inclination and Mr. Roche's argument.

The result must be that the plaintiffs succeed. There can be no question of figures and, I gather, no question of amount. The amount claimed is 588*l.* 4*s.* 11*d.*, and that is the amount for which I give judgment, with costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Trinder, Capron,* and *Co.*

Solicitors for the defendants, *W. A. Crump* and *Co.*

Judicial Committee of the Privy Council.

Feb. 14, 15, 16, 17, 18, *March* 21, *and April* 5, 7, 1916.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE ZAMORA. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Neutral cargo—Contraband—Requisition before condemnation—Order in Council—Validity—Prize Court Rules 1915—*Order XXIX.*, *rr.* 1, 2, 5.

By Order XXIX. of the Prize Court Rules, as authorised by an Order in Council, it is provided that: "Where it is made to appear to the judge on application of the proper officer of the Crown that it is desirable to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given . . . the ship shall be released and delivered to the Crown."

By Order I. of the Prize Court Rules: "Unless the contrary intention appears, the provisions of these rules relative to ships shall extend and apply, mutatis mutandis, to goods.

A Swedish vessel carrying copper, which was absolute contraband of war, was seized and brought into a British port. A writ was issued that the ship and her cargo should be condemned and confiscated. Before any adjudication as to these claims had taken place the Procurator-General, on behalf of the War Department, took out a summons that the Crown should be entitled to requisition the copper, leaving the question of the right to the same, or the proceeds of the sale thereof, to be decided at some later date.

Held, that Order XXIX., r. 1, *as an imperative direction to the court, is not binding; that there was no inherent power in the Prize Court to sell or realise the property in its custody pending decision in such a case as this; that a belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations: First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, secondly, there must be a real question to be tried, so that it would be improper to order an immediate release, and, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable; and that in the present case there was insufficient evidence before the President to justify him making the order appealed from. The order was therefore set aside.*

As the copper had been used up by the War Department no order for its restitution could be made, and there must be a declaration instead and leave granted the claimants, in the event of their ultimately succeeding in the proceedings for condemnation, to apply to the court below for damages, if any, as they might have suffered by reason of the order and what had been done under it. In a proper case both damages and costs can be awarded against the Crown or the officer representing the Crown in the proceedings.

Decision of Evans, P. (13 *Asp. Mar. Law Cas.* 144; 113 *L. T. Rep.* 649; (1916) *P.* 27) *reversed.*

APPEAL from an order of the President of the Admiralty Division of the High Court in Prize, reported 13 Asp. Mar. Law Cas. 144; 113 L. T. Rep. 649; (1916) P. 27.

The question raised for decision was whether the War Department had power to requisition 400 tons of copper on board the neutral steamship *Zamora*, belonging to the Swedish Trading Company of Stockholm, and destined for a neutral port, before the cargo had been properly condemned as prize of war.

The *Zamora*, when proceeding from New York to Stockholm, was, on the 8th April 1915, stopped by a British warship and taken to Barrow-in-Furness. A writ having been issued in prize claiming confiscation of both the ship and cargo, a summons was taken out by the Procurator-General that the War Department be at liberty forthwith to requisition part of her cargo—namely, the copper—in accordance with the provisions of Order XXIX., r. 5, of the Prize Court Rules as altered by an Order in Council of the 29th April 1915.

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

Order XXIX., r. 1, provides that:

Where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that, upon an undertaking being given in accordance with rule 5 of this order, the ship shall be released and given to the Crown.

Rule 5 provides that:

In every case of requisition under this order an undertaking in writing shall be filed by the proper officer for the Crown for payment into court on behalf of the Crown of the appraised value of the ship. . .

By Order I., r. 2, the provisions of these rules relative to ships are applicable also to goods.

Sir S. T. Evans, P. held that he had power to make the order, and accordingly directed that the copper should be delivered up to the War Department in accordance with rule 5.

The owners of the copper appealed and submitted that the proceedings were not in conformity with the law of nations.

Sir *Robert Finlay*, K.C., *Leslie Scott*, K.C., *Roche*, K.C., *Balloch*, and *Baty* for the appellants.

Sir *F. E. Smith* (A.-G.), Sir *George Cave* (S.-G.), *Branson*, and *C. R. Dunlop* for the respondents.

Sir *Robert Finlay*, K.C. in reply.

April 7. — The considered judgment of the committee was delivered by

Lord PARKER OF WADDINGTON. — On the 8th April 1915 the *Zamora*, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers, between the Faroe and Shetland Islands, and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on the 19th April 1915, and in due course placed in the custody of the marshal of the Prize Court. It is admitted, on the one hand, that the copper was contraband of war, and, on the other hand, that the steamship was ostensibly bound for a neutral port. The question whether either steamship or cargo was lawful prize must therefore depend on whether the steamship had a concealed or ulterior destination in an enemy country, or whether the copper was by means of transhipment or otherwise, in fact, destined for the enemy.

On the 14th May 1915 a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on the 14th June 1915 the President, at the instance of the Procurator-General, made an order under Order XXIX., r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of Order XXIX., r. 5. This appeal is from the President's order of the 14th June 1915.

It will be convenient in the first place to consider the precise terms of Order XXIX. of the Prize Court Rules. In so doing it must be borne in mind that though the order in terms applies to ships only, it is by virtue of Order I., r. 2, of the Prize Court Rules equally applicable to goods. The first rule of Order XXIX. provides that where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition, on behalf of His Majesty, a ship in respect of which no final decree of condemnation has been made, he shall order that the ship be appraised, and, upon an undertaking being given in accordance with rule 5 of the order, the ship shall be released and delivered to the Crown. The third rule of the order provides that where in any case of requisition under the order it is made to appear to the judge on behalf of the Crown that the ship is required for the service of His Majesty forthwith, the judge may order the same to be forthwith released and delivered to the Crown without appraisement. In such a case the amount payable by the Crown is to be fixed by the judge under rule 4 of this order. The fifth rule of the order provides that in every case of requisition under the order an undertaking in writing shall be filed by the proper officer of the Crown for payment into court on behalf of the Crown of the appraised value of the ship or of the amount fixed under rule 4 of the order, as the case may be, at such time or times as the court shall declare that the same or any part thereof is required for the purpose of payment out of court.

The first observation which their Lordships desire to make on this order is that the provisions of rule 1 are *primâ facie* imperative. The judge is to act in a certain way whenever it is made to appear to him that it is desired to requisition the vessel or goods in question on His Majesty's behalf. If this be the true construction of the rule and the judge is, as a matter of law, bound thereby, there is nothing more to be said and the appeal must fail. If, however, it appear that the rule so construed is not, as a matter of law, binding on the judge, it will have, if possible, to be construed in some other way. Their Lordships, propose, therefore, to consider in the first place whether the rule construed as an imperative direction to the judge is to any and what extent binding.

The Prize Court Rules derive their force from orders of His Majesty in Council. These orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act 1894 or otherwise. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX., r. 1, construed as an imperative direction to the judge is not merely a rule of procedure or practice. It can only be a rule of procedure or practice if it be construed as prescribing the course to be followed if the judge is satisfied that according to the law administered in the Prize Court the Crown has, independently of the rule, a right to requisition the vessel or goods in question, or if the judge is minded in exercise of some discretionary power inherent in the Prize Court to sell the vessel or goods in question to the Crown. If, therefore, Order XXIX., r. 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal Prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in courts of common law or equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other courts.

Prior to the Naval Prize Act 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The courts of common law and equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that quoted by Lord Mansfield in *Lindo* v. *Rodney* (2 Doug. 614) as an example. It required and authorised the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships or goods which are or shall be taken, and to hear and determine according to the course of Admiralty and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the court is authorised to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a court his position is in fact the same as in the ordinary courts of the realm upon a petition of right which has been duly fiated. Rights based on sovereignty are waived, and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while dwelling for a moment on this distinction. Of course, the Prize Court is a municipal court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to the orders of the King in Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on anyone outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the courts of any other power. As is said by Story, J. in the case of *The Invincible* (2 Gall. 39, at p. 43) "acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign, and the parties to such acts are not responsible therefor in their individual capacity." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognisable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of these courts are such as to amount to a gross miscarriage of justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court like any other court is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by

Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the report dated the 18th Jan. 1753 of the committee appointed by His Britannic Majesty to reply to the complaints of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures, the Prussian King had suspended the payment of interest on the Silesian loan. The report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the report, "a subject of the King of Prussia is injured by or has a demand upon any person here, he ought to apply to your Majesty's Courts of Justice, which are equally open and indifferent to foreigner or native; so, *vice versâ*, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of Justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, conscience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied *in re minime dubia* by all the tribunals and afterwards by the Prince. When the judges are left free and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently, and all a friend can desire is that justice should be impartially administered to him as it is to the subjects of that Prince in whose courts the matter is tried." The report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is given to any judge." It also contains the following statement: "All captures at sea as prize in time of war must be judged of in the Court of Admiralty according to the law of nations and particular treaties, if there are any. There never existed a case where a court, judging according to the laws of England only, took cognisance of prize. . . . It never was imagined that the property of a foreign subject taken as prize on the high seas could be affected by laws peculiar to England." This report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which an order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of *The Fox* (Roscoe, vol. 2, 61; Edw. 311). The actual decision in this case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the orders would not have been justified by international law. The decision proceeded upon the principle that where there is just cause for retaliation neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in *The Lucy* (Edw. 122).

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of Common Law. At most this amounts to a dictum, and in their Lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in *The Maria*, a Swedish ship (Roscoe's English Prize Cases, vol. 1, 152; 1 C. Rob. 340), his judgment contains the following passage: "The seat of judicial authority is indeed locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm, to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden as a neutral country which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the Prize Court is to take its law from Orders in Council. Moreover, if such a proposition were correct the court might at any time be deprived of the right which is well recognised of determining according to law whether a blockade is rendered invalid either because it is ineffective, or because it is partial in its operation: (see *The Franciska*, 4 W. R. 100; 10 Moo. P. C. 37). Moreover, in *The Lucy* above referred to, Lord Stowell had, in effect, refused to give effect to the Order in Council on which the captors relied.

Lord Stowell's dictum gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore (International Law,

vol. 3, sect. 436). It is said to have been approved by Story, J. in the case of *Maisonnaire* v. *Keating* (2 Gall. 325), but it will be found that Story, J.'s remarks, on which some reliance seems to have been placed by the President in this case, are directed not to the liability of captors in their own Courts of Prize, but to their liability in the courts of other nations. He is in effect repeating the opinion he expressed in the case of the *Invincible*, to which their Lordships have already referred. An Act, though illegal by international law, will not on that account be justiciable in the tribunals of another Power—at any rate, if expressly authorised by order of the Sovereign on whose behalf it is done.

Their Lordships have come to the conclusion, therefore, that, at any rate, prior to the Naval Prize Act 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. It was suggested that the Naval Prize Act 1864 confers such a power. Under that Act the Court of Admiralty became a permanent Court of Prize, independent of any commission issued under the Great Seal. The Act, however, by sect. 55, while saving the King's prerogative, on the one hand, saves, on the other hand, the jurisdiction of the court to decide judicially, and in accordance with international law. Subject, therefore, to any express provisions contained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in Council are: (1) those contained in sect. 13 (now repealed and superseded by sect. 3 of the Prize Court Act 1894) conferring a power of making rules as to the practice or procedure of Prize Courts; and (2) those contained in sect. 53, conferring power to make such orders as may be necessary for the better execution of the Act.

Their Lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question, the law therefore remains the same as it was before the Act, nor has it been affected by the substitution under the Supreme Court of Judicature Acts 1873 and 1891 of the High Court of Justice for the Court of Admiralty as the permanent Court of Prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the board by the Solicitor-General. It may be, he said, that the court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the court should subordinate its own opinion to the directions of the executive. This argument is open to the same objection as the argument of the Attorney-General. If the court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court, and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. As explained in the case of *The Odessa* (13 Asp. Mar. Law Cas. 215; 114 L. T. Rep. 10; (1916) A. C. 145), the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or Admiralty droits are now made part of the Consolidated Fund, and do not replenish the Privy Purse. Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law. Thus an order declaring a blockade will *primâ facie* justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective, and therefore unlawful. An order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established: (see Wheaton's International Law, 4th English edit., pp. 25 and 26.)

On this part of the case, therefore, their Lordships hold that Order XXIX., r. 1, of the Prize Court Rules, construed as an imperative direction to the court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessels or goods of enemies or neutrals. There is much to warrant this construction, for the Order in Council, by which the Prize Court Rules were made, conforms to the provisions of the Rules Publication Act 1893, and on reference to that Act it will be found inapplicable to Orders in Council, the validity of which depends on an exercise of the prerogative. It is reasonable, therefore, to assume that the words "or otherwise," contained in the Order in Council, refer to such other powers, if any, as the Crown possesses of making rules, and not to powers vested in the Crown by virtue of the prerogative.

The next question which arises for decision is whether the order appealed from can be justified under any power inherent in the court as to the

sale or realisation of property in its custody pending decision of the question to whom such property belongs. It cannot, in their Lordships' opinion, be held that the court has any such inherent power as laid down by the President in this case. The primary duty of the Prize Court (as indeed of all courts having the custody of property the subject of litigation) is to preserve the *res* for delivery to the persons who ultimately establish their title. The inherent power of the court as to sale or realisation is confined to cases where this cannot be done, either because the *res* is perishable in its nature, or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realised, and the court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the court in directing a sale of the *res* merely because it thought fit so to do, or merely because one of the parties desired the sale or claimed to become the purchaser.

It remains to consider the third and perhaps the most difficult question which arises on this appeal—the question whether the Crown has, independently of Order XXIX., r. 1, any and what right to requisition vessels or goods in the custody of the Prize Court pending the decision of the court as to their condemnation or release. In arguing this question the Attorney-General again laid considerable stress on the Crown's prerogative, referring to the recent decision of the Court of Appeal in this country *Re Petition of Right* (113 L. T. Rep. 575; (1915) 3 K. B. 649). There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging to its own subjects. But this right being one conferred by municipal law is not, as such, enforceable in a court which administers international law. The fact, however, that the Crown possesses such a right in this country, and that somewhat similar rights are claimed by most civilised nations may well give rise to the expectation that, at any rate in times of war, some right on the part of a belligerent Power to requisition the goods of neutrals within its jurisdiction will be found to be recognised by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognise a similar right of international obligation.

In support of the former alternative, which is apparently accepted by Albrecht (Zeitschrift für Völkerrecht und Bundesstaatsrecht, VI. Band, Breslau, 1912), it may be argued that the mere fact of the property of neutrals being found within the jurisdiction of a belligerent Power ought, according to international law, to render it subject to the municipal law of that jurisdiction. The argument is certainly plausible and may in certain cases and for some purposes be sound. In general, property belonging to the subject of one Power is not found within territory of another Power without the consent of the true owner, and this consent may well operate as a submission to the municipal law. A distinction may perhaps be drawn in this respect between property, the presence of which within the jurisdiction is of a permanent nature, and property the presence of which within the jurisdiction is temporary only. The goods of a foreigner carrying on business here are not in the same position as a vessel using an English port as a port of call. Even in the latter case, however, it is clear that for some purposes, as, for example, sanitary or police regulations, it would become subject to the *lex loci*. After all, no vessel is under ordinary circumstances under any compulsion to come within the jurisdiction. Different considerations arise with regard to a vessel brought within the territorial jurisdiction in exercise of a right of war. In the latter case there is no consent of the owner or of anyone whose consent might impose obligations on the owner. Nevertheless, even here, the vessel might well for police and sanitary purposes become subject to the municipal law. To hold, however, that it became so subject for all purposes, including the municipal right of requisition, would give rise to various anomalies.

The municipal law of one nation in respect of the right to requisition the property of its subjects differs or may differ from that of another nation. The circumstances under which, the purposes for which, and the conditions subject to which the right may be exercised need not be the same. The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown. The municipal law of other nations may insist on compensation as a condition of the right. The circumstances and purposes under and for which the right can be exercised may similarly vary. It would be anomalous if the international law by which all nations are bound could only be ascertained by an inquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own, and has not recognised the right of each nation to apply its own municipal law.

The right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation, is recognised by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognised as involving an obligation to make full compensation There is, however, much difference of opinion as to the precise circumstances under which and the precise purposes for which it may be lawfully exercised. It was exercised by Germany during the Franco-German War of 1870 in respect of property belonging to British and Austrian subjects. The German military authorities seized certain British ships and sunk them in the Seine. They also seized certain Austrian rolling stock and utilised it for the transport of troops and munitions of war. The German Government offered full compensation, and its action was not made the subject of diplomatic protest, at any rate by Great Britain. In justifying the action of the military authorities with regard to the British ships, Count von Bismarck laid stress on the fact "that a pressing danger was at hand and every other method of meeting it was wanting, so that the case was one

of necessity," and he referred to Phillimore, International Law, vol. 3, sect. 29. He did not rely on the municipal law of either France or Germany.(a)

On reference to Phillimore it will be found that he limits the right to cases of "clear and overwhelming necessity." In this he agrees with De Martens, who speaks of the right existing only in cases of "extreme necessity" (Law of Nations, book 6, sect. 7), and with Gessner, who says the necessity must be real, that there must be no other means less violent "de sauver l'existence," and that neither the desire to injure the enemy nor the greatest degree of convenience to the belligerent is sufficient: (Droits des Neutres, p. 154, 2nd edit., Berlin, 1876). It is difficult to see how the acts of the German Government to which reference has been made come within the limits thus laid down. It might have been convenient to Germany and hurtful to France to sink English vessels in the Seine or to utilise Austrian rolling stock for transport purposes, but clearly no extreme necessity involving actual existence had arisen. Azuni, on the other hand (Droit maritime de l'Europe, vol. 1, c. 3, art. 5), thought that an exercise of the right would be justified by necessity or public utility; in other words, that a very high degree of convenience to the belligerent Power would be sufficient. Germany must be taken to have asserted and England and Austria to have acquiesced in the latter view, which is the view taken by Bluntschli (Droit International, sect. 795 *bis*) and in the only British prize decision dealing with this point.

The case to which their Lordships refer is that of the *Curlew*, *Magnet*, &c., reported in Stewart's Vice-Admiralty Cases (Nova Scotia), p. 312. The ships in question with their cargoes had been seized by the British authorities as prize in the early days of the war with the United States of America, which broke out in 1812, and had been brought into port for adjudication. The Lieutenant-Governor of the province and the Admiral and Commander-in-Chief of His Majesty's ships on that station thereupon presented a petition for leave to requisition some of the ships and parts of the cargoes pending adjudication. In his judgment Dr. Croke lays it down that though as a rule the court has no power of selling or bartering vessels or goods in its custody, prior to adjudication, to any departments of His Majesty's service, nevertheless there may be cases of necessity in which the right of self-defence supersedes and dispenses with the usual modes of procedure. He held that such a case had in fact arisen, and accordingly granted the prayer of the petitioners: (1) As to certain small arms "very much and immediately needed for the defence of the province"; (2) as to certain oak timbers of which there was "great want" in His Majesty's naval yard at Halifax; and (3) as to a vessel immediately required for use as a prison ship. The appraised value of the property requisitioned was in each case ordered to be brought into court.

It should be observed that with regard to ships and goods of neutrals in the custody of the Prize Court for adjudication, there are special reasons which render it reasonable that the belligerent should in a proper case have the power to requisition them. The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the Crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is suspended. In cases where the ships or the goods are required for immediate use, this may well entail hardship on the party who ultimately establishes his title. To mitigate the hardship in the case of a ship a custom has arisen of releasing it to the claimant on bail—that is, on giving security for the payment of its appraised value. It may well be that in practice this was never done without the consent of the Crown, but such consent would not be likely to be withheld, unless the Crown itself desired to use the ship after condemnation. The 25th section of the Naval Prize Act 1864 now confers on the judge full discretion in the matter. This being so, it is not unreasonable that the Crown on its side should in a proper case have power to requisition either vessel or goods for the national safety. It must be remembered that the neutral may obtain compensation for loss suffered by reason of an improper seizure of his vessel or goods, but the Crown can never obtain compensation from the neutral in respect of loss occasioned by a claim to release which ultimately fails.

The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In *The Memphis* (Blatchford, 202), in *The Ella Warley* (Blatchford, 204), and in *The Stephen Hart* (Blatchford, 387) Betts, J. allowed the War Department to requisition goods in the custody of the Prize Court, and required for purposes in connection with the prosecution of the war. In the case of *The Peterhoff* (Blatchford, 381) he allowed the vessel itself to be similarly requisitioned by the Navy Department. The reasons of Betts, J., as reported, are not very satisfactory, for they leave it in doubt whether he considered the right he was enforcing to be a right according to the municipal law of the United States overriding the international law, or to be a right according to the international law. But his decisions were not appealed, nor does it appear that they led to any diplomatic protest.

On the 3rd March 1863, after the decisions above referred to, the United States Legislature passed an Act (Congress, Sess. III., c. 86, of 1863) whereby it was enacted (sect. 2) that the Secretary of the Navy or the Secretary of War should be and they or either of them were thereby authorised to take any captured vessel, any arms or munitions of war or other material for the use of the Government, and when the same should have been taken before being sent in for adjudication or afterwards, the department for whose use it was taken should deposit the value of the same in the Treasury of the United States, subject to the order of the court in which prize proceedings might be taken, or, if no proceedings in prize should be taken, to be credited to the Navy Department, and dealt with according to law.

It is impossible to suppose that the United States Legislature in passing this Act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the Act must be regarded as embodying the considered opinion of the United States authorities as to the right pos-

(a) See Westlake's International Law, Part 2, p. 132.—ED.

sessed by a belligerent to requisition vessels or goods seized as prize before adjudication. Nevertheless, their Lordships regard the passing of the Act as somewhat unfortunate from the standpoint of the international lawyer. In the first place, it seems to cast some doubt upon the decisions already given by Betts, J. In the second place, it tends to weaken all subsequent decisions of the United States Prize Courts on the right to requisition vessels or goods, as authorities on international law, for these courts are bound by the provisions of the Act, whether it be in accordance with international law or otherwise. In the third place, their Lordships are of opinion that the provisions of the Act go beyond what is justified by international usage. The right to requisition recognised by international law is not, in their opinion, an absolute right, but a right exercisable in certain circumstances and for certain purposes only. Further, international usage requires all captures to be brought promptly into the Prize Court for adjudication, and the right to requisition, therefore, ought as a general rule to be exercised only when this has been done. It is for the court and not the executive of the belligerent State to decide whether the right claimed can be lawfully exercised in any particular case.

It appears that the British Government, shortly after the Act was passed, protested against the provisions of the second section. The grounds for such protest appear in Lord Russell's dispatch of the 21st April 1863. The first is the primary duty of the court to preserve the subject-matter of the litigation for the party who ultimately establishes his title. In stating it Lord Russell ignores, and (having regard to the provisions of the section) was probably entitled to ignore, all exceptional cases based on the right of angary. The second ground is that such a general right as asserted in the section would encourage the making of seizures known at the time when they are made to be unwarrantable by law merely because the property seized might be useful to the belligerent. This objection is more serious, but it derives its chief force from the fact that the right asserted in the section can be exercised before the property seized is brought into the Prize Court for adjudication, and, even when it has been so brought in, precludes the judge from dealing judicially with the matter. If the right accorded by international law to requisition vessels or goods in the custody of the court be exercised through the court, and be confined to cases in which there is really a question to be tried, and the vessel or goods cannot, therefore, be released forthwith, the objection is obviated.

It further appears that the United States took the opinion of their own Attorney-General on the matter (10th vol., Opinions of A.-G. of U.S., p. 519), and were advised that there was no warrant for the section in international law, and that it would not be advisable to put it into force in cases where controversy was likely to arise. The Attorney-General did not, any more than Lord Russell, refer to exceptional cases based on the right of angary, but dealt only with the provisions of the section as a whole.

Some stress was laid in argument on the cases cited in the judgment in the court below upon what is known as "the right of pre-emption," but in their Lordships' opinion these cases have little if any bearing on the matter now in controversy. The right of pre-emption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contraband, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such stores were only contraband if destined for the use of the enemy Government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British Government, by way of mitigation of the severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners, and this practice, after forming the subject of many particular treaties, at last came to be recognised as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the Crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt and the property might turn out to be enemy property was the purchase money paid into court. It is obvious, therefore, that this "right of pre-emption" differs widely from the right to requisition the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect the question whether the vessel or goods should or should not be condemned as prize.

On the whole question their Lordships have come to the following conclusion: A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

With regard to the first of these limitations, their Lordships are of opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the Crown to the effect that the vessel or goods which it desired to requisition are urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law (see Warrington, L.J. in the case of *Re Petition of Right* already cited (113 L. T. Rep. 575; (1915) 3 K. B., at p. 666), and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of

evidence in a court of law or otherwise discussed in public.

With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the judge, under special circumstances, thought it reasonable to admit. If, on this hearing, the judge was of opinion that the vessel or goods ought to be released forthwith, an order for release would in general be made. A further hearing was not readily granted at the instance of the Crown. If, on the other hand, the judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. If the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, though obviously unsuitable in many respects to modern conditions, had the advantage of demonstrating at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their Lordships' opinion, the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself (having regard of course to modern conditions) that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the judge in this respect. In this manner Lord Russell's objection as to the encouragement of unwarranted seizures is altogether obviated.

With regard to the third limitation, it is based on the principle that the jurisdiction of the Prize Court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the court will, at the instance of any party aggrieved, compel them so to do. From the moment of seizure, the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbour for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search—a practice which is justifiable because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea.

It remains to apply what has been said to the present case. In their Lordships' opinion, the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the court, but because the judge had before him no satisfactory evidence that such a right was exercisable. The affidavit of the director of army contracts, following the words of Order XXIX., r. 1, merely states that it is desired on behalf of His Majesty to requisition the copper in question. It does not state that the copper is urgently required for national purposes. Further, the affidavit of Sven Hoglund, which is unanswered, so far from showing that there was any real case to be tried, suggests a case for immediate release. Under these circumstances the normal course would be to discharge the order appealed from without prejudice to another application by the Procurator-General supported by proper evidence. But the copper in question has long since been handed over to the War Department, and, if not used up, at any rate cannot now be identified. No order for its restoration can therefore be made, and it would be wrong to require the Government to provide other copper in its place. Under the old procedure, the proper course would have been to give the appellant, in case his claim to the copper be ultimately allowed, leave to apply to the court for any damage he may have suffered by reason of its having been taken by the Government under the order.

It was, however, suggested that the procedure prescribed by the existing Prize Court Rules precludes the possibility of the court awarding damages or costs in the existing proceedings. Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the Procurator-General on behalf of the Crown, and the captors are not necessarily parties. It is said that neither damages nor costs can be awarded against the Crown. It is not suggested that the persons entitled to such damages or costs are deprived of all remedy, but it is urged that in order to recover either damages or costs, if damages or costs are claimed, they must themselves institute fresh proceedings as plaintiffs, not against the Crown, but against the actual captors. This result would, in their Lordships' opinion, be extremely inconvenient, and would entail considerable hardship on claimants. If possible, therefore, the Prize Court Rules ought to be construed so as to avoid it, and, in their Lordships' opinion, the Prize Court Rules can be so construed.

It will be observed that by Order I., r. 1, the expression "captor" is, for the purposes of proceedings in any cause or matter, to include "the proper officer of the Crown," and "the proper officer of the Crown" is defined as the King's Proctor or other law officer or agent authorised to conduct prize proceedings on behalf of the Crown within the jurisdiction of the court.

It is provided by Order II., r. 3, that every cause instituted for the condemnation of a ship or (by virtue of Order I., r. 2) goods, shall be instituted in the name of the Crown, though the proceedings therein may, with the consent of the Crown, be conducted by the actual captors. By Order II., r. 7, in a cause instituted against the "captor" for restitution or damages, the writ is to be in the form of No. 4 of Appendix A. This would appear to contemplate that an action for damages can be instituted against the proper officer of the Crown, any argument to the contrary, based upon the form of writ as originally framed, being rendered invalid by the alterations in such form introduced by rule 5 of the Prize

Court Rules under the Order in Council dated the 11th March 1915. It is not, however, necessary to decide this point.

Order V. provides for proceedings in case of failure to proceed by captors. Under rules 1 and 2, which contemplate the case of no proceedings having been yet instituted, the claimant must issue a writ, and can then apply for relief by way of restitution, with or without damages and costs. It does not appear against whom the writ is to be issued, whether against the actual captors or the proper officer of the Crown who ought to have instituted proceedings. Under rule 3, however, which contemplates that proceedings have been instituted, it is provided that, if the captors (which, in the case of an action for condemnation must of course mean the proper officer of the Crown) fail to take any steps within the respective times provided by the rules, or, in the opinion of the judge, fail to prosecute with effect the proceedings for adjudication, the judge may, on the application of a claimant, order the property to be released to the claimant, and may make such order as to damages or costs as he thinks fit. This rule, therefore, distinctly contemplates that the Crown or its proper officer may be made liable for damages or costs. Neither damages nor costs could be awarded against persons who were not parties to the proceedings, and it can hardly have been the intention of the rules to make third parties liable for the default of those who were actually conducting the proceedings.

By Order VI. proceedings may be discontinued by leave of the judge, but such discontinuance is not to affect the right, if any, of the claimant to costs and damages. This, again, contemplates that in an action for condemnation the claimant may have a right to costs and damages, and, as the Crown is the only proper plaintiff in such an action, to costs and damages against the Crown.

Order XIII. is concerned with releases. They are to be issued out of the registry, and, except in the six cases referred to in rule 3, only with the consent of the judge. One of the excepted cases is when the property is the subject of proceedings for condemnation, that is, of proceedings in which the Crown by its proper officer is plaintiff, and when a consent to restitution signed by the captor (again by the proper officer of the Crown) has been filed. Another excepted case is when proceedings instituted by or on behalf of the Crown are discontinued. By rule 4 no release is to affect the right of any of the owners of the property to costs and damages against the "captor," unless so ordered by the judge. In the cases last referred to "captor" must again mean the proper officer who is suing on behalf of the Crown.

Order XLIV. deals with appeals, and provides that in every case the appellant must give security for costs to the satisfaction of the judge. In cases of appeals from a condemnation or in other cases in which the Crown by its proper officer would be a respondent, this provision could serve no useful purpose unless costs could be awarded in favour of the Crown, and if costs can be awarded in favour of, it follows that they can similarly be awarded against the Crown.

It is to be observed that unless the judgment or order appealed from be stayed pending appeal, rule 4 of this order contemplates that persons in whose favour it is executed will give security for the due performance of such order as His Majesty in Council may think fit to make. Their Lordships were not informed whether such security was given in the present case.

In their Lordships' opinion these rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject. This is precisely what might be expected, for otherwise the rules would tend to hamper claimants in pursuing the remedies open to them according to international law. The matter is somewhat technical, for even under the old procedure the Crown, as a general rule, in fact defrayed the damages and costs to which the captors might be held liable. The common law rule that the Crown neither paid nor received costs is, as pointed out by Lord Macnaghten in *Johnson* v. *The King* (91 L. T. Rep. 234; (1904) A. C. 817), subject to exceptions.

Their Lordships, therefore, have come to the conclusion that, in proceedings to which under the new practice the Crown instead of the actual captors is a party, both damages and costs may in a proper case be awarded against the Crown or the officer who in such proceedings represents the Crown.

The proper course, therefore, in the present case is to declare that upon the evidence before the President he was not justified in making the order the subject of this appeal and to give the appellants leave, in the event of their ultimately succeeding in the proceedings for condemnation, to apply to the court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it. Their Lordships will humbly advise His Majesty accordingly; but, inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 29 *and March* 7, 1916.

(Before SCRUTTON, J.)

SCHEEPVAART MAATSCHAPPIJ GYLSEN *v.* NORTH AFRICAN COALING COMPANY. (*a*)

Coaling contract—Exception of "Interference by war"—Necessity of suppliers to procure coal — Increased freights — Scarcity of ships — Refusal by suppliers to supply coal—Breach of contract—Liability.

On the 5th Dec. 1914 *a coaling contract was entered into between the plaintiffs, the owners of*

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister at Law

a line of steamships, and the defendants, a coaling company, by which it was agreed that the plaintiffs should take all the bunker coal they wanted at (inter alia) *Algiers from the defendants, and that the defendants should supply all the coal normally needed by the plaintiffs at that port. The form of contract utilised was one in use before the outbreak of the war, and contained a clause allowing the defendants to cancel the contract if either Great Britain or France became engaged in war with any other Power. A slip, however, was pasted on the contract, which provided that, "notwithstanding the war clause in the contract, it is understood that the depots will supply during the present hostilities . . . and, should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of the coals, this contract is subject to cancelment by suppliers." In Feb.* 1915 *the defendants refused to supply one of the plaintiffs' ships with coal at Algiers, and the plaintiffs were thereby put to expense in obtaining coal elsewhere. In an action by the plaintiffs for breach of contract the defendants contended that they were protected from liability by the exception clause in the contract and the added slip. It appeared that between Dec.* 1914 *and Feb.* 1915 *there was a great rise in freights between Cardiff and Algiers. The judge held that the word "supply" in the slip meant supply to the defendants at Cardiff, and not to the plaintiffs at Algiers, and was satisfied that if the defendants carried out the contract they would have had difficulty in chartering a vessel between these places at more than double the freights prevalent when the contract was made.*

Held, that since, to fulfil their contract, the defendants would not only have been put to extra expense, but would have had difficulty in obtaining ships, there was "interference" within the meaning of the slip, and that, therefore, the defendants were excused from liability.

Commercial List.

Action tried by Scrutton, J.

By a contract in writing dated the 5th Dec. 1914, and made between the agents of the respective parties, the defendants, the North African Coaling Company, agreed to supply to vessels belonging to the plaintiffs, Sheepvaart Maatschappij Gylsen, a firm of shipowners, bunker coal at Algiers. The contract, which was a pre-war form of contract, contained a clause providing that "in the event of war, hostilities, or other hindrance of any kind whatever, beyond the control of the suppliers affecting the normal working of the contract, the suppliers shall, during the continuance of those events, and until normal conditions again prevail, be relieved from all obligation under the contract. If Great Britain shall be engaged in war with a European Power the contract is subject to cancelment by the suppliers." As war was, in fact, prevailing at the time of the making of the contract, an additional clause in these terms, printed on a slip, was attached to the contract:

Clause A.—Notwithstanding the war clause in the attached contract, it is understood that the depots will supply during present hostilities so long and in such quantities as the port authorities will permit, and should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of coals, this contract is subject to cancellation by the suppliers.

Subsequently, freights between Cardiff and Algiers rose greatly. The result was that coal became expensive at Algiers, and the defendants were not in a position to carry out their contract with the defendants at a profit. On the 31st Dec. a steamship, the *Norton*, which had been chartered by the defendants and loaded with coal, was requisitioned by the British Government at Cardiff. The defendants procured another vessel in her place at a higher price, and this steamer did not arrive for a month after the *Norton* would have done, and great inconvenience was caused thereby.

On the 15th Jan. 1915 the defendants wrote to the plaintiffs to the effect that in consequence of abnormal circumstances having arisen they were compelled to cancel the contract in accordance with the provisions of clause A. Acting upon this letter the defendants, in February, refused to provide the *Fruithandel*, a vessel belonging to the defendants, with bunker coal. The plaintiffs in consequence had to purchase 680 tons of coal elsewhere at a price—18*s.* a ton—in advance of the contract price. They now brought this action for breach of contract, claiming as damages the difference—viz., 612*l.*—between the price they had had to pay for the coal and the contract price.

The defendants contended that "circumstances had arisen to further interfere with the supply of coals" within the meaning of clause A on the slip attached to the contract, and that they were entitled to repudiate the contract by that clause.

Leck, K.C. and *W. N. Raeburn* for the plaintiffs.

Maurice Hill, K.C. and *Alec Neilson* for the defendants.

Scrutton, J. read the following judgment:—

Scheepvaart Maatschappij Gylsen, whom I call the shipowners, sue the North African Coaling Company, whom I call the Coaling Company, for damages for failing to supply bunker coal to their steamer *Fruithandel* at Algiers in Feb. 1915. The coaling company reply that they had cancelled their coaling contract with the shipowners in Jan. 1915, and were not bound to supply them with coal in February.

The coaling contract between the parties was made on the 5th Dec. 1914, after the outbreak of war. It was in a common coaling depot form used before the war, binding the shipowners to take their entire bunker coal requirements at Algiers and Malta from the coaling company, and the coaling company to supply all the bunker coal normally required by the shipowners for the use of their steamers coaling *en route* in the customary manner.

The *Fruithandel*, going from Barcelona to the United States, in ballast, proposed to take her coal for the voyage at Algiers. This, which sometimes happened before the war, had become quite usual during the war, and the coaling company did not contend that it was not within the contract.

There was an exception clause in the original contract, which the coaling company did not contend protected them in the events which happened, and which contained a power to the

coaling company to cancel if Great Britain was at war, and to suspend the contract if France (the owner of Algiers) was at war. On this ante-war contract was pasted a slip "A," which I suspect to be a general clause agreed to by the owners of coal depots, and patched into their contracts without any minute consideration whether its language suited the particular contract in question. It ran as follows:

Notwithstanding the war clause in the attached contract, it is understood that depots will supply during the present hostilities so long and in such quantities as the port authorities will permit, and should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of coals, this contract is subject to cancelment by suppliers.

I think the war clause referred to is the power to cancel or to suspend in case of war. The question in the case was whether the events which happened were sufficient to relieve the coaling company under the provisions of this clause. The matters which freed the coaling company were said to be interference with supplies at the Algiers depot by the French authorities, and the requisitioning of large numbers of steamers by the Government with the consequent reduction of steamers available for trade, and increase of freights. The facts are as follows: The French authorities at Algiers on the outbreak of war put an embargo on all coal. This was soon removed, but permission for each shipment was required, and various regulations as to quantities for each steamer, and quantities of coal to be retained in Algiers by the coal depots collectively, were made from time to time.

I am not satisfied that the Government regulations would have prevented the shipment of the 500 tons asked for on the *Fruithandel* in February, for the coaling company supplied several steamers with larger quantities from the end of December to the end of February, *e.g.*, *Highbury*, 682 tons; *Harewood*, 686 tons; *Armuru*, 536 tons; *Black Head*, 602 tons. I am satisfied that the Government regulations would not have allowed the coaling company to supply coal to all the shipowners who in January and February would have claimed coal if their contracts, made before the middle of December, were still in force.

The facts on the second head of exemption claimed are as follows: After the first shock of the outbreak of war freights from Cardiff to Algiers were fairly steady; 14 and 15 francs a ton against 10 francs in peace time; and were so up to the middle of December, and when the coaling contract was made. From the middle of December till March they rose violently from 15 francs to 30 francs. A number of coaling contracts were made just before this big rise of freights, and consequently at quite inadequate prices, and it was undoubtedly to the pecuniary interest of the coaling company to cancel them if it could.

The history of the rise in freights was this: At first shipowners offered to charter to the Government. Ships thus chartered were removed from the commercial market, freights in which accordingly rose, and private owners thereupon chartered in that market. The Government then wanted ships and requisitioned, with the result that there was a great scarcity of ships in the commercial market, and freights rose rapidly.

In particular the coaling company had a vessel, the *Norton*, chartered at 18 francs, and just going under the tips at Cardiff on the 31st Dec., when the Government requisitioned her. The coaling company were able to replace her at 20 francs, but the substituted steamer did not arrive for a month after the *Norton* would have arrived, and considerable inconvenience was caused by the non-arrival of the *Norton's* cargo.

This was the beginning of a rapid rise in freights, due almost entirely to the number of vessels requisitioned by the Government, which brought freights by the end of the year to 70 francs a ton to Algiers. I am satisfied that if the coaling company was unable to cancel its contracts the coal it would have been required to supply by its contract would have required the charter of vessels which it would have been difficult to obtain at more than double the freights prevalent when the contract was made.

The question then is: Have, within the meaning of the contract, "circumstances arisen further to interfere in any manner with the supply, shipment, carriage, or delivery of the coal"? I have come to the conclusion that the last words are not limited to supply at Algiers, though the word "supply" in many parts of the contract has that meaning. I think the words may be paraphrased "the supply of the coal in Wales for shipment for and carriage to Algiers and delivery to ships there."

To limit the words to Algiers makes it very difficult to give any reasonable meaning to the four words used, while the wider meaning has a good business reason involved in it. Then did circumstances arise further to interfere with this?

In *Rolo* v. *Agius* (unreported), heard on the 3rd June 1915, Bailhache, J., of whose judgment I have seen a shorthand note, had to consider whether "war" had "interfered" with chartering so as to relieve the vendors of coal. It was proved before him that the outbreak of war with Turkey had rendered boats for the Eastern Mediterranean very difficult to obtain.

The rise in freight was not large, but boats were difficult to get, there being only two or three charters for Alexandria in a period when normally there would have been twelve. As I read his judgment, he would not have found the war "prevented" chartering, in this taking the same view as my recent judgment in *W. Blythe and Co.* v. *Richards Turpin and Co.* (*ante*, p. 753). But he held that though a moderate rise in freights would not "interfere," such a rise as proved shortage of ships, or the shortage of ships itself, would be an interference within the meaning of such a clause.

Mere extra expense would not do, if you could get all the ships you wanted by paying extra for them, but if you could not get the ships there would be "interference" and high freights for those you did get, or in the market generally would be evidence of shortage of ships. I do not think the mere variations of the market with the tonnage available in a particular place are enough to prove the physical scarcity, the results of which would amount to "interference." It must always be a question of degree, for every rise of price may be attributed to short supply, or supply too small for the demand, and what is a question of degree may often be a very difficult question, but a question of fact.

On the 15th Jan., when the coaling company cancelled, what had happened? They had been deprived of their ship, chartered to carry coal which was ready for her, by the unexpected requisition of the Government, and could not replace her coal at Algiers within a month. That, in my view, was certainly a fresh circumstance, further interfering with shipment and carriage. There was a shortage of ships, due to Government requisitions, which showed itself in a very rapid increase of freights, which quintupled themselves during the year.

This was, in my opinion, a fresh circumstance further interfering with shipment and delivery. And, I think, though I am not so clear about this, that the French regulations requiring a minimum of coal to be kept at Algiers, having in view the number of demands under contracts which might be expected in view of the rapid rise in price of coal, due to the rise in freights, which in turn was due to shortage of ships, was also a fresh circumstance further interfering with the delivery of coal.

In my view, the coaling company, following the principle laid down in *Crawford* v. *Wilson* (1 Com. Cas. 277), were entitled to look at the matter from the point of view of all their trade, not of the individual demand of coal for one ship of one customer. From that point of view I think they have established their right to cancel, and I give judgment for them with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *Holman, Birdwood, and Co.*

Solicitors for the defendants, *Ince, Colt, Ince, and Roscoe.*

March 17, 20, 21, *and* 30, 1916.

(Before Bailhache, J.)

Bolckow, Vaughan, and Co. *v.* Compania Minera de Sierra Menera. (*a*)

Contract of sale — Provision of suspension of deliveries "in case of war"—Rise in freights—Liability of shippers.

Sellers in Spain agreed to deliver iron ore to buyers in Middlesbrough, the contract of sale (which was made after the commencement of the war) containing the provision that: "In case of war . . . the supply of minerals now contracted for may be wholly or partially suspended during the continuation thereof." The sellers possessed a fleet of steamers. Owing to the course of events in the war freights rose very considerably, and the sellers then contended that they were entitled under the above provision in the contract of sale to "suspend wholly or partially" further deliveries.

Held, that the sellers were not entitled to suspend, since the sole effect of the contract of sale was to prevent them taking advantage in the rise of freights, but not to prevent them from fulfilling the contract.

Per Bailhache, J.: The only prevention of this nature on which the sellers could insist would be such an increased cost of carrying out their contract due to the war as made it commercially impossible.

A rise in freights due to an excepted cause can amount to prevention of the fulfilment of a contract to deliver oversea goods if it be indicative of a great scarcity in ships. The extent to which the rise in freights must be indicative of a scarcity in ships before it amounts to a prevention is a question of fact in each particular case. Where sellers would have to give away their goods, and, further, to make a loss on the goods delivered, such a scarcity of tonnage due to the war is indicated as will amount to commercial prevention.

Commercial Court.

Action tried by Bailhache, J.

By a contract in writing dated the 4th Nov. 1914 the defendants, the Compania Minera de Sierra Menera, owners of mines in Spain, agreed to sell to the plaintiffs, Bolckow, Vaughan, and Co., ironfounders and smelters carrying on business at Middlesbrough, 50,000 tons of ore during the year 1915. The contract contained the following provision:

> In case of strikes, accidents, war, or any unavoidable total or partial stoppage of works or mines, the supply of minerals now contracted for may be wholly or partially suspended drring the continuation thereof, and the time for delivery extended proportionately. In case of partial stoppage of works or mines, delivery to be *pro rata* with other then existing engagements.

The defendants made two deliveries under the contract, one of 5439 tons and another of 1365 tons. By the time the second delivery had been made, however, freights had risen to a considerable extent. The defendants thereupon repudiated the contract and refused to make any further deliveries until the end of the war unless the plaintiffs paid an increased purchase price. This the plaintiffs refused to do and the deliveries ceased.

The plaintiffs now brought this action for breach of contract, claiming damages in respect of the whole of the ore undelivered.

The facts are set out more fully in the judgment of his Lordship (*infra*).

A. A. Roche, K.C. and *C. F. Lowenthal* for the plaintiffs.—The defendants cannot rely upon the exception clause in the contract (*sup.*) as excusing them from their obligation to fulfil their part of the contract. They say that the war caused a rise in freights which rendered it impossible for them to carry out the contract at a profit, and that they were thereby brought within the provisions of the exception clause relating to war, and were entitled, wholly or partially, to suspend deliveries during the continuance of the war. But the exception clause dealt with events incidental to the production of the ore and in no way with transit.

Maurice Hill, K.C. and *R. A. Wright* for the defendants.—The defendants were entitled to repudiate the contract under the exception clause. It is true that the contract was made after the outbreak of war, but if anything occurred in the progress of the war to make the state of affairs different from what they had been when the contract was made (*e.g.*, here an enormous increase of freights) the clause came into operation. In any case, even if the defendants have broken their contract with the plaintiffs, the plaintiffs have suffered no recoverable damage.

A. A. Roche, K.C. replied.

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-law.

March 30.—Bailhache, J. read the following judgment:—

This is an action by buyers against sellers for damages for breach of a contract dated the 4th Nov. 1914 for the sale of 50,000 tons of Sagunto Rubio iron ore, to be delivered free *ex* ship at Middlesbrough, in about equal quantities over the year 1915. The price was 13*s.* 6*d.* per ton delivered.

The sellers delivered a cargo of 5439 tons on account of the contract, by arrangement with the buyers in Dec. 1914. They delivered a further part cargo of 1365 tons in Feb. 1915, but have made no further deliveries. After correspondence, to some of which I shall have occasion to refer later, the sellers, by their solicitors' letter of the 15th March 1915, refused to make further deliveries until after the war. The buyers elected to treat the claim to suspension as a repudiation of the contract, and on the 7th April issued their writ.

The right to suspend deliveries ultimately falls to be determined upon the construction of a few words in the exceptions clause in the contract and its application to the facts and circumstances of the case.

The crucial words are "In case of war."

Before discussing their meaning I had better mention a small incidental point. The defendants, after the contract was made, wrote to the plaintiffs on the 16th Nov. 1914 stating that: "In the event of the North Sea being closed to Spanish tonnage by the Admiralty authorities they would be compelled to suspend deliveries."

To this the plaintiffs assented, and it was argued for the plaintiffs that the defendants in writing this letter must be taken to have put their own interpretation on the exception "In case of war," and to have limited it to the closing of the North Sea to Spanish vessels.

I do not agree. I do not even now understand why this stipulation was made, but I do not think it was intended to be a limitation of the exception, but an extension of it.

Turning now to the crucial words it is, of course, clear that as a contract made after the war broke out the words "In case of war" cannot mean "If war should be declared." It must be treated as an elliptical expression requiring expansion. The most usual words where the sentence is written in full are "affecting or interfering with or preventing the performance of the contract." My selection is "preventing." That word seems to me most in accord with the general tenor of the clause, and the word which, having regard to all the circumstances, the parties themselves would have chosen at the time if they had considered and discussed the point. It is noteworthy that the closing of the North Sea to Spanish steamships would prevent and not merely interfere with deliveries. Mr. Roche suggested that the words now expressed did not apply to the transit of the ore, as none of the other words in the clause do so, but again I do not agree.

Having got thus far, I have to see whether the defendants were prevented by war from fulfilling their contract with the plaintiffs.

In order to do this I must, I fear, set out the facts in considerable detail.

The sellers are a Spanish company, controlled and managed by a Spanish firm, Messrs. Sota and Aznar.

This firm are, among other things, the owners of a fleet of steamers, and, having made the contract in question for the defendants, they made a freight contract in the form of a charter-party between the defendants and themselves on the 25th Nov. 1914 whereby they contracted to carry about 44,500 tons of iron ore during the year 1915 in about equal monthly quantities from Sagunto to Middlesbrough, at the freight of 5*s.* 9*d.* per ton. The defendants made separate arrangements for the carrying of the December cargo, and the quantity of about 44,500 tons was the quantity of ore remaining to be delivered by the defendants to the plaintiffs over 1915. The freight contract was, in fact, made to enable the defendants to carry out their contract with the plaintiffs

The charter-party was in English and in an English form, and contained the usual exceptions, the only material one being "restraints of princes."

Messrs. Sota and Aznar, through their representative, a Mr. Harrison, held out as an inducement to the plaintiffs to make the contract sued upon that there need be no fear of non-delivery as Messrs. Sota and Aznar would carry the ore in their own steamers.

I may observe in passing, that shortly after making the contract sued upon, and on the 11th Nov., the defendants made similar contracts with the plaintiffs at a slightly increased price for 25,000 tons of the same ore, for delivery over each of the years 1916 and 1917, at the price of 14*s.* a ton delivered. It seems to me strange that in war time, with the enormous fluctuations likely to take place from time to time in prices of goods and in freights, the defendants should have been willing to contract so far ahead. I attribute it to the fact that Messrs. Sota and Aznar knew that they had the ore under their hands in the mines, and also the ships to carry it, and that what they had to fear was not a rise in market prices, but in cost.

The freight at which Messrs. Sota and Aznar contracted with the defendants to carry the plaintiffs' ore was 5*s.* 9*d.* per ton, about the market rate when the contract of the 25th Nov. was made. Freights rose sharply afterwards, and in January they had risen to 15*s.* or 16*s.* a ton, and they continued at or about that figure at all material times. The present rates are something like 24*s.* a ton.

The reason for the sharp and continued rise is this. Immediately upon the declaration of war, and down to December, merchants were anxious and doubtful and were not making engagements. The Government were taking up ships. Shipowners, finding cargoes scarce, were in most instances glad to get their ships taken for Government purposes. The Government were also requisitioning ships. The requirements of the Government about counter-balanced the absence of commercial cargoes, and freights did not advance. By the middle of December things altered. The requirements of the Government increased. Merchants gained confidence in the ability of the Admiralty to protect maritime ventures, and were eagerly seeking ships. The result was an all-round demand or shortage of supply, and as a consequence a sharp rise in freights, which has been continuous and increasing.

An incident which contributed to the increased Government demand for ships and a consequent rise in freights was the intervention of Turkey in the war on the 5th Nov. 1915.

On the 1st Dec. 1914 the Admiralty issued stringent regulations, from time to time repeated and amplified, for the navigation of the Channel from the Isle of Wight to the North-East Coast. Pilotage was made compulsory from the Isle of Wight to Yarmouth and from Yarmouth to the Tees. Neutral vessels were for a short time convoyed by torpedo-boats, but later one armed guard was put on board to ensure their going to their destination; moreover, navigation at night was prohibited. All this entailed delays, considerable at first but less later on. These delays were the subject of interviews and correspondence with the Board of Trade.

I have no reason to doubt that the complaints made were well founded, if somewhat exaggerated.

The result of these delays was that Messrs. Sota and Aznar found it difficult to carry out by their own ships the freight engagements they had made in respect of the ore sold to the plaintiffs and to other customers. Difficult, but by no means impossible, as the correspondence shows. The delays, in fact, tended to decrease as time went on, partly through smoother working and partly due to the fact that as the days lengthened so did the hours during which navigation was permitted.

The cost to shipowners was increased by concessions having to be made to the crews in raising wages and providing better food. The price of coal, too, rose. Altogether Mr. Harrison put the extra cost of carriage at 8*s.* a ton, of which 6*d.* was for wages, 1*s.* for coal, and 4*s.* for delay. This last item I think excessive.

Messrs. Sota and Aznar somewhat added to their difficulties by taking advantage of the high prices steamers were fetching to sell three-quarters of their old steamers. They replaced them by others to some extent, but there was, I gather, a reduction of their fleet by one-half.

Early in January Messrs. Sota and Aznar approached buyers in England, with whom they had made contracts for the sale of ores, with a view to getting them to meet them by sharing with them the extra cost of carriage. Their views were communicated to Messrs. Bagley and Co., their agents at Middlesbrough, in a letter of the 8th Jan. 1915.

On the 14th Jan. Messrs. Bagley and Co. wrote the plaintiffs on the subject:

Referring to conversation yesterday, kindly note the steamship *Urko Mendi* sailed from Sagunto on the 8th inst., and will bring about 1000-1500 tons of Sagunto Rubio for you. All being well, the steamer should arrive towards the end of this month, although owing to the exceptional delays and increased Government restrictions on the north-east coast, the voyage will probably take double the usual time. The agent of the steamer will be Mr. Geo. S. Rosevear, with whom please keep in touch.

Our principals, Messrs. Sota and Aznar, advise that the freights from the Mediterranean are now equal to the c.i.f. price of the ore, and there is a probability of their going still higher. Under the circumstances, they consider that they are entitled to ask you for some relief, as the conditions now prevailing in the North Sea are very much worse than they were at the time the contract was made. Since the bombardment of Hartlepool a new set of circumstances has arisen, notably the much greater delay and risk by mines, seeing that the whole of the coast is now mined by the British Government, resulting in increased rates of freight to the east coast by at least 6*s.* to 7*s.* a ton as compared with the west coast, while the crews have to be paid double, and in many cases will not even come at all. Messrs. Sota and Aznar reluctantly have to ask for your assistance, but, under the exceptional circumstances now current, we trust you will appreciate their point of view and make them some contribution towards the extra rates of freight which they have to pay.

Upon this Messrs. Sota and Aznar and their agents, Messrs. Bagley, exchanged views in letters of the 21st and 22nd Jan.:

Messrs. T. Bagley and Co., Middlesbrough.—Dear Sirs,—We are in receipt of your letter of yesterday. . Of course you may point out to Bolckows or thers in reply to their contention that the shippers have hips, that the Menera Company have no ships at all, and that the freight question does very much affect them. The reasons we have urged have not been adequately dealt with by any of your receivers, except to try and airily push them on one side, which is no answer at all. However, we hope to revert to the whole position to-morrow. . . .—Yours faithfully, p.pro Sota and Aznar.—E. Toda, Manager.

Messrs. Sota and Aznar, London.—Dear Sirs,—We thank you for your letter of yesterday. Bolckows—We await to hear further from you. We are afraid they will think, seeing the Menera Company and the ships are both managed by Messrs. Sota and Aznar, that the excuse is a trifle thin. . . .—Yours faithfully T. Bagley and Co.

On the 6th Feb. there appeared in the *Times* a German official announcement in the following terms:

The waters round Great Britain and Ireland, including the whole of the English Channel, are herewith proclaimed a war region.

On and after the 18th Feb. every enemy merchant vessel found in this war region will be destroyed without its always being possible to warn the crew or passengers of the dangers threatening.

Neutral ships will also incur danger in the war region, where, in view of the misuse of neutral flags ordered by the British Government, and incidents inevitable in sea warfare, attacks intended for hostile ships may affect neutral ships also.

The *Times* headed the announcement "A Blockade of England," but that is no part of the German announcement and is incorrect.

Messrs. Sota and Aznar on the same day wrote to Messrs. Bagley a letter in these terms. It is unnecessary to comment upon this letter except to say that iron ore was not declared contraband by the Germans until the 18th April, a month after the defendants' claim to suspend all further deliveries:

Dear Sirs,—We are in receipt of yours of yesterday. . . . The German declaration of attack starting by 18th we think makes our case absolutely clear for relief. Contrary to your opinion, we declare that the Tees is a fortified area. It is protected by batteries both at West Hartlepool and the South Gare. We have lately been in the position of delivering contraband to a fortified area, and now we are going to be in the position of having to run a blockade, and, looked at from a neutral point of view, this is altogether too thick to manage without relief.

Meanwhile the defendants had delivered to the plaintiffs the part cargo in February to which I have already referred. They were delivering to such of their buyers as had met their claim for an

increasing price, and were offering to deliver to the plaintiffs, with 5*s.* a ton relief, and to make further deliveries on mutually acceptable terms, offers which the plaintiffs declined, while pointing out that the fact of making them showed the defendants' ability to deliver them if they would.

The German threat had no effect upon freights, but it caused a rise in premiums on war risks at Lloyd's. The rate at Lloyd's for three months' insurance on Spanish ships became about 60*s.* per cent., as against about 30*s.* This did not affect Messrs. Sota and Aznar, as they did not insure at Lloyd's. They had insured in a Spanish club shortly after war broke out. Ships entered in that club paid a premium, and this premium has always remained the same. I understand there has up to the present time been one loss.

Lloyd's records show that the losses of ships of all nationalities in or near waters which would be traversed between Spain and the Tees was in February, fifteen; March, fifteen; April, nine. In other waters the losses were in February, eight; March, nineteen; April, twenty-two; or just under 1 per cent. of the arrivals in the United Kingdom during these same months. There was no increase in the number of neutral vessels sunk by mines or submarines in the first three months of 1915 as compared with the last three months of 1914.

These are the relevant facts, and I am now in a position to consider whether the defendants' claim to suspend deliveries was a justifiable one or was one which the plaintiffs were entitled to treat as a repudiation of the contract. Mr. Hill contended that the covering contract which the defendants made with Messrs. Sota and Aznar had become unenforceable by the 17th March, and that the defendants must be treated as sellers, who would have needed to go into the market and charter at about 16s. a ton to fulfil their contract with the plaintiffs to deliver ore to them at the price of 13*s.* 6*d.* delivered, and that the rise was due to the war, and the defendants were therefore prevented in a commercial sense from performing this contract.

I will deal with the matter firstly on the assumption that the contention that the defendants were left without a covering freight contract is correct. I do this in deference to Mr. Hill's very able argument, and to the general importance of the point so raised. Upon this assumption the question to be first decided is whether a rise in freights due to an excepted cause, in this case war, can ever amount to prevention of fulfilment of a contract to deliver oversea goods.

I am of an opinion that there may be such a rise in freights due to war as to entitle a seller who has to pay freight to say that he was thereby prevented by war from making delivery. The expression "rise in freights" in this connection, and in this case in particular, really means war has caused a scarcity of ships for commercial purposes, of which the rise in freights is at once the sign and the measure. Scarcity of ships due to war, and rise of freights due to war, are interchangeable expressions, but, as the thing that matters to a seller who is seeking a ship to enable him to make delivery is the price he must pay for her, he more usually speaks of the rise in freights. It would simplify matters to say that no rise in freights can amount to prevention of performance, but I think that is impossible in a case where rise in freights due to war connotes scarcity of ships due to war. Suppose, for example, that all British ships were commandeered by the Admiralty, they leaving only neutral ships for private commerce. It seems clear to me that in such a case a seller might truly say, "War has prevented my chartering," and it would be equally correct for him to express himself as being prevented by scarcity of ships or by a rise in freights, a rise which in such a case would, of course, be enormous.

Prevention in a commercial sense is, in my judgment, sufficient, and what is prevention in that sense is a question of degree which could theoretically be expressed either in terms of tonnage or freight, but for practical purposes can be most intelligibly stated in terms of freight.

A scarcely less difficult question is to what extent must a rise in freights be indicative of a scarcity of ships before it amounts to prevention. This must depend, to some extent, upon the circumstances of each particular case. In this case the rise was 5*s.* 9*d.*, to, say, 16*s.* A 16*s.* freight means that the defendants would have had to give away their goods, and, further, to lose 2*s.* 6*d.* a ton on each ton delivered.

As at present advised, I should be inclined to hold that such a rise in freights did indicate such a scarcity of tonnage due to the war as amounted to commercial prevention.

I am, however, relieved from definitely deciding this very difficult question because I have come to the conclusion that Messrs. Sota and Aznar were not, in this case, released from this freight contract, and that the defendants were not in the position of having to charter ships at the increased freight in order to fulfil their contract with the plaintiffs.

Before, however, leaving the subject I should like, in view of its general interests, to make one or two further observations.

It may be objected to this doctrine of commercial prevention that it presses hardly on the buyer who is injured to precisely the extent to which the seller is relieved. To this I would say that it must be borne in mind that, where the contract provides for exemption in the case of war preventing deliveries, the parties clearly contemplate the possibility of prevention, and the seller's contract is not that he will deliver in all events.

The other observation is that no seller can claim exemption if he has failed to protect himself by the requisite covering contracts in a case where it is usual and prudent so to do. A seller cannot choose to take the risks of the market and then, when the market has gone against him, claim protection. In such a case he is prevented, not by war, but by his own imprudence.

It remains to give my reasons why I think Messrs. Sota and Aznar were bound by this carrying contract with the defendants.

They cannot make any use of rise in freights as they had the ships. The effect of their contract with the defendants was to prevent them from taking advantage of the rise in freights, a sufficiently galling situation, no doubt, but not prevention.

The only prevention of this nature on which they could insist would be such an increased cost of carrying out their contract due to the war as made it commercially impossible.

I think there was no sufficient rise in cost, but it is immaterial to consider the matter because they have no clause or words in their contracts with the defendants which in any way entitle them to raise the point. The only possible words are "restraints of princes," and these obviously will not do.

Mr. Hill, as a last resource, sought to make out a case of "restraint of princes" on quite other grounds, and he directed my attention to the delays in the voyage due to the Admiralty Regulations and to the German threat of February.

As to delays, I doubt whether the Admiralty Regulations for the safe navigation of the home waters from the Isle of Wight to the Tees can be called "restraints of princes," although, no doubt, they involve compliance with Admiralty requirements. These requirements, however, were more in the nature of encouraging navigation than preventing it.

Moreover, I remember the defendants' stipulation about the closing of the North Sea to Spanish ships, and in the face of that stipulation I should not hold any regulations for the safer navigation of the North Sea a restraint of princes, even though they involve delays.

Apart from all this, these delays, such as they were, did not in any way prevent their fulfilling their contract, or compel them to get outside tonnage, for they persistently offered cargoes to the plaintiffs at current market prices, and their requests for an increase of a few shillings in the contract price were based, not upon want of ships, but upon increased cost of running them plus the added risk of submarines after the German threat of Feb. 5.

This threat, which is Mr. Hill's other instance of restraint of princes, is, indeed, the only ground upon which they could hope to escape from their contract. I think the point is quite unsound. The German notice is not notice of a blockade. They were not in a position in any case to give notice of blockade, and indeed the only danger which neutrals ran, according to the notice, was the danger of falling victims to attacks intended for British ships. One may pardon Spanish owners being sceptical of the Germans being at much pains to discriminate between neutral and British ships, but I cannot regard either the notice or the subsequent action of the Germans as "restraints of princes." I am glad to find that upon this point my view is in accord with that of Messrs. Sota and Aznar, as shown by the fact that they ran their steamers as readily as before, and made no change at all in their insurances.

The real truth of the case is that Messrs. Sota and Aznar, as managers and controllers of the defendant company and their contracts, would not hold themselves as shipowners to an enforceable but unprofitable freight contract.

By no stretch of imagination can this be brought within the words "in the case of war," however one contemplates that imperfect phrase, whether by "affecting or interfering with or preventing performance," and the result is there must be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Van Sandau* and *Co.*, for *Belk, Cochrane*, and *Belk*, Middlesbrough.

Solicitors for the defendants, *W. A. Crump* and *Son.*

Judicial Committee of the Privy Council.

March 10, 13, 14, 16, *and April* 7, 1916.

(Present: the Right Hons. Lords Parker of Waddington, Sumner, Parmoor, Wrenbury, and Sir Samuel Evans).

The Gutenfels.

The Barenfels.

The Derfflinger. (*a*)

ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT (IN PRIZE).

Prize Court—Merchant ship in enemy port—Use of Suez Canal port as port of refuge—Commencement of hostilities—Permission to leave—No offer of pass—Attitude of Germany—Reciprocal obligations—Detention—Sixth Hague Convention of 1907, *art.* 1, 2, 5—*Form of Order.*

By art. 1 *of the Sixth Hague Convention* 1907: "*When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to the port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war, and has entered a port belonging to the enemy whilst still ignorant that hostilities have broken out.*"

By art. 2: "*A merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port within the period contemplated in the preceding article or which was not allowed to leave may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation or he may requisition it on payment of compensation.*"

The G., a German ship, arrived at Port Said on the 5th Aug. 1914 *in ignorance that war had been declared between Great Britain and Germany. From her arrival till the 14th Aug. she was not free to leave, but on the latter date she was informed that she was free to proceed if she liked. Matters so remained until the 13th Oct. She never asked for a pass. She was never offered one. On the 13th Oct. the Egyptian Government by arrangement with the British Government put a crew on board her, and on the 16th she was conducted out to sea, where she was seized by a British cruiser as prize. War was not declared between Great Britain and Turkey until the 5th Nov.* 1914, *and Egypt had not then been declared a British protectorate.*

The Egyptian Prize Court held that the G. was entitled to detention in lieu of confiscation, and that in accordance with art. 2 (sup.) *she should be detained during the war and restored to her owners at the conclusion of hostilities.*

Held, that Egyptian ports must be treated as enemy ports, and that, assuming the Hague Convention applied and the Order in Council of the 4th Aug. 1914 *extended to Egypt and was operative at the time the vessel was taken as prize, the failure of Germany to concur in recognising art.* 1 *left*

(*a*) Reported by W. E. Reid, Esq., Barrister-at-Law.

the question whether art. 2 or any part of it was obligatory, or whether, if the course referred to in art. 1 as "desirable" was not taken, art. 2 had any application to an enemy ship in an enemy port at the outbreak of hostilities, or had subsequently without knowledge of the war entered it, was one of international law involving a reciprocal obligation performable only at the end of the war. The British Government was entitled in such circumstances to seize and detain the ship during the war, and the proper order was one merely for the detention of the ship, leaving the ultimate rights of the parties to be determined after the war.

THESE were three appeals from orders of His Britannic Majesty's Supreme Court for Egypt.

In the case of the *Gutenfels* and the *Barenfels* the appeal was by the Crown.

In the case of the *Derfflinger* the Crown was the respondent.

Counsel appearing in the appeals were in the *Gutenfels*:

Sir *F. E. Smith*, (A.-G.), Sir *George Cave*, (S.-G.), *Stuart Bevan*, *Pearce Higgins*, and *C. R. Dunlop* for the Crown.

Sir *Robert Finlay*, K.C. and *R. A. Wright* for the respondents.

In the case of the *Barenfels* it was admitted that it must be governed by the decision in the *Gutenfels*. The only substantial difference in the facts was that in this case the ship entered Port Said in ignorance that war had been declared and was already in port at the time of the outbreak between Germany and Great Britain.

Sir *F. E. Smith* (A.-G.), Sir *George Cave* (S.-G.), and *Darby* for the appellant.

Sir *Robert Finlay*, K.C. and *R. A. Wright* for the respondents.

In the case of the *Derfflinger* the Hague Convention did not apply, as, although a merchant ship, it was intended to convert her into a warship. She took refuge in Port Said on the 2nd Aug. 1914 on account of war between Germany and France and Russia. She intended to pass through the Suez Canal, but was detained, and the Egyptian Prize Court made an order for her confiscation.

Sir *Robert Finlay*, K.C. and *Dumas* for the appellants.

Sir *George Cave* (S.-G.) and *A. Clive Lawrence* for the respondent the Procurator of Egypt were not called on.

The judgment of their Lordships was delivered by

Lord WRENBURY.—The *Gutenfels* is a German ship. Bound from Antwerp for Bombay and Karachi, she arrived at Port Said in the afternoon of the 5th Aug. 1914, and entered the port while still ignorant (as is now admitted) that hostilities had broken out between Great Britain and Germany. From the 5th Aug. to the 14th Aug. she was not free to leave. On the 14th Aug. she was informed that she was free to proceed if she liked. Matters so remained until the 13th Oct. She never asked for a pass. She was not offered one. On the 13th Oct. 1914 the Egyptian Government put a crew on board, and on the 16th Oct. they took her to sea and conducted her to H.M.S. *Warrior*, who seized her as prize and took her to Alexandria. It is admitted that this was done by arrangement between the Egyptian Government and the British Government.

At the date of these events war had not been declared between Great Britain and Turkey, and Great Britain had not declared Egypt to be a protectorate. The date of the declaration of war with Turkey was the 5th Nov. 1914. The date of the declaration of the protectorate was the 18th Dec. 1914.

The Egyptian Prize Court has pronounced the ship to have belonged at the time of seizure to enemies of the Crown, and to have been seized under such circumstances as to be entitled to detention in lieu of confiscation, and has ordered the ship to be detained by the marshal until further order; and has further declared that, in accordance with the provisions of art. 2 of No. VI. of the Hague Conventions, the ship must be restored or her value paid to the owners at the conclusion of hostilities. From this order the Crown appeals. There is no cross-appeal. The Crown contends that the ship ought to be confiscated, or, at any rate, that the question whether she ought to be confiscated, or, on the contrary, whether she must be restored or her value paid to the owners at the conclusion of hostilities, should be left to be determined after the war, and that in default of confiscation the order should be for detention till further order, with liberty to apply as in the case of *The Chile* (12 Asp. Mar. Law Cas. 598; 112 L. T. Rep. 248; (1914) P. 217). The respondents, having no cross-appeal, cannot contest the order which imposes detention.

The points which have been argued before their Lordships are numerous. Upon some of them it is unnecessary to pronounce any opinion:

First, to the Hague Convention No. VI. (which is the relevant Hague Convention, and will hereinafter be styled simply the Hague Convention) Egypt was not a party. The question has been raised whether, having regard to the anomalous position in which Egypt stood, the Hague Convention applies to Egypt. Their Lordships find it unnecessary to determine this question. They will assume, in favour of the respondents, that the Hague Convention does apply to the case before them.

Secondly, the question has been argued whether Port Said was, within the meaning of the Hague Convention, an "enemy port," that is, a port enemy to Germany. Having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain, their Lordships do not doubt that it was. In Hall's International Law, 6th edit., p. 595, the learned author writes: "When a place is militarily occupied by an enemy the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil." Their Lordships think this to be right.

Thirdly, a question has been raised whether, in the events which have happened, the Hague Convention was operative and binding at the date of the events with which the board are concerned in this case. The respondents say that it was. The law officers of the Crown have stated in the

plainest terms that the British Government abide by the Hague Convention and look to Germany to do the same. The British Government, by the Order in Council of the 4th Aug. 1914, presently mentioned, acted under the Hague Convention. It is unnecessary to determine whether the Hague Convention applies or not. Their Lordships will assume in favour of the respondents that it does.

It results that the only question for determination is the construction and meaning of the Hague Convention, and that question reduces itself to the decision of a single point—namely, whether art. 2 is, or whether any part of it is, obligatory, or whether, if the course referred to as "desirable" in art. 1 be not taken, art. 2 has or has not any application to a vessel which finds itself in an enemy port at the commencement of hostilities, or which, having left its last port of call before the commencement of hostilities, enters an enemy port without having heard of the hostilities. The respondents contend that it has, the appellants that it has not. The question is one of law arising on an international document involving a reciprocal obligation performable only at the end of the war. If this board were now to determine this question of construction, Germany might hereafter take a different view, and the performance of the obligation, as a reciprocal obligation, might become impossible.

The order made by the Egyptian court determines that the ship must be restored, or her value paid at the conclusion of hostilities. If this order were to stand and at the conclusion of hostilities Germany maintained that the construction upon which that order is based was wrong and refused to restore or pay the value of British ships seized and detained by Germany in like circumstances, the performance of the obligation as a reciprocal obligation would be impossible unless achieved by diplomatic action. Under these circumstances the construction for which the respondents contend, involving as it does a reciprocal obligation performable only at the end of the war, cannot at present be fully determined by their Lordships in the absence of knowledge of the future attitude of the respective belligerents in that regard. Accordingly they think it incompetent to dispose of this question of construction at present.

It remains to apply the above considerations—subject to the above reservations—to the case before the board.

On the 4th Aug. 1914 an Order in Council was issued recognising and acting upon art. 1 of the Hague Convention, conditionally upon Germany within a limited time doing the same. Germany did not do so, and the Order in Council did not come into operation. If this Order in Council included Egypt, the result of Germany's refusal to concur was that neither art. 1 nor art. 2, so far as it is complementary to art. 1, took effect as regards Port Said. If, as their Lordships incline to think, it did not extend to Egypt, it may, of course, be set out of consideration. In either case nothing turns upon this Order in Council, except that it evidences the desire of Great Britain to take that which the Hague Convention indicated as the reasonable course. Their Lordships do not forget that the respondents placed some reliance upon this Order in Council as assisting in the construction which they place upon the Hague Convention, but their Lordships are unable to accept the view that it is of any service for this purpose. Even if at the date of this Order in Council Great Britain took a particular view of the construction of the Hague Convention, that fact throws no light upon the question as to what is, in fact, the true construction.

On the 5th Aug. 1914 the Egyptian Government issued a "Décision," or Decree, similar in some respects to the Order in Council of the 4th Aug. This granted days of grace to sunset on the 14th August to ships of not more than 5000 tons gross. But as the *Gutenfels* was more than 5000 tons it did not apply to her.

The facts then are (assuming, as for the purposes of this judgment their Lordships do assume, that the Hague Convention applies) that art. 2, so far as it was complementary to art. 1, never came into operation by reason of the fact that as between Great Britain and Germany the recommendation agreed by art. 1 failed, by reason of the action, or, rather, the inaction, of Germany, to be carried into effect by the contracting parties. Under these circumstances, there being nothing which entitled the *Gutenfels* to remain in the port (for she had long exceeded any such limited right as might arise from a right of passage through the canal, assuming that she had such a right), there was nothing to prevent the Egyptian Government and British Government acting as they did, and at the least seizing and detaining her during the war, to await at the conclusion of the war the determination of the questions above reserved. The order which, in their Lordships' judgment, will be right will be an order allowing the appeal, and substituting an order in the terms of that in the case of *The Chile* (12 Asp. Mar. Law Cas. 598; 112 L. T. Rep. 248; (1914) P. 217), leaving the ultimate rights between the parties to be determined after the war.

Their Lordships will humbly advise His Majesty accordingly.

They think that each party should bear his own costs of this appeal.

THE BARENFELS.

This vessel, bound from Hamburg and Antwerp to Colombo, Madras, and Calcutta, arrived at Port Said on the 1st Aug. 1914, and was still there on the 4th and 5th Aug. Except that she was in Port Said before and at the commencement of the war, the relevant facts are identical with those in the case of the *Gutenfels*. This case is governed by the decision in the *Gutenfels*, and their Lordships will humbly advise His Majesty that the same order should be made.

THE DERFFLINGER.

This vessel showed by her build that she was intended for conversion into a warship. The Hague Convention therefore does not apply (see art. 5). She passed through the canal and arrived at Port Said on the 2nd Aug. on a voyage from Yokohama to Bremen. Her log contains the following entries:

1914, August 2: Arrived Port Said. The journey cannot be continued on account of the war.

August 3rd: Passengers and baggage landed.

Under the International Suez Canal Convention of 1889, she was entitled to use the canal for the purposes of passage. She had used it, and the

above entries show that her voyage of passage was over; that her journey was, in her view, rendered abortive by reason of the war, and that she had accordingly landed her passengers and cargo. Port Said was, on the 2nd and 3rd Aug., a neutral port. The war which caused the discontinuance of the ship's voyage was the war between Germany and France and that between Germany and Russia. When war broke out on the 4th Aug. between Germany and Great Britain the vessel was lying in Port Said, not in exercise of a right of passage, but by way of user of the port as a port of refuge. Under these circumstances, the Canal Convention had ceased to be operative and she was not entitled to any protection. The ship was a German ship lying in an enemy port, and was a ship to which the Hague Convention did not apply.

If any justification were necessary for the subsequent acts of the Egyptian and British Governments it is found in the fact that the ship, while lying in the port, was using her wireless for communicating information to the German warships, the *Goeben* and the *Breslau*. In their Lordships' opinion, the order for her confiscation was right, and this appeal should be dismissed. The order should be varied, however, so as to run "and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown" and in other respects should be in the form of the order under appeal. Their Lordships will advise His Majesty accordingly. The appellants will pay the costs of the appeal.

Solicitors for the Crown, *Treasury Solicitor*.

Solicitors for the respondents in the first two cases, *Botterell* and *Roche*.

Solicitors for the appellants in the third case, *Clarkson* and *Co*.

March 17 *and April* 7, 1916.

(Present: The Right Hons. Lords PARKER of WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE ACHAIA. (a)

ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT.

Prize Court—Ship in enemy port at outbreak of hostilities—Refusal of offer of pass—Liability to confiscation—Hague Conference 1907, *Convention VI., arts.* 1, 2.

If a merchant ship in an enemy port at the outbreak of hostilities rejects the offer of a pass and elects to remain in that port, she is not protected by arts. 1 *and* 2 *of the Hague Conference* 1907, *Convention VI., from condemnation and confiscation as prize.*

Decision of the Supreme Court for Egypt (in Prize) affirmed.

APPEAL by the owners of the German steamship *Achaia* from a judgment of H.B.M. Supreme Court for Egypt ordering the condemnation and confiscation of the ship as prize.

Sir *Robert Finlay*, K.C. and *Dunlop* for the appellants.

Ernest Pollock, K.C. and *Rayner Goddard* for the respondent, the Procurator-General in Egypt.

At the close of the arguments for the appellants their Lordships reserved judgment.

The judgment of their Lordships was delivered by

Lord PARKER OF WADDINGTON.—The *Achaia* was a German steamship of 2732 tons, belonging to the Deutsche Devante Linie, of Hamburg. She arrived at the port of Alexandria on the 31st July 1914 in the course of a voyage from Bremen to Alexandria, and thence to certain Syrian ports. She carried a general cargo, part of which was consigned to Alexandria. She had discharged this part of her cargo by 4 p.m. on the 4th Aug. Upon the outbreak of war between Germany and this country she was, under the Egyptian Decision of the 5th Aug., allowed till sunset on the 14th Aug. to leave the port of Alexandria. On the 12th Aug. she was offered a pass for the Piræus available till sunset on the 14th Aug., signed by Lieutenant Grogan Bey, Inspector of Marine of the Egyptian Ports and Lights Administration. According to the evidence of Max Stross, the ship's agent, she made all arrangements to leave, but at the last moment came to the conclusion that it would be too dangerous unless the pass were viséd by the French Consul. Moreover, she believed that all Egyptian ports were neutral. She accordingly elected to remain where she was. The port authorities thereupon seized the ship and disabled her engines. Subsequently, on the 19th Oct. 1914, the captain and crew were made prisoners of war, and the ship placed in the custody of the marshal of the Prize Court. There can be no doubt that what happened amounted to a seizure as prize.

Their Lordships have already decided in the case of the *Gutenfels* that Egyptian ports must be treated as enemy ports within the meaning of the Sixth Hague Convention. Under the circumstances, however, they are of opinion that the recommendation contained in the first article of that Convention was fully complied with. The vessel was given sufficient time to leave the port of Alexandria. She was offered a pass to a neutral port, and there is no reason to suppose that such pass was insufficient, or would not have been recognised as valid by any belligerent Power. The fact that the vessel did not leave Alexandra under this pass was not due to *force majeure*, but to her own deliberate election not to do so. She cannot, therefore, rely on the provisions of art. 2 of the Convention. Even if Alexandria could be regarded as a neutral port, the fact would be immaterial. The seizure of an enemy vessel in a neutral port, though a breach of neutrality, would not in a Court of Prize afford any ground for its release.

The case is, in their Lordships' opinion, a clear one. The appeal should be dismissed, and the appellants will pay the costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Pritchard* and *Sons*.

Solicitor for the respondent, *Treasury Solicitor*.

(a) Reported by W. E. REID, Esq., Barrister-at-Law.

March 2 *and April* 7, 1916.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL)

THE BELGIA. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Enemy merchant ship in enemy port—Outbreak of war—Capture "in port" or "at sea"—Meaning of "port"—Capture in open roadstead—Hague Peace Conference 1907, *Convention VI., arts.* 1, 2.

By art. 1 *of the Sixth Hague Convention* 1907: "*When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass direct to the port of destination or any other port indicated to it. . . .*"

By art. 2: "*A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated,*" *but may be detained.*

Held, that these articles applied only to vessels within a "port" in the ordinary mercantile sense of the word, and did not apply to a vessel captured while lying in an open roadstead at the commencement of hostilities, although at a place within the limits of the fiscal port.

Decision of Sir S. T. Evans affirmed.

APPEAL from a decree of Sir Samuel Evans, sitting in the Prize Court, whereby the steamship *Belgia*, belonging to the appellants the Hamburg-Amerika Line, was condemned as lawful prize.

Sir *Robert Finlay*, K.C. and *Lumas*, for the appellants.

Sir *F. E. Smith* (A.-G.), *Butler Aspinall*, K.C., and *C. R. Dunlop*, for the Procurator-General, respondent, were not called on.

The following cases were referred to by the appellants:

Garston Steamship Company v. *Hickie and Co.*, 15 Q. B. Div. 580;
Hunter v. *North Marine Insurance Company*, 13 App. Cas. 717;
The Erymanthos, 1 P. Cas. 339;
The Möwe, ante, p. 17; 112 L. T. Rep. 261; (1915) P. 1.

The considered judgment of their Lordships was delivered by

Lord PARMOOR.—The question raised in this appeal is whether the steamship *Belgia* is entitled to the benefit of the 1st and 2nd articles of the Sixth Convention of the Second Hague Peace Conference 1907. The appellants are a German company, known as the Hamburg-Amerika Line. The master of the *Belgia*, which was bound from Boston to Hamburg, received information at about 9 p.m. on the 3rd Aug. 1914, when off the Scilly Isles, that war had broken out between Germany and France. The master decided to deviate from the voyage to Hamburg and to go to the Bristol Channel, on the ground, as stated in his evidence, "because I was afraid of being captured by a French man-of-war." When off Trevose Head, a Newport pilot was taken on board. The *Belgia* arrived off Newport in the afternoon of the 4th Aug. 1914, and at about 5.50 p.m. proceeded as far as the Bell Buoy at the entrance to the river Usk. Among other places vessels are discharged at the port of Newport in the Alexandra Dock, which is approached by a dredged channel, at the entrance to which is the Bell Buoy. At this point the *Belgia* was stopped by the dockmaster, and ordered to anchor off the English and Welsh lightship, in a position alleged to be within the fiscal port of Newport. On the afternoon of the 4th Aug. war had not broken out between Germany and England, and Newport was not an enemy port to a German vessel. Art. 1 and 2 of the Sixth Convention only apply to merchant ships at the commencement of hostilities in an enemy port, or entering an enemy port whilst still ignorant that hostilities have broken out. Their Lordships, therefore, cannot hold that, when the steamship *Belgia* reached Newport on the afternoon of the 4th Aug., the first and second articles of the Sixth Convention had any application. It was argued by Sir Robert Finlay that the dockmaster had no right to stop the *Belgia* at the Bell Buoy, but in the opinion of their Lordships the dockmaster was not exceeding the limits of his authority. Their was no obligation to admit the *Belgia* to the Alexandra Dock, admission being a matter of courtesy and not of right.

On the morning of the 5th Aug., and after war had broken out between Germany and England, the *Belgia* was captured in the position described in para. 6 of the affidavit of the dockmaster as follows:

> The position of the *Belgia* was then as follows: The English and Welsh light vessel bearing about E.S.E. three-quarters of a mile, and the Spit lay about N.E. one mile. She was, therefore, 3¾ miles from the Somersetshire coast, and 5 miles from the Bell Buoy (marking the mouth of the River Usk).

It is proved in evidence that the position in which the *Belgia* was anchored at the time of capture is in an open roadstead, and that no cargoes are ever discharged or unloaded at or near this position, and that the only places at Newport where cargoes are discharged or unloaded are in the docks or at wharves up the river Usk. In ordinary mercantile language, a merchant vessel in such a position would not be within the port of Newport. A port denotes a place to which merchant vessels are in the habit of going to load or discharge cargo, and not a place in an open roadstead at which no cargoes are ever discharged or unloaded. It was, however, argued on behalf of the appellants that the word "port" in arts. 1 and 2 of the sixth convention included not only a port in the ordinary mercantile sense, but a fiscal port, and that at the time of capture the *Belgia* was within the fiscal port of Newport.

It is not necessary to determine whether the *Belgia* at the time of capture was in fact within the fiscal port of Newport, since, in the opinion of their Lordships, arts. 1 and 2 of the sixth Convention do not include vessels merely within a fiscal port. These articles are limited to merchant ships, and refer to commercial transactions, not to fiscal regulations. The word "port" is used not only in the collocation

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

"enemy port," but of "a port of destination" and a "port of departure"—well recognised terms in the language of commerce. To extend the benefit of arts. 1 and 2 of the Sixth Convention to vessels within a fiscal port would be not only to interpolate a word not used in the articles, but to introduce a new test not relevant to their subject-matter and involving different considerations. That the scope of arts. 1 and 2 is commercial and not fiscal is further confirmed by the language of the preamble of the Convention. The parties to the Convention are not concerned with the fiscal regulations in any particular country, but anxious to ensure the security of international commerce against the surprises of war, and to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities.

It is not necessary in this appeal to consider the questions which have arisen as to the conditions under which the provisions of arts. 1 and 2 of the Sixth Convention become applicable, since, assuming their applicability, the facts do not bring the *Belgia* within their benefit. In the opinion of their Lordships, the *Belgia* was captured at sea, and is not entitled to the benefits of arts. 1 and 2. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants, *Pritchard* and *Sons*.

Solicitor for the respondent, *Treasury Solicitor*.

March 16 *and April* 13, 1916.

(Present: The Right Hons. Lords PARKER of WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE MARQUIS BACQUEHEM. (a)

ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT (IN PRIZE).

Prize Court—Ship entering enemy port after declaration of war with knowledge, but under leave to proceed on voyage—Boarding at sea—Leave to proceed on voyage—Detention—Liability to confiscation—Hague Peace Conference 1907, *Convention VI., arts.* 1 *and* 2.

A merchant ship belonging to a belligerent Power was stopped by a British warship at sea and was informed of the outbreak of hostilities. She was, however, allowed to proceed on her voyage apparently under a misapprehension that some period of grace had been allowed her. She proceeded to the port of Suez, regarding it as a neutral port, with the intention of remaining there.

Held, that she was not protected by arts. 1 *and* 2 *of the Sixth Hague Convention* 1907, *and was liable to condemnation.*

Decision of the Supreme Court for Egypt (in prize) reversed.

APPEAL by the Procurator-General in Egypt from a judgment of His Britannic Majesty's Supreme Court for Egypt in Prize (Cator, J. and Grain, J.) ordering the detention of the Austrian-Lloyd steamship *Marquis Bacquehem*, and asking for the condemnation and confiscation of the ship as prize.

Sir *F. E. Smith* (A.-G.) and *J. B. Aspinall* for the appellant.

Sir *Robert Finlay*, K.C. and *Balloch* for the respondents.

The judgment of their Lordships was delivered by

Sir SAMUEL EVANS.—The subject-matter of this appeal is an Austria-Hungarian steamship of about 4400 tons gross register.

The court at Alexandria pronounced that the ship had been seized under such circumstances as to be entitled to detention in lieu of confiscation, and ordered that she should be detained until further order. The court further declared that the ship should be restored or her value paid to the owners at the conclusion of the war, in accordance with the provisions of the Hague Convention No. VI. of 1907.

The appellant contends that this order should be set aside, and asks for the condemnation and confiscation of the ship as prize.

The respondents seek to uphold the order. They have not brought a cross-appeal, and do not ask for restitution.

The facts alleged and relied upon by the respondents in support of the order were that on the 17th Aug. 1914, when the ship was in the Red Sea about 150 miles north of Port Sudan on her voyage from Karachi to Trieste, she was boarded by officers from H.M.S. *Duke of Edinburgh*, and informed of the hostilities between Great Britain and Austria-Hungary; that until then those on board of her were ignorant of such hostilities; that an officer from H.M.S. *Duke of Edinburgh* informed her master that he was at liberty to proceed on the voyage, and made an entry to that effect in the ship's log-book; that she so proceeded and entered the port of Suez; and that she intended to prosecute the voyage through the Suez Canal to its termination at Trieste, but was prevented from so doing by the disabling of her engines on the 20th Aug.

As was done in reference to Port Said and the captures of vessels which had been lying there, in the cases of the *Gutenfels* and others, their Lordships in the present case accept that the port of Suez, in the circumstances of the time, is to be regarded as an "enemy port" within the meaning of The Hague Convention.

Assuming this in favour of the respondents, and assuming, for the purposes of this appeal, that the Hague Convention is binding upon Great Britain and Austria-Hungary, their Lordships consider it clear that the case of this ship is not one of those specified in the Convention, where only an order for detention during the war, on condition of restoration or of making compensation after the war, should be made.

Upon the undisputed facts the vessel was not in a belligerent or enemy port at the outbreak of war; nor did she enter such a port while ignorant of the hostilities between the two countries; nor was she captured on the high seas while ignorant of such hostilities.

Accordingly, in their Lordships' opinion, the order made in the court below in the terms of the Hague Convention cannot stand.

(a) Reported by W. E. REID, Esq., Barrister-at-Law.

But even if the ship was not entitled to direct protection under the provisions of The Hague Convention, counsel for her owners contended that, inasmuch as the only knowledge of hostilities which her master had was derived from H.M.S. *Duke of Edinburgh*, and as she had been allowed to proceed on her voyage by the visiting officer from H.M.S. *Duke of Edinburgh*, she ought not to be deprived of the protection she had claimed under The Hague Convention or to be in a worse position than she would have been if the *Duke of Edinburgh* had captured her at sea and exercised the right to detain her.

These contentions were not formulated in accordance with any principle of law, and their Lordships are unable to accept them, even if the facts were as alleged.

In order to appreciate the real situation relating to the voyage, visit, search, and seizure of the vessel, it is deemed useful to make a short statement of the true facts as they present themselves to their Lordships.

The ship was loaded at Karachi, bound with a cargo of cotton for Trieste, and with a cargo of 4600 sacks of grain for Aden. She set out on her voyage from Karachi on the 4th Aug. 1914. The following entry appears in the ship's log:

Aug. 4, 1914.—Left Karachi. A few minutes before the steamer left the port the agent of the society repeated a telegram to the commander of the ship received from the directors of the Austrian Lloyd ordering the captain to go direct to Trieste—not to stop at Aden—and on arrival at Suez the passengers would be shipped on to another steamer and taken to their destination.

The vessel was not constructed for passenger traffic. No information was given as to what passengers were on board or what were their respective destinations. Nor was anything said about any steamer on which they were to be shipped at Suez. But an entry in the log on the 26th Aug. refers to "arrangements for fifteen Austrian reservists to go to Alexandria *en route* for Europe."

The summary of the contents of the log between Karachi and Suez (from the 4th to the 20th Aug.) is unusually meagre. It only records the visit from H.M.S. *Duke of Edinburgh* on the 17th. But on a loose sheet of paper discovered in the log-book by His Honour Judge Cator were found these entries:

Aug. 12-13, 1914.—We navigate at the same speed. At 8.30 Ras Marshay was sighted. As by approaching Aden we might meet the "natanti" and in order not to be seen we navigate without lights, this all the more as we had seen some searchlights from the direction of the harbour.

Aug. 13.—At night we navigate without lights towards the Straits of Perim, keeping our steamer out of the way in order to avoid encounters.

Thus, darkly and furtively, did the ship sail past Aden—a British possession—the port to which a large part of her cargo was destined. There is a significant omission of any reference to the Aden cargo in the master's affidavit and in the petition filed for the claimants.

The ship was navigated with similar precautions through the Straits and past Perim Island, also a British possession.

When, on the 17th Aug., after travelling some 700 miles or more up the Red Sea, she was visited and searched by the officer from H.M.S. *Duke of Edinburgh*, these incidents of the voyage and entries on the loose sheet were not disclosed to him. The lieutenant commander acted (no doubt upon the information imparted, to which he appears to have given the unsuspecting credence of an honest sailor) upon the assumption that the master of the enemy vessel was not aware of hostilities. He also acted under a misapprehension that some period of grace had been allowed to the ship. He accordingly refrained from capturing her, and made the following entry in the ship's log-book:

Boarded steamship *Marquis Bacquehem* in latitude 22° 25′ N., longitude 37° 8′ E., and informed captain that a state of war exists between England and Austria. Being within the period of grace, allowed ship to proceed on her voyage.—(Signed) J. K. B. BIRCH, Lieutenant Commander, R.N., H.M.S. *Duke of Edinburgh*, commanded by Captain H. Blackett, R.N.

It was argued, or suggested, that this constituted some kind of licence for the ship to proceed upon her voyage without any risk of capture, or at any rate, of any capture or seizure involving more than detention as a penal consequence. But the entry, in fact, was nothing more than a memorandum of his visit and search which the boarding officer was bound, as part of his duty, to record on the ship's log.

The instructions to officers in such a case are prescribed thus:

The visiting officer should enter on the log-book of the vessel a memorandum of the search. The memorandum should specify the date and place of the search, and the name of Her Majesty's ship and of the commander; and the visiting officer should sign the memorandum, adding his rank in the navy.—(See Manual of Naval Prize Law, by Holland, issued by authority of the Admiralty, 1888, art. 225)

What the officer did amounted to no more than if he had said, "From what you have told me, so far as I am concerned you can go."

Having thus escaped capture by H.M.S. *Duke of Edinburgh*, the ship reached Suez on the 20th Aug.

There her engines were partly disabled so as to prevent her from entering the canal; and there she remained until she was taken out to the roads and captured on the 27th Oct.

It was admitted by the respondents' counsel that notwithstanding anything contained in any of the Suez Canal Conventions, it was right for the safety of the canal to disable the ship so as to make it impossible for her to enter it.

In these circumstances their Lordships are of opinion that the owners of the ship could not after that claim any rights or privileges under any of the Canal Conventions.

In the course of his argument for the respondents, Sir Robert Finlay did not rely upon any protection or privilege under the Canal Conventions. After the reply of the Attorney-General, however, in answer to their Lordships, he put forward tentatively an argument that under the Conventions the vessel while at Suez was immune from any act of hostility. As to this, it is sufficient to state, in addition to what has already been said, that their Lordships find, as a fact, that the ship did not intend to pass through the canal in the course of her voyage. She intended to, and did, use Suez as a port of refuge. She made direct for it, although Aden

with a cargo destined for Aden which would have to be reshipped and carried back about 1300 miles to be delivered at Aden. At Suez her "passengers" were to be shipped on to another steamer and thence "taken to their destination." She regarded Suez as a neutral port and intended to stay there indefinitely; and, indeed, on the 26th Oct. a protest was made against her expulsion from the neutral port.

His Honour Judge Cator, in the court below, said he greatly doubted if the ship ever intended to proceed beyond Suez. Their Lordships do not share any such doubt. On the contrary, they have come to the conclusions above stated.

As to the order made in the court below, the judgments express in terms the difficulties the court felt in ordering detention instead of confiscation.

Judge Cator in one passage said: "If the news of hostilities had reached her through any source but that of a British man-of-war, I apprehend that we should have no option but to condemn her to confiscation. That would have been her fate under the old law, and she can only escape by bringing her case within the exceptions specified in the Hague Convention, and when the language of the Convention is clear we must abide by it. For although I have every wish to construe its articles in a liberal spirit, the court cannot modify or add to them."

Their Lordships have already declared their opinion that the ship could not be brought within the provisions of the Sixth Hague Convention at all.

In another passage His Honour expressed himself as follows: "I find it hard to decide whether we should confiscate the ship or only order her detention. I have had more difficulty in making up my mind upon this point than any that I have yet had to determine in prize. For although it is true that, after being warned, the *Marquis Bacquehem* might have run for a neutral port, it certainly does seem hard that she should be in a worse plight because the *Duke of Edinburgh* allowed her to proceed instead of taking her before a Prize Court, especially as this permission seems to have been given in the belief that the ship was entitled to consideration in consequence of her ignorance that war had broken out. Moreover, no stipulation was made that she should go to a neutral port, and she may have been encouraged in the belief that she could enter Suez in security. On the whole, I think that we should only order detention."

Their Lordships have already shown that this view of the effect of what was done by the Lieutenant Commander of the *Duke of Edinburgh* was erroneous, and that no such result could properly be held to follow his visit and search and his record thereof in the ship's log.

Indeed, if the officer had been truthfully informed of the facts, he would have been justified himself in capturing the ship on the high seas; and if that had been done, the facts would supply sufficient evidence to enable the court to order her confiscation.

It is not necessary to comment further upon the judgments. Their Lordships have only dealt as fully as they have with the case because they differ in opinion from the learned judges of the court below. Upon the simple ground that the ship, after knowledge of hostilities, entered into an enemy port, where in the circumstances she was not entitled to protection or immunity under any international Convention, their Lordships are of opinion that she was properly seized as prize, and is subject to confiscation.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed; that the order appealed against should be reversed; and that an order be made condemning the vessel as lawful prize to the Crown. The respondents must pay the costs of the appeal.

Solicitor for the appellants, *Treasury Solicitor*.
Solicitors for the respondents, *Waltons* and *Co.*

March 16, 17, *and April* 13, 1916.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS)

THE PINDOS.
THE HELGOLAND.
THE ROSTOCK. (*a*)

ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT (IN PRIZE).

Prize Court—Enemy ship—Port of refuge—Suez Canal port—Rejection of safe conduct pass—Seizure—Suez Canal Convention 1888, *arts.* 1 *and* 4*—Question of international convention—Right of enemy owners to be heard.*

Art. 4 *of the Suez Canal Convention of* 1888, *confirmed by the subsequent Anglo-French Agreement of* 1904, *contains the following provisions: "The Maritime Canal remaining open in time of war as a free passage even to the ships of war of belligerents, according to the terms of art.* 1 *of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of three miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers."*

Held, that the Convention had no application to enemy ships which were using the Canal ports of access, not for the purpose of passing through the Suez Canal, but as a neutral port in which to seclude themselves for an indefinite time in order to defeat belligerents' rights of capture.

Held, further, that as the alleged immunity from capture was based on international conventions, the enemy owners were entitled to be heard.

Practice laid down in The Möwe (ante, *p.* 17; 112 *L. T. Rep.* 261; (1915) *P.* 1) *followed.*

APPEALS by the owners of three German merchant vessels which had been captured and condemned as lawful prize under circumstances which fully appear from the judgment.

Sir *Robert Finlay*, K.C. and *Dunlop* for the appellants, the owners of the *Pindos*.

Sir *Robert Finlay*, K.C. and *Dumas* for the appellants, the owners of the *Helgoland*.

Sir *Robert Finlay*, K.C. and *Balloch* for the appellants, the owners of the *Rostock*.

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

Sir *F. E. Smith* (A.-G.) and *Ricketts* for the respondent in the case of the *Pindos*.

Sir *F. E. Smith* (A.-G.) and *Hubert Hull* for the respondent in the cases of the *Helgoland* and the *Rostock*.

The considered judgment of their Lordships was delivered by

Lord SUMNER.—These are three appeals from three decrees of His Majesty's Court of Prize in Egypt, condemning these vessels as lawful prize. In view of the fact that reliance was placed on immunities alleged to be claimable under international conventions, no objection has been raised, such as was raised in *The Möwe* (*ante*, p. 17; 112 L. T. Rep. 261; (1915) P. 1), to the presence of enemy owners to be heard before their Lordships on appeal.

The steamship *Pindos* is a steamship of 2933 tons gross, which belonged to the Deutsches Levant Linie, of Hamburg. In the course of a round voyage from Antwerp to Eastern Mediterranean ports she entered Port Said at 2 a.m. on the 1st Aug. 1914. Her next port would have been on the Syrian coast. Through her agents at Port Said she "received orders not to proceed until further instructions." She discharged her Port Said cargo and continued to lie in her berth. On the 14th Aug. the captain was informed by the authorities that he was free to sail and would receive a pass, if he would call for it at the port office. This he did not do, having been informed by someone, but inaccurately, that the harbour of Port Said had been declared neutral. In fact, by that date Egypt was in a state of hostility *de facto* to the German Empire. On the 22nd Aug. a pass for Beirut was actually delivered to him. He says that he doubted its validity—which, in truth, he had no grounds for doing—but, since he was advised by his agents to stay in Port Said, as it was a neutral port, his reasons for staying there are clear.

On the 15th Oct. he was taken outside the limits of Port Said and of territorial waters in charge of persons appointed for the purpose by the Egyptian authorities, and then was captured by H.M.S. *Warrior* in latitude 31 degrees 24¼ minutes north and longitude 32 degrees 20¾ minutes east. Upon these facts a decree of condemnation as prize was pronounced in His Majesty's Supreme Court for Egypt in Prize on the 17th Feb. 1915, from which this appeal is brought.

The steamship *Helgoland* is a steamship of 5666 tons gross, which belonged to the Norddeutscher Lloyd, of Bremen. On the 29th July 1914 she entered the Suez Canal bound with a general cargo from Singapore to Rotterdam and Bremen, and reached Port Said on the 30th July. Her captain had made preparations to continue his voyage and leave Port Said on the 31st July, but on his arrival he received instructions from his owners to stay there. He recorded in his log on that day "German mobilisation," and on the 17th and 18th Aug. he paid off a large number of his crew. A pass was offered to him in the same way as to the captain of the *Pindos*, but he did not avail himself of the offer. Another was actually delivered, also as in that case, of which, though it was valid, no use was made. The reason for this again was that the captain, on the same pretext, had definitely decided, in accordance with his owners' instructions, to stay where he was. Subsequently the *Helgoland* also was taken outside Egyptian territorial waters by persons employed by the Egyptian authorities, and there captured by H.M.S. *Warrior* on the 15th Oct. at about the same place. She was duly condemned as prize on the 17th Feb. 1915.

The *Rostock* was a steamship of 4957 tons gross, which belonged to the Deutsche-Australische Dampfschiffsgesellschaft, of Hamburg. She came through the Suez Canal from Eastern ports with general cargo, bound, no doubt, for a home port, and arrived at Port Said on the 31st July and began to discharge such part of her cargo as was deliverable there. While doing so her captain received a cablegram from his owners at Hamburg to wait further orders. His log records on the 1st Aug.: "In order to protect ship and cargo from the attacks of the enemy, shall remain until further notice in Port Said, as the harbour is neutral." On the 17th to 19th Aug. the ship discharged her cargo of frozen meat. After the 31st July the captain received no further communication from his owners. He was treated by the Egyptian authorities in respect of the offer of a pass, the actual delivery of a valid pass subsequently, and the removal of his ship outside Egyptian territorial waters, exactly as the captains of the *Pindos* and the *Helgoland* were treated. He behaved in the same way and for the same reasons. The *Rostock* was captured by the *Warrior* on the 15th Oct., and was condemned as prize on the 17th Feb. 1915.

The claimants in their petitions formerly relied on what in each case were substantially the same defences—namely: (1) the benefit of the Sixth Hague Convention of 1907, arts. 1 and 2; (2) the benefit of art. 4 of the Suez Canal Convention of 1888, confirmed by art. 6 of the Anglo-French Agreement of 1904; (3) the formal invalidity and the practical inefficiency of the passes which were offered by the Egyptian authorities; (4) considerations of equity and natural justice arising out of the circumstances under which the ships were ejected from Egyptian waters.

Of these points the first has already been dealt with sufficiently by their Lordships in the case of *The Gutenfels* (*ante*, p. 346; 114 L. T. Rep. 953; (1916) A. C. 112) and the third in that of *The Achaia* (*ante*, p. 349; (1916) 2 A. C. 198). Of the second all that need be said is this: Whatever question can be raised as to the parties, to and between whom the Suez Canal Convention 1888 is applicable and as to the interpretation of its articles, one thing is plain, that the Convention is not applicable to ships which are using Port Said not for the purposes of passage through the Suez Canal or as one of its ports of access, but as a neutral port in which to seclude themselves for an indefinite time, in order to defeat belligerents' rights of capture, after abandoning any intention there may ever have been to use the port as a port of access in connection with transit through the canal. Those responsible for the ships took their course deliberately, and took it before the 14th Aug. The captains appear, as was only natural, to have consulted together and to have acted in concert. In the case of the *Helgoland*, her owners in Bremen, doubtless well informed persons, as early as Thursday, the 30th July

1914, if not earlier, were so assured, though no ultimatum had then been issued, that Germany would shortly be at war, and England and Egypt would be neutral, that they ordered her captain to stop in Port Said instead of trying to reach a Turkish, a Greek, an Italian, or an Austrian port. It is no light responsibility to stop a ship of over 5000 tons with general cargo in midvoyage for an indefinite period, and thus to imperil insurances alike on ship and cargo, and to incur heavy expenses and probably heavy claims from cargo owners as well; but this responsibility was taken. Their Lordships are of opinion that the evidence amply justified the decision of the Prize Court in each case, that the ships were using Port Said simply as a port of refuge, and therefore without any right or privilege arising out of the Suez Canal Convention 1888. Hence their expulsion by the Egyptian authorities when it had become plain that they would not leave of themselves, affords no answer to the claim for condemnation in natural justice, or equity, or law. In view of their common election to remain, no distinction can be drawn between the ships which had used the canal and the *Pindos*, which never meant to use it at all. By the 14th Aug. liability to capture and condemnation had accrued in each case, and no circumstance then existing or arising thereafter had annulled that liability. The general question of costs has been dealt with in the case of *The Zamora* (*ante*, p. 330; 114 L. T. Rep. 626; (1916) 1 A. C. 77).

Their Lordships will humbly advise His Majesty that in each of these three cases the appeal should be dismissed with costs.

The orders should in each case be varied, however, so as to run, "and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown," and in other respects should be in the form of the orders under appeal.

Solicitors for the respective appellants, *Pritchard* and *Sons*; *Clarkson* and *Co.*; *Waltons* and *Co.*

Solicitor for the respondent, *Treasury Solicitor*.

March 17 *and April* 14, 1916.

(Present: The Right Hons. Lord PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE CONCADORO. (*a*)

ON APPEAL FROM H.B.M. SUPREME COURT FOR EGYPT (IN PRIZE).

Prize Court—Enemy merchant ship—Offer of pass to neutral port—Conditions—Failure to use pass—"Force majeure"—Ship detained "owing to circumstances beyond its control"—Hague Conference 1907, *Convention VI., arts.* 1 *and* 2.

A merchant ship in an enemy port is not entitled to receive an unconditional pass under art. 1 *of the Hague Convention VI., and reasonable conditions attached to the offer of the pass do not invalidate it; and the expression "force majeure" in art.* 2 *of the same Convention has reference to circumstances which render the ship unable to leave the port within the days of grace allowed her, and cannot be construed to include the circumstance that the master has not been provided with sufficient money by the owners to continue the voyage.*

Decision of the Supreme Court for Egypt (*in Prize*) *affirmed.*

APPEAL by the owners of the Austrian steamship *Concadoro* from a judgment of H.B.M. Supreme Court for Egypt condemning the vessel as prize.

Sir *Robert Finlay*, K.C. and *Theobald Mathew* for the appellants.

Sir *F. E. Smith* (A.-G.) and *Branson* for the Procurator-General, respondent.

The considered judgment of their Lordships was delivered by

Lord PARMOOR.—The steamship *Concadoro* is an Austrian vessel (1813 tons gross and 1198 tons net register) registered at Trieste. On the 1st Aug. 1914 the *Concadoro* left the port of Cardiff under charter to Messrs. D. L. Flack and Son, with a cargo of patent fuel destined for consignees at Port Soudan. She arrived at Port Said on the 18th Aug. 1914, her master being ignorant that war had broken out between Great Britain and Austria-Hungary. Owing to the outbreak of war, the master was not provided by the managing owner with funds to enable him to continue his voyage, and decided to remain at Port Said, fearing to put to sea lest he should be captured by British men-of-war. The master says that he believed Port Said to be a neutral port. Their Lordships have already found that Port Said was not at this date in fact a neutral port, and that, under the Suez Convention, the ships of belligerents had no right to make it a port of refuge. It is only because Port Said has at the said date to be regarded as an enemy, and not a neutral, port, that the appellants are able to found their case on the application of arts. 1 and 2 of the Hague Convention No. VI. of 1907, assuming for the purposes of the appeal that the Hague Convention applies, as their Lordships have done in other appeals from the Egyptian court.

Immediately on arrival the *Concadoro* came under the general precautionary order issued by the general officer commanding British troops, that no enemy vessel was to enter the canal. The *Concadoro* was free to return to the Mediterranean. On the 22nd Sept. 1914 the master of the *Concadoro* was offered a safe conduct to Port Soudan, and thence to Basra, on the terms comprised in the following document:

Sir,—I am instructed to inform you as follows:—The coal cargo of the *Concadoro* being required at Port Soudan, you are requested to proceed to that port and discharge it to the consignees' order. If you will agree to do so, the Egyptian Government is authorised by the British Foreign Office to grant you a safe conduct to the said port, and from thence to the port of Basra, a neutral port, on the following conditions: (1) The *Concadoro* must leave Port Said on or before the 27th Sept., and must proceed direct to Port Soudan, arriving there not later than six days from date of departure from Port Said; (2) she must discharge without delay the 1900 tons of patent fuel to the consignees, Messrs. Contomichalos, Darke, and Co., and forty-eight hours after completion must leave Port Soudan for the neutral port named above; (3) the *Concadoro* will be liable to capture in the event of any infringement of the fore-

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law

going conditions. You are requested to give me a written answer to this letter as soon as possible, and, in the event of your acceptance of the conditions named, you will be good enough to apply to this office for the safe-conduct referred to, at the same time informing me of the date and time you propose to enter the canal.

(Signed) C. E. D. TRELAWNEY, Captain of Port.

On the 23rd Sept. the master replied: "I beg to thank you for your letter of the 22nd, but in reply I regret to inform you that, on account of the present political situation, I cannot see my way to undertake the vogage to Port Soudan before the end of hostilities. I can only deliver the cargo here against original bill of lading and signature of bond with deposit for general average."

Their Lordships would not desire to place undue weight on this letter, but the claim of the master not to prosecute the voyage to Port Soudan before the end of hostilities in substance amounts to a claim to use Port Said as a port of refuge. It is material that at this date the master of the *Concadoro* had received an offer by the consignees of the cargo to advance the sum of 530*l.* for the canal dues and disbursements at Port Said. On the 22nd Oct. the *Concadoro* was taken out to sea, under instruction from the Director-General to the Port and Lights Administration of Egypt, and steered northwards towards a British destroyer which was laying outside the harbour. The vessel was boarded by officers and crew of the destroyer, brought back to the point from which she had started in the morning, and was then taken over by a crew from H.M.S. *Warrior*. The next day the *Concadoro*, in charge of a crew from the *Warrior*, left Port Said for Port Soudan. The cargo was discharged at Port Soudan and the *Concadoro* was taken to Alexandria, where she arrived on the 17th Nov. The *Concadoro* was subsequently condemned as an enemy ship properly seized as prize, and this appeal is against the order for condemnation.

On the hearing of the appeal, two arguments were urged on behalf of the *Concadoro* as differentiating her case from that of the other appeals from His Britannic Majesty's Supreme Court of Egypt (in Prize), which had come before their Lordships. In the first place, it was argued that the words in art. 1, "il est désirable qu'il lui soit permis de sortir librement, immédiatement ou après un délai de faveur suffisant, et de gagner directement, après avoir été muni d'un laissez-passer, son port de destination ou tel autre port qui lui sera désigné," entitled the master to receive a pass, and more than that, a wholly unconditional pass, direct to the port of destination or any other port indicated, and that by reason of the conditions attached to the offer made on the 22nd Sept. 1914, the safe-conduct was not a proper pass within the meaning of art. 1. Their Lordships agree with the view of Grain, J., that the conditions attached under the circumstances were manifestly reasonable. The conditions were that the master of the *Concadoro* should discharge his cargo at the port to which it was consigned, arriving there after the allowance of a sufficient time for the voyage from Port Said; that she must discharge her cargo without delay, and that forty-eight hours after completion she must leave Port Soudan for Basra, a neutral port, to which the master had originally intended to proceed after discharging the cargo at Port Soudan. Their Lordships hold that manifestly reasonable conditions do not invalidate a pass offered under art. 1. To adopt so narrow a construction of the article would, in their opinion, unduly restrict the benefits intended to be conferred for the protection of mercantile international operations undertaken in good faith, and in process of being carried out before the outbreak of hostilities.

In the second place, it was argued that the inability of the master to procure the necessary funds for his voyage brought the *Concadora* under art. 2, and that she was unable to leave the enemy port within the days of grace "par suite de circonstances de force majeure." In their Lordships' opinion, this contention cannot be maintained. The *force majeure* contemplated in the article is one which renders the vessel unable to leave the port, and cannot be construed to include the circumstance that the master has not been provided by the owners with sufficient financial resources to continue his voyage. Moreover, in the present case, the master of the *Concadoro* was offered a loan of 530*l.*, which was a sufficient sum, to enable him to pay the charges at Port Said and of the Suez Canal, and to take his vessel to Port Soudan.

Their Lordships are of opinion that the order appealed against was properly made, and will humbly advise His Majesty that the appeal be dismissed with costs. The order should be varied, however, so as to run "and as such or otherwise subject and liable to confiscation and condemned the said ship as good and lawful prize seized on behalf of the Crown," and in other respects should be in the form under appeal.

Solicitors for the appellants, *Charles Russell and Co.*

Solicitor for the respondent, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 9, 10, *and* 11, 1916.

(Before SWINFEN EADY, PICKFORD, and BANKES, L.J.)

THE BROADMAYNE. (*a*)

Salvage — Action in rem — *Requisitioned ship — Exemption from arrest—Motion by Crown to stay proceedings—Costs—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 557—*Proclamation of the 3rd Aug.* 1914 (*Transports and Auxiliaries*).

An action was instituted for salvage services rendered by a tug to a ship requisitioned by the Admiralty and her freight, and the owners of the ship and her freight entered an appearance as defendants and gave the usual undertaking in lieu of bail.

Under the powers conferred by the Royal Proclamation (*Transports and Auxiliaries*) *of the 3rd Aug.* 1914, *the ship had become a ship belonging to His*

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

Majesty within the meaning of sect. 557 of the Merchant Shipping Act 1894.

Upon an application by the Crown that the writ and all subsequent proceedings in the action be set aside, or that the proceedings against the ship and her freight be stayed so long as she remained in the service of the Crown.

Held, that no proceedings ought to be taken with a view to arresting the ship so long as she was in the service of the Crown and under requisition, and that there would be no order as to costs as the application had been made directly on behalf of the Crown.

APPEAL by the Crown from an order of Bargrave Deane, J. in an action for salvage *in rem*.

On the 30th July 1914 the owners of the tug *Revenger* received a telegram from "Dockyard Sheerness" for the "*Vanquisher* or tug of similar description" to be sent, and on the following day they received a further telegram "Request *Revenger* be sent Sheerness forthwith." In accordance with this telegram the *Revenger* was employed on Admiralty work. On the 5th Feb. 1915 the tank steamship *Broadmayne* with a cargo of oil fuel for the use of the Navy stranded outside Harwich Harbour, and the *Revenger* was sent to her assistance. On the 8th Feb. 1915 the plaintiffs, the Elliott Steam Tug Company Limited, of London, as the owners, and the master and crew of the *Revenger* issued a writ in an action *in rem* against the owners of the *Broadmayne*, her cargo and freight, for an award in respect of salvage services rendered. On the 11th Feb. the owners of the *Broadmayne* entered an appearance and gave an undertaking in lieu of bail. The statement of claim was delivered on the 22nd June, and on the 6th August the defence. On the 3rd Nov. the plaintiffs gave notice of the abandonment of their claim against the cargo, which was the property of the Crown.

On the 24th Nov. the Treasury solicitor, on behalf of the Crown, gave notice of motion to the plaintiffs for an order that "the writ and all subsequent proceedings in the action be set aside or that the proceedings against the *Broadmayne* and her freight be stayed so long as the ship shall remain in the service of the Crown or for such further or other order as to the Court may seem just."

On the 14th Jan. 1916 Bargrave Deane, J. dismissed the motion with costs to be paid by the Crown. The learned judge held that at the time the salvage services were rendered the *Broadmayne* had not been requisitioned by the Admiralty and therefore could not claim immunity as being a King's ship under sect. 557 of the Merchant Shipping Act, 1894; that the action which had been commenced as an action *in rem* had by the fact that the owners of the *Broadmayne* had given a personal undertaking in lieu of bail been converted into an action *in personam* and that the Crown had no ground for intervention.

The Crown appealed.

The *Attorney-General* (Sir Frederick Smith, K.C.), *Butler Aspinall*, K.C., and *R. H. Balloch* for the Crown.

Bateson, K.C. and *C. R. Dunlop* for the plaintiffs.

Laing, K.C. and *Lewis Noad* for the defendants the owners of the *Broadmayne* and freight.

The following cases were referred to in argument:

Sir John Jackson Limited v. *Owners of Steamship Blanche and others*, 98 L. T. Rep. 464; (1908) A. C. 126;
The Gemma, 8 Asp. Mar. Law Cas. 585; 81 L. T. Rep. 379; (1899) P. 285;
The Dictator, 8 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563; (1892) P. 304;
The Parlement Belge, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 Prob. Div. 197;
The Dupleix, 12 Asp. Mar. Law Cas. 122; 106 L. T. Rep. 347; (1912) P. 8;
The Constitution, 4 Asp. Mar. Law Cas. 79; 40 L. T. Rep. 219; 4 Prob. Div. 39;
Young v. *Steamship Scotia*, 9 Asp. Mar. Law Cas. 485; 89 L. T. Rep. 374; (1903) A. C. 501;
The Prins Frederik, 2 Dods. 451;
The Five Steel Barges, 6 Asp. Mar. Law Cas. 580; 63 L. T. Rep. 499; 15 Prob. Div. 142;
The Athol, 1 W. Rob. 374;
The Marquis of Huntly, 3 Hagg Adm. 246;
The Warrior, 6 L. T. Rep. 133; Lush. 476;
The Duc D'Aumale (No. 2), 9 Asp. Mar. Law Cas. 502; 89 L. T. Rep. 486; (1904) P. 60;
The Bertie, 6 Asp. Mar. Law Cas. 26; 55 L. T. Rep. 520;
The Lord Hobart, 2 Dods. 100;
De Haber v. *Queen of Portugal*, 17 Q. B. 171;
The Leda, Brown & Lush. 19;
The Leon Blum, *ante*, p. 273; 114 L. T. Rep. 320; (1915) P. 90-103;
Re a Petition of Right, 113 L. T. Rep. 575; (1915) 3 K. B. 649;

SWINFEN EADY, L.J.—This is a motion by way of appeal made on behalf of the Crown "that the writ and all subsequent proceedings in this action be set aside, or, in the alternative, that the proceedings against the ship and freight may be stayed so long as the ship shall remain in the service of the Crown."

The application was made, in the first instance, to Bargrave Deane, J., and he refused the application and ordered the Crown to pay the costs of the plaintiffs and of the defendants; the present motion is made by way of appeal from that order. The facts are, shortly, these: Immediately before the outbreak of war—the state of war commenced as from 11 p.m. on the 4th Aug. 1914—a proclamation was issued stating that "a national emergency exists rendering it necessary to take steps for preserving and defending national interests" and authorising "the Lords Commissioners of the Admiralty . . . to requisition and take up . . . any British ship or British vessel as defined in the Merchant Shipping Act 1894, within the British Isles or the waters adjacent thereto, for such period of time as may be necessary, on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service . . . according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a board of arbitration." The proclamation bears date the 3rd Aug. 1914. It is not disputed, indeed it is beyond dispute, that it is part of the prerogative of the Crown in times of emergency to requisition British ships. In Chitty's

Prerogatives of the Crown (at p. 50) this passage occurs: "To finish this part of the subject, in the words of Lord Erskine, 'The King may relax from the utmost rights of war, and from its extreme severities. What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change by his prerogative of war either the law of nations or the law of the land by general and unlimited regulations.'"

As I have already said the recital to the proclamation authorising requisitioning is: "Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests."

In these circumstances the Crown had power to requisition British ships, and on the 3rd Sept. 1914 requisitioned the ship in question, the *Broadmayne*. The ship, a tank steamer, at the time in question when the salvage services were rendered was carrying fuel oil for the British Government. She, having been requisitioned on the 3rd Sept., was under requisition and remained so at the time of the events that took place and which led up to these proceedings.

On the 5th Feb. 1915 the steamer, laden with her cargo of fuel oil, stranded outside Harwich Harbour. Instructions were given by the King's Harbour Master to the tug *Revenger* to proceed to her assistance.

Nothing now turns upon the character of the tug. No question arises in these proceeding as to whether the tug could, or could not, claim salvage remuneration. That is a claim to be adjudicated upon in the action.

The *Revenger* proceeded to the assistance of the *Broadmayne*. On the 5th Feb. she attempted to tow her off but failed. She renewed the attempt the next day, the 6th Feb., and succeeded, and the *Broadmayne* was successfully towed into the harbour.

On the 8th Feb. the writ in the present proceedings was issued. The writ is a writ *in rem*. The plaintiffs are "the owners, master, and crew of the steam tug *Revenger*," and the defendants "the owners of the steamship *Broadmayne* and the cargo now or lately laden thereon and the freight due for the transportation thereof." The writ is in the ordinary form directed to the owners and the parties interested in the steam vessel *Broadmayne* and the cargo, and commanding them to enter an appearance. No address is given of the defendants beyond the name of the ship. The essential for a writ in a personal action, that the address of the defendant should be inserted, does not appear here.

The memorandum with regard to the service of the writ, which is prescribed by the rules to be placed upon a writ *in rem*, appears in this writ. It was a service on the vessel and cargo by nailing the original writ for a time on the mast and then by leaving a true copy of it only. There can be no question that it is an ordinary writ *in rem* against the ship and cargo and freight. On the 11th Feb. an undertaking was given by the solicitors, thus: "We accept service and undertake to appear and put in bail and prove value on the defendants' behalf in due course."

On the 17th Feb. an appearance was entered—a common appearance, not an appearance under protest. Under Order IX., r. 10, of the Rules of the Supreme Court: "In Admiralty actions *in rem* no service of writ or warrant shall be required where the solicitor of the defendant agrees to accept service and to put in bail, or to pay money into court in lieu of bail."

That applies to this case. On the 22nd June the statement of claim was delivered in the action, and on the 6th Aug. the defence. Then on the 24th Nov. notice of motion was served in the Admiralty Division on behalf of the Crown asking to set aside the writ, or, alternatively, for a stay of proceedings. The cargo of fuel oil belonged to the Crown, and the Crown is not liable to be impleaded—that is, is not liable to be sued in respect of the cargo on board; and when it was pointed out that the cargo belonged to the Crown, notice of discontinuance of the action against the owners of the cargo was served, though, true it is, that formal discontinuance was not till after formal notification of the present motion was given. The writ was admittedly wrong in that an attempt was made to sue the owners of the cargo in the circumstances in question; but as notice of discontinuance has been served and no claim is now made in regard to the cargo, all further reference to the cargo may be omitted.

It is clear that a ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be, and the exemption extends as well to claims of salvage as to claims of collision or other claims. The grounds upon which the exemption exists were fully stated in the judgment of the Court of Appeal in the case of *The Parlement Belge* (*sup.*), where the whole question is discussed. The late Master of the Rolls, Lord Esher, in giving the judgment of the court, said at p. 210: "On the one side it is urged that the only ships exempted from the jurisdiction are armed ships of war, or ships which, though not armed, are in the employ of the Government as part of the military force of the State. On the other side it is contended that all movable property, which is the public property of a Sovereign and nation used for public purposes, is exempt from adverse interference by any Court of Judicature. The point and force of this argument is that the public property of every State, being destined to public uses, cannot with reason be submitted to the jurisdiction of the courts of such State because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that by international comity, which acknowledges the equality of States, if such immunity, grounded on such reasons, exist in each State with regard to its own public property, the same immunity must be granted by each State to similar property of all other States. The dignity and independence of each State require this reciprocity. It was this reasoning which induced Sir William Scott to hesitate to exercise jurisdiction, and so to act as to intimate his opinion that the reason could not be controverted. The case has always been considered as conveying his opinion to have been to that effect. Such was the view of Lord Campbell, who in *De Haber* v. *Queen of Portugal* (*sup.*) says

that the difficulties suggested by the argument were, in the opinion of Sir William Scott, insuperable. But if so, he assented to an argument which embraced in one class 'all public property' of the State and treated 'armed ships of war' as a member of that class."

It was urged by Mr. Bateson that the effect of requisitioning a ship is not to change the ownership—the ship requisitioned remains the property of the owners notwithstanding the requisitioning—and that when the use of the ship by the Crown ceases the ship is restored to her owners. That is so, but it does not prevent a ship so long as she remains under requisition being in the service of the Crown, and as such exempt from process of arrest.

In these circumstances the question arises what ought to be done on the present motion. By reason of the writ having been issued the plaintiffs have been given an undertaking for bail, but bail has not been given. In the present case no doubt bail will be given in ordinary course. But technically the ship is not free from arrest because bail has not been given, and I am of opinion that an order ought to be made in this action restraining any further proceedings in the action with a view to the arrest of the ship, and consequently that all proceedings in the action for that purpose ought to be stayed for so long as the ship shall remain under requisition by and in the service of the Crown.

It may be that in other cases that may arise, different orders will have to be made. At present we are only dealing with the case before us, and having regard to the present position I am satisfied that an order in that form will give ample protection to the Crown in this case, because, in addition, there is the statement of the law that ships so requisitioned are exempt from arrest, and that no proceedings with a view to her arrest can properly be taken so long as a ship is under requisition.

There remains the question of costs. Below, the learned judge ordered the Crown to pay the costs both of the plaintiffs and of the defendants. Now the ordinary rule is that the Crown does not pay or receive costs, except so far as that rule was affected by the Crown Suits Act. It is not suggested that this case is within that Act. In Admiralty proceedings the rule was "no costs either side." The point was settled in the case of *The Leda* (*sup.*), decided in 1863. Then came the Admiralty Suits Act 1868 (31 & 32 Vict. c. 78), and by that statute "the term 'Admiralty' means the Lord High Admiral of the United Kingdom for the time being, or the Commissioners for the time being for executing the office of Lord High Admiral," and by sect. 3 power is given to the Admiralty to "institute any action, suit, or proceeding . . . concerning any debt, damages, claim, demand, or cause of action or suit whatever arising out of any matter in anywise relating to the rights, powers, or duties of the Admiralty, or to property vested in or purchased by or being under the management or control of the Admiralty." And then sect. 5: "In any such action, suit, or proceeding the Admiralty shall be liable and entitled to pay or receive costs according to the ordinary law and practice relative to costs." Again sect. 6: "Nothing in this Act (except as expressly otherwise provided) shall take away or abridge in any such action, suit, or proceeding any legal right, privilege, or prerogative of the Crown. . . ."

The Commissioners of the Admiralty are not parties to these proceedings. This is a motion directly on behalf of the Crown, and is not within the provisions of the Admiralty Suits Act. In these circumstances I am of opinion that the order below was wrong so far as regards costs, and that the learned judge had no jurisdiction to order the Crown to pay the costs of either the plaintiffs or the defendants.

There was a slip in the proceedings in the court below because the learned judge treated the *Broadmayne* as a ship which had not been requisitioned. He gave the date of the requisitioning as the 3rd Sept. 1915, and by some misunderstanding it was not appreciated that the ship had been requisitioned on and as from the 3rd Sept. 1914. So that the basis on which he dealt with the case that she was not a requisitioned ship at the time of the salvage services and at the time of the commencement of the proceedings, the material dates, was erroneous in point of fact.

In these circumstances I am of opinion that the appeal ought to be allowed, and an order made in the form I have indicated. A suggestion was made that certain instructions or directions should be given in regard to the future. In my judgment it is impracticable to do anything of that kind here. If there are instructions to be given they must be given by the judges of the Admiralty Court. All that we can do is to say in terms that ships in this position are not liable to be arrested, and therefore no proceedings ought to be taken with a view to arresting a ship so long as the ship is in the service of the Crown and under requisition.

Pickford, L.J.—I am of the same opinion.

The motion by the Crown is for an order that the writ and all subsequent proceedings in this action may be set aside, or that the proceedings against the *Broadmayne* and her freight be stayed so long as the ship shall remain in the service of the Crown. The writ was originally issued against the cargo as well as the freight; but as soon as it was ascertained that the cargo was the property of the Crown the action was discontinued so far as the cargo was concerned. It is true that the formal notice of discontinuance was not filed until after this notice of motion; but it is clear from the terms of the notice of motion that the Crown at this time were aware that no proceedings were going to be taken against the cargo, and therefore in their notice of motion they do not mention the cargo at all, but merely ask that the proceedings be set aside as against the *Broadmayne* and her freight. Therefore the question of the cargo may be considered as out of this case so far as we are concerned.

The ground of this notice of motion was this, that the *Broadmayne* was a requisitioned ship. She had been requisitioned for the services of the Crown, and, in order to see what the position is with regard to such a ship, one has to see what "requisition" means. There is no particular magic in the word itself; it does not connote the same state of things in every particular case. In this case it was under the proclamation of the 3rd Aug. 1914 that the ship was requisitioned, and that authorised the Lords Commissioners of the Admiralty to requisition and take up

for the service of the Crown any British ship for certain services on condition that the owners of all ships and vessels so requisitioned should receive payment for their use and for services rendered at an agreed amount, or, if there be not an agreed amount, an amount to be settled by a board of arbitration appointed by the Crown. In this case no arrangement had been arrived at at the time of the services rendered. A certain form of charter, which is well known as the Government time charter, was sent to the owners of the ship, and they returned it with some alterations which were not assented to by the Crown, and therefore no agreement was come to. It must be taken that she was requisitioned for the service of the Crown at a rate of remuneration which had not then been settled, but which would be settled in the future, or, if not settled, at a reasonable rate of remuneration. That is really nothing more than a hiring of the ship, and the effect of the requisition, of course, is that His Majesty has the power to make the owner of the ship come to that hiring agreement. The owner of the ship has no alternative as to whether he will accept the proposition of hiring or not, but the vessel is, after all, a hired ship. It does not take the property of the ship out of the owner and vest it in the Crown, and therefore this vessel is not for all purposes in the same position as a vessel which is the property of the Crown. You cannot take proceedings *in rem* against a ship which is the property of the Crown, because the result of doing so is to attempt to bring the King as a defendant into his own court just as much as if you were to try to serve a writ *in personam* upon him personally.

You bring him, or attempt to bring him, into his court by means of his property instead of by means of his person, but that really does not make any difference, and therefore in the case of these ships, the property of the Crown, proceedings cannot be taken against them because they are proceedings against the King. That is not this state of things. Here the vessel remains the property of her previous owners, the American Oil Company I think they were. She still remains their property and is liable to satisfy claims upon them subject to the right of the Crown not to have its prerogative interfered with, and not to have its interest in any way deteriorated.

What happened was this. The writ was communicated to the solicitors for the owners of the *Broadmayne*. The owners of the *Broadmayne*, I suppose, not having any more information about the ownership of the cargo than the plaintiffs, had given an undertaking to appear and put in bail for the ship and cargo, but, as I have said, the proceedings against the cargo are out of this case, and we need not say anything more about it. They undertook to put in bail for the ship. As long as that undertaking remains the ship is free from arrest. The result of it is that so long as the undertaking exists it is the same as putting in bail, and if you put in bail the ship is released and cannot be re-arrested except in some very exceptional circumstances, though I think ships have been re-arrested for costs or something of that kind. But for all practical purposes the ship is free from arrest as soon as bail is put in, and also she is free from arrest when an undertaking to give bail is put in unless that undertaking falls through for some reason, which is not suggested in this case. Now that being so, the position is this. The plaintiffs had brought on proceedings against the owners of the *Broadmayne*, which in my opinion they were entitled to bring. The owners of the *Broadmayne* had appeared and undertaken to give bail, and had thereby put themselves in this position, that they were liable to the amount of the bail, and also, according to *The Gemma* (*sup.*) and *The Dictator* (*sup.*), if a judgment were obtained to a larger amount than the bail, they were also liable for that personally, but nothing more could be done as against the ship. Now that was, as I say, an action between two private litigants, perfectly properly constituted and which could and would, if it were not interfered with, go on to its appropriate end and judgment on either one side or the other without any possibility, except the very remotest—I do not think I ought to say no possibility—of interference with the rights of the Crown. The learned counsel for the Crown to whom I put the question said he could not suggest anything in these proceedings, if they went on, which would affect the rights of the Crown except that they possibly might encourage other people to bring similar litigation under other circumstances which would affect its rights. I confess I could not quite follow that argument. I do not see why, if there is not a right to interfere with the litigation itself, it should be interfered with in order to prevent a possibility of somebody else doing wrong. That was the position. Why the Crown should have chosen this particular litigation in which the interests of the Crown were not in the least concerned to intervene I do not know. I dare say they had some reason for doing so and not waiting until there was a proceeding in which their interests were possibly compromised, but that was the position. I agree entirely with what has been said by my Lord as to the position. I think nobody has any right to arrest a ship requisitioned under these circumstances so long as she is in the service of the Crown any more than he has the right to arrest a man-of-war. He may bring his action, if he likes, against the owners, but he cannot interfere with the rights of the Crown in a ship. The rights of the Crown are to have her services during the time she is requisitioned. During that time, as I have said, I do not think anybody has a right to arrest her, and therefore I think that the position is this: that this action should be allowed to go on; there is no ground for interfering with it at all except to this extent, that the plaintiffs should be restrained—I am not speaking exactly of the form at the moment—from doing that which they have always said they had not the slightest intention of doing, and which I cannot help thinking the Crown knew quite well they had no intention of doing, namely, taking any proceedings to arrest this ship, or in any way to interfere with her so long as she is in the service of the Crown. That, I think, is the right position, and that is the order (I do not mean the words in which I put it) in substance which in my opinion should be made. I may say that I think, except for the point of deciding, as we have decided, that a ship so long as she is requisitioned cannot be arrested as long as she is in the service of the Crown, we ought not to

lay down any general rule as to what ought to be done in the case of actions against the owners of requisitioned ships. It was suggested by Mr. Aspinall, and I think also by the Attorney-General, that we should suggest some rule for the conduct of the marshal in cases of this kind. I do not think we ought to do anything of the sort. If any directions are to be given to the officials of the Admiralty Court, general instructions of that kind, it seems to me that they should be given by the judges of the Admiralty Court, who are far more familiar with the practice, and who can do it far better than we can, and I am inclined to think that it is, I will not say outside our jurisdiction, really outside the scope of what we have to do to lay down any such general rules. I agree also with my Lord on that point, and also as to costs.

BANKES, L.J.—Two questions arise for decision in this appeal: first, the effect upon an action *in rem* in the Admiralty Division of the appearance in the action of the owner of the res, and the giving by him of bail or an equivalent undertaking; and, secondly, the position with regard to liability to arrest of a requisitioned vessel against which an action *in rem* has been brought. In my opinion an action which has been commenced as an action *in rem* continues until its termination as an action *in rem* unless it undergoes some alteration in its character by amendment by order of the court or under the rules of court. It is, in my opinion, a mistake to say that the action changes its character and ceases to be an action *in rem* and becomes an action *in personam* when the owner of the *res* appears and gives bail. It is no doubt true that when this is done the action, so far as its special characteristic as an action *in rem* is concerned, has served its purpose, or possibly its chief purpose, when the owner of the *res* has been induced by reason of the arrest, or fear of arrest, of the vessel to enter an appearance and to give bail in order to obtain the release, or avoid the seizure, of his vessel. It is also true that when once the owner of the *res* has appeared the plaintiff has the advantage of being able in case of necessity to take his property in satisfaction of the judgment in addition to the bail. These consequences, however, are, in my opinion, incidents which arise only in the course of the action *in rem*, which add to its value, but which in no way alter or deprive it of its special character.

The position is, I think, quite clearly indicated in the passage from Clerke's Praxis Curiae Admiralitatis, cited with approval by Jeune, J. in *The Dictator* (*sup.*), where the writer says that after appearance the case proceeds *ut in actione instituta contra personam debitoris*—that is to say, that the action is to proceed as if, but only as if, it was an action *in personam*. The advantage of the action being an action *in rem* still remains, in the sense that, should the exceptional occasion arise, the court in a proper case would no doubt still have jurisdiction to order the arrest of the vessel.

With regard to the second point, I entertain no doubt that a vessel if and so long as she is under requisition is privileged from arrest. The requisition is made under the prerogative of the Crown, and the fact that the proclamation of the 3rd Aug. 1914 indicates that payment will be made for the use of the vessel and for services rendered during her employment in the Government service does not, in my opinion, alter the nature or the consequences of the act of requisition. It is, in my opinion, equally immaterial that the terms of payment and employment are incorporated in a charter-party or other form of agreement. The vessel whilst the requisition lasts is, to use the language of Dr. Arnold in his argument in the case of *The Prins Frederik* (*sup*), approved by Lord Esher in *The Parlement Belge* (*sup.*), *publicis usibus destinata*, and as such not liable to the claims or demands of private persons.

I agree with the proposed order which is to be made in this case.

Appeal allowed.

The court made the following order: "On the motion of the Crown discharge order of Mr. Justice Bargrave Deane, and, the plaintiffs having discontinued this action so far as concerns any claim as against the owners of the cargo, it is ordered that all further proceedings in this action with a view to the arrest or detention of the ship be stayed for so long as the ship shall remain under requisition in the service of the Crown."

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

Wednesday, May 10, 1916.

(Before Lord READING, C.J., WARRINGTON, L.J., and LUSH, J.)

CAPEL AND CO. *v.* SOULIDI. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Construction of — Cancellation if ship "commandeered."

The plaintiffs were time charterers of a Greek steamer. The charter-party contained the following clause: "32. Should steamer be commandeered by the Greek Government this charter shall be cancelled." Whilst the steamer was at Marseilles discharging a cargo of coal for the charterers, on the 25th Sept. 1915, *a notice was served upon her captain by the Greek Consul-General ordering him to proceed immediately to the Piræus, pursuant to an order of the Royal Greek Government. On the 27th Sept. the defendant gave to the plaintiffs formal notice of cancellation of the charter-party pursuant to clause* 32. *On the 11th Oct., and while the steamer was still at Marseilles, the Greek Government withdrew their notice of the 25th Sept. and released the ship.*

Held, that the defendant's vessel had been effectively commandeered by the Greek Government, which had taken control of the vessel, and that the charter-party was therefore cancelled.

APPEAL by the plaintiffs from the decision of Atkin, J.

The action was brought by the plaintiffs for a declaration that the charter-party remained valid and binding on the defendant and for an injunction restraining him from employing the

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law

ship otherwise than in accordance with the terms of the charter-party.

The facts, which are sufficiently summarised in the headnote, appear fully in the judgments.

MacKinnon, K.C. and *Raeburn* for the plaintiffs.

Roche, K.C. and *C. R. Dunlop* for the defendant.

ATKIN, J.—This case I understand, raises an important question, and I appreciate it to be an important question; but it is also a somewhat urgent question, because it relates to the disposal of a ship which is now in a British port. An interim injunction has been granted pending the hearing of this action restraining the owner from dealing with the ship. Therefore I proceed to give judgment at once, although no doubt if I could have taken a little time I could possibly have put my judgment into more suitable language.

The dispute arises between the plaintiffs, who are the time charterers of a cargo vessel called the *Kardamila*, and the owner. The ship was chartered by a time charter dated the 6th May 1915, by which the defendant's ship, which is about 3500 tons dead weight, was hired for twelve months to the charterers to carry certain cargoes within the limits of the West Coast, United Kingdom, France (not east of Calais) and Portugal, Spain, and the Mediterranean (not east of Sicily). The hire was payable monthly in advance in Cardiff. There is a provision in clause 12 for the ship being off hire under certain circumstances that are mentioned there. The exception clause provides "that throughout this charter losses or damages, whether in respect of goods carried or to be carried, or in other respects arising or occasioned by the following causes, shall be absolutely excepted — namely . . . enemies, pirates, robbers, or thieves; arrests and restraints of princes, rulers, and peoples." Then follows a clause which I am informed was inserted at the charterers' instance, although I do not know that that makes any difference in this case. The clause, which is numbered 32, is written in and added to the printed clauses and runs thus: "Should steamer be commandeered by the Greek Government this charter shall be cancelled." The dispute between the parties is whether the steamer has been commandeered by the Greek Government. Apparently this vessel was employed by the time charterers to carry coal from South Wales to Marseilles, and on the 25th Sept. the ship was in Marseilles harbour engaged in discharging a cargo of coal. Upon that day a notice addressed to the captain was served upon him by the Greek Consul-General at Marseilles, which as translated is in these terms: "I beg to advise you that pursuant to the telegraphic orders of the Royal Greek Government all Greek steamers in the harbour of Marseilles, in ballast or loaded with coal or grain, must proceed immediately to Piræus, and the steamers loaded with other cargoes to discharge with all speed and sail immediately for Piræus. In informing you of the above order of the Royal Greek Government I beg you to strictly and without fail conform to same and acknowledge receipt." It is signed by the consul-general. Upon that correspondence followed, but upon the 27th Sept. the defendant wrote to the plaintiffs: "I hereby beg to formally notify you that the steamship *Kardamila* having been commandeered by the Greek Government the charter-party of the 6th May last is cancelled pursuant to clause 32.—Yours faithfully, D. SOULIDI." What followed was that certain negotiations took place between the defendant and the consul-general with a view to enabling the ship to proceed to Cardiff for the purpose of undergoing repairs which the defendant said he had arranged for at that port, and he wrote to say that after those repairs were effected he would proceed to the Piræus. Eventually permission was given to him to proceed to Cardiff and he was told that he was in fact free of the requisition. That appears from the evidence which I have heard to have been in pursuance of the general policy of the Greek Government, who, I think, afterwards changed their orders, certainly in respect to some of the available vessels, so that on the 11th Oct. the *Kardamila*, which had completed the discharge of her coal, was free from the requisition and was in a condition to and did in fact proceed to Cardiff, as I understand she has just arrived there.

The question, therefore, is whether the charter-party is cancelled or not, and that depends upon whether the vessel was or was not commandeered. I have to form the best conclusion I can as to what is the meaning of the word "commandeer." It is, I understand, a word of recent origin in ordinary use, and a word as to which there has been no previous judicial interpretation to guide me. It certainly seems to me to involve the exercise by the Government of the executive power, the sovereign power, with a view to compelling the owner of the ship to surrender the control of that ship to the Government. I think that it involves the intention of the Government to have the ship put in such circumstances that they may hereafter, if they elect so to do, have the use of the ship. In other words I think that the word "commandeer" involves the seizing or obtaining control of the ship for the purposes of the Government, not for general political purposes or for the protection of the ship. I do not think that if a Government were to give orders to a ship to deviate or take refuge at a friendly port, war being imminent, that would be a commandeering of the ship. I think that it involves the Government having in prospect, at any rate, the taking of the ship for its own purposes. I think, as the best conclusion I can form here, that is what happened.

It was contended that this notice was merely equivalent to the Government issuing a general order to all ships to proceed home for general political purposes, that it was equivalent to an embargo as if the ship had actually been in a Greek port, that it did not connote any intention at all on the part of the Greek Government necessarily to use the ship, and that it was only a step which was preliminary to that which would be commandeering if in fact the Government afterwards decided to use the ship.

On the facts I do not think that that is what took place here. It appears to me that the right inference to draw from the facts is that the Government required Greek ships to proceed to Greece for the purposes of the Government, so as to enable them to use the ships themselves if the

Government so desired. It does not appear to me that it necessarily follows that the Government would avail themselves of the ship when it arrived; but I think that it is quite plain that the Government required the particular voyage to be made back to Greece for the purposes of the Government using that ship on its arrival if they thought fit. To my mind that is the object of commandeering. Now, I have had evidence before me to the effect that as soon as the order is given, by Greek law the crew of the ship are deemed to be members of the Royal Greek Navy, and as such I presume would be subject to naval discipline, and I think that that indicates also that the Government have assumed control of the ship from the time that they gave the order, so as to make the ship, at any rate until it arrived in Greece, their ship. They no doubt would be able to decide when it arrived whether they had any further use for it.

It was suggested here that the order of the Government was substantially inoperative, because in fact it did not prevent the ship from performing its obligations under the charter, as notice was given on the 25th Sept., and the ship remained all the time in Marseilles and eventually sailed back to Cardiff, where it would sail under the charter. But that seems to me to have no real bearing upon the construction of the clause. The clause says that if the ship is commandeered then the charter shall be cancelled. I think myself that the true construction of that clause, at any rate, is that upon the occurrence of the event—namely, the commandeering—the charter is *ipso facto* cancelled, and I think that that is the effect of the decision in *Adamson and another* v. *Newcastle Steamship Freight Insurance Association* (4 Asp. Mar. Law Cas. 150; 41 L. T. Rep. 160; 4 Q. B. Div. 462). What happened afterwards is immaterial. But even if the construction were that upon that event happening the owner had an option to cancel, I think that clearly the option was exercised by the letter of the 27th Sept.

It was further said by Mr. MacKinnon that in fact all that happened here was not that the Government commandeered the ship, but that they exercised such rights over it as would amount to restraint of princes, and that for any damage suffered by the charterer by reason of that act the shipowner would be protected by reason of the lause giving an exception as to the restraint of princes.

That may be so, that is to say the act of commandeering may also be restraint of princes (I should think that it probably is), but it appears to me that none the less it was in fact a commandeering, and I think that one can see the business object of this clause, because obviously such an act as is in question here is by the Government and one which one has to assume from the evidence was within the powers of the Greek Government; it is an act that, of course, defeats for the time being entirely the operation of any contractual obligation which the shipowner has entered upon. I think that it was the intention of both parties—no doubt for the reasons mentioned in the judgment of Cockburn, C.J., namely, in order to prevent all further question or delay upon such an event happening as this—that the charter should be put an end to. I think that that reason applies whether the ship was ordered to Athens in order that the Greek Government might then make up its mind whether it would further use it, or whether it at the time it was in Marseilles made up its mind that it was going to use it for the purpose of the carrying of troops or otherwise. Commercially the effect seems to me to be exactly the same. I do not think that I need add anything, therefore, to what I have said. It appears to me on the consideration of the arguments that have been put before me—and I am satisfied that everything has been said that could have been said in the case—that this ship was in fact commandeered by the Greek Government, and under those circumstances I think the charter-party was cancelled. I suppose that the result of that is that upon the claim of the plaintiffs there should be judgment for the defendant with costs.

The plaintiffs appealed.

Sir *Robert Finlay*, K.C., *MacKinnon*, K.C., and *Raeburn* for the appellants.—All that the Greek Government did was to take a preliminary step towards commandeering. They never, in fact, exercised any control over her.

Roche, K.C. and *C. R. Dunlop* for the respondent.—By serving that notice the Greek Government prevented the ship from performing its obligations under the charter-party. That notice in effect amounted to commandeering.

Sir *Robert Finlay*, K.C., in reply.

Lord READING, C.J.—This is an appeal from a judgment of Atkin, J., who tried the case without a jury and gave judgment for the defendant. The claim was made by Messrs. Capel and Co., who were the charterers under a charter-party dated the 6th May 1915, entered into between them and the defendant, Mr. D. Soulidi, the owner of a vessel, which was under the Greek flag and is called the *Kardamila*. The charter was a time charter for twelve months at the rate of 2300*l.* per calendar month, and clause 32 of the charter is in these words: "Should steamer be commandeered by the Greek Government this charter shall be cancelled."

In the events that happened it is alleged by the shipowner that commandeering did happen, and consequently that the charter-party was cancelled. The charterers objected to that. They say there was no commandeering, or if there was a commandeering, it was not such a commandeering of the vessel as was provided for in clause 32, and consequently the charter-party was not cancelled. The question we have to determine is whether the event had happened as mentioned in clause 32.

To my mind the facts of the case are of the utmost importance, because on the conclusion at which I have arrived the facts dispose of this case, without giving rise to the various difficulties which have been suggested by Sir R. Finlay and Mr. MacKinnon in their arguments on behalf of the plaintiffs. The vessel being at Marseilles several months after the time charter had begun to be effective, notice was given to the person responsible on the *Kardomila* from the Consul-General of Greece at Marseilles, where the vessel then was, in these words: "I beg to advise you that pursuant to the telegraphic orders of the Royal Greek Government all Greek steamers in the harbour of Marseilles in ballast, or loaded with coal or grain, must proceed immediately to Piræus, and the steamers loaded with

other cargoes to discharge with all speed and sail immediately for Piræus. In informing you of the above order of the Royal Greek Government I beg you to strictly and without fail conform to same and acknowledge receipt."

According to the evidence given by a Greek lawyer in this country, the effect of that document was to place the vessel under the orders of the Greek Government and to bring those who were on board—Greek subjects—under the orders of the Greek Government, as if they were belonging to the Royal Greek Navy. They were to consider that that notice applied to them as if they were in the Royal Greek Navy. As I understand the arguments presented to us to-day, it is not suggested that that cannot be the effect of the order, but what is said is that the order never became effective, and consequently the commandeering was never an effective commandeering.

True, a notice of this kind may be sufficient to constitute commandeering within the meaning of the clause if in truth that which follows shows that the notice was effective, and that the vessel was brought under the control, or, as it has been said during the latter part of the argument, taken to the use of the Greek Government. In my judgment the suspension of the order, which, it is suggested, took place between the 25th Sept. and the 11th Oct., never in fact took place. There were negotiations proceeding to enable the shipowner to send his vessel to England for the purpose of repairs being executed before the vessel proceeded on voyages for the Greek Government, but the correspondence shows that the owner of the vessel was desirous that the Greek Government should understand that he was sailing his vessel under seaworthy certificates, and that in order to enable him to do what the Greek Government required his vessel must be put into a perfectly seaworthy condition, and that necessitated his bringing the ship to England. Therefore he asked permission to go, and negotiations went on for some time. Before he got this permission on the 11th Oct., the Greek Government changed its view with regard to this vessel, and set her free. She then proceeded home on the 13th Oct., where she was repaired.

During the time that elapsed between the 25th Sept. and the 11th Oct. I am of opinion upon the facts as found by the learned judge that this vessel was under the control of the Greek Government, and that she was actually being used by the Greek Government in that one sense, although, to my mind, it is by no means necessary to say that she was actually being used in the sense of having to proceed on a voyage for the Greek Government in order to bring her within this clause. If she once came under the control of the Greek Government she was commandeered by the Greek Government and, having regard to the facts of the case, effectively commandeered.

I can see very difficult problems which might arise if the facts warranted the hypothesis upon which Sir Robert Finlay argued the case, and, in my judgment, in this case we have no such difficulties, because there was a clear, and, in my opinion, effective commandeering until the release took place, which was some fifteen or sixteen days after. In fact, when one considers what was happening, it seems to me beyond question that this was the kind of commandeering intended to be covered by clause 32, because the charterers were paying 2300*l.* a month for the use of the vessel, and stipulating that, in the event of the Greek Government taking control of the vessel, the charter should be cancelled. Nevertheless, during fifteen or sixteen days the vessel was kept there at Marseilles under the orders and because of the orders of the Greek Government, with the result that if the charter had been running all the time the money would have had to be paid, notwithstanding that the Greek Government had taken control.

I have come to the conclusion that there was no difficulty in this case owing to the facts, and that Atkin, J.'s judgment was right, and that the appeal must be dismissed.

Warrington, J.—I am of the same opinion. I think the captain and crew of the steamer became members of the Greek Navy by virtue of the order issued by the Greek Government on the 25th Sept. 1915. That order became effective as soon as it was made, and accepted by the shipowner. In my opinion it is impossible to say that this vessel was not commandeered by the Greek Government within the meaning of clause 32.

Lush, J.—I agree. I think that the mere service of a notice commandeering a vessel does not necessarily affect the commandeering of the vessel. On the facts of this case, however, the Greek Government took over control of this vessel as from the 25th Sept. 1915, and in my opinion she was commandeered as from that date.

Appeal dismissed.

Solicitors for the plaintiffs, *Stokes* and *Stokes*, agents for *Lloyd* and *Pratt*, Cardiff.

Solicitors for the defendant, *Downing, Handcock, Middleton* and *Lewis*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, March 14, 1916.

(Before Atkin, J.)

Owners of Steamship Nolisement *v.* Bunge and Born. (*a*)

Charter-party—Lay days—Completion of loading before expiration of lay days—Acceptance of dispatch money—Failure to free ship as soon as possible—Whether charterers liable in damages.

By a charter-party dated the 1st Feb. 1915 *a steamer was to be loaded at an Argentine port and to proceed therefrom as ordered by the charterers to a European port as port of discharge. Dispatch money at the rate of* 15*l. per day was payable for all time saved in loading, and the charterers had the right to keep the steamer for twenty-four hours after completion of loading for the purpose of settling accounts. The steamer was loaded nineteen days before the expiration of the lay or loading*

(*a*) Reported by W. V. Ball, Esq., Barrister-at-Law

days, and in respect of the nineteen days the charterers received dispatch money. Owing to delay by the charterers in deciding as to the port of call, the steamer was kept waiting for the bills of lading and orders for three days. The shipowners claimed damages in respect of this delay, and in arbitration proceedings were awarded 300l., being damages at the rate of 150l. for two days.

Held, that, the loading time granted to the charterers not having been exceeded, the shipowners were not entitled to claim for demurrage or detention, but only to a return of the dispatch money as money paid for a consideration which had failed.

AWARD in the form of a special case stated by an arbitrator.

By a charter-party dated the 1st Feb. 1915, made between the owners of the steamship *Nolisement* and Ernest A. Bunge and J. Born (hereinafter called "the charterers"), it was agreed (by clause 2) that the steamer should with all convenient speed after arrival at Monte Video proceed as ordered by the charterers to various ports or places to receive a full and complete cargo of wheat or other grain.

By clause 4 the steamer when loaded was to proceed to one or other of various European ports at the master's option for orders, "unless these be given to him by the charterers on signing bills of lading to discharge at a safe port on the Continent. . . ."

By clause 13 the steamer was to load at a certain rate (the details of which are not material to this report), otherwise demurrage to be paid at the rate of 3*d.* sterling per ton per running day, the time for loading to commence twelve hours after written notice to be given by the master to the charterers or their agents that the steamer was ready to receive cargo.

By clause 16 dispatch money, which was to be paid to the charterers before the steamer sailed, was payable for all time saved in loading at the rate of 15*l.* sterling per day.

By clause 30 disputes were referred to arbitration.

The cargo was duly loaded under the said charter-party and a dispute arose between the parties as to what damages (if any) the owners were entitled to receive in consequence of the steamer being unable to sail from her port of loading for three days after she was ready to sail and the loading was completed owing to the failure of the charterers to make out the bills of lading, they not having made up their minds as to the port of discharge, although they had decided to give orders as to the destination pursuant to clause 4 (*sup.*) on signing the bills of lading.

The loading of the vessel proceeded so rapidly that it was completed nineteen days before the lay days were completed, and the charterers received in account dispatch money in respect of those nineteen days.

The arbitrators having failed to agree, their umpire found the following facts in a special case:

That on the 16th March 1915 at 4 p.m. the loading of the steamship *Nolisement* was finished, and at that time the master applied for his bills of lading and orders as to destination from the charterers, but the same were not forthcoming. The steamer was kept waiting for the bills of lading and orders for three days, viz., until 4 p.m. on the 19th March 1915, owing to the charterers, who had decided to give orders for the discharging port on signing bills of lading, not having made up their minds as to the port to which they should order the steamer. The steamer sailed at 5 p.m. on the said 19th March 1915. It was agreed between the parties and I find that the charterers had the right to keep the steamer for twenty-four hours for the purpose of settling accounts, and that the dispute arises in relation to two remaining days that the steamer was kept waiting.

I find as a fact that the steamer was kept two days over and above the said twenty-four hours owing to a breach by the charterers of their obligation to present to the captain the bills of lading and orders as to the port of discharge.

I further find the fact that the owners paid to the charterers on accounts made out by the charterers dispatch money pursuant to clause 16 of the charter-party on the footing that the loading of the steamer was completed at 4 p.m. on the 16th March 1915, and that they included in their account for dispatch money the time the captain was waiting for his bills of lading and orders, and that the time taken was not paid under any mistake of fact.

The charterers contended:—

(*a*) That the loading time granted by the charter-party not having been exceeded, the shipowners were not entitled to claim for demurrage or detention, but only to a return of the dispatch money so paid under a mistake of fact.

(*b*) Alternatively, that if the shipowners were entitled to claim for the time occupied at the port of loading in waiting for orders, their claim should be for a return of the dispatch money paid for the two days on the ground that the freight was based on ten days being occupied in loading, or, in the alternative, their claim should be for demurrage at the charter-party rate.

[There were other contentions which are immaterial to this report].

The shipowners contended:—

(*a*) That on completion of the loading of the steamer the charterers were bound within twenty-four hours to present to the captain his bills of lading and orders and so enable the steamer to sail.

(*b*) That on the expiration of the said twenty-four hours the steamer was entitled to proceed to sea, and that, having been prevented for two days from doing so owing to the wrongful action of the charterers in not giving orders and presenting the bills of lading, they were entitled to claim damages for such detention.

(*c*) Alternatively, that, having paid the charterers' dispatch money for the unexpired time within which they were bound to load the steamer, the loading time must be taken to have expired on the completion of the loading, and that for any time during which the steamer was prevented from sailing by the charterers they were entitled to claim damages for such detention subject to allowing the charterers twenty-four hours for making out the accounts and the bills of lading and giving orders.

Subject to the opinion of the court, he found that the shipowners were right, and were entitled to 300*l.* and costs. Alternatively, if the charterers were correct, he awarded that they should only pay 30*l.* to the owners. He also found that, assuming the damages should have been assessed upon the basis of the demurrage rate, they came to 94*l.* 14*s.*

By clause 12 of the charter-party:

Lay days shall not commence before the 1st March 1915, unless charterers begin loading sooner, and, should the steamer not be ready to load by 6 p.m. on the 31st March 1915, charterers shall have the option of cancelling.

Leck, K.C. (*R. A. Wright* with him) for the charterers.—The contention of the charterers is correct, but the point now raised is not covered by authority. So long as they do not exceed the lay days, the charterers may load at any time. They are under no obligation to ship within a reasonable time. In fixing the rates of freight and demurrage, the parties have taken the possibility of all the lay days being occupied into account. The mere fact that dispatch money has been paid and accepted makes no difference. The number of lay days was twenty-five, and the loading was completed in five days.

Maurice Hill, K.C. (*Raeburn* with him) for the owners.—The charterers were under obligation to present the bills of lading within a reasonable time after the loading was complete. [Atkin, J.—Do you say the charterer is obliged to load at any particular rate?] No; but here he had nineteen days to spare. Moreover, the dispatch money has been paid. In effect, the lay days came to an end on the 16th March. [He referred to *Oakville Steamship Company* v. *Holmes* (5 Com. Cas. 48).] As to the damages, they were at large. The ship was not kept in any state of circumstances for which a fixed rate is provided by the charter-party. Having regard to the date, the arbitrator awarded moderate damages. The lay days constitute a period given for the total operation of loading. The charterer need not begin that operation until the lay days are half through; but, if he completes before the time, he should allow the ship to sail.

Leck, K.C., in reply, referred to clause 12 of the charter-party (*sup.*).

Atkin, J.—This is a short point arising on a charter-party, dated the 1st Feb. 1915, made between the owners of the steamship *Nolisement* and Ernest A. Bunge and J. Born. The charter-party provided that the steamer should with all convenient speed after arrival at Monte Video or at an Argentine port proceed as ordered by the charterers or their agents to various ports or places mentioned to receive cargo. [His Lordship read the case and stated the facts as above set out, and continued:]

It is clear from the charter-party that the vessel had an exact and substantial number of lay days within which to take in cargo; in fact, she saved nineteen days in carrying out the work of loading, and became entitled to have, and was in fact paid, dispatch money in respect of those days. The loading having been completed, the vessel was delayed (as the arbitrator has found) for two days in getting her orders. The arbitrator held that twenty-four hours was a reasonable allowance of time and that she in fact took three days. The shipowners allege that this was a breach of contract for which they are entitled to claim damages. The exact obligation of the charterers, of which they are said to have committed a breach, has not been clearly defined, but it appears to be an obligation to present the bills of lading within a reasonable time. The arbitrator has awarded damages at the rate of 150*l.* a day.

The charterers contended before the arbitrator and again before me that they have committed no breach of contract. They say, in effect, that if there is a certain number of lay days, and the charterer contrives to load the ship in less, he commits no breach of any obligation if he detains the ship for the whole lay period. In my view that contention is sound. The charterer is entitled to hold the ship at the port of loading for the full number of the lay days. He is under no obligation to employ the lay days reasonably or in any particular way. He may, if he so choose, refrain from commencing to load until the lay days are half up and then complete his loading during the latter half of the period. I fail to see why he cannot do the work of loading at any time within the lay period. It was further contended that while the charterers might not have been bound to commence to load at once, yet they were bound to see that the loading was proceeded with with all dispatch. In my opinion that is not so. So long as the ship is not detained beyond the stipulated period the charterer is not liable.

It was also contended by Mr. Hill that, inasmuch as the charterers have taken and accepted the dispatch money in respect of no less than nineteen days, they cannot be heard to deny that there has been delay. In my opinion the mere acceptance of dispatch money has no bearing on the point, and the authority cited has no bearing on the question which I have to decide. I ought to add, however, that the charterers have clearly lost their right to the dispatch money for the two days, which can now be recovered from them as money paid upon a consideration which has failed. With regard to what has been contended as to measure of damages, it is unnecessary, having regard to the view I have expressed, for me to say anything; but I ought to say that there was nothing in my opinion to prevent the arbitrator awarding the damages which he did award. The measure of damages was at large. The result is that I answer the question propounded by the arbitrator upholding the contention of the charterers, and I find that there is due to the owners from the charterers 30*l.* and no more. The shipowners will pay the costs of the proceedings before me.

Award in favour of the charterers.

Solicitors: *Thomas Cooper* and *Sons; Church, Rackham*, and *Co.*, for *Donald Maclean* and *Handcock*, Cardiff.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

March 6 and 30, 1916.

(Before Sir S. T. EVANS, President.)

THE ANGLO-MEXICAN. (a)

Prize Court—Goods of enemy firm—Goods shipped before the outbreak of war—Rights of neutral partner—Protection of his share—Conditions under which share is protected from confiscation.

A neutral subject was a partner in an enemy firm which had its headquarters in Germany. Goods which were the property of the firm were shipped from America before the outbreak of war and were consigned to a German port. During the voyage, hostilities having commenced in the meantime, the goods were seized as prize. Upon the Crown claiming condemnation of the goods, the neutral asserted that he was entitled to his share in the same.

Held, that a neutral partner does not lose his right to have his share in the partnership property protected from confiscation merely because he allows the delivery of the goods to proceed in the ordinary course, provided that he does nothing actively after the commencement of hostilities to further or to facilitate the delivery of the goods to the enemy house.

THIS was a suit for the condemnation as prize of a part of the cargo of the *Anglo-Mexican*.

The *Anglo-Mexican* was a British steamship, and on the 3rd Aug. 1914, the day before the outbreak of war between Great Britain and Germany, she sailed from Savannah with a cargo which included 276 bales of cotton sweepings, fifty of which were to be delivered at Antwerp and the remainder at Hamburg, in each case to the order of the shippers. The bills of lading specified that notification of the shipment was to be given to Messrs. Reis and Co., Friedrichsfeld, Heidelberg, Germany. On the 5th Sept. 1914 the vessel put into the port of London, where, in consequence of the direction in the bills of lading that notification was to be given to a German firm, the cotton was seized by the officer of Customs as prize.

There was no question as to the cotton sweepings being the property of Messrs. Reis and Co. This firm had three offices, one at Friedrichsfeld, near Heidelberg, Germany; another at Salford, Manchester, in England; and the third at Boston, in the United States of America. The head office was the German one. There were four partners—Edwin Reis and Ludwig Reis, both Germans, who resided at Heidelberg; Karl Bachert Strauss, a naturalised Englishman, who managed the Manchester office; and Richard Mayer, a naturalised American, who conducted the business of the firm in Boston. The share of Strauss in the business was one-fourth, that of Mayer one-fifth, whilst the remainder belonged to the two German partners. Strauss was in Germany at the time of the outbreak of war, and had since remained there. He made no claim to his share in the goods seized. Mayer was also in Germany in Aug. 1914, but he afterwards left that country, and he now claimed restitution of his share upon the ground that he was a neutral partner, and that the goods had been innocently shipped by him to the German house before the commencement of hostilities. The evidence showed that after the shipment of the goods Mayer had done nothing whatever in respect of them, and had left the delivery according to the terms of the bills of lading to take its course.

Maurice Hill, K.C. and *Pilcher* for the Procurator-General.—The only question which arises in the case is as to the share of Mayer. He was a member of the enemy firm, who were the owners of the goods, and, although Mayer was, a neutral, it was incumbent upon him, if he was to succeed, to show that he had dissociated himself entirely from the other members of the firm immediately after the declaration of war. There was no evidence before the court that he had done so, and consequently he could not claim any protection for his share in the partnership goods. They cited

The Vigilantia, Roscoe's English Prize Cases, vol. 1, 31; 1 Ch. Rob. 1;
The Manningtry, 32 Times L. Rep. 37.

Inskip, K.C. and *Conway* for Mayer.—The position of Mayer as to the right of claiming restitution was different from that of an English citizen. As a neutral he owed no duty to the British Crown, and, so long as he took no active part in the delivery of the goods after the outbreak of the war he was perfectly entitled to his share in the same as it stood at the time when hostilities commenced. He simply stood by and allowed matters to take their course. There was no necessity for him to dissociate himself from the enemy partners as he would have had to do if he had been an English citizen instead of a neutral. The goods were shipped on a date before the war, and restitution ought to be made.

Maurice Hill, K.C. in reply.

Cur. adv. vult.

March 30.—The PRESIDENT.—The claim to the part cargo in this case—namely, 276 bales of factory or cotton sweepings—was originally made by Messrs. Reis and Co., of Manchester, as alleged owners, and alternatively by Messrs. Reis and Co., of Boston, United States, as alleged owners. The facts have now been fully investigated, and the following are the results: The property in question belonged to Messrs. Reis and Co., of Friedrichsfeld, Heidelberg, Germany. That firm consisted of four partners—namely, two German subjects, a naturalised Englishman of the name of Karl Bachert Strauss, and a naturalised American of the name of Richard Mayer. The share of Strauss was one-fourth and that of Mayer one-fifth. The remainder belonged to the Germans. Strauss was in Germany at the date of the outbreak of the war, and apparently has remained there, adhering to the enemy ever since. The branch office which he managed in Manchester was raided, and one of his clerks

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

was convicted of trading with the enemy. It is not surprising that no claim is now made on his behalf.

The shares of the German partners and the share of Strauss himself, making up four-fifths of the whole, must be condemned as property of the enemies of the country and of a naturalised Englishman who has put himself in the same category.

There is now nothing more than the claim of Richard Mayer to be considered, and that is a claim to one-fifth share in the goods. Mr. Mayer had become a naturalised American before the outbreak of the war, and he puts forward his claim as a neutral partner in the German house. There is no doctrine in prize law which is more clearly and firmly settled than that the property of such a house of trade or business as that of Messrs. Reis and Co., in Heidelberg, established in the enemy's country, is subject to capture or seizure and to condemnation as prize during war, whatever may be the domicil of the partners. But with regard to transactions and shipments made before the war this doctrine is subject to certain qualifications in the case of subjects of the other belligerent and of neutrals in reference to trades or businesses in which they might be engaged at the beginning of a war.

An early and authoritative statement upon the subject was made by Sir William Scott in the case of *The Vigilantia* (*ubi sup*). In dealing with three unreported cases which had been decided by the Lords Commissioners of Appeal in Prize Cases between 1785 and 1798—namely, the *Jacobus Johannes*, the *Osprey*, and the *Nancy* (*Coopman's claim*)—Sir William Scott said: "It was then [*i.e.*, in the last case] said by the Lords that the former cases were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce; and that it would press too heavy on neutrals to say that immediately on the first breaking out of a war their goods should become subject to confiscation; but it was then expressly laid down that if a person entered into a house of trade in the enemy's country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country."

These have been the doctrines adopted by America and by this country ever since: (see *The Antonia Johanna*, 14 U. S. 159; *The Friendschaft*, 17 U. S. 105; *The San Jose Indiano*, 2 Gall 268; and *The Cheshire*, 70 U. S. 231). I have dealt recently with the case of British subjects who were partners in enemy firms and their position and duties at the outbreak of war in *The Manningtry* (*ubi sup.*). Incidentally the position of neutral subjects similarly situated was also there considered. It is not necessary for me to repeat what I said on that occasion.

It it obvious that in one respect there is a difference between the duties of a British subject and a neutral in such cases. There is an absolute duty strictly incumbent upon a British subject not to do anything which may amount to trading with the enemy, or to have any business intercourse with him. There is no such duty imposed upon a neutral partner. He acts fully within his rights in remaining in the partnership after hostilities have commenced if he cares to subject his share in the goods to the risk of capture and confiscation by the opposite belligerent during the war.

The question turns upon the stage at which in the case of a shipment made before the war a neutral partner in an enemy house of trade ceases to have his share in the partnership property protected from confiscation. It is a question of fact upon which side of the line a particular case falls. One test would be whether the neutral partner has done anything actively after the commencement of hostilities to further or to facilitate the delivery of the goods to the enemy house. This test does not seem to me to be unfavourable to the neutral or unfair to the belligerent. If the neutral does no act after the war in regard to the goods, but merely allows them to proceed in the ordinary course, I find it difficult to hold that his share in the goods innocently shipped should be forfeited. He has no duty in regard to the goods towards the belligerent State to stop their delivery because he has an undivided share in them. His situation appears to me to differ in that respect from that of a partner who is a subject of the belligerent State.

At the outbreak of the war Mr. Mayer happened to be in Germany. He did not inform the court as to this fact, nor as to his business there, nor as to the date of his return to America. His affidavit on these matters is disingenuous, and his counsel did not attempt to justify it. I do not wish to say that the deponent had any intention to mislead. I do not know how he may have been advised in framing his affidavit. I have had some doubt as to whether, because of the non-disclosure of what may have been material facts, he ought not to forfeit his protection, but I give him the benefit of the doubt.

I order restitution of his one-fifth share in the goods or their proceeds, and condemnation of the remaining four-fifths as prize to the Crown in its right to droits of Admiralty.

Order for restitution of Mayer's share.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for Mayer, *Oppenheimer, Blandford, and Co.*

Judicial Committee of the Privy Council.

Wednesday, May 17, 1916.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, and Sir ARTHUR CHANNELL.)

THE BOLIVAR. (a)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE).

Prize Court — Practice — Decree condemning cargo—Bonâ fide claims by third parties who had no opportunity of being heard—Rehearing —Jurisdiction of court to set aside its own judgments.

Where substantial injustice would otherwise result, the court has an inherent power to set aside its own judgments of condemnation so as to let in bonâ fide claims by third parties who had not in fact been heard and who had had no opportunity of appearing. But such power is discretionary and should not be exercised except where there would be substantial injustice if the decree were allowed to stand and where the application for relief had been promptly made.

So held, remitting the summons to the Prize Court, with leave to the appellants to amend it and to file the proper evidence in support thereof.

APPEAL by special leave from an order of the Admiralty Division (in Prize).

The appeal was brought by Juan E. Paris and Co., neutrals, carrying on business in Venezuela.

Before the outbreak of war they chartered the German schooner *Bolivar* to proceed to Maracaibo and there to load a cargo, which by bills of lading was to be delivered at Hamburg "for and in the name of" the appellants to one Weil or to his order. The *Bolivar* sailed from Maracaibo on the 23rd June 1914, and was captured in the course of her voyage.

A writ was issued on the 31st Aug. 1914 claiming condemnation of ship and cargo, but no appearance was entered. On the 1st Oct. 1914 Sir Samuel Evans, P., after hearing evidence, condemned the ship and cargo, and they were subsequently sold under the terms of the decree and the proceeds paid into court. Subsequently the appellants, who apparently had not heard of the proceedings, claimed the goods through their London agents. The Procurator-General replied, stating that the cargo had been condemned and sold, and that he had handed the documents to the secretary of the Prize Committee.

On Jan. 1915 solicitors on behalf of the appellants inquired whether any decision had been arrived at, and, on being informed that the claim would be placed before the committee as soon as possible, asked for and obtained a return of the documents.

On the 7th May 1915 a summons was issued in the Prize Court for an order that the appellants' London agents might have liberty to enter an appearance and put in a claim to the proceeds on behalf of the appellants. No affidavit was filed. The Prize Claims Committee refused the application, and the President declined to give leave to appeal on the ground of delay and of acquiescence in the claim being considered by the Prize Claims Committee.

Sir *R. Finlay*, K.C. and *Dunlop* for the appellants.

Sir *George Cave* (S.-G.) and *A. B. Marten* (for *G. T. Simonds*, serving with His Majesty's forces) for the Procurator-General, respondent.

Sir *R. Finlay*, K.C. in reply.

The following authorities were referred to:

The Orcoma, 1915, 1 Br. & Col. P. C. 402;
The Vrouw Hermina, 1 C. Rob. 163 (cited in *The Orcoma*);
Hession v. *Jones*, 110 L. T. Rep. 773; (1914) 2 K. B. 421;
The Elizabeth, 2 Acton, 57;
Story on Prize Courts (1854), p. 222, par. 23;
Order II., rr. 10 and 11, of the Prize Court Rules.

The judgment of their Lordships was delivered by

Lord PARKER.—Where substantial injustice would otherwise result, the court has, in their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in *bonâ fide* claims by third parties who have not in fact been heard, and who have had no opportunity of appearing. This power is discretionary, and should not be exercised, except where there would be substantial injustice if the judgment in question were allowed to stand, and where the application for relief has been promptly made. In the present case the learned President has refused the relief on the ground of delay, apparently under the impression that the appellants invoked the assistance of the Prize Claims Committee, whereas in fact the papers were sent to such committee by the Procurator-General. It was not, under the circumstances, unreasonable for the appellants to have awaited the result of what the Procurator-General was doing before instituting further proceedings in the matter.

Their Lordships therefore think that the proper order would be to allow the appeal, and remit the summons to the court below, with leave to the appellants to amend it in such manner as they may be advised, and file the proper evidence in support thereof.

With regard to the costs of this appeal, their Lordships are of opinion that no costs should be allowed on either side. The costs below will be dealt with by the President on the further hearing of the summons.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitor for the respondent, *Treasury Solicitor*

(a) Reported by W. E. REID, Esq., Barrister-at-Law.

Supreme Court of Judicature.

COURT OF APPEAL.

March 22, 23, *May* 27, *and June* 5, 1916.

(Before SWINFEN EADY, PICKFORD, and BANKES, LJJ.)

THE SARPEN. (*a*)

Salvage—Services rendered by ship requisitioned by Admiralty—King's ship—Claim by owners of ship—Whether consent of Admiralty necessary—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 557 (1)—*Voluntariness.*

The plaintiffs were the owners of a steam tug which had been requisitioned by the Admiralty on terms whereby the owners were to pay the wages of the crew, to provide for all stores and necessary equipment of the vessel, and to take marine risks, and the Admiralty were to accept war risks on the vessel and crew and to provide coal.

Whilst thus under requisition the tug rendered salvage services to a ship belonging to the defendants, and a claim was made against the defendants by the owners, master, and crew of the tug in respect of these services.

Held, that the tug could not be regarded as a King's ship when rendering the salvage services, and was not prevented by sect. 557 *of the Merchant Shipping Act* 1894 *from claiming ordinary salvage remuneration by the fact that she was hired to the Admiralty, nor did the master and crew require the consent of the Admiralty to the prosecution of their claim.*

Per Pickford, L.J.: The test of voluntariness is only applicable as between the salvor and salved.

APPEAL by the plaintiffs from the decision of Bargrave Deane, J.

The action was brought by the owners, master, and crew of the steam tug *Simla* for salvage services rendered to the Norwegian steamship *Sarpen* when she was ashore on Papa Stronsa, in the Orkneys, in April 1915. The *Simla* had been requisitioned by the Admiralty under the Royal Proclamation of the 3rd Aug. 1914 (Transports and Auxiliaries) authorising "the Lords Commissioners of the Admiralty . . . to requisition and take up . . . any British ship or British vessel as defined in the Merchant Shipping Act 1894, within the British Isles or the waters adjacent thereto, for such period of time as may be necessary, on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use and for services rendered during their employment in the Government service, . . . according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners, or, failing such agreement, by the award of a board of arbitration." No agreement had been come to between the Admiralty and the tug owners settling the terms of the engagement of the *Simla* until after the trial of this action before Bargrave Deane, J. The terms of the agreement as subsequently arrived at were that the master and crew of the *Simla* were paid by the owners, who also provided the stores and provisions, but the Admiralty provided and paid for the coal and accepted all war risks on the vessel.

Bargrave Deane, J. held that, the *Simla* being in the same position as a King's ship, no claim for salvage services could be allowed by sect. 557 of the Merchant Shipping Act 1894. In case there should be an appeal, he fixed the amount to be awarded for the salvage services rendered at 800*l.*

The plaintiffs appealed.

Dawson Miller, K.C. and *Raeburn* for the plaintiffs.

Stephens and *J. B. Aspinall* for the defendants.

The following cases were referred to:

The Nile, 3 Asp. Mar. Law Cas. 11; 33 L. T. Rep. 66; L. Rep. 4 Adm. & Ecc. 449;
The Bertie, 6 Asp. Mar. Law Cas. 26; 55 L. T. Rep. 520;
The Lemington, 2 Asp. Mar. Law Cas. 475; 32 L. T. Rep. 69;
The Ripon City, 8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226;
Cargo ex Woosung, 3 Asp. Mar. Law Cas. 239; 35 L. T. Rep. 8; 1 P. Div. 260;
The Scout, 1 Asp. Mar. Law Cas. 258; 26 L. T. Rep. 371; L. Rep. 3 Adm. & Ecc. 512;
The Cybele, 3 Asp. Mar. Law Cas. 532; 37 L. T. Rep. 773; 3 Prob. Div. 8;
The Dalhousie, 1 Prob. Div. 271 (n);
Colin v. *Newberry*, 8 B. & C. 166;
Baumwoll Manufactur von Carl Scheibler v. *Furness*, 68 L. T. Rep. 1; (1893) A. C. 8;
Sir John Jackson Limited v. *Owners of Steamship Blanche and others*, 98 L. T. Rep. 464; (1908) A. C. 126;
The Broadmayne, *ante*, p. 356; 114 L. T. Rep. 891; (1916) P. 64;
Master, &c., of the Trinity House v. *Clark*, 4 M. & S. 288;
Stroud's Judicial Dictionary, vol. 2, p. 177;
Kennedy on Civil Salvage (2nd edit.), p. 112;
Re a Petition of Right, 113 L. T. Rep. 575; (1915) 3 K. B. 649;
Young v. *Steamship Scotia*, 9 Asp. Mar. Law Cas. 485; 89 L. T. Rep. 374; (1903) A. C. 501;
Symons v. *Baker*, 10 Asp. Mar. Law Cas. 129; 93 L. T. Rep. 548; (1905) 2 K. B. 723;
Christie v. *Lewis*, 2 Br. & B. 410.

Cur. adv. vult.

June 5.—SWINFEN EADY, L.J. read the following judgment:—The tug *Simla* rendered valuable salvage services to the Norwegian steamship *Sarpen*, a vessel laden with dry wood pulp, when the latter was on the rocks at Papa Stronsa, one of the Orkney Islands, in the month of April 1915. This action was brought by the owners, master, and crew of the tug against the *Sarpen*, her cargo and freight, to recover salvage. The judge decided that the *Simla* was a vessel in the service of the Crown, and in the position of a King's ship, and precluded by sect. 557 of the Merchant Shipping Act 1894 from making any claim for salvage; and that the master and crew of the vessel were not entitled to have their claim for salvage services finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim was proved, which had not been done. He therefore held that the claim failed. In case there should be an appeal, the judge proceeded to consider what would be a

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

proper amount to award for the salvage services rendered, if a claim could be maintained, and he fixed the amount at 800*l.*

The owners, master, and crew of the tug appeal, and ask to have it determined that the ship was not and ought not to be regarded as a King's ship at the time when the services were rendered, and accordingly that the claim can be maintained, and that the consent of the Admiralty is not required for the due prosecution of the claim by the master and crew. The appellants also contend that if they are entitled to recover salvage the sum of 800*l.* determined by Bargrave Deane, J. is inadequate compensation for services rendered.

In order to determine whether the tug is to be regarded as a King's ship, it is necessary to consider her position and the terms upon which she had been acquired and was held by the British Admiralty when the salvage services were rendered. She was sent to Sheerness dock by her owners in response to a telegram from the dockyard authority of the 30th July 1914 requesting that certain named tugs (not including the *Simla*) be dispatched to Sheerness forthwith, but, if not available, that tugs of similar description be dispatched; the plaintiffs in their reply admitted that the tug *Simla* was under requisition by the Admiralty, and accordingly the learned judge said that he accepted "the position which both parties seem to agree to, that the requisition was duly effected, and when so requisitioned the *Simla* went to Sheerness, and then to Kirkwall Bay, and lay in the harbour there under the direction of the naval harbour master." I treat the matter upon the same footing as by agreement it was treated in the court below, and regard the tug *Simla* as requisitioned and taken up on the terms of the proclamation of the 3rd Aug. 1914. The proclamation, however, contains a recital that, owing to the urgency of the need, it is impossible to delay the employment of the vessels taken until the terms of engagement have been mutually agreed upon, and it provides for terms being arranged as soon as possible after a ship has been taken up, either by mutual agreement between the Admiralty and the shipowner, or, failing such agreement, by the award of a board of arbitration. Since the trial of the action before Bargrave Deane, J. an agreement has been come to between the Admiralty and the tug owners, settling the terms of the engagement of the tug *Simla*. By this agreement the Admiralty are to pay an agreed sum per day for the hire of the tug; the rate is framed on the following conditions: Owners are to pay wages and health insurance of the crew; to provide and pay for all stores and the necessary equipment for the proper and efficient working of the vessel, and to take marine risks on the vessel and crew. Admiralty to accept war risks on the vessel and crew and to provide coal. In the event of loss of time or prevention of a vessel working owing to deficiency of men or stores, defect, or damage not due to a contingency coming under the category of war risks, payment of hire shall cease until she be again in an efficient state to resume her service, and the costs of repair of such defects or damage shall be an owner's charge. A charter-party to be issued later. These terms are retrospective and date back to the 30th July 1914. This court, having now before it the terms so settled, is in a much better position than Bargrave Deane, J. was to determine whether the ship is to be deemed to be a ship belonging to His Majesty, within the meaning of sect. 557 of the Merchant Shipping Act 1894.

By the terms of that section, "where salvage services are rendered by any ship belonging to Her Majesty, or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service." This provision is a re-enactment of sect. 484 of the Merchant Shipping Act 1844. Where salvage services are rendered by a King's ship, no claim to salvage can be made in respect of the ship, but the commander and crew may prosecute a claim with the consent of the Admiralty: (sect. 557 of the Act of 1894). Previous to this provision and the corresponding enactment in the Act of 1854 there was in force an order of the Board of Admiralty of the 30th Jan. 1852 directing the officers of Her Majesty's ships not to claim reward for salvage services rendered to vessels in distress unless the service was one of real importance, or was accompanied with hazard: (Kennedy on Civil Salvage, 2nd edit., p. 113). The question is whether the *Simla* is to be considered a King's ship for the purpose of determining whether a claim for salvage can be made on behalf of the ship and her owners. In the case of *The Nile* (*sup.*) salvage services were rendered by the *Finisterre*, and the officers of H.M.S. *Simoom* and the *Nile* admitted liability for salvage, and paid 1000*l.*, which was accepted, and the only question actually raised was as to the apportionment of the amount, and whether Commander Peile was entitled to a share as well as the naval officers who actually assisted at the operations. In that case the *Finisterre* had been chartered by the Government by a charter not demising the ship; all sea damage was at the risk of the owners of the ship. and the salvage services were outside the scope of the vessel's employment as a transport. Sir Robert Phillimore pointed out that the ship was never demised; and that there was no temporary transfer of her ownership to Her Majesty, and that her owners were therefore entitled to the ship's share of salvage remuneration. The inference from this is that if there had been an actual demise of the *Finisterre* to the Admiralty, and if sea damage had been at the risk of the Admiralty, the ship would have been for the time being "a ship belonging to Her Majesty" within the meaning of sect. 484 of the Merchant Shipping Act 1854—now sect. 557 of the Act of 1894. This is in accordance with the decision of the King's Bench in 1815 in *Master, &c., of the Trinity House* v. *Clark* (*sup.*), where Lord Ellenborough delivered the judgment of the court, which determined that where the ship *Britannia* was under a time charter to the Crown which amounted to a demise of the ship, a temporary ownership in the vessel passed to the Crown. In *Weir and Co.* v. *Union Steamship Company* 83 L. T. Rep. 90; (1900) A.C. 525). Lord Davey, referring to this case, said that it was decided on very special circumstances, and could hardly be a precedent for any other. But the

passage which follows indicates that in his opinion if the contract is one in which the ship is completely handed over to the charterers, to be navigated by them at their own risk and responsibility, there would be a transfer of temporary ownership. Certainly a ship may belong to a person as "owner," although such ownership may be only temporary: (see *The Lemington*, *sup.*, at p. 478; *The Ripon City*, *sup.*, at pp. 242, 244). In the case before us, however, it now appears that the tug *Simla* was taken by the Admiralty upon the terms of the owners paying wages and health insurance of crew, providing and paying for all stores and the necessary equipment for the proper and efficient working of the vessel, and taking the marine risk on the vessel and crew. When, therefore, the *Simla* was rendering (with the permission of the naval authorities) the services for which salvage reward was claimed, it was the owners of the *Simla* and not the Admiralty who were incurring risks of sea damage and injury to the vessel and her crew, and the Admiralty were not at risk in the matter.

Now that the facts have been more fully ascertained, I am of opinion that the *Simla* cannot be regarded as a King's ship when rendering the salvage services, and that the ship is not prevented from claiming ordinary salvage remuneration by the fact of the vessel's hiring to the Admiralty, nor do the commander and crew require the consent of the Admiralty to the prosecution of their claim. I observe that Bargrave Deane, J., after holding that the vessel was in the service of the Crown, added that without the sanction of the Admiralty she could not claim any salvage reward for salvage services. But if the ship were a King's ship, no claim to salvage can be made on behalf of the ship, whether with or without the consent of the Admiralty; the claim must be limited to a claim by the commander and crew; it is this claim which requires the consent of the Admiralty for its prosecution in the case of a vessel belonging to His Majesty.

It may be urged that the settlement of the terms of hire between the Admiralty and the tug owners, come to since the trial of the action before Bargrave Deane, J., although operating retrospectively, ought not to prejudice the defence of the *Sarpen* to the demand for salvage. But the terms upon which the vessel was acquired by the Admiralty had been left open; *primâ facie* a ship rendering services such as the *Simla* rendered to the *Sarpen* would be entitled to a salvage award; the burden of showing that the *Simla* was not so entitled was upon the *Sarpen*; and if at the trial the terms of hire had not been sufficiently settled to determine the character and position of the *Simla*, the owners of the *Sarpen* might have applied for an adjournment of the hearing until either agreement or arbitration had determined whether the *Simla* was in the position of a King's ship. No adjournment, however, was asked for; the evidence before Bargrave Deane, J. was quite insufficient to establish that the *Simla* was in the position of a vessel belonging to His Majesty; and the subsequent agreement shows that the *Simla* has not at any time since it was taken up acquired that character. It was also contended on behalf of the *Sarpen* that there could be no salvage award, as the services rendered were not voluntary on the part of the tug, since she had been directed by the naval officer in command at Kirkwall to proceed to the assistance of the *Sarpen*. But the services were rendered voluntarily as between the salvors and the salved, which is all that is material; the *Simla* owed no duty towards the *Sarpen*. In all cases of salvage by a King's ship, where the commander and crew are entitled to obtain a salvage award, they are acting under orders, given either in general instructions or by a superior officer in the particular instance.

With regard to the amount to be awarded, which Bargrave Deane, J. assessed at 800*l.*, if this court should be of opinion that salvage could be recovered, I see no ground for differing from the learned judge on the question of amount. There does not appear to have been any misapprehension on his part as to the facts of the case, or any error in point of principle.

In my judgment the appeal should be allowed, and 800*l.* awarded to the salvors.

Pickford, L.J. read the following judgment:—This is an action of salvage brought by the owners, master, and crew of the steam tug *Simla* against the owners of the steamship *Sarpen*, a Norwegian vessel, her cargo and freight, for services rendered while the "*Sarpen* was ashore on Papa Stronsa, in the Orkneys." The services are not denied, but the defendants allege that the plaintiffs are not entitled to claim salvage because they are prohibited from doing so by sect. 557 of the Merchant Shipping Act 1894. This is not the form of the pleading, but it is the substantial question. It is also alleged that the services were not voluntary because they were rendered by the orders of the naval authorities. It may be as well to dispose of this point at once. It rests in my opinion on no sound basis. The test of voluntariness is only applicable as between the salvor and salved, and if the services be voluntary in relation to the salved—*i.e.*, not rendered by reason of any obligation towards him—it is quite immaterial that the salvor has been ordered by someone who has control of his movements to render them. To decide the main question it is necessary to see in what way the *Simla* was employed at the time of the services. She was owned by Mr. Watkins and was placed at the disposal of the Government in consequence of two telegrams received on the 30th July which requested certain named tugs or others of a similar description to be sent to Sheerness. The proclamation under which vessels were requisitioned was issued two or three days later, and it is admitted by the reply that at the time of the services the *Simla* was under requisition, but it is denied that such requisition amounted to a demise of the tug or a transfer of ownership to His Majesty. So far as the facts were known at the trial and on the argument before us, they were that the owners were to be paid a monthly hire, the amount of which was not ascertained; that they provided and paid the master and crew and provided the stores and provisions, bunker coal being supplied by the Admiralty. I think that the learned judge described the position correctly when he said that the tug was in sole employment of the Crown, which had actual discretion as to her use, and it was necessary to obtain the permission of the Admiralty authorities before she could go out and render salvage services. I cannot, however,

agree with him when he says that under those circumstances she could not claim any salvage reward for salvage services without the sanction of the Admiralty.

The sanction of the Admiralty has nothing to do with the claim of the owners of the tug; if they come within the provisions of sect. 557 of the Merchant Shipping Act 1894, no claim can be made by them at all either with or without such sanction; if they do not come within the provisions, no such sanction is necessary. In order to defeat their claim it must be shown that the *Simla* was a ship belonging to His Majesty within the meaning of that section. The section is as follows: [His Lordship then read the section.] Probably the reason of the provision is that it is not considered right that risk or loss to property provided by the public should be paid for by a member of that public. It is true that this reason does not apply to risk and loss occasioned by services to foreigners, and it was contended before us that the section must be limited to services rendered to British ships or cargo, but I see no such limitation in the section, and it was probably extended to foreign ships by the comity of nations. But to bring the salving vessel within the section she must belong to the Crown. It is not enough that she is chartered by the Crown, which has the sole directing power over her, and that she cannot render salvage services without the Crown's consent. She does not necessarily belong to the Crown in that case any more than a vessel under charter not by way of demise to anyone else belongs to the charterer. See *The Nile* (*sup.*) and *The Bertie* (*sup.*), with which I agree. Those cases are not authorities which govern this, the salving vessels were under charter as transports only and not hired for any purpose which the Crown required, and they were not, so far as I can tell, under requisition; but I think they are authorities, with which I agree, that the owner of a vessel is not excluded from the right to salvage because she is in the service of the Crown and cannot render such services without its consent, and the services are rendered under the instructions of the naval authorities.

It is necessary to see if the fact of being under requisition makes any difference. In my opinion it does not necessarily do so. I do not deny that there may be a requisition under such terms as to give the Crown the dominion as well as the control of the ship, and it may be that in such a case she may be said to belong to the Crown, although not in the ordinary sense belonging to it. But I am of the same opinion that I expressed in *The Broadmayne* (*sup.*), that the word "requisition" does not necessarily connote such a state of things; it means that the Crown has the right to require the services of the ship without the consent of the owner, but it does not define the terms upon which the Crown may see fit to take those services. It is well known that some vessels are employed under requisition on terms of charter-parties and some are not, that the terms of the charter-parties are not always the same, and a case was mentioned at the Bar in which express terms were made entitling the tug so requisitioned to the benefit of salvage. The proclamation under which the ship is to be taken to be requisitioned seems to me to contemplate that all vessels will not be requisitioned on the same terms. It is as follows: [His Lordship read the proclamation as above set out.]

It may very well be that the words "according to terms to be arranged" strictly and grammatically refer only to payment for services and compensation, but it is obvious that in arranging such payment and compensation it is necessary to look at the other terms of the hiring—*e.g.*, whether the owner or the Crown pays the crew; on whom war and marine risks fall, and such matters, and, as I have pointed out, it is well known that the Crown does under requisition hire the services of ships on different terms as to such matters. The Crown cannot be forced by arbitration to accept any particular conditions, but it can and does agree to such conditions, and then the only question for arbitration is, given those conditions, what is the proper amount to be paid. In my opinion when there is a hiring under requisition as in this case, on terms to be settled after the hiring, the question of whether the requisitioned ship is a ship belonging to His Majesty cannot be ascertained until those terms are settled. I do not think in this case there was a taking over of the absolute dominion of the vessel, subject to being afterwards altered at the will of the Crown, but a taking over on terms which the Crown had not then settled, and which when settled might or might not confer such dominion. In this case there were not, in my opinion, materials before the court on which it could come to the conclusion that the *Simla* was a ship belonging to His Majesty, and I think, therefore, that the plaintiffs are entitled to an award. On Mr. Watkins' evidence the tug belonged to him and was entitled to salvage reward, and to show that the Crown was employing her under terms which were not ascertained was not sufficient to displace that *primâ facie* case. It is to be noticed that the Admiralty have in no way interfered; in fact, so far as any intelligible meaning can be given to the communications from the Transport Department, they seem to be willing that the plaintiffs should recover salvage so long as it is not against Crown property, and the defendants have not taken the trouble to obtain any evidence from the Admiralty as to anything. I think, therefore, that upon the evidence before the learned judge the plaintiffs were entitled to succeed. The defendants would, I think, have been entitled to object to judgment being given against them while the terms were unsettled and to ask for an adjournment until it was decided what they were, but they did not do so. We have, however, since the case was argued, had sent to us in substance the terms agreed between the plaintiffs and the Government. They are finally to be embodied in a charter-party, and that has not yet been done, but they have been accepted by the parties as substantially correct, and we have heard argument on them on that basis. Those terms have been read. They are in effect a hiring by the Government, which is not a demise of the vessel, and leave the marine risk to fall upon the owners, and they take effect from July 1914.

The result is that when the salvage services were rendered the tug was employed under terms which did not constitute her a ship belonging to His Majesty, and therefore her owners, master, and crew were entitled to recover a salvage reward. There remains to be considered the

amount of the award. The learned judge assessed it at 800*l.* in case the plaintiffs were entitled to recover, and they have appealed on the ground that the amount was insufficient.

This court is always loth to interfere with the amount of salvage awarded, even where it might possibly not take exactly the same view as the court below, and I do not see in this case sufficient grounds for interfering with the discretion of Bargrave Deane, J.

BANKES, L.J. — This is an appeal from a decision of Bargrave Deane, J., who decided against the claim of the owners, master, and crew of the steam tug *Simla* for salvage services rendered to the Norwegian steamship *Sarpen*. The decision proceeded entirely upon the ground that the *Simla* was a "ship belonging to His Majesty" and that the claim of the owners must therefore be disallowed, and that, so far as the claim of the master and crew was concerned, the consent of the Admiralty not having been obtained for the prosecution of the claim, that claim must be disallowed also.

The rule restricting any claim for salvage by a vessel belonging to His Majesty appears to be of very old standing. It was referred to in the case of the *Iodine* by Mr. Lushington in the year 1844, in 3 Notes of Cases, at p. 141, in the following terms: "Observations have been made in the argument respecting one of Her Majesty's vessels preferring a claim of this nature, though that question had long ago been settled; for from the very earliest date of my experience as an advocate, as far back as 1808, I thought the opinion expressed by Lord Stowell had decided this question. I apprehend that where assistance is rendered by any vessel belonging to Her Majesty the following principles are to be applied: that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made on account of the vessel being the property of the country, and the property of the owners under these circumstances never being risked." Ten years later the rule as extended was incorporated in the Merchant Shipping Act 1854 (sects. 484 and 485); and is now to be found in sect. 557 of the Merchant Shipping Act 1894. It has never been expressly decided what constitutes a vessel belonging to His Majesty so as to render the owners incapable of claiming for salvage services. The question can, of course, only arise in relation to vessels engaged in Government service and privately owned, or owned by the Government of some colony or dependency. The question was discussed in the cases of *Cargo ex Woosung* (*sup.*) and *The Dalhousie* (*sup.*) with reference to vessels belonging to the Bombay Government. The most instructive case on the point to which we have been referred is, I think, that of *The Nile* (*sup.*). That case raised the question as to whether the owners of the steamship *Finisterre* were entitled to salvage. The vessel was at the time engaged under charter in Her Majesty's transport service. In dealing with the question Sir R. Phillimore, at p. 455, says this: "Having reference to these documents, I am of opinion that the *Finisterre* was never demised—indeed, it was not so contended—to Her Majesty; that there was no temporary transfer of her ownership to Her Majesty; and that her owners are entitled (a point faintly, if at all, contested) to her share of salvage remuneration. I think, however, that she was so far under the control of the senior naval officer, Captain Peile, that on the one hand she could not have acted as salvor without his permission, though, on the other hand, she could not have been ordered by him to perform this service, which was not, in my judgment, within the terms of the charter." In this passage Sir Robert Phillimore clearly indicates that in his opinion if there had been a temporary transfer of ownership the *Finisterre* would have become for the time being, and for the purposes of the Merchant Shipping Act and the earning of salvage, a vessel belonging to Her Majesty. In this view I agree; and it is therefore unnecessary to consider the cases, to several of which we have been referred, in which it has been held that for certain purposes a vessel may be considered as having a dual ownership—the ownership of what I may call the actual owner, and the ownership of the temporary owner.

In the present case there is no question that the actual owners of the *Simla* are the plaintiffs in the action. The only question is whether the requisitioning of the *Simla* by the Government placed her, for the time being in the temporary ownership of the Government so as to constitute her a vessel belonging to His Majesty, and as such disentitled to earn salvage. I should entertain no doubt at all on this subject had the requisition been a formal unqualified exercise of the Royal Prerogative. Such an exercise of the prerogative must, I think, be interpreted as a taking over of a vessel in the fullest possible sense, which would include the claim to exercise and the exercising of the rights of the owner to the full extent. The difficulty in the present case arises from the circumstances under which the *Simla* was taken for Government service, and the terms of the proclamation of the 3rd Aug. 1914. The only documents which passed between the Government and the owners before and in reference to the taking of the *Simla* were two telegrams, both dated the 30th July, in which the Admiralty requested the owners to send certain named tugs or tugs of similar description to Sheerness. In pursuance of this request the *Simla* was sent with others, and she has since been continuously retained in Government employ. For the purposes of this action the parties are agreed that the *Simla* must be treated as having been requisitioned under the proclamation, although no warrant was ever issued for that purpose. It becomes, therefore, very material to consider the terms of the proclamation. The proclamation confers upon the Lords Commissioners of the Admiralty the power to requisition and take up for the service of His Majesty any ship as defined by the proclamation for such period of time as may be necessary, but only on condition that the owner shall receive payment for the use, and for services rendered, during the employment in Government service, and compensation for loss and damage thereby occasioned according to terms to be arranged as soon as possible after the ship has been taken up either by mutual agreement or by arbitration. This

language appears to me to give the Admiralty a wide discretion in arranging terms with the owner of a requisitioned vessel. The payment to be made is to depend upon the use to which the vessel is put, or the services which she is required to render, and the terms of employment may therefore extend from the full requisitioning of the vessel upon terms at least as extensive as a demise of the vessel to the mere occasional employment of the vessel to render some specified and intermittent service. The language of the proclamation appears to me to indicate that it was intended to provide for the possibility of there being cases in which the continuous use of the vessel might not be required, but that she might be required to render certain services only at stated periods, leaving her free for her owner's purposes at other times, and that other terms might be agreed upon which might affect the amount of compensation which an owner could properly claim. As an instance I cannot think of a better illustration than the present, where conceivably it may be in the interest of everyone that the *Simla* should be at liberty to undertake services for reward if and when the Admiralty authorities thought it right to give her permission to undertake them. If this was permitted, the rate of payment to the owners would presumably be less than if it was not permitted, while the Admiralty would be free to give or refuse permission as it suited their purpose. This question of the right to charge for salvage services must necessarily, as it seems to me, come up for settlement if and whenever the terms of payment are discussed between the Admiralty and the owners of the requisitioned tug. In the present case when the matter was before the Admiralty Court the question of the tug's position and the terms of payment had not come up for discussion. I certainly am not prepared to assume and I do not think that the learned judge was right in assuming either that the effect of a requisition under the proclamation was *ipso facto* to put the *Simla* into the class of a ship "belonging to His Majesty," or that the terms which would be eventually mutually agreed or settled by arbitration must necessarily involve a transfer of the temporary ownership to the Crown. During the argument before this court counsel for the plaintiffs mentioned the fact that since the case was before the Admiralty Court terms had been agreed between the owners and the Admiralty. We were not told the terms at the time, but the court has been furnished at its own request with a copy of the correspondence which has passed and counsel have been further heard upon it. It now appears that one of the terms which have been agreed is that marine risks are for the owner and war risks only for the Crown.

In my opinion this agreement concludes the question as to the real position of the *Simla* with regard to salvage while she remains under requisition, and that it is no longer possible to contend that she was at the time the salvage services were rendered a ship belonging to His Majesty. Apart from the question of the agreement, however, the evidence before the learned judge was not in my opinion such as to justify a finding that the *Simla* was at the time the salvage services were rendered in the position of "a ship belonging to His Majesty." I regard her at that time as only conditionally requisitioned—that is to say, that she was requisitioned upon terms which might or might not place her in the position of "a ship belonging to His Majesty"; but, as the terms had not at that time even come under discussion, she had not become fixed with the disabilities, so far as salvage services are concerned, of one of His Majesty's ships. Under these circumstances I consider that the appeal on the question of liability should succeed. The amount fixed by the learned judge is, I consider, low, but not so low as to justify any interference by this court.

Appeal allowed.

Solicitors for the appellants, *Clarkson* and *Co.*
Solicitors for the respondents, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

May 4 and 11, 1916.

(Before Sir S. T. EVANS, President.)

THE ASTURIAN. (*a*)

Prize—Cargo—Shipment of cargo before outbreak of war—Goods the produce of enemy soil—Neutral claimants — Company domiciled in neutral country—Branch office in enemy country—Domicil—Effect of Turkish Capitulations.

A Greek company, having its head offices at Athens, carried on a branch business in Asia Minor, where it owned certain vineyards. Before the outbreak of hostilities between Great Britain and Turkey a cargo of sultanas, the produce of the vineyards, was shipped by the company in a British vessel and consigned to the order of the company at Liverpool. At the last-named port the goods were seized as enemy property and claimed as prize by the Crown.

Held, that, although the Greek company was neutral, the goods claimed were the produce of land owned or held by the claimants in an enemy country and were liable to confiscation and condemnation, even though the goods were shipped before the outbreak of war, and that the effect of the Turkish Capitulation as to the holding of land in the Turkish Empire by persons of foreign nationality was irrelevant.

THIS was a case in which the Crown asked for the condemnation of a cargo of sultanas shipped on the *Asturian* at Smyrna and consigned to Liverpool.

The *Asturian* was a British steamship which shipped (*inter alia*) a cargo of 2500 boxes of sultanas at Smyrna, in Asia Minor, before the date of the outbreak of war between Great Britain and Turkey—namely, the 5th Nov. 1914. No question arose as to any portion of the cargo except the sultanas, which were shipped by the Banque d'Orient, a Greek company having its head office at Athens, and a branch at Smyrna, where it owned a vineyard, of which the sultanas in question were the produce. The cargo of

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

sultanas was consigned to the order of the Banque d'Orient at Liverpool, where the *Asturian* arrived on the 29th Oct. 1914. The goods were seized as enemy property at the port of Liverpool on the 12th Nov. 1914.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Pearce Higgins* for the Procurator-General. —The goods in question in this case must be regarded as having an enemy character. They were the produce of a vineyard situated in enemy territory, which was admittedly the property of the claimants. If a merchant or a trading company had places of business in two countries, that merchant or that company was to be considered, for business purposes, as a subject of both countries. And it was clearly established that if one of the places of business was in a neutral country and the other in an enemy country, the connection between the two must be severed at the earliest opportunity after the outbreak of hostilities. It was also an established proposition of international law that the produce of the soil of an enemy country was enemy property. It was immaterial what was the nationality of the owner. The claimants had endeavoured to set up an exception to this rule, by contending that under the Turkish Capitulation systems Europeans in Turkey possessed certain ex-territorial rights. But even if it was assumed that Turkey had not repudiated the capitulations, the fact of their existence did not affect the principle contended for by the Crown, that the produce of enemy soil, which soil was under the control of the enemy Government, was undoubtedly enemy property. They cited

The Jonge Klassina, Roscoe's English Prize Cases, vol. 1, 485; 5 Ch. Rob. 297;
Thirty Hogsheads of Sugar (*Bentzon*) v. *Boyle*, 9 Cranch, 191;
The Manningtry, 32 Times L. Rep. 37;
The Anglo-Mexican, *ante*, p. 367; 114 L. T. Rep. 807; (1916) P. 112.

Leslie Scott, K.C. and *Dunlop* for the claimants. —The claim put forward by the Crown was stated too high. The rule as regarding neutrals residing in a neutral country with a branch place of business in an enemy country was that goods shipped from the enemy country would only be treated as enemy goods if an enemy character was, under the circumstances, attributable to them. This followed from the judgment in the case of *The Phœnix* (Roscoe, vol. 1, 495*a*; 5 Ch. Rob. 20). There was, however, a distinction to be drawn in the present case. An enemy character could not be attributed to the owners of the goods, and therefore the goods must be treated as of a neutral character. This applied equally to the produce of the soil owned by them, even though that soil was a part of the enemy territory. Again, in the absence of proof that the neutral owners had continued to carry on their business in the enemy country, there was no ground for attributing an enemy character to goods which were shipped before the outbreak of war. The Banque d'Orient had kept open their branch at Smyrna for the purpose of preserving the property of the bank. There was not a particle of evidence that they had continued to carry on business. The Banque d'Orient retained its neutral character under the Turkish Capitulations, and should be treated, in spite of its branch house in Smyrna, as a company established in Greece. They cited

The Danous, 4 Ch. Rob. 255*a*;
The Dree Gebroeders, 4 Ch. Rob. 232;
The Eumœus, *ante*, p. 228; 114 L. T. Rep. 190;
The Derfflinger, *ante*, p. 346; 114 L. T. Rep. 953; (1916) 2 A. C. 112.

The Attorney-General in reply. *Cur. adv. vult.*

May 11.—THE PRESIDENT.—Part of the cargo laden on board this vessel consisted of 2560 boxes of sultanas shipped at Smyrna before the war by the Banque d'Orient, and consigned to their order at Liverpool. The said boxes were seized at Liverpool on the 12th Nov. 1914. On the 1st Jan. 1915 appearance was entered in these prize proceedings on behalf of the Banque d'Orient as the owners of the 2560 boxes. On the 19th April 1915 the claim was made to the same or to the proceeds thereof by or on behalf of the Banque d'Orient, on the ground that they were neutrals, and were at all material times the owners of the goods.

The Banque d'Orient was a Greek company, with a head office at Athens and with a branch at Smyrna. The company carried on business as bankers and merchants. It owned and controlled land and dealt with the produce. Among other landed property, it owned a vineyard at Magnessia, near Smyrna. The sultanas claimed in these proceedings were the produce of that vineyard. They were shipped by the claimants in the steamship *Asturian* to their order at Liverpool for sale by their agents. The said land or vineyard was admittedly the property of the claimants. It was nominally held for them by some or one of their staff at Smyrna as the registered trustees or trustee on their behalf. This was a mere formality necessitated by the fact that the Ottoman Government did not allow land to be registered in the name of a foreign limited company.

According to the affidavit of Manuel Camara, there were three registered trustees who held the land and managed it for the Banque d'Orient. But according to a letter of the 4th or the 17th April 1916 (which depends on the styles) and its inclosures, it would appear that the property was nominally held for them by one of their directors, Loncas, who signed what amounts to a declaration of trust, in which he declared that the property was in the indisputable possession of the Banque d'Orient, and that its registration in his name was "merely fictitious." Whatever may have been the technical form, the claimants themselves asserted that they were the real owners of the vineyard, and their claim was founded on the ownership of the land and its produce.

The argument on their behalf was in the main based upon their alleged neutral domicil, as their head office was in Athens; and the business at Smyrna was that of a mere branch, in relation to which it was said that they had the benefit of the privileges of the Turkish Capitulations system. Under this system they claimed that their position in Smyrna, and their character as owners of the vineyard, was that of neutral subjects of the kingdom of Greece. In that regard, much of the argument before me revolved round the questions of commercial domicil, and the effect of the Turkish Capitulations, and their alleged abolition before the war by the Sublime Porte.

In the view that I take of this case all such questions are irrelevant. The simple fact upon which the decision of the court depends is that the goods claimed were the produce of land owned or held by the claimants in an enemy country. The law applicable is well settled—namely, that the produce of such land, while in the possession or ownership of the person owning or holding such land, even though he be a neutral, and resident in a neutral country, is confiscable if captured or seized by a belligerent with whom the State where the land is situate is at war. This doctrine was declared as long ago as 1803 to have been so repeatedly decided, both in the English Prize Court and in the Court of the Commissioners of Appeal in Prize Cases, that it was no longer open to question or discussion: (see *The Phœnix, ubi sup.*). It was also fully adopted and indorsed by the Supreme Court of the United States of America in *Thirty Hogsheads of Sugar* v. *Boyle* (*ubi sup.*).

This doctrine has not been doubted, and still remains in full force as part of the law of nations. It is well stated by the late Mr. Hall, in the 6th edit. of his work on International Law, at pp. 497, 498, in this passage: "Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land it is held, being fixed, is necessarily associated with the permanent interests of the State to which it belongs; and its proprietor, so far from being able to impress his own character if he happens to be neutral upon it or its produce, is drawn by the intimacy of his association with property which cannot be moved into identification in respect of it with its national character. The produce of such property, therefore, is liable to capture under all circumstances in which enemy's property can be seized."

The fact was relied upon by the claimants that the shipment of the goods was before the state of war existed between this country and Turkey. Upon the principle enunciated in the above passage from Mr. Hall's work, this fact does not affect the question of the confiscability of the goods; and, indeed, it was expressly declared by Sir William Scott, in the *Vrow Anna Catharina* (5 Ch. Rob. 161), that the produce of land in an enemy country was subject to confiscation, although shipped in time of peace.

The judgment of the court, therefore, is that the goods claimed by the claimants must be treated as if they were enemy property, and that they were accordingly subject to seizure as lawful prize, and that they or their proceeds must be condemned as prize to the Crown as droits of Admiralty.

Solicitor for Procurator-General, *Treasury Solicitor.*

Solicitors for claimants, *Markby, Stewart,* and Co.

Judicial Committee of the Privy Council.

March 2, 3, 6, 7, 8, 9, *and May* 8, 1916.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL).

THE OPHELIA. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE).

Prize Court—Military hospital ship—Evidence pointing to user for other purposes—Claim of protection under the Hague Convention—Appeal involving question of fact only—Practice—Hague Conference 1907, *Convention* 10, *arts.* 1 *and* 8.

By the provisions of Convention 10 *of the Hague Convention* 1907 *it is provided:*

Art. 1. *Military hospital ships—that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers—shall be respected and cannot be captured.*

Art. 8. *The protection to which hospital ships are entitled ceases if they are used to commit acts harmful to the enemy. The presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection.*

Held, on the evidence that the German ship O, *which claimed to be a military hospital ship, had been made use of to commit acts harmful to the enemy, and therefore had forfeited protection under the Hague Convention and had rightly been condemned as lawful prize.*

An appeal from a decision of the Prize Court on a question of fact must be treated as a rehearing in the same way as an appeal to the Court of Appeal from a judge sitting without a jury in the High Court. There is jurisdiction to review the findings of the judge, but the Appeal Court attaches great weight to the fact that the judge below has heard the witnesses and practically acts on the opinion of the judge as to the credibility of the witnesses before him and the weight to be attached to their evidence.

Without laying down an absolute rule that the mere sending by a hospital ship of a wireless message in secret code will of itself forfeit her right to protection and subject her to capture and condemnation, if such messages are sent a clear and satisfactory record of them should be kept, so that when the right to search is exercised there may be reasonable evidence of the messages and of the necessity—if there can be any on the part of a hospital ship—for sending them in secret code.

Semble, *that the principle of the Prize Court condemning the spoliation of ships' papers is especially applicable to vessels claiming to be hospital ships.*

Decision of Sir Samuel Evans, P. affirmed.

APPEAL from a decision of the Prize Court (England), condemning the steamship *Ophelia.* The appellant claimed that the vessel was an auxiliary military hospital ship and privileged under The Hague Convention 1907 (art. 8).

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

The appellant was Naval Staff Surgeon J. V. C. Pfeiffer, commander of the *Ophelia*, who lodged the appeal on behalf of the Imperial German Government.

Leslie Scott, K.C., *Leck*, K.C., *Darby*, and *V. Holmes* for the appellant.

Sir *F. E. Smith* (A.-G.), Sir *George Cave* (S.-G.), and *C. R. Dunlop* for the respondent.

The considered judgment of their Lordships was delivered by

Sir ARTHUR CHANNELL.—This is an appeal from a decree of the President of the Admiralty Division, sitting in Prize, condemning as lawful prize the German steamship *Ophelia* and rejecting the claim of the appellant, made on behalf of the German Government, to her release as a hospital ship protected by the provisions of Convention X. of the Hague Conventions of 1907. A very complete abstract of these provisions is set out in the judgment of the learned President, and it is only necessary to refer to the most material of them, which are the following:

Art. 1. Military hospital ships, that is to say, ships constructed or adapted by States wholly and solely with a view to aiding the wounded, sick, and shipwrecked, the names of which have been communicatod to the belligerent Powers, shall be respected and cannot be captured.

Art. 8. The protection to which hospital ships are entitled ceases if they are used to commit acts harmful to the enemy. The presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection.

The question whether the *Ophelia* was entitled to protection from capture, as complying with these provisions, or whether, by reason of her equipment or the acts of her captain and crew, she had lost that right to protection, is almost entirely a question of fact. The only question which is at all in the nature of a point of law arises on the words of the Convention as to the presence of a wireless telegraphy apparatus, and that question can most conveniently be dealt with after the facts have been stated which raise it. It is necessary, therefore, to consider what is open upon an appeal to this board from the Prize Court on facts.

The Attorney-General has contended that the findings of the judge below should be held conclusive, and he quotes *The Julia* (14 Moore, Rep. 210) and *The Princess Alice* (19 L. T. Rep. 678; L. Rep. 2 P. C. 245). These cases, however, which were collision cases heard on appeal from the Admiralty Court, and not prize cases, only point out the advantage which the judge below had in seeing and hearing the witnesses, and also in the knowledge of navigation which he necessarily acquired in the exercise of his office, and the Judicial Committee merely emphasised the rules on which Appeal Courts always profess to act.

Their Lordships are of opinion that this appeal must be treated as a rehearing, in the same way as an appeal to the Court of Appeal from a judge sitting without a jury in the High Court. There is a jurisdiction to review the findings of the judge, but the Appeal Court gives very great weight to the fact that the judge below hears the witnesses, which they do not, and practically acts on the opinion of the judge as to the credibility of the witnesses before him and the weight to be attached to their evidence. Here the evidence for the Crown was all on affidavit and the evidence for the claimant was given orally after his witnesses had had an opportunity of studying the evidence for the Crown. The affidavits for the Crown were sworn before the case for the claimant had been disclosed, except so far as it was very slightly disclosed by an affidavit sworn by the claimant on the 13th Feb. 1915 (p. 6 of the Record), which did little more than verify the claim. The claimant did not apply to cross-examine any of the Crown witnesses on their affidavits, and his counsel accounts for this by saying that he does not substantially dispute the facts deposed to by the witnesses, but only the inferences drawn by the witnesses from the facts; and it is contended that the claimant's evidence explains rather than contradicts the facts on which the Crown relies. To a great extent that is so, but there seem some contradictions of fact, and some points on which the learned President appears not to have accepted as reliable the oral evidence which he heard. On these points their Lordships would not lightly differ from the learned President, but many matters have been raised on the argument of the appeal which cannot be satisfactorily disposed of by treating them as matters of fact concluded by the views of the President. Their Lordships therefore feel it their duty to review the facts in some detail.

No question is raised as to the necessary formalities to constitute the *Ophelia* a hospital-ship having been complied with. She had a proper certificate, and her name had been duly communicated to the belligerent Powers. She was painted properly as a hospital-ship, and was furnished with the proper flags, although a question is raised as to whether she displayed them properly on the 8th Oct., one of the days to which the evidence relates.

The first point to be considered seems to be whether the fitting and equipment of the *Ophelia* were such that she can be said, as required by the Convention, to be constructed or adapted "wholly and solely" for affording relief to the wounded, sick, and shipwrecked. The affidavits for the Crown and the admission of witnesses for the claimant show that the vessel, although she had some special fittings appropriate only to a hospital-ship, was not, according to British requirements, at all well adapted and fitted for that purpose; but it is unnecessary to go into the details of this, as their Lordships agree with the view of the learned President (who, it may be observed, himself inspected the ship) that no standard of fitness can be laid down, and although not well adapted, this vessel cannot be said not to be adapted, and that the real question therefore is whether she was solely adapted for hospital purposes. The inadequacy and the, in some respects, curious character of the sanitary and other hospital equipment is not, however, without significance on the question of the use which it was really intended to make of the vessel.

In the opinion of Commander Newman, who had special experience in the fitting of hospital ships, the *Ophelia* was not only unsuitable for use as a hospital ship, but was undoubtedly fitted and intended for signalling purposes. He came to that conclusion without knowing that the ship was suspected of acting as a signalling ship, and when he had merely been instructed to

report on her suitability as a hospital ship. It is obvious that there could hardly be a greater or more dangerous abuse of the privileges of a hospital ship than the communicating to the naval authorities of her nation information which she would be constantly in a position to obtain by virtue of her immunity. Her signalling apparatus ought to be confined strictly to what would be necessary for receiving instruction as to her duties and for calling assistance in the performance of them and such like legitimate purposes. That the risk of such abuse was present to the minds of the framers of the Hague Convention is shown by the mention of wireless telegraphy. Instead of the signalling apparatus and equipment of the *Ophelia* being confined within the narrow limits necessary for a *bonâ fide* hospital ship, it was obviously very largely in excess of them. She had a very unusual number of signal halliards working on brackets from the funnel, which brackets were fitted to her in Kiel after her first fit-out and very shortly before her capture; but it is said by the German witnesses that this was merely in substitution for another arrangement of signal halliards working on a stay between the masts, and that the stay interfered with the wireless apparatus which had been supplied. It appeared, however, that the flags of the international commercial code which she had on board were kept stowed away in the charthouse; whilst on each side of the funnel, which was thus equipped with an abnormal number of signal halliards, there were stowed on hooks, obviously kept there for immediate use, special German flags which must have been provided for her when adapted for a hospital-ship, and must have been meant for secret signalling. Her masts were, on this last visit to Kiel, lengthened, which would have the effect of extending the receiving capacity of her wireless installation. This, it was said, was done not for the purpose of so increasing the range, but because the signal halliards on the brackets were interfered with by the wireless. This explanation in itself shows the great attention which was being paid to the signalling equipment of the ship. It is, however, the enormous number of Verey's signal lights which were on board which seemed to the President, and seems also to the board, practically conclusive that the vessel was specially equipped for signalling. These lights are fired from a special kind of pistol, of which there were two on board. Of these Verey's lights she had on board no less than 600 green, 480 red, and 140 white lights, obviously a most abnormal number. It is said by Commander Newman that a British vessel of the same class would have about twelve of each. At the trial it was discovered for the first time that a record of the number of these lights, which had been used, had been kept, but that it was destroyed by the paymaster by the order of Captain Pfeiffer after the capture, and on the evening of the day when they had been informed that the vessel was to be put in the Prize Court.

The subject of spoliation of documents will be dealt with hereafter, but the destruction of this particular book indicates in a most significant manner that the signal lights were provided for an illegitimate purpose, and none the less so because at that time the British officers had not made any complaint on this point. If any doubt could have remained as to the intended use of these lights, it seems cleared away by the incredible explanation which Captain Pfeifferwas driven to give of the large number of them. He actually swore that the green and red lights were intended to illuminate the surface of the sea and assist in searching at night for shipwrecked mariners or their corpses. Even with lights fired two at a time from the two pistols would be of little use for such a purpose, and green and red lights obviously of no use at all. They were, he suggested, to be so used because curiously enough the vessel had no searchlight, which as an auxiliary hospital ship she certainly ought to have had. This was the only way in which the number of lights could be accounted for; but a much better explanation, which would account for a moderate number, was that they were used to acknowledge Morse signals received from a distance greater than the Morse lamp which they had on board would carry, and a suggestion was also made that they would be used to identify the ship on coming into German harbours at night, for which obviously such a number as were on board would not have been wanted. No evidence was given of what the identification signal of the *Ophelia* was, and as to how many, if any, green, red, and white lights would be required to make it.

On these facts the learned President found that the *Ophelia* was not adapted or equipped solely as a hospital ship and with that finding their Lordship's agree. This finding would in itself justify the condemnation, but the matter ought not to be left to rest there, and the use actually made of the vessel must now be considered.

The *Ophelia* was before the war a German merchant vessel—a few days before the war she was in the Thames, and on the 3rd Aug. 1914 she received orders from the German consulate by an order of the German Government that she was to return to Germany for military service, and she sailed on the 4th Aug. with a party of German reservists on board. She was met by a German gunboat off Nordeney and was directed to go to Heligoland, which she did, and shortly afterwards went on to Hamburg, where her fitting as a hospital-ship was commenced by the Hamburg-American Steamship Company for the German Government. On the 12th Aug. she went to Kiel, where her fitting was continued. On the 5th Sept. she received orders to go to Cuxhaven, and arrived there on the 6th, but shortly afterwards came back to the Kaiser Wilhelm Canal, and got her certificate as a hospital-ship on the 11th Sept. On the 19th she went to Heligoland. There she stayed until the 3rd Oct., when she went to Wilhelmshaven. During all this time she did no hospital work, but according to the witnesses at trial, the time was occupied in drilling the crew in boat work and stretcher work and the like. The witnesses denied the suggestion that during that period she did any scouting, and there is no evidence that she did. On the 6th Oct. she proceeded from Wilhelmshaven to Schellinghorn roads, at the mouth of the Weser River, and at 11 a.m. of that day, whilst she was on her passage down the river, a German torpedo-boat, *S* 116, was sunk by a British submarine in the mouth of the Ems. The *Ophelia* arrived at Schellinghorn roads about noon, and at 8 30 p.m. received orders

to steam at once to the mouth of the Ems. There is considerable mystery as to the orders received on this evening and the next morning. Captain Pfeiffer "thinks" that they were received by Morse code from the Schellinghorn signal station. He also "thinks that it was also said that *S* 116 had been sunk, but he cannot say for certain, and he thinks that it was even mentioned that there were nine survivors, or something of that kind." He is, however, quite certain that he never was given any statement as to the place where the torpedo-boat was sunk, except that it was at the mouth of the Ems, and equally certain that he never asked anyone where the spot was, and did not know it on the 8th. On receipt of the order at 8 30 p.m. on the 6th the *Ophelia* got her anchor and proceeded to sea, having taken a pilot on board, from whom, of course, it is possible that Captain Pfeiffer got some of the information of which he cannot recollect the source. On passing the German warship *Beowulf*, which apparently was acting as guardship somewhere to the west of the entrance to the Weser, she received orders to return. This was a verbal order, and the captain's memory is again at fault as to the particulars of it. In the log the entry is "Received counter-orders, steamed back." The captain "thinks" that the reason of this order, either stated or conjectured, was that navigation was dangerous at night, which when lights were extinguished and buoys removed was probably the case; but if there had been a reasonable prospect or real idea of saving life the risk, one would think, would have been run. On the following morning, about 9.30, orders were received again from Schellinghorn signal station to proceed "to the place of the accident." These orders are not entered in the log, although both the orders of the previous evening are, and they are stated only on the recollection of the captain. He does not appear surprised at receiving orders to go to a place he did not know, and again he asked no questions.

They weighed anchor at 10 a.m. and got off the Eastern Ems buoy at 5.40 p.m. They apparently anchored outside of Borkum to wait for a pilot, and having taken one on board at 7.30 p.m., proceeded and came to anchor for the night in the Ems, somewhere off Borkum, at 8.30 p.m. There were some discussions as to the place of anchorage, but it does not seem very material. There was no information obtained from the shore except such as may have been obtained from the local pilot, and Captain Pfeiffer does not say that he asked for any information from him as to the place of the accident, and does not say that the pilot, who either remained on board or came on board again to take them out on the morning of the 8th, knew it.

It seems very odd that no inquiry should be made for the information which would appear so necessary, and which, it is said, was never given, and it is impossible to avoid a suspicion in the absence of any reliable record of the signals received, that there were some directions given as to what was to be done which were of a nature that it is not desirable to disclose.

At 6.50 on the morning of the 8th Oct. the *Ophelia* got her anchor and, to use the words recorded in her log, "Steamed under directions of the pilot out of the Ems by land and sea marks on the search for a sunken torpedo-boat." The movements of the *Ophelia* on that day were the subject of much controversy, both in the court below and on the argument of the appeal. Indeed, the counsel for the appellant devoted a large part of his argument to the events of that day, and contended strongly that the President was wrong in the view he took of these events, and in his finding as to the speed of the *Ophelia*, which was material in its bearing on the events of the 8th Oct. and possibly on the credibility of the German witnesses, who all swore most positively that the *Ophelia* was incapable of going faster than about 9½ knots.

A British submarine was on that day on patrol duty off the mouth of the Ems, and her commanding officer, Lieutenant-Commander Moncreiffe, makes an affidavit as to what he observed, which he thought so suspicious that he reported it at the first opportunity to his superior officer. This affidavit was sworn before Commander Moncreiffe had any information as to the German version of the events of the day, except by seeing a copy of the *Ophelia's* log. The affidavit of Captain Pfeiffer verifying the claim makes no mention of the 8th Oct. Commander Moncreiffe, in reference to the entry in the log quoted above, says that he was quite certain that the *Ophelia* was not searching for a sunken torpedo-boat or any sunken vessel, and that, of course, is absolutely true. It is clear from the German evidence, as well as from Commander Moncreiffe's own observations, that she was not sweeping the bottom to locate the position of the sunken wreck, and the entry in the log is, taking it literally, clearly untrue; but it would, perhaps, be unfair to take the words so literally and not to assume that the words used refer to a search for floating wreckage, survivors, and corpses from the sunken vessel, rather than to a search for the wreck itself at the bottom of the sea. The result, however, is that Commander Moncreiffe has not dealt with the story now told by the German witnesses, on this and on some other points. No notice to cross-examine him on his affidavit having been given, the Crown did not think it necessary to call the witness away from his naval duties, and he was not in attendance at the trial, otherwise he might have cleared up, one way or the other, several of the matters which have been the subject of much argument.

His account of the matter shortly is that about 9.15 English time, by his clock (which he does not vouch as quite accurate), he saw to the south-east the smoke of a vessel, which afterwards proved to be the *Ophelia*, coming from the Huibert Gat (the southernmost of the three passages into the Ems between the shoals) and proceeding in a westerly direction. He proceeded in a southerly direction, and at 9.28, when in latitude 53° 45′ and longitude 5° 41′ E., he sighted the masts and funnel of the vessel, which had then altered her course "to the northward." Comparing this with the account of the *Ophelia*, she started at 6.50 German time, or 6.50 English time, and went out of the Huibert Gat. On the way out she passed close to the German torpedo-boat No. 119, the commanding officer of which was called as a witness at the trial, he being then a prisoner of war. The *Ophelia* made no inquiry of that torpedo-boat as to the place of the accident, and received no information

on the point. At 9.30 German time (8.30 English) she sighted an English submarine to the north or north-west, "about eleven miles off Schiermonnikoog," according to her deck log. The deck log gives no courses, which, however, can be accounted for if she was at first following a channel and afterwards zigzagging on a search; but as the engine-room log records running full speed ahead from 7 to 10 a.m. (6 to 9 English time), she would, if running on anything like a straight course, have been well outside the Huibert Gat, and at least as far to the westward as the place where she is described by Commander Moncreiffe as being at 9.15 and 9.28 English time. She might even have done some zigzagging, and still have been as far out as that. The *Ophelia's* engine log records that between 10.10 and 10.28 she twice stopped, went full speed astern, and then ahead again. These would be the manœuvres of a steamer picking up a boat or anything floating, and Captain Pfeiffer at first explained them by saying he picked up a pilot, but afterwards corrected this, and said that he did that before coming out of the Ems, so it could not have been after ten o'clock. Pfeiffer also said that at some time, which, however, he puts as happening on the return journey, while searching on this day they sighted a floating object, which might have been wreckage, but turned out to be a fisherman's basket. This cannot be the explanation of the manœuvres between 10 a.m. and half-past. Whatever those manœuvres were, they were not observed by Commander Moncreiffe, the vessel being hull down when they began; but the time when they ended and when the *Ophelia* went full speed ahead again corresponds with the time (9.28 English, 10.28 German) when Commander Moncreiffe made out the two masts and funnel of the *Ophelia*, and saw that she had altered her course to the northward," which would not, of course, necessarily mean that she was heading due north. So far there is little, if any, contradiction, and nothing making it clear that the story of the *Ophelia* taking zigzag courses in order to search was untrue. At 9.45 Commander Moncreiffe speaks of another alteration of the *Ophelia's* course, and he then made out she was painted as a hospital ship. At ten, he says, she evidently made out his presence and "hoisted" her Red Cross flag. Later on he said that she "hauled down" that flag. If that means that the commander actually had his glasses to his eyes and saw the flag actually going up or coming down it is significant, although not quite easy to say why she should do it; but if it only means that he saw the flag flying and then shortly afterwards failed to see it when he looked for it and thought it was hauled down, it means very little. A steamer's flags in a moderate wind will not fly out when she is going with the wind. It happens that at the time he says the flag was hoisted the *Ophelia* was heading north-west and then north, and on either course, the wind being W.N.W., the flag would fly out well, and when he says it was hauled down she was heading very nearly east down wind, and he was very nearly astern of her and to windward, and would not be very likely to see her flag. It is unfortunate that the commander could not be called to clear up the doubts which arise on his affidavit made under the circumstances it was. The next thing stated by the commander is that after standing to the northward for five minutes from 10 to 10.5 the *Ophelia* altered her course to east, and at 10.18 was steering S. 85 degrees E. true (that is, very nearly E.), and being right ahead of him on the same course he could at this time speak with absolute accuracy as to the course she was steering, whereas before he could only do so approximately.

The log of the *Ophelia* records that at eleven o'clock (ten o'clock English time) she steered back up the Ems. She went up the Western Ems Channel, and S. 85 degrees E. true would be a course which would take her up that channel. There is, therefore, a remarkable coincidence here. Although the German log is very meagre and possibly not very reliable, this entry must have been written in without the writer knowing Commander Moncreiffe's story. According to the plotting on the chart of the course of the two vessels given to the board on behalf of the Crown, after correction of an obvious error in the first plotting, the *Ophelia*, when at ten o'clock English and eleven o'clock German time, she turned to the east, was a long way north of the entrance to the Western Ems Channel, and after standing in that direction for something like three-quarters of an hour had to come to the southward to make the entrance. This depends on the accuracy of the plotting; and that further depends upon the exact correctness of the courses of the *Ophelia* as estimated from the submarine. It is remarkable that the affidavit, in rather curious language, states that at ten o'clock the *Ophelia* was "in a position which would be accurately described as near Schiermonnikoog." If she was at the position plotted she would be somewhere about eighteen miles from Schiermonnikoog, which could hardly in any sense be called near; whereas if she was near the Western Ems Buoy, and about to proceed up the Western Ems Channel, she would only be about eight miles from Schiermonnikoog; and if, as is more probable, she was to the westward of the position of that buoy, but at a point from which the Borkum Island Lighthouse bore anywhere near S. 85 degrees E. (true), she would be a very great deal nearer to Schiermonnikoog than if at the plotted position, and if steering that course from such a point she would get to the entrance to the Western Ems Channel and a long way up it without having to alter the course. This rather suggests that the plotting cannot be right. At this point the question of the speed which the *Ophelia* was capable of going becomes material. Commander Moncreiffe says that she was obviously running away from him, and appeared to have increased her speed by two to three knots, and that finding he could not "overtake" her he gave up the chase. He made no signal for her to stop. He was going eleven knots. She was shortly before this four and a half to five miles away from him, and, putting it at only four miles, it would have taken him two hours to catch her if she was only going nine knots (her admitted speed) to his eleven, and by that time, if she was going where she says, both would have been near Borkum, or beyond it, and he would have been in a trap, with the difficulty a submarine has in diving in shallow water or among shoals. If, however, both were considerably to the northward, he would have had plenty of sea room, and

if going faster than she was would of course have caught her. It is suggested that in saying he could not "overtake" her he merely meant that she would have got into shelter before he could do so, and that, as to running away, the *Ophelia* was, it is true, going straight away from the submarine, but was on her proper course home. Why, however, she should have started for home when she did with plenty of daylight left, and without having searched all the channels into the Ems, is quite unexplained.

The President expressed the opinion that the *Ophelia* must be able to go more than nine knots, because it appeared by her log of the 5th Aug. that she had done so when escaping from England at the outbreak of the war. According to the readings of the patent log, on that day, as entered in the log book, she undoubtedly in some hours did more; but it has been pointed out on the argument of the appeal that there are obvious inconsistencies in the readings for that day, and that there must be some mistake. On the other hand, the Attorney-General produces the figures from the log of other voyages of the *Ophelia* when she was a German trading vessel, which, if correct, show that she then constantly averaged eleven knots. The account of the German witnesses on this matter is peculiar, as most vessels can at a pinch do more than their usual so-called maximum. On the whole, it certainly seems probable that she can go faster than her witnesses swear to, and the experienced officer who thought she was running away was probably in the right on such a point. Certainly the movements of the *Ophelia* on the 8th Oct. are most suspicious. The evidence shows that at that time there was in the Ems the flotilla of German torpedo-boats which a few days afterwards made a dash out of the Ems on some unknown destination and which were then intercepted by a British squadron, pursued in a north-easterly direction, and sunk on the 17th Oct. near the spot where the *Ophelia* afterwards appeared again. Probably this flotilla was on the 8th Oct. looking out for an opportunity to make this dash, and if the German naval authorities were unscrupulous enough it would have been very useful to them to use the *Ophelia* in order to ascertain whether the British submarines were still off the mouth of the Ems, rather than to have to send out one of the torpedo-boats to scout when she might have met with the fate of *S* 116. It is also possible that the *Ophelia* may have been trying to tempt the submarine into a trap. But the question is whether there is proof of this, or merely suspicion. Having regard to the fact that a search by a hospital ship for corpses of sailors drowned by the sinking of their ship would be a legitimate operation for such a ship, even after a search for survivors had become practically hopeless, and that such a search, if made four tides after the disaster, must be made over rather a wide area and would be made at a fair speed, with men on the look-out for floating objects; and having regard to the matters which appear somewhat ambiguous in Commander Moncreiffe's affidavit, their Lordships would probably hesitate to find it proved that the *Ophelia* was scouting on the 8th if there was no other case proved against her; but when subsequent events are considered there is much more to show her to be a scout.

After anchoring on the 8th Captain Pfeiffer landed at Borkum and sent a telegram, a copy of which was not produced, and which, he says, was only to ask for orders. In the course of that night he got, by Morse signal, orders to go to Hamburg to clean boilers. They did go to Hamburg, and remained about five days; the boilers are said to have been cleaned, and the masts were then lengthened, and the signalling equipment altered as already mentioned. There is no entry in the log of the cleaning of the boilers or of the orders to do it, and it looks rather as if the real object of the visit to Hamburg were to have the signalling equipment improved. They left Hamburg on the 15th and, after stopping a night at the mouth of the Elbe, arrived at Heligoland on the 16th. On the evening of the 17th (at 7 p.m.) they are said to have received an order by wireless telegraphy. When the ship was captured on the 18th there was produced what purported to be the original copy of this message as taken down by the operator. That original was produced on the hearing before the President and on the argument of the appeal, and a translation is at p. 12 of the record. The original was on a form which has on it the three words, "open," "sealed," "decoded," for the purpose. apparently, of the inappropriate words being struck through. On the copy produced, the words "open" and "decoded" are struck through, "sealed" being left, and this was in accordance with the evidence that this message came in the second German code known as "H V B." This code was used by non-combatant Government ships. Warships had another secret code for use between themselves, but they also had copies of the "H V B" code in order to communicate with auxiliary ships. Wireless messages to the *Ophelia* were taken down on a pad, and, obviously, when in code they must be taken down as they come and be afterwards translated or decoded. They could not, therefore, be taken down when heard on the form produced. The operator Grau was called as a witness and explained that he did not khow the code without the book. There were also on the form printed words with spaces for the time and date to be filled in, and this was done on the message of the 17th. The message of the 17th, which there is no reason to suppose was not genuine, reads "Go at once to the Haaks Lightship. Further instructions to follow." At the trial evidence was given both by Pfeiffer and Grau that a book for entering wireless signals in was kept; that signals which had been sent by the *Ophelia* on ordinary ship's matters when at Kiel were entered in it. In the preliminary affidavit sworn by Pfeiffer on the 13th Feb. 1915 he had said that "a separate log for wireless messages was intended to be kept, but had not, in fact, been opened at the time of capture, as the messages were so few." The accounts of the witnesses as to the books which were kept were by no means clear and consistent, and whatever it was that they kept, it was thrown overboard, as will hereafter appear.

On the 17th Oct., the day when the message was received by the *Ophelia* at 7 p.m., the four German torpedo-boats which were in the Ems on the 8th Oct. were sunk by a British squadron between 2.30 p.m. and 4.30 p.m. Greenwich time (3.30 p.m. and 5.30 p.m. German time) within a radius of six miles from latitude 53° 7′ N. and

longitude 3° 40′ E. These torpedo-boats, when on their flight before the British squadron, no doubt sent wireless messages to Norddeich of their peril, and no doubt this was the reason for the wireless message to the *Ophelia*; but the German authorities could hardly have known the particulars of the disaster, and certainly not the exact place of the sinking of their boats when the message was sent off. The Haaks Light-vessel's situation is 52° 57′ 8″ N. and 4° 18′ 3″ E., and was therefore a suitable point to direct the *Ophelia* to go to, and doubtless it was intended to send her further instructions whilst she was on her way there. She got under way at 7·30 and proceeded along the coast towards the position where the Haaks Lightship, which of course had been removed, should have been. The deck log had not been written up at the time of her capture, but we have the loose sheets torn out of the rough log and also translations of them. The figures on the originals are almost undecipherable. The track of the vessel as indicated by the entries on the rough log has been plotted out on the chart handed up, and if this plotting is correctly done it shows that the *Ophelia* did not after noon of the 18th steer straight for the Haaks Lightship, but considerably to the west of it—that is to say, very nearly towards the place of the engagement. A British squadron was at midday of the 18th approaching the place of the engagement of the previous day. At 1.20 p.m., James Alexander Cox, the wireless operator on H.M.S. *Lawford*, one of this squadron, heard a very loud signal in code on the 300-metre wave used by German ships. He did not hear the beginning of the message, but he took down and recorded what he did hear, and the letters are set out in his affidavit, p. 13 of the record. He found it was a message from a German ship using the call letters D O P to K A V which means Norddeich. At the end of the message he heard an answering signal from Norddeich apparently answering or indicating the receipt of the message he had taken down. At 1.30 he reported to his captain that a German ship in their vicinity was making code messages to Norddeich, and in a very few minutes the ship was sighted and proved to be the *Ophelia*. From the affidavit of the captain of the *Lawford*, it appears that the *Lawford* at 1.30 was in latitude 52° 56′ N. and longitude 3° 50′ E. The *Ophelia* when sighted was about six miles from the *Lawford*, and, from the affidavit of Lieutenant Peters, of the *Meteor*, another ship of the same British squadron, it appears that the *Ophelia*, when sighted, was to the eastward of the squadron and proceeding westward. The position of the *Ophelia* at the time she sent the message which was overheard by Cox must therefore have been approximately latitude 52° 56′ N. and longitude 4° E. The time when she sent that message was 1.20 p.m. English time, 2.20 p.m. German. It is most important to bear in mind this time and this approximate position.

The *Ophelia* was stopped and was boarded by Lieutenant Peters, who gives his account of what happened in an affidavit. He requested to see the ship's papers, and was shown the certificates of the ship being adapted for a hospital ship, and of her name having been sent in, which he states appeared to him to be in order, as in fact they were. He was told that the ship had been ordered to proceed to latitude 52° 51′ N. and longitude 3° 55′ E. and to look around. The lieutenant asked if these orders were in writing. He was told by Captain Pfeiffer that in the first instance he had been ordered to proceed to sea, but that, when outside the harbour, he had received the order as to the locality by wireless telegraphy. The harbour being Heligoland, which he had left on the previous night, this would be a curious way of saying that he received the orders about an hour and a half or less before the conversation. On demand, the paper purporting to be the wireless message was produced, and it was produced before their Lordships. It is on a similar form to the previous message, but the time and date of its receipt are not entered in the space provided for the purpose. The words "open," "sealed," "decoded," are all left unstruck through, but it was stated at the trial by the German witnesses that it was an open message. The captain told Lieutenant Peters that he did not know what he was to look for, but possibly it was dead bodies. He was unable at the trial to say for certain when he first heard of the sinking of the four German gunboats, but he thinks that it was Lieutenant Peters who told him of it. Nothing appears to have been said on Lieutenant Peters' visit as to any wireless message being sent from the ship, either asking for orders or any other message, and Lieutenant Peters did not tell Pfeiffer that any message had been overheard. The vagueness of the answers given and the circumstances generally excited suspicion, and the *Ophelia* was ordered to follow the *Meteor* to Yarmouth, which she did. In the affidavit of Pfeiffer of the 13th Feb., stating the grounds of the claim, he swore (par. 5): "To the best of my knowledge, the wireless telegraphy apparatus on board the said ship was used on two or three occasions only to receive urgent orders. No wireless message was sent from the ship, except one to Norddeich on the 18th Oct., asking for orders, which message was evidently heard by the British squadron. . . . A true record of all messages received or sent by this means during the voyage was kept on slips of paper, intended to be copied into a log, to which slips I crave leave to refer. A separate log for wireless messages was intended to be kept, but had not in fact been opened at the time of capture, as the messages were so few."

This is, of course, not in strict accordance with the facts as afterwards stated by him in evidence. In evidence Pfeiffer stated that he got to the place of the Haaks Lightship at noon of the 18th. That he then sent a wireless message to Norddeich, of which there was no copy, but which he recollected to be: "Please send on following message to Würtemberg. Am at Haaks Lightship. Request further instructions."

Being asked at what time this message was sent, he said: "It must have been about one o'clock, but it may have been half-past twelve or later."

Then he said that he received the reply, "Search 3° 55′ E. 52° 51′ N. and neighbourhood," and that he received that message about two o'clock. In cross-examination by the Attorney-General, when asked about the two messages to the ship, he said: "The latter [*i.e.*, the message to the ship in code] was chronologically the

earlier. It was on the 17th, while the other (*i.e.*, the open one) was on the 18th at noon."

Then at question 435 he says that message from the ship was sent about one o'clock. Captain Ridder, the navigating captain of the *Ophelia*, in his evidence said that they got near the Haaks Lightship about one o'clock, and that they then had had no further instructions; that he did not know what messages were sent or received, but that he afterwards had instructions from Pfeiffer to go to a particular latitude and longitude, which he could not remember. Grau, the wireless operator of the *Ophelia*, deposed to the receipt and sending of the various messages on the 17th and 18th. As to the time of his sending the wireless message he said, "That was towards noon—about noon." This was wholly inconsistent with the case of the claimant, which was that the message overheard by Cox at 1.20 English time, 2.20 German, was that sent by the *Ophelia* asking for directions. An effort was made to explain Grau's evidence by suggesting that by noon he merely meant midday, and that this would not be inconsistent with 2.20 p.m., but that cannot be accepted.

At the trial the then Attorney-General assumed that the overheard message was, as the other side asserted, a message asking for further directions, but the learned President evidently was not satisfied about this. Question 437 shows this, and also his examination of the witness Grau (questions 1388 to 1392) as to there being in the code used four letters to every word. In a passage not printed in the record, but which was read by counsel from the shorthand notes of the Solicitor-General's reply, the President said:

"At the present moment the message which was intercepted has been rather assumed to be the message which was said to have been sent; but it might not have been, and I was trying to get from the witness this morning something which would enable me to say whether that was so or not."

In giving judgment the President no doubt proceeded on the assumption of the Attorney-General that the messages were the same. On the argument of the appeal it was contended that it was not open to the present Attorney-General to rely on the point that the overheard message could not be that which the German witnesses say that it was. Their Lordships are not of that opinion. If the claimant had been induced by the late Attorney-General's conceding this point to him to refrain from tendering evidence which he otherwise might have given, it might have been otherwise, but that was not so. The evidence was all given and it is upon that evidence that the point arises. If the judgment below had been against the Crown it might have been more doubtful whether an appeal could have been supported on a ground not taken, but it is clearly admissible to support a judgment upon a point not relied on below where the evidence which raised the point is all before the court.

As has been pointed out, not only was the time when the message was overheard quite inconsistent with the German story, but also the place where the vessel was when the overheard message was sent off was also inconsistent with it. The Haaks Lightship is situated (or would be if in her place) in latitude 52° 57′ 8″ N. and longitude 4° 18′ 3″. As already pointed out, the *Ophelia* when she sent off the message must have been approximately in latitude 52° 56′ N. and longitude 4° E. That is to say, if she ever was at the station of the Haaks Lightship, she had before asking for or getting the directions to go to 52° 51′ N. and 3° 55′ E. already by some prophetic instinct gone a considerable distance in the general direction she was afterwards ordered to go, and that without any knowledge of the disaster which had in fact taken place on the previous day. Further, the information which the President elicited from the witness Grau as to the character of the H V B code makes it difficult to see that the message as taken down by Cox could correspond with the message stated by Pfeiffer. He professes to swear to the exact words, but he might be clever enough to vary them in order to avoid giving a clue to the code, so perhaps this point is not a very strong one. Further, again, if the message to go to the named latitude and longitude which was not in code was really received after the message which was overheard by Cox, it is remarkable that that open message was not heard either by Cox or any other wireless operator of the squadron. True, to hear it the operator must have been listening on the German wave, but that they probably all did from time to time as Cox did. On this evidence it appears certain that the *Ophelia* must have received the directions where to go to a considerable time before 2.30 German time when Cox heard her message in code, and if so that message could not have been a request for directions. There is, therefore, very strong reason on the evidence before the court for distrusting the claimant's explanation of the message which the *Ophelia* was detected in sending. Apart from these reasons, the conduct of those in charge of the *Ophelia* was such as to disentitle them to credit, and it is on that ground that the judgment of the learned President mainly proceeds. There are three matters to be considered in their admitted conduct: First, the propriety of a hospital ship sending any message in a secret code; secondly, the neglect to keep proper records of the orders to and the doings of the ship; and, thirdly and most important, the destruction of such records as there were.

What the Hague Convention says as to wireless installation is that "the fact of the presence on board" ("le fait de la présence à bord") of a wireless installation shall not take away the protection, but it says nothing to justify sending messages—all of which when sent by a hospital-ship ought to be of innocent character—in a secret code. Counsel in arguing the appellant's case were able to put various cases where orders sent to a hospital ship might be such as it would be justifiable to give in a secret code to avoid their disclosure to the enemy, but they were unable to suggest any message which it would be right for a hospital ship to send and which could properly be concealed from the enemy. As to the message alleged by German witnesses to have been that sent by the *Ophelia* asking for instructions, there can be no possibility of suggesting any necessity for sending it in secret code. The message which is alleged to have been sent in answer to it was itself an open one. Their Lordships are quite unable to suggest any circumstances which could justify a hospital ship in sending a message by a secret code; but without

laying down an absolute rule that the mere sending by a hospital ship of such a message would of itself forfeit her right to protection and subject her to capture and condemnation, it may certainly be said that if such messages are sent, a clear and satisfactory record of them must be kept, so that when the right of search is exercised there may be reasonable evidence to produce of the messages which have been sent and of their innocent character and of the necessity for sending them in a secret code. It would not be necessary in such a record to set out the identical words so as to give a key to the code in the event of the message having been overheard and taken down. The effect might be stated, and in a regularly kept and apparently full signal log such entries would be entitled to considerable credit.

It would, in their Lordships' opinion, be the duty of a hospital ship, even if not equipped with a wireless installation, and still more so when so equipped, to keep a full and correct log. It is a custom of the sea, very long established, that seagoing vessels shall keep logs. Originally, no doubt, logs would be required, as indeed they are now, for the navigation of the vessel, and when the weather prevented astronomical observations being taken, a ship would be ignorant of her position without a record of courses steered and estimated rates of sailing. But it has been the custom to make the log a full record of the voyage and all that happens on it. In some countries the log is legal evidence of the matters contained in it. In this country it is subject to the overriding rule of evidence that a man cannot (subject to some exceptions in case of death and the like) make evidence in his own favour by entries in his own books. But even in our Law Courts a well-kept log is in all disputes arising out of or in connection with the voyage treated as of very great weight; and between merchants and underwriters and others doing business connected with the sea, it is in practice treated as conclusive, unless by external or internal evidence it is falsified.

In Prize Courts in particular the log has always been treated as a most important document. Formerly, no doubt, all entries connected with the voyage were in one book, the log, but at the present time often more than one log is kept: a steamer has her engine log, because the entries in it can thus be made direct by the engineer instead of his having to give details to the mate for entering in the ship's log. So it has become fairly common in vessels which do much signalling to keep a separate signal log, the entries in which are made by the signalling officer. In the case of the *Ophelia*, the principal log, or deck log, is not very satisfactorily kept. It often omits courses and other things which would be useful to throw light on the employment of the ship. As incidentally remarked already, it occasionally contains an entry of a signal received, but omits to record the next signal said to have been received. This would be likely to occur if no separate signal log were kept. Having regard to the danger of improper signalling by hospital ships, a signal log should certainly be kept by them. As to what was done in the way of keeping a signal log by the *Ophelia*, the evidence is most confused and conflicting. Some of it has already been referred to.

As to the Morse signals, the witnesses say a book was kept, but no one knows much about it, and the signalmen who kept it are vouched, but they are not called. The only signalman called was Grau, the wireless operator, and he, after giving a good deal of confusing evidence, finally said that he knew nothing about the Morse signals. As to wireless messages, he said he did make entries of them in what he called the F. T. book ("Funken Telegraphie"), and that in that book he entered various quite unimportant messages which he sent on ship's business at Kiel. At question 1260 he distinctly told the President there were two books: one the F. T. book and another for the wireless news of events supposed to be happening circulated from Norddeich for the benefit of the world in general. This evidence as to the F. T. book was, of course, in contradiction of the affidavit of Pfeiffer already referred to. There seems, taking the evidence as a whole, the greatest uncertainty as to what books recording signals were really kept, but the one thing which is certain is, that any which were kept, except the news log, were thrown overboard when it was seen that the vessel was about to be searched. If nothing but innocent signals had been sent, the signal log was the very book of all others which should have been preserved. The result, therefore, is that the appellant has nothing to show to vouch his story that all signals sent (including the one so unnecessarily, according to his account of its purport, sent in secret code) were of an innocent character. Further, the absence of such evidence, if any ever existed, is caused by his own act.

This leads to the subject of what is technically called spoliation of documents, on which the President, rightly, as their Lordships think, laid much stress. The authorities on the subject are carefully reviewed in his judgment, and these authorities and others were quoted on the appeal by the appellant's counsel. In considering these authorities it is necessary to recollect that the procedure in the Prize Court has been very substantially altered by the new rules abolishing the preliminary hearing. The alterations in modes of doing business in modern times may have made this preliminary hearing not quite so useful as it was formerly, and some modification of procedure may have been desirable; but the total abolition of a preliminary hearing seems to their Lordships, as has been remarked during the argument of this and other cases before this board recently, to operate occasionally against the interests of the Crown. Certainly the procedure in the present case has given an advantage to the claimant which he would not have had under the old procedure.

In the cases as to spoliation of documents, the point has frequently arisen on the preliminary hearing on documents, and the question has been debated whether or not further proof should be allowed. This point cannot arise under the present procedure, and it may be that in some respects the old doctrine was rather technical. The substance of it, however, remains and is as forcible now as ever, and it is applicable not merely in prize cases, but to almost all kinds of disputes. If anyone by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible

presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without corroboration which might have been expected in his case.

In the present case there are two separate destructions of documents: one the throwing overboard documents when the vessel was about to be searched, the other the destruction of the accounts relating to the stock and the consumption of signal lights. As to the first, the Attorney-General admits that the destruction of the code book to prevent it getting into enemy hands is at least excusable. It is, indeed, so obvious that that must at any rate be done that complaint could not be made of it. But Captain Pfeiffer naïvely admitted that, when throwing overboard documents to avoid their getting into enemy hands, he acted on the principle of throwing overboard too many rather than too few, and adds that the Morse signal book contained absolutely innocent messages, which could be read by anyone. That probably was so, but it may also have contained some which were not so innocent; and it is pretty obvious that when he threw it overboard he either knew it did, or was not sure that it did not.

The Morse signal book could not have disclosed or given any key to the wireless signal code, so there could be no reason for destroying it except the consciousness that as something wrong had in fact taken place, it might be disclosed by the book. As pointed out, a wireless signal log might have been kept in such a way as not to disclose the code or give any key to it. The destruction of the stock book of signal lights cannot be excused by any fear of disclosing a secret code. It is suggested that it was innocent because the guard on the ship was told it was being done, and that British officers had already examined it. British officers would not in the first instance examine minutely documents of that kind, but would assume that if wanted they could be looked over afterwards. Pfeiffer and the paymaster doubtless knew what the signal lights really were for, and hoped that the British, who up to that time had made no point about it, would not find it out, so they destroyed the book. Nothing that can be called a reason was given for doing so. Even if the books had become waste paper, why destroy them?

Their Lordships are of opinion that Captain Pfeiffer and the other witnesses have by their acts put themselves in such a position that their evidence cannot be relied on; that the evidence discloses facts of which no satisfactory explanations are or can be given; and that although on the Crown affidavit evidence some ambiguities have been pointed out which have not been cleared up by cross-examination, or re-examination, yet there are incriminatory matters in those affidavits to which no answer has been given. They are of opinion that the President was fully justified in finding that "the *Ophelia* was not constructed or adapted or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and used as a signalling ship for military purposes." Their Lordships agree in that finding, which of course justifies the condemnation of the vessel as lawful prize. They will humbly advise His Majesty that the appeal should be dismissed, with costs.

Solicitors for the appellant, *Hewitt, Woolacott, and Chown.*

Solicitor for the respondent, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, April 5, 1916.

(Before SWINFEN EADY, PICKFORD, and BANKES, L.JJ.)

GROVES AND SONS *v.* WEBB AND KENWARD. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Indemnity — Warehouseman — Issue of clean warrants — Lighterage — Damage to cargo in possession of lighterman — Warehouseman's liability to purchasers under warrants—Right to indemnity.

In Nov. 1914 *the defendants, who were grain merchants, had a cargo of wheat in the steamship G., discharging in the S. Dock, London. The plaintiffs, who were wharfingers, carrying on business in the port of London, agreed to store the wheat. A lighterman was employed to lighter the wheat, and the defendants requested the plaintiffs to issue clean warrants for the wheat, making them deliverable to the defendants or their assigns by indorsement, so that they might sell the wheat. The plaintiffs duly made out the warrants, and the defendants sold the wheat to W. and Co., who came to take delivery of the wheat towards the end of Jan.* 1915, *when it was discovered that, owing to a leaky barge and exposure to the weather, some of the wheat was unsound, having become damaged before the delivery to the plaintiffs. The plaintiffs in consequence became liable on their warrants in damages to W. and Co. Scrutton, J. found that the lighterman was the agent of the defendants. In an action by the plaintiffs against the defendants claiming an indemnity:*

Held, that the plaintiffs having issued the warrants at the request of the defendants, there was an implied contract by the defendants to indemnify the plaintiffs for the loss, and the defendants were therefore liable.

Decision of Scrutton, J. affirmed.

APPEAL from a judgment of Scrutton, J. in the commercial list.

The plaintiffs brought an action against the defendants claiming to recover 107*l.* under an implied undertaking by the defendants to indemnify the plaintiffs.

The following facts are taken from the judgment of Scrutton, J.: The plaintiffs are wharfingers and granary keepers in the Port of London. The defendants had some wheat coming by the steamship *Glenstrae*. The wheat was lightered from the ship to the wharf by a lighter-

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

man named Fletcher. When not more than a small portion of it had arrived the defendants asked the plaintiffs to issue warrants which the defendants could use for the purpose of selling the wheat, and the plaintiffs, having received a letter from Fletcher, stating that he held the wheat to their order, and a letter from the defendants addressed to Fletcher ordering Fletcher to deliver to the plaintiffs, issued in November the warrants, which the defendants sold to W. P. Wood and Co. When in January W. P. Wood and Co. came to take delivery, it was found that owing to one of the barges being leaky and apparently owing also to exposure to the weather, some of the grain was damaged. Thereupon the plaintiffs, having issued clean warrants, without any qualification as to damage, to W. P. Wood and Company, were called upon to pay, and did pay, 107*l.* for the damage. The damaged wheat was dried and sold, the value realised was credited, and the difference between the amount paid and the value realised was claimed.

Scrutton, J. found in the course of his judgment that as between the plaintiffs and the defendants, the plaintiffs declined to do any lighterage, and the defendants undertook to do the lighterage; that the defendants ordered the barges from Fletcher at 1s. 6*d.* a ton; that the defendants for their own purposes asked the plaintiffs for warrants, and that the plaintiffs having got both the defendants and Fletcher to agree to deliver to them issued the warrants; and that this did not amount to the plaintiffs taking over the liability which they had previously refused, but only to the plaintiffs issuing for the defendants' benefit certain warrants in order that the defendants might sell the goods.

SCRUTTON, J. (after finding the facts).—Those being the facts, what is the legal position? It is a matter of some difficulty. That is quite obvious to anyone who reads the judgments in the case of *Kruger and Co. Limited* v. *Moel Tryvan Ship Company Limited* (97 L. T. Rep. 143; 10 Asp. Mar. Law Cas. 465; (1907) A. C. 272). There there was a charter under which charterers were to sign bills of lading as presented to them, and they were not to be liable for negligence. It took place in Rangoon. The charterers presented bills of lading containing a clause: "Freight and all other conditions as per charter-party," and apparently both the captain and the charterers were under the impression that that meant what it said, and that all the conditions of the charter-party were not put into the bill of lading, not knowing that some fifty years before the opposite had been decided by the House or Lords and that it had been so stated in all the commercial text books since 1864 when the principle was determined. The result was that there was a bill of lading which, when indorsed to a third party, made the ship liable for negligence, although by the charter they were not liable for negligence. The ship was lost through negligence, the shipowners had to pay the whole value of the cargo to the owners of the goods, the holders of the bill of lading, and they then claimed to recover from the charterers in various ways as a breach of the charter, and under an implied indemnity to be given if they signed the bills of lading presented by the charterers. They succeeded in all the courts, but they succeeded on a variety of grounds and with considerable contradiction in the judgments. They succeeded before Phillimore, J. (10 Asp. Mar. Law Cas. 310; 95 L. T. Rep. 614; (1906) 2 K. B. 792) on the ground of implied indemnity; they succeeded in the Court of Appeal, according to the judgment of Lord Gorrell, because presenting the bills of lading in that form was a breach of the charter, and Lord Gorrell said he thought they might have succeeded on an implied indemnity, but he was not going to decide that. Farwell, L.J. said they had succeeded on breach of the charter, but could not have succeeded on an implied indemnity for reasons which he pointed out. Buckley, L.J. said they had succeeded on a breach of the charter, and could have succeeded on implied indemnity for reasons which he pointed out. The matter then went to the House of Lords, who said they certainly could succeed for breach of the charter, but they did not agree with a number of the things which the Court of Appeal had said, but they did not say which parts of the Court of Appeal judgments they disagreed with. I think as I read the judgments, and as I thought at the time, they were mainly disagreeing with the suggestion that it might be a ministerial act on the part of the captain in signing bills of lading, as he was bound to sign whatever bill of lading was presented. I think that was, from the indications in the House of Lords' judgments, what they were disagreeing with. This case is not quite the same as that, because there is no express agreement between the plaintiffs and the defendants here as to liability for lighterage. Perhaps that is a technical way of putting it, because it can be said the plaintiffs had not agreed to do the lighterage and the defendants had, and it is not suggested—as of course it was in *Kruger* v. *Moel Tryvan Ship Company* (10 Asp. Mar. Law Cas. 465; 97 L. T. Rep. 143; (1907) A. C. 276)—that these warrants were signed in any purported following out of a previous contract made, unless it can be said that they are signed because of the contract to warehouse, and it is an implied duty of the warehouseman to issue warrants. I did not hear any suggestion on that point as to whether it was the duty of a wharfinger to issue warrants if he was asked.

The first question in controversy between the parties was: Who is liable for the lightering apart from the warrants? I have decided that, and have held that the defendants are liable for the lightering apart from the warrants. Then it appears to me that it is possible, although I am not sure that it is the soundest way of putting it, to adopt the same line as the House of Lords adopted in the *Moel Tryvan* case, and to say, as was the second line of the argument put forward by the plaintiffs, "By the contractual relations between you, we, the plaintiffs, were not liable for lighterage or for damage in lighters, but you have requested us to do something which has made us liable, you have requested us entirely for your own purposes and without any benefit to us, and from that it follows that is a breach or alteration of the contractual relations between us, and you must pay." I am not sure that that is a sound view, because although it is an alteration of the contractual

relations, it is difficult to say it is a breach of the contractual relations between the two parties. Then I do not think that any liability of the defendants in this case can be put upon the lines of *Sheffield Corporation* v. *Barclay* (93 L. T. Rep. 83; (1905) A. C. 397), for the reason that that case has been limited to cases where the person claiming the indemnity has only to do a ministerial duty on request, and, having done the ministerial duty on request, suffers damage and claims an implied indemnity from the person who requested him. I do not think that issuing warrants here was a ministerial duty. The plaintiffs certainly were not bound to issue warrants for goods which had not come into their custody, and I do not think it can be put upon the lines of the *Sheffield Corporation* v. *Barclay* (*sup.*).

The other branch of indemnity to which one is always referred is the principle laid down by the Court of Appeal in *Birmingham and District Land Company* v. *London and North-Western Railway Company* (55 L. T. Rep. 699; 34 Ch. Div. 261), and the passages I am reading are at pp. 272 and 274 of 34 Ch. Div. In that case Cotton, L.J. said: "If A. requests B. to do a thing for him, and B. in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A. to indemnify B. from the consequences of his doing it." Bowen, L.J. put it in this way: "In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract—by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do." To see whether there is such an implied indemnity here, I can quite appreciate that you do not imply terms unless there is any business necessity for doing it. As between A. and B, A. has nothing to do with goods in lighters; I have found that to be the fact. But thereupon B., for his own purposes, says to A: "To enable me to sell these goods, do something which will make you liable for the goods in the lighters," and A. assents. Now, in my view, that comes within the principle laid down in the *Birmingham and District Land Company's* case. It is a case in which an indemnity can be implied from the request. It follows, therefore, that in my view the plaintiffs' claim in this case succeeds, and there must be judgment for the amount claimed less the amount already paid, with the usual consequences as to costs.

The defendants appealed.

T. W. H. Inskip, K.C., and *E. A. Harney* for the defendants.—There was no implied contract that the defendants would indemnify the plaintiffs. Fletcher lightered on behalf of the plaintiffs, and not the defendants. All the defendants did was to put Fletcher in touch with the plaintiffs. The request for the warrants was merely a request to the plaintiffs to do what was in the ordinary course of business. The plaintiffs charged rent as if the wheat were in their warehouse, and they insured it. The deposit of the goods was not controlled by the defendants, who did not know whether they had been transferred to the warehouse. The plaintiffs had the option of giving the warrants and taking the responsibility on themselves, and this they did. The defendants never gave any assurance or made any representation that would lead to an implied undertaking to indemnify. They referred to

Sheffield Corporation v. *Barclay*, 93 L. T. Rep. 83; (1905) A. C. 392;
Birmingham and District Land Company v. *London and North-Western Railway Company*, 55 L. T. Rep. 699; 34 Ch. Div. 261;
Childers v. *Wooller*, 2 E. & E. 288.

J. B. Matthews, K.C. and *J. G. Trapnell* for the plaintiffs.—On the evidence Fletcher lightered for the defendants, and their remedy for negligence is against him. The plaintiffs here were under no liability as long as the goods remained in the lighters. The plaintiffs at the request of the defendants, and merely to oblige the defendants, in order to enable them to sell the wheat, issued warrants for goods which were not in their possession, and the lightering of which they had refused, and having rendered themselves thereby liable in damages to the purchasers, have a right to be indemnified by the defendants. They referred to

Betts v. *Gibbins*, 2 Ad. & El., p. 57;
Toplis v. *Grane*, 5 Bing. N. C. 636;
Dugdale v. *Lovering*, 32 L. T. Rep. 155; L. Rep. 10 C. P. 196;
Re Chappell; *Ex parte Ford*, 16 Q. B. Div. 305;
Birmingham and District Land Company v. *London and North-Western Railway Company* (*sup.*);
Sheffield Corporation v. *Barclay* (*sup.*);
Kruger v. *Moel Tryvan Ship Company*, 10 Asp. Mar. Law Cas. 465; 97 L. T. Rep. 143; (1907) A. C. 276;
Childers v. *Wooler* (*sup.*).

T. W. H. Inskip, K.C., in reply.

April 5.—SWINFEN EADY, L.J.—This is an appeal by the defendants, Messrs. Webb and Kenward Limited, from the judgment of Scrutton, J. at the trial without a jury in Middlesex. The action is brought by Thomas Groves and Sons, plaintiffs, against Webb and Kenward Limited, defendants, and the plaintiffs claim to have it determined that defendants were liable to indemnify the plaintiffs in respect of a liability incurred by them, the plaintiffs, in connection with the landing and delivery of a parcel of wheat *ex* the steamship *Glenstrae*, in Nov. 1914. The learned judge who tried the action found that the defendants were liable to indemnify the plaintiffs, and he gave judgment for the plaintiffs for the amount in dispute, which was, I think, 106*l.* and a few shillings, and it is from that judgment that the defendants appeal.

The circumstances out of which the action arose were these: In Nov. 1914 the defendants, Webb and Kenward Limited, were expecting a consignment of wheat, and they mentioned it to the plaintiffs, who carry on business at the Granaries and Sufferance Wharves at Rotherhithe and Bermondsey. They referred to the plaintiffs, saying they were carrying some 5000 quarters of wheat,

and would the plaintiffs be able to land and warehouse that? There was a general discussion. Nothing came of it. The wheat had not arrived.

Subsequently the wheat arrived, and on the arrival of the wheat the defendants wished the plaintiffs to deal with about 2000 quarters. I do not know whether the other 3000 quarters arrived at the defendants', or whether they made arrangements elsewhere for dealing with it. Two thousand quarters were all that were mentioned by the defendants to the plaintiffs.

Mr. Groom, representing the plaintiffs, said that between five and six o'clock in the evening he was rung up on the telephone by Mr. Falby, who is a grain superintendent and had been employed for many years by the defendants to assist them in receiving and discharging cargoes of wheat, to examine them, and generally superintend the discharge of the cargoes—that is Falby's business. He acts for the defendants and for other people as well. In respect of this transaction he was acting for the defendants, and he rang up plaintiffs on the telephone Of course, Falby was known to the plaintiffs. I think Groom said he had known Falby for forty years. So that the parties were dealing through him, the defendants employing him and the plaintiffs knowing him. He was then in Webb and Kenward's office, and he asked plaintiffs if they would undertake to land the wheat ex *Glenstrae* on the usual terms. The answer was they would not undertake it at all; they were so full of Government work they could do nothing at all. Groom's evidence was:

> I said, when he asked me the reason and all the rest of it, that we were so full of Government work and that the barges—that was the principal objection—were so exceedingly scarce that we could not undertake to do any more work from the ship to the wharf. He then said, "If I can arrange to provide craft, can you land wheat in your warehouse?" I said, "So far as the room is concerned, we have room, and shall be able to put in the wheat some day, but I will not promise any definite day for landing it." I said, "I will do the best I can, but I cannot be bound to any particular day or date." He then said, "If I can arrange this lighterage, I will ring you up in a few minutes again."

He, Groom, was asked "What was the reason that you were not able to arrange for the unloading of the lighters within any definite or assignable date?" And his answer was, "Because this Government work that we were doing was very important and we were pressed." Again he was asked, "Do you mean your wharfage frontage was full and occupied?" and the answer was, "Yes, with other craft. The berths at our wharves were already occupied, and not only that but they kept coming on to us." Q. "It was occupied continuously by other matters?"—A. "Yes, continuously." Q. "To which preference had to be given?"—A. "Yes."

Now, upon that Falby got into communication with a man named Fletcher, a lighterman. Fletcher was prepared to undertake the discharge, he said, of about 1800 quarters of wheat. As a matter of fact, the actual quantity that is in dispute in these proceedings is a little under that. It is 1630 quarters. But when Fletcher, the lighterman, was approached, he said he could obtain barges for about 1800 quarters. There is a dispute between the parties with regard to the price to be paid to Fletcher, and who was to pay it, and the way it was to be paid. The story told by Groom is this: "I was to have nothing to do with the lighterage. Defendants were to arrange it. But then they asked me what we (the plaintiffs) would allow off our lump sum charge of 2*s.* 9*d.*" Now, the lump sum charge of 2*s.* 9*d.* is an inclusive charge made in respect of landing, delivering, weighing, and warehousing for, I think, the first fortnight; and it is a charge of 2*s.* 9*d.* Groom said: "We will allow off that lump sum charge for lightering, which we are not to do—we will allow 1*s.*" And the plaintiffs added this: "According to an arrangement with the Granary Keepers' Association, we are under a penalty of 100*l.* not to allow more than 1*s.*"

In the judgment of the learned judge below that 1*s.* is taken into account, and the plaintiffs have paid that 1*s.* In other words, it is deducted from the sum for which judgment has been given, and is taken into account in arriving at the judgment. The plaintiffs admit liability to make a deduction of 1*s.* in respect of lighterage. So that plaintiffs' story is that they were to allow 1*s.* in respect of lighterage, and that the defendants were to undertake the burden of lighterage, to obtain barges, to obtain lightermen to lighter the goods from the ship to the Sufferance Wharf, and the defendants were to pay them.

The defendants' story is quite different. The defendants' story is: True it is that Falby on our behalf found Fletcher, who in turn found four barges to lighter goods, but that is all we were to do. We simply put Fletcher into communication with the plaintiffs and everything else was to be arranged by the plaintiffs. All we did was to find a man named Fletcher, who found barges, and to give the plaintiffs Fletcher's telephone number and let them do the rest. True it is Fletcher said he would not lighter at 1*s.* 4*d.*, which was the ordinary charge; that he would want 2*d.* more. True it is that subsequently, upon a communication from the plaintiffs, we agreed to pay the extra 2*d*, that in other words, the plaintiffs were to pay 1*s.* 4*d.* for lightering and defendants were to find the extra 2*d.* That is the defendants' story.

Having regard to the evidence given and to the documents, I should draw the same conclusion as the judge drew from the evidence which was adduced before him, and, furthermore, he speaks of the conflict of evidence there was. He refers to the conflict as being not unusual in cases of lighterage, and arrives at the conclusion that the truth is on this occasion on the plaintiffs' side. He found that the plaintiffs' story is in substance the true one, that the defendants were to find the lighterage and pay the lightermen, and all the plaintiffs were to do was to contribute 1*s.* towards the cost to the defendants.

The judge says: "I find that the truth is this, so far as I can find it out of this inconsistent evidence, that as between the plaintiffs and the defendants, the plaintiffs declined to do any lighterage, and the defendants undertook to do it. I find, secondly, that the defendants ordered the barges from Fletcher at 1*s.* 6*d.*" And then he goes on to deal with another matter. So that so far as the conflict of evidence is concerned the judge comes to the conclusion that the plaintiffs' story is right; and that the contract for employing lighters was between the defen-

dants and Fletcher and not with the plaintiffs; the only concern of the plaintiffs was to allow the abatement of 1s. Thereupon the wheat in question was delivered *ex* this steamship to Fletcher's barges and it was laden on four barges. The *Marian* carried a small quantity, 135 quarters, which was only about a quarter of the capacity of the barge. The *Percy* took the bulk, 588 quarters. And the rest of the wheat was divided between two barges, the *Minnie* and the *Spray*. The next thing that happened was this. An order was given and lodged with the ship to deliver the wheat to Fletcher, and Fletcher, on the 17th Nov., wrote this letter to the plaintiffs:

Dear Sir,—*Ex Glenstrae.*—Please note that we hold to your orders 1630½ qrs. wheat at 62.

That is 62lb. to the bushel. And then he mentions the particular barges on which the wheat was loaded.

The next thing that happened is that defendants wanted warrants for the goods, and they applied to the plaintiffs to give warrants. The wheat was in barges, having been delivered over the side of the ship; and the position which the plaintiffs had indicated, the difficulty there was in discharging the barges, seems to have accurately described the position. Because the barges were discharged on these days: The first barge that had only 135 quarters was discharged on the 20th Nov.—a special effort was made to discharge that barge because she had only a small quantity of wheat compared with her capacity, and the barge was required. The next barge, the *Percy*, discharged on the 25th Nov. The other barges were not discharged for a long time afterwards; and, as I gather, there was no opportunity to discharge them, because the evidence was that the frontage was continuously occupied with Government craft, to which preference had to be given. The *Minnie* and the *Spray* did not discharge until the following January, one on the 9th Jan. and the other on the 19th Jan.

In the meantime those barges were, as we are told, not at the plaintiffs' wharf, but were detained in the dock until there was vacant space at the frontage for these barges to discharge.

Meantime the defendants, having asked for warrants, had sold the wheat.

Now the warrants were dated the 18th Nov., and were given by the defendants on the 19th Nov. When the plaintiffs were asked for warrants they wished to have something in writing from Fletcher to show that he held the wheat to the plaintiffs' order, so that they might consider that the wheat was under their control. Otherwise they would be giving warrants for wheat not only in their warehouse, but in respect of which they had no documents to show they were entitled to the wheat or would ever receive it.

The documents were two in number. One was a letter from Fletcher to Thos. Groves and Sons, showing that Fletcher held to plaintiffs' order 1630 quarters of wheat, and the other was an authority which Fletcher obtained from the defendants dated the 18th Nov., and in these words:

Dear Sir,—Please deliver the above 1630 quarters wheat ex s.s. *Glenstrae* to Messrs. Thomas Groves and Sons' Platform Wharf, and oblige.—Yours truly, WEBB and KENWARD.

So that the documents were first a letter from the defendants to Fletcher to deliver the wheat to Thos. Groves and Sons, the plaintiffs; and then a letter from Fletcher to Thos. Groves and Sons that they held the wheat to Thos. Groves and Sons' order.

In that way the plaintiffs obtained some documentary evidence that the wheat was under their control.

Thereupon warrants were issued dated the 18th Nov., and were handed over to the defendants on the 19th Nov.

Application for the warrants was not made to the plaintiffs personally, but to Smith, their manager or representative, and by Smith passed on to Groves, who gave evidence.

According to Smith's evidence, the defendants wanted the warrants as soon as possible. Groom was called, and he said the message that reached him was that the warrants were urgently required, and they were given at the date they were said to have been given, and for weeks and weeks afterwards the wheat that was damaged was not in their warehouse, but remained in the barges. And the question is whether and what implied undertaking to indemnify is to be inferred from the circumstances under which these warrants were given.

The warrants were certainly given. The applications for the warrants was made at a time when the defendants must in my judgment be taken to have known that the wheat was not in the warehouse, and was not likely to reach the warehouse for a considerable time, and not likely to be landed for some time—that is the effect of the conversation with the plaintiffs, and it turned out to be true in the events which have happened.

The defendants also required the warrants, as I think, for the purposes of sale—it was not absolutely essential, but it would be convenient to have the warrants for sale—because they did sell the wheat within a very few days of obtaining the warrants.

The warrants dated the 18th Nov. were handed to them on the 19th Nov., and they sold the wheat within nine days. On the 28th Nov. was the contract for sale. They indorsed the warrants, and delivered them to the purchaser, and the purchaser claimed possession of the wheat under the warrants.

It so happened that at the time the wheat was delivered, I think some time in January—part on the 14th and part on the 19th—when the wheat was claimed and delivered under the warrants part of it was damaged. It appears that one of the barges was leaky. Water leaked into the barge and damaged the wheat and, apparently, the wheat had not been sufficiently covered with tarpaulins to keep it from the rain, and rain had also damaged it. The consequence is that the plaintiffs having issued warrants in respect of wheat without any reference to damage—clean warrants—the purchasers were entitled to rely on the warrants as being clean warrants entitling them to wheat undamaged by fresh water; and then when the wheat came to be delivered there was damage for which the wharfingers were liable on their warrants. A sum of something over 100*l.*, which is the amount in dispute in this action, had to be

paid by the plaintiffs to the holders of the warrants for damage, and it is in respect of that claim that the present action is brought.

It is said first that the defendants only asked for warrants in the ordinary course of business, and that being so there is no presumption that they were to indemnify the wharfinger in respect of any damage to the goods. In my judgment the application was not in the ordinary course of business. It was anticipating what would be the ordinary course of business. No doubt when the goods reach the warehouseman he should on demand issue warrants. But this was before they reached the warehouse, when all he had was a letter placing them under his control, when he had had no opportunity of examining them to see whether the wheat actually given into his custody was damaged or not.

Secondly, I think the true inference from the facts is that the defendants must have known, and certainly their agents, the lightermen, knew the wheat was still in the barges, and they had no reason to believe at this short interval of two days after the conversation that the wheat was in the warehouse. On the contrary, they had every reason to believe it was not, and if they had asked the lightermen employed by them they would have been told at once that it was not.

The learned judge, with regard to that part of the case, says: "I find next that the defendants, for their own purposes, asked Groves for warrants, and that Groves, having got both the defendants and Fletcher to agree to deliver to him, issued the warrants. In my view this did not disturb in any way the relations between the plaintiffs and the defendants as to lighterage; it did not amount to the plaintiffs taking over the liability for lighterage, which they previously refused to do; it did amount to the plaintiffs issuing, for the defendants' benefit, certain warrants in order that they might sell the goods which the plaintiffs, by reason of the documents they had got, thought they were safe in thinking would cover them."

Now the consequence of having obtained these clean warrants was that the defendants were able to sell this wheat as undamaged and to receive the full price of the wheat as undamaged wheat. For any damage due to the negligence of the lightermen the defendants would have a claim against the lightermen, and the result has been that the plaintiffs, who have not received the price of the wheat, the plaintiffs as warehousemen have had to pay for the damage caused to the wheat simply by reason of the fact that they issued clean warrants, while the defendants, who were the proprietors of the damaged wheat, who have a right of action against the lightermen, have received the full price of the wheat.

It is under these circumstances that the present action is brought. In my opinion the view the Judge took at the trial was the right one. The plaintiffs never accepted as between them and the defendants any liability in respect of damage occasioned by the lightermen. I think the case comes well within the principle of various cases that have been cited to us. I am not sure that it is not best expressed by Bowen, L.J. in *Birmingham and District Land Company* v. *London and North-Western Railway Company* (55 L. T. Rep. 699; 34 Ch. Div. 274). He first deals with the right to indemnity by express contract, and then he goes on to deal with the right to indemnity by implied contract. Thus: "By implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what under the circumstances he ought to do." Now, here the defendants asked the plaintiffs to issue warrants before they had an opportunity of examining the wheat. They did issue clean warrants, and it is, to my mind, obvious that under these circumstances for any damage to the wheat before it is actually in the custody of the plaintiffs, the defendants ought to indemnify the plaintiffs, they in turn having their right of action over against the lightermen by whose negligence the damage was caused.

Again, Lord Halsbury, in *Sheffield Corporation* v. *Barclay* (93 L. T. Rep. 83; (1905) A. C. 397), adopts as an accurate statement of the law the contention put forward by Mr. Cave, who was arguing for the plaintiff in *Dugdale* v. *Lovering* (32 L. T. Rep. 155; L. Rep. 10 C. P. 196): "It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." That was the contention, and Lord Halsbury said: "The principle insisted upon by Mr. Cave in his argument quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think the principle as enunciated is well established." What happened here is this. One person at the request of another, the plaintiffs at the request of the defendants, did an act—they issued warrants as clean warrants before the wheat was in their warehouse. It turns out to be injurious to the rights of third parties, that is to say, the purchasers of the wheat having purchased on the faith of the warrants, it turned out that wheat they obtained was not clean wheat but damaged wheat. They were injured thereby. The person doing that act is entitled to an indemnity from him who requested that it should be done. The defendants having requested that it should be done, the plaintiffs are entitled to an indemnity in respect of the loss and damage they incurred through liability to the third party, who acted on the assurance of their warrants.

Under these circumstances I am of opinion that on all grounds the judgment of Scrutton, J. was quite right. The liability, according to his judgment, falls where it ought honestly and in good conscience to fall, and where, in my opinion, it also falls legally. I think the appeal fails and should be dismissed.

PICKFORD, L.J.—I am of the same opinion.

I do not intend to go through all the facts again. The first, and perhaps the most important question is, who employed the lighterman? Scrutton, J. has found, after hearing and considering all the evidence, that it was the defendants who employed him. I see no reason to differ. The conduct of both parties is not unnaturally inconsistent with the case they set up, but Scrutton, J. considered the evidence of the

witnesses and the inconsistencies on either side. The defendants then employed the lighterman, so far as the evidence goes—the question whether the damage was occasioned by the default of the lighterman was not tried, of course; if that case is ever tried the evidence may turn out different, but if the lighterman was negligent the defendants would have a remedy against him. The plaintiffs, who did not employ the lighterman, and, in my opinion, never had privity established between them and him at any time, would have no remedy against him. The defendants obtained warrants from the plaintiffs which they used in this sale of wheat. I quite agree it would be possible to sell it without the warrants, but it is usual to obtain them, for it facilitates matters. They did obtain them, and they sold the wheat, and have received the whole proceeds without any deduction or any counterclaim for damage at all. In consequence of having issued those warrants the plaintiffs became liable to the purchasers of the wheat and have paid to them the amount claimed for damage to the wheat, so that the plaintiffs who did not employ the lighterman, who had nothing whatever to do with the damage, and who have received nothing but the warehouse charges, part of which they have credited in the action, have got to bear the whole of the loss occasioned by the damage to the wheat, and the defendants who, by their agent or contractor, had occasioned the damage, have received the full price of it, and have not to pay for the damage at all. Still, if the legal result is to leave the damage upon the plaintiffs they must bear it. We have to see whether the legal position leaves that damage upon the plaintiffs. They were asked to give warrants when the wheat was in the lighters and not in their warehouse. That is contrary to the usual practice where the lighterman is not employed by the warehouseman, and in order to make themselves safe, as they thought, at any rate, to a certain extent, the plaintiffs got the documents which have been mentioned from Fletcher and from the defendants to assure themselves that the wheat would not be delivered to any one else They secured themselves to that extent. They did not secure themselves against the risk of the wheat being damaged in the lighters, because neither party thought that was to be contemplated. Of course, it was always possible; but neither the plaintiffs nor the defendants thought it was a matter to be considered. If the lighterman was employed by the defendants, the damage was not due to any act or default of the plaintiffs or their servants, and they had no opportunity of finding it out before they gave the warrants which they gave for the convenience of the defendants. Is the proper inference in those circumstances that the plaintiffs intended to take the risk of that unknown quantity or that it still continued a risk of the defendants, who had a remedy against the lighterman? In my opinion the conclusion to be drawn from the facts, as they appear in the evidence, is that the latter was the case. It still continued a risk of the defendants, and they had a remedy against the lighterman for it, if it were to be occasioned by the lighterman's default. If that be so, it seems to me, applying the principle which is stated in the passage from Lord Bowen, L.J.'s judgment which has just been read, there is a state of circumstances from which an implied promise to indemnify the plaintiff against that risk, which was really the risk of the defendants, arises.

That was the conclusion to which the learned judge came, and in my opinion it was the right conclusion. I think the appeal should be dismissed.

BANKES, L.J.—I agree.

There are two questions raised in this appeal. The first is a question of fact, as to which I do not desire to say anything, except to say that I agree with the view which Scrutton, J. took, the question being whether it was the plaintiffs or whether it was the defendants who engaged the lighterman.

The second question is as to the proper inference to be drawn from the facts as found. Upon that I must say I have had very considerable doubt during the course of the argument as to what the true view of the facts is, but I have come to the conclusion that the view taken by Scrutton, J. was the right view. In the case of *Sheffield Corporation* v. *Barclay* (*sup.*), Lord Davey, at p. 401, speaks of the inference as an inference of fact; whether it is an inference of fact or a mixed inference of law and fact it does not seem to matter very much. In the case of *Birmingham and District Land Company* v. *London and North-Western Railway Company* (*sup.*), Bowen, L.J. sums up the cases in a passage which I desire to adopt. He says: "They all proceeded upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so." That raises two questions—first of all, as to what the request was; and, secondly, as to the circumstances under which it was made. Now, in this case, there is no doubt that the defendants did request, and, accepting Scrutton's, J. finding, there is no doubt at all as to the circumstances under which it was made. The request was a request to issue warrants for this wheat, and the warrants, of course, when once issued, made the plaintiffs responsible for the delivery of the wheat in the condition in which it was stated to be according to the warrants. That was the request that was made. The circumstances under which it was made were these: The wheat at the time at which the request was made was in lighters, and it was in lighters, I am satisfied, to the knowledge of both parties, and in lighters which had been engaged by the defendants. It was also known or contemplated that the wheat might remain in these lighters longer than ordinary—that is to say, longer than was just necessary to convey the wheat from the ship's side to the warehouse, because the plaintiffs had intimated that they would not be responsible, and could not undertake to place the wheat in the warehouse on any particular day or at any particular time. Now, under those circumstances, it followed that the wheat during the time it remained in the lighters, whether it was long or whether it was short, was exposed to risk of injury from negligence on the part of the lightermen in charge or from some defect in the craft, and it also followed as part of the circumstances from the fact that the defendants had engaged the lighterman and the plaintiffs had not that if the wheat did suffer any such injury the defendants would have a remedy against

the lightermen in respect of that injury, but the plaintiffs would not. The circumstances also included this fact, that if the plaintiffs gave the warrants in the form of clean warrants they would become liable to anybody in whose hands those warrants came for the delivery of the wheat as undamaged wheat, whereas, as a matter of fact, it might have become damaged, and under circumstances which would give them no remedy for the damage, but would give the defendants a remedy. Those being the circumstances, what is the true inference to be drawn? Now, it seems to me plain from a consideration of the cases that this doctrine of implied warranty is not confined to risks which are in the contemplation of the parties at the time the request is made, but it extends to risks which actually occur, provided they are the direct result of acting upon the request. Now, in this particular case the plaintiffs had been exposed to this risk of paying for the damage to the wheat as a result of giving clean warrants, and they had been exposed to that risk in consequence of acting upon the request of the defendants. Under these circumstances, in my opinion, the true inference to draw, whether it be an inference of fact or an inference of law, or mixed fact and law, is that the defendants must be taken to have impliedly promised—that is to say, it must be taken that they would have promised as a matter of ordinary business had the circumstances been brought to their attention—that if the wheat was injured whilst it was in the lighters engaged by the defendants, and paid for by the defendants, the defendants would accept responsibility and not the plaintiffs. On these grounds I think that the judgment must stand. I wish to say what I think I omitted, that I am quite satisfied on the evidence that when the defendants asked for the warrants they knew that the wheat was still in the lighters and would continue to be there for some time, though for how long they did not know.

Appeal dismissed.

Solicitors: for the appellants, *Lowless* and *Co.*; for the respondents, *Keene, Marsland, Bryden,* and *Besant.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 10 *and* 18, 1916.

(Before Horridge and Rowlatt, JJ.)

Olympia Oil and Cake Company Limited *v.* Produce Brokers Company Limited. (*a*)

Contract—Sale of goods—Resale—Custom—Buyers to accept original shipper's appropriation—Reasonableness of custom.

In connection with a contract for the sale of goods a dispute had arisen between the parties as to whether a certain tender was a good tender or not. The question was referred to arbitration under a clause in the contract, and an award was duly made. That was carried to the Board of Appeal, and they stated a special case for the opinion of the court. Certain questions were put to the court, and the material one was whether under the terms of a certain contract there could be a valid tender or appropriation of a cargo shipped on board the C. to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Divisional Court answered those questions in the negative: (12 *Asp. Mar. Law Cas.* 570; 111 *L. T. Rep.* 1107). *Thereupon the matter went back to the Board of Appeal, and they made an award in which they stated that while they "unreservedly accepted the said answers upon he construction of the contract as a matter of law, apart from the custom of the trade" they nevertheless found that by a long-established and well-recognised custom of the trade in cases of resales buyers under the form of contract impliedly agree* (1) *that they will accept the original shipper's appropriation passed on without delay if valid at the time of being made by the original shipper; and* (2) *that sellers shall be under no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though that appropriation at the time of being passed on might, apart from the custom and implied agreement, be invalid; and they found that there was a valid appropriation to the buyers under this contract.*

On a motion by the buyers to set aside the award on the ground that it was bad on the face of it or wrong in point of law, they contended (1) *that the custom was unreasonable, and* (2) *that it was not applicable to the contract in question, the contract not being a "resale," and the original shipper's appropriation not being valid, as the goods were lost before that appropriation was made.*

Held (dismissing the motion), that the custom being one which honest and fair-minded men would adopt was reasonable; and that the buyers' other contentions could not be established, the special case, by which alone (if at all) they could be established, not forming part of the award.

Further consideration of a motion to set aside an award.

On the 30th May 1915 the Produce Brokers Company Limited (hereinafter called the sellers) agreed to sell and the Olympia Oil and Cake Company Limited (hereinafter called the buyers) agreed to buy 6000 (10 per cent. more or less) tons of 2240lb. each Harbin and (or) Dalny Soya beans to be shipped from an Oriental port or ports during Dec. 1912 and (or) Jan. 1913 by steamer direct or indirect *viâ* Suez Canal or Cape to Hull, at 7*l.* 18*s.* 9*d.* per ton, gross weight, *ex* ship, usual new bags included. The contract provided: "If shipped as a cargo buyers to have the option of charter-party."

Clause 3 of the contract provided:

Particulars of shipment, with date of bill or bills of lading and approximate weights marks (if any), and number of bags to be declared by original sellers not later than forty days from the date of last bill of lading. . . . In case of resales copy of original appropriation shall be accepted by buyers and passed on without delay. Buyers shall not object to slight deviations in marks so long as the beans can be identified on arrival as the *bonâ fide* shipment intended to be delivered on the declaration. . . .

Clause 10 of the contract provided:

This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract, and also if shipment or delivery be

(*a*) Reported by L. H. Barnes Esq., Barrister-at-Law.

prevented by embargo, hostilities, prohibition of export, or blockade.

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

By a contract dated the 9th Sept. 1912 the sellers purchased from the East Asiatic Company (the shippers of the cargo), under a contract similar to the above-mentioned contract, an identical quantity of 6000 tons, 10 per cent. more or less, Harbin and (or) Dalny Soya beans for shipment in Dec. 1912 and (or) Jan. 1913.

By letter dated the 24th Jan. 1913 the sellers informed the buyers that they had not yet received a tender, but believed that the same would be in the *Canterbury*.

On the 29th Jan. 1913 the sellers agreed to purchase from the buyers 6000 tons Harbin and (or) Dalna Soya beans, December-January, to Hull, and stated in their letter of this date confirming the purchase: "We shall put this against our sale to you of the 30th May 1912."

On or about the 4th Feb. 1913 the sellers received a notice of appropriation of 6400-6600 tons per *Canterbury*, stated to have sailed from Vladivostok on the 31st Jan. By letter dated the 4th Feb. the sellers declared and appropriated this shipment to their contract with the buyers, and claimed that the buyers should retender the same in fulfilment of the contract of the 29th Jan. 1913.

The *Canterbury* sailed from Vladivostok on the evening of the 3rd Feb., and shortly after sailing struck submerged rocks fifteen miles from Karatsu. She was towed off on the 4th Feb., but foundered immediately afterwards. The loss was known in London at about 3 p.m. on the 4th Feb. It was not known to the East Asiatic Company at the time of their tender, but the sellers were aware of it at the time of making their said tender.

The buyers contending that they were not bound to accept the tender per *Canterbury*, arbitration was claimed under the terms of the contract and the dispute was referred to arbitration in pursuance of the rules indorsed on the contract. The umpire, by his award dated the 19th May 1913, awarded "that the appropriation per *Canterbury* is a good appropriation in the terms of the contract, and must be accepted by the buyers."

The buyers thereupon appealed from the award to the committee of appeal of the Incorporated Oil Seed Association, and certain members were elected as a board of Appeal to hear the appeal, in accordance with the provisions of the contract and the rules and regulations of the association.

The buyers contended before the board:

(1) That, the steamship *Canterbury* having sunk or been lost with her cargo before the tender by the sellers, the said tender was bad.

(2) Alternatively that the said tender was bad because the sellers knew of the said sinking or loss of the *Canterbury* and (or) her cargo before they made the said tender.

(3) That there was not a resale within the meaning of clause 3 of the contract, the sale to the buyers having taken place before the sellers purchased the beans under the contract of the 9th Sept. 1912, and that the buyers were not bound to accept the tender as an appropriation passed on by their sellers on a resale.

(4) That the provisions of clause 3 as to resales could not in this case apply, the *Canterbury* and her cargo being at the bottom of the sea when the sellers made or purported to make the appropriation.

The buyers requested the board to state a case for the opinion of the court on the question of law arising in the reference.

The sellers contended:

(1) That under clause 3 of the contract the buyers as "buyers" from the sellers under a resale, were bound to accept as a valid declaration, the copy of the original appropriation received by the sellers and handed on by them to the buyers.

(2) Alternatively that by clause 3 the sellers, having passed on without delay to the buyers the copy of the original appropriation, received and accepted by them as "buyers," were entitled to call on the buyers to accept such copy as a valid declaration.

(3) That by reason of the loss of the *Canterbury* with all her cargo the contract became void pursuant to clause 10 of the contract.

The questions of law submitted in the special case stated by the board at the request of the buyers were:

(1) Whether, regard being had to the terms of the contract of the 30th May 1912, a tender or appropriation under clause 3 could validly be made if at the material time, and whether to the knowledge of the sellers or not, the vessel and her cargo had already become a total loss.

(2) Whether there was any difference "in case of resales," and, if so, whether the sentence in clause 3, "In case of resales copy of original appropriation shall be accepted by buyers and passed on without delay," applied to the facts of this case.

(3) Whether under the circumstances above detailed the provisions of clause 10 of the contract applied so as to render the contract void as regards the beans shipped by the *Canterbury* which had not arrivsd by that vessel.

(4) (*a*) and (*b*) was not relevant to this case.

(5) Whether the sellers were relieved from every obligation to the buyers under the said contract by tendering the cargo shipped per steamship *Canterbury*.

The court answered questions 1, 2, 3, and 5 in the negative, and sent back these answers to the board of appeal: (12 Asp. Mar. Law Cas. 570; 111 L. T. Rep. 1107; (1915) 1 K. B. 233).

On the 25th June 1914, the board of appeal, having considered the case and the answers of the High Court of Justice to the questions stated in the special case in the matter of the said arbitration, unreservedly accepted the said answers upon the construction of the contract, as a matter of law, apart from the custom of the trade, but it nevertheless found:

(1) That by the long established and well recognised custom of the trade in cases of resales buyers under the form of contract impliedly agree with their sellers (*a*) that they will accept the original shipper's appropriation passed on without delay, provided that the original shippers' appropriation was valid and in order at the time of being made by the original shipper to his buyer, and (*b*) that those sellers shall be under no obli-

gation to make any appropriation other than that of passing a copy of original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might, apart from such custom and implied agreement, be invalid and not in order.

(2) That the appropriation by Messrs. the Produce Brokers to the Olympia was made under a resale, to which the said custom of the trade applies; and

(3) That the appropriation of the original shippers, the East Asiatic Company Limited, to their buyers, Messrs. the Produce Brokers, was valid and in order, and they do hereby decide and award that the original award, dated the 19th May 1913, of Berthold Pinner, the umpire appointed in the arbitration, be varied, and award that Messrs. the Olympia are bound to accept as a valid appropriation under the contract of the 30th May 1912 copy of the original shippers' appropriation, passed on to them by Messrs. the Produce Brokers.

The buyers then moved to set aside the awards of the 19th May 1913 and the 25th June 1914 on the following grounds:

(1) That each of the awards was bad on its face or wrong in point of law.

(2) That the appeal committee exceeded their jurisdiction in determining whether the custom mentioned in the award dated the 25th June 1914 had any existence in fact or in deciding that the Olympia Oil and Cake Company Limited were bound by the alleged custom to accept the appropriation therein referred to, which was invalid under the terms of the contract.

(3) That the members of the appeal committee misconducted themselves as arbitrators in not giving proper effect to the answers of the court to the questions of law submitted by them in the form of a special case for the opinion of the court, and the judgments delivered by the court on the 19th May 1914 in exceeding their jurisdiction as aforesaid; and in determining the question of custom without any evidence, or without giving the Olympia Oil and Cake Company Limited any opportunity of adducing evidence to disprove the alleged custom or of putting their contentions with reference to the alleged custom before the appeal committee, or of requesting the appeal committee to state a case for the opinion of the court on the question of law arising out of the question of the alleged custom, or in not holding any proper judicial investigation of the matters relating to the alleged custom.

(4) That the award of the 25th June 1914 was improperly procured by reason of the matters mentioned in par. 3 hereof.

The Divisional Court (Horridge and Rowlatt, JJ.) (13 Asp. Mar. Law Cas. 71; 112 L. T. Rep. 744) held that the custom was not inconsistent with the terms of the contract, but that the arbitrators had no jurisdiction to find the existence of the custom, and that therefore there must be a further inquiry by the Divisional Court as to the existence or non-existence of the custom. They accordingly adjourned the motion in order that the parties might have an opportunity of filing further affidavits on this question.

The Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.) (13 Asp. Mar. Law Cas. 71; 112 L. T. Rep. 744), affirmed the decision of the Divisional Court solely on the authority of *Hutcheson and Co.* v. *Eaton and Son* (51 L. T. Rep. 846; 13 Q. B. Div. 861) and *Re Arbitration, North-Western Rubber Company* v. *Hüttenbach and Co.* (99 L. T. Rep. 680; (1908) 2 K. B. 907.).

The sellers appealed, and the House of Lords (114 L. T. Rep. 94; (1916) A. C. 314) allowed the appeal, and declared that the motion of which notice was given on the 11th July 1914 ought to be dismissed as to grounds 2, 3, and 4 contained therein, and the case remitted to the Divisional Court to determine it upon the first ground contained in the notice.

Leslie Scott, K.C. and *C. R. Dunlop* for the applicants the buyers.

D. C. Leck, K.C. and *F. D. MacKinnon*, K.C. for the respondents, the sellers.

Cur. adv. vult.

April 18.—Horridge, J. read the following judgment:—

The notice of motion in this case asked that two awards dated the 17th May 1913 and the 25th June 1914 might be set aside upon the four grounds therein stated. Grounds 2, 3, and 4 have now been disposed of by the decision of the House of Lords reported in 114 L. T. Rep. 94; (1916) App. Cas. 314, but the first ground remains to be disposed of.

This ground is that each of the awards was bad on its face or wrong in point of law. The points relied upon under this head were as follows: (1) That on the face of the awards there was an incompatibility between the contract and the custom; (2) that the custom was unreasonable; (3) that the custom was not applicable to the contract in question. As regards (1), it was admitted before us we had already on the previous hearing decided that the custom was not incompatible with the written contract.

The second question is whether or not the custom was unreasonable. A usage is not reasonable unless it be fair and proper and such as reasonable, honest, and fair-minded men would adopt: (*Paxton* v. *Courtnay*, 2 Foster and Finlayson, p. 131). The custom found in this case by the arbitrators was (*a*) that the buyers impliedly agreed with their sellers that they would accept the original shipper's appropriation if passed on without delay, provided that the original shipper's appropriation was valid and in order at the time of being made by the original shipper to his buyer, and (*b*) that the sellers should be under no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might, apart from such custom and implied agreement, be invalid and not in order.

To put the above more shortly it amounts in my view to saying that when the parcel of goods to be shipped has been resold and a proper appropriation has been made of a particular shipment in the first instance, a copy of that appropriation will be accepted by the purchaser under the second contract, even though the goods have at the time of the appropriation been lost. I cannot see why such an agreement cannot be fairly and properly made between reasonable, honest, and fair-minded men. On behalf of the respondents it was said that the finding of the arbitrators was

conclusive as to the custom being a legal custom, and therefore a reasonable custom; but I think, notwithstanding the finding of the arbitrators, if the custom as set out in the award was, in our opinion, unreasonable, we should have been entitled to say so, as the nature of the custom fully appears from the finding. I have already said I do not think it is unreasonable.

The third ground that the custom was not applicable was based on two contentions, (*a*) that the second finding in the award that it appeared the appropriation was made under a resale was wrong on the face of the award; (*b*) that on the face of the award it appeared that there was no original shipper's appropriation which was valid and in order, inasmuch as the loss of the parcel took place before the first appropriation was made. It was admitted that in order to establish either of these contentions it was necessary to hold the special case formed part of the award. Whilst not deciding that either of these contentions could in fact be established from the findings of the special case, I base my judgment on my view that the special case formed no portion of the award. The arbitrators merely accept the law as decided by the Divisional Court upon this case, and they in no way incorporate it in the final award. The objection that the award is bad in law on the face of it must be dealt with strictly, and the award is limited to the documents which really form part of it. The motion must be dismissed with costs.

Rowlatt, J.—I am of the same opinion. We decided on the former occasion that this custom was not contradictory to the written contract. The points now raised are that the award is bad on the face of it, first of all because it is wrong in law, this not being, it is said, a resale; secondly, because it is unreasonable; and thirdly, because the original appropriation is said not to have been valid.

Now the award, whatever it does, incorporates the submission which is the contract, and I wish to say what I think the word "resale" now means. This contract cannot at the time of making it be classified either as an original sale or as a resale. It is a contract for the sale of future goods against which the seller may declare either a cargo which he possesses by reason of having himself shipped it, or a cargo which he may have bought as a cargo from the shipper, or a cargo which he may thereafter ship or buy from a shipper. If at the time of the contract the seller has a cargo which he has shipped himself that does not make it an original sale, for he may ultimately tender a cargo which he has bought, nor if when he makes the contract he has a cargo which he has bought does that make it a resale, for he may tender a cargo which he has shipped already or afterwards ships. Mr. Dunlop argued that it was only when at the time of making the contract the seller has a cargo which he has bought that his contract can be a resale. Supposing a man makes two contracts, having at the time both a cargo which he has bought and a cargo which he has shipped, which is the original sale and which is the resale? No answer is possible. It is clear, therefore, that it is only when the cargo is declared under the contract that it is determined whether we are in the presence of what the contract calls, not very accurately, a resale. A case of resale arises if the seller declares a cargo which he has not shipped himself but bought, and whether he bought it before or after the contract can make no difference whatever. Now that is, in my view, what a resale is. It was argued by Mr. Dunlop that this was not a resale. From what I have said it appears that I do not agree with Mr. Dunlop's argument; at the same time I do not think that for the purpose of showing this was not a resale he can go into the point, because he cannot get the necessary facts although they are not of course in dispute, without referring to the previous special case. I do not think that that special case is incorporated in this award; it is mentioned in the award, but not mentioned so as to incorporate it. Why should it be incorporated? The arbitrators are not now stating a special case or desiring to bring to the notice of the court any evidence at all; on the contrary, they are stating what they intend to be a final award, as to which it is Mr. Dunlop's task to show an error in law apparent on the face of it. I do not think he can do it, because he cannot get the necessary facts, even if his view of what is a resale is right.

Now, it is said the custom is unreasonable. I am not prepared to go the length that Mr. Leck contended for, and say that when the arbitrators have found a custom therefore the court is bound to hold that it is a reasonable one. It may come to that in time, but certainly so far as I am concerned I should not be inclined to lay that down without a good deal of argument. Anyhow, it is not necessary to decide that now. This contract is a contract, I am bound to say, as I have said on a previous occasion, which in my judgment may lead to very curious, indeed whimsical results, because it enables a man in whose hands the contract is void to elect to keep it alive and to hand it on to somebody in whose hands it is also void who may elect to keep it alive and hand it on to somebody else until it reaches the hands of somebody who is not a seller, when it is no good and comes to an end. I think it is very curious, but if they like to do it I cannot say it is unreasonable. It seems to me that before the court can say that a custom known to both parties, not when introduced against an ignorant purchaser, but a custom of this kind, is unreasonable, it has to say the custom outrages justice and common sense. I cannot express it more narrowly that that. I think it is quite out of the question to suggest this is such a custom.

The third ground which is raised is that the original tender was not a valid one, and therefore that the tender on what was called the resale could not be valid either under what is called the custom. The short answer to that is that it is not open to Mr. Dunlop, because the facts which are necessary for him are only to be found in the special case, which is not part of the award. There is the fact on the special case itself, but Mr. Dunlop cannot get that far, and therefore I think that that question may be left alone.

Motion dismissed.

Solicitors for the applicant, *William A. Crump and Son*, for *Andrew M. Jackson*, Hull.

Solicitors for the respondents, *Waltons* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

May 30 and June 9, 1916.

(Before Sir S. T. EVANS, President.)

THE BANGOR. (a)

Prize Court—Neutral ship—Capture—Unneutral service—Capture in neutral territorial waters—Validity of capture—Restitution—Right to demand restitution—Hague Conference 1907, Convention XIII.

It is an established rule of international law that a capture within the territorial waters of a neutral is, as between enemy belligerents, rightful for all purposes, and it is only by the neutral State concerned that the legal validity of the capture can be questioned. Neither an enemy, nor a neutral acting the part of an enemy, as, for instance, by being guilty of unneutral service, can demand the restitution of captured property on the sole ground of its capture within neutral waters.

This rule of international law has been in no way modified by Convention XIII. of the Hague Conference 1907.

THIS was a case in which the Procurator-General asked for the condemnation of a neutral vessel and her cargo on the ground that at the time of her capture she was engaged in unneutral service. The cargo consisted of coal and stores, and the unneutral service complained of was that the vessel was acting as an enemy supply ship.

The *Bangor* was a steamship of 5133 tons register and, until Oct. 1914, was owned by a Norwegian company. In Oct. 1914, whilst at sea, she was sold to one R. Suhren, a United States citizen, but she continued to fly the Norwegian flag. On the 25th Dec. 1914 the *Bangor* left Copenhagen for New York, carrying a small general cargo, and reached her destination on the 17th Jan. 1915. Two days before her arrival at New York permission had been given by the Collector of Customs at Christiania for the name of the ship to be changed to *Seattle*, and on the 28th Jan. a note of the change of name was made on the ship's papers by the Norwegian Consul in New York. It appeared, however, that the new name was not painted up until a long time afterwards.

On the 28th Jan. 1915 the *Bangor* sailed from New York for Baltimore in ballast. She arrived at Baltimore on the 30th Jan., where she remained until she left for Buenos Aires on the 4th Feb. Whilst at Baltimore, the *Bangor* took in a cargo of 6895 tons of coal (in addition to 1274 tons in her bunkers), 50 tons of stores in the shape of preserved provisions, and ten cases of electrical gear. The bills of lading were not forthcoming, but the manifest as well as the log heading showed that the coal and the electrical gear were consigned to one firm in Buenos Aires and the provisions to another firm in the same city. On the day before sailing the *Bangor* received an addition to her complement in the shape of three persons named, respectively, Vielmetter, Farnow, and Maisch. Vielmetter signed on as purser, although he was in fact a supercargo; Farnow was entered as an electrician; and Maisch signed on as second steward, although he was really a wireless operator. From a statement made by Vielmetter it appeared that an agent of the German Government had arranged with him that he should have an opportunity of leaving the United States by some supply ship; that, independently of any message or messages which he might receive by wireless, he controlled the whole cargo and the destination of the vessel; and that it was intended that the coal and the stores, but not the electrical gear, should be delivered to any of the German warships which might make a call for the same by wireless.

During her voyage from Baltimore, the electrical gear was brought out and proved to be wireless apparatus. It was duly set up and wireless messages were received by the *Bangor*. The apparatus was taken down before the vessel put in at Montevideo, at which place new bills of lading where made out whereby the cargo was expressed to be consigned to Corral, with the option of Valparaiso or Iquique, to a Valparaiso firm. After leaving Montevideo the *Bangor* proceeded direct to Corral—she never attempted to call at Buenos Aires—and passed through the Strait of Magellan. As she neared the mouth of the strait and was making for the open sea of the Pacific Ocean, the wireless apparatus was once again set up, but it was quickly taken down when H.M.S. *Bristol* came in sight. Whilst a boarding party was coming from the *Bristol* to the *Bangor*, Vielmetter threw the wireless code overboard and Farnow burnt certain papers and the records of wireless messages which he had received. The vessel was then seized and taken to the Falkland Islands, where Prize Court proceedings were commenced for the condemnation of the ship and cargo, but, by an order dated the 11th Aug. 1915, the suit was transferred to London under sect. 1 of the Prize Court Act 1915 (5 & 6 Geo. 5, c. 57).

No claim was put in, nor was there any appearance, in respect of the cargo, but there was a claim in respect of the ship by the Norwegian company as well as by a Danish company, who asserted that they had a beneficial interest in the same. The grounds of the claim were:

(1) That the *Bangor* was at the time of her capture the property of neutral subjects.

(2) That the ship was not liable to capture or condemnation on the ground of unneutral service or otherwise.

(3) That the ship was captured in neutral territorial waters.

The facts of the case were really not in dispute, and the sole question argued was the third ground of resistance to the claim of the Crown, which, it was contended, had been modified by Convention XIII. of the Hague Conference 1907. The material articles of this Convention, which was signed by Great Britain and by Chile (but not ratified by either Power), and was both signed and ratified by Norway, are as follows:

1. Belligerents are bound to respect the sovereign rights of neutral Powers, and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

2. Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

3. When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not within the jurisdiction of a neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Dunlop* for the Procurator-General.

Butler Aspinall, K.C. and *Balloch* for the claimants.

Cur. adv. vult.

June 9.—The PRESIDENT.—This is a flagrant case of a vessel flying the Norwegian flag, and commanded by a Norwegian master, being fitted and manned from New York for the purposes of rendering services to German warships. Circumstances of aggravation of almost every kind attended her conduct and management. They are set out in the evidence to which the Attorney-General adverted. The master, one Hansen, attempted some kind of repudiation of the charges made against him. His efforts did not relieve the weight of those charges. He only added to his discredit the disgrace of giving false evidence.

It is unnecessary to make a statement of the facts, because counsel for the shipowners admitted that their vessel must suffer judgment of condemnation, unless she was immune from capture on the technical ground that she was at the time in waters alleged to be territorial waters of a neutral State.

The vessel was captured in the Strait of Magellan. According to the entry in the log, the vessel was captured when she was in the middle of the Strait of Magellan, about opposite Port Tamar anchorage. This agreed with the statement of the British naval officers. The Strait of Magellan is admitted to be seven miles wide at that place. Strictly, therefore, the middle would not be within three miles of the land on either side.

The ship's master gave evidence that he took bearings which fixed his position much nearer the south shore than the line midway between the land on the north and south sides. His evidence is not worthy of any credence, and I cannot accept any part of it as being true. Accordingly, if it is material to establish that the capture took place within three miles, or a marine league, of either shore, the claimants have not proved to my satisfaction that it did.

The limits of territorial waters, in relation to national and international rights and privileges, have of recent years been subject to much discussion. It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection.

This case does not, in my view, call for any pronouncement upon that question. I am content to decide the question of law raised by the claimants upon the assumption that the capture took place within the territorial waters of the Republic of Chile. This assumption, of course, does not imply any expression of opinion as to the character of the Strait of Magellan as between Chile and other nations. This strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans.

In 1879 the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait.

Later, in 1881, the Republic of Chile entered into a treaty with the Argentine Republic by which the Strait of Magellan was declared to be neutralised for ever, and free navigation was guaranteed to the flags of all nations.

I have referred to these matters in order to show that there is a right of free passage through the Strait of Magellan for commercial purposes. It is not inconsistent with this that during war between any nations entitled to use it for commerce the Strait of Magellan should be regarded in whole or in part as the territorial waters of Chile, whose lands bound it on both sides.

Upon the assumption made for the purposes of this case that the *Bangor* was in fact captured within the territorial waters of a neutral country, the question is whether the vessel was immune from legal capture and its consequences according to the law of nations. In other words, can the owners of the vessel, who are, *ex hypothesi*, to be treated as enemies, rely upon the territorial rights of a neutral State and object to the capture? Or must the objection to the validity of the capture come from the neutral State alone?

No proposition in international law is clearer or more surely established than that a capture within the territorial waters of a neutral country is, as between enemy belligerents, for all purposes rightful, and that it is only by the neutral country concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral State and not as to the enemy. This proposition is very clearly established by the cases of *The Anne* (3 Wheaton, 435), *The Lilla* (2 Sprague, 177), *The Sir Wm. Peel* (5 Wall, 517, and *The Adela* (6 Wall, 263), and is neatly stated in *The Sir Wm. Peel* (*ubi sup.*, at p. 536) as follows: "Neither an enemy nor a neutral acting the part of an enemy can demand restitution of captured property on the sole ground of capture in neutral waters."

It was contended by counsel for the shipowners that this well established rule of international law had been modified by Convention XIII. of the Hague Convention of 1907. Assuming for the purpose of this judgment that Convention XIII. is binding, it is clear that the Convention was only directed to the relations between neutral Powers and belligerent Powers, and was only intended to apply to questions arising between neutral Powers and belligerent Powers as such. Its provisions were not intended to deal with any question between belligerents, and did not affect the rule relating to capture in territorial waters of a neutral State as between two belligerent Powers where the neutral State did not intervene.

For these reasons I decide that the objection made by the claimants to the validity of the capture, even if it took place in neutral territorial

waters, is not well founded, and I disallow the claim with costs.

The judgment of the court is that the vessel and her cargo are condemned as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche.*

Monday, May 17, 1915.

(Before Sir S. T. EVANS, President.)

THE KATWIJK. (*a*)

Prize Court—Neutral ship—Cargo—Cargo lawful at commencement of voyage—Cargo declared conditional contraband before voyage completed—Seizure—Consideration—Claim for freight—Claim for demurrage.

A neutral vessel started from a neutral port for a neutral destination after the outbreak of war. Part of her cargo consisted of goods which were declared conditional contraband after her departure. The vessel was stopped on her way and sent into a British port for examination. Later on, but after the date of the order making the particular cargo conditional contraband, the cargo was seized as prize, on the assumption that it was ultimately intended for delivery to the enemy. The vessel was delayed a considerable time, but was ultimately released, and the shipowners put in a claim for freight and demurrage.

Held, that the cargo was a proper subject for condemnation, but that the shipowners were entitled to a certain amount for freight, to be settled by the registrar and merchants, though not to anything for demurrage, which was an unfortunate incident of a state of war.

THIS was a case in which the Procurator-General on behalf of the Crown asked for the condemnation of a cargo of iron ore on board the steamship *Katwijk*, which had been seized as contraband. The case was first heard on the 15th Feb. 1915, when it was adjourned for further and fuller argument.

The *Katwijk* was a Dutch steamer belonging to the port of Rotterdam. Some time after the outbreak of war on the 4th Aug. 1914—namely, on the 16th Sept. 1914—the steamer sailed from Decido, a port near Bilbao, in the north of Spain, with a cargo of 3350 tons of iron ore. The charter-party was dated the 10th Sept. 1914, and the bill of lading was dated as of the date of sailing, the 16th Sept. The iron ore was deliverable under the bill of lading to Messrs. Ruys and Co., a Dutch firm, who were alleged to be the agents of Krupp's, of Essen. It was not disputed that the iron ore was destined for Krupps. Whilst the steamship was proceeding up the English Channel she was directed, on the 19th Sept., to Ryde Roads. After an examination had been made she was sent on to Middlesbrough, where the cargo was discharged and the steamship was released. Later on the *Katwijk*, whilst on a voyage to Holland with a general cargo, was torpedoed and sunk in the North Sea. The cargo was seized as prize on the 4th Oct. 1914, and in the meantime—namely, on the 21st Sept.—iron ore had been declared conditional contraband by the British Government, whereas it had previously been held free.

In an affidavit of the Collector of Customs at Portsmouth it was stated that the ship, with her cargo, was seized as prize on the 4th Oct. 1914, and in a further affidavit it was stated the *Katwijk* was sent into Ryde Roads for examination on the 26th Sept. 1914. These dates were of importance in view of the Order in Council declaring metallic ores as conditional contraband dated the 21st Sept. 1914.

As the ship had been lost there was no application to condemn the same, and there was no appearance as to the cargo. The only claim put forward was one by the shipowners for freight and demurrage.

The *Attorney-General* (Sir John Simon, K.C.) and *Stuart Bevan* for the Crown.

Dunlop for the shipowners.

The PRESIDENT.—In this case the Crown seeks for a decree of condemnation of 3350 tons of iron ore, a cargo found upon the Dutch ship *Katwijk*, which was seized in Sept. 1914. There has been some discussion here as to when the cargo was definitely seized. Nobody appears for the owners of the cargo and nobody claims the cargo, but Mr. Dunlop, acting for the ship, has suggested the seizure was before the 21st Sept.

I decide upon the evidence in this case and upon the affidavits read by the Attorney-General, that the cargo was not seized before the 26th Sept. It is not necessary for me to go further and declare whether it was in fact seized on that date or on the 4th Oct. If it was not seized until the 26th Sept., then by that date the proclamation of the 21st Sept. had been issued in which it was declared that iron ore would be regarded as contraband. It is, of course, within the power of the Crown to add to the list of contraband from time to time, and acting in pursuance of that power the Crown issued the proclamation referred to. I therefore decree condemnation of this cargo as contraband, seized after the proclamation was issued.

Now a claim has been put forward by the owners of the ship for freight and other sums of money for what was called demurrage or damage for detention. The *Katwijk* belonged to a Dutch company. It is admitted that the ship sailed on the 16th Sept., carrying a cargo which was not then contraband, and therefore she started upon a perfectly innocent voyage.

According to the principles which have been agreed upon in the Declaration of London, which I think it would be right for the court to act upon, the ship could not be condemned by reason of the cargo being declared contraband after starting on the voyage. *Primâ facie*, therefore, the company and owners of the ship would be entitled to some freight. The Attorney-General, however, has pointed out to me certain facts with reference to the position of the firm of Messrs. Erhardt and Dekkers, and their relationship in business with Krupp's Company. Now, whatever their position was at the time when they started on this voyage to carry cargo to be delivered to Messrs. Krupp for the purpose of being converted into munitions of war—though they do not seem to have been on very friendly terms with the Germans because this ship has been torpedoed—the question is, is

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

there enough before me to displace the *primâ facie* claim of this firm, the owners of the ship, for freight? At that time there was no reason whatever why Messrs. Erhardt and Dekkers should not be engaged in business transactions with Messrs. Krupp and make a profit out of them if they could, and I see no reason here for deciding to deprive the owners of a neutral vessel of such freight as in all the circumstances ought to be given to them, the amount of the freight to be decided by reference to the registrar and merchants.

With regard to the further claim for demurrage and detention, I disallow it. This vessel, like all others, ran some risk, and no doubt, if they considered it at all, the master and charterers might very well have said: "Well, we are starting on an innocent voyage, but we wonder whether iron ore will be added to the list of contraband before we reach Rotterdam," as in fact it was. Now such detention as they were put to, and such losses as they suffered, are unfortunately suffered by even neutrals in the dire circumstances of war. I therefore disallow any claim except such claim for freight as ought reasonably to be allowed.

Cargo condemned. Freight allowed.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the shipowners, *Clarkson* and *Co.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Jan. 3, *and Feb.* 1, 1916.

(Before BAILHACHE, J.)

JAMES MORRISON AND CO. LIMITED *v.* SHAW, SAVILL, AND ALBION COMPANY LIMITED. (*a*)

Carriage by direct route—Liberty to call at intermediate port — Exception of King's enemies — Deviation to intermediate port not usually visited by owners' ships—Destruction by enemy vessel—Liability of owners.

In Nov. 1914 *the defendants, a steamship company, contracted to carry a cargo of wool from New Zealand to London in their steamship. The bills of lading provided for "Direct service between New Zealand and London," and contained these two clauses: "Clause* 1. *With liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies." Clause* 3. *"The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat and reship and forward the same at the owner's expense, but at merchant's risk." The exception clause excepted the "King's enemies." Besides the wool the steamship carried a quantity of frozen meat for delivery at Havre. The vessel kept a direct course from New Zealand to London until she reached the Casquets, when she turned and made for Havre, which was not one of the usual ports visited by the defendants' steamships. Before reaching Havre she was sunk by a German submarine. The plaintiffs, who were indorsees and holders of the bills of lading under which the wool was shipped, brought an action against the defendants claiming damages for breach of contract.*

Held, (1) *that clause* 3 *of the bills of lading did not avail the defendants, since it only applied when transhipment of the cargo from the T. to another vessel had taken place, and, even if that were not so, the bills of lading would be ambiguous* (Elderslie Steamship Company *v.* Borthwick (10 *Asp. Mar. Law Cas.* 24; 92 *L. T. Rep.* 274; (1905) *A. C.* 93); (2) *that the provisions of clause* 1 *did not constitute a defence to the plaintiffs' claim, since, assuming that Havre was an intermediate port within the meaning of the clause, when the route and ports of call of a line of steamships had become stereotyped mere general words in the owners' own bill of lading giving liberty to call at intermediate ports would not justify their calling at some entirely fresh intermediate port;* (3) *that after deviation the defendants were only common carriers and were not protected by the common law exception of the King's enemies, since in deviating they were breaking their contract with the plaintiffs and not fulfilling it; and* (4) *that it was unnecessary for the plaintiffs in order to substantiate their claim to show that the natural and probable result of deviating to Havre was that the T. would be sunk by hostile craft. The plaintiffs were, therefore, entitled to judgment.*

COMMERCIAL LIST.

Action tried by Bailhache, J.

The plaintiffs were consignees and owners of 158 bales of wool shipped from Wellington, New Zealand, in the steamship *Tokomaru*, owned by the defendants, the Shaw, Savill, and Albion Company Limited. The *Tokomaru* was one of the defendant company's regular line from New Zealand to the United Kingdom. The goods were shipped under a bill of lading, dated Nov. 1914, which was headed: "Direct service between New Zealand and London." The bill of lading gave the shipowners extensive liberty to load at any port in New Zealand, and contained these clauses:

1. . . . And bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and (or) Montevideo and (or) La Plata.

3. The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination and to tranship or land and store goods

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

either on shore or afloat and reship and forward the same at the owner's expense, but at merchant's risk.

The exceptions clause included "act of God" and the "King's enemies."

The regular course taken by steamers of the defendant line from New Zealand to London after leaving Ushant was to proceed direct to the south side of the Isle of Wight and thence up the Channel, through the Straits of Dover, to the Thames. On the occasion in question the defendants undertook the carriage of a quantity of frozen meat to Havre.

The *Tokomaru* commenced her voyage, and was within twelve or thirteen miles from Havre when she was torpedoed by a German submarine and sank, all her cargo being lost.

The plaintiffs thereupon commenced this action claiming 4013*l.* agreed damages from the defendants for loss of the cargo.

F. D. MacKinnon, K.C. and *R. A. Wright* for the plaintiffs.—The defendants are liable to the plaintiffs in the sum claimed. In proceeding to Havre the *Tokomaru* was guilty of deviation, and such deviation was not permissible under clause 1 in the bill of lading, since Havre was not an "intermediate port" between New Zealand and London. Nor can clause 3 avail the defendants, since that clause only applies after transhipment of the goods from the *Tokomaru* to another vessel. It is admitted by the defendants that deviation would put an end to the contract of carriage contained in the bill of lading and charter-party, but it is contended that the defendants must then be considered as common carriers and as such entitled to invoke the common law right of immunity from liability where damage to or loss of goods carried is caused by the King's enemies. Here the goods were lost through the sinking of the *Tokomaru* by an enemy submarine. It is submitted that that is not so, and that the deviation of the defendants suffices to deprive them of their common law rights.

Sir *Robert Finlay*, K.C., *Maurice Hill*, K.C., and *W. N. Raeburn* for the defendants.—The *Tokomaru* by the terms of the bill of lading was entitled to call at Havre. This interpretation is the only commercially reasonable interpretation to place upon clauses (1) and (3) in the bill of lading. Moreover, a shipowner can only be liable for the direct consequences of deviation. Here the direct cause of the vessel's loss was attack by enemy craft, and it must be remembered that there was no more risk in proceeding to Havre than in steaming straight to London. The *Tokomaru* never received any warning of the presence of hostile vessels in the vicinity, and the defendants were therefore not robbed of their common law rights, since they could not be prevented from availing themselves of them unless they had deliberately or, at least, with reckless carelessness thrown themselves in the way of the enemy.

MacKinnon, K.C. replied.

Feb. 11.—Bailhache, J. read the following judgment:—The defendants' steamship *Tokomaru*, bound from New Zealand to London with a valuable cargo on board, was making for the port of Havre on the 30th Jan. 1915. She was within some seven or eight miles of the coast and some twelve or thirteen miles from Havre when, at about nine o'clock in the morning, she was torpedoed by the German submarine *U* 21 and sank with her cargo.

Amongst the cargo were 158 bales of greasy wool belonging to the plaintiffs, who held two bills of lading covering this shipment at Napier, in New Zealand. Both bills of lading are in the same form, and both are dated the 19th Nov. 1914. The agreed value of the wool is 4013*l.* 19*s.* 7*d.*, and the plaintiffs sue the defendants for this sum upon the simple and, as they allege, sufficient ground that the wool was lost while the *Tokomaru* was deviating from her voyage to London.

The defendants deny that there was any deviation. They assert that the *Tokomaru* was intending to call at Havre to discharge a parcel of frozen meat, and that her so doing was within the liberties reserved to them by the bills of lading held by the plaintiffs. Alternatively, and while admitting that deviation destroys the bill of lading exceptions, they say that they were common carriers, with the common law exceptions of act of God and the King's enemies, and that they are thus protected, and they further say that the deviation was not the cause of the loss. It is between these conflicting contentions that I have to decide.

The facts of the case are that the *Tokomaru* was one of the defendants' well-known line of steamships running from New Zealand to London. She loads, as do the other vessels of this line, on the berth in New Zealand at different ports there, not always in the same order. As the shippers load their goods they receive their bills of lading. After the plaintiffs' goods had been shipped and their bills of lading handed over, the defendants, on or shortly before the 30th Nov. 1914, took on board a parcel of frozen meat from Messrs. Fletcher Limited for carriage, as it turned out, to Havre. The negotiations for this parcel began in London in October, and about the same time in New Zealand, and several cables and letters passed between the defendants and their agent, Mr. Findlay, of Wellington, on the subject.

Bordeaux and Marseilles were both spoken of as ports of discharge, but Havre was finally arranged, and the master had instructions at Teneriffe to proceed to Havre to discharge the meat before coming to London. In accepting this meat for discharge at a French port the defendants were embarrassed by the fact that they had already issued bills of lading in their usual form to the earlier shippers, including the plaintiffs. They might have protected themselves from all difficulties with regard to cargo loaded after the meat by an appropriate clause added to the later bills of lading, but they were unfortunately under the impression that Bordeaux would be the port of discharge, and so they added a clause to the later bills of lading, giving express liberty to call at Bordeaux. This, of course, to say the least of it, made things no better.

The defendants' uneasiness is expressed with such knowledge of the position and with such lucidity in their letter to Mr. Findlay of the 8th Jan 1915 that I cannot do better than read it.

> Bordeaux.—It appears that this port is not so convenient for discharging meat as Havre, and Vesteys have asked us to give delivery of the *Tokomaru* meat at Havre, instead of at Bordeaux. On looking into the matter we conclude that we are not free to do so under the bill of lading without running a risk of claims from the consignees of the other cargo, should anything

happen to the vessel. Our only chance was in the possibility that you had claused the bills in an open way for French ports and not for Bordeaux exclusively, but your reply to our cabled inquiry as to this precludes any hope of assistance in that direction. There remains only the alternative of insuring the risk or going to Havre under orders from the Government. The latter is not available, and the former would have cost 10s. per cent, and this on a cargo worth a quarter of a million pounds is more than we could afford to pay. The consignees, however, may elect to pay this themselves, which will settle the matter and incidentally will show what magnificent profits the meat, which cannot afford to pay an increased rate of freight, is bringing to the shipper. Our experience in regard to this matter led us to ask you to clause all bills of lading of any steamer likely to call at any port outside of our ordinary course, "with liberty to call at any French port or ports." You will doubtless understand that although our bills of lading give full permission to wander about on the New Zealand coast, and although the clauses otherwise seem fairly full, there is a distinct risk in deviating from our ordinary route without specific provision being made for it in the bill of lading.

It is obvious from this letter that the defendants feared and were inclined to think that calling at Havre would be a deviation from the voyage to which they had committed themselves both by their earlier and later bills of lading; that there was possibility of damage and, if so, claims would result which they would be ill-equipped to meet. Havre is not one of their usual ports of call. I gather that no boat of this line, bound from New Zealand to London, had ever called there before. Their ports of call were well known. After leaving one or more named ports on the South American coast they proceed to the Canary Islands, where they call either at Teneriffe or Madeira, and thence direct to London, except in the case of their mail steamships, which, I understand, call at Plymouth to land passengers and mails for London.

This has always been their practice, nor were they able to call anyone to prove that Havre is a usual port of call for any steamship bound from New Zealand to London. After making Ushant the courses for London and Havre are the same until shortly after passing the Casquets, when the course for London goes straight ahead till off Dover, and the course for Havre sharply deflects to the eastward at an angle from the London course of approximately 45 degrees. The distance to Havre from the point where the two courses diverge is about 100 miles.

On leaving Havre the London course is picked up again off Dover. The actual difference in distance between proceeding from Ushant direct to London, and proceeding to Havre and thence to London, is some fifty-eight miles. The defendants proved that submarines had not been active before the 30th Jan. 1915. Down to that date they had only sunk three ships. The master of the *Tokomaru* had received no warning that any danger was to be anticipated in calling at Havre, and there was no greater likelihood of damage in going there than in going to London.

The question which lies at the root of the case is whether calling at Havre was within the liberties reserved to the defendants by the bills of lading held by the plaintiffs, and only so can the making for Havre be justified. To answer this question I must examine the bill of lading. It is in the defendants' own form. It bears upon it the words: "Direct service between New Zealand and London."

The first portion, which is in larger type than the exceptions and conditions clauses, states that the *Tokomaru* is now lying in the port of Napier and is bound for London. It gives the fullest liberty to load at ports or places in New Zealand in any order and for any purpose, and continues:

> And bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies, with permission if desired for the vessel to call at Rio de Janeiro and (or) Montevideo and (or) La Plata.

I will call this clause 1. There are seventeen other clauses in small print. The only material one is clause 3, which reads thus:

> The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination and to tranship or land and store the goods either on shore or afloat and reship and forward the same at the owners' expense, but at merchant's risk.

It was suggested for the defendants that whatever may be the effect of clause 1 there can be no doubt that clause 3 gave them liberty to call at Havre. I cannot accept this suggestion. As a mere matter of construction if clause 3 stood alone it might be held to apply to the *Tokomaru*, but I have to look at the bill of lading as a whole and to read clauses 1 and 3 together, and so reading them I think the true result is that the shipowners are in fact saying to the shippers: If we carry your goods by the *Tokomaru* we will carry them upon the terms of clause 1, but we may have to tranship and possibly into a steamer not belonging to us; in that case we must have greater latitude, and must have the liberties reserved by clause 3.

If this is not so, we get a situation very similar to that in *Elderslie* v. *Borthwick* (10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93), and the bill of lading becomes an ambiguous document, which will not assist the defendants. It is instructive to compare the bill of lading in this case with that in the case of *Hadji Ali Akbar* v. *Anglo-Arabian Steamship Company* (10 Asp. Mar. Law. Cas. 307; 95 L. T. Rep. 610), in which the decision was the other way.

A more formidable point was taken by the defendants, based upon clause 1. Sir Robert Finlay strongly insisted that the words "and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies" fully justified a call at Havre to discharge the frozen meat. Havre, he said, is clearly an intermediate port.

If I were asked, as a mere matter of geography, whether Havre was an intermediate port between New Zealand and London, I might be inclined to say "Yes." If I was at the same time shown a chart with the respective courses from Ushant to London and from Ushant to Havre laid out upon it, I should hesitate and doubt and be inclined to

say "No." It seems to me a question of degree. Any port which can be reached directly by diverging from the course to London, and which is not north of London, is in a sense an intermediate port between New Zealand and London, say, for instance, Lisbon or Bordeaux. No port, however near the course, can be entered without some divergence.

It is not very helpful to say that a port is intermediate which can be reached by divergence, is not north of London, and not too far from the direct route to London. What is "too far"? About that opinions in a given case must differ, and if it should hereafter be thought necessary to decide the point as a mere question of geography, I leave it to wiser heads than mine.

The question, in truth, seems to me one in which the question of geography is only one element, and I will assume, without so deciding, that Havre is geographically an intermediate port. The real question is: Were the defendants entitled to call there under the terms of their bill of lading? In deciding this question I must bear in mind that deviation has always been looked upon as a grave breach of contract. It entails upon the shipowner the displacement of his contract of carriage. It avoids the cargo-owner's policy as and from the point of deviation unless, as is now sometimes the case, the rigour of the law is mitigated by apt words added to the policy. It causes what in these days every shipper wishes to avoid—delay in delivery, a delay not measured by the actual extra distance covered, but also by the time occupied in entering and leaving port and loading or discharging cargo.

It is, further, to be borne in mind that in the course of a long series of years the route taken and the ports called at by a particular line become fixed, and are well known to shippers and to underwriters. The defendants have themselves, by their conduct, put their own construction upon clause 1 of the bill of lading. Teneriffe or Madeira are their intermediate ports. Underwriters, therefore, in insuring cargo by the defendants' line from New Zealand to London, are writing what they understand to be a well-defined risk, a matter of importance both to shippers and underwriters, and one into which it is undesirable to introduce an element of uncertainty.

Lastly, "liberty to call at intermediate ports" has become common form in bills of lading, and has come to mean very little. I am of opinion that the fears expressed by the defendants in their letter, which I read a few minutes ago, of incurring liability to claims if they called at Havre and cargo was damaged, were well founded.

In my judgment, the *Tokomaru* was not justified, to use their own words, "in deviating from our ordinary route without specific provision being made for it in the bill of lading."

That sentence exactly expresses my view. In my judgment, when the route and ports of call of a line of steamships have become stereotyped, mere general words in their own bill of lading giving liberty to call at intermediate ports will not justify their calling at some entirely fresh intermediate port. The truth is, the defendants were tempted by a high rate of freight to run risks which they recognised as possible, but regarded as improbable. Unfortunately, the improbable happened.

The remaining points may be dealt with briefly. The effect of deviation is to displace the contract of carriage during and after deviation, and *ab initio* if Pickford, J. is right in his judgment in *Internationale Guano-en-Superphosphaatwerken* v. *MacAndrew and Co.* (11 Asp. Mar. Law Cas. 271; 100 L. T. Rep. 850; (1909) 2 K. B. 360). From the point of deviation, at any rate, the shipowner becomes at best a common carrier. The defendants say that they are common carriers, with the common law exceptions of act of God and King's enemies in their favour.

Let me assume that. Of what use are those exceptions to the defendants in this case? As I understand it, the law stands thus. When a ship deviates and loss or damage to cargo occurs, either by act of God or, as here, by the King's enemies, it is not open to her owners to set up either exception. Those exceptions apply and apply only to a carrier who is performing his contract, and never to a carrier who is breaking it, unless he can show that the loss or damage must have occurred in any event: (see *Davis* v. *Garrett*, 6 Bing. 716; and *Lilley* v. *Doubleday*, 44 L. T. Rep. 814; 7 Q. B. Div. 510). That he can obviously never do in such a case as the present.

The most that can be said is that the *Tokomaru* might have been torpedoed if she had continued on her course to London, and that avails the defendants nothing. The only case that occurs to me as likely to arise in practice in which a shipowner can hope to escape liability for damage to or loss of goods during or after deviation is when the goods perish from inherent vice and would have so perished without deviation: (see, for example, *Internationale Guano-en-Superphosphaatwerken* v. *MacAndrew and Co.*, *sup.*).

The defendants lastly say that the deviation was not the cause of the loss, and that the plaintiffs cannot recover because they cannot show that the natural and probable result of deviating to Havre was that the *Tokomaru* would be torpedoed. This seems to me rank heresy. A shipowner is an insurer of the goods he carries, subject, if there is a special contract, to the contractual exceptions, and subject, if there is no special contract, to the common law exceptions of act of God, the King's enemies, and inherent vice. If the goods are lost while in his ship, it is not for the goods owner in the first instance to prove anything but the loss. The shipowner, if he denies liability, must then set up the particular exception upon which he relies and bring himself within it. Here the exception is the King's enemies, but the defendants are in the difficulty pointed out by Lord Watson in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (6 Asp. Mar. Law Cas. 202; 57 L. T. Rep. 726; 12 A. C. 518), where he says: "When a shipowner . . . claims the benefit of the exception, the court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible."

This is equally true whether the exception be contractual or implied by law. Deviation leaves a shipowner defenceless in the face of such a loss as occurred in this case. I have to add that throughout this judgment whenever I have spoken of "deviation" I must be taken to mean

"wrongful deviation." My judgment is for the plaintiffs for 4013*l.* 19*s.* 7*d.* and costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendants, *Ince, Colt, Ince and Roscoe.*

Thursday, Feb. 24, 1916.

(Before Scrutton, J.)

Orpheus Steam Shipping Company *v.* Bovill and Sons (*a*)

Demurrage — Certain rate at port of loading — Restricted liability of charterers—"Same rate to apply at port of discharge" — Liability of charterers not thereby restricted at port of discharge—"Working days of twenty-four hours each."

By a charter-party dated the 13th April 1915 the plaintiffs chartered their vessel, the O., to an American export company to carry a cargo of 6350 tons of grain from Newport News to Avonmouth. By a contract of sale the ownership of the cargo passed to the defendants. The charter-party and the bill of lading (which was to complete and supersede the charter-party) provided that the vessel should "be loaded according to berth terms, and with customary berth dispatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage [at a certain rate] . . . provided that such detention shall occur by default of charterers or their agents, and same rate of demurrage to apply at port of discharge," and further, that she should discharge at Avonmouth, "in accordance with the rules of the Bristol Channel and West of England Corn Trade Association." It was also provided that the steamer might discharge at all hours when the customs authorities would allow her to do so, provided that any extra expense in working at night or on Sundays should be borne by the party ordering the work. The rules of the Bristol Channel and West of England Corn Trade Association provided that a steamer carrying a cargo of 6350 tons should be allowed eight "working days of twenty-four hours each" (Sundays excluded) to discharge. The O. arrived off Avonmouth at 8.15 a.m. on Tuesday, the 6th July, and by the terms of the charter-party and bill of lading the lay days began at that time. The discharge was finished at 5 p.m. on the 23rd July. The plaintiffs claimed demurrage in respect of eight days nine hours, alleging that (allowing for exclusion of Sunday, the 11th July) the lay days ended at 8.15 a.m. on the 15th July.

Held, (1) *that the provision that the same rate of demurrage should apply at the port of discharge as at the port of shipment did not necessarily imply that the liability of the charterers was restricted at the port of discharge as at the port of shipment; and* (2) *that "a working day of twenty-four hours" meant a period of twenty-four hours commencing at the time when the ship was ready to discharge, excluding Sundays and certain other excepted days. Judgment was therefore entered for the plaintiffs.*

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

Commercial Court.

Action tried by Scrutton, J.

By a charter-party dated the 13th April 1915 the Grain Growers Export Company of Winnipeg chartered from the agents of the plaintiffs the steamship *Orpheus*, a vessel of 2731 tons registered tonnage, to carry a cargo of 6350 tons of oats from Newport News to (*inter alia*) Avonmouth. The charter-party further provided that

If ordered to Avonmouth, vessel to discharge in accordance with the rules of the Bristol Channel and West of England Corn Trade Association, time to count from arrival off Avonmouth whether berthed or not. . . . Steamer to be loaded according to berth terms, with customary berth dispatch, and if detained longer that five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of 8*d.* British sterling or its equivalent per net register ton per day, or *pro rata*, payable day by day, provided such detention shall occur by default of charterers or their agents, and same rate of demurrage to apply at port of discharge.

The bill of lading, the signing of which was to complete and supersede the charter-party, provided that the

Steamer may commence discharging immediately on arrival and discharge continuously, at all such hours as the Customs House authorities may give permission for the ship to work, any custom of the port to the contrary notwithstanding, provided that all extra expense in working at night or on Sundays or on holidays shall be borne by the party ordering such work.

Rule 4 of the rules of the Bristol Channel and West of England Corn Trade Association was as follows:

Discharge Clause.—Sellers undertake that if the grain forming the subject-matter of the contract shall be carried by general steamer loading on the berth, the time for discharging such grain shall be regulated according to the scale printed below:

	If discharged at Avonmouth Dock or Portishead Dock, whether the grain forms the entire cargo or forms part of cargo.
For steamers carrying not exceeding 2750 tons of grain	5
Exceeding 2750 tons and not exceeding 4800 tons	6
Exceeding 4800 tons, one extra day for each extra 1000 tons or part thereof	Working days of twenty-four hours each.

Working days under this contract are exclusive of Sundays, Good Fridays, Christmas Day, and Bank Holidays, and begin to run at Avonmouth or Portishead Dock from the time of the steamer being berthed and ready to discharge . . . except on Saturdays, when if vessel is not ready to discharge at 8 a.m. the day not to count.

By a contract of sale dated the 7th April 1915 the property in the cargo passed to the defendants, Messrs. Bovill and Sons.

The *Orpheus* arrived off Avonmouth on Tuesday, the 6th July, at 8.15 a.m., and anchored at the place where vessels customarily lay waiting for orders to proceed into dock as berths became available. She received orders to dock at 3 a.m.

on Friday, the 9th July, and was moored in berth at 5 a.m. The work of discharging was commenced on the following Monday, and was not completed until Friday, the 23rd July, at 5 p.m.

The plaintiffs now claimed demurrage in respect of alleged delay by the defendants in discharging the cargo. In their points of claim they said that by rule 4 of the rules of the Bristol Channel and West of England Corn Trade Association the time for discharging a cargo of 4800 tons was six days; that one extra day was allowed for each 1000 tons, or part of 1000 tons, beyond 4800 tons; and that as the cargo of the *Orpheus* was 6350 tons she was entitled to eight days for discharging. At 8.15 a.m. on Tuesday, the 6th July, the *Orpheus* arrived off Avonmouth and the lay days began, and, allowing for the exclusion of Sunday, the 11th July, they ended at 8.15 a.m. on the 15th July. The discharge not being completed until 5 p.m. on the 23rd July, the plaintiffs alleged that the defendants were liable to pay demurrage in respect of eight days nine hours, and claimed therefor at 8*d.* per register ton (*i.e.*, 2731) per day — *i.e.*, 762*l.* 8*s.* 1*d.*

The defendants contended that the time only ran from the time when the vessel was docked, and that by the terms of the charter-party not only did the same rate of demurrage apply at the port of discharge as at the port of loading, but that, for demurrage to become due at the port of discharge, the detention of the vessel must, as at the port of loading, not occur by default of the charterers or their agents. The defendants further said that the term in rule 4 "working days of twenty-four hours each" meant a "day" composed of twenty-four actual working hours. Where, they maintained, men were accustomed to work eight hours per day, a "working day" within the meaning of rule 4 would be comprised of three calendar days, as all hours when work was not in progress were to be excluded from consideration. Following this interpretation the lay days to which the *Orpheus* was entitled had not ceased when she finished discharging.

A. A. Roche, K.C. and *S. L. Porter* for the plaintiffs.

George Wallace, K.C. and *Stuart Bevan* for the defendants.

Scrutton, J.—In this case the plaintiffs, the Orpheus Steam Shipping Company Limited, bring an action against Messrs. Bovill and Sons, the bill of lading owners of the cargo, for demurrage. The defendants raise various points, one of which is of considerable importance to the port of Bristol, and perhaps elsewhere.

The charter was to take a cargo to Avonmouth if ordered there, the vessel to discharge according to the rules of the Bristol Channel and West of England Corn Trade Association, and time was to count from the arrival of the vessel whether berthed or not. I mention that point only in order to dispose of it. The loading clause says that the steamer was to be loaded according to berth terms with customary berth dispatch, and if the vessel was detained longer than five days, then the charterers were to pay demurrage at the rate of 8*d.* per register ton per day, provided such detention was caused by the fault of the charterers or their agents, and the same rate of demurrage was to apply to the port of discharge.

Counsel for the defendants says the "same rate of demurrage" includes the condition of liability, among other things, including the phrase "provided such detention shall be caused by the fault of the charterers or their agents," and says that if it can be shown that the detention of the vessel at the port was not caused by the fault of the charterers or their agents, the charterers shall be free from liability. In my opinion, that is putting on the word "rate" a meaning which I do not think it is possible it can bear. I think the word "rate" there refers to the sum per ton and not to the condition of liability under which it is to be paid. I say no more on that point.

The bill of lading, which is under certain conditions to supersede the charter, contains in the margin:

> Vessel to discharge in accordance with the rules of the Bristol Channel and West of England Corn Trade Association and to count from arrival off Avonmouth, whether berthed or not.

And also contains a clause that:

> The steamer may commence discharge immediately on arrival, and discharge continuously at all such hours as the Customs House authorities may give permission for the ship to work, any custom of the port to the contrary notwithstanding, provided that all extra cost incurred in working at night or on Sundays or holidays shall be borne by the party ordering such work.

The remaining document in which the contract is to be discovered is the rules of the Bristol Channel and West of England Corn Trade Association, of which rule 4, indorsed on the back of the contract, is as follows:

> Discharging Clause.—Time for discharging such grain shall be regulated according to the scale printed below. [The scale provided that for a ship carrying the weight borne by that in this case the time for discharging should be eight days.]

Then followed the words:

> Working days of twenty-four hours each.

There was also a provision that:

> Working days under this contract are exclusive of Sundays, Good Fridays, Christmas Day, and bank holidays, and begin to run at Avonmouth or Portishead from the time of the steamer being berthed and ready to discharge at railway wharf . . . except on Saturdays at either dock, when if vessel is not ready to commence discharge at 8 a.m. the day not to count.

The substantial point is, therefore, what does "working days of twenty-four hours each" mean?

The shipowners say that that means that you take periods of twenty-four hours, commencing at the hour when the ship is ready to discharge—not at midnight, but when the ship is ready to discharge—and going on continuously, except that you exclude matters you are told to exclude—*i.e.*, Sundays, Good Fridays, Christmas Day, and bank holidays, and Saturdays in particular circumstances, namely, if the vessel is not ready to commence to discharge at 8 a.m.

The cargo-owners, on the other hand, say that clause means: You are to make a conventional working day out of the ordinary working hours of the port. The ordinary working hours of the port are eight to five. If, therefore, the vessel is ready at eight o'clock on a particular day, you are

to take from eight to five of that day—Mr. Wallace is not sure whether you should exclude the luncheon hour—then you are to go from five to eight o'clock next working day.

He says it is immaterial that after five o'clock in the clause in the bill of lading the ship has power to work, and it may be in view of the odd words that the charterer has power to require the ship to work. It may be, though it is immaterial—although he is inclined to think that if work is done in fact the hours will count.

The practical difference between the two contentions is that, if the ship's version is right, a considerable sum for demurrage is payable; if the charterer's version is right, if there were provision for dispatch money, the charterer would have earned a considerable amount of dispatch money because he has done the discharging well within the time he says.

One has the advantage or disadvantage of reported decisions on clauses which are rather like this in charters which are rather like this, and in my view a judge is not bound by a decision on a charter rather like the one he is considering unless he can extract some principle which it is obvious that he should follow.

A day or running day is a consecutive day of the calendar from midnight to midnight. You cut down a running day by speaking of working day. It has been decided in several cases, and the case of *Saxon Steamship Company Limited* v. *Union Steamship Company Limited* (9 Asp. Mar. Law Cas. 114; 83 L. T. Rep. 106) is one example that a working day does not mean the day on which the work is done, but a day on which it can be done, and that a working day ordinarily is twenty-four hours from midnight to midnight, part of it being the time in which work is ordinarily done.

There came before the courts a question of what happened if you worked part of the day, the case of *The Katy* (7 Asp. Mar. Law Cas. 527; 71 L. T. Rep. 709; (1895) P. 56) being the first authority in which the matter was prominently brought forward. The Court of Appeal said that if you begin late in the day on work you may infer that the whole day is to count. You are entitled to a whole day, and then if you do not begin till part of the day has gone, the day does count against you.

This brought the attention of shipowners and charterers to the fact that you may be zealous in discharging a ship and find yourself charged with a whole day, although you had only enjoyed the benefit of part it, and, in my view, that was why the shipowners and charterers began to put in their charters "working days of twenty-four hours each" meaning that when you were entitled to so many days you would have days of twenty-four hours and not days of six hours, because if you had worked only six hours it would be treated as a whole day. Shortly after that clause began to get into charters a case arose on a complicated charter which went to the House of Lords.

In that case, *Forest Steamship Company* v. *Iberian Iron Company* (9 Asp. Mar. Law Cas. 1; 81 L. T. Rep. 563), the charter-party provided that the charterers were

> To be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . to count from six a.m. of the day following the day when steamer is reported at the Custom House, unless she be reported before noon, in which case time to count from notice of readiness and in every respect ready to load or discharge respectively and in free pratique. Steamer to work at night if required, also on Sundays and holidays, such days not to count as lay days unless used.

Having to interpret that the question was raised, what did these people mean when they talked about a working day of twenty-four hours? Did they mean a calendar day from midnight to midnight, which is twenty-four hours? It was said against that that to give some meaning to the twenty-four hours you must make it a conventional day and add up the times to count and exclude the times that are not to count. The House of Lords decided that a conventional day was the right meaning.

In 1910, in the case of *Watson Brothers Shipping Company Limited* v. *Mysore Manganese Company Limited* (11 Asp. Mar. Law Cas. 364; 102 L. T. Rep. 169), a similar form of charter-party came before Hamilton, J. There again there was a very complicated series of provisions, the new provision being that it was to be shipped and discharged at the rate of 500 tons per "clear" working day of twenty-four hours. The same contention was raised in that case, and Hamilton, J. decided in favour of the contention that it was not a calendar day but a conventional day, made up of periods. But in doing so he undoubtedly used some language which suggested that it was to be made up of usual hours of working at the port, and not the hours which were unusual hours, but which the shipowners or charterers could desire each other to work. He says: "It does not seem to me that the circumstance that the charterer stipulates that if he can arrange to work in hours when ordinarily men in the port would not work he is to be entitled to call upon the ship to allow work to be done prevents the working day of twenty-four hours mentioned in the charter-party from being in itself a day made up of working hours whenever they may occur. I take it that if he does require the ship to work in hours not usually worked on, and the ship complies with its obligation, the shipper could not deny that such hours having been used were part of the working day of twenty-four hours; but I do not think that the fact that the ship is bound to work if requested, while the charterer is not so bound unless he chooses, entitles the ship to say: "The day for the purpose of this charter-party is a day and a night, twenty-four hours consecutively within which I may be called upon to work during the whole twenty-four hours at the charterer's option."

It is quite unnecessary to say that I usually follow with the greatest respect any opinion of Lord Sumner, but I find great difficulty in following that passage. These being the authorities I turn to the rule.

The rule provides that you are not to take from midnight to midnight, but from the hour the ship is ready to discharge, with a proviso that if that is after eight o'clock on a Saturday you are not to count that day. From that hour you are to take working days of twenty-four hours, but you are to exclude Sundays, Good Fridays, Christmas Day, and bank holidays, and Saturday if the vessel is only ready to discharge after eight

o'clock. There is no provision that you are to exclude anything else. There is no provision as there was in the other cases about what you are to do with the period after the working hours.

In *Forest Steamship Company* v. *Iberian Iron Ore Company* (*sup.*) you were not to count that; in the other case you have to do so. In this case there is no provision either authorising you to exclude it or saying what will happen if it is worked. In these circumstances it seems to me that it is part of the working day. It is a day on which work can be done between the parties and the parties can require work to be done during that time. I see no reason to exclude it.

I have dealt with that on the construction of the documents. On that construction the plaintiffs are right and the defendants are wrong.

It is further said that I ought to come to the same conclusion because everybody at Bristol thinks it is the right one; and a large quantity of evidence has been given by witnesses, some of whose names I recognise as those of people concerned in the Bristol trade. They say that for the last ten years Bristol people, and everyone who came to Bristol, had thought it means this, and had settled disputes on the basis that it does mean it.

I am doubtful whether I ought to recognise that evidence. Mr. Wallace admits that the evidence does show that people at Bristol for ten years or so have thought the words mean what I say and acted on that supposition. He is not able to call evidence to contradict it.

It is clear that if that goes on long enough a custom or usage will be established showing what the words mean in cases where the words without such evidence are ambiguous. The case cited by Mr. Roche, where thirty years' practice was treated by the Court of Appeal as showing what was meant, is sufficient for that. But in this case it has not been in existence for much more than ten years, and I do not think ten years is sufficient to make a custom or usage. A little longer may, but I do not feel able to decide on the ground of the alleged usage.

It is some satisfaction to know, in dealing with the matter on construction, that I have decided in accordance with the views of mercantile people, but I do not decide it on that ground. I decide on the ground that the words mean what the plaintiffs say they mean. If that view is taken of the construction I do not understand that there is any dispute as to amount.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Coward* and *Hawksley, Sons*, and *Chance*.

Feb. 23 *and* 28, 1916.

(Before SCRUTTON, J.)

BLYTHE AND CO. *v.* RICHARDS, TURPIN, AND CO. (*a*)

Contract — Sale — No liability if shipment and delivery prevented by war — Increased freights owing to war—Impossibility of profit—Refusal of seller to deliver—Liability.

By a written contract dated Dec. 1914 *defendants agreed to sell and the plaintiffs agreed to buy iron pyrites as produced at certain mines in Portugal to the amount of about* 6000 *tons per year for three years. Delivery was to be c.i.f. at Manchester. The contract contained this clause: "If war, epidemics, quarantine, strikes of men, accidents, diminution of output at the mine, or any other cause over which the sellers have no control should prevent them from shipping or exporting the ore from the river Guadiana, Portugal, or delivering under normal conditions, the obligation to ship and (or) deliver under this contract shall be partially or entirely suspended during the continuance of such impediment, and for a reasonable time afterwards to allow the sellers time to prepare to recommence shipments." Owing to the continuance of the European war freights rose to such an extent that the defendants found that they could no longer carry out the contract except at a loss. They thereupon gave notice to the plaintiffs that the "conditions of delivering pyrites under our contract with you have become abnormal, and therefore we must claim relief," and refused to make any deliveries at the contract price. The plaintiffs therefore brought this action, in which they claimed damages for the breach of contract of sale. The learned judge found that there was never any difficulty in effecting shipment in Portugal, that the words "under normal conditions" in the suspension clause referred to "shipping and delivery," and that "delivery" was "delivery at Manchester."*

Held, (1) *that "prevention" within the meaning of the suspension clause was physical or legal prevention, and not economic unprofitableness;* (2) *that a provision enabling the defendants to take advantage of a fall in the freight market, but to repudiate the contract if freights rose, must, to avail them, be in clearer language than that used in the suspension clause;* (3) *that the clause applied to shipping and delivery which were required to be effected under normal conditions, but did not apply to the intermediate transit; and* (4) *that it was doubtful what the term "normal conditions" meant in a contract made during a war. Judgment was therefore entered for the plaintiffs.*

COMMERCIAL COURT.

Action tried by Scrutton, J.

By a contract dated the 8th Dec. 1914 the defendants, Richards, Turpin, and Co., merchants and sellers of ore purchased by them in Spain and Portugal, agreed to sell to the plaintiffs, W. Blythe and Co., chemical manufacturers carrying on business in England, 6000 tons of iron pyrites in each year, 1915, 1916, and 1917. The ore was to be delivered c.i.f. at Manchester in cargoes to be arranged. The contract contained this clause:

If war, or any other cause over which the sellers have no control, should prevent them from shipping or export-

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

ing ore from the river Guadiana or delivering under normal conditions, the obligation to ship and (or) deliver under the said contract shall be partially or entirely suspended during the continuance of such impediment, and for a reasonable time afterwards to allow the sellers time to recommence shipments.

The pyrites were to be obtained from mines in Portugal and shipped from Pomaron. In Jan. 1915 there was a sudden and great increase in the rate of freights between Pomaron and Manchester, the freight rising from 6*s.* to 8*s.* per ton to more than 15*s.* per ton. The result was that the defendants could no longer fulfil their contract with the plaintiffs at a profit. They accordingly sent a notice to the plaintiffs to the effect that the conditions of delivering the pyrites had become abnormal and refused to make any deliveries at the contract price although they were willing and able to do so at a profit to themselves at an increased price.

The plaintiffs in consequence brought this action claiming (1) a declaration that the defendants were not entitled to suspend deliveries under the contract and had committed, in the claiming to suspend, a breach of such contract; (2) a declaration that the plaintiffs were entitled to claim damages from defendants for so suspending deliveries.

A. A. Roche, K.C. and *R. A. Wright* for the plaintiffs.—The defendants have been guilty of a clear breach of contract for which the plaintiffs are entitled to damages.

F. D. MacKinnon, K.C. and *A. E. Nelson* for the defendants.—There has been no breach of contract. The defendants were entitled to suspend deliveries by the exceptions clause in the contract. The rise of freights in the early months of 1915 made the position abnormal. "Abnormality" in the exceptions clause meant a state considerably and materially different from that existing at the time of the contract.

A. A. Roche, K.C. in reply.—The clause does not protect the defendants as is contended. It does not apply to transit at all.

Feb. 28.—SCRUTTON, J. read the following judgment:—

Messrs. W. Blythe and Co. Limited, manufacturers of sulphuric acid, sue Messrs. Richards, Turpin, and Co. Limited for damages for failure to supply, between the 8th Dec. 1914 and the 12th Nov. 1915, certain iron pyrites from which sulphuric acid was to be made. The defendants reply that their failure to do so at the contract price was excused by an exception clause in their contract. There is very little dispute about the facts. The real contest and the difficulty of the case is in the construction of the exception clause.

By the contract the defendants were to supply for three years the buyers' requirements of pyrites, estimated to be about 6000 tons per annum, in lots, cargoes, or parcels as arranged at reasonably regular intervals during the year. Delivery c.i.f. Manchester, payment cash against invoice after assay is agreed, price 22*s.* per ton delivered. The pyrites were described "as produced from the mines in Portugal known as Guadiana ore." This ore, in fact, was produced by Messrs. Mason and Barry Limited, and shipped at Pomaron, a town twenty miles up the Guadiana River in Portugal. The depth on the bar and windings of this river limited the use of the port to vessels under a certain length and tonnage.

When the contract was made the present war was in progress. After its outbreak, for a short period, no one would enter into charters. After a month or so chartering recommenced, and freights from Pomaron to the West Coast of England were about as usual, rising slightly, say, from 6*s.* to 7*s.* 6*d.* a ton. The defendants supplied a part cargo of 696 tons under the contract. They had two steamers, the *Mauranger* and *Trudvang*, chartered for consecutive voyages during 1915 to 1917 at 7*s.* a ton Pomaron to Manchester. The round voyage had been thirty days. By difficulties of transit and congestion it increased to sixty days by the end of 1915. One of these steamers was torpedoed in May-June 1915, but the two actually carried some 16,000 tons of ore in 1915 at the same freight as was prevalent at the making of the ore contract.

The defendants sold some 50,000 to 100,000 tons in the year, and chartered other vessels to carry the balance. In Jan. 1915, in consequence of various economic and naval events in the war, freights rose very rapidly, and varied from 11*s.* to 20*s.* Pomaron to West Coast of England, some of the lower freights being for parcels of dead-weight cargo in boats on regular lines. This rise of freight would turn the defendants' contract into a losing one, and they were desirous of avoiding the loss if possible. They, therefore, on the 15th Jan. 1915 sent out a notice to all their customers:

> Dear Sirs,—We are reluctantly obliged to give you formal notice that in consequence of the British Government having commandeered a large amount of tonnage in pursuance of the war against Germany, and of other tonnage being held up through warlike operations, the conditions of delivering pyrites under our contract with you have become abnormal; therefore we must claim relief,

and continued during the time in question to refuse to supply under their contracts at the contract price. They made fresh bargains to supply ore with such customers as would pay increased freight. The plaintiffs made one such bargain without prejudice to rights, and bought two other lots of pyrites from other sellers at a higher price against the defendants.

I need only further state that there was never any difficulty in shipping ore at Pomaron. More ore was supplied in 1915 than in 1914. There may have been congestion at Manchester, though I had no specific evidence of it. The buyers undertook to take ore at 350 tons a day. I had no evidence to show whether the state of the port prevented delivery at that rate.

The question which was argued before me was whether the rise of freights was a circumstance excusing the defendants, the vendors, from performance of their contract under their exception clause, to which I now turn. The defendants had covered themselves in the plaintiffs' contract by a contract with Messrs. Mason and Barry Limited for ore f.o.b. Pomaron. That contract contains the following exception clause:

> If war, epidemics, quarantine, strikes of men, lock-outs, labour troubles, or any other cause over which the sellers have no control should prevent them from shipping or exporting the ore from Portugal or delivering under normal conditions the obligation to ship and (or) deliver under this contract shall be suspended

during the continuance of such impediment and for a reasonable time afterwards to allow the sellers time to prepare to recommence shipments.

In this clause it is clear that "shipping, exporting, or delivery" refers to what happens at Pomaron. It is also fairly clear that the defendants to cover themselves copied this clause with minor alterations and one substantial addition in their favour, as follows:

If war, epidemics, quarantine, strikes of men, accidents, diminution of output at the mine, or any other cause over which the sellers have no control should prevent them from shipping or exporting the ore from the River Guadiana, Portugal, or delivering under normal conditions, the obligation to ship and (or) deliver under this contract shall be partially or entirely suspended during the continuance of such impediment and for a reasonable time afterwards to allow the sellers time to prepare to recommence shipments;

and then there is a clause at the end which is immaterial to this case. They inserted it in their contract, without considering whether it made any difference that their contract was a c.i.f. Manchester contract, payment by weight delivered, and that the contract from which the clause came was a contract for sale f.o.b. Pomaron.

I do not use the Mason and Barry clause to construe the defendants' clause, but I bear in mind in the attempt to construe the latter (1) that its language was obviously originally framed for a different subject-matter; (2) that as the material part of it was inserted in favour of the defendants, it must be construed against them; and (3) that, as frequently stated, an ambiguous clause is no protection. I think the term "under normal conditions," whatever it may mean, must apply to shipping and delivering.

Mr. Roche for the plaintiffs argued that "delivering" means the putting of the goods on the ship under a contract of carriage, which is the first step towards performing a c.i.f. contract. This argument is tempting, as it would give "delivery" the same meaning as in the Mason and Barry contract, and would harmonise with the later language "prepare to recommence shipments." But on consideration, I think it is more probable that the phrase in this clause refers to the delivery at Manchester, which is essential for payment. The question then is: Did war prevent the sellers from shipping or delivering under normal conditions? It is said that it did, because war caused freights to become so high that shipping and delivery under normal conditions was prevented, freights being higher than normal.

I have come to the conclusion that this argument is unsound, for several reasons. I think prevention by the matters referred to is physical or legal prevention, not economic unprofitableness. You are not prevented from buying a thing if you think its cost higher than you can afford, or that it is not worth the price. You are prevented from buying a thing by a given cause if, owing to that cause, there are none to be had. This appears to be the reasoning of Bailhache, J. in the two cases to which I was referred of *Rolo* v. *Aquis* (June 3, 1915, unreported) and *Instone and Co.* v. *Speeding, Marshall, and Co.* (114 L. T. Rep. 370), both decided on slightly different clauses.

In this case the defendants could, and did, get the ships, but as to some three-fourths of them at a cost which made their contract, if carried out by those ships, a losing one. The war did not prevent them performing their contract, but did indirectly by its action on freights make it an unprofitable one. If the defendants wished to say, "We will keep the benefit of any turn of the freight market which helps us, but if the market goes against us we will not perform our contract," they must, in my opinion, use clearer words than they have done.

But, further, I do not think this language is applicable to transit at all; it is applicable to the shipping at the commencement of the transit and the delivery at the end of it. Transit was not provided for in the original Mason and Barry clause, the contract being f.o.b, and it is provided for in this contract by the "addenda" clause inserted by the defendants and dealing with the perils, such as perils of the sea or restraint of princes, which may affect the goods afloat. This clause contains nothing about the transits being too expensive.

I have considerable difficulty in understanding what is meant by "normal conditions." It cannot mean the conditions existing at the date of the contract; at that date there may be quarantine, or a strike of a temporary nature, which clearly would not be treated as normal conditions; and I should have thought in war time there were no normal conditions, everything being subject to constant change and almost beyond prophecy. I do not see any difficulty in allowing the clause to operate on a number of ships, though the excepted peril would not hinder any one ship alone. This is in accordance with the view expressed in *Crawford and Rowat* v. *Wilson, Sons, and Co.* (1 Com. Cas. 277) by the Court of Appeal.

If I am wrong in the view that the clause does not protect the defendants at all, it may be that the fact that as to one quarter of their shipments they had old charters which protected them as to freight may cause the prevention, if any, to be only a "partial suspension" within the words of the contract. But the grounds on which I decide against the defendants are: (1) That here there is no evidence of prevention, but only of increased cost; (2) that the clause does not apply to transit, but only to shipment or delivery; and (3) that the defendants have not made clear what they mean, in a contract made in time of war, by "normal conditions" in war time, particularly as relating to cost of transit.

The plaintiffs are therefore entitled to damages, which I assess at 1900*l*., and I give judgment for that amount with costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Waltons* and *Co.*

Solicitors for the defendants, *Williamson, Hill,* and *Co.*, for *Ingledew* and *Sons*, Swansea.

Supreme Court of Judicature.

COURT OF APPEAL.

June 21 *and July* 10, 1916.

(Before SWINFEN EADY, PHILLIMORE, and BANKES, L.JJ.)

CROSSFIELD AND CO. *v.* KYLE SHIPPING COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Bill of lading "conclusive evidence of quantity delivered to ship as stated therein"—Statement in bill of lading that goods were "shipped on board"—Short delivery—Estoppel—Authority of master—"Perils of the sea."

By a charter-party dated the 28th May 1913 the steamship K., belonging to the defendants, was chartered to proceed to Grindstone Island, New Brunswick, and there load a cargo of timber and therewith proceed to certain ports (including Manchester) as ordered. Freight was to be payable on measurement of quantity delivered as ascertained at port of discharge, and all responsibilty of the charterers under the charter was to cease as soon as the cargo was alongside. The exceptions included "perils of the sea." The captain or his agent was empowered to sign bills of lading which, it was agreed, should be "conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The charterers gave instructions that the vessel when loaded should proceed to Manchester. The K. was loaded from lighters, the contents of which was checked by surveyors as they left the shore. Owing to rough weather, a quantity of the timber fell between the lighters and the ship and was lost, but despite this the master of the vessel signed a bill of lading in this form: "Shipped, in good order and well conditioned, on board the steamship Kylestrome" the quantities of timber contained in the surveyors' reports. The result was that on arrival at Manchester the cargo was found to be short.

In an action by the plaintiffs, who were indorsees of the bill of lading, for damages for short delivery the defendants contended that the timber was lost through perils of the sea, since by the charter-party, the terms of which must be incorporated in the bill of lading, the responsibility of the charterer ceased as soon as the cargo was alongside, whereby the responsibility of the defendants commenced and the exception of "perils of the sea" came into operation.

Held, that the defendants were bound by the statement in the bill of lading that the whole of the timber had been shipped on board, and could not give evidence that certain portions of the timber had been lost after they had been put into lighters, but before they had been received on board.

Lishman *v.* Christie (6 Asp. Mar. Law Cas. 186; 57 *L. T. Rep.* 552; 19 *Q. B. Div.* 333) *followed.*

Judgment of Bailhache, J. (ante, p. 327; 114 *L. T. Rep.* 743) *affirmed.*

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

DEFENDANTS' appeal from a judgment of Bailhache, J. in the Commercial list, reported *ante*, p. 327; 114 L. T. Rep. 743.

On the 11th April 1913 the plaintiffs, Crossfield and Co., timber merchants, of Barrow-in-Furness, entered into a contract with J. Nelson Smith, of St. John, New Brunswick, to buy a cargo of wood which was to be shipped at Grindstone Island for Manchester on c.i.f. terms.

On the 28th May J. Nelson Smith chartered the steamship *Kylestrome* to load the cargo in question. By the charter-party it was agreed that the steamship *Kylestrome* should, with all convenient speed, sail and proceed to Grindstone Island, New Brunswick, and there load a cargo of timber, and being so loaded should therewith proceed to a number of named ports (including Manchester) as ordered on signing bills of lading.

The charter-party continued in these terms:

2. Freight payable on measurement of quantity delivered as and when ascertained at the port of discharge. . . . All responsibility whatsoever of the charterers hereunder ceases as soon as the cargo is alongside.

3. The act of God, perils of the sea, &c., always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

12. The usual custom of the wood trade of each port is to be observed by each party on customary terms.

13. Captain or agent to sign bills of lading as per surveyors' return for the cargo, and, if required, for separate parcels and delivery accordingly.

14. Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to ship as stated therein. The captain's or agent's signature to be accepted in all cases as binding on owners.

On the 28th June the *Kylestrome* arrived at Grindstone Island, and moored at the buoys at the back of the island. On the 30th June loading commenced, which was performed from lighters which carried their cargo stowed athwartships. The captain's agent signed the bills of lading in these terms:

Shipped in good order and well conditioned by J. Nelson Smith on board the steamship called the *Kylestrome* . . . one hundred and seventy-seven thousand two hundred and eighty-one pieces of deals, battens, &c., containing three million one hundred and seventy thousand five hundred and fifty-five superficial feet . . . in accordance with charter-party dated the 28th May 1913, the terms, conditions, and exceptions (including negligence clause) contained in which are herewith incorporated and form part hereof. In witness whereof the master of the said vessel hath affirmed to two bills of lading all of this tenor and date, one of which being accomplished, the other to stand void.—(Signed) J. F. KNIGHT and Co., Agents.—Harvey, N.B., July 16, 1913.

On the 17th July the *Kylestrome* left Grindstone Island. On arrival at Manchester it was found that the cargo was short by eighty-five standards. The plaintiffs in consequence brought this action against the defendants to recover 558*l.* damages for non-delivery of cargo, which they alleged had been lost. The defendants in their defence said that the cargo was lost while alongside the ship; that the loss was therefore due to perils of the sea; and that responsibility

on their part was in consequence excluded by the exceptions clause in the charter-party.

Bailhache, J. held (*ante*, p. 327; 114 L. T. Rep. 743) that the words in the bill of lading "shipped . . . on board the steamship *Kylestrome*" were inconsistent with the provision in the charter-party that the cargo was only to be delivered alongside, and must prevail; that in consequence the exception of "perils of the sea" never came into operation, and the plaintiffs were therefore entitled to succeed.

The defendants appealed.

A. A. Roche, K.C. and *R. A. Wright* for the defendants.

F. D. MacKinnon, K.C. and *W. A. Jowitt* for plaintiffs.

The following cases were referred to:

Lishman v. *Christie* (*sup.*);
Pyman v. *Burt*, Cab. & Ell. 207;
Fisher, Renwick, and Co. v. *Calder and Co.*, 1 Com. Cas. 456;
Mediterranean and New York Steamship Company Limited v. *A. F. and D. MacKay*, (1903) 1 K. B. 297;
J. Lohden v. *Charles Calder and Co.*, 14 Times L. Rep. 311;
Brenda Steamship Company Limited v. *Green*, 9 Asp. Mar Law Cas. 55; 82 L. T. Rep. 66; 5 Com. Cas. 195.

Cur. adv. vult.

July 10.—The following written judgments were delivered:—

SWINFEN EADY, L.J.—The plaintiffs in this action, as indorsees of a bill of lading for a timber cargo, sued the defendants, who are the owners of the ship *Kylestrome*, upon which the cargo was loaded, for short delivery. The judge found for the plaintiffs for 588*l.* 4*s.* 11*d.*, and against this judgment the defendants appeal.

The shipment was from New Brunswick to Manchester.

It is not now disputed that the quantity of timber delivered from the ship at Manchester was eighty-five standards of the value of 588*l.* 4*s.* 11*d.*, less than the quantity stated in the bills of lading to have been shipped on board; nor, on the other hand, is it disputed that all the cargo, which was actually placed on board the ship, was duly discharged at Manchester. The uprights and surface of this deck load timber had been marked with paint at regular intervals, and the stowage was regular and unbroken throughout, and on arrival at Manchester showed no signs of any cargo having been lost.

How so large a quantity of timber as eighty-five standards came to be lost does not clearly appear. The loading of the ship commenced on Monday, the 30th June, and was not completed until about the 16th July, and it is only on one day that any loss from weather is definitely stated to have occurred. In the log, under date the 30th June, there is an entry, "A nasty choppy sea, causing lighters to roll, and losing a quantity of timber overboard," and in the master's protest of the 15th July he states that

"On the 30th June I commenced taking in a cargo of lumber, and in consequence of the lighters striking against the sides of the ship, and from the strong winds and choppy seas and exceptionally strong current, a quantity of lumber in being transferred from the said lighters to the said ship was washed overboard and lost, and every effort was made to recover same, and a quantity was bruised, broken, and split"; and that "due care, diligence, and skill were observed in transferring the said lumber from the said lighters to the said ship."

No further details of the loss are given. It appears that the cargo for the steamship was brought down from the interior, and was loaded into lighters at Grindstone Island, and was checked and tallied into the lighters by licensed and sworn surveyors, and that such measurements are conclusive as between the sellers and buyers—upon these figures the timber is invoiced and the buyer pays. There is no further checking or tallying when the timber is brought alongside for shipment. It would probably be impracticable, except at very considerable expense, as the original entries with details of the lumber loaded into lighters occupied seventy sheets. The master signs the bills of lading for the figures arrived at by the surveyors, stating the whole quantity to be shipped on board.

The defendants contend that they are not estopped and precluded by the terms of the bill of lading (which incorporates the material provisions of the charter-party) from showing that the full amount of cargo stated therein was not actually shipped on board.

If defendants are entitled to show that a smaller quantity than that mentioned in the bill of lading was all that was really shipped on board, then it was doubtless proved as a fact that such was the case.

The bill of lading, dated the 16th July 1913, is as follows: "Shipped in good order and well conditioned by J. Nelson Smith on board the steamship *Kylestrome*, whereof David Muir is master, now lying in the port of Harvey, New Brunswick, and bound for Manchester, England . . . [then follows a detailed specification of 177,281 pieces of wood containing in the whole 3,170.555 superficial feet] being marked and numbered as in the margin, and are to be delivered in like good order and condition at the port of Manchester, England, unto Messrs. Price and Price Limited, or to their assigns, he or they paying freight for the said goods in accordance with charter-party dated the 28th May 1913. All the terms, conditions, and exceptions (including negligence clause) contained in which are herein incorporated and form part hereof."

Clause 2 of the said charter-party is as follows: "Freight payable on measurement of quantity delivered as and when ascertained at the port of discharge. . . . All responsibility whatsoever of the charterers hereunder ceases as soon as the cargo is alongside."

Having regard to the terms of this charter-party, and especially to clause 14, the plaintiffs contend that the defendants have bound themselves by contract to treat the bills of lading as conclusive evidence of the quantity delivered to the ship as stated therein—that is, as they contend, of the quantity "shipped on board"—and cannot now question the amount. A bill of lading is, generally speaking, *primâ facie* evidence against the shipowner of the shipment on board of the quantity of goods thereby acknowledged by him to have been so shipped, but it is not conclusive; the parties, however, may by contract agree to make it conclusive evidence, and the

question here is whether that is the true effect of the clause in the charter-party incorporated in the bill of lading.

If the true meaning of clause 14 is that the bill of lading is to be conclusive evidence against the owners that the quantity stated therein as having been "shipped . . . on board" has in fact been actually shipped and placed on board, then the appeal cannot succeed; there was the short delivery of eighty-five standards, and it is not suggested that any lumber actually shipped on board was subsequently lost by any excepted peril.

The defendants, however, contend that clause 14 only means that the bill of lading is to be conclusive evidence of the quantity "delivered to ship"; that if, in accordance with the contract, delivery of lumber by the shipper alongside the ship, in lighters, or floating in the water, is delivery to the shipowner, so that his responsibility for cargo then commences, and his lien for freight then attaches, the bill of lading is only conclusive evidence of such delivery; that the words "as stated therein" refer only to quantity as stated in bill of lading; and that the words "as stated therein" do not refer to and make conclusive the statement in the bill of lading "shipped . . . on board."

It must be assumed that the parties to the charter-party contemplated that the bill of lading would be in the form in common use in the timber trade at the port of loading, which states the quantity of timber mentioned therein as having been "shipped on board," which can only mean actually shipped on board. What is the object of such a provision in a charter-party? This question was put and answered by Lord Esher, M.R. in *Lishman* v. *Christie* (6 Asp. Mar. Law Cas. 186; 57 L. T. Rep. 552; 19 Q. B. Div. 333, at p. 338). He said: "What can be the meaning of such a provision but to get rid of the liberty of the shipowners to show that the quantity stated to have been shipped was not really put on board and to make the bill of lading an estoppel? The provision is a good business provision for the purpose of avoiding disputes as to quantity shipped where there is no dishonesty on either side."

In that case it was provided by the charter-party that the bills of lading should be conclusive evidence against the owners of the quantity of cargo "received as stated therein." Here it is "delivered to ship as stated therein." I see no distinction between delivered to ship and received by ship. They both describe the same transaction looked at from opposite points of view. The Master of the Rolls said (p. 338): "The provision is that the bill of lading is to be conclusive evidence of the quantity of cargo received as stated therein. How is any quantity stated to have been received by a bill of lading? By the word "shipped," of course.

In that case the express terms of the contract required the cargo which was to be carried to be brought alongside the ship at merchants' risk and expense, and excluded the custom of the port of Memel, by which the captains of ships took delivery of timber to be shipped at timber ponds a mile and a half away, the timber being subsequently rafted down to the ships; and it was urged that the captain had exceeded his authority in signing bills of lading with regard to goods for which the mate gave receipts a mile or more away, and which had been lost in rafting down. But assuming that the shipowner was bound by the bills of lading (as the court held he was), the further question arose as to the meaning of the words "received as therein stated"; indeed, the same point was open in that case as is raised here—that "received" did not mean more than received by the ship, and did not extend to shipped on board as stated in the bill of lading; and accordingly, as the owners were held liable for goods received by the mate at the timber ponds, that the owner ought to be allowed to prove loss by an excepted peril in process of loading while being rafted down the river.

It was, however, determined that the object of the clause as to conclusive evidence was to prevent that very kind of dispute and to make the statement in the bill of lading as to shipment on board an absolute estoppel as against the shipowner. As Lindley, L.J. said: "The shipowner has agreed to be bound by the statement in the bill of lading, and by that he must stand or fall." *Fisher, Renwick, and Co.* v. *Calder and Co.* (1 Com. Cas. 456) is to the same effect.

In that case, tried before Mathew, J., timber had been brought alongside the vessel to be shipped therein, and was then delivered into the custody of those in charge of the vessel, by whom it was properly secured alongside her by booms and ropes. Subsequently, by reason of violent weather, a quantity of that timber was lost before it could be actually shipped on board. The master signed bills of lading for the whole quantity brought alongside, without deducting so much as had never been actually shipped on board. In an action by the consignees against the shipowners for the value of the timber so lost, it was held that the plaintiffs were entitled to recover. Mathew, J. said: "In the shipment of timber cargoes troublesome questions frequently arise as to whether timber, which is found at the time of delivery to be missing, was lost before or after shipment. With a view to disposing of all such questions, the clause in this charter-party provides that the bills of lading shall be conclusive evidence against the owners of the quantity of cargo shipped on board as stated therein. What is contemplated is that the bills of lading should pass from hand to hand, and that the consignee should have by the acknowledgment therein conclusive evidence of the quantity shipped. In this particular case the shipowners have sought to show that the timber in question was lost by reason of the excepted perils. But I must give effect to the words of the contract. These goods never were shipped, and therefore the exception of the specified perils did not operate." *Pyman* v. *Burt* (Cab. & Ell. 207) cannot be considered an authority to the contrary, as the case was decided upon the grounds that the special circumstances were such as to prevent the conclusive evidence clause in the charter-party from being held binding.

I am of opinion that no encouragement should be given to a practice of signing clean bills of lading for goods which the master knows have not been put on board, and with the intention that the actual shipment shall be subsequently disputed.

In the seventh edition of Scrutton on Charter-parties (1914) the learned author states (at p. 58)

that recently "shipowners have met the difficulty by adding to the statement of cargo shipped in the bill of lading a marginal note 'so many timbers of above lost alongside' or similar words. This seems to make the bill of lading contain no conclusive statement of quantity shipped, and it was so treated (by Bigham, J.) in *Lohden* v. *Charles Calder and Co.* (14 Times L. Rep. 311)." The bill of lading there stated that the full quantity of whole sleepers or half-sleepers had been shipped on board, but a note was put in the margin in these words: "Hereof about 1000 half pieces, and about 400 whole pieces lost through weather as per protest dated Riga, 5-17 Nov. 1897." In that case it was held that there was no estoppel (although the charter-party contained a conclusive evidence clause), as the bill of lading did not amount to such a clear statement of the quantity taken on board as to justify the court in holding that the owners of the ship were precluded from showing that part of the goods were not shipped on board the vessel.

In my opinion the effect of the conclusive evidence clause was settled by *Lishman* v. *Christie* (*sup.*) nearly thirty years ago, and a method has since been pointed out by which, by means of a note in the margin of a bill of lading, shipowners can protect themselves if cargo is known to be lost before actual shipment on board, and it would only unsettle the law if fine distinctions were now to be drawn depending upon slight verbal differences in the language of the conclusive evidence clause.

In my judgment the appeal fails and should be dismissed.

Phillimore, L.J.—The plaintiffs in this case, being the receivers of a cargo of timber delivered at the port of Manchester, sought for and have obtained judgment against the defendants, the shipowners, for short delivery. Hence this appeal.

There is no doubt that upon its final ascertainment it was settled that the cargo was about eighty-five standards short of the total quantity entered upon the bill of lading.

On the other hand it is not disputed that the ship brought all the cargo which she actually took on board.

No other explanations of the discrepancy are offered, except that the bill of lading follows (as it should do) the surveyor's return at the port of shipment, and that either the surveyor made some serious miscalculation or the cargo was lost after it had been brought by schooners or scows from various places further inland to the place where the ship was lying, and had been finally checked by the surveyor.

There was a statement in the log and protest which would account for some of it having been so lost. It is not very probable that the statement would cover so large a loss; but, having regard to the letter of the plaintiffs' solicitors of the 11th Feb. 1914 and other matters, I am of opinion that it was intended to try this action upon the supposition that the missing cargo had been lost during the loading operations and, if so, by perils of the seas.

The bill of lading incorporates all the terms, conditions, and exceptions of the charter-party; and by the terms of the latter all responsibility of the charterer ceases "as soon as per cargo is alongside" (clause 2). Certain perils are excepted (clause 3). The usual custom of the wood trade of each port is to be observed (clause 12). The captain is to sign bills of lading as per surveyor's return (clause 13). And the "bills of lading shall be conclusive evidence against the shipowners as establishing the quantity delivered to the ship as stated therein. The captain's or agent's signature to be accepted in all cases as binding on owners" (clause 14).

The defences raised for the shipowners are: (1) That if the bill of lading is to be construed as meaning that the quantities mentioned had been actually taken on board, the statement therein is not a statement establishing the quantity delivered to the ship as stated therein" within the meaning of clause 14 of the charter-party, and is therefore a simple statement by the master which, though *primâ facie* evidence against the shipowners, is rebuttable and was rebutted. (2) If, on the other hand, the bill of lading means that the quantities had been delivered into the possession of the master so that the shipper's risk was ended and that of the shipowner had begun, then the loss was subsequent and was due to a peril excepted by the bill of lading—to wit, perils of the seas.

For the second question, which I propose to take first, it is necessary to ascertain at what period of the adventure the risk of the shipper ended and that of the shipowners began.

For some time I was of opinion that the risk of the shipowners began at a period anterior to the actual shipment, and, indeed, I think that in the argument there was almost an agreement between the two parties as to this, except that counsel for the shippers would date back the dividing period even further than the shipowners need for the purposes of their defence.

In the case of *Lishman* v. *Christie* (*sup.*), decided in this court, and in some cases in courts of first instance, the dividing period was that which is usual in cases of shipment. The cargo had to be brought alongside at merchants' risk and expense, "alongside" meaning in ordinary cases by and level with the ship's rail, but very likely in shipments of timber or other bulky materials which must be raised by the ship's gear within reach of the ship's tackles.

In these cases the short period of time spent in the act of shipping is not treated as a separate period, and the master signs or should sign for goods so brought level with the rail, or in appropriate cases within reach of the ship's tackles, as "shipped on board."

Counsel for the shipowners contended that the effect of clause 13 that the captain was to sign bills of lading as per surveyors' return, coupled with the practice by which the final surveyor's return was merely an arithmetical result of the several returns made by the surveyors who measured the timber as it was put upon the several lighters up country, made the shipowners responsible at least for the totals of cargo put on board the lighters which arrived at the ship without apparent loss by the way, and counsel for the shippers (as I understood the argument) ante-dated this liability to the times of the original shipments up country. If either of these contentions were correct, I should think that whenever the shipowner's liability began the excepted perils also attached. Otherwise there would be two contracts by the

shipowner, one of ordinary bailment and another for carriage upon the terms of the bills of lading. But upon reflection I do not think that either of these contentions is correct. The clause by which the charterer's responsibility ceases as soon as the cargo is alongside, though in form a cesser clause, sufficiently shows what is intended. There is no reason for giving "alongside" any other meaning than the usual one, which was that given to it in *Lishman* v. *Christie* (*sup.*).

The clause requiring the captain to sign bills of lading as per surveyors' return must be given a reasonable construction. By it the captain may be precluded from questioning the measurements of the original surveyors or the arithmetic of the final surveyor. But he is not compelled to sign bills of lading according to a return which neglects such an occurrence as the non-arrival of a lighter or its arrival with half its cargo. Nor is he compelled to sign clean bills of lading if after the arrival of the lighters he knows that portions of the cargo have got adrift before they were actually brought on board. He can either insist upon the proper deductions being made, or he can (as has been done in other cases) sign for the quantities specified in the final return, with a note that so many pieces of such and such a description were lost or are short. If there is a dispute, the matter must be settled by arbitration, as provided by clause 16 of the charter-party. If this be so, then the present case is on all fours with *Lishman* v. *Christie* (*sup.*).

In this case, as in that, the master was not bound to sign bills of lading which admitted without qualification that the sum of the quantities of timber collected up country had been shipped on board. Having, however, so signed and the conclusive evidence clause being in the charter-party, his owners were precluded from contesting the quantity, and could not rely upon an excepted peril as no such peril had occurred after shipment.

I should say a word on the phrase in the charter-party "as stated therein." I think that the meaning is that the bill of lading is to be conclusive evidence establishing not only the quantity delivered to the ship, but also that the total quantity is made up according to the details stated therein—that is to say, that there are so many "pieces," so many "deals and battens" containing so many cubic feet, so much "scantling," so many "deal ends" and "boards," and thus conclude the shipowner from raising, or successfully raising, the point raised in *Mediterranean and New York Steamship Company* v. *A. F. and D. Mackay* (1903) 1 K. B. 297).

Therefore I think that these words do not help the shippers. But, for the reasons already given, the second point taken for the defence fails.

As to the first point taken for the defence, that, if the words "shipped on board" are to be given their precise meaning, then the master had no authority within the conclusive evidence clause to make this admission, but had only authority to sign for what was delivered to the ship; if delivery and receipt are correlative terms, and if receipt is by shipment, then the master has, by signing the bills of lading, established the quantity delivered to the ship, and this is what he had authority to do.

I think, therefore, that the appeal fails.

BANKES, L.J.—This is an action in which the plaintiffs claimed as indorsees of a bill of lading for damages for short delivery of a quantity of timber. The bill of lading incorporated all the terms, conditions, and exceptions of a charter-party, and the main contest between the parties was whether, by the terms of the charter-party, the bill of lading was made conclusive evidence against the shipowner in regard to the quantity of timber short delivered at the port of discharge. Bailhache, J. decided against the defendants, the shipowners, upon the ground that he considered the case was covered by the decision of this court in *Lishman* v. *Christie* (*sup.*).

The facts of the case lie in a small compass. On the 11th April 1913 the plaintiffs entered into a contract with J. Nelson Smith for the purchase from him of a cargo of timber upon c.i.f. terms. The goods were deliverable to the vessel at Grindstone Island, New Brunswick, agreeably to the customs of the port. The contract contained a provision that the seller was not responsible for any deterioration of quality or condition after the goods had been sent alongside the vessel.

The provision as to payment contained the following terms: "The freight is to be deducted from invoice on foreign measure and paid by buyers as per usual charter-party and (or) liner bill of lading, which they hereby agree to adopt, remainder by approved acceptance of sellers, sellers' agents, or brokers' draft, payable in London in exchange for bill of lading and other shipping documents." "Foreign measure" was explained to mean measurement according to the custom of the port. Evidence was given by affidavit as to what the custom was, and a good deal of discussion took place before us as to what was the proper inference to be drawn from that evidence. It seems to me clear from the affidavits that in the case of wood goods dispatched from the interior, of which the present cargo consisted, the only measurements taken were those taken by the appointed surveyors when the goods are loaded on board lighters for the purpose of being conveyed alongside the ship. These measurements are taken in the first instance for the purpose of ascertaining the price to be paid for the timber as between the original vendors of the timber and their buyer or buyers, and the measurements may be (as they were in this case) taken by a number of different surveyors at a number of different places. The measurements so taken are checked by a selected surveyor. Having regard to the purpose for which the measurements are taken, this checking must, I think, be a checking of the figures as relating to the quantities loaded on board the lighters, and not as relating to the quantities which arrive alongside the ship. This conclusion appears to agree with what is stated in par. 3 of Mr. Nelson Smith's affidavit. The position created by the purchase contract, therefore, appears to be this. The invoice is made out on, and the buyer must pay for, the quantities of timber loaded into the lighters; but the seller must deliver the timber to the vessel, and is responsible for any deterioration of quality or condition until the timber is sent alongside the vessel—the seller consequently is responsible in damages for any loss or deterioration arising between the time when the goods are loaded on to the lighter and the time when they arrive alongside. The question which has to be

determined in the present appeal has reference to the position of the charterer and the shipowner, and the contract of purchase can only be material (if material at all) as explaining the course of business and the custom of the port. The custom so far as it affects the position of the charterer and shipowner is stated in par. 4 of Mr. Smith Sleeves' affidavit in these terms: "For the preparation of complete surveyors' return all the returns so prepared as sent in to a selected surveyor, who checks the same and prepares a summary thereof; the total figures so arrived at are then inserted in a bill of lading which is presented to the captain or ship's agent for signature."

For the purpose of enabling him to fulfil his contract with the respondents, Mr. Nelson Smith chartered the steamship *Kylestrome*. The charter-party is dated the 28th May 1913. It provides (clause 2) for payment of freight on measurement of quantity delivered as and when ascertained at port of discharge, and that all responsibility of the charterers is to cease as soon as the cargo is alongside, the vessel holding a lien upon the cargo for freight and demurrage. Clause 3 contains the excepted peril, which includes perils of the sea. Clauses 12 and 13 are as follows: "(12) The usual custom of the wood trade of each port is to be observed by each party on customary terms. (13) Captain or agent to sign bills of lading as per surveyor's return for the cargo, and, if required, for separate parcels and deliver accordingly."

The parties in the present case appear to have expressed in their written contract the extent to which they intended to be bound by the custom of the port, so that no question arises with regard to the custom apart from the construction of the written contract. By clause 13 the appellants agreed that the captain or agent should sign bill of lading "as per surveyors' return." The result of this agreement is that in the present case the parties assented to the course of business indicated in par. 4 of Mr. Smith Sleeves' affidavit. The conclusive evidence clause is the one upon which the questions involved in this appeal turn. The custom of the port does not touch this clause, in the sense that the shipowner is perfectly free, so far as the custom of the port is concerned, to decide whether he will or will not agree to any form of conclusive evidence clause. The shipowner must be taken to understand what his position is when he has undertaken to sign bills of lading "as per surveyors' return," and he must protect himself by the language used in the clause itself if he decides to bind himself by a conclusive evidence clause, or by a note in the margin of the bill of lading, if the master is compellable to sign for a quantity not received. The form of the clause to which the shipowner in the present case agreed provides (clause 14): "Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to ship as stated therein." Having regard to the other provisions of the charter-party, I think that the expression "delivered to ship" means delivered alongside in the sense that the goods have reached the ship and are under the control of the master, so that the responsibility of the charterer under clause 2 ceased.

The precise dispute between the parties may conveniently be stated at this point. The appellants do not now dispute that the out-turn of the cargo at the port of discharge was some eighty-five standards short of the bill of lading quantity, nor do they dispute that the bill of lading quantity was delivered alongside the ship, but they allege that the whole of the missing timber was lost by peril of the sea whilst being loaded from alongside on to the vessel, and they claim the right to give evidence of that fact. The respondents on the other hand say, "No—you cannot do that—you are estopped by the terms of the bill of lading from disputing that the full bill of lading quantity was shipped on board your vessel."

This brings me to a consideration of the terms of the bill of lading. The question of the proper construction to be put upon that document, having regard to the provisions of clause 14 of the charter-party, is the real question in the case. The bill of lading is in the usual form "shipped in good order and well conditioned by J. Nelson Smith on board the steamship *Kylestrome*." Then follows a statement of pieces and quantities as per surveyor's return. The concluding paragraph incorporates all the terms, conditions, and exceptions contained in the charter-party.

The appellants put their argument in two ways. Their first contention was that the bill of lading should be construed as an acknowledgment merely that the goods were delivered alongside. I cannot accept this argument. The language of the bill of lading is too clear to admit of any such construction. The expression "shipped on board" means and means only, in my opinion, what it says. The alternative contention is in substance this. If the bill of lading is to be treated as an acknowledgment of the receipt of the goods on board, then it does not come within the exclusive evidence clause of the charter-party at all. If the charterer had desired to bind the shipowner by that clause he should have tendered a document which dealt with the delivery of the goods alongside, and not with the receipt of the goods on board.

At this point it becomes material to consider whether any distinction can be drawn between the present case and *Lishman* v. *Christie* (*sup.*). In that case, as in this, by the terms of the charter-parties (though in different language) the cargo had to be brought to the ship at charterer's risk and expense. In that case the conclusive evidence clause was framed to cover "cargo received as stated therein." In the present case it is "quantity delivered to ship as stated therein." In that case the bill of lading contained the word "shipped" only. In the present case the words are "shipped on board." The argument in that case was, as here, that the conclusive evidence clause provided that the bill of lading should be conclusive evidence only that the goods were received as therein stated, not that they were shipped on board. In that case the charter-party contained no similar provision to that contained in the charter-party under consideration requiring the master to sign bills of lading in any particular form or for any particular quantity, but, material as such a clause may be as between as shipowner and the holder of the bill of lading, it does not, in my opinion, affect the liability of the charterer to bring the goods alongside. Under these circumstances I am unable to draw any sufficient distinction between the facts

in *Lishman* v. *Christie* (*sup.*) and those in the present case to justify the conclusion that the decision in that case does not apply also to the present.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Trinder, Capron,* and *Co.*

Solicitors for the defendants, *William A. Crump* and *Co.*

Thursday, May 11, 1916.

(Before Lord READING, C.J., WARRINGTON, L.J., and LUSH, J.)

WULFSBERG AND CO. *v.* OWNERS OF STEAMSHIP WEARDALE. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Withdrawal by owners before expiration of term—Subsequent issue of writ for hire due—Whether withdrawal waived.

A vessel was chartered in June 1914 *for five months at so much per month, payable in advance. On the* 13*th Aug., a month's hire being due and unpaid, the owners telegraphed to the charterers, saying that they withdrew the steamer pursuant to a clause in the charter-party. Half an hour later they issued a writ in an action to recover the month's hire. Arbitrators found as a fact that the ship was properly withdrawn, but they reserved for the opinion of the court the question whether the notice of withdrawal, if properly given, was withdrawn or waived by the subsequent conduct of the owners in issuing the writ.*

Held, on the facts, that notice of the withdrawal of the steamer from the service of the charterers had been properly given by the owners, and that the subsequent conduct of the owners did not constitute a waiver of that notice.

Decision of Bailhache, J. (*reported* ante, *p.* 296; 114 *L. T. Rep.* 371) *affirmed.*

APPEAL by the plaintiffs from the decision of Bailhache, J. (reported *ante,* p. 296; 114 L. T. Rep. 371) on an award stated in the form of a special case.

By a time charter dated the 19th May 1914 Messrs. Wulfsberg and Co. (hereinafter referred to as the charterers) chartered the steamship *Weardale* to be employed in, amongst other places, the Baltic, at the rate at 690*l.* per calendar month, for a period of about five months as from the 1st June 1914.

On the 3rd July the vessel was sub-chartered for a voyage to Archangel with a cargo of wood pulp, and on the 23rd July she sailed on this voyage, losing a propeller blade by the way.

On the 3rd Aug. loading was commenced.

On the 4th Aug. war broke out between the United Kingdom and Germany, the loading being stopped on that day by order of the harbour master.

On the 5th Aug. the owners wired to the master not to sail, but loading was resumed on the 6th Aug. and again stopped on the 8th Aug., on which day a month's hire in advance became due.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Loading was continued for a short time on the 10th Aug., stopped, resumed again on the 15th Aug., and, after various interruptions, was finally completed on the 26th Aug.

On the 27th Aug. the vessel sailed for home and was injured in the North Sea, arriving in tow at Aberdeen on the 15th Sept. and at Hartlepool on the 30th Sept.

On the 13th Aug, the hire being still unpaid, the owners telegraphed to say that in consequence they withdrew the steamer under a power enabling them so to do contained in clause 5 of the charter-party.

Half an hour after the telegram was received they issued a writ in an action to recover the month's hire, which was payable in advance.

On the 25th Aug. the charterers paid the hire claimed in the action.

Arbitrators, to whom questions in dispute were referred, found that the owners did in fact withdraw the steamer from the service of the charterers as from the date of the notice of the 13th Aug., and reserved for the opinion of the court the question whether the notice of withdrawal, if properly given on the 13th Aug., was withdrawn or waived by the subsequent conduct of the owners in issuing a writ.

The following findings of the arbitrators are material to this report:

We find as follows: . . . (*d*) That the owners did in fact withdraw the steamer from the service of the charterers from the date of their said notice of the 13th Aug. 1914. (*e*) That the steamer completed her voyage from Archangel to West Hartlepool and delivered the sub-charterer's cargo at the last-named port, and the owners collected the freights thereon, and that, while not admitting that they were liable to account to the charterers for the amount of the said freight, the owners have in fact accounted to the charterers for the same without prejudice to their rights and to the charter-party. (*f*) That the owners have not, in issuing the said writ or by receiving payment of the hire money thereunder, or by completing the said voyage and collecting the freight thereunder, or by accounting for the said freight in the circumstances aforesaid to the charterers or otherwise waived or abandoned their notice of withdrawal of the said steamer.

By clause 26 of the award the arbitrators found as a fact that the solicitor's telegram of the 13th Aug., which reached the owners before the writ in the action was issued, was in fact a withdrawal of the steamer.

Bailhache, J. held that in the circumstances of the case the notice of withdrawal had been properly given, and that it had not been withdrawn by the subsequent conduct of the owners.

The plaintiffs appealed.

Roche, K.C. and *Whitehead* for the appellants.

Leck, K.C. and *R. A. Wright* for the respondents.

The following authorities were cited:

Croft v. *Lumley,* 6 H. L. Cas. 672;
Dendy v. *Nicholl,* 4 C. B. N. S. 376;
Williams Brothers v. *E. T. Agius Limited,* 110 L. T. Rep. 865; (1910) A. C. 510.

Lord READING, C.J.—This is an appeal from the judgment of Bailhache, J. in a case that came before him in the form of a special case stated by arbitrators. The dispute between the parties

arose under a charter in reference to the steamship *Weardale*. Messrs. Wulfsberg and Co. became the charterers, and the question in the case was whether the steamer was rightly withdrawn, in accordance with the terms of the agreement between the parties, from the service of the time charterers in the month of Aug. 1914. The facts are stated in the case, and I do not propose to repeat them, except very briefly, for the purposes of making plain the actual dispute between the parties.

The charter was in operation at the time of the declaration of war at the end of July, and also on the 4th Aug. when war was declared between Great Britain and Germany. The vessel was at Archangel. She had proceeded there, and was going to load, under a sub-charter which had been made in July, a cargo to be carried from Archangel to Aberdeen.

She had started loading on the 3rd Aug., and on the 8th Aug. a month's hire became due under the charter-party. Payment was to be made monthly in advance, and in default of payment the owners were to have the opportunity of withdrawing the steamer from the service of the charterers without prejudice to any claim which the owners might have upon the charterers. According to the charter, on the 8th Aug. 1914 390*l.* became payable, representing the freight or hire for one month running from the 8th Aug. to the 8th Sept. The vessel continued to load from the 8th Aug. until the 13th Aug., when disputes arose with regard to the vessel.

It is unnecessary to go into them in any detail. The consequence was that the hire was not in fact paid. Thereupon the owners on the 13th Aug. claimed the right under clause 5 of the charter-party to withdraw the steamer from the service of the charterers, and gave notice to that effect on the 13th Aug. The owners withdrew the steamer under the power obtained under clause 5 of the charter. Then, one or two hours after this notice was given by the owners to the charterers, a writ was issued by the owners claiming payment of one month's hire from the 8th Aug. to the 8th Sept.

On the 14th Aug. the owners telegraphed to the British Consul at St. Petersburg, giving him instructions to wire the British Consul at Archangel that he on his part was to instruct the master of the *Weardale* that if loading had not commenced the vessel was to sail forthwith for Barry Roads, and that if loading had been partially done then she was to complete the loading and sail for her destination—that was Aberdeen—under the sub-charter. And then he adds: "Ship withdrawn time charter; non-payment of hire."

The effect of that telegram was, of course, communicated to the master of the ship, who received it on the 19th Aug. On a later date the vessel sailed and arrived in this country, and, in fact, discharged at some time after the 8th Sept.; at any rate, she was completely discharged on some day apparently about the end of September. Upon that it is said on behalf of the charterers that the notice of withdrawal of the ship was, in fact, of no value for the purpose of the matter being determined by arbitration, inasmuch as, however good it might be at the time when it was given, it was waived or abandoned by the issue of the writ and the completion of the loading of the vessel and the sailing of the vessel for her destination under the sub-charter.

The argument addressed to us was that under these circumstances, on these facts, the arbitrators were bound to find as a matter of law that the notice of the withdrawal had been abandoned, and that the only point before us, and the only point before the learned judge, was whether on these facts the arbitrators or the tribunal as a matter of law must come to the conclusion that the notice of withdrawal had been waived or abandoned. It is not enough for Mr. Roche to persuade us that there was evidence upon which it would have been open to the tribunal, in determining the issue of fact, to conclude that there was a waiver or abandonment of the withdrawal of the ship by reason of these facts.

It is a question of intention to be decided according to the facts presented to the court. In this case I cannot accept the contention that the facts relied upon by the appellants do afford conclusive evidence. There is no appeal from the decision, unless the finding of fact can be changed into a finding of law.

I have already stated that the contention of Mr. Roche is, in my opinion, not supported by the evidence, and I do not think that the cases of *Dendy* v. *Nicholl* (*sup.*) and *Croft* v. *Lumley* (*sup.*) support the argument put forward on behalf of the appellants. I agree with the views expressed by Bailhache, J., that the findings are findings of fact against Mr. Roche's client, and, therefore, are not appealable.

It is wrong to say that on the facts which he put before us the court, in determining the facts, must as a matter of law conclude that there had been a waiver. It seems to me that the issue of the writ in itself amounted to nothing more than a claim put forward for payment of the rent or hire which was due on the 8th Aug. There is no authority which affords me conclusive evidence that the issue of that writ for the purpose of enforcing a claim then in existence amounted to a waiver of the right of withdrawal, which the person issuing the writ was at that moment asserting, and which he continued to assert by the telegram which he sent on the next day.

So far as this is evidence of intention it is quite plain that he was asserting that there had been a withdrawal. Clause 12 of the charter states that the captain was to be put under the orders of the charterers, and when the notice of withdrawal was given the owners immediately gave instructions to the captain that he resumed his employment under them. That is the explanation of the telegram of the 14th Aug. It is consistent with the case that they had withdrawn the charter; it is inconsistent with the case that the charter had not been withdrawn, or that the notice of withdrawal had been waived

It was pointed out that loading of the cargo was continued. The captain was entitled to do that and to keep the freight as he did for carriage to Aberdeen, and it seems to me to be quite immaterial that it happens that the port is the port of destination in the sub-charter. Therefore, I think there was evidence on which the arbitrators could find as

they did find, and there is nothing to disturb their findings. We are bound by the case as stated by them. Bailhache, J.'s decision was right, and the appeal must be dismissed.

WARRINGTON, L.J.—I agree, and have nothing to add.

LUSH, J.—I agree.

I think that the terms of the notice which was given to the charterers on the 13th Aug. established that the owners had as from that date withdrawn the steamer from the service of the charterers. The contract having been once determined, no subsequent recognition can possibly revive it; in fact there is no evidence of any such recognition. In my opinion the charterers have failed to discharge the burden which was upon them. The result is that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Winn-Jones* and *Co.*

Solicitors for the respondents, *Botterell* and *Roche.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 5, 6, *and* 17, 1916.

(Before BAILHACHE, J.)

PHOSPHATE MINING COMPANY AND CORONET PHOSPHATE COMPANY *v.* RANKIN, GILMOUR, AND CO. (*a*)

Contract—Provision of ship—Exception of "public enemies and restraint of princes"—Outbreak of war—Failure to provide ship—Liability of contractor.

In 1913 *the defendants, steamship owners, contracted to provide a steamship (to be nominated) in Aug.-Sept.* 1915 *to carry phosphate from Florida to Delfzyl, in Holland, up the river Ems. The exceptions clause included "public enemies and restraint of princes." In Aug.-Sept.* 1915, *during the continuance of a state of war between Great Britain and Germany, the Germans had assumed full control of the fairways of the Ems. All vessels bound for Delfzyl were boarded by them and compelled to take a German pilot. The ship's papers were overhauled or liable to be overhauled, and the channel was mined. Freights had risen since* 1913 *from about* 13*s.* 6*d.* *to three or four times as much. The defendants in these circumstances refused to tender a vessel, maintaining that they need only nominate one of their own vessels and, having done so, to rely upon the exceptions clause in the contract as they were prevented from performing the contract by "public enemies and restraint of princes." The plaintiffs, in an action for breach of the contract, argued that the exceptions clause did not come into operation until a steamer was nominated.*

Held, that as the defendants contracted not as owners, but as contractors, it was not sufficient for them merely to nominate one of their own vessels and not to try to procure another steamer in the market; but that, on the other hand, it was not necessary that a steamer should have been nominated for the exceptions clause to come into operation, since such a conclusion would leave the defendants without excuse if the operation of the exception were such that it was impossible to procure any steamer which could, or would, undertake the voyage.

The German control of the Ems shut out from the market not only the defendants' own steamers, but also the ships of Great Britain and her allies, amounting probably to more than three-quarters of the tonnage available but for the excepted peril. Neutral shipowners would have been very reluctant of getting their ships under German control when proceeding under an English charter-party, and the cargo would probably have been seized by the Germans with the result that no freight would have been earned. The rate of insurance (if insurance had been possible) would have been extremely high. The defendants would have had to prepay the freight, or pay the premium, or run the risk themselves, or to have paid the shipowner such a freight as would have enabled him to cover the risk or induce him to run it.

Held, that, even leaving out of consideration the general and enormous rise in freights, it would be wholly unreasonable to expect the defendants to pay large sums of money, or to run big risks, or both, in order to deprive themselves of the protection of an exception inserted in the contract on their behalf.

Dictum of Esher, M.R. in Crawford and Rowat *v.* Wilson, Sons, and Co. (1 *Com. Cas.* 277, *at* p. 280) *applied.*

COMMERCIAL COURT.

Action tried by Bailhache, J.

The facts appear sufficiently from the headnote and his Lordship's judgment.

A. A. Roche, K.C. and *H. F. Andorsen* for the plaintiffs.

Leslie Scott, K.C. and *W. N. Raeburn* for the defendants.

Roche, K.C. in reply.

April 17.—BAILHACHE, J. read the following judgment:—The defendants, who are steamship owners, made two contracts, both dated the 3rd Nov. 1913, one with the plaintiffs the Phosphate Mining Company and one with the plaintiffs the Coronet Phosphate Company. Each contract was in charter-party form, and each was to provide a steamship to be afterwards named to carry 1500 tons of phosphate from Tampa, in Florida, to Delfzyl, a Dutch port situated some distance up the river Ems. The loading date was to be between the 1st Aug. and the 20th Sept. 1915. The freight was in each case 13*s.* 6*d.* per ton. Both charter-parties were in the same form, and contained an exception clause. The material words to be considered are "public enemies and restraint of princes." The facts in both cases are precisely alike, and I shall treat the questions to be solved as though there was only one plaintiff and one charter-party.

On the 6th Aug. 1915, in answer to an inquiry as to the probable date of readiness to load, the defendants stated that they did not intend to tender a vessel, alleging that the state of war existing between this country and Germany made

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

it both illegal and impossible for them safely to carry and deliver a cargo destined for Delfzyl. Some negotiations took place between the parties with a view to some compromise or arrangement, but they led to nothing, and the plaintiffs thereupon brought this action, claiming as damages the difference between the contractual freight and the market rate of 43*s.* 6*d.* per ton.

In order to appreciate the defence and the points at issue between the parties, it is necessary to state a few facts. The German fortress of Borkum is at the mouth of the Ems, and the Germans had before Aug. 1915 assumed full control of the fairway of the Ems. All vessels bound for Delfzyl were boarded by them and compelled to take a German pilot. The ship's papers were overhauled, or liable to be overhauled, and the channel was mined. Freights to Rotterdam had risen to about 43*s.* 6*d.*, the figure mentioned in the points of claim. In normal times freights to Delfzyl are from 6*d.* to 1*s.* per ton higher than to Rotterdam. On the 8th Sept. 1915 the plaintiffs' solicitors wrote to the defendants: "Our clients have already made some inquiries as to the rate at which other vessels might be obtained, and the best indication they have so far got is that a steamship was recently fixed from Tampa to Rotterdam for phosphates at 42*s.* 6d., and that the rate to Delfzyl for these parcels will certainly be more, and probably very considerably more than the rate to Rotterdam."

There was no evidence before me that any shipowner had quoted a rate to Delfzyl, but I have no doubt that had he done so the extra rate as compared with Rotterdam would have borne no relation at all to the ordinary excess of 6*d.* to 1*s.* per ton for reasons I shall hereafter state.

In August and September the plaintiffs sold some 10,000 tons of phosphate for Holland, but the Dutch port was Rotterdam or Amsterdam. They sold none for Delfzyl.

In the six months from the 1st Feb. to 1st July 1914 a considerable number of vessels had entered Delfzyl from American ports with cargoes, or part cargoes, of saltpetre, wood, and phosphate, and, of course, of all nationalities and some of large size. During the whole of 1915 the only vessel from an American port was the steamship *Mizar*, which arrived at Delfzyl on the 31st Aug. 1915, with a cargo of timber from a Gulf port. The only other cargoes taken to Delfzyl during this period were cargoes of timber, with the exception of three cargoes of iron ore, which latter were all carried in German bottoms.

I cannot reconcile the list furnished by the plaintiffs with those of the defendants, but it is evident from the plaintiffs' list, signed by the lockmaster at Delfzyl, that the neutral steamers entering the port between Sept. and Dec. 1915 were small Swedish boats from Scandinavian ports, and they all carried wood cargoes. During the same period steamers of all nationalities, except German and Austrian, were going freely to Rotterdam.

I shall have to mention some other facts later on, but the foregoing are sufficient to render the defence intelligible. Mr. Leslie Scott for the defendants raised three points: (1) That the defendants were entitled to nominate one of their own steamers for the carriage of the phosphate, and, having done so, to rely on the exception clause in the charter-party. (2) That the defendants were prevented from performing this contract by "public enemies and restraint of princes." (3) That it would have been illegal for them to charter a neutral ship, even if one could have been found, as she would have had to pay pilotage dues to a German pilot, and it would have been illegal for the defendants to make a contract involving such consequences.

Mr. Roche, for the plaintiffs, denied that any of these points was sound, and argued that the exceptions clause did not come into operation until a boat was nominated and it could be said that the boat so named was prevented from performing the voyage by the exception relied on.

As to the first point, the defendants own a fleet of steamers known as the Saint Line. They run from Galveston to Bremen, and their object in making this freight contract was to obtain some weight cargo for their steamers, and they intended to fill up with cotton. Unfortunately, as it turned out, they did not contract as owners, but as contractors.

I cannot accept Mr. Scott's suggestion that it was open to the defendants to nominate one of their own steamers, rely upon the exception, and do no more. Nor can I agree with Mr. Roche that the exception does not come into operation until an available steamer has been nominated. The former suggestion puts the exception too high, the latter too low. The former omits to notice that the defendants contracted not as owners, but as contractors; the latter would leave the defendants without excuse if the operation of the exception were such that it was impossible to procure any steamer which could, or would, undertake the voyage.

Mr. Roche put the same point in another way, and argued that as the defendants refused to nominate any steamer, even one of their own, they could not rely on the exception. The defendants were not, in my opinion, bound to go through the empty form of nominating an impossible steamer.

I pass to the next point. Were the defendants prevented from procuring a steamer to perform the contractual voyage as they allege? Now, if Delfzyl had been an open port like Rotterdam, they clearly would not have been prevented. They could have carried it in one of their own steamers, and the rise in freight would have been irrelevant, as I had recently occasion to point out.

Moreover, although freights to Delfzyl would no doubt have risen proportionately, and would have been some three-fourths more than to Rotterdam, yet the total rise would in such case be merely an instance of the general rise due to the war. It would not, *ex hypothesi*, be due to the German control of the Ems, and would afford the defendants no excuse.

Delfzyl was not, however, an open port, and the defendants were clearly prevented by the peril relied upon from carrying out their contract in the way they had originally intended; but, having made the charter-party in question as contractors and not as owners, it is no answer to the plaintiffs' claim to say that the defendants' own steamer could not go to Delfzyl. It was clearly the defendants' duty to seek other steamers if they could be found, and to do everything that could reasonably be required of them to overcome the difficulty created by the German control of the Ems.

The limits of the endeavours which the defendants were bound to make to procure some steamer to carry the plaintiffs' phosphate are indicated by a passage in the judgment of Lord Esher in *Crawford and Rowat* v. *Wilson, Sons, and Co.* (1 Com. Cas. 277, at p. 280), which, if I may paraphrase it so as to make it applicable to the precise facts of this case, would then read thus: "If owing to an excepted peril the defendants could not provide a steamer without doing something which it was wholly unreasonable they should be called upon to do, they would be excused although by doing an unreasonable thing they might possibly have provided a steamer."

This passage from Lord Esher's judgment has lately been referred to with approval in an unreported judgment of the Divisional Court, delivered on the 12th Jan. last, in the case of *Corrie McColl and Sons* v. *Sargent and Son*, and is, I believe, the test which is now always applied by the court to the problem presented by such a case as this. The difficulty, indeed, is not in the principle, but in its application to the almost infinitely varying circumstances of each particular case.

Applying the test as laid down to this case I proceed to ask what were the special difficulties which the German control of the Ems placed in the defendants' way? First, it shut out from the market not only the defendants' own steamers but also all the ships of Great Britain and her allies—probably more than three-fourths of the tonnage of which would have been available but for the excepted peril. Second, it was explained to me by experienced brokers, and I find as a fact, that neutral shipowners would have been very shy of getting their ships within German control and having their papers subject to German overhaul if proceeding under an English charter-party. Third, the cargo was a tempting one for the Germans. They are very large buyers of phosphates in normal times, and at the relevant time had been shut off from all direct supplies for months. Fourth, if they had seized the cargo no freight would have been earned.

In view of this possibility it is doubtful if the freight could have been insured. If insurable the rate would have been high. The defendants would have had either to prepay the freight or pay the premium, or run the risk themselves, or to have paid the shipowner such a freight as would have enabled him to cover the risk or induce him to run it. It is easy to see why the plaintiffs' solicitors wrote that the freight to Delfzyl would be very considerably higher than that to Rotterdam.

Now I ask myself: Would it be reasonable or wholly unreasonable to expect the defendants to find a possible neutral shipowner willing to send his ship to Delfzyl and to pay a freight calculated on the scale which such a shipowner would, under the circumstances, require, remembering, too, that there would be little or no competition for such a venture by other shipowners? I think it would be wholly unreasonable.

I cannot see my way to hold that the defendants were bound to pay large sums of money or to run big risks or both, in order to deprive themselves of the protection of an exception inserted in the contract for their own benefit.

It is a question of degree no doubt, and the dividing line between reasonable and unreasonable steps to avoid an excepted peril will be drawn at different points by different people, but the steps which the defendants would have had to take in this case seem to me well on the unreasonable side of the line, even after leaving altogether out of account, as I agree in this case I must, the general and enormous rise in freights.

I am, indeed, prepared to go further. The evidence has satisfied me that no neutral ship could, in fact, have been procured. The plaintiffs tried the market, but got no further than an intimation that the freight would be very considerably higher than to Rotterdam. They got no offer of a steamer. The defendants did not try the market (it would have been better if they had done so), but they called brokers of experience, who assured me that no shipowner would have entertained the venture.

I accept this evidence. It entirely coincides with my view of the probabilities of the case. I can see no reason why a neutral owner besieged with offers of cargoes to ports less open to objection should have accepted a charter to Delfzyl.

The evidence is, moreover, strongly confirmed by the fact that in 1915 only one neutral ship did perform an oversea voyage to Delfzyl and that with a wood cargo. If it is said "It is all a question of money," then the point is the same as that which I have already discussed, but in an aggravated form.

I am satisfied that the defendants could not have procured a neutral steamer to have performed their contract, and that their inability to do so was due to the excepted perils of public enemies and restraints of princes.

In view of my conclusions on the second point, it is not necessary for me to express any opinion on the third point (the illegality point), and it is perhaps wiser not to do so.

I ought, perhaps, to say a word about the measure of damages. The plaintiffs claim the difference between the contract freight, 13*s.* 6*d.*, and an assumed freight to Delfzyl of 43*s.* 6*d.* They did not charter against the defendants, but cancelled their contracts with their Dutch buyers as, under the terms of those contracts, they were entitled to do. In these circumstances the true measure of damages is, I think, that adopted in the case of *Ströms Bruks Aktie Bolag* v. *Hutchison* (10 Asp. Mar. Law Cas. 138; 93 L. T. Rep. 562; (1905) A. C. 515). The difference between the two measures is probably not large in this particular case, and I do not need to go further into the question. My judgment is for the defendants with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *W. A. Crump and Son.*

Solicitors for the defendants, *Lightbound, Owen, and Co.*

Friday, May 12, 1916.

(Before ATKIN, J.)

HUMBER CONSERVANCY BOARD *v.* GRANT. (*a*)

Pilotage — Compulsory pilotage through mined area — Remuneration of pilot — Liability of shipowner.

In consequence of the war between Great Britain and Germany, certain coast defences became necessary on the east coast of England, among them being the establishment of a minefield in the Humber. The scheme of this minefield was confided to certain pilots, and the Admiralty directed that vessels using the Humber should be piloted through the minefield. The Humber Conservancy Board were requested to provide the pilots, for whose services charges were made. The defendant used the Humber for the passage of his vessels and took pilots aboard in compliance with the Admiralty order, but refused to pay pilotage fees on the ground that the regulation directing him to take pilots on board was ultra vires *the Admiralty and void.*

Held, that, apart from any statutory authority, the Admiralty had power to take the steps which they had taken, and that the defendant must pay for the pilotage services rendered to him.

COMMERCIAL COURT.

Action tried by Atkin, J.

The facts appear sufficiently from the headnote and his Lordship's judgment.

A. A. Roche, K.C. and *W. N. Raeburn* for the Humber Conservancy Board.—The Admiralty orders were issued under His Majesty's prerogative in time of war and under the Defence of the Realm Acts. The Admiralty were competent to issue those orders, which were good. The defendant has taken advantage of the services of the pilots and cannot now refuse to pay for them.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Branson* for the Crown.—The Admiralty had power to issue the order for compulsory pilotage through the minefield under the King's prerogative.

Hollis Walker, K.C. and *C. M. Knowles* for the defendant.—The orders of the Admiralty making pilotage within the areas named were *ultra vires* and void. Even if they were good, the defendant could not be compelled to pay for services which he could not avoid being rendered.

ATKIN, J.—This is an action by the plaintiffs to recover against the defendant, William Grant, of Great Grimsby, a steam trawl owner, charges for pilotage between the 28th Nov. 1914 and the 4th Jan. 1915.

The matter arises in this way. War broke out between this country and Germany on the 4th Aug. 1914. I mention that fact as one of which I am entitled to take judicial notice, and which I assume has come to the knowledge of the defendant and the persons whom he represents. Thereupon it appeared necessary to the Admiralty to take steps to protect these coasts, and in particular to protect the Humber, that being a part of the sea which enables the defendant by his trawlers to enter the port of Grimsby.

The Admiralty took certain precautions which have been made to some extent a mystery in this court, but which it is quite clear from the documents which have been read, and it was known, I have no doubt, to all the world, consisted of certain minefields in the Humber. The Admiralty, therefore, having created these defences in the Humber, the position of the navigation was that it was quite impossible that these defences should have been maintained as they were, and yet that free access should be given to the whole of the fairway to ordinary sea traffic, because our own vessels would first of all run the risk of being blown up by mines, and, secondly, if they were blown up by mines there would be the further disadvantage that they would disarrange the minefield.

Therefore, I think it is quite clear that it was essentially necessary that some provision should be made for defence, and there were only two alternatives. One was to obstruct the traffic altogether, in which case the defendant and those associated with him would not have been able to carry on their business at all, and the other was to entrust the secret of the minefield to certain persons, and to enable them to convoy vessels up the Humber through the minefields, and thereby enable navigation to be carried on. The latter was the course that was adopted.

It seems to me to be a course which was essentially necessary to be adopted, and the only course that could be adopted, and in order to carry it out Rear-Admiral Ballard, the admiral of patrols along the East Coast at this particular time, gave certain notices to the effect that all vessels would be required to take a pilot at a point which was outside the jurisdiction of the plaintiffs, who would pilot vessels through the danger zone and then they were at liberty to drop the pilot at a point that was mentioned.

The defendant's vessels were, in fact, piloted through this zone, and the defendant was thereby enabled to carry on his business. He says that these orders made by the admiral were *ultra vires*. I have not quite been able to follow how far it is said these orders were *ultra vires*. At one time the argument seemed to go to this length, that it was *ultra vires* to defend the Humber against the Germans at all; but I do not think that is the effect of the legal argument, and I do not think that Mr. Walker meant to put it quite as high as that.

It was further contended that so much of the orders as compelled the defendant to take a pilot was *ultra vires*, and that certainly so much of the orders as compelled him to pay for a pilot was *ultra vires*. I fancy the real point in the case is an objection by the defendant to pay for the pilots. We have had references to the authorities that entitled the admiral to impose this obligation upon the owners of vessels. It appears to me that it is an essential part of the powers of any Government, civilised or uncivilised, that it should have, at any rate, the means of ordering such measures as are necessary in time of war to protect its realm against enemies, and I think it is quite plain that the Crown in this country has, in time of war, the power, in connection with naval and military operations, to take such naval or military steps as are necessary for the defence of the realm.

It appears to me that there was ample power in the Admiralty to take all the steps that were taken in this case without needing any statutory

(*a*) Reported by LEONARD O. THOMAS, Esq., Barrister-at-Law.

authority at all. The steps taken seem to me to be steps which were essential for the protection of the realm as naval measures of precaution, and I think they necessarily involved the doing of that which was done—namely, the provision that the traffic of His Majesty's subjects should be continued as far as was reasonably possible, and in order to enable that to be done no other steps appeared possible except to provide that they should be guided through the danger zone by people whom it was thought might be safely trusted with the knowledge of the particular defences. It appears to me also to follow that if there was power to make these provisions there was power to say you must employ these particular people, and if you are going to employ them you must pay them. That is the extent of the orders which were made in this case, and I think, speaking from that plain point of view, every step which was taken here was well within the authority and jurisdiction of the person who in fact made these orders and issued these notices.

What really has been done in this case is that nobody has been compelled to take a pilot in the sense that when a vessel has arrived off the Humber a pilot was put on board her, but in fact people were told that if they wanted to arrive at their destination and did not want to be blown up, they must take a pilot, and they must not go to their destination without, because if they did, not only was there a peril to their vessel, which was in itself a matter of regard to the naval authorities, but they might, in the event of an accident, disarrange the mines. The defendant seems to have accepted that position, as he was obviously bound to do. I think, quite apart from any question of the validity of the orders made, that, having availed himself of the services of the pilots which enabled his ships to arrive at their destination safely, the defendant ought to pay for the services he has used.

But I also think that the orders made were made with complete power and complete jurisdiction, and that no objection can be made to them on the ground that they are *ultra vires*. I think, therefore, it is unnecessary to consider the question whether the orders that were made were valid under the regulations for the defence of the realm. All I need say is that I am by no means satisfied that these orders were not justified under the first set of regulations that were made, and also under the regulations which were made on the 28th Nov., but I need not discuss these matters because I am clearly of opinion that the orders made by the admiral were competent orders for him to make without any statutory authority at all, and in these circumstances the defendant is liable to pay reasonable pilotage charges in respect of the services which he has received.

I have only to determine the question of liability. Any question as to the particular vessels will have to be adjusted between the parties, and I understand there will be no difficulty in doing that. There will be judgment for the plaintiffs for an amount to be agreed, with costs on the High Court scale.

Judgment for plaintiffs.

Solicitors: for the plaintiffs, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull; for the defendant, *Page* and *Scorer*, for *H. K. Bloomer*, Grimsby; for the Crown, *Treasury Solicitor.*

May 15 *and* 18, 1916.

(Before ATKIN, J.)

STEIN FORBES AND CO. *v.* COUNTY TAILORING COMPANY, (*a*)

Sale of goods—Contract—Shipments — Payment against documents on arrival of steamer—Refusal of buyers to take up documents—Breach of contract—Competency of sellers to recover price of goods—Sale of Goods Act 1893 (56 *&* 57 *Vict.* c. 71), *ss.* 16, 17, 19, 49 (2).

By a contract of sale the defendants agreed to buy from the plaintiffs certain shipments of sheepskins. Payment was to be "net cash against documents on arrival of the steamer." On the arrival of the third shipment the defendants refused to take up the documents. In an action by the plaintiffs for breach of contract, the learned judge was of opinion that the defendants had in these circumstances been guilty of breach of contract. The plaintiffs in the action claimed the price of the goods, and on this point:

Held, that the price of the goods was not recoverable since it was not a sum payable to the plaintiffs on a day certain irrespective of delivery, and since the property in the goods had not passed to the defendants.

COMMERCIAL COURT.

Action tried by Atkin, J.

By a c.i.f. contract dated the 18th Sept. 1915 the plaintiffs agreed to deliver and the defendants to buy three cargoes of sheepskins to be shipped from New York to Liverpool. Payment was to be net cash against documents on arrival of the steamer. Two shipments were duly delivered and paid for and no disputes arose thereon. The third shipment, consisting of some 2000 skins, arrived at Liverpool on the 29th Oct. 1915, but the defendants refused to take up the documents.

The plaintiffs thereupon instituted these proceedings for breach of contract, claiming the price of the goods. The defendants denied the alleged breach, and contended that the price of the goods was not recoverable by the plaintiffs.

R. A. Wright for the plaintiffs.

Greer, K.C. and *Elkin* for the defendants.

The arguments appear sufficiently from the judgment of the learned judge.

May 18.—ATKIN, J. read the following judgment:—

In this case the plaintiffs are suing the defendants to recover the price of six bales of sheepskins agreed to be sold to the defendants under a contract dated the 17th Sept. 1915. The contract note is as follows. It is dated the 17th Sept. 1915, London.

The County Tailoring Company Limited, 1 Hoxton-square, London, N.—We beg to confirm having this day sold to you the undermentioned goods of our usual standard assortment and quality, mark: About 12,000 dressed sheepskins for prompt shipment, and about 33,000 ditto for shipment as quickly as possible (September, if possible) at 8*d.* per square foot, c.i.f. London or Liverpool. Payment: Net cash against documents on arrival of the steamer.

Then there is an arbitration clause. That is signed by the County Tailoring Company Limited.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The goods were shipped by three different steamers, in lots of ninety-four bales per steamship *Devonian*, 217 bales per steamship *Bohemian*, and six bales per steamship *Den of Glamis*. The first two lots were taken up and paid for by the defendants after some little delay; the question here arises as to the third lot.

The *Devonian* arrived at Liverpool on the 5th Oct., and the goods were paid for about the 11th Oct. The *Bohemian* arrived on the 13th Oct, and the goods were paid for about the 29th Oct. The *Den of Glamis* arrived on the 25th Oct., and the defendants have not taken up the documents. They allege that the documents were never tendered to them, and that they were not informed of the vessel's arrival until the 8th Nov., which date they say was outside the contract date for delivery, which provided for net cash against documents on arrival of steamer.

I am satisfied that the defendants were informed by telephone of the arrival of the steamer immediately after she arrived. It was said, however, that the plaintiffs should have tendered the documents to the defendants at the defendants' office. In the absence of any express stipulation to this effect, or some trade usage or course of business between the parties importing such a stipulation, I doubt whether the obligation on the vendor exists.

Sect. 29, sub-sect. 1, of the Sale of Goods Act 1893 appears to provide the contrary. That provides:

> Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence.

Then there is a proviso which I think is irrelevant. But if such an obligation would have existed normally I am satisfied that the defendants by their conduct absolved the plaintiffs of any such duty.

In the other two shipments the defendants desired delay in taking up the documents and expressly promised to come to the plaintiffs' place of business to take up the documents and did in fact take them up there. In the present case I am satisfied that the defendants made the same promises over the telephone. I think this objection fails.

It was further contended that the contract provides for only two shipments and not for three. I do not think that this is the true construction of the agreement.

Then it was said that the shipments arrived too late. There is no doubt that the goods were bought by the defendants to perform a contract with the Italian Government and this the plaintiffs knew; but they had no knowledge of any limits of time in such contract; and I think they performed the contract with reasonable dispatch and without departing from its terms.

Last of all it was said that the contract was for about 33,000 sheepskins, and that the contract was performed by the delivery of the first two shipments, amounting to 31,000. I cannot accept this view. In the absence of any trade usage to that effect I do not think that the first two shipments did amount to a fulfilment of the contract. The defendants received an invoice on the 26th Oct. for the further 2000 skins, and they made repeated promises up to and including December to take them up and pay for them. There seems to me no substance in this point.

The result is that I think the defendants have broken the contract. The material question that remains is as to the plaintiffs' remedy. The plaintiffs have sued only for the price. If they are not entitled to the price they ask for leave to amend and claim damages. I intimated that I should give leave, but the defendants intimated that they were not prepared with evidence on that footing, and should require an adjournment if such was the relief that the plaintiffs were entitled to. I think the defendants' request not unreasonable, and, therefore, there must be an adjournment unless I come to the conclusion that the plaintiffs are entitled to recover the price.

Mr. Wright contended that the plaintiffs were entitled to the price, even though the property in the goods had not passed to the defendants, on the ground that here was a sum certain payable at a fixed time and that, as the defendants had prevented delivery, they could not rely upon non-delivery as a condition precedent.

I do not think that he can establish his claim on that footing. This is not the case of a day being appointed for payment of money and the day happening before the thing which is the consideration for the payment. In such a case, which falls within one of the well-known rules in the notes to *Portage* v. *Cole* (1 William Saunders, 5th edit., p. 320), the money can be claimed before performance. Such a case is provided for by the Sale of Goods Act 1893, s. 49, sub-s. 2:

> Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

But this is not a case where the price is payable on a day certain irrespective of delivery. On the contrary, it is payable expressly against delivery. I think, therefore, no action will lie for the price on this ground.

But it was further said by Mr. Wright that the property in fact had passed to the defendants and that upon the plaintiffs being willing to transfer possession they were entitled to the price as in the case of goods bargained and sold. I think that there are many objections to this view. At what time property passes under a contract of sale depends upon the intention of the parties. Sect. 16 of the Sale of Goods Act 1893 says:

> Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Then sect. 17 (1) says:

> Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

The Act provides certain rules for ascertaining the intention of the parties unless a different inten-

tion appears. Many cases have dealt with the problem as to when property passes in contracts of sale on c.i.f. terms. Mr. Wright contends that as soon as the goods are unconditionally appropriated to the contract and the seller holds the documents at the disposal of the buyer the property passes. The value of that proposition depends on the meaning of unconditionally.

I doubt whether goods are appropriated unconditionally if the seller does not mean the buyer to have them unless he pays for them. But it seems to me impossible to lay down a general rule applicable to all c.i.f. contracts. The overruling question is: Does the intention of the parties appear in the course of the making and the fulfilment of the contract? By sect. 19 of the Sale of Goods Act 1893, sub ss. 1, 2, and 3, it is provided as follows:

(1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal. (3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

In the present case, the goods were shipped at New York on behalf of the plaintiffs, and the bill of lading was taken to the order of the banking firm who financed the transaction for the plaintiffs. On arrival of the ship the plaintiffs had to take up the bill of lading from the bankers; and, inasmuch as the defendants would not take up the documents, the plaintiffs had to take delivery of the goods from the ship. It seems quite plain that the seller or his banker reserved the *jus disponendi*.

It was said that the property passed to the buyer on shipment, but the seller only reserved his unpaid vendor's lien. That view seems to me inconsistent with the section I have read and with every business probability. In the majority of cases where the seller takes the bill of lading to his order the goods come forward through a banker, and it seems to me very improbable that the seller means to give to the banker or the banker to take a document representing goods the property in which is in some third person, the only security given being a right to retain possession till the fine is paid. I think the intention is to keep the property in the seller till payment.

Then it is said, whatever the original intention may be, at any rate the property passes when there is an appropriation of specific goods, as by the invoice in this case, and a tender or a willingness to tender. It would be a remarkable intention in a commercial man to keep the property on shipment in order to secure payment, but yet in taking the necessary steps to procure payment by appropriation and tender to part with the property before payment is in fact made. I think that in such cases the ordinary inference to be drawn is that the seller does not intend to part with the property, except against payment. It seems to me that this view is confirmed by the statutory provisions in sect. 19, sub-sect. 3 which I have read.

Unless the property has passed I do not think that in this case the plaintiffs can sue for the price; and in my opinion it has not passed. The plaintiffs' claim, therefore, is for damages. The case will be adjourned to enable the defendants to deal with the question of damages in case the parties cannot agree. There will be liberty to apply, and I shall reserve all questions of costs.

Case adjourned.

Solicitors for the plaintiffs, *Gard, Lyell,* and *Co.*

Solicitors for the defendants, *A. De Frece* and *Co.*

Monday, May 29, 1916.

(Before BAILHACHE, J.)

BARNETT AND CO. *v.* JAVERI AND CO. (*a*)

Sale of goods—Contract—"Subject to safe arrival"—Failure to deliver—Goods never in seller's hands—Liability of seller.

J. contracted to deliver to B. goods at a certain price ex Liverpool "subject to safe arrival." The goods were never delivered because J. never had them to ship. In an action for breach of contract where J. sought to protect himself by the clause "subject to safe arrival" on the ground that the goods had never "arrived" safely or at all:

Held, that the clause referred to the danger to which the goods must be subjected in course of transit and protected J. if any accident occurred during transit, but that J. was under an obligation to ship the goods, and judgment must therefore be entered for B.

COMMERCIAL COURT.

Action tried by Bailhache, J.

By a contract in writing dated the 24th Sept. 1915 the plaintiffs agreed to buy and the defendants to deliver four tons of hematine crystals at 2*s.* per lb. ex Liverpool. The contract provided that the defendants "booked for the plaintiffs" about four tons of hematine crystals at 2*s.* per lb. ex Liverpool, net cash against invoice and subject to safe arrival; delivery about three to four weeks." The goods were never delivered, and it subsequently appeared that the defendants had never had them to ship. The plaintiffs thereupon brought this action alleging breach of contract and claiming damages for loss of profits and a declaration that they were entitled to be indemnified in respect of their liability to a sub-seller.

Maurice Hill, K.C. and *Harold Morris* for the plaintiffs.—The provision that the contract was to be "subject to safe arrival" of the goods does not avail the defendants in this action. This

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

phrase protects goods in transit, but there must be goods in existence for it to operate upon.

Langdon, K.C. and *T. B. Leigh* for the defendants.—There has been no breach of contract here. The defendants are protected by the words "subject to safe arrival" in the contract. The goods did not arrive safely or at all, and the contract therefore never operated.

BAILHACHE, J.—In this case I have come to a clear conclusion in my own mind as to the construction of the contract, and I will deliver judgment straight away.

The action is by Messrs. Barnett and Co. against Messrs. Javeri and Co., and it relates to the sale of hematine crystals. Hematine crystals apparently are some products of logwood, and they are used for dyeing purposes. The matter arises on a contract, the terms of which are sufficiently set out in the letter of Messrs. Javeri and Co. to Messrs. Barnett and Co. of the 24th Sept. 1915. That letter is in these terms:

> With reference to our conversation over the telephone this afternoon, we have pleasure in booking for you about four tons of hematine crystals at 2*s.* per lb. ex Liverpool, net cash against invoice, and subject to safe arrival; delivery about three to four weeks.

The point and the whole difficulty of the case turns upon the meaning of the words "subject to safe arrival."

Messrs. Javeri and Co. at this time had made a contract with a Mr. Whittle for the delivery to them of four tons of hematine crystals at 1s. 9d. per lb. I may assume for the purpose of this case that they had made such a firm contract. I am aware that there may be a difference of opinion about that which may have to be dealt with hereafter. No hematine crystals have arrived. We know from Mr. Whittle's evidence that crystals which he may have sold to Messrs. Javeri he expected to come from Alexandria; that they had not come from Alexandria in the first instance, but that these were a surplus lot to be sent back from Alexandria. As a matter of fact, these crystals come either from Jamaica or from America.

In this particular instance probably it was expected by Messrs. Barnett and Co. that they were coming from Jamaica. Various excuses were made for non-delivery, but there is nothing in the excuses that were, in fact, made, and I need not trouble to go into them. One was that they could not get vessels from Jamaica, which was untrue, and another was that there was an embargo on the export of these crystals from Jamaica, which was incorrect. Ultimately, on the 19th Jan. 1916, Messrs. Javeri and Co., finding it was quite impossible to get these crystals, repudiated the contract, stating that they could not get them. That repudiation was accepted a few days afterwards, and upon it this action was brought.

The whole question turns upon the construction of the letter of the 24th Sept. 1915. The words "subject to safe arrival" are new words now in a contract of this description. Years ago "subject to safe arrival" or words similar, such as "subject to arrive," and expressions of that kind, were very common indeed, but they have dropped out of modern contracts and have only been re-introduced since the beginning of the war.

The question, therefore, is: What do these words mean? Some evidence was given that there is, by custom among merchants, a customary meaning to be attached to these words, and that these words according to that customary meaning mean that the contract is off if the goods, the subject-matter of the contract, are lost in the course of transit, and that the words refer entirely to accidental loss, fortuitous loss through war, or perhaps by sea perils, in the course of transit.

I am not quite sure that the evidence was strictly admissible. I rather think that the construction of the contract is for me. It is not suggested that the words have any particular trade meaning, and I have really to give effect to what I think is their natural meaning, as I find them in a contract of this description. I only mention the fact that there was evidence to this effect, and I proceed to consider the words and the construction of the contract.

In the old days in cases where this matter has been debated the words in the contract have always referred to the arrival of a particular named steamer, and, speaking generally, the question has turned upon whether there was, or was not, to be found in the terms of the contract a warranty that the goods, the subject-matter of the contract, were in fact on board a particular steamer. Wherever there was such a warranty the vendor was to be held to be liable to deliver or pay damages for failure to deliver; where there was not a warranty the vendor succeeded, and the buyer failed to get either his goods or his damages. It seems to me there is a great deal of difference, a fundamental difference, between contracts which referred to the arrival of a particular steamer, and an indefinite contract of this description, which refers to no particular steamer at all, but merely relates to the safe arrival of the goods.

Messrs. Javeri and Co. have definitely contracted in this case that they will sell four tons of hematine crystals at a particular price, ex Liverpool, to be delivered within a period of three or four weeks, but they have protected themselves against one contingency during war time. We know of the activities of the submarines and the dangers of mines, and they have protected themselves against contingencies of this nature by providing that the goods shall arrive safely.

I attach a good deal of importance to the word "safely" in this action. It seems to me to show that what the parties are dealing with in this case when speaking of arrival is the danger to which these goods are likely to be subjected in the course of transit.

This contract for the sale of four tons of hematine crystals is subject to their safe arrival. I think under this contract the seller's obligation is, at any rate, to ship the goods, to pack the goods, or to get the goods so far under his control as to put them on board some ship or other. Having shipped them, if any accident occurs in transit, then he is not liable to deliver, because the goods have not arrived safely.

It seems to me that under this contract he is clearly under the obligation to ship the goods. In order to excuse non-delivery, the seller must bring himself within the exception provided by the words "subject to safe arrival."

In my judgment the plaintiff was right in this case, and the seller is without excuse. There is

then the question as to the measure of the damages. We seem to have arrived at a common conclusion about that. The measure of the damages would, in ordinary circumstances, have been the value of the goods to the buyer at the time when they ought to have arrived in this country. They ought to have arrived long before the 19th Jan., but the buyer waited at the seller's request, the seller constantly telling him that the goods would come. The buyer, therefore, is entitled to take the measure of his damages at the date, about the 19th Jan., when the seller expressed his belief that he was unable to fulfil his contract. There is some slight difference as to the price at that date, the highest amount being put at 5*s.* 6*d.*, but, I think, if I take it at 5*s.* I shall be doing justice in the case. That will give, I think, a considerable sum, but that is the sum which the vendors have to pay.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Cosmo Cran* and *Co.*

Solicitors for the defendants, *Chester* and *Co.*, for *Brett, Hamilton*, and *Tarbolton*, Manchester.

Friday, June 2, 1916.

(Before ROWLATT, J.)

LEYLAND SHIPPING COMPANY *v.* NORWICH UNION FIRE INSURANCE SOCIETY. (*a*)

Insurance — Perils of the sea — Exception of "consequences of hostilities"—Vessel torpedoed —Removal into harbour—Transfer to outer berth —Grounding—Loss—Liability of insurer.

The plaintiffs insured their vessel, the I., *with the defendants against ordinary marine perils. The policy contained an exception clause by which "consequences of hostilities" were excepted from its scope. The* I. *was torpedoed near Havre. Although the vessel was badly damaged, the incoming water was kept under by the pumps, and she contrived to get into Havre Harbour. Bad weather during the night caused her to bump, and the harbour authorities, fearing she would sink in the inner berth which she then occupied, directed her removal to an outer berth. When the tide fell the vessel grounded, and the additional strain caused her to make more water. Subsequent tides caused further damage, and the vessel ultimately became a total loss. In an action on the policy:*

Held, that the vessel was lost as a "consequence of hostilities" and not through ordinary perils of the sea, and that, therefore, the defendants were not liable under the policy,

COMMERCIAL COURT.

Action tried by Rowlatt, J.

The facts appear sufficiently from the headnote and from his Lordship's judgment.

Leslie Scott, K.C. and *W. N. Raeburn* for the plaintiffs.—The approximate cause of the loss of the vessel was perils of the sea and not hostilities, and the defendants are consequently liable. The vessel would never have become a total loss if she had not grounded while in the outer berth.

A. A. Roche, K.C. and *R. A. Wright* for the defendants.—The vessel was lost through the entrance of water into her holds. That would not have occurred if she had not been torpedoed. Had she not been torpedoed she would never have grounded. Her loss was the natural result of the torpedoing.

Scott, K.C. replied.

ROWLATT, J.—This is an important case, and as I have made up my mind about it I shall give my judgment now. In the first place I had better give shortly my view of the facts.

This ship was torpedoed some miles from Havre, in the way of No. 1 hold, and a hole was blown in her side, which filled that hold with water. The crew left the vessel thinking that she would sink, but after a time, seeing that although she settled by the head, that settling was arrested, they returned to her, and found that there was 3ft. of water in No. 2 hold, showing that there had been some injury affecting the water-tightness of No. 2 hold. That water was kept under by the pumps. In that condition she was navigated to Havre and got alongside the Quai d'Escale. While there, on the Saturday night and on Sunday, operations were commenced with a view of lightening her and getting her into dry dock. The salvage pump was kept in the forepeak, and the ballast pump was put into No. 2 hold. There was this leak going on in No. 2 hold. It had been caused undoubtedly by the explosion, and there is some doubt as to its extent, because, although the deck log shows that the water was kept down until the vessel had been moored to the other berth, the engineer's log appears to show that the water in No. 2 hold gained rapidly on the ballast pump. At this period I have to consider the probabilities of what had happened to the bulkhead at No. 1 and No. 2 holds. The leak in the No. 2 hold may have been caused by the injury to the bulkhead making a small local hole or fracture without weakening its general stability. On the other hand, it may have been caused by an injury which did weaken the general stability. The witness, Mr. Swainston, said he thought the latter was the more probable view. I am bound to say that that is what common sense points to. There had been an explosion in No. 1 hold—an explosion, not a puncturing casualty, but a disrupting casualty—and undoubtedly the bulkhead between No. 1 hold and the peak had been very largely destroyed because the peak was full of water. Therefore I shall take it that the bulkhead between No. 1 hold and No. 2 held was seriously weakened.

That being the state in which the ship arrived at the Quai d'Escale, operations were commenced upon her. But unfortunately the weather became bad, and the salvage steamer, which had a pump on board, was ranging badly outside this ship, and the ship herself was also ranging badly against the quay. The salvage steamer's pipe was broken by the ranging, and the ropes that held her in position kept breaking. She therefore gave up pumping, and then the authorities at the port, seeing the state of affairs, did not like leaving the ship in that dangerous condition, as they thought, and ordered her off to another berth.

At this point I pause to make my conclusion so far. I think that when the vessel got to

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

the Quai d'Escale she had got to a place where she would have been in safety if she could have stayed there. But you cannot say that a ship or anything else reaches a place of safety if the tenure of the place of safety is not permitted to be long enough to ensure complete safety. My conclusion of fact, therefore, is that if she could have stayed there and pumping could have gone on, she would have been likely ultimately to get into dry dock. But that did not happen, because the authorities of the port could not let her stay there. They had her moved to the Batardeau, where she took the ground by the hold. Therefore I conclude, and I think the evidence and common sense warrant me coming to that conclusion—that the ship was ultimately lost because of two combined causes—the weakness of the bulkhead and the grounding of the ship. The ship was open in the side, the shell plating was open in the way that the sketches show me, which suggests to my mind that there was a buckling of the ship by lifting, so that she ultimately became a loss by reason of her grounding there in the condition in which she was. I have endeavoured to state what I think are the grounds on which I come to my conclusion of fact.

What is the law? *Primâ facie* the vessel was lost by perils of the sea, but then there is an exception clause covering hostilities and its consequences to be considered. The question I have to decide is whether the loss was due to a cause within the meaning of that exception, and if that exception is applicable to the explosion of the torpedo against her side. Mr. Leslie Scott says the loss is *primâ facie* due to the inrush of water; that the defendants had got to bring this within the exception, and must show that the loss inevitably flowed from the explosion. If he means by "inevitably" that in no circumstances could she have been saved, I cannot agree with him. That does not seem to me to be what is necessary. When a ship is torpedoed on the sea, she may be saved and she may not. It is not inevitable that she should sink. With good fortune she may be saved. But if she does sink it does not follow that it is approximately owing to the torpedoing. In this case I have got to consider whether she really became a loss because she was torpedoed; we have got rid of that question of inevitability. I was referred to the case of *Pink* v. *Fleming* (6 Asp. Mar. Law Cas. 554; 63 L. T. Rep. 413; 25 Q. B. Div. 436); but there, of course, it was an entirely new casualty which supervened; it was damage to the goods while the ship was being repaired. On the other hand, I was referred to the case of *Reischer v. Borwick* (71 L. T. Rep. 238; (1894) 2 Q. B. 548), to circumstances which in my judgment are not present here. I am bound to say that I have arrived at a pretty clear view of this case that the defendants are right. It seems to me that this is really a simple case in point of law. This ship was torpedoed. Every effort was made to take her to a place of safety. She never got to a place which was safe. She was never saved after being injured by the torpedo, and when you have said that you have said the whole of my judgment.

Mr. Leslie Scott says there was an intervening cause similar to that in the case of *Pink* v. *Fleming* (*sup.*). I can conceive that there were circumstances which thwarted the attempt to save the ship, but they did not constitute a new departure as a casualty. I cannot say more upon the law than that. Here you have a torpedoed ship which makes for harbour. She finds a berth where she might be saved if she could stay there. She cannot stay there, and she is moved on to a berth where she cannot be saved, and the struggles she makes there, in the course of which she receives further injury to some extent by bumping on the ground, are merely efforts to escape from that casualty in the grip of which she has been throughout. On these grounds I hold that this loss was due to the "consequences of hostilities" with the exception clause, and therefore that the defendants are not liable. I must give judgment for them with costs.

Judgment for defendants.

Solicitors: for the plaintiffs, *Batesons, Warr,* and *Wimshurst,* Liverpool; for the defendants, *W. A. Crump* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 22, 23, 26, *and* 29, 1916.

(Before SWINFEN EADY, PHILLIMORE, and BANKES, L.JJ.)

MITSUI AND CO. LIMITED *v.* WATTS, WATTS, AND CO. LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Exception of "restraint of princes"—Reasonable anticipation of restraint—Breach by shipowner—Liability—Measure of damages.

The plaintiffs chartered a vessel from the defendants, who were shipowners, to enable them to fulfil a contract by which they agreed to buy a cargo of sulphate of ammonia from a Belgian firm. The charter-party excepted "arrests and restraints of princes," and provided that the penalty for non-performance should be proved damages not exceeding the estimated amount of freight. The defendants refused to provide a ship which by the charter-party they had agreed to provide, upon the ground that there was reasonable apprehension that if they fulfilled the charter the ship would be seized by the King's enemies. In these circumstances the plaintiffs were compelled to repudiate their contract with their sellers, and paid them, as the result of arbitration proceedings, 4500l. for so doing.

In an action by the plaintiffs against the defendants for damages for breach of the charter:

Held, that the defendants were guilty of a breach of the charter-party by not sending a vessel to load, but that as regards the amount of damages the proper amount to fix was the difference between the price which would have been realised by the sale of the goods in Japan at or about the time the vessel should under ordinary circumstances have arrived and the cost of the goods at the port of loading at the time of shipment together with the cost of freight and insurance,

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law

and that the penalty clause had no reference to general damages.

Appeal by the defendants from the judgment of Bailhache, J., reported 13 Asp. Mar. Law Cas. 300; 114 L. T. Rep. 326; (1916) W. N. 62.

By a contract, dated the 23rd April 1914, between the sellers, Evence Coppée et Cie., of Brussels, and the buyers, Mitsui and Co., of Lime-street, in the City of London, the sellers sold to the buyers 3500 tons of Russian sulphate of ammonia. The ammonia was to be delivered in bulk by the sellers free on board at Mariopol at the rate of 125 tons (minimum) per hatchway, with a maximum of 500 tons per weather working day, Sundays and holidays excepted. It was provided that any dispute or difference whatsoever at any time arising under the contract should be referred to arbitration.

By a charter-party, dated the 5th June 1914, between Watts, Watts, and Co. Limited as owners and Mitsui and Co. Limited as charterers, it was agreed that a steamer, whose name was to be declared at least twenty-one days before expected date of readiness, should with all possible dispatch proceed to Mariopol and there load, always afloat, a full and complete cargo of the 3500 tons of sulphate of ammonia in bulk specified in the contract of sale, and, being so loaded, should therewith proceed to Japan and there deliver the same, freight at the rate of 20*s.* per ton delivered. The cargo to be loaded at the rate of 125 tons per hatch, but not exceeding in all 500 tons per weather working day, Sundays and holidays excepted. Loading time not to commence before the 1st Sept., except by consent of the charterers, who had also the option of cancelling the charter if the steamer was not ready to receive cargo before noon on the 20th Sept. 1914.

"Arrests and restraints of princes" were included in the exception clause, and by clause 13 it was provided that the penalty for non-performance of the agreement should be proved damages not exceeding the estimated amount of freight.

Early in Aug. 1914 war was declared by Germany and Austria on the one hand and Great Britain, France, and Russia on the other. On the 1st Sept. the plaintiffs wrote asking the defendants to declare a steamship to load under the charter-party as they had not done so. The defendants declined to comply with this request, giving as their excuse the prevailing state of war. The plaintiffs attempted to recharter, but were unsuccessful. There was some suggestion of a possible steamer at 60*s.* a ton, and, had the plaintiffs secured the vessel at that price, their loss would have been 7000*l.* The plaintiffs thereupon repudiated their contract with the sellers and paid them, as the result of arbitration proceedings, 4500*l.* The plaintiffs then commenced this action claiming damages. They alleged:

1. By a charter-party, dated the 5th June 1914, between the plaintiffs as charterers and the defendants as owners or deponents, the defendants agreed that a steamer to be named twenty-one days before expected date of readiness should with all possible dispatch proceed to Mariopol and there load a full and complete cargo of sulphate of ammonia, not more than 3500 nor less than 3500 tons, and, so loaded, proceed *viâ* Suez Canal to one port south side Middle Islands or South Island, Japan, and deliver the same on being paid freight at the rate of 20*s.* per ton. Loading time was not to commence before the 1st Sept. 1914, and the plaintiffs were to have the option of cancelling if steamer should not be ready to load before the 20th Sept. 1914.

2. The defendants have wholly failed to perform the said charter-party. By letter, dated the 3rd Sept. 1914, the plaintiffs gave notice that they would hold the defendants liable for the loss resulting from their repudiation of the contract.

3. As the defendants knew at the date of the said contract, the plaintiffs made the said charter for the purpose of taking delivery of a cargo of sulphate of ammonia purchased by them under a contract in writing, dated the 23rd April 1914, from Evence Coppée et Cie. By reason of the defendants' said breach of contract the plaintiffs failed to take up the said sulphate of ammonia and have reasonably compromised the consequent claim against them by the said sellers by paying 4500*l.* and 30*l.* for costs. The plaintiffs have also lost the enhanced value (or profit) on the said goods had they been delivered in Japan in accordance with the said charter-party, and have incurred legal charges in connection with the claim of the said Evence Coppée amounting to 97*l.* 11*s.* 2*d.*

The defendants by their defence said:

1. The said charter-party is admitted and referred to for its terms, which included an exception of arrests and restraints of princes, rulers, and people.

2. The defendants admit that they did not send a vessel to load at Mariopol under the said charter-party, but say that, owing to piratical seizures of cargoes by the Turkish Government and reasonable apprehension of Turkey becoming involved in the European war and of the Dardanelles being thereupon closed, they were justified, by reason of the exception of arrests and restraints of princes, in not sending a vessel to load.

3. None of the allegations in par. 3 of the points of claim is admitted. In any event the defendants will contend that the damages therein specified are too remote and are not recoverable from the defendants.

4. The defendants will further, if necessary, rely upon clause 13 of the said charter-party, and will contend that the damages (if any) recoverable by the plaintiffs are limited to the estimated amount of freight.

Bailhache, J. held that the shipowners were guilty of a breach of the charter-party, and that the plaintiffs could not recover from the defendants the 4500*l.*, such damage being too remote, but that they were entitled to recover 3800*l.* as estimated profit if the cargo had been carried to Japan.

He accordingly gave judgment for the plaintiffs.

The defendants appealed.

Leck, K.C. and *Raeburn* for the appellants.

Leslie Scott, K.C. and *R. A. Wright* for the respondents.

Cur. adv. vult.

June 29. — The following judgments were delivered:—

Swinfen Eady, L.J.—This is an appeal by the defendants from the judgment of Bailhache, J. at the trial of an action before him without a jury. The plaintiffs brought an action against the defendants claiming damages for breach of contract contained in a charter-party; the learned judge found in favour of the plaintiffs, and gave judgment for them for 3800*l.* damages. From that judgment the defendants appeal, and they have raised various points upon the appeal. The first question is whether there was any breach of the charter-party.

The defendants contend, first, that there was no breach of the charter-party at all; secondly, they say that, if there was a breach, the plaintiffs are only entitled to recover nominal damages; and, thirdly, they say that if they are wrong in that and the plaintiffs are entitled to recover substantial damages, then, having regard to a clause in the charter-party, the amount which they can recover is limited to 3500*l*. The learned judge has given judgment for 3890*l*., and they say that in that respect the judgment must be erroneous. The charter-party is dated the 5th June 1914, and it is agreed that the defendants were to send a ship, the steamer's name to be declared at least twenty-one days before the expected date of readiness, and then followed the classification 100 A1 or British corporation. The steamer was to go to Mariopol, in the Sea of Azoff, and there load a cargo of sulphate of ammonia, not more nor less than 3500 tons, and then was to proceed, *viâ* the Suez Canal, to Japan, on being paid freight at the rate of 20s. a ton. Then by clause 2 provision was made as to the rate of loading—the maximum rate not exceeding 500 tons per day. The loading time is not to commence before the 1st Sept. except by the consent of the charterers, who also have the option to cancel the charter-party on the forenoon of the 20th Sept.; and then clause 13 provides: "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight." It appears that the plaintiffs provided themselves with a cargo of sulphate of ammonia, having entered into an agreement for that purpose, but the defendants failed to send the ship. We were told that at one time the defendants had a certain ship which they contemplated sending, and that they intended to sell the cargo in Japan. Apparently the position changed; at all events the ship was not sent. Time ran on, and on the 1st Sept. the plaintiffs' agent wrote to the defendants referring to the clause in the charter-party under which the steamer's name should be declared twenty-one days before the expected date of readiness: "We observe now we are within twenty-one days of the cancelling date. Messrs. Mitsui and Co. will be obliged if you will let them have this information immediately so that they may advise the suppliers of the cargo," and the answer on the same date was: "In reply to your letter of to-day's date, as we already informed you"—there was some verbal conversation—"the above-mentioned charter must be considered as cancelled, owing to the war, our Government prohibiting steamers going into the Black Sea to load." After some communications between the parties, that was accepted as a repudiation, and the present action was brought.

The ground stated in the letter was inaccurate—namely, that "our Government prohibiting steamers going into the Black Sea to load"; that was written doubtless under a misapprehension; there had been no such prohibition. It may well be that the British Admiralty had looked upon a voyage to the Black Sea at this time as a dangerous voyage, and as one not being within the Government scheme of marine insurance; but the writers of the letter were altogether under a misapprehension in saying that steamers were prohibited going to the Black Sea to load. Except for the increased danger, there was no reason why the steamer should not proceed to the Black Sea to load. The Dardanelles were open at this time, and, having regard to the terms of the charter, the defendants were bound to send a ship to load this cargo. It was urged that at a later date the Dardanelles were closed, and that if the steamer had been sent not later than the cancelling date and had then loaded her cargo, having regard to the subsequent closing of the Dardanelles, the cargo could not have been carried to Japan. But there was nothing at this date to excuse the defendants from their obligation to send the ship to load.

In support of their contention the appellants relied upon *Geipel and others* v. *Smith and another* (1 Asp. Mar. Law. Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404); but in that case, at the date of the alleged breach, the performance of the one entire contract had been rendered impossible by an obstacle which it was impossible to expect would be removed within a reasonable time. In the present case, at the date of the alleged breach there was nothing to prevent the ship going to load pursuant to the terms of the contract. In these circumstances Bailhache, J. said: "No authority was cited to me in support of the defendants' proposition that a breach of contract is excused by reasonable anticipation of the happening of an event which, if it happens, will excuse the performance of the contract, and, in my opinion, such a proposition will not bear examination. The closing of the Dardanelles was too late for the defendants, whether one treats their refusal to send the *Henley* as a repudiation of this contract accepted by the plaintiffs or whether one regards the contract as still open down to the 20th Sept. The defendants were entirely without excuse, and the breach alleged is proved." I concur in the view of the learned judge, and in my opinion it is clear in this case that the defendants committed a breach of their contract in not sending the ship to load pursuant to the charter-party.

The second point which was urged on behalf of the defendants is this: They say that, assuming there was a breach of the contract, the plaintiffs are only entitled to nominal damages, and they put it in this way. It was not the breach of the contract that caused the failure of carriage of this sulphate of ammonia to Japan, because, apart from the breach, the goods could not have been carried to Japan. On the facts found by the learned judge, having regard to the cancelling date, namely, the 30th Sept., and to the maximum rate of loading—500 tons a day—and to the quantity of cargo to be shipped—3500 tons—it would have taken seven working days to load the ship, and then, having regard to the time that the steamer would take to proceed from Mariopol, in the Sea of Azoff, through the Dardanelles, by the time the steamer arrived at the Dardanelles they would have been closed, and closed perhaps for several days, and it was the closing of the Dardanelles that in any case prevented the cargo from going to Japan; the voyage would have been prevented by a restraint of princes and the defendants would then have been under no liability. That is the way it is put, but it seems to me that that is only putting part of the proposition. If the ship had been loaded, in the events that have happened the plaintiffs would have obtained the same benefit as if the goods had been carried to Japan. In considering

whether the plaintiffs are entitled to recover anything more than nominal damages, regard must be had to the ordinary rule as to the measure of damages in an action for breach of contract. When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered to arise naturally according to the usual course of business. That is the ordinary rule as laid down in *Hadley* v. *Baxendale* (9 Ex. 341). If you apply that rule to the facts of this present case, what would have happened? Assuming the defendants had sent the ship pursuant to the contract, the ship would have been sent to Mariopol, the sulphate of ammonia would have been loaded on board, proper insurances on the cargo would have been effected, and the shipper would have been in this position: Either the ship would arrive in due course in Japan and he would receive the proceeds of the sale of the cargo there, or, in default, supposing that the ship was prevented by a restraint of princes or some other reason, he would have been entitled to recover the loss in one way or the other; either under the policy or by reason of the safe arrival of the ship he would have obtained the benefit of his contract.

In a case of this kind it appears to me that the proper measure of damages is the amount which he would have received if the contract had been kept. What would he have received if this contract had been kept? The learned judge awarded 3800*l.*, but in my opinion that figure was not properly arrived at; it does not represent the true measure of damages. It was urged by the appellants in the first place that in arriving at that figure the learned judge had taken into account that the shippers would have effected an insurance against the excepted peril "free of capture and seizure," but it was argued that there was no evidence that the shippers had any intention of effecting such an insurance. But as the argument proceeded it became evident—at least in one view of the case—that it was to the advantage of the appellants to argue the other way, because, if there was a liability for damages, the greater the cost of insuring the cargo the less amount the plaintiffs would have received, and therefore it would go to reduce the amount of damages, and that if the appellants were wrong and they were held to be liable for substantial damages, if the shippers had effected an insurance against "free of capture and seizure," against the consequences of hostilities, the premium payable in respect of that would have been an expense connected with the cargo, an expense of getting that cargo to Japan, and therefore an additional sum to deduct from the selling price of the cargo. That sum was not taken into account. On the other hand, another error into which I think the learned judge fell was this. In assessing the amount of damages at 3800*l.* as being the probable profit, he gave credit to the defendants for the higher cost of the sulphate of ammonia under a contract into which the plaintiffs had previously entered. It appeared that the plaintiffs had entered into a contract for sulphate of ammonia; but between the date of their contract and the date at which the steamer ought to have been loaded at Mariopol there was a substantial fall in the price of sulphate of ammonia, and the learned judge did not take the cost at the port of loading at or about the date of loading, but he took the contract price, the effect of which was materially to diminish the profit which the shippers would otherwise have made. In those two respects and proceeding on that footing and in omitting the premium for the insurance against hostilities, I am of opinion that the judgment of the learned judge was wrong, and that the proper measure of damages was not taken.

The question then arises as to what is the proper measure of damages in a case of this sort. In my opinion it may be stated in a very few words. The proper measure of damages is the difference between the price which would have been realised by the sale of the goods in Japan if they had arrived in due course at or about the probable date of arrival of the steamer and the cost at the port of loading at or about the date when the cargo should have been loaded together with freight and insurance, and having regard to what has happened in the present case, and to the circumstances under which the ship would have left Mariopol if she had sailed, there must be included in the cost of insurance the cost of insuring against hostilities. In a recent case in the House of Lords of *Ström Bruks Aktie Bolag* v. *Hutchison* (10 Asp. Mar. Law Cas. 138; 93 L. T. Rep. 562; (1905) A. C. 515) the only question which arose on the appeal was as to what was the proper measure of damages for the breach of the contract. In that case the plaintiffs had secured tonnage for wood pulp from Sweden to Cardiff. There was a failure to supply the wood pulp, in consequence whereof it was not delivered to Cardiff and was bought in against the vendors, and they had to pay the difference in price resulting from its being bought in against them. In the action they put the sum which they had to pay their disappointed purchasers as the measure of their damages. The damages which the appellants claimed was the amount which they paid in this country to their customers to whom they had contracted to supply the wood pulp. That was not the true measure of damages. The shipowners had nothing to do with the particular contract into which the charterers had entered any more than in this case I think the shipowners have anything to do with the particular contract to acquire the sulphate of ammonia into which the plaintiffs had entered. In the next place it was argued in that case that they having claimed that particular damage upon that footing could not succeed; they had not claimed general damages, and were only entitled to nominal damages for breach of contract. That was the point that was taken. It was said that, having failed to claim general damage, they were only entitled to nominal damages. Lord Davey, at p. 529, put the rule in this way: "I am of opinion that the proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived less the value of the goods in Sweden and the amount of the freight and insurance."

Applying that rule to the facts of the present case, the proper measure of damages is the amount which would have been realised by the sale of the goods in Japan at or about the

date when the steamer would have arrived less the cost of the goods, taking the cost price at the port of loading at or about the date when the steamer would have been loaded together with freight and insurance. The total amount of damages on that footing has not yet been ascertained, and there will have to be an inquiry to ascertain that amount. Part of the figure was ascertained; it was ascertained—and I gather there is no dispute as to this—what sum the cargo would have fetched at the date at which the steamer would have arrived in Japan in due course if it had been sold. There is a certificate which seems to have been accepted from a gentleman in Japan fixing both the date and the price. I think the market price at the end of Nov. 1914, when the goods would have arrived, works out at 13*l.* 11s. 10*d.* per ton, if I have read the figures correctly. At all events, that is an agreed figure. It is the total sum, and, when one considers the amount for which the insurance should have been effected, I think one cannot accept the figures which during the argument counsel for the appellants handed up to us. There is no warranty for those figures. One must take it that the amount for which the cargo would have been insured is the sum at which it would have been sold on arrival in Japan, and there must be deducted from that the cost of freight and insurance. Then the question arises at what date should the cost price be ascertained? I think the proper date to take would be a middle date between the first date for loading mentioned in the charter-party—namely, the 1st Sept.—and the cancelling date, the 20th Sept. I do not know and it is not in evidence as to whether there was during the first fortnight in September any fluctuation in the price of sulphate of ammonia that would make one date more advantageous to the parties than another. We have no evidence upon than point at all. I think it may be put in this way. Take the nearest market date, that is not a Sunday and not a public holiday, to the 10th Sept. as being the middle date between the 1st Sept. and the cancelling date as the date the parties must have contemplated for the loading. That fixes the mode in which the damages could be arrived at. It was put forward on behalf of the plaintiffs that they had sustained a heavy loss as between themselves and their vendors, and in an arbitration they have in fact ultimately paid by way of compromise a sum of between 4000*l.* and 5000*l.* to their vendors as damages for breach of their contract. That sum cannot be an item in the calculation of damages; it must be ignored. The damages which have to be calculated are the difference between the two sums which I have mentioned.

There remains one further point to be considered. It was argued that, having regard to clause 13 in the charter-party, no larger sum could be recovered than 3500*l.*, the estimated amount of freight, and it was said that, having regard to that clause, the general damages recoverable under the charter-party were limited to the estimated amount of freight—namely, 3500*l.* This clause is in a somewhat different form from the earlier clause which used to be inserted in charter-parties. Previously to this clause coming into use the old form was: "Penalty for non-performance of this agreement estimated amount of freight." There is no doubt that in such a case the estimated amount of the freight was a penalty, but, on proof of the breach, judgment could be recovered for the amount of the penalty, but only as a penalty, and execution was limited to the damages which were proved at the time, the judgment only standing by way of security for such damages as should be proved. That was the position if the action was brought in respect of penalty; but otherwise, at the same time, the charterer would have been entitled to general damages, and in respect of that whatever damages were sustained and were proved to have happened in the ordinary course could have been recovered. In the present case the clause is in a slightly different form. It is "penalty for non-performance of this agreement," not "estimated amount of freight," but "proved damages not exceeding the estimated amount of freight." It is a form that seems to have been in use a considerable time, because I see in the fourth edition of Scrutton's, J. book on charter-parties, which was published in 1899 (seventeen years ago), that the form given is in exactly the same language as this: "Penalty for non-performance of this agreement to be proved damages not exceeding estimated amount of freight," and then he adds "due under this charter," and there is a footnote added: "This clause is worthless and unenforceable." Bailhache, J. arrived at the view that the parties here only intended to express in an extended form the effect of the ordinary penalty clause. Under such a clause you cannot obtain execution for the amount of the penalty, but it stands as security for the proved damages, and the learned judge arrived at the conclusion that the clause in this charter-party is nothing more than the common form writ large—that is to say, that it sets out what would be the effect of the common form, namely, to stand as security for the proved damages. I do not think it is quite that, because under the old form there is no doubt that the price was recoverable as a penalty—that is to say, you could obtain judgment for it as a penalty. Under the amended form you could not recover judgment for the entire estimated freight as a penalty because it is not so mentioned. The words are "proved damages not exceeding the amount of freight." The penalty, if it were recoverable as a penalty, would be the proved damages, and the proved damages as such cannot be a penalty because that is the sum which the plaintiffs are absolutely entitled to recover. To my mind the true explanation of the clause is what the learned judge says: They had endeavoured to state what the effect of the old form would be, and they endeavoured to improve the old form, but in any case it is dealing with that head of the charter-party which in the ordinary way provides a penalty for non-performance of the charter, and it has no reference to a claim for general damages irrespective of that, and whether the clause be meaningless or not—and it probably is with regard to the penalty for non-performance—it does not limit the amount which can be recovered under the charter-party to general damages. An instance could be given. Supposing an action were brought on the charter-party against the shipowner for breach of the implied condition of supplying a seaworthy ship, it might be the loss would be very great. The action

could be brought on the charter-party, although it is usually brought on the bills of lading, but, if it were brought effectively upon the charter-party, it could not be contended that in such a case the damages were so limited. In fact, in the case of *Elderslie Steamship Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93), Lord Macnaghten said, at p. 96: "It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words." In my opinion, having regard to the construction of the charter-party as a whole, this clause has no reference to general damages; it has only reference to the penalty, and it may be that, having regard to the language in which it is expressed, there is in strictness no penalty, but in no case can it be held to limit the general damages that can be recovered for breach of contract.

Under these circumstances I am of opinion that this contention of the appellants fails, and that it must be determined that the appellants are liable in substantial damages on the footing which I have mentioned with a reference to ascertain the amount. With regard to the costs, the proper plan will be to reserve the costs of the appeal until after the official referee has made his finding. He will probably be the best tribunal to ascertain the amount.

PHILLIMORE, L.J.—I agree with the judgment which has just been pronounced.

To deal with the questions which have been raised *seriatim*, in the first place I am of opinion that Bailhache, J. rightly held that the defendants were liable. This case is entirely distinguishable from *Geipel and others* v. *Smith and another* (*sup.*). Where it is certain, or so nearly certain as in commercial matters can be considered as certain, that the adventure cannot be successfully completed, the shipowner or charterer may be excused from taking preliminary steps which will obviously be futile. If the port to which the ship is to go is a port blockaded under an operation of war, the rule being that the termination of war is so uncertain that the state of war is to be regarded as indefinitely and almost infinitely prolonged, there is no duty to prepare a cargo or to bring a cargo to the port which the ship will not be able to enter. But in this case there was at the moment no reason to suppose that the adventure might not be carried through—carried through at greater cost because obviously it would be prudent to insure against war risks—and therefore it was the duty of each party to perform the contract as long as they could or up to the point to which they could perform it until the performance would be excused. That being the case, there was no reason why the ship should not have sailed for Mariopol, and there was a breach of contract by the shipowners in refusing to declare a ship and in refusing to send her.

Again I agree that the damages are not nominal, but substantial. Let us try the matter in this way. Suppose there had been no closing of the Dardanelles, what would have been the loss to the cargo owner? He would have lost the profit which he would have made upon the transportation of his goods from Mariopol to a port in Japan. The closing of the Dardanelles makes no difference, because in the ordinary course of business the cargo owner would have insured against the loss of his profit. Treating it in another way, on every contract for transportation, unless the element of insurance is introduced, the damages would have to be speculative and calculated on a speculative basis. A charterer says: "You contracted to send your ship to port A and to transport my cargo to port B. I have lost the profit which I should have gained if the cargo had gone to port B." The answer is: "But what are those profits? Was there any certainty that you would get to port B.? The ship might have been lost by perils of the sea with your cargo on board between port A and port B." And that is a perfectly sound answer. It is based on the same principle upon which juries are always directed in any event in which there is any uncertainty of life or any other physical uncertainty with regard to the profit to be earned. But the answer is: "This is measured by the insurance. The profit that you have lost you could have insured and made certain of. We will deduct from your profit the cost of insurance, and then we will treat your profit as certain." And that was the right of the cargo owner in this case. He was entitled to say: "If you had sent your ship to Mariopol, I should in the ordinary course of business have made my profit certain by insuring against the loss. I am prepared to deduct the cost of insurance in order to make my profit smaller but certain, instead of larger but uncertain." It is upon that principle that the House of Lords laid down the measure in damages in the case of *Ström Bruks Aktie Bolag* v. *Hutchison* (*sup.*). Looking at it in another way, it comes, as the Lord Justice has observed, under the old rule laid down in *Hadley* v. *Baxendale* (*sup.*). The measure of damages for breach of contract may be larger than the damages in tort. The suffering party ought to have either such damages as may fairly and reasonably be considered as arising according to the usual course of things from such breach of contract or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. I think that those damages may be supported under either of those heads; either they are so much in the ordinary nature of things as to be certain to have followed from the breach of contract or you may put it that the parties would contemplate that the cargo owner would insure, and that therefore his damages would be the loss and that which he would have recovered under the insurance minus the cost of procuring the insurance. That being so, I think Bailhache, J. was right in saying that the charterers were entitled to a substantial award. The block in the Dardanelles, which would have stopped the ship from completing her voyage from the Sea of Azoff to Japan, may be regarded for this purpose as permanent, because we know that it lasted till a state of war broke out between Turkey and Russia and England, under which no English ship coming from a Russian port, or any English or Russian ship at all, could have safely navigated the narrow waters in the control of the Turkish arms. But it is important to consider that a loss by reason of that could not be a loss under the free from capture and seizure clause; it would be a loss by restraint of princes, or, possibly, a loss by perils of the sea. If the Turkish Government forbade the

navigation of the Dardanelles it would be put as a loss by restraint of princes. If all that they did was to make the navigation of the Dardanelles so perilous as to be impracticable, it is exactly the same thing as if there had been a long block of ice or as if there had been some convulsion of nature and a great rock had fallen either into the Bosphorus or the Dardanelles, making the passage for a time impossible. The cargo owners would have been entitled, if they had had their cargo put on board and had insured it in the ordinary way with the free from capture and seizure clause without provision against war risks, to recover upon proof that the Dardanelles were blocked for so long a time as to render the continuance of the adventure impracticable.

So far as regards the fact that there should be substantial damages awarded to the plaintiffs, but in my opinion the learned judge in arriving at his figure has been led into a wrong calculation. He has certainly given the respondents too much, and he has probably under another head given them too little. He has certainly given them too much because, in order to make this profit certain, it was not sufficient to have an ordinary insurance; to make the profit certain it was necessary to add to the ordinary insurance an insurance against war risks, otherwise the certainty of the profit would have been reduced very greatly indeed, and in fact it was admitted by Mr. Leslie Scott that it was proper to add to the cost of insurance the cost of insurance against war risks. I understood him to take it at 3000*l.*, and, as far as I can see, that is a reasonable way of looking at the matter, and taking Bailhache, J.'s 3800*l.* as the figure of profit, that would reduce the profits to 800*l.* But now there is an enhancement of those profits which is almost certain—I do not know that it is quite certain, and certainly the calculation of it is very uncertain—and Bailhache, J., in order to arrive at the loss of profit, has saddled the charterers with the price at which they bought these goods in April. If that is the same price at which they would have been bound to buy the goods on the date which the Lord Justice has intimated as being the proper date—namely, the 10th Sept.—that would be right; but if in fact the goods were cheaper on the 10th Sept., to that extent the damages are too little. Putting it in another way, the shipowner was entitled to say: "I have nothing to do with the contract of purchase which you made in April; I have only got to be saddled with what would be the market value of these goods at Mariopol at the proper date"; but if he does choose to say that or to say, "I am not going to pay what you had to pay your vendors for breach of contract," then he must not rely upon the fact that these people bought these goods at probably a larger price. The true price is the price at which the goods would have been bought at the date we have fixed. There seems great reason to suppose that that price would be less—as to how much less I confess I see very little reason for arriving at any conclusion about at all. It may be that the fall was more than 3000*l.*, in which case what the appellants have successfully taken off would be more than counterbalanced by what the respondents on their cross-appeal would add. It may very likely be that it is a good deal less than 3000*l.*, in which case the appellants will have gained something by reason of their appeal.

As far as I understand the view of the court, it is to be the one figure and the only figure which need be found by the official referee. Given that one figure, the rest, as I understand it, is a mere matter of arithmetic.

Now we have got to consider, supposing that figure should come to over 3500*l.*, what is the effect of the penalty clause. I am personally a little sorry that it is thought that we ought to settle that to-day, because I think it is quite likely that it will not arise, but I may be mistaken over that. At any rate, it may be right that we should settle it as the matter has been fully argued to-day, and, if it is to be settled to-day, I concur in the view which the Lord Justice has expressed. But I am bound to say that I concur in it with very great hesitation. I myself belong to the school which holds that parties when they say a thing should be held to mean it, and that artificial constructions should not be put upon their words. It may be that the cases are too strong for me in that respect. I have, then, very great difficulty with this clause. It has been running *pari passu* with the old clause. The Lord Justice has pointed out that this clause is at least as old as 1899. On the other hand, in a case now pending before us for judgment, I find that the charter-party has got the old form, so that the two clauses are running side by side. As far as I can make out, the result of the decision which we are now going to express is this: that the new form is less in favour of the claimant than the old one under which the claimant could not only recover his damages, but he could also, if his damages were less than the amount of freights, obtain a judgment for the penalty—that is to say, for the amount of the freight which would be of some value to him. Under the new form, as the Lord Justice has pointed out, he cannot get the penalty; he can only get the proved damages. It may be that that is the result of the alteration. I am sure I do not know. I am not prepared to accede to the reasoning of Bailhache, J., or to accept the very able argument on this point of Mr. Wright in its entirety. I am, on the whole, although reluctantly, ready to agree, in order to decide the point to-day, upon this ground only, that the parties have used the word "penalty," which *primâ facie* means that the thing is a penalty, and that they have not sufficiently varied from the old form, which had an established construction, to show that they meant any very serious variation other than that which I have just mentioned, and that it would have been very easy, if they really meant to make a limitation of liability, to have expressed it in words about which there could be no doubt.

BANKES, L.J.—I agree. The material facts seem to me to lie in a very small compass. On the 23rd April 1914 the plaintiffs entered into a contract for the purchase of a large quantity of sulphate of ammonia from a Belgian company to be shipped at Mariopol, in the Sea of Azoff. I agree that the defendants are not bound by the terms of that contract, and that the only materiality of the contract, if it has any materiality, is as evidence, if evidence is wanted, that the plaintiffs had a cargo ready and available for shipment if the defendants had sent their vessel to the port of loading. On the 5th June 1914 the plaintiffs entered into a charter-party with the defendants

under which the defendants undertook to send a steamer, to be named by a certain date, to Mariopol, the port of loading, for the purpose of receiving a cargo of sulphate of ammonia with which the vessel was to proceed to Japan. The loading time was not to be before the 1st Sept. and not to be after the 20th Sept. On the 1st Sept. the defendants wrote a letter to the plaintiffs announcing their intention of not sending the vessel, and intimating that in their opinion they thought that they had good reasons for cancelling the contract.

The first point which arises in this case is whether the defendants were right in their view that they had a good and sufficient reason for refusing to send the steamer to the port of loading. Bailhache, J. has held that they had not, and in that I agree. I really need add nothing to what has fallen on this point from the other members of the court, except to say that in all the cases to which Mr. Leck referred I think it will be found that there was at the time at which the repudiation of the contract occurred an actual existing restraint of princes, whereas here the most that can be said is that there was reasonable anticipation that before the time came to complete the performance of the contract some restraint of princes would arise which would prevent the complete performance of the contract. In my opinion that is no answer to the allegation that there was a breach of contract.

There is only one other matter, it seems to me, that need be mentioned, and that is this, that on the 26th or 27th Sept. the Dardanelles were closed for traffic. Under those circumstances what was the position of the parties? Bailhache, J. has held—and I think quite rightly—that it was only in the ordinary course of business that, had the defendants sent the steamer to the port of loading, the plaintiffs would have insured the cargo in the ordinary way, and that the insurance would have included war risks. Upon that finding, what was the position of the parties? The position was this, that there was no reason whatever to prevent the defendants from sending the steamer to Mariopol, and there was nothing to prevent the cargo being loaded upon the vessel at Mariopol. It is quite true that when once the cargo had been loaded events occurred which prevented or would have prevented the vessel from proceeding to Japan, and as a result the plaintiffs would have been entitled to abandon their cargo to the underwriters upon the ground that the adventure was impossible of performance. If they had done that they would have been entitled to receive from the underwriters the amount for which they had insured the cargo, and, as Bailhache, J. puts it, the amount for which they would have been insured would have been a sum sufficient to cover the cost of the goods, the freight, the cost of insurance, and a reasonable sum for profit, or, in other words, what would have been the fair value of the goods at the port of destination. Under those circumstances it is, in my opinion, quite clear that the plaintiffs were entitled to recover substantial damages and not merely nominal damages, and I agree with the other members of the court as to the proper measure of damages and the way in which the amount should be ascertained.

There remains one further point, and that has reference to clause 13 of the charter-party. It is said that upon the true interpretation of the language of that clause it ought to be construed as a clause limiting liability, and not as a mere penalty clause. If it was open to the shipowner to claim the strict construction of that clause, I am not prepared to say that that is not the meaning that ought to be put upon it or, at any rate, might be put upon it; but Mr. Wright has appealed to the principle which has been laid down in many cases and, amongst others, in the case of *Elderslie Steamship Company* v. *Borthwick* (*sup.*), to which reference has already been made, where Lord Macnaghten said: "It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words." Now, what is the position with regard to this clause? For a very long period of time there has been inserted in charter-parties a clause which has come to be known as the penalty clause, and it has been expressed in a well-known form of words, and the commencement of the clause has been "Penalty for non-performance of this charter" or "this agreement," and it has ended with the words "estimated amount of freight." It has been accepted both by business men and by lawyers that the clause so commencing and so known as the penalty clause was a worthless and unenforceable clause. In my opinion, applying the principle to which Lord Macnaghten referred, if a shipowner desires to clothe this clause with vitality, he must dress it up in an entirely new suit of clothes, and, so long as its identity is concealed either wholly or partially by the old clothes, he cannot escape the application of the rule—namely, that if he desires to limit his liability, he must do so in plain words. It certainly cannot be said that the words are plain words so long as the well-known form of words which was accepted to represent a worthless and unenforceable clause is adopted as the opening sentence or the opening expression in the clause itself. On that ground, in my opinion, the shipowners are not entitled to be heard to say that this is a clause limiting their liability.

Judgment accordingly.

Solicitors for the appellants, *Holman, Fenwick, and Willan.*

Solicitors for the respondents, *Waltons and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, Dec. 10, 1915.

(Before Sankey, J.)

Modern Transport Company Limited *v.* Duneric Steamship Company Limited. (a)

Charter-party—Restraint of princes—Admiralty requisition—Liability of charterers for hire—Withdrawal of vessel.

A charter-party contained an exception clause which included restraint of princes, and also provided that the owners might withdraw the vessel for nonpayment of hire. During the currency of the charter-party the vessel was requisitioned by the Admiralty for a period of

(a) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

about six months, for which period the charterers refused to pay the hire. The owners threatened to withdraw the vessel, whereupon the plaintiffs (the charterers) brought an action claiming an injunction to restrain the defendants from withdrawing the vessel, in which the owners counter-claimed for hire during the period of the requisition.

Held, that the owners were not entitled to withdraw the vessel, but the plaintiffs were liable to pay the charter-party hire to the owners during the period of the requisition, they receiving the hire paid by the Admiralty.

COMMERCIAL COURT.

Action tried by Sankey, J.

The plaintiffs were time charterers of the steamship *Duneric*, and their claim was for an injunction to restrain the defendants, the owners, from withdrawing the vessel from their service.

The defendants defended the action on the ground that they were entitled to withdraw the vessel, and counter-claimed for about 8000*l.* for hire.

Roche, K.C. and *R. A. Wright* for the plaintiffs.

MacKinnon, K.C. and *Raeburn* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

SANKEY, J.—In this case the plaintiffs, who were time charterers of the defendants' steamship *Duneric*, claimed an injunction to restrain the defendants from withdrawing her from their service. The defendants contended that they were entitled so to withdraw the vessel by reason of the failure of the plaintiffs to pay her hire punctually, and they bring a counter-claim for a sum alleged to be owing to them for such hire. The plaintiffs reply that the hire claimed is for a period during which the *Duneric* was requisitioned and used by His Majesty's Government, and that no hire is due, and those are the issues which fall for my decision.

The facts are as follows: By a time charter-party dated the 2nd March 1915 made between the defendants, as owners, and the plaintiffs, as charterers, it was agreed that the defendants should let and plaintiffs should hire the *Duneric* for a period of twelve calendar months from the date of being placed at the charterers' disposal, at a rate of 2350*l.* per calendar month, payable monthly in advance.

The several clauses of the charter-party material to the present case are as follows:

(1) There was a clause limiting the cargo which the vessel was entitled to carry. She was forbidden to carry contraband of war.

(2) There was a clause limiting the voyages she might perform—she was only to be employed between safe ports of the United Kingdom and the Continent of Europe not east of Dieppe nor east of Sicily.

(3) There was a cesser clause prescribing the events upon which the hire should cease, or be suspended.

(4) There was an exception clause under which the restraint of princes was mutually excepted.

(5) There was a clause giving the plaintiffs an option of sub-letting the steamer.

The vessel was duly placed at the plaintiffs' disposal upon the 15th April 1915. Upon the 21st May the Admiralty, by a requisition notice of that date, delivered to the defendants' agents, Messrs. Andrew Weir and Co., gave notice requisitioning the *Duneric* from the defendants for immediate use on Government services. A few days afterwards a form of Government charter was sent to Messrs. Andrew Weir and Co., which was completed by them, under which there was no such limitation either as regards cargo or voyage as there was in the time charter between the plaintiffs and defendants.

Upon the 26th May Messrs. Andrew Weir and Co. informed the plaintiffs by a letter of that date that the Government had requisitioned the *Duneric*, and upon the 11th June the vessel was placed at the disposal of the Admiralty, and was employed on Government business up till the 29th Nov., when the Government gave her up.

The sum which the Government paid for the use of the vessel was 1220*l.* 14*s.* monthly. As above pointed out, the monthly hire under the time charter between plaintiffs and defendants was 2350*l.*, a sum greatly in excess of the amount paid by the Government.

Considerable correspondence took place between the parties and their solicitors as to whether the Government had hired the vessel from the plaintiffs or from the defendants, and upon the 20th May 1915 the Admiralty agents sent to the plaintiffs a requisition similar to the one they had already sent to the defendants.

The plaintiffs argued in such correspondence that they were not liable to pay the hire during the time the vessel was used by the Government. The defendants argued the other way. Both parties being naturally and properly anxious to assist the authorities, the defendants agreed to collect the hire payable from time to time by the Government, and they wrote on the 10th June saying:

> We still maintain the position we have taken up, but, in order to carry out the wishes of the Admiralty, and entirely without prejudice to our claim, we have ordered the master to follow the instructions of the Admiralty.

Upon the 14th June the defendants sent in their account for the third month's hire, which would certainly have been due on the next day if nothing had happened in the meanwhile to alter the state of affairs.

Correspondence again ensued between the parties, the gist of which is that the plaintiffs refused to pay the hire, and the defendants suggested arbitration. By the end of June the parties had consulted their solicitors, who were discussing whether going to arbitration or to the courts would be preferable, but on the 9th July the defendants nominated their arbitrator, and upon the 15th July the plaintiffs nominated theirs. Upon the 20th July, when it will be noted that another month's hire, if the defendants' contention was correct, had fallen due, Messrs. Andrew Weir and Co. wrote on behalf of the defendants:

> We are in receipt of your letter of yesterday. The matter of the time charter, hire, interest, &c., will be dealt with by the arbitrators.

And upon the 22nd July the plaintiffs' solicitors wrote that their clients had no objection at all to the Government paying the hire to the defendants pending the arbitration.

The arbitration proceedings dragged on, and the defendants from time to time sent in their account for hire. Before the next hire accrued due—namely, the 2nd Nov.—the Government

wrote informing the defendants that the *Duneric* would be discharged from His Majesty's service when clear of her cargo at Middlesbrough, and upon the 30th Nov. defendants passed that information on to the plaintiffs. No award had as yet been made in the arbitration.

Upon the 16th Nov. the defendants again wrote demanding the hire, and on the 17th Nov. the plaintiffs replied that they were content to leave the question of the responsibility for the difference between the Admiralty rate and their own time charter rate to the decision of the arbitrators, or to the courts. Upon the next day the defendants threatened to withdraw the steamer. She was not given up by the Government till the 29th Nov., but on the 25th Nov. the plaintiffs issued a writ claiming an injunction to restrain the defendants withdrawing the *Duneric* from their service. The 2nd Dec. was, in fact, the first day upon which the plaintiffs could have had the vessel, and upon that day they tendered a cheque for the hire, which was refused.

The first point which falls for my decision is, whether the defendants are entitled to withdraw the *Duneric*, but as that is bound up with the question whether the plaintiffs are liable to pay the hire, I propose to discuss the latter question first. It was argued on behalf of the plaintiffs that the Proclamation of the 3rd Aug. 1914, under which the Admiralty are entitled to requisition ships, is one which entitles them so to do from owners—that, in this case, the requisition was made upon the owners, who consequently were unable to allow the plaintiffs to have the use of the vessel, and thus there had been a total failure of the consideration, and no hire was due during the period the vessel had been employed by the Government.

It was further urged on their behalf that the Admiralty had requistioned a larger interest than the plaintiffs had in the vessel, because there was no such limitation either with regard to the cargo to be carried or the voyages to be undertaken in the Admiralty charter as there was in the plaintiffs' time charter.

I do not think these contentions are sound. It appears to me: (1) That there is a special clause in the plaintiffs' time charter which provides for the circumstances, upon the happening of which hire is to cease, and the events which have happened do not come within that clause. (2) Further, I am of opinion that there has been no failure of consideration.

I think that the true view is that the owners of the vessel granted the use of their ship subject to the restraint of princes. It will be observed that the exception clause, which is a mutual one, includes such events as perils of the seas, as well as restraint of princes, and I do not think that if a vessel were delayed, say, for a fortnight, either by perils of the sea or by a temporary embargo, the hire would cease during such a period: (see *Brown* v. *Turner, Brightman, and Co.*, 12 Asp. Mar. Law Cas. 79; 105 L. T. Rep. 562; (1912) A. C. 12). In fact, there has been no failure of consideration. The consideration is a promise to give such use of the ship as defendants are capable of giving, subject to restraint of princes, and this the defendants have done.

In my view, therefore, the plaintiffs were liable to pay the hire to the defendants, and were entitled to receive for themselves those sums paid by the Admiralty for the use of the vessel. In this case, as above pointed out, the hire paid by the Admiralty was very much less than the hire contracted to be paid by the plaintiffs.

A somewhat similar case, where the sum paid by the Admiralty was very much more than the sum contracted to be paid by the charterers, has been decided by Atkin, J. in *Tamplin Steamship Company* v. *Anglo-Mexican Products Company* (13 Asp. Mar. Law Cas. 284; 114 L. T. Rep. 259; (1915) 3 K. B. 668; (1916) 1 K. B. 485), where that learned judge held that the charterers were bound to pay the hire contracted for, and were entitled to receive the amount paid by the Admiralty.

Speaking generally, unless there are some special clauses in such a charter-party, the position is that the time charterer is entitled to the use of the ship during the period in question, and it is his use of the ship which the Admiralty puts an end to. Under these circumstances, it would appear to be proper that he should pay the owners for what they have always been willing to give him, and should himself receive from the Admiralty the fair compensation for the loss of the fruits of his bargain.

I now turn to the question whether the defendants were entitled to withdraw the ship. A clause in the charter-party gives them the right so to do if the hire is not paid punctually and regularly in advance. It was contended by the defendants that as the charter-party so stipulated, and as, in fact, the hire had not been so paid, it was incumbent upon the plaintiffs to show some agreement whereby they were excused from so paying the hire. The plaintiffs, on the other hand, contended that it was possible for the defendants either to waive the punctual payment of hire or to elect not to rely thereon.

There are numerous cases to this effect, and one of the elements to be considered is the lapse of time which has taken place before an owner exercises or purports to exercise his right. I have already set out the facts on this point.

I am satisfied that the defendants meant to refer to arbitration the question of the payment of hire during the whole time the ship was requisitioned by the Government. I remember how the arbitration had not been concluded when the defendants threatened to withdraw the vessel; also that she remained in Government service till the 29th Nov., in fact till after the issue of the writ in this case, and that she was not free for the plaintiffs till the 2nd Dec., upon which date they tendered a cheque for the future hire.

I am of opinion, under the circumstances, that the defendants were not entitled to withdraw her, and that the plaintiffs are entitled to an injunction as asked.

I cannot pass from this case without remarking that it is one of doubt and perplexity, and I am glad to hear that the opinion of higher tribunals is likely to be invoked. As far as this court is concerned, there must be judgment for the plaintiffs for the injunction asked for and judgment for the defendants for the balance of hire, 8627*l.* 0*s.* 9*d.* in each case, with costs.

Solicitors: for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*, for *Bolam, Middleton*, and *Co.*, Sunderland; for the defendants, *Holman, Birdwood*, and *Co.*

Monday, July 3, 1916.

(Before ATKIN, J.)

DENNY v. SKELTON. (a)

Carriage of goods—Contract—Sale—Two buyers purchase two parcels from same cargo—Parcel intended for one buyer delivered to lighter of other buyer—Innocent mistake—Title to goods—Sale of Goods Act 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 18, 62 (4).

From a cargo of oats in bulk while in transit 500 *quarters were sold to D. and* 500 *quarters to S. Both parties instructed the same lighterman to take delivery of their respective parcels of oats on their behalf. The lighterman, intending to take delivery of the parcel sold to S., sent a lighter to the vessel. The lighter was loaded, but, through a misunderstanding, the clerk on the vessel prepared documents which showed that he intended to make delivery of the oats to the lighterman on behalf, not of S., but of D., and believed that he was so doing. Subsequently, another lighter was sent by the lighterman, who now intended to take delivery of the parcel sold to D., and the same misunderstanding occurred, documents being handed over which demonstrated the intention of the clerk to make delivery to S. and not to D. The last lighter became jammed and sunk, and the oats were damaged. The result of these two mistakes was that the unharmed parcel came into the possession of S., although the documents relating thereto showed an intention that they should be delivered to D. In an action for wrongful detention of the oats: Held, that in these circumstances the property in the undamaged goods had passed to the plaintiff D., who was entitled to judgment.*

COMMERCIAL COURT.

Action tried by Atkin, J.

The facts appear sufficiently from the headnote and his Lordship's judgment.

Holman Gregory, K.C. and *Douglas Hogg* for the plaintiff.

A. A. Roche, K.C. and *H. C. S. Dumas* for the defendants.

ATKIN, J.—In this case a question arises which raises somewhat interesting questions, partly of law and partly of fact. There was a ship called the *Bland Hall*, which arrived in London with a cargo of oats in bulk. There were two original shippers, but we are only concerned with one here—Messrs. Bunge and Born, who had shipped a certain amount of oats in bulk, which were kept separate in the ship. During the voyage certain portions of the cargo had been sold to different purchasers, and these purchasers again had resold the goods.

By the time the ship arrived in London 500 quarters of the oats had been sold to the plaintiff, Mr. Oliver Chas. Denny, through Messrs. Guerrier, Marshall, and Co., who were sub-purchasers from another firm, Messrs. Taylor and Co. Another 500 quarters of the oats of the same quality had been sold to the defendants, Messrs. T. Skelton and Co., who had purchased through Messrs. G. C. Giddins and Co. Therefore, when the vessel arrived in London deliveries had to be made by the sellers to these purchasers of the oats, which seem to have been sold ex the ship. The practice is for the buyer who has obtained the bill of lading for the amount of his purchase to lodge the bill of lading with the ship, or the representative of the ship, and then to give the delivery orders to his sub-purchaser against the amount of the bill of lading.

The purchaser takes delivery from the ship overside. In this case the two purchasers took delivery of the goods overside in barges. They both employed the same lighterman, Mr. Jameson. They both of them gave delivery orders to Mr. Jameson, which were substantially in the same form.

The one given by plaintiff was signed by Messrs. Guerrier, Marshall, and Co., and was as follows:

> *Date* Sept. 29, 1915.—To the captain of the *Bland Hall*, lying at Victoria Docks: Deliver to the buyer, Mr. O. C. Denny, 500 quarters 38lb. oats. Must be worked at once.

Messrs. G. C. Giddins and Co. had given a similar order in respect to their 500 quarters to Messrs. T. Skelton and Co. Both these gentlemen handed over their delivery orders to Mr. Jameson and instructed him to collect the oats, to put them on craft, and take them to their respective wharves. The plaintiff's wharf was up the river from the Royal Victoria Dock, and Messrs. T. Skelton and Co.'s wharf was in Bermondsey.

Mr. Jameson, therefore, duly sent these delivery orders to the Port of London Authority on, I think, the 29th Sept., the Port of London Authority being the proper persons to deal with these matters.

The practice in delivery is this: The ship's clerk is on board the ship, and he has a record in his book of the bills of lading which have been delivered to him. He enters the delivery order when it comes in against the bill of lading, and then he is prepared to deliver to craft.

When the craft comes alongside, representing the person who has lodged the delivery order, he makes out a tally card containing the bill of lading number, against which he is transferring, and the person to whom the goods are to be delivered. He delivers the tally card to the ganger, who is delivering the particular hold, for the purpose of carrying out the goods and seeing that they are delivered in accordance with the delivery order. The ganger, or the weigher, if the goods have to be weighed, has to ascertain whether the actual barge to which he is about to deliver the goods is the barge that corresponds with the tally card, and his instructions from the shipping clerk. Having made inquiries as to the barge, he thereupon proceeds to deliver into that barge, and on his card he marks or tallies the number of sacks he delivers, and when he is finished he completes the card by filling up the date he commenced and the date he finished and the name of the actual craft, and he then either takes it to the shipping clerk or gives it to the man in charge of the lighter, who takes it to the shipping clerk, and it is then exchanged for a weigh note and for a pass out of the dock.

The weigh note is in the nature of a consignment note. It is then handed to the waterman in charge of the lighter, and in this particular case it says:

> Deliver on account of Messrs. C. and J. Denny to craft *Oliver* ex *Bland Hall* per order of Messrs. Guerrier, Marshall, and Co., 500 quarters of oats.

That is to say, it contains reference to the particulars of the delivery order and the name of the

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law

craft, and it is then handed with a pass to the man in charge of the lighter, who takes both documents, and is able in that way to take the goods to their proper destination. That is the practice.

In this case there is no doubt that a mistake has arisen, because what happened was this: The *Oliver* arrived on the 2nd Oct., which was a Saturday, in charge of a lighterman. It is quite plain to my mind that that craft, in fact, was intended by Mr. Jameson, and intended by Messrs. T. Skelton and Co.. to carry their goods. Not that Messrs. T. Skelton and Co. had bargained that any particular craft should carry their goods, because they had not, but they had apparently given sacks, for the purpose of carrying out the contract, to the barge, or the man in charge of the barge, and Mr. Jameson intended that his man in charge of the barge should receive the 500 quarters that were intended for Messrs. T. Skelton and Co.

I have no doubt about that as a matter of fact. On the other hand, the goods were handed over to that craft on the 2nd Oct., and the clerk, Mr. Vincent, prepared a tally card, intending to deliver the goods to this particular craft for Mr. Denny, the plaintiff. He prepared a tally card with that object before the loading began. He prepared a tally card in which he inserted bill of lading 15; that was the number of the bill of lading which had been lodged in respect of Messrs. Guerrier, Marshall, and Co.'s goods which they had sold to Mr. Denny. He put down upon it the description of grain:

> Oats, quarters, 500, deliver to Messrs. C. and J. Denny, account Messrs. Guerrier, Marshall, and Co.

It is quite plain that the goods that were in fact put into that craft were intended to be a delivery against Messrs. Guerrier, Marshall, and Co.'s delivery order for Mr. Denny. The goods were, in fact, delivered to the craft and a weigh note was prepared carrying out the same intention:

> Delivery on account of Messrs. C. and J. Denny to craft *Oliver* ex *Bland Hall* per order of Messrs. Guerrier, Marshall, and Co.

That document was handed to the lighterman. I do not think there can be clearer evidence of the intention on the part of the Port of London Authority by their clerk, Mr. Vincent, to make delivery on account of the delivery order lodged by Mr. Jameson and signed by Messrs. Guerrier, Marshall, and Co., and to make delivery in that way to Mr. Jameson for Mr. Denny. I am quite satisfied that was the intention.

Therefore you have got this result, that the person delivering, who I think quite plainly is delivering on account of the seller, intended to deliver to Mr. Denny, while the craft intended to receive on behalf of Messrs. T. Skelton and Co. Leaving the transaction there for the time being, exactly the same position arises in respect of Messrs. T. Skelton and Co.'s order, because the craft that arrived—the *Cedric*—arrived on the Monday after the *Oliver* had completed loading, and the *Cedric* had been lying at Denny's wharf.

No doubt they contemplated that their oats would be delivered to them in that ship, although, again, they were not bound as between themselves and Mr. Denny, nor was Mr. Denny bound to use that craft. He could use any craft, but Mr. Jameson had given instructions to the man in charge to take delivery of Mr. Denny's oats in that craft. And in the same way a similar mistake was made in connection with the Port of London Authority, plainly showing that they intended to deliver the goods for Messrs. T. Skelton and Co., and exactly the same position arose there.

I do not think it is necessary for me to decide whether that was due to the fault of anybody, but if I had to decide that I should come to the conclusion, so far as I am concerned, that it was nobody's fault. I think there was a misunderstanding. It might be due to the fact that undoubtedly the first lighterman in charge of the *Oliver* was deaf, and if he spoke in the way he did here that he also possesses rather an indistinct utterance.

It appears to me that what happened was that Mr. Vincent prepared his tally note for Mr. Denny, seeing there was the Jameson craft there, and possibly without being told that it was there for Messrs. T. Skelton and Co. or Mr. Denny Then in the ordinary course of business I am satisfied an inquiry would be made, and the probability is that an inquiry was made and that there probably arose a misunderstanding. I cannot find anybody to blame. It is one of those mischances that happen without amounting to neglect on either side. That is how I think the matter happened.

The unfortunate thing was that the *Cedric*, which was the last craft loaded, when she was being taken off by the lighterman—as she certainly was for Mr. Denny, although the lighterman had got a weigh note which said the goods were delivered on account of Messrs. T. Skelton and Co.—got jammed and sunk and the oats were much damaged by water, whereas the *Oliver*, having in her possession a weigh note which said the goods were delivered on account of Mr. Denny, duly delivered her goods to Messrs. T. Skelton and Co., who dealt with the goods and sold part of them, apparently before the mistake was discovered.

In three or four days time the documents were examined, and the mistake was discovered, and I do not think it necessary to go into the question of what took place between the parties, or whether there was any admission one side or the other. It is quite sufficient, that Messrs. T. Skelton and Co. dealt with the goods as I have mentioned, on board the *Oliver*.

The point is what is the true construction of the law in these circumstances. The question is, I think, whether or not the property in these goods in the *Oliver* had, in fact, passed to Mr. Denny, because it is with regard to these goods that the claim is made by him. I think that must depend on the question of whether or not the goods had been appropriated under the Sale of Goods Act 1893, ss. 16, 17, and 18. Sect 16 provides that:

> Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Sect. 18 provides rules for ascertaining the intention of the parties. The rule one has to deal with here is rule 5 (1):

> Where there is a contract for the sale of unascertained future goods by description, and goods of that

description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

I think the only other section I ought to refer to is sect. 62, sub-sect. 4, which says:

Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

The assent of the buyer may be express or implied and given before or after the appropriation is made, and it seems to me the principle in cases like this is that the buyer does give an assent before appropriation. That is to say, he is not supposed to assent afterwards, but beforehand. But I do not think it is an absolute assent, as suggested by Mr. Gregory, to his making an appropriation in the terms of the contract. I doubt much whether there is an intention that the seller shall have the right of passing before an opportunity arises for delivery in accordance with the terms of the contract.

The question seems to be whether or not the seller in this case did act in accordance with the contract and unconditionally appropriate the goods to the contract.

What was the assent given? It seems to me that the assent was that delivery should be made to Mr. Jameson, and therefore it seems to me that if the seller should deliver the goods to Mr. Jameson in accordance with the contract that he would be delivering in accordance with the contract, that he would be delivering properly, and that the appropriation made in the course of that delivery would be an appropriation which passed the property. It appears in this case that was done. That there was an intention to appropriate to the contract there can be no question at all. And it was done in the ordinary way, over the side of the vessel, in making the delivery into craft provided by Mr. Jameson.

It is perfectly true, as far as Mr. Jameson was concerned, that he did not desire to take delivery for Mr. Denny, but intended to take delivery for Messrs. T. Skelton and Co., in the barge *Oliver*. As far as the sellers are concerned, that is irrelevant, as long as they delivered to the person they were told to deliver to, and unless it is made plain that it was a mistake, and that the property in question was going to some other buyer than Mr. Denny, it appears to me they were justified in making the delivery. I have found that they were not so told, and that they believed, without any default on their part, that the property here was going to Mr. Denny. If it were necessary to show authority in fact, I cannot conceive of anything stronger than the fact that they did show the weigh note to the person to whom they were making delivery. It is said that he would not look at it. That is his fault.

It is clear that any mistake could have been corrected, but when the goods are accepted and taken away it seems to me that the sellers are justified in treating that matter as conclusive, and that the delivery thereupon was final.

There was one further point made. It was said that it was quite plain that this was in fact only asked for as Messrs. T. Skelton and Co.'s goods, because the sacks had only one name upon them in large letters. The name upon the sacks was the "London Grist Mills," and I accept the evidence which was given to me on behalf of the weigher that he did not know at the time of delivery, or at all, that the London Grist Mills was another name for defendants.

It appears to me that the authority is to deliver to the lighterman in the sacks the lighterman provides for the purpose, whatever name is on the sacks. And when the goods are put in the sacks they seem to me to be in a deliverable state, and I do not think it can be said that delivery was appropriated because the grain was put in certain sacks provided by the agent. There was proper delivery in this case, and it appears to me, therefore, that the plaintiff is entitled to recover. Mr Roche has said that Messrs. T. Skelton and Co. are entitled to sue Mr. Denny for converting their goods. I have not to decide that matter, and I express no opinion about it. I do not know whether the damages are agreed, but the result will be that the plaintiff is entitled to recover in this case, and that Messrs. T. Skelton and Co. are entitled to the salvage upon the goods.

Judgment for plaintiff.

Solicitors for the plaintiff, *Timbrell* and *Deighton*.

Solicitors for the defendants, *J. A.* and *H. E. Farnfield*.

Wednesday, July 12, 1916.

(Before Scrutton, J.)

Re An Arbitration between O. T. Tonnevold and Finn Friis. (*a*)

Charter-party—Option of cancelling in the event of war—Risk of seizure, capture by rulers or Governments — Voyage contemplated involving risk—Submarines and mines—Refusal of owner to proceed—Subsequent agreement for extra hire —Arbitration.

By a charter-party dated the 5th Aug. 1912 *a vessel was chartered for five years within the limits of the European trade. By clause* 24 *it was provided: "That no voyage be undertaken and no goods, documents, or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers of Governments." In June* 1915 *the vessel was at Leith fixed to load coals for Rouen, but the owner refused to allow her to proceed on the voyage owing to the risk of German submarines. Eventually the vessel was allowed to sail in consideration of extra hire money being paid, and in an arbitration it was decided that the owner was justified in refusing to allow the vessel to proceed. The vessel having completed this voyage and two other voyages upon similar terms, arbitration proceedings took place, and the umpire found that the voyages involved the risk of the vessel being attacked and sunk by German submarines, and he awarded that the owner was justified in refusing to allow the*

(*a*) Reported by W. V. Ball, Esq., Barrister-at-Law.

vessel to proceed on the voyages inasmuch as they involved risk of seizure or capture by rulers or Governments. A case having been stated for the opinion of the court:

Held, that the risk of being attacked and sunk by German submarines was a risk of "seizure or capture" by rulers or Governments within the meaning of clause 24 of the charter-party, and that the shipowner was justified in refusing to allow his vessel to proceed upon voyages involving that risk.

By a charter-party dated the 5th Aug. 1912, and made between the plaintiff as owner and the defendant as charterer, the steamer *Thelma* was chartered at the monthly hire of 500*l.* for a period of five years within the following limits: "European trade . . . excluding regular coal trade and regular ore trade and regular coasting trade. The charterer to have the option to send the steamer over in ballast to load coal, but not for more than two following voyages." Clause 24 provided: "That in the event of war between the nation to whose flag the chartered steamer belongs and any European Power or any other Power operating or likely to operate in European waters the charterers and the (or) owners shall have the option of cancelling this charter. That no voyage be undertaken and no goods, documents, or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers or Governments." The charter-party also contained an arbitration clause. On the 16th June 1915 the *Thelma* was at Leith fixed to load coals for Rouen, but the owner declined to proceed on the voyage owing to the risk of German submarines and mines. Subsequently, after some negotiations between the parties, the vessel was allowed to proceed on her voyage subject to the payment of 100*l.* monthly increase of hire by the charterer if in an arbitration it was decided that the owner was entitled to refuse to allow the vessel to proceed to Rouen with coals.

Subsequently the charterer desired to load a cargo from Liverpool to Throndjem, thence to Archangel, and back to Hull. The owners declined to agree to the vessel going on such a voyage, and it was agreed between the parties that if in an arbitration it was decided that there was no obligation upon the owner to allow the steamer to proceed on such a voyage, the charterer would pay 700*l.* extra hire per month for the time taken to carry out the voyage. The *Thelma* duly completed the voyage in respect of which the extra hire was stipulated and arrived at Hull on the 1st Oct., and she completed her discharge on the 20th Oct. Arbitration proceedings then took place, and, the arbitrators failing to agree, the umpire stated his award in the form of a special case. He found that those voyages involved the risk of the vessel being attacked and sunk by German submarines, and he awarded that on the true construction of the contract and on the facts found those voyages involved the "risk of seizure, capture, or penalty by rulers or Governments," and that the owner was therefore not obliged to sail upon the voyage from Leith to Rouen or on the voyage from Liverpool to Archangel and back to Hull, and he awarded that there was due to the owner from the charterer 180*l.* extra hire for the voyage to Rouen and 2100*l.* extra hire for the voyage from Liverpool to Archangel and back to Hull.

The case for the opinion of the court was whether the fact that the said voyages involved the risk of being attacked and sunk by German submarines entitled the shipowner to refuse to proceed on those voyages under clause 24 of the charter-party.

F. D. MacKinnon, K.C. and *Stuart Bevan* for the charterer.

D. C. Leck, K.C. and *Leonard C. Thomas* for the owner.

Scrutton, J.—This case raises an interesting point, and it arises under a charter-party on a printed form which is called the Baltic and White Sea Conference Uniform Time Charter 1912, which I observe was revised at Berlin. The vessel was chartered for the European trade at a fixed rate per month, and there is a provision in clause 24 of the charter-party in regard to war which does not apply to the facts of this case. The second part of clause 24 is as follows: No voyage shall be undertaken and no goods, documents, or persons shipped that would involve risk or seizure, capture, repatriation, or penalty by rulers or Governments." What happened was that the charterer proposed to send the vessel on two voyages in 1915, the one from Leith to Rouen and the other from Liverpool to Throndjem and Archangel and back to Hull. The shipowner said that as these voyages involved risk of seizure and capture he would not undertake them. His reluctance to allow the vessel to proceed on these voyages was overcome by an agreement whereby he should have extra pay if the vessel undertook these voyages conditional upon its being determined that he had a right to refuse. The arbitrator has found as a fact that these voyages did involve a risk of the vessel being attacked or sunk by German submarines, and the question here is whether that finding brings the case within the words of the second part of clause 24 which I have just read. I doubt very much when this charter-party was revised in Berlin or when this particular charter was entered into between the parties whether they had present to their minds danger from submarines. I think it is pretty clear that the intention of these parties was that the shipowner was not to be required to undertake voyages under the charter which would expose him to the risk of having his vessel taken out of his possession by rulers or Governments. I think it is quite clear that they had in their minds any legislation there might be against undesirable aliens being carried to countries which would not admit them, because that would involve the shipowner in the expense of bringing them back to their own country. I think it is quite likely that when the word "penalty" was used they had in their minds the particular kind of penalty for carrying certain classes of goods or persons, but the words "seizure, capture," in the same clause must, I think, be taken to point to acts of rulers or Governments which deprive owners of their vessels. It has been argued that sinking by submarine or mine is not seizure or capture, but I suppose that, although the Government which owns the submarine does not enter into possession of the vessel after she has been sunk, yet the practical effect remains the same—namely, that the shipowner is deprived of the possession of his ship by the action of the Government which owns

the submarine. I agree with the arbitrator in thinking that it would be putting much too fine and technical a meaning upon the words of clause 24 to hold that where the captain of a submarine went on board a vessel and ordered her crew to leave her and then sank her it would constitute capture, but that if he did not go on board, but merely ordered the crew off and then sank her, it would not be seizure or capture.

I think I must take the commercial view of the clause just as the arbitrator has done, and I agree with the conclusions at which he has arrived. The result is that the charterer must pay the cost of this hearing.

Award confirmed.

Solicitors for the charterer, *Thain, Davidson and Co.*

Solicitors for the owner, *Botterell and Roche.*

Tuesday, June 6, 1916.

(Before ROWLATT, J.)

HOOD *v.* WEST END MOTOR CAR PACKING COMPANY. (*a*)

Carriage of goods—Insurance (marine)—"Held covered"—Insurance of motor-car for voyage—Shipment of car on deck—Liability of underwriter.

A motor-car, which it was proposed to ship from England to Italy, was insured against general risks of breakage and damage during the voyage. The policy of insurance contained a "held covered" clause "at a premium to be arranged in case of omission or error in the description of the interest." The motor-car was carried on deck and was found to be badly damaged on arrival. In an action by the owner against the shipping agents for shipping the car in an improper manner and failing to protect it adequately by insurance:

Held, that a motor-car carried on the deck of a vessel was outside the insurance policy, and that the defendants were liable.

COMMERCIAL COURT.

Action tried by Rowlatt, J.

In Nov. 1914 the plaintiff instructed the defendants, as his agents, to arrange for the conveyance and insurance during transit of a motor-car valued at 500*l.* from this country to Messina. The defendants sent the car on the deck of the steamship *Hero* and during the voyage it was very badly damaged. The insurance which they effected was against general risks of breakage and damage during the voyage, and made no provision where the car was to be carried. Evidence was given that, whereas most underwriters dealing in this class of risk would effect an insurance on a car carried in the hold of a ship, it was a matter of some difficulty to get one to accept the risk when the car was conveyed on deck. The insurers having refused to pay the amount of the policy, the plaintiff brought this action claiming damages for alleged breach of contract to ship the car in a proper manner and to protect it sufficiently by insurance.

Barnard Lailey, K.C. and *E. F. Spence* for the plaintiff.—The fact that the car was improperly placed on the deck of the steamer takes it out of the policy altogether.

Newbolt, K.C. and *A. Lawton* for the defendants *contra*.

D. C. Leck, K.C. and *Martin O'Connor* for a third party.

ROWLATT, J.—The plaintiff was a gentleman who wanted a motor-car for use in Sicily. He bought it in England, and went to defendants to pack it and send it out. The defendants estimated in these terms: "To packing and freight to Messina 31*l.* 10*s.*, all risks of breakage except war risks 12*s.* 6*d.* per cent."

That estimate was accepted. I think defendants contracted with the plaintiffs as agents to pack and freight the car to Messina and to procure it to be insured against all risks and breakage. It was sent to the ship to be carried on deck, and what the plaintiff complains of in substance is, that being shipped in fact on deck, it was not insured so as to protect it. The first contention was that it was insured in fact, and that the insurance had not been paid because of the refusal of the underwriters to meet their liabilities. I come to the conclusion, notwithstanding the excellent arguments used, that this case is not within the policy. A motor-car carried on deck is not within the description in the body of the policy. A point was made that what was called the "Institute Cargo Clauses" bring it in. Clauses 4 and 7 are the important clauses:

(4) Held covered, at a premium to be arranged, in case of deviation or change of voyage, or of any omission or error in the description of the interest, vessel or voyage.

(7) Including all liberties as per contract of affreightment. The assured are not to be prejudiced by the presence of the negligence clause and (or) latent defect clause in the bills of lading and (or) charter-party. The seaworthiness of the vessel as between the assured and the assurers is hereby admitted.

It has been held that "interest" there must mean subject-matter, and I have to decide whether a motor-car on the deck of a ship can be brought within this policy by treating the omission of the statement that it was on deck as an error in the description of the "interest" or subject-matter of the policy. I have got to consider some evidence which is very material, which I must accept as if it was called for the defendants. One of the witnesses said a risk was very much increased by the car being on deck, and that a great many underwriters would not touch such a risk; that it would certainly be a matter of special bargain, and that it was necessary to tell the underwriters about the position of the car. I read this "held covered" clause as intended to apply to a case where there has been some error in description—an error sufficient to put the subject-matter outside the terms of the policy. I think the subject-matter to be brought in must be subject-matter which could be insured at some trifling increase of the premium; and it must be subject-matter which the parties contemplate as certainly insurable by any underwriter in the market. That is involved in the words "held covered at a premium to be arranged," in which case the market rate would be paid. That seems to be the real key to the ultimate operation of this clause. When I am told that as between a motor-car on the deck and

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

a motor-car in the hold of the ship there is all this difference—that a car on deck is a risk that underwriters would hardly look at, and would certainly charge more for—I am constrained to hold that a car on deck is outside this policy, in which there is no reference to the position of the car. I must decide against the defendants on that point.

In regard to clause 7 there is no question here of any increase of premiums being arranged. These "liberties" are thrown into the contract as it stands at the premium named, and I do not think that "liberties" covers the case of a motor-car being carried on deck. There are other liberties, liberty to sail with or without a pilot, liberty to deviate, &c., which do not substantially affect the risk covered by the policy of insurance, although they might be used as a defence if the "liberties" clause was not in the policy.

When one finds that the shipping of a car on deck makes a very great difference as to the difficulty of placing the insurance at all, I cannot think that even though you may give a right to ship on deck in the form of liberty in words, I cannot think that that is the sort of liberty intended in this case. After all, we are dealing with a motor-car. I cannot believe that anyone would contemplate, knowing that this was an insurance of a motor-car, that under the "liberties" would be included liberty to put a motor-car on the deck of a ship. Were the defendants negligent? Their duty was to pack, freight, and insure. What they did was to leave it to others. I think at the very least they should have gone to a Lloyd's broker and not merely have started the matter through a series of commission agents, with the result that finally it got to a broker who insured at Lloyd's. I do not think they did their duty by going to Messrs. Sheldon and Co. and getting them to go to an agent. I do not think they could possibly be held to be discharging their duty to insure by this procedure. So the defendants must be responsible in damages for the amount which would have been recoverable if the car had been properly insured, because that is what they contracted to do, but credit must be allowed for the premium which I understand has not been paid. Judgment will therefore be for the plaintiff for 500*l.*, less 37*l.* 2*s.* 6*d.*, the premium and freight.

Judgment for plaintiff.

Solicitors for the plaintiff, *Capel Cure* and *Ball.*
Solicitor for the defendants, *Richard Brooks.*
Solicitors for the third party, *Yardley, Tilley,* and *Co.*

June 5 *and* 6, 1916.

(Before BAILHACHE, J.)

MACBETH AND CO. *v.* KING. (*a*)

Insurance (*marine*)—*Insurance of vessel against all perils—Exception of loss as result of hostilities—Unexplained loss of vessel during time of war—Liability of underwriter.*

By a policy of insurance a vessel was insured against all perils of the sea for twelve months. Loss in consequence of hostilities and warlike operations was excepted. During the currency of the policy, and during the continuance of a state of war between England and Germany, the vessel in fair weather commenced a voyage from Hull to the Tyne. After leaving the mouth of the Humber she was never seen again. In an action by the assured upon the policy in respect of her total loss:

Held, that, in these circumstances, the vessel must be presumed to have been lost by being torpedoed or by striking a floating mine, and not by ordinary perils of the sea, and that the defendant was accordingly entitled to judgment.

COMMERCIAL LIST.

Action tried by Bailhache, J.

By a policy of marine insurance the plaintiffs insured with the defendant and other underwriters the steamship *Membland* for a period of twelve calendar months from the 15th Feb. 1915 to the 14th Feb. 1916 against all perils of the sea. The policy further contained this clause:

Warranted free from capture, seizure, and detention, and the consequences thereof or at any time thereat, piracy excepted, and also from all consequences of hostilities and warlike operations, whether before or after the declaration of war.

On the 15th Feb. 1915 the vessel sailed from Hull on a voyage to the Tyne and thence to South America. The Humber pilot left her at the mouth of the Humber, and after that time no information as to her whereabouts was received. No wreckage had been found belonging to her and the Admiralty had informed the plaintiffs that at the material dates there was no interruption in the Hull-Tyne traffic.

The defendant having refused to make any payment under the policy, the plaintiffs instituted these proceedings claiming in respect of the total loss of the *Membland.* The plaintiffs contended that the vessel must be taken to have been lost by "perils of the sea," against which they were insured with the defendant. The defendant maintained that where a ship commenced a voyage in fair weather conditions, but during the existence of a war closely affecting the seas in which she was sailing, the presumption would be that her loss was occasioned in consequence of hostilities or warlike operations, and that therefore the defendant was free from liability.

The facts will appear in greater detail in his Lordship's judgment.

F. D. MacKinnon, K.C. and *D. Stephens* for the plaintiffs.

Sir *Maurice Hill,* K.C. and *Lewis Noad* for the defendant.

MacKinnon, K.C. in reply.

BAILHACHE, J.—This is an action brought by Messrs. Macbeth and Co. Limited against an underwriter, Mr. J. King, upon a time policy dated 23rd Feb. 1915 on the steamship *Membland.* The policy is for one year from the 15th Feb. 1915. It appears that about that time Messrs. Macbeth and Co. Limited bought the steamer *Membland.* She was then at Hull. They had her drydocked and surveyed and sent her round on a passage from Hull to the Tyne in order to load a cargo of coal. The *Membland* was a steamer of considerable size, about 325ft. long, 47ft. wide, with a depth of about 26ft., and she had five watertight bulkheads. It was intended that she should leave Hull on Saturday, the

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

13th Feb., but it appears that it was blowing hard from the north-east, and on the 14th Feb. it continued to blow hard also from the same direction. The result was that it was thought advisable that she should not sail until the Monday. On the Monday the weather had moderated considerably and the wind had somewhat changed, and there was then blowing a fresh wind from the N.N.W. She left Hull on the 15th Feb. at eight o'clock in the morning. She had on board two pilots—one was the Humber River pilot to take her down to the Spurn Lightship, and the other was the pilot to take her up the coast to the Tyne. She reached the Spurn Lightship about 10.40 on the same morning. At the Spurn Lightship the Humber pilot, a man named Hildred, left her. He got into his boat and came back, I suppose, to Hull. That was the last time that anyone saw her. In the ordinary course of her passage to the Tyne she would, by reason of the Admiralty directions, have kept fairly close in shore, and in particular she would have passed Flamborough Head within a distance of not exceeding five miles and probably of between two and three miles off Flamborough Head. If everything had gone well she would have reached Flamborough Head, according to calculations made, and which I see no reason to doubt, about three o'clock that afternoon. At Flamborough Head there is a signalling and coastguard station, and a look-out is kept there by men who are relieved from time to time. There are always two men on duty, and they were rather expecting her to come by, but she never appeared—and, as I say, from the time the pilot left her at the Spurn Lightship she was never seen again. That is all we know about the facts of this case.

In these circumstances, the plaintiffs seek to recover as for a total loss under this policy. The body of the policy is in the usual form, against the usual perils, and is expressed in the well-known clause with which we are all familiar in regard to adventures, perils of the sea, and so on. To the policy is attached the time clause, and the clause that matters here is this one :

Warranted free of capture, seizure, and detention, and the consequences thereof or any time thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war.

The defence which the underwriter on that policy sets up is that in this case the *Membland* was not lost by perils of the sea, but by one of the causes mentioned in that clause. The defendant says in all probability the vessel was sunk either by a torpedo or by striking a mine. There is some difference of opinion between counsel as to what is the effect of the "warranted free of capture and seizure" clause. It has been suggested by Sir Maurice Hill that its effect is to delete from the list of perils which are insured against in the body of the policy all those perils which have to do with seizure, capture, and, roughly, all war risks. Mr. MacKinnon, on the other hand, argues that that is not the effect of it at all, but that it must be read that the underwriter insures against all risks named in the body of the policy; but, as a sort of proviso, they add that they are not to be liable if the vessel is lost by capture, seizure, detention, and so on. I think Mr. MacKinnon is right, and I think he is further right in saying that, if the effect was to delete the war risks from the policy, it would not be such a good policy for Sir Maurice Hill's client as it in fact is. No one knows exactly, or at all, how the ship went to the bottom. It is rather material to decide what the assured must prove in order to make out a *primâ facie* case, and where they are entitled to stop. In my judgment, they do make out a *primâ facie* case when they satisfy us that the *Membland* is at the bottom of the sea. There cannot be a more obvious peril of the sea than that a ship sailing the seas should sink to the bottom.

In any policy in this form, with the warranty f.c. and s. clause attached to it, the assured does make out a *primâ facie* case when he establishes that the ship, the subject-matter of the policy, is at the bottom of the sea. It is one thing to make out a *primâ facie* case and another thing to make out a satisfactory case. In this case the *Membland* had been drydocked and surveyed, and she was, as far as we know and have been informed, a "well-found" ship. Her engines were working perfectly satisfactorily. She was answering her helm, and there was no suggestion at all that she was in any way unseaworthy or unfitted for this particular voyage. The weather was moderately fine. I have had weather experts from various stations and have had the weather described by persons who were about at the time, and I think I am right in saying that the highest force of the wind was "6," which is a fresh breeze. The weather during the 15th and 16th Feb. 1915 moderated, and from "6" the force of the wind went down as low as "3" and "2." At midnight on the 16th Feb. I believe the wind increased and something in the nature of a gale or half a gale sprung up. There can be little doubt whatever that the mischief happened to the ship before the wind freshened at midnight on the 16th Feb. The sea was moderately calm and there was nothing at all in any way to account for the loss of the steamer. She was light and drew 11ft. aft—that we know for certain. What she drew forward we do not know for certain, but it was somewhere about 8ft. or 9ft. She would have a considerable surface exposed to the wind. The tides run up and down, the ebb tide running northwards and the flood tide running southwards, and both of them within fifteen miles of the English coast, with an inset towards the English coast. The wind, as I have said, was N.N.W.

It is suggested by the plaintiffs that she was lost by perils of the sea and not by some war risk; that by reason of some accident happening to her machinery she became helpless, and was driven out into the North Sea. They say, and say with truth, that if she had been driven out some fifteen miles or so, she would have been out of reach of vessels going up and down the coast, because those vessels at that time were navigating within a few miles of the coast in pursuance of Admiralty instructions. No wreckage came ashore from her at all, unless it may be a small piece of a stave of a tub or bucket. A piece has been produced to me which was picked up on the beach a couple of months afterwards, which has on it writing in pencil which says: "Steamship *Membland* torpedoed engine-room port side good-bye." And then followed some rather unintelligible words. It

is suggested that I ought to receive that as evidence that the ship was in fact torpedoed or mined, and that this was written by someone who was on board at the time.

An expert in handwriting has been called, and he tells me that it is probable that the words on this little bit of wood were written by a seaman of the name of Ellis, who was one of the men on board this ill-fated vessel. I have come to the conclusion that I cannot trust the evidence from this bit of bucket as being a bit of the bucket from the *Membland*, and cannot trust to the writing upon it. It may be so, but I am not satisfied that it is, and I disregard the piece of bucket and the writing upon it. I have to consider the probabilities of this case and come to a conclusion as though that writing upon it had not been produced. Mr. Blackwood, the secretary of the plaintiff company, was called, and if I may say so, he was a thoroughly intelligent gentleman and gave his evidence very well. When he was asked why he thought that the *Membland* had gone down from an ordinary sea peril rather than as the result of a torpedo, he said the sole reason which he could give for that was that no wreckage was washed ashore. It was upon that, and upon that alone, that he based his opinion that he thought she had sunk by a peril of the sea. As against that, it is obvious that whatever disaster overtook the *Membland* was a disaster of a sudden character. Unless she was blown out of the track, she was well in the way of vessels going up to the Spurn Lightship and Flamborough Head, and vessels were passing at frequent intervals during this period. No vessel, however, saw her at all. She must have gone down, therefore, with great suddenness.

It is very doubtful whether the wind, which was prevailing at the time from the N.N.W., could have driven her far. It must be remembered, it is true, that there was a considerable surface of the vessel exposed to the wind, but, on the other hand, there was a slight inset of the tides, setting her in. No doubt the wind must have overcome the force of the tide to a certain extent, but I am satisfied she could not have been driven out of the track of vessels under many hours. It is, then, difficult to see what disaster which one could class with a "peril of the sea," other than some explosion, that could have happened to her which would have sunk her at all rapidly. She carried boats, and they were not brought out, as far as one knows, certainly they never came ashore and no one came ashore in them. She was also "light," and if she was sinking by springing a leak she had a good deal of bouyancy and flotation to lose before she would sink, and if she was lost in that way there must have been ample time, and more than ample time, for the boats to have been got out and for the crew to have been saved. There is no reason to suppose that the master of the vessel, who was an experienced man and had been in her before, would have allowed himself to be drifted out into the North Sea if he was in a helpless condition. There was no great depth of water and there was no reason why he should not have anchored and tried to check his ship. It is very difficult indeed to suppose or imagine any disaster which can have happened to the steamer other than some sudden explosion which would have sent her to the bottom quickly. Even if she had struck some piece of sunken wreckage the most she would have done would have been to have sprung a leak; but not a leak so large that she would have sunk without giving time for the people on board to take some measures for their own safety and without giving them time to get the boats out. On the other hand, there was at the time, and there is now, for all I know, not very far from Flamborough Head, and in a position which it would not be desirable to describe, an English minefield.

It had been blowing hard, particularly on the Sunday, from the north-east. If that minefield had been disturbed by a gale from the north-east, it is possible some of the mines might have got in the track of vessels coming up from the Spurn Light to Flamborough Head. It was notorious there were from time to time stray floating German mines over this part of the sea. Moreover, it is also notorious that there had been in these parts of the sea submarines, and a list was given to me of the vessels that had been torpedoed by submarines in this vicinity, but there is no record of any vessel close about this particular time. There appear to have been one or two in February, but none about the 15th Feb.

In these circumstances, I have to make up my mind whether this was a loss from an ordinary peril of the sea or whether it was a loss from war risks—whether from torpedo or mine it matters not which, either of them being equally a war risk. Forming the best judgment I can upon the whole matter, I am quite satisfied in my own mind that the *Membland* was not lost by an ordinary peril of the sea. I cannot imagine any peril of the sea which would have caused her loss so that she could have completely disappeared in so short a time that vessels coming up and down the coast at this time would not have observed her. The fact that no wreckage ever reached the shore struck me at first as very strong evidence that she was lost by some peril of the sea, and not by explosion; but Mr. Balfre, who is in charge of the coastguard station at Flamborough Head, and the "look-out" there, has given rather remarkable evidence. He speaks of having seen three trawlers struck by mines within half an hour of each other, and of another ship also striking a mine within his own observation from Flamborough Head; and he tells me that in not one of the four cases was any wreckage washed ashore at all.

It is, therefore, perfectly obvious that a ship might meet with this disaster by explosion without any wreckage coming ashore, and that disposes of one of the things that seems strongest in favour of a loss by "perils of the sea." Once that is out of the way I can see nothing to suggest a loss by perils of the sea. I can see a number of possibilities by mines, torpedoes and submarines, and I have come to the conclusion that I must find without any doubt in my mind that the *Membland* either struck a mine or was torpedoed. In any event she was not lost by a peril of the sea, and there must be judgment for the defendant with costs.

Judgment for defendant.

Solicitors for the plaintiffs, *Holman, Birdwood, and Co.*

Solicitors for the defendant, *W. A. Crump and Son.*

Tuesday, June 20, 1916.

(Before ROWLATT, J.)

LE QUELLEC ET FILS *v.* THOMSON. (*a*)

Insurance (marine)—War risks—Extinction of lights—Loss of vessel—Remoteness of cause—Liability of insurer.

A vessel was insured against war risks, "including extinction of lights." While off the coast of Normandy, on a voyage from Rouen to Bristol, she went on the rocks at the Cap de la Hague, where, owing to war, the light in the lighthouse had been extinguished. The master was not attempting to steer by the light, but said in evidence that had it been alight he would have seen it when he deviated from the course he had set and so managed to save the vessel. The learned judge was not satisfied that the master, in the weather existing at the time of the accident, could have seen the light had it been there.

Held, upon these facts, that the owners of the vessel could not recover on the policy as the extinction of the Cap de la Hague light was too remote a cause of the loss of the vessel.

COMMERCIAL COURT.

Action tried by Rowlatt, J.

By a policy of insurance dated the 15th Jan. 1915 the plaintiffs, a French firm, insured their steamship the *Astree* with the defendant

Against war risks only (French conditions), including extinction of lights, &c., but excluding all claims arising from delay, including mines, torpedoes, bombs, &c.

The French conditions included the following:

Risks of civil or foreign war are not at the charge of the underwriters, excepting in so far as there is an express agreement to that effect. In the latter case the underwriters are responsible for damage or loss consequent upon war hostilities, reprisals, arrests, captures, and molestation of every kind of Government, friendly or hostile, recognised or not recognised, and generally of all accidents and fortunes of war.

On the night of the 22nd-23rd Jan. 1916 the vessel was on a voyage from Rouen to the Bristol Channel and was off the coast of Normandy. Owing to war conditions, there was no light in the lighthouse on the Cap de la Hague, a promontory in the extreme north-west of Normandy. At about 2.40 in the morning of the 23rd the *Astree* got on the rocks at the Cap de la Hague. The master of the vessel, in evidence, said that the calamity would never have occurred if the Cap de la Hague light had been burning. He was not attempting to steer by the light, but had it been there, he would have seen where he had left his course and could have saved the vessel. In these circumstances the plaintiffs claimed the amount of the policy, alleging that the defendant was liable under the "war risk" clause, which included "extinction of lights." The defendant denied that the loss was actually caused by the extinction of the Cap de la Hague light, though its existence might have enabled the vessel to avoid the disaster.

A. A. Roche, K.C. and *A. R. Kennedy* for the plaintiffs.

Sir *Maurice Hill*, K.C., *R. A. Wright*, and *Lewis Noad* for the defendant.

A. A. Roche, K.C. in reply.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

ROWLATT, J.—In this case, this vessel, the *Astree*, was insured "to cover war risks, French conditions, including extinction of lights, &c." It is clear, therefore, that I must treat the policy as one which covers loss by extinction of lights, and I do not think I need inquire whether French war risks, on French conditions, would have included without express mention of the words, "extinction of lights." When underwriters subscribe to a policy covering loss due to extinction of lights in time of war, it is obvious that they are taking a departure which must involve some relinquishment of that well-known guide, proximate cause, because, as has been justly observed, the extinction of lights never can be exactly the proximate cause of the casualty to a vessel. It may mean that, in one way or other, it may facilitate a collision or stranding of a ship, which is a peril of the sea, but the extinction of lights is not the proximate cause in that case. However, here is a policy in which the extinction of lights has been included as a peril, and effect must be given to it, and therefore, though it does mean skipping over the immediate proximate cause, it must be done.

When you have once taken leave of the doctrine of proximate cause one is in difficulties how to make up one's mind where to draw the line. Apparently the French have never found themselves bound by any limit to confine them to the proximate cause, but according to the evidence before me they will not travel beyond what is the real and only and direct or determining cause, and in certain cases they have held that the extinguishing of lights must be a cause of that kind. It seems to me that there must be some limitation introduced somewhere; and where that should be may be a very difficult question. It is quite clear that in certain circumstances the extinguishing of lights would lead very directly to an immediate casualty. If a ship collided with another ship under way or at anchor, although the immediate cause of the damage was collision, still, without any doubt at all, the extinction of lights might be said to be the cause of the catastrophe. Even the extinction of shore lights could, it seems to me, sometimes be the immediate cause of a stranding. Where a master is expecting to find a light and is carrying on his course in reliance of seeing whether it is necessary to alter his course by the light, and where a light is not lit, the darkness causes his destruction as much as a false light would. I do not know, and I do not intend to express any opinion upon it, whether under a policy such as this the assured is limited to causes like those, but in this case it is a good deal more remote.

To begin with, the captain was not steering by the Cap de la Hague light, or any other light, as they were not lit. Really he was steering—or attempting to steer—for the English coast. His idea was not to steer by the Cap de la Hague light, but to steer direct to the English coast. That, unfortunately, was not what he succeeded in doing. Owing, not to the extinction of the lights, but possibly to something the matter with the compass or to extremely inefficient navigation, but in circumstances when neither the light of Cap de la Hague nor any other light would have helped him, because the weather was so bad, he got right in shore out of his course. He was nowhere near where he ought to have been

or where he thought he was. Mr. Roche says: "Take this ship at two o'clock or just before two o'clock in the morning. It does not matter how she got there, but she was right in to shore. If she had seen the light she would have escaped. Therefore the loss of the vessel was due to the extinction of that light."

I am by no means clear that that is the right way to deal with the matter. I think the proper plan is to take the story all through and to say that the Cap de la Hague light was never a light which the captain really set out to steer by or set his course by. You must take the story all through, and when you have found he got out of his course without anything to do with the extinction of the Cap de la Hague light, you must treat that getting out of his course as nothing whatever to do with the Cap de la Hague light. I do not wish to go into that, because it seems to me the evidence is absolutely insufficient to convince me that this light would have saved him at all. He was right in shore within two or three miles of where he ultimately struck. It is not contended that up to that time he could see the Cap de la Hague light. How he got where he was I am quite unable to say. I am not at all certain that he steered the course which he traced on the map, but somehow or other he got where he did. There is just a chance that if the Cap de la Hague light had been lit the captain would have seen it. I cannot find he would have seen it. If I hold that, I cannot find for the plaintiffs in this case. In the deck log there is the entry: "Weather thick, raining, very little breeze. About two o'clock weather lifting and became clear in the west. About 2.30 squall of misty rain, it became misty, rain." The official log says: "About two o'clock there was a good clearing up of the weather leaving a clear sea in front. About 2.30 weather misty again," and so on. At two o'clock the captain was about four to six miles off, and at 2.30 he was still about six miles off this Cap de la Hague. How can I assume from evidence like that that he could have seen it? Here is a man who is looking into the darkness in the middle of the night in January. He sees nothing through the darkness, nor can he know how far his vision is penetrating. He says it was clear, but it is impossible to my thinking to say he can convince me on that point. There is no evidence of any weather report by any local authority produced before me. I should have thought it might have been possible to obtain evidence of that to be admitted into this court for the purpose of throwing some little light on the point. I am left simply with these materials.

In these circumstances, I cannot come to the conclusion that even if the light had been lighted the captain would have seen it during that critical twenty minutes. Therefore the whole basis of the plaintiffs' contention fails, and I must give judgment for the defendant, with costs.

Judgment for defendant.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendant, *W. A. Crump and Son.*

Wednesday, June 21, 1916.

(Before ROWLATT, J.)

RICHARDS *v.* JOHN PAYNE AND CO. (*a*)

Charter-party — Reference to arbitration of disputes "as to meaning and intentions of the charter"—Extent of clause.

A charter-party provided that "any disputes arising between the owner and the charterers as to the meaning and intentions of the charter should be referred to arbitration."

Held, that this phrase did not mean merely that there should be submitted to the arbitrators questions of construction as to the rights of the parties arising upon the words of the charter-party, but included the application of the charter to the facts which had arisen involving the determination of what facts had arisen, but did not entitle the arbitrator to award damages.

COMMERCIAL COURT.

Action tried by Rowlatt, J.

A charter-party under which the plaintiff let a tug to the defendants provided that the hire was to be paid in advance with punctuality and regularity, and that, in default of payment, the plaintiff was to be at liberty to withdraw the tug. The charter-party also provided that "should any differences arise between the owner and the charterers as to the meaning and intentions of the charter, the same should be referred to arbitration." Disputes having arisen in which (*inter alia*) the plaintiff alleged that the defendants were in arrear with payments of hire, recourse was had to arbitration. The arbitrators in due course published an award in which they found that the defendants were in arrear as regarded the payment of hire and ordered the delivery up by them of the tug. The plaintiff subsequently brought this action on the award. The defendants contended that under the agreement to refer the arbitrators had no power to make the award which they had made. They argued that the reference of disputes as to the meanings and intentions of the charter "meant a submission to the arbitrators of questions as to the construction of the charter involving the rights of the parties under that document," and nothing more.

R. A. Wright for the plaintiff.

C. R. Dunlop for the defendants.

ROWLATT, J.—In this case the plaintiff sues for the delivery up of a tug and for damages for its detention, founding his claim for delivery up upon an award made under a clause in the charter-party. He claimed before the arbitrators that the charter had come to an end. The award determined that the plaintiff had a right to withdraw the tug from the service of the charterers on the 4th Feb. 1916, and that it is made under the submission which provides that, should any difference arise between the owner and the charterers as to the meanings and intentions of the charter, the same should be referred to arbitration. The phrase, "meanings and intentions" is a very curious one, but it falls to be construed in these proceedings. What the owner said was that there had been default in payment of the hire, and that by the charter-party he was thereby entitled to withdraw the tug. It is said that this arbitration clause referring to the meanings and intentions of the

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

charter only submits to arbitration the question of construction as to the rights of the parties arising upon the words of the charter-party, and does not include any application of the conditions of the charter-party to the facts which have arisen and given rise to the dispute. In other words, that the arbitrators had no jurisdiction to determine whether the hire was in arrear or not, so as to give rise to the clause for re-delivery. I do not think the words are clear or satisfactory, but upon the whole I think that that is too narrow a construction. I think that "meanings and intentions of the charter" include the application of it to the facts which have arisen, and not merely the construction of it as a piece of paper, and that, of course, involves the determination of what facts have arisen. It has not been treated, and I do not think it can be treated, as entitling the arbitrators to go on and give damages.

That really is enough to determine the main point in the case. But I think the plaintiff has two other points on which he can win. When you come to the letters I think it is clear that the parties interpreted this clause in the way I have interpreted it, and appointed their arbitrators to proceed upon it in the sense which I have given to it. The matter appears in a few letters as follows:

In December the plaintiff, thinking he had a right, altogether apart from the question of non-payment of hire, to determine the charter by fourteen days' notice, gave fourteen days' notice. That was not accepted by the charterers, who said the charter-party was not so determinable at the owner's instance. But when it came to the 4th Feb. the owner, then alleging that hire was in arrear, telegraphed demanding immediate re-delivery of the tug by reason of the breach of clause 7 by non-payment of hire. He wrote confirming on the same day, saying that he should proceed under the arbitration clause if re-delivery was refused, and would claim damages. On the next day he writes returning the cheque which had been sent to him, and reaffirming his intention to submit the matter in dispute to arbitration, saying he would let the other side know his arbitrator in due course, and suggesting that it would be better to have one arbitrator than two, as provided in the charter. The matter he is speaking of there seems to me quite clearly the matter last raised—namely, the claim for re-delivery on the ground of non-payment of hire. On the 7th Feb. there is an answer from the charterers' solicitor, saying: "We see no reason why the terms of the charter-party should be deviated from." That refers to the only proposal to deviate from the terms of the arbitration clause—namely, the proposal to substitute one arbitrator for two. On the 18th Feb. the plaintiff's solicitors write back declining, and saying they will proceed to arbitration, and will claim damages as from the 11th Jan.—meaning damages as from the date applicable to the fourteen days' notice given in December—and in the alternative the 4th Feb., when re-delivery of the tug was claimed. Thus there were being put forward two cases of non-delivery and two claims for damages. In these circumstances it seems to me that the parties have construed the matter and have referred both these claims to the arbitrators. They have not agreed, of course, to the arbitrators awarding damages for them, for they have no jurisdiction, but it seems to me that they have agreed that both the claims for re-delivery shall be arbitrated upon with such consequences as shall properly follow. Therefore it seems to me that on that ground also the award can be supported.

Then it is said that the award is not good because it is silent as to the claim for non-delivery upon the fourteen days' notice given in December. It is true that arbitrators must decide all matters submitted to them, but I think Mr. Wright's answer to that argument is correct when he says they really have decided it. If you ask for re-delivery and for damages based on an early date and also on a later date, and as here the award is made on the later date, I think that is sufficient. Therefore I think the award is good, and that the plaintiff succeeds.

With regard to the hire, that might be paid at the option of the owner monthly or weekly in advance. Nothing seems to have been said about that particularly, but something had to be paid in advance, and accounts were stated and money paid up to the 18th Jan. 1916. On the 10th Jan. a cheque was sent on by defendants for 90*l.*, four weeks' hire, and that took matters up to the 29th Jan. Therefore, on the 29th Jan., something more had to be paid, but nothing at all was paid, and there seems to be no answer to the claim that unless the money was paid on the 29th Jan. the owner was entitled to re-delivery of the tug. These clauses must be strictly applied. The owners of a tug have no sort of security for their money. They cannot distrain like the lessor of a house, and the only security they have, if money is not paid when due, is to have the tug back again.

It is also argued that after all the money was not really due till the 4th Feb., but I do not think that will do. There was said to be a question of some 2½ per cent. commission on the charter-party, but the fact was they were treating the hire as a separate matter, and if there was going to be an account between the parties, that should have been put to the plaintiff. But the parties have gone on treating the hire as becoming due on the 29th Jan., and therefore I think the arbitrators have taken a reasonable and business-like view when they said there was default made on the part of the defendants on the 29th Jan. Therefore I hold that plaintiff must recover.

In regard to the question of damages Mr. Dunlop said he was ignorant as to the value of tugs. I do not know if he really meant that, but he was right when he said the matter of the value of the tug had not been brought strictly to his notice in the case. I think the plaintiff is entitled to the value of the tug as from the 4th Feb., always allowing for the fact that this tug seems to have been "out of health" now and then, and was for some days off running. That must be allowed for, but I cannot possibly decide the question of figures, and I cannot adjourn the case, which would not be fair to others. In the same way, I cannot try the amount of repairs and commission claimed by defendants against the plaintiff. What I think is that if the parties cannot agree as to the figures they ought to find someone to settle it for them, and in default of that there will be liberty to apply.

I shall therefore give judgment for the plaintiff with costs, with a reference as to damages

and for an account of all claims between the parties.

Judgment for plaintiff.

Solicitors for the plaintiff, *Botterell* and *Roche*, for *W. Cox*, Swansea.

Solicitors for the defendants, *Holman, Birdwood, and Co.*, for *Edward Gerrish, Harris*, and *Co.*, Bristol.

June 27 *and* 29, 1916.

(Before ROWLATT, J.)

BAIRD AND Co. *v.* PRICE, WALKER, AND Co. (*a*)

Charter-party — Discharge with customary dispatch—Discharge of certain quantity of cargo per day—Payment of demurrage where delay occasioned through fault of charterers—Fixed time charter-party.

By clause 10 *of a charter-party the cargo was to be discharged with the customary steamer dispatch of the port and in the ordinary working hours.*

By clause 11 *demurrage was to be payable at the rate of* 90*l. per day where the delay was occasioned through "any fault of the charterer or merchant."*

By clause 20, *as amended by agreement between the parties, the steamer was to be discharged at the rate of* 100 *standards of timber per weather working day.*

Held, that the effect of clause 20 *was to quantify by agreement what in its absence would be achieved by the application of clause* 10, *which resulted in the combination of the two becoming a fixed lay day discharging clause.*

Held, also, that, where clause 20 *operated, the words "through any fault of the charterer or merchant" became inapplicable.*

COMMERCIAL COURT.

Action tried by Rowlatt, J.

By a charter-party dated the 13th July 1915 the plaintiffs, as owners, chartered the steamship *Mary Baird* to the defendants to load timber at Archangel for conveyance to Sharpness Docks, where it was to be discharged.

By clause 10 of the charter-party the cargo was to be discharged with the customary steamer dispatch of the port, and in the ordinary working hours. By clause 11 demurrage was to be payable at the rate of 90*l.* per day, where the delay was occasioned "through any fault of the charterer or merchant." By clause 20 the steamer was to be discharged at Sharpness Docks at the average rate of ninety standards per weather working day. In the negotiations for the charter-party it was agreed that, notwithstanding clause 20, steamer dispatch at the Sharpness Docks for the ship should be at the average rate of 100 standards per weather working day. By clause 21 the stevedores employed by the steamer for the discharge of the cargo were to be approved by the charterers.

On the 22nd Sept. 1915 the *Mary Baird* with a cargo of 747 standards of timber arrived at Sharpness Docks. The lay days commenced on the following day. By the supplementary agreement between the parties the cargo should have been discharged in eight weather working days—*i.e.*, on the 1st Oct. Unloading was not, however, completed until 2 p.m. on the 19th Oct. The plaintiffs now brought this action claiming 1582*l.* 10*s.* demurrage in respect of detention of the vessel for seventeen days fourteen hours after the 1st Oct.

The plaintiffs contended that this sum was due since by its terms the charter-party was a "fixed time" charter-party, and that the defendants were bound to unload at the rate of 100 standards per day or pay demurrage. The defendants argued that it was a "reasonable time" charter-party, and they fulfilled their part under it when they unloaded with all possible dispatch.

F. D. MacKinnon, K.C. and *W. N. Raeburn* for the plaintiffs.

A. A. Roche, K.C. and *C. R. Dunlop* for the defendants.

ROWLATT, J. — The first question for my decision is whether this charter-party is to be treated as one providing for fixed lay days. Mr. MacKinnon was willing to concede that apart from clause 20 (that is in its application to ports other than Sharpness) it only provided for reasonable diligence in discharge. But for the purposes of the present case we have to consider the effect of clause 20 and also the interlineations and the letter of July 19.

Without considering the interlineations as to Archangel and the special bargaining about the increase of ninety standards in clause 20 to 100 (on both of which matters a good deal of argument was expended which does not appear to me to come to very much in the end), I think that the effect of clause 20 is to quantify by agreement in the case of Sharpness what will be achieved by the application of clause 10, and that makes the combination of the two a fixed lay day discharging clause. Mr. Roche said that clause 20 only made ninety standards a maximum, reaching which, however easily, the charterer was not to be called on to do more. On the words of the document I cannot see why it should be a maximum more than a minimum. But Mr. Roche said that history showed that that is what the merchants have been contending for, and referred to *Sea Steamship Company* v. *Price* (8 Com. Cas. 292) and *Ropner* v. *Stoate* (10 Asp. Mar. Law Cas. 32; 92 L. T. Rep. 328).

Admitting the argument, I do not see why the controversy should be settled by the adoption of a maximum any more than by the adoption of a fixed rate. At any rate I do not feel constrained to depart from what I think is the straightforward meaning of the words used. No doubt ninety standards was the figure which was regarded as suitable for the general run of steamers chartered for Sharpness. If there was an extra large one or a very small one the figure could easily be altered.

This then, in my view, is a fixed lay day charter-party. But then Mr. Roche says that the ship could not do her part in discharging 100 standards a day, and that the rule in *Budgett* v. *Billington* (1891) 1 Q. B. 35) is excluded by clause 11, which says that demurrage is to be payable for delay "by the fault of the charterer." The first difficulty is that if clause 11 limits the consequences to the charterer of this being a fixed lay day charter-party I cannot see how it is limited to delivering him from the doctrine of *Budgett* v. *Billington* (*sup.*), and does not protect him from the con-

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

sequences of something which is not his fault—in other words, gets rid of the effect of the fixed lay days altogether. The words do undoubtedly create a difficulty, but I think the solution is what was suggested by Mr. MacKinnon. The general frame of this printed form and its effect, except as regards Sharpness, is that of a charter-party without fixed lay days. The words of clause 11 now under discussion are suitable enough for a charter-party of that kind. The breach of contract involving payment of demurrage is not using due diligence, which may be called a fault. Turn the charter for the purposes of Sharpness into a fixed lay day charter, and the breach of contract becomes merely the fact (excepted causes excluded) of not keeping time. That would not naturally have been described as the result of a "fault" of the charterer, but the word is there, and it must be read when clause 20 applies as descriptive merely of his breach of an absolute contract, though actually it is not his fault. Or to put it more shortly, it may be said that where clause 20 operates the words "through any fault of the charterer or merchant" become inapplicable.

The next question is, when did the time begin to run? Under the charter-party as printed the ship having by the express words to proceed to a berth as ordered, was not an arrived ship, and could not be ready to discharge until she got to the berth. Of a ship under such a charter-party it can never be said that she is ready in herself to unload before she gets to the berth, that expression being only applicable, in the absence of some special provision ante dating her readiness, to a ship which has arrived. It can only apply to a ship not yet in an unloading berth if under the terms of the charter-party, and in accordance with the rules expounded in *Leonis Steamship Company* v. *Rank* (11 Asp. Mar. Law Cas. 142; (1908) 1 K. B. 499), her arrival is complete on reaching a port or dock and before she reaches an unloading berth.

By the letter of the 19th July time was made to count by reference to the time when the ship is reported ready to discharge. If it had only said "is reported" the time would, of course, have run from the report, and arrival, within the meaning of the charter-party, could have nothing to do with it. The position would have been as in *Horsley Line* v. *Roechling Brothers* (1908, S. C. 866). But she has also to be ready to discharge, and I read that as meaning ready to discharge in conformity with the printed charter-party under which, as I have already said, she could not be ready till she had got to her berth, because till then she would not be an arrived ship.

I can see nothing in this letter to alter the destination at which this ship is to arrive from the berth to be named in Sharpness Docks generally, so as to bring her in this respect under a different class of charter-party altogether. This provision is designed to draw a line at noon, and not to vary the conditions under which the ship could be said to be ready to discharge. To do that in the sense contended for it would be necessary to insert some such words as "whether in berth or not," as was done in *Northfield Steamship Company* v. *Compagnie l'Union de Gaz* (12 Asp. Mar. Law Cas. 87; 105 L. T. Rep. 853; (1912) 1 K. B. 434), where the decision turned on that provision. In fact, the defendants here did unload a little of the cargo in the tidal dock on the 23rd, doubtless to save time and be so much to the good, but there is nothing from which I can infer that there was an agreement to ante-date the running of time. In the result, time began to count on the morning of the 24th, from which time the charterers had eight days.

The only other question is whether half a day is to be allowed for rain on Tuesday, the 28th Sept. According to the log, the day began with light rain and ended with heavy rain. Meteorological records state that 40in. of rain fell that day. Work, in fact, went on till one o'clock.

Mr. Reece, the stevedore for the ship, being in fact the stevedore to the dock company and approved as acting for the ship by the charterers under clause 21 of the charter-party, reported to the owners a few days afterwards that rain stopped work at the same time as the only lighter available was fully loaded—namely, at one o'clock. Mr. Reece gave evidence before me, but was unable to tell me when the other timber vessels stopped for the rain. It is clear that work having proceeded till one o'clock—that is to say, an hour and a half into the second half of the day—it was getting near the time when enough work would have been done in the latter half of the day to prevent that half-day being allowed for rain.

In these circumstances, in the absence of information as to when the other ships stopped, I am not satisfied, and it was for the charterers, who are local people at Gloucester, to satisfy me that rain stopped work precisely at one, or early enough thereafter to entitle the charterers to claim the half-day. Judgment must be for the plaintiffs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*, for *Bolam, Middleton*, and *Co.*, West Hartlepool.

Solicitors for the defendants, *Trinder, Capron*, and *Co.*

July 13, 14, *and* 17, 1916.

(Before ROWLATT, J.)

EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION LIMITED *v.* NEWHOUSE AND CO. (*a*)

Carriage of goods—Delivery ex ship to railway—Deposit in carriers' warehouse—Destruction by fire—Liability of carriers.

The plaintiffs directed the defendants—the owners of a line of steamships which were carrying certain goods for delivery to the plaintiffs—to "deliver ex ship to the railway company to our order." The contract contained a clause protecting the defendants from liability for damage to goods by fire. On arrival the goods were not taken direct to the railway station, but were placed in the defendants' warehouse adjoining the quay. Here a fire broke out, and the goods were destroyed. The plaintiffs brought an action for breach of contract and duty in handling the goods, contending that, in view of the instructions sent to the defendants, the goods should never

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

have been put into the warehouse, and that, as they had been so dealt with, the defendants were liable for their loss and could not avail themselves of the protection afforded by the terms of the contract.

Held, that the expression "ex ship" did not exclude the taking of goods into warehouse for the purpose of dispatching them by cart to a railway, and that in this case, the removal of the goods into the warehouse being justifiable, the defendants were entitled to avail themselves of the protection afforded by the contract.

COMMERCIAL COURT.

Action tried by Rowlatt, J.

The plaintiffs were a limited company dealing in agricultural produce generally. The defendants were a company owning a line of steamers sailing from Hull to various places, among which was Yarmouth. In July 1915 the plaintiffs, who were expecting delivery of thirty tons of oil cake from the north of England, which was being conveyed by the defendants' line of steamers, sent a notice to the defendants in the following terms: "Deliver ex ship to the railway company to our order." The goods were in consequence only insured against marine risks until delivery.

Instead, however, of being delivered direct from the ship to the railway station, on arrival the oil cake was put into the defendants' warehouse adjoining the quay. On the 19th July 1915 a fire broke out in the warehouse and the oil cake was destroyed.

The contract between the parties contained this clause:

> Newhouse and Co. are not responsible for loss or damage by fire while lying for shipment, collection, delivery, or in the course of transit, at their wharf or warehouse, or any other wharf or warehouse at which they may be placed, landed, or kept, nor for any loss or damage occasioned to the goods while shipping, wharfing, storing, carting, landing, or lightering the same, or in any way after discharge, nor for the acts, neglects, or defaults of servants.

The plaintiffs brought this action against the defendants for breach of contract and duty in regard to the carriage and delivery of the oil cake which, they alleged, had resulted in its loss.

Greer, K.C. and *H. A. McCardie* for the plaintiffs.—The oil cake should never have been put into the warehouse. It should have been taken straight from the ship to the railway station, or, if that was impossible, it should have been placed upon the quay until such time as conveyance to the station was practicable. The defendants acted wrongly in putting it into the warehouse, and are responsible for its loss. The protection afforded them by the contract cannot in the circumstances avail them.

A. A. Roche, K.C. and *Alec Neilson* for the defendants.—The conduct of the defendants was throughout reasonable, and the defendants, in consequence, are not liable to the plaintiffs in respect of the damage to the goods. It was impossible for the defendants to deal with all the cargo of the ship at once. They are clearly protected by the terms of the contract.

ROWLATT, J.—This is an action for the loss of goods intrusted to the defendants for carriage. There were certain exceptions in the printed document under which the business was done between the parties, and the point was taken on the pleadings that these exceptions did not form part of the contract. That point was quite properly given up by Mr. Greer at the commencement of the case. It is a point of which nothing whatever could have been made, because, when business people are dealing together, it is quite hopeless to raise any question as to whether printed conditions of this kind are part of the contract. It is also quite rightly admitted that if the condition, being part of the contract, applied to the goods at the time of the loss, that could not be maintained.

The defendants are shipowners, and their contract was to carry the goods in question from Hull to Yarmouth, and there deliver them ex ship on rail. They were to be paid for carting and some other small charges, and the carriage included landing and carting to the rail. The loss resulted from a fire at the defendants' quay at Yarmouth, where they had put the goods into a warehouse pending carting to the railway. The fire was on the 19th July 1915, and some of the goods had been in the warehouse from the 14th or 15th. Others had only arrived, I think, the day before the fire, and had only just been put into the warehouse.

The plaintiffs say that putting the goods into the warehouse was a dealing with them not warranted by the contract at all, and therefore the exceptions, referring as they do only to risks occurring when the goods are being handled, accordingly did not apply to goods in the warehouse. Further, they say that not only are the expressed exceptions not applicable, but that, the goods having been put by the defendants into warehouse without authority, the defendants are absolutely responsible for their loss by a risk, external to the goods themselves, operating in a place where the defendants had no business to put the goods.

The principles involved are clear. The only difficulty is to appreciate correctly the facts connected with the business so as to see whether or not the defendants had authority to put the goods into warehouse for the purpose and for the time they did put them there.

These goods were to be put on rail ex ship. The practice was for the plaintiffs, if they desired the goods so dealt with, to advise to that effect the defendants before the arrival of the ship, and they did so in this case. If they did not so advise, the goods went into warehouse. The plaintiffs afterwards ordered them ex warehouse, and in this latter case defendants made a small charge, and after a certain time they also charged a warehouse rent.

The plaintiffs at first argued that these two courses of dealing being in the contract, the goods ex ship could not be put into warehouse at all; that they must be hoisted straight out of the ship into carts, or, if that could not be done, placed on the quay, and wait there under a tarpaulin, and that on no account could they have been put into warehouse.

I find no difficulty in rejecting this argument. The expression "ex ship" does not exclude taking the goods into warehouse for the purpose of dispatching them by cart to the railway. The defendants, as the owners of these small coasting steamers, carrying cargoes of multifarious parcels which they require to unload with all dispatch

and without loss of time, cannot be expected to sort the goods at the ship as they are being hoisted from the hull. Common sense requires that they should have terminal premises, as in fact they have on the quay, where they can sort goods for forwarding to where they require to send them in due course. The real point made by the plaintiffs is that the goods were not here for the purpose of being forwarded, but were taken here in order to allow the defendants, for their own convenience, to delay the forwarding of them, and that this was the interposition of a new stage in the transaction not contemplated, and the plaintiffs further say there was no distinction between the goods which came in on the day of the fire and those which had been in four or five days. The purpose for which they were there was the same in either case, and I am inclined to agree that, from the point of view of the plaintiffs' argument, there was no distinction.

What I have to determine is whether the purposes for which they were taken into the warehouse was justifiable.

The defendants' steamers come in at somewhat irregular intervals of a week or less. The defendants contract for the cartage required to take the goods to the rail, and their arrangements are made so as to keep deliveries in general level with arrivals, getting rid of the cargo of each steamer by the time the next comes in, thus keeping their cartage requirements fairly constant. Some of the goods are perishable, and they go first. They might also send other goods if they are required. Plaintiffs' oil cake, not being perishable, was left to the end. Does that, so far as the oil cake is concerned, introduce a new and unauthorised stage in connection with the transaction? I do not think it does, and I think the defendants, carrying on as they do the business of carriers by these local steamers, and performing also for the plaintiffs the function of forwarding agents, must be contemplated as arranging their business in the way they have arranged it, not intending to cope instantly with each cargo as it arrived, and then relapsing into comparative inertia until the next one comes in.

Therefore, I think they were covered by the exception. Mr. Roche argued that if I held that the removal into the warehouse was justifiable, their detention there could not be complained of. That does not deal with Mr. Greer's point, which was that this was not a prolongation of a mere passage through warehouse on the way to the carts, but was a subsequent deposit of another kind, which was not warranted. I have come to a conclusion against Mr. Greer on the facts.

Therefore I must give judgment for defendants with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *Field, Roscoe,* and *Co.,* for *Birkett, Ridley,* and *Francis,* Ipswich.

Solicitors for the defendants, *Vizard, Oldham, Crowder,* and *Cash,* for *Mills* and *Reeve,* Norwich.

Supreme Court of Judicature.

COURT OF APPEAL.

March 15, 16, *and May* 23, 1916.

(Before Lord Reading, C.J., Warrington, L.J. and Scrutton, J.)

Booth Steamship Company Limited *v.* Cargo Fleet Iron Company Limited. (*a*)

Sale of goods—Stoppage in transitu—*Liability of unpaid vendor for freight—Sale of Goods Act* 1893, *ss.* 44, 45, 46, 47, 48, 61.

A notice of stoppage given during the transit and persisted in upon arrival of the goods involves an obligation upon the vendor to discharge the shipowner's lien for freight. If the vendor repudiates the obligation and so conducts himself as to prevent the shipowner completing his voyage and earning his freight, an action can be maintained by the shipowner against the vendor for damages for the breach of the obligation created by the notice to take actual possession of the goods upon arrival and to discharge the shipowner's lien for the freight in respect of the goods.

By a contract of carriage entered into by the plaintiffs, who were shipowners, with the Construction Company, the plaintiffs carried in the autumn of 1913 *by their steamers certain parcels of railway material from England to C., a small island owned by the plaintiffs in the Gulf of Tutoya, in Brazil. The ultimate destination of the goods was P., a place which was sixty miles up the river and could only be reached by lighters at certain states of the tide. Tutoya was the end of the ocean transit. The defendants, who were the vendors of the goods to the Construction Company, were not parties to the contract of affreightment with the plaintiffs. The Construction Company being in financial difficulties, the defendants, as unpaid vendors of the goods, exercised their right of stoppage* in transitu *by giving due notice to the plaintiffs before the steamers arrived at the port of destination. By the contract of carriage freight was payable before the departure of the steamers, and the plaintiffs had a lien upon the goods for unpaid freight. Upon the arrival of the steamers at Tutoya the plaintiffs landed the goods in question upon the island of C. and notified the defendants accordingly, but the defendants repudiated all responsibility in respect of the goods. At the time of the trial the goods were still at C., and no duty had been paid on them, nor had the plaintiffs received their freight.*

Held, that the plaintiffs were entitled to treat the voyage as completed when the goods were landed at C., and to recover as damages for the breach of the obligation the full amount of freight which they would have earned had the voyage been completed.

Appeal by the plaintiffs from the decision of Bailhache, J. The facts, which are sufficiently summarised in the headnote, appear fully from the judgments.

Bailhache, J. held that the plaintiffs had not completed the voyage, and that they had failed to prove that the defendants had prevented them

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

carrying the goods to their destination and tendering them there. He accordingly gave judgment for the defendants.

The plaintiffs appealed.

Maurice Hill, K.C. and Hon. *M. Macnaghten* for the appellants.

Leck, K.C. and *Raeburn* for the respondents.

The following cases were referred to:

The Tigress, 8 L. T. Rep. 117;
Pontifex v. *Midland Railway Company*, 37 L. T. Rep. 403; 3 Q. B. Div. 23;
Whitehead v. *Anderson*, 9 M. & W. 518, 534;
Oppenheim v. *Russell*, 2 Bos. & P. 42;
United States Steel Products Company v. *Great Western Railway Company*, 113 L. T. Rep. 886: (1916) 1 A. C. 189, 195, 202;
Chalmers' Sale of Goods Act 1893, 6th edit., p. 95.

Cur. adv. vult.

May 23.—The following written judgments were delivered:—

Lord READING, C.J.—This case raises a novel and interesting point of law, of some importance to carriers and merchants—namely, whether an unpaid vendor who has stopped goods *in transitu* can be made liable for the freight on the goods, or for damages for having prevented the carrier earning the freight.

The plaintiffs claim to recover freight or damages from the defendants, the unpaid vendors of certain goods carried by the plaintiffs and consigned to the purchasers. The defendants were not parties to the contract of carriage, but gave notice of stoppage *in transitu* whilst the goods were being carried by the plaintiffs. The plaintiffs acted on this notice, and claim that in the circumstances the defendants are liable to them for the amount of the freight on the goods. The defendants deny that they have incurred any liability to the plaintiffs for freight or damages by the giving of this notice or otherwise. Bailhache, J. came to the conclusion that the plaintiffs had not completed the voyage, and that they had failed to prove that the defendants had prevented them carrying the goods to their destination and tendering them there, and for these reasons he gave judgment for the defendants. The learned judge did not decide whether the defendants would have been liable to the plaintiffs if he had found in their favour on the facts, but expressed the view that he should have been disposed to grant the relief claimed. From that judgment the plaintiffs appeal.

The plaintiffs are shipowners trading from the United Kingdom to ports in Brazil. The defendants are manufacturers of steel rails and other material used in the construction of railways. They sold certain steel rails and fish-plates to the South American Railway Construction Company Limited, which was constructing a railway in Brazil under a concession from the Brazilian Government. In the autumn of 1913 the defendants, acting under the instructions of the British Maritime Trust Limited, given on behalf of the Construction Company, delivered certain parcels of steel rails and fish-plates to be carried by the plaintiffs' steamships to Paranahyba in Brazil. The defendants were under obligations to deliver the goods "f.o.b. Middlesbrough" or on certain terms "f.o.b. Liverpool," payment to be made in exchange for shipping documents. Six hundred tons of rails and fifty-five tons of fish-plates were shipped at Middlesbrough in the *Napo* and 400 tons were shipped in the *Ravonia* for transhipment at Liverpool into the *Crispin*. The *Napo* and the *Crispin* were steamships owned by the plaintiffs. Although the defendants were the actual shippers of the rails and plates on these vessels for carriage to Paranahyba, they were not parties to the contract of affreightment with the plaintiffs. Under engagements made between the British Maritime Trust Limited, on behalf of the Construction Company, and the plaintiffs, the Construction Company were the consignees of the goods, and were also treated as the shippers, and the freight was payable by them before the departure of the ship. The mates' receipts for the goods as shipped were received by the defendants and forwarded by them to the plaintiffs, who, after making out the bills of lading, cancelled the mates' receipts and returned them to the defendants. The bills of lading for the goods on the *Napo* and the *Crispin*, dated the 6th and 8th Oct. 1913 respectively, were held by the plaintiffs until payment of the freight. The freight has not been paid and the bills of lading have never been issued. The rails and plates were never carried to Paranahyba, their destination under the contract, but were landed at Cajueiro, a small island owned by the plaintiffs in the Bay of Tutoya, in Brazil, Paranahyba being situate at a distance of sixty miles from Tutoya up the river. On a voyage to Paranahyba the ocean transport ends at Tutoya, and the carriage up the river to Paranahyba is made by means of lighters. This river is navigable for the lighters only when the tides serve, which occurs twice or thrice in a month. In the ordinary course, and if the tide is serving, the goods are taken from the ship at Tutoya and immediately placed in the lighters for carriage to Paranahyba. If the tide does not serve, the goods are landed by the plaintiffs at Cajueiro and are left there until the lighters can carry them to Paranahyba. There is a bonded warehouse at Paranahyba capable of receiving 300 or 400 tons of cargo, but steel rails and fish-plates are never placed in the warehouse. The practice is that Custom House guards accompany the lighters to Paranahyba, and, in the case of heavy goods, such as steel rails and fish-plates, the duty is assessed and paid in the lighters, and the goods are thus "dispatched." This term is used to denote the passing of the goods through the customs and the payment of the duty leviable upon them. If the rails are not sent forward at once for use, they must lie at Paranahyba in the open, as there is no warehouse accommodation for them. They cannot, however, be landed at Paranahyba unless the duty has been paid upon them.

On the 14th Oct. 1913 the defendants became aware that the purchasers were in financial difficulties, and on that date wrote to the plaintiffs' agents requesting them to refrain from handing over the bills of lading until further notice from the defendants. On the 27th Oct. 1913 the defendants gave notice to the plaintiffs in the following terms: "Please arrange to prevent any rails and fish-plates shipped per *Napo* and *Crispin* being handed over to South American Construction Company at Paranahyba without bill of lading or our authority to release." On the same day the plaintiffs' agents wrote to the defen-

dants: "We may say that we have declined to part with the bills of lading for the cargo shipped by you per steamship *Napo* and steamship *Crispin* to the shippers, the South American Railway Construction Company, pending payment by them of the freight due, and we now take note that you desire us not to part with them irrespective of this condition. We are forwarding to Messrs. the Booth Steamship Company Limited, Liverpool, a copy of your message. They may perhaps address you direct on the subject, as we understand the steamship *Napo* is getting due at her destination, but, failing this, we will advise you as soon as we receive their reply—the question of lien in a Brazilian port is a difficult one. Would it simplify matters if you paid the freight and took up the bills of lading under a guarantee of indemnity to the shipowners?" On the next day the defendants refused to fall in with this suggestion as to the payment by them of the freight. On the 29th Oct. 1913 the defendants gave them the following notice to the plaintiffs:

We beg to inclose copies of letters which we have exchanged with your agents, Messrs. Moxon, Salt, and Co. Please note that we look to you not to hand over the material shipped per steamship *Napo* and steamship *Crispin* to the South American Railway Construction Company or anyone else without authority from us. We give you this notice as we understand you are holding our bills of lading for freight.

It is not in dispute that these letters constituted an effective notice of stoppage *in transitu* and that the defendants, as unpaid vendors, had the right to give it, and that the plaintiffs accepted it and promised to act upon it. The plaintiffs had no alternative in the matter; they were bound to act upon the notice, and, if they disregarded it and delivered the goods to the consignees, they would be liable to the defendants for damages for wrongful conversion: (*The Tigress, sup.*). On the 29th Oct. the *Napo* arrived at Tutoya; the *Crispin* did not arrive until the 25th Nov. 1913. On the 30th Oct. the plaintiffs' agents at Middlesbrough advised the defendants of the arrival of the *Napo* at Tutoya, and informed them that it was necessary to take some prompt action to deal with the rails on board the vessel. They added that the plaintiffs were willing to take the defendants' instructions regarding the disposal of the rails, and in this connection would act as agents for the defendants to hold the rails under their orders, subject to the payment of any charges which might be incurred. On the 31st Oct. 1913 the plaintiffs wrote to the defendants:

"We beg to confirm our telegram of to-day as follows: "Acting on your instructions we shall not surrender bills of lading to the South American Railway Company without your authority. We shall commence landing rails forthwith for your account, holding bills of lading at your disposal." We shall be glad to have your specific instructions without delay.

On the same day the defendants replied:

Telegram received. Note you will not surrender bills of lading without our authority, which is in order. For the rest we cannot accept responsibility for your landing rails at Tutoya.

On the 1st Nov. 1913 the plaintiffs telegraphed to defendants:

You have instructed us not to deliver the goods ex *Napo* to the bill of lading consignees, thus stopping the goods on the basis of your lien in transit. We are carrying out your instructions, and must land cargo at Paranahyba for your account, and look to you for all consequent charges.

On the 1st Nov. 1913 the defendants wrote to plaintiffs:

While we have nothing to do with the decision you have apparently arrived at for your protection to land the material at Tutoya instead of Paranahyba . . . we look to you to hold the bills of lading at our disposal, so far as they relate to the goods supplied by us, until further notice.

The plaintiffs then advised the defendants to appeal to the judicial tribunal at Paranahyba for restraint of delivery. On the 4th Nov. 1913 the defendants requested the plaintiffs to make this appeal in respect of the shipment per *Napo* and *Crispin*, but later, and before effective steps had been taken, withdrew the request (the 26th Nov. 1913), stating that "our friends the South American Railway Construction Company have given us their undertaking that they will not deal with the goods or take any steps to our detriment until our account has been paid." A number of letters and telegrams passed thereafter between the parties and their agents which did not change the situation. The plaintiffs continued to insist that, as the defendants had given instructions to stop the goods and also not to deliver them, the plaintiffs looked to them for all attendant charges, including freight. The defendants, on the other hand, persisted in repudiating all responsibility for freight or other expenses payable by the shippers for the landing of the goods or otherwise. They would only admit responsibility for expenses incurred on their behalf by the plaintiffs after the goods had been landed. The shipowners had carried the goods to Tutoya, and were ready and willing to forward them by lighter to Paranahyba, but it was useless to send them to Paranahyba unless it was intended to pay the duty upon them, as they could not be landed at Paranahyba until the duty had been paid, and, if not paid, the goods must either be brought back to Tutoya or left indefinitely in the lighters. Who was to pay the duty? The unpaid vendors repudiated all responsibility. The consignees were insolvent and could, or in any event would not pay the duty. They could not pay the purchase money, and had agreed with the defendants that they would not deal with the goods until it was paid. In these circumstances what were the shipowners to do? Clearly they were under no obligation to pay the duty. But the goods must be discharged; they could not remain in the ship or the lighters, and the ship could not remain indefinitely at Tutoya—neither could the lighters remain indefinitely at Paranahyba or Tutoya. The course taken by the plaintiffs was to deposit them at Cajueiro, where they lie to this day. By the freight contract the plaintiffs have a lien upon the goods for unpaid freight, and the goods are held by the plaintiffs subject to their lien. At the date of the trial the duty had not been paid upon the goods, delivery had not been made at Paranahyba, the plaintiffs had not received their freight, and the defendants had not obtained their purchase money.

Upon these facts the question arises whether the plaintiffs can recover the freight or damages from the defendants. Bailhache, J. thought not. In order to determine whether the learned judge's conclusion was right, it is, in my judgment,

necessary to ascertain the legal position of the carrier and the vendor when a valid notice of stoppage *in transitu* has been given. When goods are stopped, there is usually no difficulty as to the payment of the freight to the shipowner; the vendor pays it in order to discharge the shipowner's lien and to regain actual possession of the goods. The present case is exceptional in that the vendors insist upon the stoppage but refuse to pay the freight. They say to the shipowners: "The goods must not be handed to the consignee because of our notice of stoppage, and we will not take actual possession of the goods as we should have to pay the freight. You must continue to hold the goods subject to our notice of stoppage." The plaintiffs say: "You, the vendors, are the only persons to whom the actual possession of the goods can be given, and you are under obligation to take actual possession, which will involve the payment by you of the freight."

In the circumstances, what are the rights and obligations of the parties? The right of stoppage *in transitu* was introduced into English law in the seventeenth century, and the first reported case on the subject is in the year 1690: (*Wiseman* v. *Vandeputt*, 2 Vern. 203). As the right arises only in the case of insolvency, it came to be recognised in our courts in the first instance through the medium of the bankruptcy jurisdiction of the Lord Chancellor, which was of statutory creation. The right is not peculiar to the law of England; it was part of the law merchant existing in most of the commercial States of Europe before it was recognised as part of our law. In 1743 Lord Hardwicke received evidence of the custom of merchants as to stoppage *in transitu* and then applied the rule. He based his decree both upon the custom proved before him and upon the justice of the case. (*Snee* v. *Prescot*, 1 Atk. 245). In 1841 Lord Abinger in *Gibson* v. *Carruthers* (8 M. & W. 321, 338) gave a full and interesting account of the history of the introduction of stoppage *in transitu* into our law and reviewed the authorities. He referred to the opinions expressed by courts of equity that the right was founded upon some principle of the common law and of the practice in courts of law to call the right a principle of equity which the common law had adopted. He pointed out the difficulty, owing, perhaps, to its foreign parentage, of reducing this right to some analogy with the principles which govern the law of contract as it prevails in this country between vendor and purchaser. This difficulty, in spite of decisions and legislation, has not been entirely solved. Lord Abinger came to the conclusion that the right had been adopted as part of the law merchant and formed part of the common law of England.

What is the right? It is the right of the unpaid vendor, on discovery of the insolvency of the buyer, and notwithstanding that he has made constructive delivery of the goods to the buyer, to retake them if he can before they reach the buyer's possession. It is a right founded upon the plain reason that one man's goods shall not be applied to the payment of another man's debt: (*D'Aquila* v. *Lambert*, 2 Eden, 77; Benjamin on Sales, p. 817). It is the right not only to countermand delivery to the purchaser, but to order delivery to the vendor: (*The Tigress*, *sup.*; *United States Steel Products Company* v. *Great Western Railway Company* (*sup.*, at p. 202, per Lord Atkinson). Dr. Lushington adds, in *The Tigress* (*sup.*): "Were it otherwise, the right to stop would be useless and trade would be impeded." That the vendor has the right to order delivery to himself cannot be disputed; but does the notice to the carrier place the vendor under obligation to the carrier to take delivery or to give directions for delivery of the goods? I think it does. The goods have been received by the carrier to be delivered to the purchaser. When the vendor has placed the goods in the actual possession of the carrier he has performed his contract of sale and has made delivery to the purchaser. The property in the goods and the right to possession have passed to the purchaser, but the notice of stoppage operates to defeat the purchaser's right to the possession of the goods and transfers it to the vendor. Although doubts existed in the past as to whether or not the contract of sale was rescinded by the exercise of the vendor's right of stoppage *in transitu*, they have long since been dispelled: (*Kemp* v. *Falk*, 5 Asp. Mar. Law Cas. 1; 47 L. T. Rep. 454; 7 App. Cas. 573, 581, per Lord Blackburn; and the law is now to be found in the Sale of Goods Act 1893, 56 & 57 Vict. c. 71). Stoppage *in transitu* is dealt with in the statute by sects. 44 to 48. By sect. 61, sub-sect. 2, the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, continue to be applicable to contracts for the sale of goods. By sect. 48, sub-sect. 1, it is provided that the mere exercise by an unpaid vendor of his right to stop *in transitu* does not rescind the contract of sale: (see also *United States Steel Products Company* v. *Great Western Railway Company*, *sup.*, at p. 203, per Lord Atkinson). The vendor may resell the goods, provided he has complied with certain conditions, and recover damages from his original buyer for loss occasioned by the breach of the contract: (sect. 48, sub-sect. 3). But after the notice is given by the vendor to the carrier the right to possession of the goods is resumed by the vendor; that is the effect of the notice, and the carrier is under obligation to give actual possession to the vendor only or according to his directions. To use the words of the codifying statute, the carrier "must deliver the goods to or according to the directions of the seller": (sect. 46, sub-sect. 2). The carrier cannot be under obligation to deliver the goods upon arrival to the purchaser, his consignee, and also to the vendor who has given notice of stoppage. From the giving of the notice, and so long as the notice is operative, his obligation is to deliver, not to the consignee, but to the vendor.

It was argued in this case that the vendor obtained all the benefits of the notice without incurring any liabilities. As I have already said, I cannot accept this argument. The vendor, by the act of giving notice of stoppage, has prevented the shipowner making delivery to his consignee, and the vendor, in my judgment, is under the correlative obligation to the shipowner to take delivery or give directions for delivery. If there is a lien for freight due in respect of the goods, the vendor's obligation to take delivery involves the further obligation upon him to pay the freight, for he cannot get actual possession until he has discharged the shipowner's lien for

freight due in respect of the carriage of the goods in question, but not in respect of freight due by the consignee to the shipowner on other goods: (*Oppenheim* v. *Russell, sup.*; *United States Steel Products Company* v. *Great Western Railway Company, sup.*). Although there is no decision to be found in the books making the vendor liable in the circumstances for the freight upon the goods stopped by him, I think the earlier cases point in the direction of such an obligation upon him.

The history of the recognition of this right of stoppage *in transitu* in English law is that, at first, it was thought actual possession of the goods was necessary to constitute a valid stoppage *in transitu*. Lord Hardwicke was at one time of this opinion (see *Snee* v. *Prescot* (*sup.*); but later it was held that actual possession by the vendor was not necessary. In 1787 it was held by Grose, J. in *Lickbarrow* v. *Mason* (1 Sm. L. C., 12th edit., pp. 726, 740) that "it is now the clear, known, and established law that the consignor may seize the goods *in transitu*, if the consignee become insolvent before the delivery of them." In 1798 Lord Kenyon said in *Northey and Lewis* v. *Field* (2 Esp. 613): "The courts had of late years leaned much in favour of the power of the consignor to stop his goods *in transitu*; it was a leaning to the furtherance of justice. Lord Hardwicke had been of opinion that, in order to stop goods *in transitu*, there must be an actual possession of them obtained by the consignor before they come to the hands of the consignee; but that rule has since been relaxed; and it was now held that an actual possession was not necessary; that a claim was sufficient; and to that rule he subscribed." In 1802 Lord Alvanley expressed the same view in *Oppenheim* v. *Russell* (*sup.*). He said: "This was an action brought by the plaintiff as consignor against a carrier for the recovery of goods, and it is stated upon the case that the goods were demanded by the plaintiffs before they either actually or constructively reached the hands of the consignee. According to the general rule the carrier under these circumstances was bound to deliver them and was liable, as Lord Kenyon very properly determined, to an action of trover if he did not deliver them. Though no act of seizure ensue, yet if tender be made of the sum due for the carriage, the person sending the goods has the right to resume them, and that was done in this case." In *Litt* v. *Cowley* (7 Taunt. 169, 170) Gibbs, C.J., referring to past cases, said: "It was formerly held that the only way of stoppage *in transitu* was by actual corporal touch of the goods. It has since been held that after notice to a carrier not to deliver, he is liable for the goods in trover against himself if he does not deliver them."

Now, by sect. 44 of the statute, when the buyer becomes insolvent, the unpaid vendor has the right to resume possession of the goods so long as they are in course of transit, and he has rights of sale under sect. 48. The method of effecting the right of stoppage is by taking actual possession of the goods, or by giving notice of the claim to the carrier or other bailee in whose possession the goods are: (sect. 46, sub-sect. 1).

The statute thus gives two ways of effecting stoppage. The first is by taking actual possession, and the second by notice of claim, the latter, as Lord Kenyon observed, being a relaxation of the old rule that required actual possession to be taken. To get actual possession of goods carried the vendor must discharge the shipowner's lien (if any) for freight. Therefore satisfaction of the lien for freight must have been and still is an integral part of the stoppage of goods *in transitu* by the method of taking actual possession. Actual possession can only be taken of goods in transit when the goods arrive; by sect. 45, sub-sect. 1, they are deemed to be in transit until the buyer takes delivery—until that time there is a right in the unpaid vendor to resume the possession on arrival if he can. If the stoppage is by means of notice given, the vendor, upon arrival of the goods, is in the same position as if he had taken actual possession of the goods—that is to say, he is the sole person entitled, and, as I think, obliged, to take or order delivery of the goods. He cannot get actual possession unless he is ready and willing to discharge the lien for freight. I am therefore of opinion that a notice of stoppage given during the transit, and persisted in upon arrival of the goods, involves an obligation upon the vendor to discharge the shipowner's lien for freight—that is, to pay the freight due in respect of the goods carried. To get the goods he must free them from the lien.

There being, then, an obligation upon the vendor to take delivery and discharge the lien by paying the freight, it follows that, if he repudiates the obligation and so conducts himself as to prevent the shipowner completing his voyage and earning his freight, an action can be maintained by the shipowner against the vendor for damages for the breach of the obligation created by the notice to take actual possession of the goods upon arrival, and to discharge the shipowner's lien for the freight in respect of the goods. The damages may be the equivalent of the freight.

Having arrived at this conclusion, it must now be considered whether in the present case the plaintiffs' right of action is defeated by their failure to complete the voyage to Paranahyba. Bailhache, J. decided, without determining whether or not there would otherwise have been a right of action in the plaintiffs, that they could not recover because the plaintiffs had not proved that the defendants had prevented the completion of the voyage. With all respect to the learned judge I cannot arrive at the same conclusion, having regard to my view of the legal position of the defendants. In my judgment, when the goods arrived at Tutoya, the plaintiffs were ready and willing, then and at all material times, to complete the voyage and carry the goods to Paranahyba. The obstacle to the continuance of the voyage was the non-payment of the duty and the repudiation by the defendants of all responsibility for freight, charges, or expenses. For the reasons already given, I think this was a repudiation of their obligation to take delivery, and that they were bound to provide the duty, or to make arrangements for its payment, so as to enable the voyage to be completed. As they refused, the goods were landed and are still at Cajueiro. In my opinion the plaintiffs are entitled in these circumstances to treat the voyage as completed, and to recover, as damages for the breach of the obligation, the full amount of freight which they would have earned had the

voyage been completed: see (*Stewart* v. *Rogerson*, L. Rep. 6 C. P. 424). They claim, and I think rightly, to be placed in the same position as if the vendors had discharged their obligation and enabled the voyage to be continued to Paranahyba. It is immaterial that, after the repudiation by the defendants, the plaintiffs acted in their own interests and for their own protection as regards the freight.

The defendants strenuously contended that *Pontifex* v. *Midland Railway Company* (*sup.*) was a decision which supported their view, but upon examination of that case I do not think it has any bearing upon the problem now before the court. There the vendor had given to the defendants, a railway company, notice of stoppage *in transitu* of goods consigned to the purchasers, but the railway company refused to act on the notice and delivered the goods to the consignee. The vendor thereupon brought an action for damages for the wrongful conversion of the goods, and the sole question in dispute in the case was whether the plaintiff, having recovered a sum exceeding 10*l*, was or was not to be deprived of costs. The decision turned upon the meaning of certain words in sect. 5 of the County Courts Act 1867, and the question was whether the action was "founded on tort," and not on contract, within the meaning of that section. The court held that it was founded on tort, and Cockburn, C.J., in delivering the judgment, said, at p. 26: "The difficulty arises in a case like the present, where there is undoubtedly an unauthorised intermeddling with property, but the act is connected with a contract originally entered into, and there is ground for regarding it as founded on that contract, or some new contract implied from the circumstances"; and later on he says, at p. 28: "The contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to that contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods and the dealing with them by the defendants became tortious." And this agrees with the view which was always taken of such a case when the action for trover existed, for such a misdelivery after notice was always treated as a wrongful conversion.

The defendants argued that this case established that the refusal of the carrier to act upon the notice, and the delivery by him of the goods to the purchaser notwithstanding the notice, was a tortious act and not the breach of a contractual obligation. The decision was that an action for wrongful conversion of the goods was an action "founded on tort" within the meaning of the section, notwithstanding that there might be ground for regarding it as an action founded on "some new contract implied from the circumstances," just as an action by a passenger against a railway company for damages for personal injuries caused by the negligence of the defendants in the conveyance of passengers has been held under similar statutes to be founded on tort notwithstanding that it might also be founded upon contract: (*Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 71 L. T. Rep. 596; (1895) 1 Q. B. 134). In the present case the plaintiffs had not refused to act upon the notice, but, on the contrary, had expressly agreed with the vendors, upon receipt of the notice, that they would act upon it.

I am of opinion, for the reason expressed, that this appeal should be allowed and judgment entered for the plaintiffs for 2743*l*. 14*s*. 7*d*. with costs here and below.

Warrington, L.J.—The plaintiffs are shipowners. Under a contract of carriage entered into by them with the South American Railway Construction Company, they carried in the autumn of 1913, in two ships called the *Napo* and the *Crispin*, certain parcels of steel rails and other railway material from ports in England to Tutoya, a place on the coast of Brazil. The ultimate destination of the goods was Paranahyba, a place about sixty miles up a river from Tutoya, from which the goods have to be conveyed in lighters. Tutoya is the end of the ocean transit. The defendants are the vendors of the goods to the Construction Company. The contract of carriage was not made with them, nor were they in any sense parties to it. Believing, as it turned out to be the fact, that the Construction Company was insolvent, the defendants exercised their right of stoppage *in transitu* by giving the proper notice to the plaintiffs. Though the contract of carriage provided for payment of the freight in London and Liverpool respectively before the departure of the steamers, the freight was and still remains unpaid. For reasons sufficient and intelligible from their own point of view, the defendants have not seen fit to take actual delivery of the goods to themselves or to give directions for their delivery to any other person. The plaintiffs' lien for freight remains effective with such rights as are attached to it. The plaintiffs had not parted with the actual possession of the goods.

The plaintiffs, by the present action, seek to establish and enforce a personal liability on the part of the defendants for the freight or for an equivalent amount by way of damages.

There was at first some uncertainty as to the mode in which their case was presented, but before the close of the argument it was, I think, made clear that they asserted as against the defendants a contractual or quasi-contractual obligation arising out of the relation brought about by the stoppage *in transitu*. The case was put in this way: That by preventing delivery to the consignees the defendants ought to be treated as put in their place, and, while they are on the one hand entitled to require delivery of the goods to themselves, or according to their directions, they are on the other hand bound to accept or give directions for such delivery and thus incidentally to pay the freight. Before the learned judge the matter was dealt with in a somewhat different way. It appears to have been assumed on the facts that the contract of carriage was not performed by the plaintiffs so as to entitle them to recover from the buyers because they did not carry the goods from Tutoya to Paranahyba, but landed them on an island belonging to themselves off the former port, and it was alleged by the plaintiffs that they were prevented by the action of the defendants, in neglecting either to take delivery of the goods or to give directions for delivery, from performing their duty and earning their freight, and that the defendants must make good the amount of freight by way of damages for such neglect. The learned judge, on the facts, came to the conclusion that,

assuming the contract of carriage had not been performed, the plaintiffs had not established that they were prevented from so doing by the action of the defendants, and on that ground gave judgment for them. In the view he took it became unnecessary for him to consider whether there lay upon the defendants the obligation the neglect of which was relied on in support of the plaintiffs' claim.

I have come to the conclusion on the facts that, as between the plaintiffs and the defendants at all events, the plaintiffs have, in the peculiar circumstances of this case, done all that was reasonably necessary to entitle them to require the defendants to take delivery of the goods if the latter are in law bound to do so.

At Tutoya there is no Custom House or bonded warehouse of any kind. All goods have to be conveyed to Paranahyba in lighters. The bonded warehouse at Paranahyba is unsuited for the accommodation of a cargo such as that in question. Inasmuch as the defendants refused to pay the duties and thus enable the goods to be dispatched at Paranahyba, the only practical course, in my opinion, was that adopted by the plaintiffs, namely, to deposit the goods on their own island at Tutoya.

I think, therefore, the question of law avoided by the learned judge arises, and I proceed to deal with it. The question is: "Does the unpaid vendor of goods, by exercising his right to stop them *in transitu*, bring himself under a personal obligation to the carrier to take, or give directions for, delivery of the goods, involving, of course, the discharge of the carrier's lien for unpaid freight?" I think it must be answered in the affirmative. The question seems to be an entirely novel one. It can only arise in a very rare case such as the present, where, owing to the nature of the goods and the circumstances surrounding them at the end of the transit, it is not worth the vendor's while to take actual possession.

There is no direct authority to be found in support of or against the plaintiffs' claim, and I think a solution of the question must be found in an examination of the nature of the right of stoppage *in transitu*. It is a right to resume possession of the goods. The vendor, by the contract of sale, has transferred the property therein to the purchaser, and by delivery to the carrier has also transferred the possession thereof. If the vendor is unpaid and the purchaser is insolvent, the former may resume possession. He may do so either physically—in which case, of course, the lien for freight has *ex hypothesi* been discharged or released—or he may do so by giving notice to the carrier of his claim, and the latter must then deliver the goods to or according to the directions of the vendor. This is, in my opinion, merely an alternative mode of resuming possession, and appears to have been introduced as a relaxation of the previous stricter rule, which required physical possession in order to the effective exercise of the right of stoppage: (see Lord Kenyon, C.J. in *Northey and Lewis* v. *Field*, *sup.*). Are we to say that the vendor is at liberty to give notice to the carrier of his claim and yet to refuse to take delivery himself or to give directions therefor, leaving the carrier with no person to whom the goods can be delivered? So to hold would be to impose a very serious burden on the carrier. Under the contract of carriage his obligation is to deliver to the consignee. The vendor's notice prevents him from so doing, and, if the vendor is entitled to refuse to take delivery himself, or to give directions for delivery to someone else, it is difficult to see how the carrier is to rid himself of the goods. The whole doctrine of stoppage *in transitu* appears to have originated in the law merchant and to have been founded on the customs of traders, and I cannot believe that it can have been part of such customs to leave the carrier in such a position that he has goods of which he can require nobody to relieve him at the end of his transit.

I think, on the whole, seeing that the power of stopping *in transitu* is one of two forms of resuming possession, it may fairly be held that the right thereby confirmed of obtaining possession by notice is accompanied by the correlative duty of actually obtaining it, with the necessity, if freight is unpaid, of paying the freight and thus discharging the carrier's lien.

The vendor's obligation seems to me to arise, not because he becomes directly liable to perform the particular part of the contract of carriage, including the payment of freight—this, in my opinion, he does not—but from the relation into which he enters with the carrier by placing him in such a position that he cannot deliver to the consignee or to anyone else but the vendor or according to his directions.

I think, therefore, that the appeal ought to be allowed, and that the defendants ought to be ordered to pay to the plaintiffs the sum claimed, being that which they would have had to pay in order to obtain delivery of the goods.

Scrutton, J.—The Booth Steamship Company, whom I call "the shipowners," brought an action against the Cargo Fleet Iron Company Limited, whom I call "the vendors," for a sum of 2743*l.* 14*s.* 7*d.* as freight or damages. The defendants allege that in the events which happened they are under no liability to the plaintiffs. Bailhache, J. has given judgment for the defendants, the vendors, and the plaintiffs, the shipowners, appeal to this court.

The facts are shortly as follows: The vendors sold to the South American Railway Construction Company Limited, whom I call "the purchasers," certain rails "f.o.b. Middlesbrough. Payment against shipping documents in London." This contract contemplates that the vendors shall receive the shipping documents from the ship and hold them against the price. The purchasers made a freight engagement with the plaintiffs, the shipowners, under which the goods were to be carried to various Brazilian ports at shippers' option, including Paranahyba, "freight payable by the shippers in London or Liverpool before the departure of the ship." The vendors shipped goods f.o.b. Middlesbrough, but, in circumstances not clearly stated, the ships' and purchasers' agents followed a course of business by which on shipment the ships' agents received and cancelled the mates' receipts. They cancelled them because they drew up bills of lading against them ready to be handed against payment of freight to the purchasers with whom they had made the freight engagement; and they sent the mates' receipts to the vendors as evidence of shipment, but cancelled so that the vendors, with whom they had no freight engagement, could not claim bills of lading against them. The vendors,

as between themselves and the purchasers, might probably have objected to this course of business, which prevented their having shipping documents to hold against payment of the price, but they did not do so before the shipments in question in this action. On the 29th Sept. 1913 400 tons of rails were shipped by the defendants, the vendors, at Middlesbrough in the *Ravonia* for transhipment at Liverpool into the *Crispin*, bound for Paranahyba. On the 4th Oct. 600 tons of rails were shipped by the vendors at Middlesbrough on the *Napo*, bound for Paranahyba. Apparently in each case the ships' agents prepared bills of lading in accordance with the mates' receipts, cancelled the mates' receipts and sent them to the vendors, and held the bills of lading against payment of freight by the purchasers, to whom they rendered an account for freight. The bill of lading by the *Napo* made the purchasers shippers, and delivery was to be at "Tutoya (Paranahyba)" to the purchasers or their assigns, freight to be payable by the shippers in London before the departure of the ship. A lien was given for freight, whether payable in advance or not. The shipowners were not liable for any "duties or taxes." "Any duty, tax, or impost of whatever nature, levied by any authority at the ports of transhipment, destination, or elsewhere upon the ship, for or in respect of the goods at any time between the signing of this bill of lading and the delivery of the goods shall be paid on demand by, or collected from, the shippers or consignees at ship's option." The bill of lading by the *Crispin* was in the same terms, except that the destination was stated to be Paranahyba, and the freight was payable at Liverpool. Both bills of lading included other goods shipped by the purchasers but not supplied by the vendors.

At the beginning of Oct. 1913 the purchasers were in pecuniary difficulties, owing to some dispute with the Brazilian Government as to the payment of instalments. The vendors then appear to have found that they had not shipping documents. On the 14th Oct. they asked the shipowners not to deliver bills of lading for the *Napo* and *Ravonia* (*Crispin*) to the purchasers without their consent, and in future to give them separate bills of lading for their parcel. The shipowners agreed to the first request, and as to the second replied, as was true, that their carrying arrangements were with the purchasers, not with the vendors.

The purchasers did not pay either freight to the shipowners or the cost of the rails to the vendors, and accordingly on the 27th Oct. the vendors, being unpaid, gave the shipowners' London agents a notice—"Please arrange to prevent any rails and fish-plates shipped per *Napo* or *Crispin* being handed over to South American Construction Company at Paranahyba without proper bill of lading or our authority to release"—which has been treated throughout as a notice to stop *in transitu*. The shipowners' agents treated this as a notice to hold the bills of lading to the order of the vendors, whether freight was paid or not, forwarded it to their principals, and added, with great prudence from their point of view, "Would it not simplify matters if you paid the freight and took up the bills of lading under a guarantee of indemnity to the shipowners?" To which the vendors, with equal prudence from their point of view, replied: "We do not see our way to fall in with your suggestion." The shipowners were at first disposed to take the view that the vendors had nothing to do with the bills of lading; but, after taking legal advice, expressed their willingness "to take the vendors' instructions regarding the disposal of the rails at Tutoya," "and in this connection we would of course act as your agents subject to the payment of any charges which may be incurred." Meanwhile, on the 29th Oct., the vendors gave a notice: "Please note that we look to you not to hand over the material shipped per the steamship *Napo* and steamship *Crispin* to the South American Railway Construction Company or anyone else without authority from us. We give you this notice as we understand you are holding the bills of lading for freight." This is a genuine "stop *in transitu*" notice, subject to the point that, while it gives directions not to hand the goods to the purchasers, it gives no positive directions what is to be done with them. The shipowners at once instructed their Maranham agents to stop discharge, giving as the reason "difficulties payment freight and cargo." The Maranham agents passed this on to the Paranahyba agent, but only gave as the reason "difficulties payment freight." Bailhache, J. notes this, but as it was partly corrected in two days and wholly corrected by the 6th Nov., and discharge was in every event stopped, I attach no importance to the variation. On the 29th Oct. the *Napo* arrived at Tutoya.

Cargo for Paranahyba, which is sixty miles up a river which flows into the bay on which Tutoya is situated, only goes in the ocean ship to Tutoya. It is then transhipped into lighters, which are towed up the river to Paranahyba at such times as the draught of water permits, sometimes only three days a month. The stock of lighters will hold about 175 tons of cargo, enough for the ordinary cargo from a steamer for Paranahyba. With vessels like the *Napo*, carrying 950 tons of rails for one shipper for Paranahyba, it is necessary, to avoid detaining the ship, to put the cargo ashore on an island called Cajueiro, belonging to the shipowners, whence it is gradually removed by the lighters. The Custom House is at Paranahyba, and will hold some 300 or 400 tons of cargo Goods like rails are not put in the Custom House, but in charge of the customs officials on the beach, and in this case before they are landed on the beach the customs duties must be paid. The customs officials come down to Tutoya and accompany the lighters to Paranahyba. If things were going smoothly, probably in this case the goods would be admitted free of duty under the purchasers' concession and landed and taken away by them. But if goods were not landed by the purchasers, but by the vendors and (or) shipowners to secure their lien, duty must be paid before the goods were landed at Paranahyba, and, if not paid, the goods would either stay in the lighters or be taken back to Cajueiro island and there stored. If the purchasers were not to receive the goods because they had not paid cost and (or) freight, someone, the vendor or the shipowner, must pay the duty, or else it was no use going through the formality of lightering the goods from Tutoya to Paranahyba in order to lighter them back again.

On the 31st Oct., by telegram and letter, the shipowners told the vendors they were going to land the rails, *i.e.*, at Tutoya, and asked for

further specific instructions. The vendors replied: "We cannot accept responsibility for landing rails at Tutoya." They did not, I think, understand that the greater part of the rails must, anyhow, be landed at Tutoya before they went into lighters, or that duty must be paid before they could be landed on behalf of the vendors at Paranahyba. Discharge of the *Napo* began on the 31st Oct. On the 1st Nov. the shipowners wired: "You have instructed us not to deliver the cargo ex *Napo* to the bill of lading consignees, thus stopping the goods on the basis of your lien in transit. We are carrying out your instructions and must land cargo Paranahyba for your account and look to you for all consequent charges," and wrote repeating the telegram and adding: "We are, however, advised that the wisest procedure for your protection is to file a formal legal protest with the federal judge's representative at Paranahyba, appealing for restraint of delivery; and we shall be glad of your specific instructions on this point at the earliest possible moment. We should like to say that we are desirous of helping you in this matter, and, if you think well to follow the procedure suggested, we shall be glad to place the services of our Paranahyba agents, Messrs. Booth and Co., at your disposal." Crossing this, came the vendors' letter: "We have yours of yesterday and confirm ours of the same date. While we have nothing to do with the decision you have apparently arrived at for your own protection, to land the material at Tutoya instead of Paranahyba, or any additional expenses that may be occasioned thereby, we look to you to hold the bills of lading at our disposal until further notice," which still misunderstands the reason of landing at Tutoya. The matter was made more difficult by the fact that, for reasons of their own connected with their quarrel with the Brazilian Government, the purchasers were delighted not to receive the rails, and did not intend to make any endeavour to get them. On the 3rd Nov. the shipowners state what they then proposed to do: "You seem to have misunderstood our intended action with regard to the discharge of the rails. These we will land, ex the lighters, at Paranahyba (not Tutoya), thus fulfilling the bill of lading contract, for which you have made yourselves responsible by the instructions which we have accepted from you. We await your instructions with regard to the suggested legal protest at Paranahyba." And on the 4th Nov. the vendors ask them to take legal proceedings at Paranahyba to restrain delivery. This is the only instruction to do anything which the vendors ever gave, and they revoked the instructions on the 26th Nov.

On the 7th Nov. the vendors again repudiate liability for freight and expenses payable by the shippers, which would include the duty, but admit it for "expenses incurred by you on our behalf after the goods have been landed." They apparently thought, wrongly, that the goods could be landed without paying duty and kept in some safe place for them. On the 8th Nov. the shipowners' agents wire that only an "embargo with documents proving non-payment" will prevent delivery of cargo to consignees. On the 11th Nov. the shipowners again put forward their claim on the vendors for freight: "You appear to have forgotten that you have not only given us instructions to stop the goods *in transitu*, but also instructions not to deliver. This being so, you are, as far as we are concerned, the owners of the goods, and we must look to you for all attendant charges including freight"; and received another repudiation: "We have told you all along that we will not be in any way responsible for the freight and landing charges. We have no contract with you whereby we are liable for the freight and landing charges. You have your right to freight against the South American Railway Construction Company and also your lien on the goods, and we do not ask you, and have never asked you, to part with possession of the goods until the freight has been paid. All we have done is to give you notice that we are unpaid vendors, and to ask your assistance to enable us to get payment of the purchase money, but we are not prepared, as we have previously stated, to make ourselves responsible for the payment of the freight and landing charges or to take delivery of the goods on any such condition," a repudiation which entirely omits to say what is to happen to the goods stopped and where they are to be put. The letter of the 13th Nov. from the shipowners to their Paranahyba agents, a letter not referred to by Bailhache, J., shows that the shipowners were then acting on the view that they must look for their freight to those who had given them instructions to stop *in transitu*, the vendors, and not claim it against the purchasers, except in the case of some rails by the *Crispin*, for which the suppliers, Dorman, Long, and Co., had been paid, and which, therefore, they had not stopped *in transitu*.

Following the letter of the 13th Nov. the shipowners instructed an embargo in the case of the *Crispin* for the cost and freight of the vendors' rails in the names of the vendors; it does not appear the vendors were told of this. The *Crispin* arrived at Tutoya on the 25th Nov. But on the 26th Nov. the vendors made a surprising communication to the shipowners, writing: "In reply to your letter of the 25th inst., we beg to inform you that we have decided not to give the suggested power of attorney to your firm at Paranahyba, as our friends, the South American Construction Company, have given us their undertaking that they will not deal with the goods or take any steps to our detriment until our account has been paid. We are, therefore, for the present not taking any further steps for the protection of our interests in these cargoes." The vendors agree with the consignees that the consignees shall not receive the goods; the vendors themselves will not give any instructions to the ship as to the goods, except that they are not to be delivered to the consignees.

On the 29th Nov. the plaintiffs' agents propose to send all possible rails, except the Dorman, Long rails, ex *Crispin* to Paranahyba at once; but on the 2nd Dec. they call the shipowners' attention to the fact that duty will have to be paid on rails they embargo on their behalf, and on the 3rd Dec. they send a very important telegram to the effect that the purchasers' representatives do not want the rails at Paranahyba, and will not sign the necessary document; that the rails are not through the Custom House and will not be allowed to discharge, and that the rails are on the island of Cajueiro except three lighters which they now propose to discharge there.

There the matter stops—with the rails at Cajueiro, because no one will pay the duty on them and receive them at Paranahyba, where the shipowners are quite ready to send them, subject to the lien for freight. The purchasers refuse to receive them or pay for them; the vendors, who have stopped them *in transitu*, will not give any instructions what to do with them; and the question now is whether in any way the vendors are liable to the shipowners for the freight on them.

The rest of the history is that, the purchasers having gone into liquidation on the 23rd Feb. 1914, the vendors wrote to the receiver that they had stopped delivery *in transitu* and claimed ownership of the goods. They could not at this time have had more than possession of the goods through the shipowners, if they had that. Two days later they told the liquidator they proposed to sell the goods. The receiver would have nothing to do with the goods. The vendors persisted in their refusal to pay freight, and have by this time probably lost the goods.

The plaintiffs, the shipowners, alleged in their statement of claim that in stopping *in transitu* it became the duty of the vendors to give directions for the delivery of the cargo, and to pay freight and expenses, and they claimed either the freight or the same amount in damages. The defendants, the vendors, denied their liability, and raised the question whether the shipowners had any right to stop the transit at Tutoya. Bailhache, J. states the question to be whether the completion of the voyage was prevented by the vendors' action in giving the stop notice, and finds that the plaintiffs have failed to satisfy him that they were prevented by the stop notice given by the defendants "from performing their freight contract, carrying these rails to Paranahyba, and making a tender of them there." I do not understand to whom the learned judge suggested they should be tendered. The vendors had forbidden the shipowners to tender them to the purchasers; and had refused to take them themselves. To land them at Paranahyba would risk their seizure by the Government or their coming into possession of the purchasers, neither of which the vendors desired, and would involve the payment of duties which the vendors would not, and the shipowners were not bound to, pay. I do not think either the vendors or the purchasers could complain of the goods not going forward from Tutoya to Paranahyba, or, if otherwise liable, use it as an excuse for not paying freight. The judge thinks the landing at Tutoya was to protect the shipowners' lien for freight. I think he has overlooked that on the 28th Nov. the shipowners were only putting an embargo for freight on the goods not stopped *in transitu*, and were looking to the vendors for their freight.

I should therefore on the evidence come to a different conclusion from Bailhache, J. and find that in the circumstances the shipowners had done all that was necessary to claim freight from whomsoever was liable. If the judge below had found that, he states, without giving reasons, that the inclination of his opinion is that the plaintiffs would succeed in their claim. Whether this is right raises very difficult questions of great general importance on the nature and consequences of the right of stoppage *in transitu*, which I now proceed to consider.

The right of stoppage *in transitu* came into the English law in the seventeenth century from the custom of merchants, both English and foreign—a custom, therefore, which had grown up with no special reference or congruity to the English law. As it enabled an unpaid vendor whose purchaser was insolvent to exercise some control over goods in which he had no property and of which he had no possession, while in the hands of a shipowner with whom he had no contract, and to prevent that shipowner from performing a contract to which the unpaid vendor was no party, it was obvious there would be considerable difficulty in fitting in this international usage and the national law. As Lord Abinger says, in the well-known judgment in *Gibson* v. *Carruthers* (*sup*., at pp. 338, 339, 340): "In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted. . . . Many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee. . . ." And, again, he refers to "the reasoning and dicta by which it has been attempted, not very successfully, to develop the principle, and make it conformable in appearance and dress . . . with the family of English law into which it has been adopted."

Great difference of opinion has existed as to the nature of the right, whether or not stoppage *in transitu* revested the property and cancelled the contract. In 1761, in *D'Aquila* v. *Lambert* (1 Amb. 399, 400), it was said that the goods of one man (*i.e.*, the unpaid vendor) should not be applied in payment of another man's (*i.e.*, the purchaser's) debts, and as late as 1877 Cockburn, C.J., in *Pontifex* v. *Midland Railway Company* (*sup*., at p. 27), said that the effect of the stoppage *in transitu* was "to revest the property" in the unpaid vendor. Yet it is clear now that it does not, but only enables him to resume possession. In 1842 it was quite an open question whether stoppage *in transitu* entirely rescinded the contract, or only replaced the vendor in the same position as if he had not parted with possession: (*Wentworth* v. *Outhwaite*, 10 M. & W. 436, 452). As late as 1885 Cotton, L.J., in *Phelps, Stokes, and Co.* v. *Comber* (5 Asp. Mar. Law Cas. 428; 52 L. T. Rep. 873; 29 Ch. Div. 813, 821), treated it as still an open question, though he preferred the latter alternative.

Fortunately, in 1893, the Sale of Goods Act, purporting to codify the common law, and (see sect. 61, sub sect. 2) preserving "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act," finally settled some of the doubtful points. The right of stoppage *in transitu* does not by its mere exercise rescind the contract of sale: (sect. 48, sub-sect. 1). It is a resumption of possession, made while the goods are in course of transit, entitling the unpaid vendor to retain the goods until payment or tender of the price": (sect. 44). But it is more than a mere lien, for the unpaid vendor may, if the goods are perishable, or if, after notice to the buyer of intention to resell, the buyer does not within a reasonable time tender the price, resell the goods, and claim damages

from the buyer for any loss occasioned by breach of contract: (sect. 48, sub-sect. 2). The unpaid vendor may retake actual possession if he can get it. If the unpaid vendor "had got the goods back again by any means, provided he did not steal them, I would not blame him," said Lord Hardwicke in *Snee* v. *Prescot* (*sup.*, at p. 250); or he may exercise his right "by giving notice to the carrier . . . in whose possession the goods are" at such a time that by reasonable diligence the carrier may stop delivery to the buyer, which he ought to make according to his contract with the buyer: (sect. 46, sub-sect. 1). Lord Hardwicke says, at p. 248, that if goods "are actually delivered to a carrier to be delivered to A. and while the carrier is upon the road, and before actual delivery to A. by the carrier, the consignor hears A. his consignee is likely to become bankrupt, or is actually one, and countermands the delivery, and gets them back into his own possession again, I am of opinion that no action of trover would lie for the assignees of A. because the goods, while they were *in transitu*, might be so countermanded." And if such notice is given to the carrier "he must redeliver the goods to or according to the directions of the seller. The expenses of such redelivery must be borne by the seller": (sect. 46, sub-sect. 2). In general practice the unpaid vendor is only too ready to get back the goods which he has sold to an insolvent consignee. It is clear that, to get them from the carrier, he must discharge any lien the carrier has for particular charges or freight on the goods in question, but not any general lien by contract or usage for other sums due from the consignee but not due in respect of the particular goods. This has recently been authoritatively restated by the House of Lords in *United States Steel Products Company* v. *Great Western Railway Company* (*sup.*, at p. 196). I notice, to show I have not overlooked it, that the shipowners' lien for freight in the case now before us is not a common law lien for freight on delivery, but a contractual lien for advance freight, but it is in my view "charges payable on the carriage of the particular goods" within the decision of the House of Lords (*sup.*) The unpaid vendor is usually quite ready to do this to get the goods; and it is not till, in this case, an unpaid vendor contents himself with the negative attitude "do not deliver bills of lading or goods to the consignees under your contract," and declines to give any further instructions as to what is to be done with the goods at the end of the transit, that the question arises, what are the duties to the carrier of the unpaid vendor who stops *in transitu*, the Sale of Goods Acts having only stated some of his rights against the carrier. It will be noted that the unpaid vendor goes further in this case: he not only says, "Do not deliver to the consignee," and abstains from giving instructions to whom the carrier is to deliver, but he actually gets an undertaking from the consignee that he will not take delivery under his contract: (see letter of the 26th Nov.).

This raises the question what the unpaid vendor is bound or entitled to do when he "stops *in transitu*." May he during the transit, as of right, direct the carrier to deliver to him before the contractual place of destination? Must he at the end of the transit take delivery if he prevents delivery to the contractual consignee? Or can he say, as in this case: "Don't deliver to the consignee; I won't take the goods or tell you what to do with them; you must provide for the goods, but I shall sue you if you deliver to the consignee under your contract"? First, what is the effect on the transit or voyage under the contract of affreightment? The unpaid vendor may "stop"; that is, retake possession by the carriers holding for him *in transitu*—that is, during the transit; but he cannot, in my view, demand actual possession during the transit against the will of the carrier, or direct the shipowner to deliver to him except at the contractual place of destination. The goods may be under other goods in the hold; the ship may have contractual engagements to carry other goods to other parts; policies of insurance may be affected by detention or delay. The contract of sale is not cancelled by stoppage *in transitu*; neither, in my view, is the contract of affreightment, except in so far as delivery at the port of destination to the consignee is stopped by the unpaid vendor, and other delivery there is ordered by him. It is true that in *Whithead* v. *Anderson* (*sup.*, at p. 534) Parke, B. uses language like this: "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser." But the same learned judge, in *Wentworth* v. *Outhwaite* (*sup.*) in the same year, says, at p. 452: "The vendor is entitled to retain the part actually stopped *in transitu* till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end." He is either using "retain" and "retake" as equivalent words meaning "holding adverse possession," or is confining "retaking" to the journey's end. In the same way, when Dr. Lushington says in *The Tigress* (*sup.*), "The right to stop means the right not only to countermand delivery to the vendee, but to order delivery to the vendor," he is, I think, speaking of the place where the carrier by contract has to deliver. The carrier may, and it is frequently convenient he should, redeliver, before the contract place of delivery, to the unpaid vendor on an indemnity; but he cannot, in my view, be forced to do it. The delivery of the goods may be stopped, but not their transit to the place of delivery.

The goods then arrive at the contract place of delivery where, if there had been no stop, they would have been delivered to the consignee, subject to the shipowner's lien for freight. If the shipowner exercises that lien against a demand by the consignee, he will have to bear the cost of exercising the lien—*Somes* v. *British Empire Shipping Company Limited* (2 L. T. Rep. 547; 8 H. of L. Cas. 338)—and provide for the safe custody of the goods while he keeps his hand on them; and he cannot sell the goods. But supposing he is told not to deliver to the consignee by an unpaid vendor who has the right to order delivery to himself and does not, on what principle can he be compelled to retain and provide for the custody of the goods after he has arrived at the contract place of destination, or is ready to go there, if anyone will take delivery? What is he to do with the goods? Is his ship to go sailing round the world, like the "Flying Dutchman," on an endless, hopeless voyage for ever carrying goods that no one will take? Is

his ship to stay at the port of destination till it is convenient to someone to take the goods from her? Why, if he discharges the goods, must he pay duties which by the contract should be paid by the person taking delivery, and provide for the custody of the goods, as here, for an uncertain time, on the chance that someone will some day recoup him? And does it make any difference, when he is stopped by the unpaid vendor from tendering the goods to the consignee, that, if he had been permitted to tender them, he might have been in similar difficulties if he chose to assert his lien for freight? He is prevented from having the chance of offering the goods to the consignee.

It is said that both the shipowner for his freight and the unpaid vendor for his price have to look to the goods and must take their chance. This is not quite exact, as the unpaid vendor can sell the goods, and the shipowner cannot; but, further, the unpaid vendor is claiming to exercise his lien through the shipowner, and, if he must bear the expense of exercising his own lien, cannot make the shipowner bear the expense of exercising the vendor's lien for the benefit of the vendor. It is also suggested that the shipowner makes his contract subject to the possibility of an unpaid vendor stopping *in transitu*, and must put up with the consequences. But, if I am right that the unpaid vendor cannot stop the transit, but only the delivery to the vendee, it follows that he cannot prolong the transit or the shipowner's obligation to hold the goods after the shipowner is ready to make delivery at the end of the transit. This question must be considered, not only from the point of view of the shipowner's claim for freight for the transit, but from the point of view of his claim for demurrage or damages for detention at the end of the transit. Freight is now frequently paid in advance; but when the shipowner arrives at the end of the transit, and is forbidden by the unpaid vendor to deliver to the consignee, what is his position as to custody of the goods if the unpaid vendor refuses to give positive instructions as to their delivery? What is the shipowner to do? If he keeps the goods in his ship, ought not the person who compels him to do so to pay the demurrage? If he lands the goods in a warehouse to keep the unpaid vendor's lien, ought not the person for whom the lien is exercised to bear the expense of using the lien? And why is the shipowner to be compelled to take any responsibility for the goods after his contract voyage is over? Surely it is for the person who stops the transit and desires to exercise his lien to take the goods and exercise his lien for himself. And must he not, before he does so, satisfy any liens already existing?

Further, in my view, the shipowner has fulfilled his contract when he has reached a point where the consignee or person taking delivery is bound to do something, and is not bound himself to incur further expense when no one will take delivery. He is not bound to go into a dock and incur dock dues if he is told that the consignee will not take delivery even if he goes in. He was not in this case bound to send the goods up from Tutoya, when no one would pay the duties without which the goods could not be landed, and he was not allowed by the vendor to deliver the goods to the contractual consignees.

On these events happening the shipowners had, in my view, no further obligation to provide for the goods. The unpaid vendors had the right to stop delivery to the consignee and the right to require delivery at the port of destination to themselves. In my view this imposed on them a corresponding duty to take delivery from the shipowners, if they continued to prevent them from delivering to the consignees. The vendors are not obliged to perform this duty, for they may release the goods and withdraw the stop before the end of the transit, but if they do not withdraw the stop, but insist on it, in my opinion they substitute themselves for the original consignees and must take delivery. They can only do so on the terms of discharging the shipowners' lien for freight, and, as these vendors are quite solvent, the damages for their failing to take delivery will be at least the amount of freight the shipowners would have received if the vendors had fulfilled their obligation and taken delivery. The question is, not what the shipowners have lost by being stopped from tendering to the consignees; it is quite possible in this case that they have lost nothing, as the consignees would not or could not pay, and expenses might be incurred in asserting the lien. The question is what the shipowners have lost by the vendors refusing to take delivery at the end of the transit when they have stopped the contractual delivery. And if, as I have held, they were bound to take delivery in such a case, the shipowners have lost at least the amount of the freight which the vendors must have paid before they took delivery. It is not necessary to hold that the vendors become a party to the original contract; their obligation follows, in my view, from their interfering with that contract and persisting in their interference at the end of the transit.

It is true that this point has never been determined before, but the fact that unpaid vendors have in fact always acted in accordance with the obligation that I think is imposed on them shows that it is in accordance with commercial usage and in favour of commerce. On this part of the case the conclusion I have arrived at is apparently the same as that reached by Bailhache, J., though, as he does not state his reasons, I do not know that we have travelled by the same road. But as I differ from him in the view I take of the documents in the case, and see nothing in those documents to destroy the vendors' obligation to take delivery at the end of the transit of the goods which they have stopped from going to their contractual destinations, I am of opinion that the appeal should succeed and that judgment should be entered for the plaintiffs for 2743*l.* 14*s.* 7*d.* with costs here and below.

Appeal allowed.

Solicitors for the appellants, *Armitage, Chapple,* and *Macnaghten.*

Solicitors for the respondents, *Downing, Handcock, Middleton,* and *Lewis,* for *Bolam, Middleton,* and *Co.,* Sunderland.

May 15, 16, *and June* 3, 1916.

(Before Lords COZENS-HARDY, M.R., PICKFORD, L.J., and NEVILLE, J.)

WEIGALL AND Co. *v.* RUNCIMAN AND Co. AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Principal and agent—Instructions to agent—Warranty of authority—Ambiguity—Hire of ship—Whether principal bound by agent's contract founded on his interpretation of instructions.

The plaintiffs brought an action against the defendants for breach of warranty of authority to charter to the plaintiffs a ship belonging to one A. The authority relied upon was given to the defendants by A., a shipowner at Naples, who sent a telegram to the defendants in the following words: "You authorise fix steamer prompt loading 3000 *tons coal Newport Cagliari Mersina or Palermo twenty shillings. If cannot better wire immediately." A. refused to let a ship and repudiated the charter, his reason being that his authority to the defendants was to hire a ship and not to let one.*

Rowlatt, J. held that if the telegram was ambiguous the defendants had acted bonâ fide *and reasonably in interpreting it as they had done; that the shipowner would have been responsible to the plaintiffs for the interpretation which his agents had* bonâ fide *and reasonably placed upon ambiguous instructions; but that the actual charter-party entered into was outside the authority in whatever way it was read, and that therefore the plaintiffs were entitled to judgment.*

Ireland *v.* Livingston (1 *Asp. Mar. Law Cas.* 389; 27 *L. T. Rep.* 79; *L. Rep.* 5 *E. & I. App.* 395) *considered.*

Loring *v.* Davis (54 *L. T. Rep.* 899; 32 *Ch. Div.* 625, *at p.* 631) *applied.*

The defendants appealed.

Held, that the decision of Rowlatt, J. was right.

APPEAL by the defendants from the decision of Rowlatt, J.

The facts of the case sufficiently appear from the headnote and judgments. The following written judgment was delivered by

ROWLATT, J.—This action was brought against Runciman and Co. for breach of warranty of authority to sign a charter-party as agents for Tommaso Astarita, a shipowner of Naples. The first point taken was that Runciman and Co. were liable as principals because Tommaso Astarita was a foreign principal.

They signed a charter-party which says that it was mutually agreed between Astarita and Weigall and Co. as follows, then it is signed "For and by authority of owners, Walter Runciman and Co. of London. As agents."

Upon that document it is said that Tomaso Astarita is not liable, but that Runciman and Co. are. All I can say about that point is that such a construction absolutely contradicts the plain words of the document itself. And I think that this suggestion involves an entirely unwarranted extension of the somewhat narrow rule affecting foreign principals. I need not say any more about that part of the case.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

The next way in which the case was put was that there was a breach of warranty of authority. The first point pleaded to that was, that there was no warranty because the authority was contained in a telegram, and the telegram had been read to Mr. Weigall.

To make that point good it would be necessary that the evidence should go this length that the telegram was read to Mr. Weigall, that the reading of it should have been addressed to him so that the result would be that he took upon himself the responsibility of construing the telegram, and did not rely upon any warranty of authority by the defendants. The evidence did not at all come up to that, and Mr. Roche agreed that it did not, and that point disappears.

I come now to the real points in the case. The defendants, as I have already said, signed the charter-party as agents for Astarita and warranted his authority. Was there a breach of that warranty? The authority was contained in a telegram of the 10th April 1915 in these words: "You authorise fix steamer prompt loading three thousand tons coal Newport Cagliari Messina or Palermo twenty shillings. If cannot better wire immediately."

It was suggested to me by the evidence on the one side and on the other that that telegram was insufficient on one side to enable Runciman and Co. to let a steamer, and on the other side to enable them to hire a steamer. I think I may say that probably from both points of view it was sketchy. But as between willing parties it might have served well enough from a business point of view. It was probably sketchy from whichever way you look at it.

The real difficulty arises as to the meaning to be attached to the word "fix." Fix means letting or means hiring, according as you look at it from one point of view or from the other. I may observe that in one letter in this correspondence in two lines that word is used in two senses—first from one point of view and then from the other. But Astarita was known to Runciman and Co. as a shipowner.

Probably shipowners abroad may want to hire ships sometimes to bring coal for their ships to foreign ports. But he was known to Runciman and Co. as a shipowner, and they had been in correspondence with his brokers with a view of letting his ships, and under the circumstances, in my judgment, the word "fix" in the mouth of Astarita, speaking to Runciman and Co., meant "let," and not "hire" a ship.

That is what I think, independently altogether of the doctrine of *Ireland* v. *Livingston* (1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 E. & I. App. 395), was the meaning of that word as addressed in this wire by Asterita to Runciman and Co. But if one has to have recourse to the doctrine of *Ireland* v. *Livingston* (*ubi sup.*) I think the same result follows. If this telegram is to be regarded as ambiguous I have no doubt whatever that Runciman and Co. acted *bonâ fide* and reasonably in the interpretation which they gave to it. I do not think there can be any question about that.

But then it was said—and it is a very important point—that the rule in *Ireland* v. *Livingston* (*ubi sup.*) does not apply between these parties. As I understand the rule as enunciated by Lord Chelmsford in the well-known passage that has

been read to the court, it does not lay down that an agent is entitled to a remedy against his principal by way of a special indemnity arising out of the difficulty in which he has been placed by the ambiguity of the principal, but that he is protected by the transaction being upheld.

I think that *Loring* v. *Davis* (54 L. T. Rep. 899; 31 Ch. Div. 625) is a clear authority to that effect. I do not think it is possible to read the judgment of Chitty, J. (as he then was) on p. 631 of 32 Ch. Div., without seeing that he took that view. In reality he assumed it. He did not discuss it; he assumed it. But he clearly took that view. Therefore, he laid down that the rule applies as between two principals as well as between the principal and the agent who had ambiguous instructions.

It was said in this case that nevertheless it does not apply where the principal dealt with by the agent is suing the agent under the doctrine of *Collen* v. *Wright* (8 Ell. & Bl. 647) for breach of warranty of authority. If that is so, it would mean that in this case Weigall and Co. ought to sue Runciman and Co. and recover damages against them, and then that Runciman and Co. ought to sue Astarita and recover as damages from him the damages and costs, I suppose, which they had had to pay to Weigall and Co. But *Loring* v. *Davis* (*ubi sup.*)., if I am right, shows that Astarita is liable to Weigall and Co., and I do not see how at the same time he can be liable to Runciman and Co., that firm being liable to Weigall and Co.

Still that did not make an end of the matter, because Mr. Leck said, granting that that is so, nevertheless Runciman and Co. had not authority. Astarita may be bound to Weigall and Co. under *Ireland* v. *Livingston* (*ubi sup*) and *Loring* v. *Davis* (*ubi sup.*), but he is not bound because he gave authority. He is bound by virtue of that rule upon some principle which may be said to be analogous to an estoppel, and there is still a breach because Runciman and Co. had not authority really.

It seems to me that that is a very subtle argument, and I do not think that even as a subtlety it is correct. But assume that it is, still as Astarita is bound to Weigall and Co. there could be no possible damages for the breach which Mr. Leck's argument suggests exists, and it would be really a technical and academic matter. I think that *Loring* v. *Davis* (*ubi sup.*), as I have said, really makes an end of this point. I am bound by *Loring* v. *Davis* (*ubi sup*), but perhaps I may say, without disrespect, that I entirely agree with it.

If the basis of the rule is that the principal is bound to protect those whom his ambiguity has led into peril, why does not that apply to requiring him to protect the other principal as much as it applies to requiring him to protect his own agent? He has led the other principal into peril by the act of his agent acting reasonably and *bonâ fide* on the ambiguous instructions which he took the risk of giving. I think the result is that he is responsible for the interpretation which the agent, reasonably and *bonâ fide*, put upon those ambiguous instructions.

That is not the end of this case, because Mr. Leck raised yet another point. He said, apart altogether from *Ireland* v. *Livingston* (*ubi sup.*) and any ambiguity attaching to the word "fix," the charter-party which Runciman and Co. assumed to enter into is outside the authority, read it as you please, because it gave the charterer the right to ship, I think it was 200 to 300 tons of coke in lieu of coal.

Astarita did not repudiate on that ground. He took a much wider ground, that he was not a letter of a ship at all, but was a hirer. As a matter of fact the telegram which Runciman and Co. sent to Astarita on the 12th April 1915, which appears on p. 30 of the copy correspondence before me, did not reveal this coke option at all, and so Astarita perhaps had not the opportunity of taking if he wanted to this small and, I am bound to say, rather subsidiary point. But Mr. Leck says that does not matter.

The question is whether he is actually bound by Runciman and Co.'s act. It seems to me that the breach of a warranty of authority is established by showing there was no authority. The breach is not the repudiation, but the breach is the want of authority whereby the principal is not bound. If he adopts it afterwards, whether there has still been a breach becomes unimportant because there are no damages. It becomes merely a technical matter; but the breach is want of authority, whereby the principal is not bound.

It seems to me, therefore, I have to examine two things. I have first of all to say, Was Astarita bound; secondly, if he was not, would he have adopted or would he have repudiated? Now, as to the second matter I can have no doubt at all that he would have repudiated. He had not the ship, so he says, and he was going to be off this bargain; and I have not the least doubt that being advised this point was an arguable point he insisted upon it.

Therefore, the only question for me is, Was he bound, having regard to the coke clause? Now, the telegram of authority mentioned 3000 tons of coal. That is all it says as to the cargo, and coke is not coal. Of course it is not the same substance, but apart from that, from a shipowner's point of view it is a different cargo because it is light.

There is no evidence before me that an order to a broker to charter a ship to carry coal impliedly by custom or anything of that kind authorises him to include an option for any particular percentage of coke or any coke at all. There was a certain amount of evidence dealing with the coke option. Mr. Reece said, when he was called for the plaintiffs, the coke option was often objected to, especially with old ships. I have no evidence of the age of this ship, although there was a suggestion made about it. Mr. Young, who was called for the defendants, said: "We thought the coke option was within our authority, especially as we were doing better all round, a shilling a ton more was given, and another shilling extra in respect of such coke as was loaded."

That seems to me to come to no more than this, that the willing owner who would ask 20*s.* for coal would not have objected in point of fact, in point of business, to this coke option in this charter, having regard to all its terms. I think that is all it proves. But that is not the same thing as showing that the agent had authority, as between himself and his principal, to include this option for coke. I think, therefore, that Runciman and Co. did presume to make a

charter-party for which they had no authority from their principal. Nor can I say that the principal would be bound if he knew the point and took it by reason of Runciman and Co. having acted within the scope of their authority in any way. I have not any evidence upon the point except to the effect that I have mentioned. There is nothing in the customary printed form of charter for South Wales coal that lends colour to any such idea.

This coke option was introduced by a type-written clause added to the print, and I am absolutely at a loss to know how much coke it would be within the scope of an agent's authority to include among the cargo of coal. Could it be all coke? How am I to say (I have not the material for saying) that it was within the scope of an agent's authority to include any particular percentage of coke. Therefore I come to the conclusion, although it is a somewhat by-point, I might also say perhaps a "lawyer's point," that Runciman and Co. had no authority to make this charter-party, and therefore they are liable to the plaintiffs, Weigall and Co., for the damages for breach of warranty or authority.

The only question that remains is as to the amount of damages. I think that Mr. Weigall acted reasonably and properly. I am sure, having seen him, that he acted in good faith in the matter. He got the ship which he substituted for the ship which he hoped to get from Astarita, another ship in about a week's time. There was a good deal of evidence that there were ships chartered for Italian ports, and there was some evidence that one might have been got for Palermo, which is perhaps rather a different thing.

But, after all, I cannot help feeling that if there had been really a ship to be got Runciman and Co., who knew of the difficulty, might have heard of one. It is true they act rather for shipowners than for coalowners, but still I cannot help feeling that if really a ship could have been replaced on terms that left a small margin of loss promptly they might very probably have heard of it.

What Weigall and Co. did was to charter a ship which was larger than the ship named in the charter. I have already said that I think they acted reasonably in doing so. They could not get a ship the exact size, so they got a ship that was rather larger.

If they had only loaded the amount that they could have loaded in the ship anticipated from Astarita, she would have sailed insufficiently loaded, and dead freight would have to have been paid, and that would, I think, in effect have increased the level of freights all round. But Weigall and Co. did not do that. They had coal at their call, and they loaded that coal on this ship, and shipped it abroad really on speculation. They sacrificed that coal that was in their hands in order to fill up this ship.

It is true that they succeeded in selling the coal for not less than they bought it for, and therefore did not make a loss upon that. But the question is, in a case like this, as I conceive, how much did it cost them to replace the ship? They replaced the ship by another ship which they used to the best advantage, and it meant that they had to pay higher freight for the amount of coal originally contemplated, and they had either to pay dead freight for the balance of the capacity of the ship, or a higher freight for that also. They chose to do the latter, which was the more economical course, and I think their damages as put in the statement are rightly framed.

Therefore I think that they are entitled to recover against Runciman and Co. the difference between the freight named in the charter-party and the freight which they paid on the whole capacity of the ship which they chartered to take her place. The figure is 2929*l.* 10*s.* 9*d.* I give judgment for the plaintiff for that amount with costs.

From that decision the defendants now appealed.

Roche, K.C. (with him *Alexander Neilson*) for the appellants referred to

Loring v. *Davis*, 54 L. T. Rep. 899, 32 Ch. Div. 623;

Ireland v. *Livingston*, 1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 E. & I. App. 395;

Boustead on the Law of Agency, 3rd edit., p. 66, art. 33.

Leck, K.C. (with him *R. A. Wright*) for the respondents.

Alexander Neilson replied.

Cur. adv. vult.

June 3.—The following written judgments were delivered:—

Lord Cozens-Hardy, M.R.—I have had an opportunity of reading the judgment which Pickford, L.J. is about to deliver, and I agree with it and have nothing to add thereto.

Pickford, L.J.—This was an action against the defendants for damages arising from their breach of warranty of authority to charter to the plaintiffs a ship belonging to an Italian gentleman of the name of Astarita.

The facts may be shortly stated as follows: The defendants had been in negotiation with Mr. Astarita's agents for the charter of one of his ships, and the ship which had been mentioned as likely to perform the charter if effected was the steamship *Maria Vittoria*.

The defendants knew Mr. Astarita as a shipowner, but did not know that he was also a merchant, as was in fact the case.

On the 10th April 1915 they received the following cable from him: "You authorise fix steamer prompt loading 3000 tons coal Newport Cagliari Messina or Palermo twenty shillings. If cannot better wire immediately."

On receiving this cable they put themselves into communication with the plaintiffs, and eventually concluded a charter. The charter was on the Chamber of Shipping Welsh Coal charter form, which contained blanks as to loading and discharging time, cancelling date and other matters of that kind. These blanks were filled up by the defendants after negotiation with the plaintiffs, and the charter was signed by them for and by authority of owners as agents.

The defendants then informed Mr. Astarita of what they had done, and he at once repudiated the charter, on the ground that he had intended by his cable to instruct the defendants not to charter a ship of his to carry a cargo of coals, but to procure a ship to carry a cargo of coals for him.

The defendants were in consequence unable to provide a ship for the plaintiffs, who had to charter another ship at greatly increased terms. They then brought this action to recover the difference between the freights under the charter and that which they had to pay.

The defendants' defence was that there was no breach of warranty of authority, and that the cable gave them authority to make the charter which they had made. The plaintiffs alleged that the cable did not give the defendants authority to charter a ship of Mr. Astarita at all, and that even if as against him the defendants were justified on the authority of *Ireland* v. *Livingston* (27 L. T. Rep. 79; L. Rep. 5 E. & I. App. 395) in reading it as giving them such authority they could not set that up as a defence to the plaintiff's claim because Mr. Astarita had no intention of giving such authority, and had not in fact given it.

On this point Rowlatt, J. held that the defendants' contention was right, and I agree with him. I need not say anything further on the point.

The plaintiffs, however, also contended that even if the defendants had authority to effect a charter it must be one in accordance with the authority given, and that this charter was not so in accordance. The main points of their argument on this point was that clause 16, giving what was called the Coke option, was beyond their authority, and they also contended that they had exceeded their authority in filling up the blanks as to loading days and without referring them to Mr. Astarita.

I think there is no ground for this last contention. If a foreign shipowner gives authority to a ship broker to effect a charter I think he must be taken to give authority to settle matters of that kind, otherwise business could not be done at all.

But I regret to say that I do not think the charter was within the authority of the defendants. I agree that it is what Rowlatt, J. calls a "lawyers' point," and that if Mr. Astarita had not wished to repudiate the charter on another ground altogether he probably would not have thought of quarrelling with what the defendants had done.

But he has repudiated it, and therefore the defendants must show that they had authority to make the charter which they did make.

The authority must be read reasonably and the amount of 3000 tons of coal cannot be read as confining the defendants to that amount accurately, and the words "if cannot better" give a certain latitude, although they refer directly to the amount of freight. The defendants, although the ship was not named, concluded that the *Maria Vittoria* would be the vessel named, and made a charter which would have been a favourable one for her, but under the charter any other vessel might have been named. The authority was to fix a steamer to load 3000 tons coal at 20*s*.—if cannot better. The charter was to load a full and complete cargo of coal with a maximum of 3630 and a minimum of 2970, and an option to the charterer to load 200 to 300 tons of coke, they paying an extra 1*s*. freight and all extra charges.

The maximum in the charter was therefore 20 per cent. above the amount named in the authority, although the minimum was only 1 per cent. below, and whether the maximum or minimum were shipped the charterer had an option to ship 300 tons of coke instead of coal.

There was evidence that many shipowners objected to this coke option, and the plaintiffs' representative said that in chartering for an English shipowner he would refer such a matter to him, but he did not think it necessary to do so in case of a foreigner. No customs or usage of trade with regard to the matter was proved.

On these facts I cannot come to the conclusion that the charter was within the authority given, and therefore with regret, for I think the defendants *bonâ fide* did their best under the circumstances, I agree with Rowlatt, J. on this point, and think the appeal should be dismissed.

The appellants asked for leave to give further evidence to show that the charter was an unfavourable one for the *Maria Vittoria* and ships of her class, and that Mr. Astarita's ships were of that class, but I do not think such leave should be given.

I doubt if a sufficient case of surprise was made out, but in any case I do not think the evidence would be relevant, as I do not think it would bring what was done within the words "if cannot better."

NEVILLE J.—In this case a shipowner in Italy telegraphs to the defendants, Messrs. Runciman and Co., as follows: "You authorise fix steamer prompt loading 3000 tons coal Newport Cagliari Messina or Palermo twenty shillings. If cannot better wire immediately."

The telegram was intended to authorise the chartering of a ship to carry 3000 tons of coal. The defendants read it as a direction to secure a cargo of coal for a ship. The wording was ambiguous. It has been found that the defendants were justified in putting the interpretation upon it that they did, and I do not dissent from that decision.

The telegram was certainly intended to be acted upon without further instructions, and I think, therefore, the defendants had authority to fix all the necessary terms of the charter party at their discretion. On the other hand the name of the ship was not given, and I think they had no right to speculate as to what ship might be intended. Having authority, as they were entitled to think, to contract to carry 3000 tons of coal by ship they, on behalf of their principals, did in fact sign a charter party under which their principals might be called upon to carry 3630 tons of coal or 3330 tons of coal and 300 tons of coke, the obligation to carry the coke depending upon an option added in writing to the printed terms of the charter party.

According to the evidence, coke bulking larger for its weight than coal, whether a shipowner would or would not accept the insertion of such an option in a charter party would depend upon the space for cargo available in his ship. It appears to me therefore that the ship not being named the authority in the present case would not justify the insertion of a coke option even if the contract had been confined to the carriage of 3000 tons, but it is not necessary to decide that question because here it included the carriage of 630 tons more than the telegram authorised.

This appears to me to be beyond the authority given the defendants upon their construction of

the telegram. It is said that evidence could have been given to show that the principal must have been benefited by this, and that therefore it was within the terms of their authority. In all probability the defendants were thinking of the *Maria Vittoria*, of the capacity of which ship they had some knowledge when they signed the charter party, but they had no right, I think, to take any particular ship into consideration. It is to be remembered that no ship was intended, there being no actual authority at all for what the defendants did, the principal intending a quite different transaction.

The only authority being by estoppel, how any evidence could show that some ship which never in fact existed would have been adapted to carry the increased cargo I confess I am unable to understand.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the defendants, *William A. Crump* and *Son*.

House of Lords.

March 23, 27, 28, *and July* 24, 1916.

(Before the LORD CHANCELLOR (Lord Buckmaster), Earl LOREBURN, Viscount HALDANE, Lord ATKINSON, and Lord PARKER OF WADDINGTON.)

Re ARBITRATION BETWEEN F. A. TAMPLIN STEAMSHIP COMPANY LIMITED AND ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Time charter-party—Oil tank steamer—Period of charter unexpired—Requisition by British Government—Structural alterations to adapt her for use as transport—Restraint of princes—Frustration of adventure—Effect on contract.

By a charter-party, dated in May 1912, *the owners of a ship designed to carry cargoes of oil in bulk agreed to let and the charterers agreed to hire the ship for a period of sixty calendar months—which period would expire in Dec.* 1917—*to be employed in lawful trades for voyages between certain specified ports for the carriage of refined petroleum and (or) crude oil and (or) its products as the charterers or their agents should direct.*

The charterers were to pay as freight a fixed sum per month. Under certain restrictions the carriage of other suitable cargo than oil was to be allowed. Power was conferred on the charterers to underlet the ship on Admiralty or other service, but without prejudice to the charter-party. The charter also contained the usual exception of restraint of princes.

The ship was requisitioned by the Government in Dec. 1914 *and again in Feb.* 1915, *when she was altered to fit her for the transport of troops. The charterers had paid and were willing to continue to pay the stipulated freight.*

In these circumstances the owners (the appellants) claimed they were entitled to treat the contract as at an end.

Held (Viscount Haldane and Lord Atkinson dissenting), that under the circumstances this charter-party was not determined when the steamer was requisitioned, and that the requisition did not suspend it or affect the rights of the owners or charterers under it.

Query: Does the doctrine of frustration apply to a time charter?

Decision of the Court of Appeal (13 *Asp. Mar. Law Cas.* 284; 114 *L. T. Rep.* 259; (1916) 1 *K. B.* 485) *affirmed.*

APPEAL by the steamship company from a decision of the Court of Appeal (Lord Cozens-Hardy, M.R. and Bankes and Warrington, L.JJ.), reported 13 Asp. Mar. Law Cas 284; 114 L. T. Rep. 259; (1916) 1 K. B. 485, which affirmed a judgment (1915) 3 K. B. 668) of Atkin, J. upon an award stated in the form of a special case by an arbitrator.

The question arising on the facts, which are fully stated in the judgments of their Lordships, was whether a charter-party of a tank steamer had been determined (or suspended) by the requisitioning of the vessel by the British Government, and by her structural alteration and conversion into, and use as, a troopship.

The appellants, the owners, affirmed this; the respondents, the charterers, denied it.

The arbitrator awarded, subject to the opinion of the court, that the charter-party was terminated by the requisition, but Atkin, J. held that it remained in force, and the Court of Appeal affirmed that decision.

George Wallace, K.C. and *Raeburn* for the appellants.

Sir *R. Finlay*, K.C., *MacKinnon*, K.C., and *R. A. Wright* for the respondents.

The following cases were referred to:

Appleby v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651;
Nicholl v. *Ashton*, 84 L. T. Rep. 804; (1901) 2 K. B. 126;
Krell v. *Henry*, 89 L. T. Rep. 328; (1908) 3 K. B. 740, 748;
Paradine v. *Jane*, Aleyn, 26;
Taylor v. *Caldwell*, 3 B. & S. 826;
Brown v. *Turner, Brightman, and Co.*, 105 L. T. Rep. 562; (1912) A. C. 12;
Geipel v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404;
Jackson v. *Union Marine Insurance Company Limited*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;
Hudson v. *Hill*, 30 L. T. Rep. 555; 43 L. J. 273, C. P.;
Dahl v. *Nelson*, 44 L. T. Rep. 381; 6 App. Cas. 38;
Tully v. *Howling*, 36 L. T. Rep. 163; 2 Q. B. Div. 182;
Poussard v. *Spiers*, 34 L. T. Rep. 572; 1 Q. B. Div. 410;
British and Foreign Marine Insurance Company Limited v. *Sanday and Co.*, 13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A.C. 650; affirming C. A., 13 Asp. Mar. Law Cas. 116; 113 L. T. Rep. 407; (1915) 2 K. B. 781;
Horlock v. *Beal*, 114 L. T. Rep 193; (1916) 1 A. C. 486;

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

Admiral Shipping Company v. *Weidner and Co.*, 13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171; (1916) 1 K. B. 429.

The House, having taken time for consideration, dismissed the appeal.

Earl LOREBURN.—It is unnecessary to repeat the narrative of what has happened in this case or to analyse again the charter-party. This ship was chartered for five years. She was to be managed and controlled by the owners, but the use to be made of her in carrying merchandise within prescribed limitations depended upon the direction of the charterers. From Dec. 1912 till Dec. 1914 she was employed accordingly. From that date till the hearing of the case she has been employed by His Majesty's Government for purposes connected with the war. There are, therefore, nineteen months of the five years unexpired. No one knows how long the Government will continue to use this vessel, but, so long as they do use her, neither party to the contract can carry out their common adventure.

It may be as well to say that the first requisition of this ship was in Dec. 1914 and the second in Feb. 1915, but she was not released from the day she was first taken over.

In these circumstances the owners maintain that Mr. Leck's award, holding that this charter-party came to an end when the steamer was requisitioned in Feb. 1915, is right.

In order to decide this question it is necessary to ascertain the principle of law which underlies the authorities. I believe it to be as follows. When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of someone else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and circumstances in which it was made, not, of course, to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.

In the recent case of *Horlock* v. *Beal* (13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) 1 A. C. 486) this House considered the law upon this subject, and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination of those decisions confirms me in the view that, when our courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is, in my opinion, the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

When this question arises in regard to commercial contracts, as happened in *Dahl* v. *Nelson* (44 L. T. Rep. 381; 6 App. Cas. 38), *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361), and *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125), the principle is the same, and the language used as to "frustration of the adventure" merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of Lord Blackburn, "that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at end." That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "If that happens, of course it is all over between us"? What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end?

Applying the principle to the present case, I find that these contracting parties stipulated for the use of this ship during a period of five years, which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship, as agreed, and that they would not be deprived of it by any act of State. But I cannot say that the continuance of peace or freedom from any interruption in their use of the vessel was a tacit condition of this contract. On the contrary, one at all events of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years. On the other hand, if the interruption can be pronounced, in the language of Lord Blackburn already cited, "so great and long as to make it unreasonable to require the parties to go on with the adventure," then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and I should imply a condition to that effect. Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreason-

able to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or that he will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the Government any sums of money for the use of her he will be accountable to the charterer. Should the upshot of it all be loss to either party, and I do not suppose it will be so, then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract. It may be hard on them as it was on the plaintiff in *Appleby* v. *Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651). The violent interruption of a contract always may damage one or both of the contracting parties. Any interruption does so. Loss may arise to someone whether it be decided that these people are or that they are not still bound by the charter-party. But the test for answering that question is not the loss that either may sustain. It is this: ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or, in other words, impracticable, by some cause for which neither was responsible. Accordingly I am of opinion that this charter-party did not come to an end when the steamer was requisitioned and that the requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal fails.

It it were established that this ship would be used by the Government for substantially the remainder of the five years, I should be of a different opinion.

The Lord Chancellor desires me to say he concurs in the judgment prepared by Lord Parker.

Viscount HALDANE.—The general principles by which this appeal must be decided do not appear to me to be difficult of ascertainment. The real uncertainty in the case lies in their application. As to this it is with reluctance that I find myself differing from the conclusions at which others of your Lordships have arrived.

When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charter-party under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. If the course of events can be regarded as consistent with the continuance of the contract, it will follow that when the event possesses the more limited character there will, under the terms of the special stipulation, be mere suspension of particular rights and duties which would otherwise arise under the general terms agreed on. The circumstances that the contract is one, not for a single service, but for a succession of such services, to continue for a definite time, is a relevant fact in considering whether there is a mere temporary suspension. And where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed, but only suspended. The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the courts cannot take any course which would in reality impose new and different terms on the parties.

On the general principle there is a long series of authorities, extending from the decision of *Paradine* v. *Jane* (Aleyn, 26), more than two centuries ago, through such cases as *Taylor* v. *Caldwell* (3 B. & S. 826) down to the recent appeal to this House in *Horlock* v. *Beal* (13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) 1 A. C. 486), in which last case many of the previous authorities were considered and classified. In the main the decisions given are consistent, although there are dicta which are not everywhere easy to reconcile. But the differences in expression which these authorities disclose do not affect the fundamental principles which they recognise, and I think that what I have ventured to state as the law is in accordance with the weight of judicial opinion. It is important to endeavour to formulate these principles in a case like the present, where the task of the tribunal is essentially one of ascertaining the true bearing on the particular facts of the case.

To these facts I now turn. By a charter-party dated the 18th May 1912, on which the question arises, the owners of the tank steamer *F. A. Tamplin* agreed to let the steamer to the respondents as charterers for sixty calendar months from the date at which she was placed at the disposal of the latter, a term which would expire on the 4th Dec. 1917. The steamer was to be employed "in such lawful trades for voyages between any safe port or ports in the United Kingdom and (or) Continent of Europe and (or) any safe port or ports in the United States of America and (or) Mexico and (or) North and South America and (or) Africa and (or) Asia and (or) Australasia and back, finally to a coal port in the United Kingdom, for the carriage of refined petroleum and (or) crude oil and (or) its products, but warranted no B N A. or Atlantic except for coaling; warranted no Baltic between the 1st Oct. and the 1st April; warranted no White Sea between the 1st Oct. and the 1st April, as charterers or his agents shall direct," on certain conditions. Among these was that the charterers should pay 1750*l*, reducible later on to 1700*l*, a month, that on the last voyage the charterers should, if the vessel had been carrying other than refined oil or spirit, clean the vessel, and load a cargo of refined oil or spirit on that voyage under the charter; that no goods contraband of war were to be shipped, and the vessel was not to be required to enter any port which was blockaded or where hostilities were in progress; that no voyage was to be undertaken or goods or cargoes loaded which would involve risk of seizure, capture, or penalty by British or foreign rulers, and no acids or cargoes injurious to the steamer were to be shipped; that the charterers were to have the option of subletting the steamer to the Admiralty or other service without prejudice to the charter-party, but the charterers to remain responsible. The owners were to provide and pay the crew and for stores and maintenance. Any dispute arising during the execution of the charter-party was to be settled by arbitration.

It is, of course, obvious that, although the contract was described as one of lease, there was and could have been no lease properly so called. The real relation was that the owners retained through the officers and crew the possession of the vessel, and that the charterers were entitled to use it for certain purposes and under certain restrictions during a term of five years.

There was another important clause in the charter-party to which I have to refer. This was the usual one providing that certain perils should be excepted. These perils included "arrests and restraints of princes, rulers, and people." The effect of the clause was that if and to the extent to which the perils mentioned interfered with the fulfilment of their obligations the parties were exempted from liability for non-performance.

Early in Dec. 1914 the steamer was requisitioned by the British Government for Admiralty transport service and was engaged in such service until about the 10th Feb. 1915. No question has been raised as to this requisition, which appears to have been accepted by both parties as a merely temporary burden upon their rights under the charter-party. But about the latter date notice was given by the Admiralty Director of Transports to the charterers that the steamer was again requisitioned and that she would be specially fitted by the Government for the service on which she was to be employed. This was done shortly thereafter, and the Government made structural alterations, and used her for the transport of troops. She has since then, according to what was stated at the Bar, been in part at all events restored to something resembling her original condition, and has been used for the carriage of oil. But I think it is clear that the Admiralty neither regarded their powers as in any way restricted, nor had any intention of limiting the period during which they claimed to use the steamer. Had the charterers done what the Government has done, their action would have constituted such a breach of contract as would have entitled the owners to treat the contract as at an end.

Under these circumstances a dispute arose between the owners and the charterers as to their rights, and this dispute was, under the arbitration clause, referred to Mr. Leck, one of His Majesty's counsel. The owners claimed that what had happened could not be treated as a subletting under the contract, but that the basis of the contract was gone, inasmuch as the steamer could no longer be made available under the charter party, which was therefore either entirely at an end or was indefinitely suspended under the restraint of princes clause. The charterers argued that in reality there had been what was tantamount to a subletting to the Admiralty, and that the uses by the latter for purposes outside those prescribed by the charter-party, and the making of the structural alterations, did not amount to breaches of contract by the charterers, inasmuch as they were covered by the restraint of princes clause. If the charterers were right it would no doubt follow that they would be entitled to retain the largely increased monthly payment which Government has been making for the use of the steamer, paying to the owners only the monthly sum stipulated for by the charter-party. If the owners, on the other hand were right, the charterers would be able to claim compensation from the Government for loss of rights under the terms of a general proclamation issued by the latter, but the owners would be the persons entitled to the hire paid by the Admiralty for the steamer to the use of which the charterers would no longer be entitled. The question of compensation was not, however, raised before the arbitrator, and it is not before us. The only point referred was whether the charter-party was brought to an end or at all events fully suspended by the second requisition and what was done under it.

The arbitrator decided this question in the affirmative, but stated a special case. On the argument of this special case, Atkin, J. and the Court of Appeal differed from him, and gave judgments to the effect that the contract remained in existence, and that the restraint of princes clause kept the contract alive while precluding the owners from insisting that the diversion of use and alteration of structure were breaches for which the charterers could be held responsible.

It may well be that, at all events where there is such a clause, in the case of a time charter with a substantial period yet to run, an event might occur which, while it temporarily interfered with its performance, would not destroy its existence. On the other hand, in the case of a

charter for a single voyage, the same event might be sufficient to destroy the very basis in the case of voyage charter when it would not have been sufficient to destroy that of a time charter. The question in each case is one of the application of the general principles to which I referred earlier to the facts and circumstances of the particular case. And I think that similar considerations must govern the question whether what has happened in the present case can be regarded as falling within the meaning of the restraint of princes clause. That clause may apply to mere structural alterations made by a Government. It is a more difficult question whether it can cover a taking possession which may, so far as appears, outlast the period of the charter. In one aspect the act of the Government may come within the clause, but in another and equally important aspect it may mean so much more that by destroying the possibility of performing the contract as a whole it destroys the applicability of the clause.

In the case before us I am accordingly of opinion that if the conclusion is once reached that the requisition was of such a character that it would otherwise supersede or indefinitely suspend the contract, the special clause cannot assist the charterers. Now it is no doubt true that the charter was to remain in force until the 4th Dec. 1917. But the requisition by the Admiralty was one which enabled it to use the steamer for purposes altogether outside the contract, and that for a time to which no limit could be assigned. The time might extend until after the period of the charter-party had run out. It is impossible for any court to speculate as to the duration of the war on which the Admiralty requirements may depend. It is enough that events which are of public notoriety indicate the duration as one about which there is no apparent certainty as to a speedy close of which a court of justice can take cognisance. The question whether the contract was brought to an end must be judged in the light of events as they were in Feb. 1915. The requisition was of a character so sweeping that I think the burden of showing that the purposes of the charter could continue to subsist concurrently with its operation rested on those who maintained the affirmative. *Primâ facie* the entire basis of the contract, so far as concerned either performance in Feb. 1915, or performance at any calculable period in the future, seems to me to have been swept away. It might thereafter have proved possible to make a fresh start within what turned out to remain over of the time of the charter. But it equally might not. I am therefore unable to see how the contract can be properly looked on as only temporarily interrupted. Such interruption has a meaning if the restraint of princes clause covers the interrupting event. The clause is introduced for the very purpose of saving the foundation of the contract. But if that foundation is gone the contract is gone and the clause with it. Now the basis of the contract here was that the owners should provide a steamer to be used by the charterers for certain purposes only. The use of the ship and the fulfilment of the purposes are swept away by *vis major* for a period to which no limit can be assigned. It is possible that under different circumstances and with a period as to which there was an obvious inference of fact that it would in all probability outlast the duration of the war the *vis major* might have been regarded as a mere temporary interruption which the special clause covered. But it seems to me that the charterers cannot bring their case up to the point at which it is legitimate to draw such an inference. I am therefore driven to the conclusion that there was here no mere temporary suspension of a subordinate obligation of the charterers. I think that the entire contract was avoided, and and with it the clause providing for restraint of princes, and that the appellants were consequently entitled to judgmen .

Lord ATKINSON. — This case came before Atkin, J. upon an award in the form of a special case stated by an arbitrator, and the question for the court to determine was stated to be whether, on the facts stated in the case, the arbitrator was right in holding that the charter-party dated the 18th May 1912 came to an end when the steamer (*i.e.*, the tank steamer *F. A. Tamplin*) was requisitioned by the British Government on the 15th Feb. 1915.

Your Lordships were informed that this is a test case, and the parties on both sides desired that the House should not confine its attention to the facts found by the arbitrator, but should consider in addition all relevant matters which have take place since the hearing before him, with a view of determining whether or not this charter has come to an end.

By the charter-party the British tank steamer *F. A. Tamplin*, in process of being built at the date of the document, was chartered to the respondents for a period of sixty calendar months, commencing from the 4th Dec. 1912 and expiring on the 4th Dec. 1917, at the hire of 1750*l.* per calendar month for the first twelve months and 1700*l.* per month for the remaining forty-eight months. Under the terms of the charter-party the steamer, described as a tank steamer, was to be placed at the disposal of the charterers at Newcastle-on-Tyne, in a dock or place in which she could safely lie afloat, as the charterers should direct immediately on being ready, she being then tight, staunch, and strong, fully equipped with a full complement of officers, seamen, engineers, and firemen necessary for that service. Now the service for which she was rendered fit and for which she was delivered was this. For voyages between any safe port or ports in the United Kingdom, the Continent of Europe, or the seven other countries named, and back finally to a coal port in the United Kingdom, for the carriage of refined petroleum or crude oil or its products. It is quite true that the charterers are not, according to the letter of this clause, bound to employ this vessel on the particular service named, but they are bound not to employ her on any other service. They might possibly retain her in dock during the entire period of five years, or any part of it, at a cost of 1750*l.* or 1700*l.* per month. But if the parties were not business people, as they are, but merely rational beings, they could not when they entered into the charter-party have contemplated anything of the kind. Whether that be so or not, the contract had secured to the charterers the power to determine whether or not the vessel should be employed in the trade authorised on such voyages as they might select between the ports named; and one

of the assumptions upon which I think the contract must have been based was that the charterers should remain free to exercise, as and when they deemed fit, the powers secured to them by their contract. Else why enter into it at all. The same remark applies to the owner. The parties have, no doubt, in one article—art. 20, with which I shall presently deal—specified several instances in which the will and intentions of each of them might be overborne by *force majeure*, but if one looks through the conditions upon which the contract was made, it will plainly appear that neither party could perform his side of the contract unless he be left a free agent. For instance, the first condition requires that the owners shall provide all provisions and wages for the crew and maintain the ship in a thoroughly efficient state in hull, machinery, and equipment for and during the service. Art. 6 requires that the crew, the servants of the owners, for whom they are responsible, shall do certain work in a particular manner, in the process of loading the ship.

By art. 2 the charterers are bound to provide and pay for oil fuel, galley coals, port charges, pilotage, &c. By art. 3 the hire is to continue for the time specified for termination of the charter and until the redelivery to the owners (unless lost) at a coal port in the United Kingdom, as provided. By art. 13 the captain, although appointed by the owners, is put under the order and direction of the charterers as regards employment, agency, or other arrangements. By art. 12 the captain is bound to prosecute his voyages with the utmost dispatch, and render all customary assistance with ship's crew, winches, and boats, and proceed to sea when ordered, if tide and weather permit. If the charterers have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners, on receiving particulars of the complaint should investigate the same and, if necessary, make a change in the appointment. By art. 15 it is provided that the master should be furnished from time to time with all requisite instructions and sailing directions and shall keep a full and correct log of the voyage or voyages, which shall be submitted to the charterers or their agents when required.

Thus by these several articles, and many others which might be referred to, powers are conferred and obligations imposed upon each of the contracting parties; and active duties are required to be performed by each. None of these things can be done unless the charterers retain possession and control of the ship, and both parties retain their freedom of action. It cannot, in my view, be possibly supposed that they by this charter, apart from art. 20, even intended to enter into an absolute contract to perform the impossible—that is, to exercise these powers, fulfil these obligations, and discharge these duties after the ship, in and upon which all these things were to be done, had been taken possession of by a third party who had lawfully removed her from the control of both of them for a considerable portion of the period of hiring, and might continue so to do for the whole of that period.

Now I turn to art. 20. It is immediately preceded by art. 19, which provides that "if the vessel be lost the hire is to cease." But why? Surely because the charterers would thereby lose, possibly through one of the excepted perils, such as the act of God or perils of the sea, the thing they had contracted to pay for—namely, the use of the ship. Yet according to the contention of the respondents the hire is not to cease, though they should lose for the entire period of hiring the use of the ship by another of the excepted perils, the restraint of princes.

Art. 20 then provides: That the "Act of God, perils of the sea, fire, barratry of the master and crew, pirates, thieves, arrest and restraint of princes, rulers, and peoples, collisions, strandings, and other accidents of navigation always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, master mariners, or other servants of the shipowner." I think it plain that this clause was introduced mainly for the protection of the shipowner. Either party could, however, rely upon it as a defence to an action brought upon the charter-party to recover damages for a breach of contract, consisting in the omission to do an act that party was bound to do if he was prevented from doing it by one of the excepted perils. This, however, is not all. If the act omitted to be done was the performance or non-fulfilment of a condition precedent, then, in addition, the contract might come to an end, and both parties be released from all obligations under it. The fallacy underlying the respondents' contention appears to me to be this, that such a contract can never be put an end to through the operation of one of the excepted perils. The following authorities show, I think, that is not the law.

Two well-known cases, many times approved of and followed, establish, in my view, this proposition. First, *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404) and, second, *Jackson* v. *Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125), decided in the Exchequer Chamber on appeal from the Court of Common Pleas, and reported in the court below in L. Rep. 8 C. P. 572. In the first of these two cases the charter-party contained a clause somewhat similar to this 20th article, excepting the act of God, Queen's enemies, restraint of princes, rulers, &c. Yet the owners were relieved from their contract to take on board a cargo and carry it to Hamburg, since the port of Hamburg was blockaded by the French fleet; that blockade clearly being a restraint of princes and peoples. Blackburn, J., as he then was, at p. 412, said: "The defendants, therefore, the shipowners, could not fulfil their contract by delivery of the cargo without running the blockade. I am unable to see why this was not a restraint of princes; it was clearly a restraint of the then Emperor of France, preventing the cargo from being carried to Hamburg. But then comes another question: Conceding that while the blockade lasted there was a restraint—an obstacle to the fulfilment by the defendants of their obligations under the charter-party, it is said that the moment the blockade was raised the ship might have gone off, and therefore she ought to have been ready with her cargo on board to start at any moment. But I cannot agree that, however long the blockade existed—which might be during all the time the war lasted, and therefore might have been for years—the ship and cargo must be ready to sail as soon

as wind and weather permitted after the blockade was raised. It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract —namely, the speedy transfer of the shippers' goods and the remunerative employment of the shipowners' vessel." And Lush, J., at p. 414, said: "I think the fifth plea may also be treated as valid. It alleges the breaking-out of war between France and Germany and a blockade of the port of Hamburg. If the impediment had been in its nature temporary, I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy a commercial adventure like this." In the second of the cases the action was brought on a policy of insurance effected by the plaintiff on chartered freight valued at 2900*l.* to be earned by the plaintiffs' vessel, the *Spirit of Dawn*, on a voyage at and from Liverpool to Newport, in tow, and thence to San Francisco. By the charter dated the 22nd Nov. 1871, entered into between the plaintiff and Messrs. Rathbone and Co., this ship was to proceed with all convenient speed from Liverpool to Newport (dangers and accidents of navigation excepted), and there load a cargo of iron rails for San Francisco. The ship, in performance of her owners' obligation under the charter-party, started on the first stage of her voyage, *i.e.*, from Liverpool to Newport, but, *en route*, took the rocks in Carnarvon Bay, and was got off after considerable delay much damaged. It is an error to suppose that at the time of the accident the owners' contract was in the position of a merely executory contract. It was, in truth, part performed. The rails were required for the construction of a railway in San Francisco. Time was a matter of importance to the charterers. They accordingly immediately threw up the charter and chartered another ship. The defendants, relying on the clause excepting "dangers and accidents of navigation," denied in their defence that there was any loss by a peril insured against. The case was tried before Brett, J., as he then was. The jury answered in the affirmative three questions left to them. First, "whether there was a constructive total loss of the ship?" Second, "whether the time necessary for getting the ship off the rocks and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time"; and third, "whether such time was so long as to put an end to it in a commercial sense? &c." The learned judge being of opinion that there was no evidence of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter a verdict for him. A rule *nisi* having been obtained by the plaintiff to enter a verdict for him, on cause being shown, it was held by Keating and Brett, JJ. that the charterers were absolved from loading the vessel, and that the shipowner, therefore, might recover for the loss of the freight. Bovill, C.J., on the contrary, held that the charterers were not entitled to throw up the charter, and that consequently the plaintiffs were not entitled to recover against the underwriters, and that the findings of the jury were immaterial. The decision of the majority was affirmed in the Exchequer Chamber by Bramwell, B., Blackburn, Mellor, and Lush, JJ., Amphlett, B. dissenting. It is therefore a case of high authority. The judgment of the majority was delivered by Bramwell, B., as he then was. At p. 144 that distinguished judge points out that as no date was fixed for the arrival of the ship at Newport, it should be held that there was an implied condition in the charter-party that she should arrive within a reasonable time. He then proceeds: "Now what is the effect of the exception of perils of the seas and of a delay caused thereby? Suppose it were not there and not implied, the shipowner would be subject to an action for the ship not arriving in a reasonable time, and the charterers would be discharged. Mr. Benjamin says the exception would be implied. How that is it is not necessary to discuss, as the words are there; but if it is so, it is remarkable as showing what must be implied from the necessity of the case. The words are there. What is their effect? I think it is this. They excuse the shipowner, but give him no right. The charterers have no cause of action, but are released from the charter. When I say he is, I think both are. The condition precedent has not been performed by the default of neither. It is as though the charter were conditional on peace being made between countries A and B, and it was not, or as though the charterers agreed to load a cargo of coal (strike of pitmen excepted). If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call upon the charterer to wait till the strike is over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who has to do the act, and operates to save him from an action and makes his non-performance not a breach of contract, but does not take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement. And if one party may, so may the other." If, therefore, it be an implied condition precedent of the contract in the present case that both the parties to it should not without any default on their respective parts be, by the operation of a *force majeure*, such as the restraint of princes, deprived for the whole or a substantial portion of this period of five years of all power to exercise the rights or discharge the obligations conferred and imposed by it, the action of the Admiralty destroyed the basis upon which the contract was in the contemplation of the parties based. And in this sense rendered the fulfilment of the condition precedent impossible: (see judgment of Lord Blackburn in *Taylor* v. *Caldwell*, 3 B. & S. 826, at p. 833). Art. 20 saves each of the parties from a claim for damages for breach of contract at the suit of the other, but it does not deprive either of them of the right to free himself or themselves from the contract on the ground that the basis upon which it rested has been destroyed.

It is only necessary, I think, to cite one authority in addition to those cited in *Horlock* v. *Beal* (13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) 1 A. C. 486). It is

Poussard v. *Spiers* (34 L. T. Rep. 572; 1 Q. B. Div. 410). There the plaintiff agreed in writing with the defendants to sing and play in the chief female part in a new opera about to be brought out at the defendants' theatre at a weekly salary of 11*l.* for three months commencing about the 14th Nov., provided the opera should so long run. The first performance of the piece was not announced till the 28th Nov., but no complaint was made as to this delay. It was an implied, though not an express, term of the contract, that Madame Poussard should attend rehearsals. Owing to delays on the part of the composer, the music was not in the hands of the defendants till a few days before the 28th Nov. The later and final rehearsals did not take place till the week ending the 28th Nov. Madame Poussard, though she attended some of the rehearsals, unfortunately got ill on the 23rd Nov. and had to leave the rehearsal. On the 4th Dec., having recovered, she offered to take her place in the opera, but was refused, another artiste having, in the meantime, been engaged to fill the part. The judgment of the Court of Queen's Bench was delivered by Blackburn, J. He said (p. 413): "My brother Field, at the trial, expressed the opinion that the failure of Madame Poussard to be ready to perform under the circumstances went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants," but he left five questions to the jury. They found that the non-attendance of Madame Poussard on the night of the opening was not of such material consequence to the defendants as to entitle them to rescind the contract; but in answer to another question they found that it was of such consequence as to render it reasonable for the defendants to employ another artiste, and that the engagement of this other artiste was reasonable. Lord Blackburn held that this finding enabled the court to decide, as a matter of law, that the defendants were discharged. At p. 414 he said: "The analogy is complete between this case and that of a charter-party in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils the shipowner is excused, but if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo. See per Bramwell, B. delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson* v. *Union Marine Insurance Company*. And we think that the question whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration must, to some extent, depend on the evidence, and is a mixed question of law and fact." The case of *Horlock* v. *Beal* (13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) A. C. 486) decided that these principles apply to the contract of a sailor to serve on a very lengthened voyage or series of voyages, the duration of which was not to extend beyond a period of two years. The detention of a ship by a hostile Power, which might last for more than two years, was held to terminate, before that period had arrived, the contract of the owners to pay the sailor wages.

I am quite unable to agree with the contention urged by the respondents that the principle of these decisions can never apply to a time charter. It is by no means true that a time charter must necessarily be of longer duration than a charter for a single voyage or a round voyage to many different ports. That depends upon the length of the term for which the ship is chartered. It may well be that the "impediment," to use the words of Lush, J. in *Geipel* v. *Smith* (*sup.*), should be of longer duration in the case of a time charter than in that of a charter for a single voyage, in order to be treated as "defeating and destroying" the object of the commercial adventure of the charterer and shipowner. For instance, I think it would be impossible to contend that this adventure would not be "destroyed and defeated" if the restraint was, to the knowledge of both parties, expressly imposed by the prince or Government for the entire length of the period of hiring, or for that portion of it which remained unexpired when the restraint was imposed. I do not think it can make any substantial difference if possession should be taken for a substantial portion of the whole or of the unexpired portion of that period, coupled, as in this case, with a probability or possibility that it may continue till the end of the period. In any of these events the charterer would not get anything like the thing he contracted for—namely, the use of the ship for the stipulated period, but something wholly different. He could hardly be obliged, while deprived of the use of the ship, to pay her hire. That would be monstrously unjust. This is not like a grant or demise of land, where the right of property passes though the possession should be withheld. In truth the imposition of the restraint for a lengthened period creates a condition of things to which the charter-party is inapplicable. I can find no authority for the proposition that such a contract as the present sinks into abeyance while the restraint is imposed and the possession of the ship is withheld, and springs into active existence again when the restraint terminates, regulating the right of the parties for the residue of the period of hiring. If the restraint be prolonged for a substantial portion of that period it goes, I think, to the root of the consideration as it did in the case of *Jackson* v. *Mutual Insurance Company* and *Poussard* v. *Spiers*, and relieves both parties to the contract from their engagements. And this though the contract be not in the merely executory stage, but part performed, as it was in both these cases. Now, turning to the facts of this case, one finds that early in Dec. 1914 the steamship *F. A. Tamplin* was requisitioned by the British Government for the Admiralty transport service, and was retained in that service until the 10th Feb. 1915, a period of some fourteen months. No question was raised before the arbitrator as to this requisition. At its date over two years of the period of hiring had elapsed. On this 10th Feb., about two years and nine months of that period remained unexpired. The ship was again requisitioned by the Government, and immediately after that date alterations were made in her to fit her for the transport of troops. She has been since retained in the service of the Admiralty, and it is said she has been restored to her former condition as a tank steamer. She may be retained in the same service while the present war lasts, and even after it has terminated. Nobody can possibly tell how long it

will last. At the present moment about one year and eight months of the five years remain unexpired. Up to the present time the charterers have only had, during the two years from Dec. 1912 till Dec. 1914, what they contracted for and what they were only bound to pay for. They may never get any further use of her. The owners cannot deliver the ship into their possession and control and may not for years be in a position to do so. Neither of the parties are in default. In the month of March 1915 the owners refused to be longer bound by the charter-party. In my view there is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed on them by the charter, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of this contract when they entered into it that, in the events which have happened, each of them is now entitled to treat it as at an end.

I have dealt with the case altogether apart from the question of the amount which the charterers have received as compensation for the use of the ship. The charterers have been treated by the Crown as if they had sublet the ship to the Admiralty. They have not, in fact, done so. What they have received they have got from the bounty of the Crown. They have no legal right to it. The receipt of it is, therefore, in my view, quite irrelevant. To consider it, it only obscures the legal point for decision. When the legal rights of the parties have been determined, the Crown will, no doubt, endeavour to do justice to the parties according to those rights. Judging from what has happened up to the hearing of this appeal, I am of opinion that the charter-party is now at an end and that the parties to it are released from all obligations under it. The appeal, under these circumstances, I think, succeeds.

Lord PARKER OF WADDINGTON.—In considering the question arising on this appeal, it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely *dehors* the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency.

Again, in determining whether any such term or condition can be properly implied, the nature of the contract is of considerable materiality. If, for example, the contract be for the hire of a particular horse on a particular day, it would be easy to imply a condition that the horse should still be living on the day in question. If, however, the contract were for the hire of a horse generally, it would be difficult, if not impossible, to imply a term relieving the hirer from liability, if his only horse died before the day arrived.

Moreover, some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed. A contract under which A. is to have the use of B.'s horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition precedent to that effect. But the case would be very different if the horse died at the end of the first day, and it was sought to imply a condition subsequent relieving A. in that event of liability to pay the sum agreed for the hire.

The simplest cases of the application of the principle are, no doubt, those of contracts *de certo corpore*, as in *Taylor* v. *Caldwell* (3 B. & S., 826). Here there was an agreement by A. to allow B. the use of his music hall on certain specified days, and the music hall was burnt down before the first of those days arrived. A condition precedent could easily be implied. A similar case is that of *Appleby* v. *Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651). Here A. contracted to erect machinery in buildings belonging to B., and the buildings were burnt down before the work was finished. It was not difficult to imply a condition subsequent.

But the principle applies also to cases when the existence or continued existence of some specific thing is in no way involved, and in such cases its application is not so easy. It applies, for instance, to contracts of service which, from some causes not contemplated by the contract itself, have become impossible of fulfilment. A good instance of this may be found in the recent decision of your Lordships' House in *Horlock* v. *Beal* (13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) 1 A. C. 486). It applies also to charter-parties where some commercial adventure contemplated by the parties, and in the fulfilment of which both are interested, is brought to an end by the happening of some event for which neither is to blame. The leading case on this branch of the law is *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125). Here the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load and carry to San Francisco a cargo of iron rails. The ship left Liverpool on the 2nd Jan., and on the 3rd Jan. ran aground in Carnarvon Bay, sustaining considerable damage. It would necessarily be many months before she could be got off and put in such repair as to be able to continue her voyage. In the commercial sense, therefore, the voyage contemplated in the charter-party had been brought to an end, and under these circumstances the contract was held to have determined. The voyage, if resumed when the ship had been got off and repaired, would have been a different voyage, "as different," to use Lord Bramwell's words, "as though it had been described as intended to be a spring voyage, while the one after the repairs would have been an autumn voyage." The season within which the adventure

was to be carried out was, in fact, of importance to both parties to the bargain, and it was thus easy to imply a condition that if the voyage became impossible of completion within that season the contract should be at an end. The exception as to dangers of the sea and accidents of navigation no doubt showed that the parties were contemplating and providing for the case of some delay arising from these causes, but they were evidently not contemplating a delay so great that the spring voyage would become altogether impossible. The particular adventure being a voyage to be carried out within reasonable limits of time furnished a definite standard by which it could be determined whether the delay which actually occurred was or was not within the exception clause. There was, therefore, no inconsistency between the implied condition and the express provisions of the contract.

There is, so far as I can find, no case in which this principle has been applied to time charter-parties as distinguished from charter-parties which contemplate particular voyages. It was suggested in argument that *Tully* v. *Howling* (36 L. T. Rep. 163; 2 Q. B. Div. 182) was such a case. There the charter-party was a time charter-party for twelve months from the completion of the voyage on which the vessel was then engaged. After the completion of this voyage, and when the charterer was ready to load, the vessel was detained by the Board of Trade as unseaworthy. It took two months to make the vessel seaworthy, and meanwhile the charterer had repudiated the contract. It was held that he was justified in so doing on the ground that time was of the essence. There had been, in fact, a breach of the contract by the owners so material as to give the charterer a right to rescind. Only Brett, J. put the case as one of the frustration of a commercial adventure. Without laying it down that the principle can in no circumstances be applicable to time charter-parties, I am of opinion that its application is in such cases much more difficult than in the case of charter-parties which contemplate a definite voyage within certain limits of time. I concur in this respect with what is said by Bailhache, J. in *Admiral Shipping Company* v. *Weidner and Co.* (13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171; (1916) 1 K. B., at pp. 437-8). My reasons will appear when I come to consider the terms of the charter-party in the present case.

The contract in the present case is contained in the charter-party of the 18th May 1912, whereby the owners of the steamship *F. A. Tamplin* agreed to provide her with a full complement of officers, seamen, engineers, and firemen, and hold her at the disposition of the charterers for the voyages and other purposes therein mentioned for a period of sixty calendar months from the 4th Dec. 1912, subject, nevertheless, to the conditions therein specified. The charterers were to pay the owners monthly in advance for the first twelve calendar months 1750*l.*, and thereafter 1700*l.* per month by way of freight. By the seventeenth condition the freight was suspended in the event of loss of time by reason of deficiency in men or stores, or any defect or breakdown of machinery or damage or accident preventing the working of the vessel for more than twenty-four consecutive hours. By the nineteenth condition the payment of freight was to cease altogether in the event of the vessel being lost. By the twentieth condition the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests or restraints of princes, rulers, or people, and strandings and other accidents of navigation were excepted even when occasioned by negligence, default, or error of the pilot, master mariners, or other servants of the owners.

As I read this contract, the parties are not contemplating the prosecution of any commercial adventure in which both are interested. They are not contemplating the performance of any definite adventure at all. The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due. They are only concerned that the charterers shall pay the freight and shall not use the ship contrary to the provisions of the charter-party. It would be to the interest of the owners that the charterers should not make any use of the ship at all. They would thus save the cost of repairs due to wear and tear. On the other hand, the charterers only stipulated that the vessel shall be at their disposal for certain defined purposes. If they so desire, they retain full liberty not to use the vessel for any purpose whatever. Further, the contract contemplates that though the charterers desire to use the vessel, it may for intermittent periods of indefinite duration be impossible for them so to do. In such cases there are express provisions differing according to the particular circumstances from which such impossibility arises. In cases within condition 17 there is a suspension of freight only. In cases within condition 20, and not within condition 17, the payment of freight continues, and the owners incur no liability. Thus if the ship cannot put to sea because of deficiency of seamen, freight will be suspended. If, however, the vessel cannot put to sea because of an embargo, the freight continues to be payable, nor are the owners liable in damages. It makes no difference at what period during the term of the charter the deficiency of seamen or embargo occurs. Whether it occurs within the first or last six months of the term the result is to be the same.

I entertain no doubt that the requisitioning of the steamship by His Majesty's Government in the present case is a "restraint of princes" within the twentieth condition. The parties therefore have expressly contracted that during the period during which by reason of such restraint the owners are unable to keep the ship at the disposition of the charterers, the freight is to continue payable, and the owners are to be free from liability. This period may be long or short. It may be certain or indefinite. It may occur towards the beginning or towards the end of the term of the charter-party. The result is to be the same, unless indeed the circumstances are such that the ship can be said to be lost within the meaning of condition 19. Moreover (and this seems to me the vital point), the charter-party does not contemplate any definite adventure or object to be performed or carried out within reasonable limits of time, so as to justify a distinction being drawn between delays which may render such adventure or object impossible and delays which may not.

Under these circumstances it appears to me to be difficult, if not impossible, to frame any condition by virtue of which the contract of the

parties is at an end, without contradicting the express provisions of the contract, and defeating the intention of the parties as disclosed by these provisions. The nearest I can get is a proviso to the twentieth condition conceived as follows: "Provided that if the period during which the ship cannot be held at the disposition of the charterers by reason of any of the matters referred to in this condition, though indefinite, be such as will in all reasonable probability extend beyond the term of the charter-party, the contract between the parties shall be determined." But, in my opinion, even this would contradict the express term of contract. It could, for example, except from its provisions cases in which the ship ran aground so near the end of the term of the charter-party that it would be impossible to get her off or ready to put to sea once more within such term. This would, in my opinion, be contrary to the provisions of condition 20. Further, even if it were permissible to imply such a proviso to the twentieth condition, there is, in my opinion, no reason for holding that the Government will, in all reasonable probability, retain the vessel for the remainder of the term of the charter-party. Whether they will do so or not seems to me to depend on all sorts of circumstances as to which a court of justice cannot speculate. They may do so or they may not. I do not think that one event is more likely than the other.

Having regard to the difficulty of framing any conditions which can be implied without contradicting the express terms of the contract, having regard to the nature of the contract, which is a time charter only and does not contemplate any commercial adventure in which both parties are interested, or indeed any definite commercial adventure at all—and finally, having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition precedent to a contract which remains purely executory—I have come to the conclusion that the decision of the Court of Appeal was right and ought not to be disturbed.

I desire to add this. I cannot help thinking that the question really at issue has been somewhat obscured by the fact that the Government has under the terms of the Royal Proclamation of the 3rd Aug. 1914 to pay compensation to "the owners," to be settled in case of difference by arbitration. Owners must in this proclamation include all parties interested. It cannot, in the present case, mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests. The case was argued before your Lordships on the footing that it would determine which of two possible claimants was to be held entitled to all which might be payable by the Government by way of compensation under the proclamation. I entirely dissent from this view.

The appeal should, in my opinion, be dismissed with costs.

Solicitors for the appellants, *Holman, Birdwood, and Co.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Judicial Committee of the Privy Council.

May 23, 24, 26, *and July* 14, 1916.

(Present: the Right Hons. the LORD CHANCELLOR (Lord Buckmaster), Earl LOREBURN, Viscount MERSEY, and Lord SHAW.)

FOWLES *v.* EASTERN AND AUSTRALIAN STEAMSHIP COMPANY LIMITED. (*a*)

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Queensland—Compulsory pilotage—Negligence of pilot—Government not liable.

Under the statutes of Queensland relating to navigation and pilotage, a duty is imposed upon the Government of that State to license and appoint duly qualified pilots.

A firm of shipowners claimed damages from the defendant as the nominal representative of the Government of Queensland for the stranding of their vessel while compulsorily in charge of a duly licensed and appointed pilot, by whose negligence the stranding was caused.

Held, that the defendant was entitled to judgment as the statutes imposed no duty upon the Government to pilot the plaintiffs' ship, and it was not liable for the negligence of such a pilot, who was not alleged to have been improperly licensed.

The duty of the Government is merely to provide qualified pilots.

Decision of the Full Court of the Supreme Court of Queensland reversed.

APPEALS by the Government of Queensland, represented by Mr. William Lambert Fowles, in accordance with a statutory provision for that purpose, against orders of the Supreme Court of Queensland upon a special case stated which affirmed a judgment of Chubb, J.

The question was whether the Government of Queensland was liable in respect of the alleged negligence of licensed and qualified pilots appointed pursuant to the statutes in force in the colony. The respondents brought their actions claiming damages from the Government for the stranding of their vessel, the steamship *Eastern*, in the port of Brisbane owing to the alleged negligence of and whilst compulsorily in charge of a duly licensed and qualified pilot named Maxwell on the 22nd Jan. 1911.

A similar claim was made by the same plaintiffs in the case of the same ship, which had previously stranded in the port of Rockhampton on the 6th Aug. 1910, while in charge of a duly licensed and qualified assistant pilot named Dunmall.

The question of liability was tried before Chubb, J., who decided in favour of the plaintiffs, and his decision was affirmed by a judgment of the Full Court, but leave to appeal was given.

The two appeals were taken together.

Hon. *T. J. Ryan* (Attorney-General for Queensland), *Butler Aspinall*, K.C., *Clauson*, K.C., and Sir *John G. Micklethwait* for the appellant.

Sir *Robert Finlay*, K.C., *Schiller*, K.C., and *R. A. Wright* for the respondents.

Judgment was reserved.

Earl LOREBURN, delivering the opinion of their Lordships, said:—In the *Brisbane* case a steam-

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

ship company sues the Government of Queensland (represented by Mr. Fowles as nominal defendant under statutory provisions for that purpose) to recover damages in respect of a vessel named the *Eastern*, belonging to the company, which was stranded in the port of Brisbane. It is to be taken that the damage was caused by the negligence of one Maxwell, a pilot duly licensed and qualified for the port pursuant to the statutes there in force, and the pilotage was compulsory. The only question is whether the Government are liable for this negligence.

Chubb, J. held the Government liable, and his order was affirmed by the Supreme Court of Queensland, from which this appeal directly comes. But the board has also the advantage of judgments in the High Court of Australia, delivered at an earlier stage of the case. In both courts the whole of the law was very carefully considered. Isaacs, J. expressed an opinion that the Government were not liable, but the balance of opinion was decided in favour of the plaintiff company. It is therefore undoubtedly a difficult case.

It will be convenient to begin by considering the actual relations between the plaintiffs and the defendants, as created by law. The plaintiffs claim damages for breach of a duty owing to them. What was that duty? There was no contract between these parties. The duty, whatever it may have been, must be one that depends upon the statute. It is not, of course, necessary that the statute should contain an express statement of the duty, but it is necessary that the obligation should result from these enactments. Coming closer to the present case, the plaintiffs say that their ship was stranded owing to the negligence of a pilot named Maxwell. In order to succeed, they must show that the law imposed upon the defendants the conduct and management of that particular ship by that particular pilot; and this they seek to do by reasoning which would make the Government liable for the conduct and management of all ships compelled to accept the pilotage of pilots in the same position as Maxwell. There is nothing inherently unreasonable in such a contention, but its weight depends upon the extent and nature of the duty which the Government owe to the shipowner. It is very necessary, for this reason, to look into the true position of Maxwell and other pilots, because that may help in answering the true question—namely, whether or not the Government had laid upon them the conduct and management of the ship. If so, then they were bound to use proper care and skill and are liable for failure to do so.

In examining the statutes it is well to bear in mind the condition of things in regard to pilots before Parliament interposed. Originally the business was simply a matter of private enterprise; seamen of local experience made their own bargains with masters of ships. Barton, J. traces the sequel in his judgment. A licence was required in the interests of public safety, then pilotage fees were turned by statute into pilotage rates, no doubt for public reasons, but still the rates were paid to the men for their private emolument. Then the Treasury took the rates and empowered the Government to fix the remuneration of pilots. "The statutes also provided for constitution of a Marine Board acting in the execution of its powers and functions under the control of the Crown. The same statutes regulated the pilots in their duties after the manner of public servants and provided for a pilotage service, and, indeed, as was admitted, the Government supplied the port pilots with the instruments of their calling in the shape of boats maintained and crews paid, at Government cost, while the admissions and the regulations show that, on the other hand, the coast pilots were allowed to receive fees for themselves, and had to find their own boats and crews. The port pilots were made regular officers of the Government service, paid from the public funds, though the department called the Marine Board managed the pilot service under the immediate control of the Government. The port pilots were classified under the public service laws, according to salary, as professional servants of the Government." To this it may be added that pilotage in prescribed ports was made compulsory.

The language thus used by the learned judge is general in its terms, and was not of course intended to extend the words of the statutes, which lay down the functions of the board and the nature of Governmental control, but it presents the general result in a way from which their Lordships are not at all disposed to differ. They also entirely agree with the way in which Barton, J. puts, a little earlier in his judgment, the resulting question, "Was it the duty (of the Government) to undertake with due care and skill the pilotage of such vessels, or was it only a duty to supply qualified pilots to those who were bound to accept the services of such officers?" The learned judge comes to the former conclusion, though expressing the same difficulty which their Lordships also feel, and which, in their case, is enhanced by the adverse authority, not only of himself and the majority of his colleagues, but also of the Supreme Court of Queensland.

Nevertheless, their Lordships have been constrained to the conclusion that no greater obligation is laid on the defendants than that of providing qualified pilots. The fact that pilotage is compulsory cannot affect them. It is not they but the law that makes it so. The fact that, through the Marine Board, they license pilots cannot affect them. That has been repeatedly laid down and is not questioned. Yet, though the argument is placed on other grounds, the real thought behind the argument, which makes it forcible, is that if you compel a master to place his ship in the hands of someone else whom you designate without consulting him you ought to make good any loss arising from his negligence. There is an appearance of natural equity in this view, and, perhaps, more than an appearance; but it is clearly established that this will not suffice, and, were it relevant, ample considerations might be adduced in support of the view which has prevailed. If, then, the defendants are to be made liable, it must be on the ground that they charge pilotage rates, which go into the Treasury, that they pay salaries to the pilots, whom they choose, dismiss, or reprimand, and that they class them in the Civil Service and supply them with boats, implements, and crews; also that they make regulations which control them, but not regulations interfering with their conduct and management of ships.

Now if the crucial question here were whether or not Maxwell was in the service of the defendants, as might arise in an action of wrongful dismissal, this class of evidence would be very cogent to show that he was in their service. It is the kind of evidence common in such cases. But if the question be, as their Lordships think it is, whether or not the defendants were bound to navigate this ship and employed Maxwell to do for them the work which they were bound to do, then it is not conclusive to say that he was in their service unless it can also be said that the Government were "the principals in the piloting of ships," to borrow the happy phrase of Mr. Justice Isaacs. That phrase seems to hit the point exactly. If Maxwell himself was the principal in the piloting of ships, then the defendants cannot be liable. It was he and not they that owed the duty of careful piloting to the plaintiffs.

In their Lordships' opinion these Acts of Parliament did not alter the original status of a pilot, which is, in effect, that he must be regarded as an independent professional man in discharging his skilled duties. If it had been intended to alter this old and familiar status, it is to be supposed that the Legislature would have done it more explicitly. What it has done is more consistent with a different and limited purpose—namely, to secure a proper selection, a proper supply, a proper supervision, and a proper remuneration of men to whose skill life and property is committed, whether the shipowner likes it or not. For this purpose they become servants of the Government. For the purpose of navigating ships, they remain what they were, and the duty which the State or Government owes to a shipowner, exercised, it is true, by various authorities, is to provide a qualified man in the terms of the statutes, but not to take the conduct or management of the ship. It is not said that they have failed in this duty of providing a qualified man.

Taking this view of the statutes themselves, their Lordships do not think it is necessary to review the authorities, which were exhaustively considered, both in the High Court of Australia and the Supreme Court of Queensland. They will only say that, if they had thought the Government were directed to carry on the business of pilotage, they would have held them responsible for negligence in that business, as in the case of *Brabant and Co.* v. *King* (72 L. T. Rep. 785; (1895) A. C. 632), where the relation of bailor and bailee for hire was established.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and judgment entered for the appellant with costs throughout. The respondents must pay the costs of the appeal.

The facts of the *Rockhampton* case are similar, and their Lordships will humbly advise His Majesty that this appeal should also be allowed, and judgment entered for the appellant with costs throughout.

The respondents must pay the costs of the appeal.

Solicitors for the appellant, *Freshfields.*

Solicitors for the respondents, *William A. Crump and Sons.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

June 5, 8, *and July* 3, 1916.

(Before Sir S. T. EVANS, President.)

THE HAKAN. (*a*)

Prize Court—Neutral vessel—Carriage of contraband—Liability to confiscation of vessel and cargo — Old rule — Relaxation — Practice of maritime States—Art. 40 *of Declaration of London — Adoption of article by Order in Council—Validity—Rule of international law as to contraband since* 1908.

Although there is no formal instrument binding as an international convention, the attitude and the action of the more important maritime States before and since the holding of the International Naval Conference at London in 1908-9 *have resulted in the establishment of a rule of international law that neutral vessels carrying to an enemy port contraband which by value, weight, volume, or freight value forms more than one-half of the cargo are subject to confiscation and to condemnation.*

THIS was a case in which the Crown claimed the condemnation of the *Hakan* and its cargo, the latter being alleged to be contraband of war.

The *Hakan* was a Swedish vessel, and on the 8th Jan. 1916 she was chartered to a firm of German fish dealers, Messrs. Franz Witte and Co., carrying on business at Altona, Stettin, and Hamburg, for six weeks, "information to be given to the charterers at Gothenburg or Stettin at their option." The vessel left Haugesund in Norway for Lübeck early in April 1916, but was captured almost immediately by a British cruiser in the North Sea and sent to Kirkwall. The cargo consisted largely of salted herrings, which were conditional contraband. The shipowners contested the claim of the Crown. There was no appearance on the part of the cargo owners.

The whole of the arguments in the case were directed to the question of the liability of a neutral vessel carrying contraband to confiscation according to modern international law. These are fully set out in the judgment of the President.

The *Attorney General* (Sir F. E. Smith, K.C.), the *Solicitor-General* (Sir George Cave, K.C.), and *R. A. Wright* for the Procurator-General.

Balloch for the shipowners.

Cur. adv. vult.

July 3.—The PRESIDENT.—The claim of the shipowners for the release of this captured vessel, the *Hakan*, is founded upon a proposition that it is a well-established rule of the law of nations that neutral vessels carrying contraband of war are free from capture, subject to certain exceptions in cases where the owners of the vessels are also the owners of the contraband, or where they

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

attempt to defraud a belligerent of his belligerent rights to capture the contraband by concealment of its destination, by departure from the voyage, or by false papers, or by other similar methods. Following upon this, it is contended that the provisions adopted by the Order in Council from art. 40 of the Declaration of London offended against the rule; and that effect should not be given to them by this court. Those provisions are as follows: "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo."

In the present case the whole cargo carried by the vessel was conditional contraband. The ship was a Swedish vessel, belonging to a Swedish company. Her gross tonnage was 484 tons, and her net tonnage was 271 tons. At the time of her capture she was under a time charter (namely, six weeks, with powers of extension for four months) to Messrs. Franz Witte and Co., well-known German fish dealers, carrying on business at Altona and Stettin, as well as at Gothenburg. The agreed hire to be paid by the charterers was 520 kr. per day. The charter-party and the bills of lading are in evidence, and can be referred to. The cargo consisted of 3238 barrels of salted herrings, consigned from Haugesund, in Norway, to Lübeck. Lübeck is a German base of supply. It is also a port which has been used on a very extensive scale since the war began for the importation of goods from Scandinavia into Germany. Moreover, orders have been made by the German Federal Council regulating the import of salted herrings into the German Empire, whereby they must all be delivered to the Central Purchasing Company Limited, of Berlin, a company acting under the directions of the German Imperial Chancellor. No appearance or claim was entered or made by any of the named consignors or consignees of the cargo or by the charterers, who, of course, knew its destination. There is no doubt of its contraband character, nor of its destination for the enemy Government or its forces.

The shipowners, although not expressly admitting this, did not contend that in the circumstances it was not confiscable contraband. Their whole case was argued upon the basis that it was. The shipowners' claim, therefore, raises in a precise form the question of the soundness of their legal proposition. Is there, at the present day, according to the law of nations, a well-established rule in favour of a contraband-carrying vessel to the effect stated? There is no doubt that the law to be administered in this court is the law of nations (or international law, as it is often called) and not our municipal law. As was recently stated by the Lords of the Judicial Committee of the Privy Council, it is "a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other, or in express international agreement": (*The Zamora*, 13 Asp. Mar. Law Cas. 144; 114 L. T. Rep. 626; (1916) 2 A. C. 77). It has naturally fallen in course of time within general principles—easily understood although not always capable of precise definition—which have been approved of as equitable by jurists and judges, and acted upon in practice by States. From its nature it is subject to modifications as time rolls on, and the world's international conditions change; but its development should be along the lines of the same equitable principles as between nations.

The law as to contraband goods illustrates these developments as well as any of the subjects with which it deals. It is not necessary to elaborate this theme. But it is essential in considering the law of contraband, in its relation both to ships and goods, to bear in mind that the principle upon which it is founded is that it must be allowed to belligerents to use their maritime powers to interfere to some extent, and, indeed, as has been established, to a considerable extent, with the commerce of neutral countries in order to prevent goods being conveyed to the enemy, which might enable or might help the enemy to carry on or to prolong a war with success. If a belligerent has a right by means of capture and subsequent condemnation to prevent contraband goods from reaching the enemy and to have them confiscated, it would appear to be not unfair or unreasonable that the belligerent should also have rights of a like kind against the vessel in which the goods are being carried. The goods could not reach the enemy without the help of the vessel. The transaction in the ordinary course involves the conjoint operation of the owner of the goods and the owner of the vessel. The one trader is selling his goods for profit; the other trader is letting his vessel on hire for profit to transport them. Why should one of these two classes of traders in case of capture lose his property, and the other have it preserved? It may be urged that this comparison of the position imports to the shipowner actual knowledge of the character of the goods carried on his vessel. But this is not necessarily the case. If a shipowner allows his vessel to be chartered or to be used in such a way that contraband goods may be laden upon it for transport to an enemy, whether he is aware of the use to which his vessel is being put or not, it does not appear to be inequitable that he should suffer from the results of such a use of his vessel as would enure to the enemy's benefit. This element of the knowledge of the shipowner has entered into the discussions upon the question of his ship being involved in liability, and it will be considered hereafter in the general aspect of the law, and also in reference to the facts of this particular case.

The ancient practice in this country, before the Napoleonic wars—apart from special treaties—was that neutral vessels carrying contraband goods were subject to capture and condemnation, as were the goods themselves. Upon general principles, such a practice seems to me to be consistent with equitable rights as between belligerents and neutral traders. In the case of *The Neutralitet* (Roscoe's English Prize Cases, vol. 1, 309; 3 Ch. Rob. 295) Sir William Scott said that "it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such (*i.e.*, contraband) articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent." The confiscation of the ship had been justified by Bynkershoek and other jurists of authority. It is true, however, that by the time of Lord Stowell a relaxation of the practice was introduced, whereby the ship was regarded as non-confiscable,

except in certain cases of the character already mentioned. But it is to be noted that if the owner of any part of the contraband cargo was also the owner of the ship, or any share in it, the ship, or his share, was still held to be subject to confiscation: (see *The Jonge Tobias*, Roscoe, vol. 1, 146; 1 Ch. Rob. 329). It is difficult to ascertain precisely the reasons for the relaxation made in those times. It was probably due partly to the policy of this country in relation to neutral commerce, and to the frequency of treaties dealing with the subject. The legal ground for its introduction, however, was "the supposition that freights of noxious or doubtful articles might be taken without the personal knowledge of the owner": (see per Sir William Scott in *The Neutralitet, ubi sup.*).

On reference to the practice of other nations it will be found that at this very period the French Règlement of the 26th July 1778 was in force. Under the Règlement the ship was declared subject to confiscation if three-fourths in value of the cargo consisted of contraband goods. It is true that this was regarded by some authorities as merely part of the municipal law; but by others (including Ortolan) as applicable between States, unless, of course, treaties contained different provisions, as, for example, the treaty of Sept. 1800, made for a period of eight years between France and the United States. Its provisions were maintained by the French instructions of the 31st March 1854, and those of the 25th July 1870: (see Bonfils' Manuel de Droit International Public, 7th edit., par. 1578) Indeed, the Règlement remained in force ever since, at any rate until 1914, when the Government of France adopted the provisions of art. 40 of the Declaration of London.

During the Crimean War the question relating to vessels does not appear to have come up for decision in any Court of Prize. But not only did France adhere to the Règlement referred to during that war, but Russia also, by a Declaration issued on the 19th April 1854, pronounced that neutral vessels carrying contraband would be stopped by her cruisers and declared lawful prizes of war in conformity with the declaration of the 27th Nov. 1853: (see the *London Gazette*, May 2, 1854, p. 1364).

The matter was dealt with during the American Civil War in *The Bermuda* (3 Wall. 514). The relaxation of the time of Lord Stowell was referred to in that case as follows: "This has been called an indulgent rule, and so it is. It is a great, but very popular, relaxation of the ancient rule which condemned the vessel carrying contraband as well as the cargo." Then comes the following passage: "But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognised and enforced in all cases where that presumption is not repelled by proof": (p. 555).

The "presumption" seems to refer to the knowledge of the shipowner of the nature of the cargo. It is not easy to understand the meaning of the phrase "intent to take hostile part." If the shipowner had knowledge of the contraband character of the goods, it would appear to follow that in allowing their shipment he had the "intent" to help the enemy. However this may be, the so-called indulgent rule which *primâ facie* permitted the ship to escape confiscation was clearly regarded by the United States Court as subject to qualification by reason either of the knowledge or the intention of the shipowner as to the enemy destination of the contraband cargo. The attitude of the United States upon this question in later times will be pointed out hereafter in the appropriate period, as exemplified and defined in their Naval War Code promulgated in 1900 (amended in a few particulars in 1903), which was commended by the United States to the International Naval Conference of London in 1908.

In Europe, about the same time as the American Civil War was proceeding, Prussia, Denmark, and Austria promulgated prize regulations (in the early part of 1864) whereby ships carrying contraband goods were declared subject to confiscation, if the whole cargo consisted of contraband. Later, in the war of 1866, Austria went further and declared ships to be lawful prizes which carried contraband bearing a proportion of contraband which was considerable in reference to the whole cargo: (see Kleen, De la Contrebande de Guerre, p. 210 (n).) Italy, according to art. 215 of her Mercantile Marine Code, admitted the confiscability of the ship and contraband goods laden in her, but freed the innocent goods; and this rule was applied by her during the war of 1866: (see Bonfils, 7th edit, par. 1578). Reference has been made to the reiteration by France in 1870 of the three-fourths rule. In the development of the history of the subject, the next important stage is reached in the theories and practices of the Empires of Russia and Japan before, and in the course of, the Russo-Japanese War. These two Powers waged war on sea, as well as on land. Their rules and practices in naval warfare are, therefore, of importance in ascertaining the Law of Nations at a period when the conditions of neutral and international trade carried over the seas were, to all intents and purposes, the same as those of the present day. The decisions of their respective Prize Courts in cases arising out of that war must also have a close bearing upon the rules of International Law, regarded by these two States as governing the liability of ships carrying contraband.

The Russian prize regulations were decreed on the 27th March 1895, nine years before the outbreak of war between Russia and Japan. By these regulations merchant vessels of neutral nationality were declared liable to confiscation as prizes if found conveying to the enemy or to an enemy port certain contraband articles and substances for firearms or explosives, whatever the amount of such might be; and other articles of contraband of war amounting in bulk or weight to more than half the entire cargo, provided that it was not proved that the masters of the vessels concerned were unaware of the declaration of war: (Regulations 11 (1).

After the declaration of war no other knowledge either on the part of the owners or masters was required to be proved or to exist. These provisions were applied in the cases of British, German, and Danish vessels, with the effect that vessels were condemned where the contraband carried was more than half the cargo and released where it

was less: (see *The Arabia*, Russian and Japanese Prize Cases, vol. 1, p. 42; *The Knight Commander*, *ibid.*, p. 54; *The Calchas*, *ibid.*, p. 118; *The St. Kilda*, *ibid.*, p. 188; and *The Prinsesse Marie*, *ibid.*, p. 276). British ships were condemned on this ground, and no protest against the condemnation was made by the British Government to the Russian Government.

The Japanese regulations as to capture at sea are not so precise. They were issued after the war with Russia had begun. They came into force on the 15th March 1904. They provided that ships carrying contraband of war were liable to capture without regard to their nationality, and that the fact that a master was ignorant that contraband articles were on board could not be held to be a reason for exemption from capture: (arts. 37 and 38). They also provided that the ship should be condemned if the owner of the ship and of the contraband articles were one and the same person: (art. 43). But they contained a general rule which prescribed that with regard to matters which were not determined by law, treaty, or the Japanese regulations, the principles of international law should be followed: (art. 10). If the cases decided by the Japanese Prize Courts are examined, it will be seen that the principle of international law most often applied was the one which may be formulated from the statement of the reasons of the court in various cases, thus: International law recognises the liability to condemnation of a vessel the object of whose voyage is the carriage of contraband of war; and this rule is in accordance with what is just and reasonable, and with correct and fundamental principles.

As to the determination of what was "the object of the voyage" the Japanese Higher Prize Court held that if the greater part of the cargo was contraband, it must be concluded that the "object of the voyage" was the carriage of contraband. Applying this test and the rule referred to, the Japanese courts condemned as prizes ships of various nationalities, British, British Colonial (chartered by Americans), German, and Norwegian: (see *The Roseley*, Russian and Japanese Prize Cases, vol. 2, p. 228; *The Aphrodite*, *ibid.*, p. 240; *The Scotsman*, *ibid.*, p. 256; *The Bawtry*, *ibid.*, p. 265; *The M.S. Dollar*, *ibid.*, p. 284; *The Wyefield*, *ibid.*, p. 291; *The Paros*, *ibid.*, p. 301; *The Henry Bolckow*, *ibid.*, p. 331; *The Lydia*, *ibid.*, p. 359; and *The Antiope*, *ibid.*, p. 389).

The next important phase in the history of the question was the attitude of the various Powers which took part in the International Naval Conference held in London in 1908-1909. Before the conference was held, and in order to provide a basis for its discussion, the various Governments were invited by the British Foreign Secretary to "interchange memoranda setting out concisely what they regard as the correct rule of international law" on each of the heads enumerated, among which was the following: "Contraband, including the circumstances under which particular articles can be considered as contraband, the penalties for their carriage, &c."

It will be noted that the Powers were thus asked to state what they regarded as the correct rule of international law at the time on the subject of the confiscability of neutral vessels carrying contraband, and not what changes they desired to effect. It therefore seems material to have regard to the views then expressed by the various States called into international consultation in considering the question whether there was any, and, if so what, well-established rule on the subject according to the Law of Nations. The statements for the various countries will be taken in the order in which they appear in the proceedings. Concisely summarised they are as follows:—

Germany.—The ship carrying contraband of war is subject to confiscation, if the owner, or the charterer of the whole ship, or the master, knew, or ought to have known, that there was contraband on board, and if that contraband forms more than a quarter of the cargo, either by value, weight, or volume.

The United States of America.—For the views of the Republic, the Department of State referred to its Naval War Code of 1900, as amended in a few particulars in 1903. The Naval Code of 1900 was prepared for the guidance and use of the naval service of the United States by Charles H. Stockton (Captain and afterwards Rear-Admiral of the United States Navy and President of the George Washington University), under the direction of the Secretary of the Navy, and was approved by the President of the United States, and published "for the use of the navy, and for the information of all concerned." Rear-Admiral Stockton was a Delegate Plenipotentiary of the United States at the London Naval Conference. According to the code, a neutral vessel carrying the goods of an enemy is, with her cargo, exempt from capture except when carrying contraband of war, or endeavouring to force a blockade, or guilty of having rendered hostile assistance to the enemy. And, further, vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy, are liable to seizure and detention, unless treaty stipulations otherwise provide.

Austria-Hungary.—The memorandum did not state what was regarded as the international law on the subject. It contained observations as to the desirability of making certain changes in the law. (The regulations and practice of Austria in 1864 and during the war of 1866 have already been adverted to.)

Spain.—This memorandum also omits a statement of what Spain regarded as the law; but it contained the suggestion that between the system which allows the confiscation of ships carrying some contraband, whatever the quantity, and that which only entails that result in cases of resistance or fraud, it might be possible to provide an intermediate rule to the effect that if the shipmaster and shipowner knew or could have known that the ship carried contraband, the ship should be responsible to the captor in a ransom or confiscation equal to three times the value of the contraband and five times that of the total freight, and, in default of freight, the captor should only have recourse in execution against the ship, and while she remained in his hands.

France.—Neutral vessels, and the whole of their cargo—contraband or otherwise—are confiscable if the contraband cargo forms three-quarters in value of the whole cargo. (This is according to the rule of 1778 above referred to, and the French rules and practice ever since.)

Great Britain.—Any interest in the ship carrying the contraband which belongs to the owner of the contraband is subject to condemnation.

The ship is also subject to condemnation in case of forcible resistance, or of the carrying of false or simulated papers, or of other circumstances amounting to fraud.

Italy.—Neutral ships with cargo finally destined for the enemy country, which consists in whole or in part of contraband of war, are subject to capture, and the ships and contraband goods will be confiscated; but only when it appears that the owner was not aware that his vessel was intended to be used for the carrying of contraband.

Japan.—Ships carrying contraband of war and their cargoes belonging to the shipowner are subject to confiscation if fraudulent means are used for the carriage of the contraband; also when the carriage of contraband goods is the principal object of the ship's voyage—and also when the contraband goods belong to the shipowner. But a ship having contraband goods on board is not on that ground alone subject to capture if the master had no knowledge actual or presumed of the outbreak of hostilities.

Holland.—A ship carrying contraband is subject to confiscation if an important part of the cargo consists of contraband, unless it appears that the master or the charterer could not have known the real nature of the cargo; or if the master resists the arrest, visit, or capture of the vessel.

Russia.—Neutral vessels are subject to confiscation when they carry contraband of war forming by volume, weight, or value more than a quarter of the whole cargo; or when they carry contraband goods in lesser quantity, if their presence on board by their nature or quality could obviously be known to the master; and ships carrying contraband goods less than a quarter of the cargo are liable to make compensation to the extent of five times the value of the contraband part of the cargo.

Such were the views put forward by the various High Powers before the holding of the conference. The result of the deliberations of their representatives at the conference upon this question was the adoption of the rule in art. 40 of the Declaration of London that the vessel is subject to condemnation if the contraband reckoned either by value, weight, volume, or freight, forms more than half the cargo. It is not unimportant to note that this was adopted unanimously.

There was no ratification of the Declaration of London as a whole by this country; nor, so far as I am aware, by any other of the States represented. But by Orders in Council the provisions of art. 40 were adopted by the Crown. They have also been adopted by our allies, France, Russia, Italy, and Japan. Russia's Prize Regulations decreed in 1895 were the same, except that value or freight have now been added as tests of confiscability. Germany, shortly after the conference, incorporated art. 40 in her Prize Code of the 30th Sept. 1909—and it still forms part of the German Prize Law. It has also been acted upon in decisions of the German Prize Court. Austria-Hungary also included it in her Navy Regulations in May 1913, which had the following introduction: "By agreement between the commercial and maritime countries most concerned, including the Austro-Hungarian Monarchy, a large number of questions with regard to international law on maritime war have been regulated. The provisions of international law on war, in so far as such have been fixed by agreements, are hereby published, so that they may be observed in the event of war." As to America, the rule formulated in art. 40 is assumed to be the present law in the last work of Mr. Charles H. Stockton on International Law (published at the end of Oct. 1914), whose position I have already described. Of it he wrote in the report of the American delegation to the Secretary of State that "much relief is afforded to neutrals in respect to the penalty of carrying contraband. In the first place, the ship is not subject to confiscation unless more than half the cargo is contraband, to be determined either by weight, volume, value, or freight value": (p. 437).

What has been stated shows the attitude of the chief maritime Powers to what was unanimously agreed by their representatives at the Conference of London. Sweden was not then represented, and I do not know whether any step has since been taken by Sweden in respect of the liability of neutral ships. But one thing is clear, and that is that Sweden and her shipowners and merchants had abundant notice of what the belligerents had declared they would do in such cases. It is certain that no Swedish shipowner indulging himself in the warm prospect of abundant profit, or anyone else engaged in the cold contemplation of unprofitable theory, ever thought that if a Swedish ship was captured by a British cruiser while carrying a full cargo of contraband to Germany she would be immune from condemnation; while, if she was carrying something over half her cargo (in weight, volume, value, or freight) to the United Kingdom she would, if captured by a German war-vessel, be subject to condemnation. In the interest of neutrality such a temptation to neutrals to serve one belligerent with contraband goods to the exclusion of the other ought to be removed if it can be done consistently with fair principles and with the rules of international law.

In the light of what has been set out the case has to be considered from two or perhaps three points of view. First, apart from any resolutions or articles of the London Conference, what was the rule of the law of nations affecting a vessel which in the circumstances of this case was carrying a cargo consisting wholly of contraband destined for the enemy? Secondly, was the order in council adopting art. 40 of the Declaration of London so contrary to such a rule that the order was invalid; or was it sufficiently consistent with such a rule, or did it so mitigate the rule in favour of the enemy that it acquired validity, in accordance with the doctrine stated by the Privy Council in *The Zamora* (*ubi sup.*)? Or, thirdly, did the acts of the representatives of the various Powers at the conference and the subsequent action and practice of their States bring into existence, by a sufficiently general consensus of view and assent, a new or modified rule of the law of nations upon the subject, to which effect ought to be given in their Prize Courts at the present day, apart from any Order in Council?

As to the first, having regard to the decrees and practices of the nations for the last hundred years I should feel bound to declare that the old rule which prevailed before the relaxation introduced a century or more ago should be regarded as valid

at the present day. This means that the so-called well-established rule in favour of a contraband laden ship contended for by the claimants does not exist. In the days of the relaxation referred to the ship was subject to confiscation in many respects, which were sometimes called exceptions. It has always been held that if any part of the contraband carried belonged to the owner of the ship the ship itself was subject to the penalty of confiscation as was the contraband. According to our most recent writers the vessel suffered if her owner was privy to the carriage of the contraband goods, whether they belonged to him or not: (see Westlake, p. 291; Hall, p. 666).

In the present day even more than in the past the owner must be taken to know either directly or through the master how his vessel is laden, or to what use she is being put. In the days of Lord Stowell it was made clear that the master was bound in time of war to know what his cargo consisted of; for to hold otherwise would be to excuse real or feigned ignorance and so admit without penalty the carrying of contraband: (cf. *The Oster Risoer*, Roscoe, vol. 1, 382; 4 Ch. Rob. 199; and *The Richmond*, 5 Ch. Rob. 325).

This leads me to advert to the special facts of the present case upon the question of the knowledge of the shipowners. The vessel was chartered, as stated, for a short time to German merchants. The value of the vessel was not given; it might be estimated from her tonnage. But from the charter-party it appears that the vessel was hired at a rate per annum equal to nearly double the sum at which she had to be insured under the charter-party. She was therefore hired at a sum which represented close upon 200 per cent. per annum of her capital or insurable value. She was not an ocean-going vessel. Can there be any doubt that her owners knew she was going to be engaged in the contraband trade between Scandinavia and Lübeck or some German Baltic port?

No evidence was given for the owners that they had no knowledge of the purposes for which she was hired. Indeed, no suggestion was made that they did not know how she was to be employed. I should have no hesitation in drawing the inference that they did know. Moreover, if owners in times of war, and in waters favourable to contraband trading, enter into time charter contracts, it would be placing premiums upon contraband trading to allow the owners to protect themselves by relying on charter-parties, and sheltering themselves behind a screen of ignorance of their own deliberate construction. The vessel's immunity, or penal responsibility, ought not to depend upon such arrangements.

Apart, therefore, from any Order in Council adopting the half-cargo rule of art. 40 of the Declaration of London, I should pronounce judgment for the condemnation of the vessel as prize.

Secondly, it follows from what I have stated, that the provisions of art. 40 were a limitation or mitigation of some of the rights of the Crown; and the result of *The Zamora* (*ubi sup.*) decision is that accordingly the provisions in the Order in Council are valid.

Thirdly, although there is no formal instrument binding as an international convention, I think that the attitude and the action of the most important maritime States before and since 1908 have been such as to justify the court in accepting as forming part of the law of nations at the present date a rule that neutral vessels carrying contraband which by value, weight, volume, or freight value forms more than half the cargo are subject to confiscation and to condemnation as good and lawful prizes of war.

The judgment of the court is that the *Hakan* and her cargo are condemned as good and lawful prize, and that they be sold by the marshal of the court.

As the question of law raised in this particular case was new in one sense, and also an important one, I shall make no order as to costs.

There will be leave to appeal on security for costs of the appeal being given to the extent of 350*l*.

Solicitor for the Procurator-General, *Treasury Solicitor*.

Solicitors for the claimants, *Botterell* and *Roche*.

Judicial Committee of the Privy Council.

Feb. 28, 29, *March* 1, 2, *and April* 13, 1916.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, and WRENBURY, and Sir ARTHUR CHANNELL.)

THE PANARIELLOS. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Trading with the enemy—Goods of ally—Consignment to enemy—Contract of sale at date prior to outbreak of war—Neutral vessel — Dispatch from neutral port after date of outbreak of hostilities—Liability to seizure and condemnation—General principles to be applied —Obligations as to trading binding confederate States.

On the outbreak of a war in which a belligerent has allies, the citizens of each of the allied States are under the same obligations to each other allied State as its own subjects would be to a single belligerent State with relation to intercourse with the enemy.

Prior to the outbreak of war between Great Britain and her allies and Germany and Austria, a French company contracted to sell certain goods to a German firm. The goods were shipped from a neutral State in a neutral vessel. War broke out while the ship was being loaded. She afterwards sailed with the goods on board for Antwerp and Newcastle. The French company later on directed her to Swansea, where the goods were seized and sold. It was admitted that at the time of seizure the property in the goods was still in the French company.

Held, that although the French company had acted honestly and bonâ fide in the transaction, what they had done constituted a trading with the enemy after the outbreak of war. They had failed to discharge the onus of establishing that the transaction had been abandoned before the seizure of the goods, which were therefore con-

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

fiscable as those of a British citizen would have been under similar circumstances.

Decision of Evans P., reported 13 *Asp. Mar. Law Cas.* 52; 112 *L. T. Rep.* 777, *affirmed.*

APPEAL from a decree of the President of the Admiralty Division, sitting in Prize, reported 13 Asp. Mar. Law Cas. 52; 112 L. T. Rep. 777, pronouncing as good and lawful prize 1020 tons of silver lead laden in the Greek ship *Panariellos*, and belonging to the Compagnie Française des Mines du Laurium.

The cargo was seized the 25th Sept. 1914 as prize at Swansea by the Collector of Customs. On the 1st Oct. 1914 an order of the court was made for sale of the part cargo, which was duly effected, and the proceeds, about 16,000*l.*, were lodged in court. The present proceedings were commenced by the Procurator-General, claiming a decree that the goods in question belonged at the time of seizure to the Compagnie Française des Mines du Larium "trading in the said goods with enemies of the Crown and of the President of the French Republic, the ally of the Crown," and as such or otherwise were liable to confiscation as good and lawful prize.

The question at issue was whether the French company were trading in the goods with enemies of the Crown or the President of the French Republic, the ally of the Crown.

The facts are fully stated in the considered judgment of their Lordships.

Sir *Robert Finlay*, K.C., *Aspinall*, K.C., and *R. A. Wright* for the appellants.

Sir *George Cave* (S.-G.) and *G. W. Ricketts* for the Crown.

The judgment of the board was delivered by

Lord SUMNER.—This is the claimants' appeal from the condemnation, for trading with the enemy, of 1020 tons of silver-lead *ex* steamship *Panariellos*, as droits of Admiralty. They raise points little, if at all, relied upon below. This explains how it is that evidence, now much needed, was given below scantily or not at all, though often it was in the claimants' possession. The appellants now accept much that before was disputed, and raise issues before their Lordships which must be decided by inference from indefinite and imperfect materials. It may be that they suffer from the course so taken.

On the 11th Aug. 1914 the Greek steamer *Panariellos* sailed from Ergasteria for Belgium and the United Kingdom with a cargo of minerals belonging to the appellants, the Compagnie Française des Mines du Laurium. The cargo consisted of about 1020 tons of lead, stowed in the bottom of the ship, and about 3500 tons of calamine and 600 of speiss stowed above the lead. There were three bills of lading: one for the entire cargo, one for half of the lead, another for the other half. Each bill of lading expressed that the cargo which it covered was consigned to the appellants themselves. The lead was made deliverable at Newcastle; the bill of lading for the entire cargo made it deliverable at Antwerp and Newcastle, but the calamine, at any rate, was in fact to be discharged at Antwerp. The bills of lading incorporated a voyage charter, dated the 18th July 1914, for Antwerp and Tyne below bridges. It gave a lien for freight and demurrage.

The loading of this cargo began on the 29th July 1914 and finished on the 10th Aug. The appellants, whose *siege social* is in Paris with an office at Laurium, where they exploit mines, have not contested that at all material times they were aware of the outbreak of war between Great Britain and France and Germany. The appellants have long been in commercial relations with the firm of Beer Sondheimer and Co., of Frankfort-on-the-Main, who traded in metallic ores. Running contracts existed between them, under which Beer Sondheimer and Co. sent cargoes of galena from Tunis to Ergasteria, where the appellants treated them and reshipped the resulting lead ore as arranged with their German customers. In form, the appellants bought the galena from Beer Sondheimer and Co. and sold to them the lead extracted from it. As these transactions regularly followed one another, there was a running account between the parties on which a balance was outstanding in favour of the appellants. In this way the shipment of lead ore in question came to be made. It is common ground in the present proceedings that the lead still belonged to the appellant company at all material times. At one time a claim was made on behalf of Beer Sondheimer and Co., as owners, but it was abandoned, and the ownership of the cargo need not be pursued further.

As soon as war broke out Beer Sondheimer and Co. set to work to get possession of the bills of lading. Communication being suspended between Frankfort and Paris, they telegraphed to the appellants' office at Ergasteria on or before the 4th Aug. to send the bills of lading direct to Beer Sondheimer and Co., of London, and asked that the appellants' Paris house might be directed to transmit these instructions to this London firm. The appellants forwarded these instructions, but at that time the bills of lading had been signed, and nothing further was done.

The London firm of Beer Sondheimer and Co. consisted of one person, a German named Emil Beer. Whether he had any other business than that of agent in London for Beer Sondheimer and Co., of Frankfort, does not appear. At any rate, his firm in London were sole agents for the Frankfort firm, and, as he is said to be "a partner" in the Frankfort firm, presumably that firm had other members. The Frankfort and the London firms were distinct, but in intimate relations with one another. On the 21st Aug. the London firm, then in charge of an Austrian clerk named Weissberger, began inquiring of the appellants' Paris office where the bills of lading were, and the appellants' *secrétaire général* replied that they were not yet to hand, but would be forwarded as soon as they were received in accordance with the instruction of the Frankfort firm. On the 22nd Aug. the appellants' *administrateur délégué*, M. le Baron Jules de Catelin, was in London and saw Herr Weissberger, whose business had not up to that time been interfered with by the authorities. It was verbally agreed that, if the parcel of lead was delivered by the London firm, a complete settlement of accounts would follow. Such a settlement was a matter of some anxiety to M. de Catelin both then and for some time afterwards, and, as far as can be ascertained from the evidence, the appellants would have been sub-

stantially better off if they could have got a full settlement of this account against delivery of the bills of lading for the lead than if they took delivery of the lead themselves under the bills of lading and sold it, after paying freight, demurrage, and warehouse charges.

On the 25th Aug. the appellants' *secrétaire général* sent from Paris to Beer Sondheimer and Co., of London, the two bills of lading for the lead in accordance with the promise contained in his letter of the 21st Aug. He purported to indorse both per procuration of the *administrateur délégué*, but by some accident only one indorsement was completed with the secretary's signature. Baron de Catelin asserted that the secretary had no authority to indorse away the appellants' property at all, but it does not appear that his action was ever repudiated, nor does it appear whether the *administrateur* was himself in Paris on that day or not. The learned President, sitting in Prize below, expressly refrained from accepting the statement that the act of the secretary in writing the letter which covered the bills of lading was beyond his authority, and said that on the evidence he must take it to have been done in the ordinary course of business. Presumably he intended his observation to extend to the secretary's indorsement of one of the bills of lading as well. As things turned out, these bills of lading did not fall into the hands of Beer Sondheimer and Co., of London, for on the 25th Aug. their office was closed and their papers were impounded by the Home Secretary's orders. M. de Catelin was speedily informed. He held no further communication with Beer Sondheimer and Co.

On the 26th Aug. the *Panariellos* arrived in the Downs. It was already questionable whether it was wise to proceed to deliver the calamine at Antwerp, and the captain demanded instructions. As to the cargo in the upper part of the holds, something had to be done. The lead, which was stowed underneath the calamine, was a less pressing matter. On that day M. de Catelin was in London, and, although after the 22nd Aug. he was entirely unable to fix any dates in his evidence, it is tolerably clear from the documents produced that he went to Swansea, sold part of the calamine for delivery there ex ship, and then returned to Paris. There he found that his company still had the general bill of lading covering both the calamine, the speiss, and the lead, and so was in a position to claim delivery of the whole cargo at Swansea if the ship went there to discharge. He must have returned to London on or after the 29th Aug. and there began or went on trying to sell the lead either to or through Messrs. Enthoven for delivery at Swansea or elsewhere. When this negotiation was concluded does not appear. It certainly took some time. It clearly was still unsettled on the 31st Aug., on which day M. de Catelin wrote from Paris again, contemplating the possibility that either Beer Sondheimer and Co., of London, or His Majesty's Government might claim part of this lead as bill of lading holders, and insisting that, if so, the balance of Beer Sondheimer and Co.'s account ought to be discharged. On the 1st Sept. the appellants telegraphed to their agents in London, Messrs. Walford, that they accepted the *Panariellos* at Swansea, and that the lead, speiss, and unsold balance of the calamine were to be warehoused, and they sent the general bill of lading over to London by messenger. From this it would seem that, although the owners of the *Panariellos* were entitled under the charter to insist on proceeding to Antwerp and Newcastle, they were soliciting the nomination of some safer ports, and the substitution of Swansea was agreed without other alteration of the chartered terms. The *Panariellos* left Deal on the 3rd Sept., and Messrs. Walford instructed agents in Swansea on the 4th and 5th Sept., in accordance with the appellants' telegram of the 1st Sept, to put the lead into warehouse "for our account." They made it plain that their clients' chief concern as to the lead was that their claim against Beer Sondheimer and Co. should take priority over any other claimant under any bill of lading.

It is very improbable that the appellants would have thus directed that the lead should be landed and warehoused at their own expense if any sale had as yet been concluded by or through Messrs. Enthoven. No document evidencing such a sale earlier than the 24th Sept. has been produced. The *Panariellos* arrived at Swansea on the 7th Sept., and the collector of customs on its arrival at once gave notice of detention of the lead. It was ultimately discharged into the warehouses of the Swansea Harbour Trust, and storage charges were incurred. The discharge of the lead clearly took some considerable time, and the ship was three days on demurrage, but the dates of the commencement and completion of the discharge do not appear. Ultimately the lead seems to have been sold by M. de Catelin on the 24th Sept. for delivery to buyers at Newcastle-on-Tyne, but this sale was afterwards cancelled. On the 25th Sept. the lead was formally seized as prize by the collector of customs at Swansea, and it was subsequently sold, and the proceeds, 16,000*l.* or thereabouts, were paid into court.

The general principles upon which trading with the enemy is forbidden to the subjects, or those who stand in the place of subjects, of His Majesty and of his allies, are well settled and need not be restated. Ample citations from the authorities are to be found in the learned and elaborate judgment in the court below. Before their Lordships little, if any, stress was laid on points much relied on at the trial—namely, that the *administrateur délégué* of the company had no intention to offend and believed that what was done was legitimate as long as Beer Sondheimer and Co.'s office had not been closed; that in these proceedings a French company was more favourably situated than an English company; and that the intercourse in this case fell short, somehow, of technical "trading." Their Lordships think it sufficient to say that none of these points avail the appellants.

The questions with which it is necessary to deal are, first, whether at any time the goods condemned were engaged in trading with the enemy; and, secondly, whether such trading had not ended before seizure, so that the goods were no longer liable to condemnation.

In their Lordships' opinion, the despatch of the ore from Ergasteria, for delivery as directed by Beer Sondheimer and Co. of Frankfort and for their benefit, engaged the goods in forbidden intercourse with the enemy. Consignment of goods to an enemy port and vesting of them in

an enemy while on passage, though common features in the reported cases, are not essential to the imputation of forbidden trading. Geographical destination alone is not the test. Intercourse with an enemy subject, resident in the enemy country, is forbidden even though it takes place through his agent in the United Kingdom. The development of communications, the increased complexity of commercial intercourse, and the multiplication of facilities for enemy dealings with goods though at a distance from the enemy country, are incidents in the growth of modern commerce, to which in its application the rule of law must be adapted. They do not in themselves operate to defeat the application of an established principle. In the present case it is true that on shipment the consignors retained the indicia of title to the goods and the *jus disponendi* over them; that the lead ore was shipped for discharge at an English port, and that the enemy buyers selected as the actual recipients of the ore a firm carrying on business in London, which had a manager there who, though not licensed to trade, was in one sense tolerated, since for some days his business premises were not officially closed. Indeed, this agent was informed by the Board of Trade (with what authority, if any, does not appear) that he needed no licence; but this advice was given on the express representation, made on his behalf, that his intention was to trade only in the United Kingdom or with allied or neutral countries. Hence this official reply had no reference to or effect upon dealings with this ore, which, if Beer Sondheimer and Co. of London entered into them at all would plainly be dealings on behalf of Beer Sondheimer and Co. of Frankfort. These circumstances do not take the case out of the rule.

Their Lordships being of opinion that the ore was so shipped as to be engaged in commercial intercourse with the enemy, the burden is upon the claimants to establish that subsequently such events happened or such a course was taken as effectually relieved it from liability to forfeiture.

The affidavit of the collector of customs at Swansea at the beginning of the record says: "The said ship arrived at Swansea on the 7th day of September last, having on board the said goods . . . which were detained by the pending inquiry as to the ownership thereof, and were ultimately seized by me as prize on the 25th day of September last." Not till this appeal was heard does it appear that any question was raised which made it necessary to inquire into the exact steps taken or the exact formalities observed at Swansea on the 7th Sept. Their Lordships, therefore, presume that the collector, as his duty required under the circumstances, assumed effective control over the ore immediately on the ship's arrival and before the voyage was over. Thenceforward, wherever the ore actually was stored, it was no longer controlled by the consignors or their agents and could no longer physically be dealt with on their behalf. If so, the 7th Sept. becomes the critical date. It may be that when, in the interest alike of the goods owner and of the Crown, a reasonable time is necessary for proper inquiry and deliberation in order to avoid delay, litigation, and expense, detention during such a period without seizure is a correct incident in the regular course of the exercise of the rights which are given to a captor by prize law and is not opposed to the established rules of Prize Court procedure. It may be again the better opinion in such a case to regard the detention, when it culminates in seizure, as one with it and to hold that the seizure commences provisionally with the first detention, though the ultimate character of that detention cannot yet be known. It is not necessary to decide this somewhat theoretic point, for it is plain that after the 7th Sept. the claimants did and could do nothing to the ore itself, and as proceedings for the forfeiture of this ore are proceedings *in rem*, there must be some dealing with the goods themselves to terminate that engagement in prohibited trade, which was constituted by loading and dispatching them from Ergasteria to abide the directions of Beer Sondheimer and Co. of Frankfort. For this purpose mere personal declarations of intention or negotiations or even contracts with reference to them would not suffice. The appellants' contention that at the time of the seizure all trading with the enemy had ceased, and that the appellants were selling the lead on their own account, only begs the question.

The French company can only be said to have thus dealt with the goods by sending them to Swansea, and by retaining control through bills of lading made out to their own order, subject to the effect of the *de facto* indorsement and delivery of one parcel bill of lading. In the circumstances of this case the alteration of the port of delivery certainly did not constitute an abandonment of the old voyage and an undertaking of a new one. Not as an exercise of dominion over the goods, so as to change their character, but largely at the instance and for the safety of the ship, a Bristol Channel port was substituted for a north-east coast port. If the destination of the ore was for enemy hands and enemy control, this change did not affect it. Moreover, as late as the 4th Sept., the claimants, in their letters and those of their agents, still contemplated that some at least of the ore might be delivered in such circumstances that the claim to hold the ore until final settlement of the account of Beer Sondheimer and Co. of Frankfort might be successfully asserted. Up to the 7th Sept. nothing else appears except negotiations for a possible sale of the lead if new buyers could be found, and it certainly is not established, nor is it even probable, that these negotiations had been concluded before the critical date.

Their Lordships are of opinion that upon these facts the appellants have failed to discharge their obligation to show that the engagement of the ore in enemy trading had been abandoned in time. It is not enough to show a mere repentance or a change of intention without some dealing with the *res*. There must be something which withdraws the goods from the forbidden adventure. Up to the 7th Sept. even the intentions of Baron de Catelin are obscure and evidently provisional, and after that date it must be observed that, in view of the action of the Crown, they are rather intentions to avert, if possible, the consequences of what had been done, than to abandon a course of business which financially was beneficial to the company though exposed to the hazards involved in trading with the enemy. In short, what he did after the 7th Sept. was rather

mending his hand than changing his mind. Accordingly, some of the appellants' contentions of law do not arise. They cited cases to show that unless seized *in delicto* their goods escape, and that their *delictum*, if any, was over when the *Panariellos* arrived in Swansea Dock. These cases, however, related to neutral goods seized for breach of blockade or as contraband of war. They differ from the present case in one important respect. Maritime trade in contraband goods and breach of blockade are acts on the part of neutrals which belligerents are entitled to prevent. Trading with the enemy on the part of his subjects or the subject of his allies is an act which the belligerent Sovereign is entitled to prohibit. To hold that, if a neutral engages in enterprises which, to him, are permitted though undertaken at his peril, his goods are only liable to condemnation if seized *in delicto*, is no warrant for further holding that, if a subject engages his goods in enterprises which to him are prohibited and unlawful, they may not be visited with the penalty of forfeiture, even if seized after the actual *delictum* has come to an end. It is not necessary to pursue the point, as no case applicable to trading with the enemy was brought forward.

The learned President in his judgment stated that "the Baron de Catelin disavowed with emphasis any intention in these transactions to do anything which would be helpful to the enemy or prejudicial to this country" and accepted the disavowal. Their Lordships do so too, and they recognise further that Baron de Catelin found his company engaged in a financial difficulty of considerable magnitude, from which it was not easy to extricate it without loss, and probably only desired to protect its interests in a way which appeared to him to be void of illegality or of offence. These, however, are considerations which, though weighty, can only be addressed to the clemency of the Crown. They cannot affect the judgment which a Court of Prize, strictly administering the universal rule as it finds it, is bound to pronounce in the grave case of trading with the enemy.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed, but, as the Procurator-General made no submission that costs should be allowed, that this appeal should be dismissed without costs.

Solicitors for the appellants, *Rehder* and *Higgs*.
Solicitor for the Crown, *Treasury Solicitor*.

July 12 *and Aug.* 1, 1916.

(Present: The Right Hons. Lord PARKER of WADDINGTON, Lord SUMNER, Lord PARMOOR, and Lord WRENBURY.)

THE ST. HELENA. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE).

Prize Court—General jurisdiction where there has been a seizure in prize—Cargo—Release—Action for freight in King's Bench Division—Subsequent motion in Prize Court—Order directing payment of a sum in lieu of freight—Order in effect varying contractual relations of parties—Order ultra vires.

The general jurisdiction which attaches in every case where there has been a seizure in prize includes the power to deal with all incidental matters, including questions of freight and compensation in lieu of freight, but does not include power to make an order which in effect varies the contractual relations of the parties.

Decision of the President reversed.

APPEAL from an order of Sir Samuel Evans, P. (in prize) whereby he decided that he had jurisdiction to deal with the respondents' claim to be paid freight in respect of the carriage of a part of a cargo of phosphates, and that they were entitled to claim remuneration for carriage, and thereby he ordered that the matter should be referred to the registrar to report as to the amount thereof.

Roche, K.C. and *R. A. Wright* for the appellants.

Inskip, K.C. and *Raeburn* for the respondents.

The considered judgment of their Lordships was delivered by

Lord PARKER OF WADDINGTON.—The jurisdiction of the Prize Court attaches in every case in which there has been a seizure in prize, and in exercising this jurisdiction the court can and will deal with all incidental matters, including questions of freight or compensation in lieu of freight. In the present case the goods in question were seized as prize on the 12th Aug. 1914. The jurisdiction of the court having thus attached, the onus of proving its determination must rest on those who allege it. The appellants have not, in their Lordships' opinion, discharged this onus. Though it is possible that the release of a vessel or goods seized as prize in the manner prescribed by the Prize Court Rules (Order XIII.) may determine the jurisdiction of the court, their Lordships do not consider that the mere handing over of the vessel or goods to the persons who claimed to be entitled, without any compliance with the prescribed formalities, can have this effect. The real question, therefore, is whether the circumstances of this case justify the order under appeal.

When the present war broke out on the 4th Aug. 1914, the British steamship *St. Helena* was on a voyage from Tampa and Galveston to Bremen and Hamburg with a cargo consisting (*inter alia*) of phosphate rock deliverable under bills of lading at Hamburg to the order of the

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

appellant, an American company. She arrived at the Lizard on the 7th Aug. and, having been informed of the outbreak of war, abandoned her voyage, which had become unlawful, and proceeded to Manchester. She arrived at Manchester on the 10th Aug. and there discharged part of her cargo, consisting of cotton and grain. On the 12th Aug. the phosphate rock, being still on board, was seized as prize and came into the possession of the Prize Court marshal. It had been shipped by the appellants in order to be delivered to two German companies under certain contracts c.i.f. at Hamburg and was thought to be enemy property. The ship was subsequently removed to Runcorn, where the phosphate rock was discharged into the custody of the Manchester Ship Canal Company on account of the marshal. On the 8th Sept. 1914 the marshal's substitute, being satisfied that the property in the phosphate rock still remained in the appellants, wrote that he was authorised to release the same without presentation of documents or payment of freight, and that all transactions as regarded bills of lading and freight were to be dealt with as between ship and consignee. It appears that on the strength of this letter the canal company delivered the phosphate rock to the appellants against deposit in the usual way of the amount claimed by the ship for freight. The respondents, the shipowners, subsequently instituted an action in the King's Bench Division to enforce their claim to freight, but this action was dismissed with costs on the ground that the respondents, not having carried the goods to Hamburg in accordance with their contract, could not recover the agreed freight or any part thereof. The respondents thereupon applied by motion to the Prize Court asking for a declaration that they were entitled to some remuneration for the carriage of the appellants' goods, and a reference to the registrar and merchants to ascertain the amount. On the hearing of this motion the President made an order declaring that the respondents were entitled to claim for remuneration in respect of the carriage of the goods, and referring such claim to the registrar and merchants for report. Some discussion took place before their Lordships as to the precise meaning of this order. In their Lordships' opinion it cannot be regarded merely as affirming the jurisdiction of the court to entertain the application, leaving the question whether the application should be granted for subsequent determination after report by the registrar and merchants. In effect it allows the application, the reference to the registrar and merchants being for the purpose of ascertaining the amount only. The question their Lordships have to decide is whether the order so construed was rightly made.

In their Lordships' opinion it is quite clear that as a matter of contract no freight was payable. Under the contract between the parties nothing could become due for freight until the ship had performed her part of the bargain by carrying the goods to their port of destination. In order to succeed, therefore, the respondents had to establish that, according to the law administered in a Court of Prize, they were entitled to some compensation in lieu of freight. It is pertinent to inquire on what ground they should be entitled to such compensation in the present case? If the goods had never been seized as prize they could have claimed nothing for freight. They abandoned the voyage on the 7th Aug., long before the seizure. They could not do otherwise, for the war rendered its continuance unlawful. Why should a subsequent seizure of the goods, unlawful as against the neutral owners, subject such owners to a liability from which they would otherwise have been free, or confer on the shipowners rights which these latter would not otherwise have had? Their Lordships failed to find any satisfactory answer to these difficulties in the arguments advanced or the cases cited on behalf of the respondents. In their opinion, compensation in lieu of freight may well be awarded against the captors where, by reason of a seizure *jure belli* which turns out to be unlawful, the ship has been deprived of the opportunity of earning freight which but for such seizure it could lawfully have earned. This might, for example, be the case where the ship on which the goods have been carried is a neutral ship, and as such entitled to continue the voyage. Again, it may well be that where enemy goods on board either a neutral or British ship are lawfully seized as prize the ship may be entitled to compensation in lieu of freight. In such a case the captors are the gainers from the fact that the ship has brought the goods to the place of seizure. But where prior to the seizure the voyage has become unlawful, and all possibility of earning the freight has been already lost, there appears to their Lordships to be nothing for which compensation can be properly awarded. It is no part of the function of the Prize Court to alter the contractual relations between ship and cargo owner, and this would be the only result of allowing such compensation.

Some stress was laid by the respondents' counsel on the case of *The Friends* (1810, Edw. 246). There, a British ship bound for the port of Lisbon, a friendly port, found it blockaded by the British Fleet during the temporary occupation of the French. After waiting some days with the blockading squadron in hopes that the blockade would terminate, she was blown out to sea and captured by a Spaniard. She was almost immediately recaptured by a British ship, and taken as prize to Madeira, where both ship and cargo were sold by the captors to pay the salvage. In adjusting the rights of ship and cargo owners respectively, Lord Stowell allowed the ship compensation in lieu of freight. His reason was that both ship and goods had met with a common misfortune, neither being in any way to blame, so that it was fair to divide the loss between them. In the present case there was no common misfortune, the ship was not seized as prize at all, and the seizure of the goods was unlawful. The case of the *Friends* is therefore clearly distinguishable.

In their Lordships' opinion the appeal ought to be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Lowless and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 2, 3, *and* 10, 1916.

(Before SWINFEN EADY and BANKES, L.JJ. and A. T. LAWRENCE, J.)

MODERN TRANSPORT COMPANY LIMITED *v.* DUNERIC STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Ship requisitioned by the Admiralty — Restraint of princes—Whether hire payable during requisition — Arbitration — Whether contract subsisting—Nonpayment of hire—Notice to withdraw ship—Whether owners entitled to withdraw vessel—Liability of charterers for hire.

The plaintiffs were time charterers of the steamship D., *and their claim was to restrain the defendants, the owners, from withdrawing the ship from their service. The defendants counter-claimed for hire during a period when the ship was requisitioned by the Admiralty. The charter-party contained exception clauses which included restraint of princes, and also provided that the owners might withdraw the ship for nonpayment of hire. There was a cesser clause prescribing the events upon which the hire should cease or be suspended, which did not include requisition by the Admiralty. During the currency of the charter-party the ship was requisitioned by the Admiralty for a period of about six months, for which period the charterers refused to pay the hire. The parties went to arbitration on the question whether the contract was still subsisting; and, during the arbitration proceedings, the defendants gave notice to withdraw the ship. Sankey, J. held that the defendants were not entitled to withdraw the ship, but that the plaintiffs were liable to pay the hire to the defendants during the period of the requisition by the Admiralty. The plaintiffs appealed and the defendants gave notice of cross-appeal.*

Held, that the appeal of the charterers and the cross-appeal of the shipowners failed. The charterers' contention was that there had been an entire failure of consideration, and that they could not be liable for hire as they had not had the use of the ship, for which alone they were liable to pay hire, during the requisition by the Admiralty. That contention, however, had been disposed of by the decision of the House of Lords in F. A. Tamplin Steamship Company Limited *v.* Anglo-Mexican Petroleum Products Company Limited (13 *Asp. Mar. Law Cas.* 467; 115 *L. T. Rep.* 315; (1916) 2 *A. C.* 397), *and the charterers in the present case had been rightly held liable to pay the chartered hire for the time during which the ship was under requisition. As regards the cross-appeal, the shipowners were not entitled to ignore the arbitration proceedings and, pending those proceedings, serve notice of withdrawal of the ship. The position was such as to lead the charterers to believe that any right to require payment of the hire or to withdraw the ship was suspended until it had been determined in the arbitration what the respective rights of the parties were—whether the time charter was still subsisting and whether the charterers remained liable to pay the hire.*

Decisions of Sankey, J. (13 *Asp. Mar. Law Cas.* 434; 115 *L. T. Rep.* 265; (1916) 1 *K. B.* 726) *affirmed.*

F. A. Tamplin Steamship Company Limited *v.* Anglo-Mexican Petroleum Products Company Limited (sup.) *applied.*

APPEAL by the plaintiffs, the charterers, and cross-appeal by the defendants, the shipowners, from decisions of Sankey, J. in the Commercial list.

The plaintiffs were time charterers of the steamship *Duneric*, and their claim was for an injunction to restrain the defendants, the owners, from withdrawing the ship from their service.

The defendants claimed that they were entitled to withdraw the ship for nonpayment of hire, and they counter-claimed for some 8000*l.* for hire.

The clauses of the charter-party material to the case were as follows:

(1) There was a clause limiting the cargo which the vessel was entitled to carry. She was forbidden to carry contraband of war.

(2) There was a clause limiting the voyages she might perform. She was only to be employed between safe ports of the United Kingdom and the continent of Europe not east of Dieppe nor east of Sicily.

(3) There was a cesser clause prescribing the events upon which the hire should cease, or be suspended.

(4) There was an exception clause under which the restraint of princes was mutually excepted.

(5) There was a clause giving the plaintiffs an option of sub-letting the steamer.

Sankey, J. gave judgment for the plaintiffs on the claim, and for the defendants on the counter-claim.

The plaintiffs appealed and the defendants gave cross-notice of appeal.

Roche, K.C. (*R. A. Wright* and *Le Quesne* with him) for the plaintiffs, the charterers.—The charterers are not liable to pay hire, as there has been a failure of consideration. There was an implied term in the charter-party that the plaintiffs need not pay hire in the events which have happened. The plaintiffs were to pay for the use of the ship; and in so far as there was no use there was no hire payable. The *Tamplin* case (*sup.*) was decided on different facts. In that case the shipowner was getting what he contracted for, but here it was otherwise. He referred also to

Brown v. *Turner, Brightman, and Co.*, 12 Asp. Mar. Law Cas. 79; 105 L. T. Rep. 562; (1912) A. C. 12.

MacKinnon, K.C. (*W. N. Raeburn* with him) for the defendants, the shipowners.—If the whole contract is looked at, the contention that if there was no use there was no hire cannot be maintained. All that the defendants promised was the use of the ship subject to the exceptions, including "restraint of princes." The clause in *Brown* v. *Turner, Brightman, and Co.* (*sup.*) was different from the present one, and a decision on that clause would have no application here. The plaintiffs are not discharged from liability to pay hire by the clause under which "restraint

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law

of princes" was mutually excepted. There was here a cesser clause prescribing the events upon which the hire should cease, or be suspended, and none of those events have happened. The shipowners rely on the *Tamplin* case, the charters being practically identical in the two cases. He referred to

Barrie v. *Peruvian Corporation*, 2 Com. Cas. 50.

As to the cross-appeal, the defendants were entitled to withdraw the vessel for nonpayment of hire. It cannot be suggested that the right to withdraw was referred to the arbitrators, nor had the question of withdrawal then arisen. Even if that question had been referred, the defendants were entitled to change their minds and give notice of withdrawal. [Swinfen Eady, L.J.—You cannot claim rent subsequent to the forfeiture, and still say you have not waived the forfeiture.]

Roche, in reply, and on the cross-appeal.—There was ample evidence that the defendants meant to refer to arbitration the question whether the contract was still subsisting, and their conduct amounted to a waiver of any right to repudiate the contract:

Bentsen v. *Taylor, Sons, and Co.*, 7 Asp. Mar. Law Cas. 385; 69 L. T. Rep. 487; (1893) 2 Q. B. 274.

The cesser clause here was not exhaustive—for instance, the case of withdrawal is not provided for. The *Tamplin* case is distinguishable. He referred to

Poussard v. *Spiers*, 34 L. T. Rep. 572; 1 Q. B. Div. 410;

Wehner v. *Dene Steam Shipping Company*, (1905) 2 K. B. 92;

Horlock v. *Beal*, 13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) A. C. 486.

Cur. adv. vult.

Nov. 10. — The following judgments were read:—

Swinfen Eady, L.J.—The plaintiffs, the charterers, appeal from the judgment of Sankey, J. upon the defendants' counter-claim, which determined that the plaintiffs were liable to pay the hire of a steamship under a time charter for the period during which she was requisitioned by the Government, although the amount paid by the Government was substantially less than the chartered hire. The defendants, the shipowners, do not make any claim to any part of the hire paid by the Government; they are content that the time charterers should receive the whole of it, subject, nevertheless, to the charterers paying the chartered hire. The appellants contend that as during the period when the ship was under requisition they no longer had the use of the ship, there was an entire failure of consideration, and that they are not under any legal liability for the hire during that time. The defendants recovered judgment against the plaintiffs for 8627*l.* 0*s.* 9*d.*, and from this judgment the plaintiffs appeal.

By a time charter, dated the 2nd March 1915, made between the defendants as owners and the plaintiffs as charterers, it was agreed that the defendants should let and the plaintiffs should hire the steamship *Duneric* for a period of twelve calendar months from the date of the ship being placed at charterers' disposal, at a rate of 2350*l.* per calendar month, payable monthly in advance, and at and after the same rate for any part of a month, for the use and hire of the vessel, any hire paid in advance, and not earned, to be refunded; and the owners to provide and pay for all provisions and wages of captain and crew and all stores, and insurance on the vessel, including war risks. The owners had power to withdraw the vessel in default of punctual and regular payment of the hire. The charter-party contained restrictions as to the trades in which the vessel was to be engaged, and also as to the limits of the voyages.

The ship was placed at charterers' disposal on the 15th April 1915, and the period of twelve months ran from that date.

On the 21st May 1915 the ship was requisitioned by the Admiralty, and on the 11th June 1915 the Admiralty service began. The monthly hire paid by the Government was 1173*l.* 15*s.*, while the chartered monthly hire was 2350*l.* Under these circumstances disputes arose between the parties.

The defendants contended that the charter-party was subsisting, and that the monthly chartered hire was still payable by the plaintiffs. The plaintiffs contended that, by reason of the requisition, they were absolutely free of the time charter. On the 17th June the defendants wrote that unless the month's hire, which became due in advance on the 15th June, was paid by the plaintiffs, the defendants would be forced to ask the plaintiffs to arbitrate in the terms of the charter. The plaintiffs expressed their willingness to have the matter arbitrated upon, but pointed out that, as the arbitrators would doubtless be requested to state a case for the opinion of the court on the legal points involved, they would prefer the matter being referred straight to the court, and thus save unnecessary expense. The defendants, however, said that they did not see why they should be asked to give up their right to a commercial arbitration under the charter-party, and insisted on arbitration. The defendants then, on the 9th July, appointed an arbitrator, and required the plaintiffs to do the same, and to appoint a person not a lawyer within seven days. On the 15th July, accordingly, the plaintiffs appointed a commercial gentleman as arbitrator. Correspondence then took place with regard to discovery and inspection of documents, and on the 22nd July the plaintiffs, at the suggestion of the arbitrators, agreed that the defendants should receive the hire payable by the Admiralty, without prejudice to any question.

On the 2nd Nov. the Admiralty gave notice that the vessel would be discharged from Government service when cleared of her cargo at Middlesbrough. By this time the conditions of the freight market were changed, and if the vessel were surrendered by the Admiralty it would be more beneficial to the owners to be free from the residue of the charter-party. On the 16th Nov. the defendants sent a debit note for chartered hire and interest claimed to be due. This included hire in advance for the month up to 15th Dec., and gave credit for the Admiralty hire. Whether the sum so arrived at gives credit for the whole of the hire payable by the Admiralty up to the time of actually redelivering the ship does not appear; but no question of figures has been raised before us on this appeal, and the sum

appearing in this debit note is the exact sum for which the defendants obtained judgment. The defendants required payment, and threatened to withdraw the vessel if not paid; the plaintiffs answered that they were content to leave the question of their liability to the decision of the arbitrators or the court, but that as the defendants themselves had insisted on arbitration, it was not right for them to ask the plaintiffs to abandon their legitimate rights pending the arbitration proceedings. It must be remembered that the arbitration involved the question whether the charter-party was a subsisting agreement between the parties. On the 18th Nov. the defendants nevertheless insisted on payment by the 19th, and on the 19th Nov., in default of payment, they gave notice purporting to withdraw the vessel. The plaintiffs took up the position that, whether they were right or wrong in their contention that they were not liable to pay chartered hire while the vessel was under requisition, the defendants were not entitled to take the law into their own hands and withdraw the vessel while the dispute as to liability was being arbitrated upon. The plaintiffs then, on the 25th Nov. 1915 issued a writ claiming an injunction, and they obtained an interim injunction on the 1st Dec., so that when the vessel was actually released and redelivered by the Admiralty on the 4th Dec., they obtained the use of the vessel. On the 10th Dec. the action was tried and the injunction continued, and the plaintiffs continued to have the undisturbed use of the ship until the 6th May 1916, when, on the termination of the time charter and the completion of the current voyage, the plaintiffs redelivered her to the defendants.

Upon the plaintiffs' appeal, the only question is whether they continued liable to pay the monthly hire while the vessel was under Admiralty requisition. The plaintiffs contended that there was an entire failure of consideration, and that they could not be liable as they did not have the use of the vessel, for which alone they were to pay the hire. The first answer is that the defendants did not agree to give the use of the ship absolutely and unconditionally; but only unless prevented (amongst other things) by the restraint of princes. Again, there was not an entire failure of the consideration, as the plaintiffs would, if the charter-party was subsisting, become entitled to the hire payable by the Admiralty.

No question is raised in this case as to any apportionment between owners and time charterers of the Admiralty hire, as the owners agree that charterers may have the benefit of the whole of it, and notwithstanding that the form of the Admiralty charter T. 99 gives the Admiralty as charterers larger powers and rights than the charterer alone could have conferred upon any sub-charterer, having regard to the terms of their own charter-party.

The question raised by the plaintiffs is, however, in my judgment completely disposed of by the decision of the House of Lords in *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (13 Asp. Mar. Law Cas. 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397). That was the case of a time charter, where the charterer was to pay for "the use and hire" of a steamer, and the charter contained an exception of "restraint of princes," and there was power to sub let. When requisitioned by the Government, there were three years unexpired of the charter term of five years, and when the case was decided in the House of Lords there were still about nineteen months unexpired. It was held by the House of Lords that the charter-party did not come to an end when the steamer was requisitioned, and that the requisition did not suspend it, or affect the rights of owners or charterers under it. Accordingly the time charterers remained liable to pay the chartered hire, and became entitled to receive the Admiralty hire, subject, however, to any question of apportionment, which, I have already pointed out, does not arise in the present case. In this case the Admiralty requisition proved to be for less than half the period of the time charter, and, in my judgment, the plaintiffs were properly held liable for the chartered hire while the ship was under requisition. No question arises about the chartered hire after the ship was restored by the Government to the time charterers, as this was duly paid by the plaintiffs monthly in advance as required by the charter-party.

There remains the question raised by the defendants by their cross notice of appeal. The defendants ask for a declaration that they were entitled to withdraw the vessel by reason of non-payment of hire, and that the notice of withdrawal given on the 19th Nov. was valid and effectual, and that since that date the plaintiffs have had no right to any further use of the vessel under the charter-party. The defendants do not claim any consequential damages, nor do they offer to repay the chartered hire, which they have been receiving from Dec. 1915 to May 1916. They also ask for the dissolution of the injunction granted by the judgment, and for an inquiry as to damages in respect of the interim injunction, that is to say, in respect of the six days' user of the vessel by the plaintiffs between the 4th Dec. 1915, when she was actually restored by the Admiralty, and the 10th Dec. 1915, when the action was tried. The facts which I have already stated in detail show that there was a *bonâ fide* dispute between the parties as to whether the charter was still subsisting after the requisition, and, if so, whether the hire continued payable by the charterers during the period of the Government requisition. The defendants insisted on their right to refer this matter to commercial arbitration; this arbitration appears to have dragged its slow length along, beginning in July, and to have made but little progress by November, when the defendants threatened to take the law into their own hands and decide the case in their own favour by actually withdrawing the ship. The interim injunction was then granted on the 1st Dec. 1915, and the case was finally heard and judgment was given within fifteen days from the issue of the writ. But for the defendants insisting upon commercial arbitrators first dealing with the matter the dispute could have been decided by the judge long previously. In my judgment the defendants were not entitled to anticipate the arbitrators' decision and withdraw the vessel by the notice of the 19th Nov., when the matter was before the arbitrators, and no decision had been given.

The circumstances of this case were of a character to lead the plaintiffs to believe that any right to require payment, or to withdraw the ship for non-payment, would be suspended until there

had been determined in the arbitration what the respective rights of the parties were, whether the time charter was still subsisting or not, and whether or not the plaintiffs remained liable to pay the hire. Pending the arbitration, and immediately upon it appearing that the Admiralty were about to release the ship, when it would be to the advantage of the owners to have their ship free from the charter, it was not open to them to ignore the arbitration proceedings, and serve notice of withdrawal.

It was said by Lord Cairns in *Hughes* v. *Metropolitan Railway Company* (36 L. T. Rep. 932; 2 App. Cas. 439, at p. 448): "It is the first principle on which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

These observations are directly applicable to the present case, and it would be highly inequitable, having regard to the correspondence and the arbitration proceedings, to allow the defendants by their notice of the 19th Nov. to enforce any right to withdraw the ship for non-payment by hire. And this is the only notice of withdrawal on which the defendants rely. It is also to be observed that the defendants have recovered judgment on their counterclaim for hire in respect of a period subsequent to the alleged forfeiture. I am of opinion that, under the circumstances, the interim injunction was properly granted, and was properly continued at the hearing. Even if the plaintiffs at the hearing had not been able to maintain their claim to a continuance of the injunction, the question would still remain whether the defendants ought to be awarded any damages upon the undertaking. The undertaking, in its expanded form, is as follows: "The plaintiffs undertaking to abide by any order this court may make as to damages in case this court should hereafter be of opinion that the defendants shall have sustained any by reason of this order, which the plaintiffs ought to pay."

Having regard to the circumstances under which the notice to withdraw of the 19th Nov. was given, I am of opinion that the plaintiffs were fully justified in applying to the court immediately for an injunction, and that the plaintiffs ought not to be required to make any payment to the defendants in respect thereof, even if it should have happened that at the trial the plaintiffs could not have sustained their claim to a continuance of the injunction. The special circumstances are such that no inquiry as to damages ought to be granted, even if the claim for injunction could not be sustained at the trial.

In my opinion the appeal and the cross-appeal should both be dismissed with costs with the usual set-off on taxation.

Bankes, L.J.—In this case the Modern Transport Company, the time charterers of the steamship *Duneric*, sued the Duneric Steamship Company Limited, the owners of that vessel, claiming an injunction to restrain them from acting on a notice dated the 19th Nov. 1915, purporting to determine the charter, and for a declaration that the charter-party remained valid and binding. In that action the Duneric Steamship Company counterclaimed for a declaration that they were entitled to withdraw the vessel and that the notice of the 19th Nov. was valid and effectual, and that since that date the Modern Transport Company had no right to any user of the vessel under the charter-party, and they also counter-claimed for the sum of 8627*l.* 0*s* 9*d.*, the amount which at the date of the counter-claim they alleged to be due for unpaid hire and for interest thereon.

The action was tried before Sankey, J., who decided in favour of the Duneric Steamship Company upon the claim for hire and interest, but against them on all the other issues raised upon the pleadings, and he granted an injunction restraining the Duneric Steamship Company from employing the vessel otherwise than in accordance with the terms of the charter-party, or from dealing with the vessel in any way so as to interfere with the Modern Transport Company's right of user of the vessel under the charter-party after the requisition of the Admiralty came to an end. On the counterclaim he entered judgment for the Duneric Steamship Company for 8627*l.* 0*s.* 9*d.*

Against this decision both parties appealed. No question arises in the case as to whether the adventure was determined by the requisition by the Admiralty. The two questions upon which the rights of the parties depend are: first, whether during the time that the vessel was requisitioned payment of hire was suspended. Second, whether in the event which happened the owners were entitled to take advantage of the clause of the charter-party giving them a right, in the event of a failure to pay the hire punctually, to withdraw the vessel from the service of the charterers. In my opinion the learned judge was right on both points.

The first point is I think completely covered by the decision in the *Tamplin* case (*sup.*), where the charter-party was practically identical with the present one, and where the decision proceeded upon the ground that, in spite of the requisition by the Admiralty, the time charterer continued liable to pay the hire to the owners of the vessel. If the present case is distinguishable from the *Tamplin* case, it is sufficient for me to say that I agree with the construction put upon the charter-party by Sankey, J., and for the reasons he has given.

On the second point I agree with the conclusion arrived at by the learned judge, but upon what are possibly somewhat different grounds. The material facts to be taken into consideration are as follows: The charter-party provided for the payment of hire at the rate of 2350*l.* per month, payable in advance in London, with a provision that failing the regular and punctual payment of the hire the owners should be at liberty to withdraw the vessel from the services of the charterers without prejudice to any claim which they (the owners) might otherwise have on the charterers in pursuance of the charter. The charter-party contained an arbitration clause,

The first and second payments of hire which became due respectively on the 15th April and the 15th May 1915 were duly paid. On the 21st May the vessel was requisitioned by the Admiralty, and service under the requisition began on the 11th June. Immediately upon the requisition being made the parties were at issue as to the effect of the requisition; the charterers contending, by their letter of the 28th May, that the charter had become null and void; the shipowners on the other hand insisting that the charter was still a subsisting contract, and that the hire continued payable. The question was one of very considerable importance to the parties, as the hire paid by the Government was very considerably less than the amount agreed to be paid by the charterers. The charterers failed to pay the hire due on the 15th June, and on the 17th June the owners' agent wrote to Messrs. Shallet, Dale, and Co. informing them that if this hire was not paid they would be forced to arbitrate in terms of the charter, and on the 30th June they wrote to the charterers' solicitors informing them that they were not prepared to give up their rights under the charter-party in respect of arbitration. In July the parties discussed with each other by correspondence the effect of Atkin, J.'s decision in the *Tamplin* case, and it is clear that each was maintaining the position which they had originally taken up with regard to the effect of the requisition of the vessel by the Government. On July 9th the owners' agent wrote to the charterers intimating that they had appointed their arbitrator, as "the matter" must go to arbitration, and on the 15th July the charterers' solicitors wrote in reply that the charterers had appointed their arbitrator "in the differences which had arisen between our clients and the Duneric Steamship Company as to the meaning and intention of the charter-party of the 2nd March 1915." Under these circumstances it appears to me plain that what the parties agreed to refer to arbitration was not a mere incidental question as to the payment of hire at its due date, but whether the contract between them was or was not a still subsisting contract, conferring rights or imposing obligations upon either party. At that time, and for some months after, it suited the shipowners from a business point of view to hold the charterers to their bargain, and accordingly each month, down to and including the 15th Nov., an ungratified demand was made for each month's hire in advance. Apart from all other consideration, the effect of these demands was to waive the forfeiture (if any) which had accrued down to the date of the last demand made. At the time the last demand was made it was known that the Government intended to release the vessel, and the state of the freight market was then such that it would suit the owners better to have control of the vessel than to continue her under the charter. As a result they served notice on the 18th Nov. that, unless the charterers paid the overdue hire in twenty-four hours, they would withdraw the vessel, and this on the 19th Nov. they purported to do. On the 25th Nov. the charterers issued their writ claiming an injunction restraining the shipowners from proceeding on this notice, and an interim injunction was obtained. The action came on for trial on the 7th Dec., and judgment was delivered on the 10th—that is to say, before the month's hire due on the 15th Dec. fell due. In the counterclaim in the action the shipowners claimed the month's hire due in advance on the 15th Nov. and recovered judgment for the full amount, and they have since been paid and have received each month's hire as it became due. The only question tried in the action was whether the notice of the 19th Nov. was a good notice at the time it was given and effectual to put an end to the charter at that date. In my opinion it was not. The shipowners had submitted to the arbitrators the very question upon which their right to give the notice depended—namely, whether the charter-party was a subsisting contract or not. Until that question was decided by the arbitrators, or the submission revoked, the right of the shipowners to take the law into their own hands and put an immediate end to the charter was, in my opinion, necessarily suspended. What had been a right under the contract immediately enforceable upon the happening of the events named necessarily ceased to be such a right when the parties had agreed that as a condition precedent to the enforcing of either right or obligation under the contract by either of them, the arbitrators should decide whether the contract itself was still a subsisting one.

In my opinion the appeals fail.

A. T. Lawrence, J.—I have had the advantage of reading the judgments of Swinfen Eady and Bankes, L.JJ. I agree with them and have nothing to add.

Appeal and cross-appeal dismissed.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton,* and *Lewis,* for *Bolam, Middleton,* and *Co.,* Sunderland.

Solicitors for the defendants, *Holman, Birdwood,* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 13 *and* 15, 1915.

(Before Sankey, J.)

Palace Shipping Company Limited *v.* Gans Steamship Line. (*a*)

Charter-party—Employment between "safe ports" —What constitutes a "safe port."

The word "safe" when used in connection with the word "port" in a charter-party implies that the port must be both physically and politically safe, and the action either of nature or war may render a port unsafe. In each case it is a question of fact and a question of degree.

Commercial Court.

Action tried by Sankey, J.

The plaintiffs' claim was for a declaration that Newcastle-upon-Tyne was not in Feb. 1915 a safe port within the meaning of a charter-party dated the 18th April 1913.

Roche, K.C. and *A. Hyslop Maxwell* for the plaintiffs.

Leck, K.C. and *Raeburn* for the defendants.

The facts and arguments are sufficiently stated in the written judgment.

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

Sankey, J.—In this case the plaintiffs claim a declaration that Newcastle-upon-Tyne was not in Feb. 1915 a safe port within the meaning of clause 3 of a charter-party dated the 18th April 1913 and made between them and the defendants; and, further, that the defendants by ordering the plaintiffs' steamship *Frankby* to proceed to Newcastle during that month to load a cargo for Barcelona committed a breach of the charter-party which entitled them to withdraw the ship from the defendants' service.

The facts are as follows: By a charter-party of the above date the plaintiffs agreed to let and the defendants agreed to hire the British steamship *Frankby* for a term of five years at the rate of 1440*l.* per calendar month for employment between a safe port or safe ports between 50 degrees N. and 50 degrees S., subject to certain exceptions which are not material to the present case. The northern limit was afterwards extended to 60 degrees N. There was a stipulation in the charter-party that upon any breach thereof the plaintiffs should be at liberty to withdraw the vessel from the service of the defendants.

In the first week of Feb. 1915 the vessel was at Havre, and had been provisionally ordered to proceed to Cardiff to load. The owners thereupon arranged to fit her up with stores and a new donkey boiler at that port. On the 11th Feb. the German Government promulgated the following announcement: "The waters round Great Britain and Ireland, including the entire English Channel, are hereby declared a military area. From the 18th Feb. every hostile merchant ship within these waters will be destroyed even if it is not always possible to avoid dangers which thereby threaten the crews and passengers."

On the 13th Feb. the defendants, by their agents, cancelled their provisional instructions for the vessel to go Cardiff and ordered her to the Tyne. This order was a serious inconvenience to the plaintiffs, who had already got their stores and donkey boiler at Cardiff, and they wrote protesting against it, not only on this ground, but also upon the ground that Newcastle was not a safe port within the meaning of the charter-party. They did not, however, withdraw the vessel from the service of the defendants, but allowed her to leave Havre upon the 19th Feb., the day after that upon which, according to the German declaration, every hostile ship in the waters round Great Britain and Ireland was to be destroyed.

In spite of the German threat, the vessel appears to have had a safe and not very speedy voyage to Newcastle. She there loaded a cargo of coals for Barcelona, left, and had a similar voyage down the North Sea and English Channel. As far as I am able to judge from her logbook, she was from first to last in no real danger or apprehension of danger.

The plaintiffs contend that the order for the steamer to proceed to Newcastle was a breach of the charter-party because Newcastle was not a safe port.

The defendants contend that Newcastle was perfectly safe, and, secondly, that, at any rate, the plaintiffs have waived their rights and are not entitled to withdraw the vessel because, after their protest, they allowed her to continue in the defendants' service.

The first point I have to decide is whether Newcastle was a safe port in February. It is admitted by both parties that Newcastle itself was safe, but the plaintiffs say that the dangers of the voyage there must be taken into account, and were such as to make the port unsafe within the meaning of the charter-party.

The defendants, on the other hand, contend that the dangers of the voyage are not material to the question whether the port was a safe one, and, further, that such dangers as either existed or might be apprehended on the voyage were not of a character to make the port unsafe. Two cases were cited to me—namely, *Ogden* v. *Graham* (1 B. & S. 773) and *Nobel's Explosives Company* v. *Jenkins* (8 Asp. Mar. Law Cas. 181; 75 L. T. Rep. 163; (1896) 2 Q. B. 326)—but neither seems to be conclusive.

In my view the word "safe," when used in connection with the word "port," implies that the port must be both physically and politically safe, and I think that the action either of nature or war may render a port unsafe. I have only to deal with the agency of war in the present case. At the moment no English port would be a safe port for a German vessel. Neither is a place which a vessel can only go to at a certain risk of confiscation a safe port: (see the observations of Blackburn, J. in *Ogden's* case, *sup.*).

There does not appear to be any sound distinction between a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels lying thereat or in the approaches thereto and a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels at a greater distance. Modern inventions like wireless telegraphy and submarines have quite altered old rules and old conceptions, and I am of opinion that dangers likely to be incurred on a voyage to a port may be taken into account in considering the question whether such port is safe to go to or not. In each case it is a question of act and a question of degree.

I now proceed to the consideration of the question of fact whether the port of Newcastle had become unsafe. It will be remembered that the German threat was that as from the 18th Feb. every hostile merchant ship in English waters would be destroyed. The performance, however, fell short of the promise. The number of arrivals in and sailings from the time of overseas nationalities was 752 for Feb. 1915; the number lost or damaged from enemy causes in the North Sea was three; for the whole of the United Kingdom the numbers were 5645 and twelve respectively.

It seems clear that such circumstances cannot be said to have made the port of Newcastle unsafe in February last. However much one may regret the loss of the lives of innocent and non-combatant crews and passengers which has been caused by those responsible for the actions of the German Navy, it is impossible to regard the results achieved as other than insignificant, or as even appreciably affecting the strength and spirit of the British mercantile marine.

Finding, as I do, therefore, that Newcastle was a safe port within the meaning of the charter-party, it is unnecessary to consider whether the

plaintiffs have waived their rights, and the result is that I dismiss the action with costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Weightman, Pedder*, and *Co.*, Liverpool.

Solicitors for the defendants, *Thain Davidson* and *Co.*

Dec. 3, 6, and 13, 1915.

(Before ROWLATT, J.)

ANDREW WEIR AND CO. *v.* DOBELL AND CO. (*a*)

Charter-party — Sub-charter — Sub-charterer's breach—Cancellation—Measure of damages.

A ship was chartered by the plaintiffs for a voyage to a port in Chile under the terms of a charter-party dated the 1st July 1912, which provided (inter alia) *that freight should be payable at the rate of 21s. per ton, and that the plaintiffs should have the option of cancelling the charter-party if the ship should not be ready for stiffening before the 15th Sept. 1913. The plaintiffs re-chartered the ship to the defendants by a charter-party dated the 2nd May 1913 for a voyage to the same port in Chile, the rate of freight being 28s. 6d. per ton. The defendants, in breach of their contract, refused to load the ship at a time when the market rate of freight had fallen to 17s. per ton.*

In an action by the plaintiffs to recover the difference between 17s. and 28s. 6d. per ton:

Held, that they were only entitled to recover the difference between 21s. and 28s. 6d.

COMMERCIAL COURT.

Action tried by Rowlatt, J.

The plaintiffs claimed damages for breach of a charter-party.

The sailing vessel *Kensington* was chartered by her owners to the plaintiffs for the carriage of a cargo of coals to a port in Chile, and, after the discharge of the coal, to load a cargo of nitrate of soda for a port in the United Kingdom or the Continent. It was provided by the charter-party that freight should be payable at the rate of 21s. per ton, and also that "should the vessel not be ready for stiffening before the 15th Sept. 1913, charterers' agents to have the option of cancelling this charter-party."

A sub-charter was subsequently entered into dated the 2nd May 1913 by which it was agreed between the plaintiffs as chartered owners and the defendants as sub-charterers that the *Kensington* should proceed to Pisagua, and, after delivery of her outward cargo, should load a cargo of nitrate of soda and then proceed to a safe port in the United Kingdom or the Continent as ordered at a freight of 28s. 6d. per ton. The sub-charter also contained the provisions that sufficient cargo for stiffening should be supplied when required by the master, and, should the vessel not have arrived at Pisagua and be ready to load on or before the 15th Dec. 1913, charterers or their agents should have the option of cancelling the charter-party.

The *Kensington* arrived at Pisagua on the 3rd Dec., and proceeded to discharge her cargo. It was not until the 11th Dec. that the master was in a position to ask for stiffening, when the defendants took the view that it was impossible for the vessel to load the stiffening and discharge the remainder of the coal cargo in time to be ready to load the nitrate by the 15th Dec. In accordance with this view they declined to load the stiffening, and cancelled the charter-party. The plaintiffs thereupon cancelled their contract with the owners, as they were entitled to do under the terms of the original charter-party. The plaintiffs by their claim alleged that the defendants had committed a breach of the charter-party in refusing to load, and, the market rate of freight at the time of the alleged breach being 17s. per ton, they claimed as damages the difference between that sum and 28s. 6d. per ton, the rate fixed by the sub-charter.

Leck, K.C. and *Jowitt* for the plaintiffs.—The proper measure of damages is the difference between the market rate of freight at the date of breach and the rate paid by the sub-charter. They referred to

Rodocanachi v. *Milburn*, 6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67, 77;
Williams Brothers v. *E. T. Agius Limited*, 110 L. T. Rep. 865; (1914) A. C. 510.

Greer, K.C. and *A. R. Kennedy* for the defendants.—The principle applicable in the case of sale of unascertained goods has no bearing where the subject-matter of the sale is specific. By cancelling their contract with the owners, the plaintiffs saved themselves 21s. per ton, and the proper measure of damages is therefore the difference between the contract rate of 28s. 6d. and the 21s.

Cur. adv. vult.

ROWLATT, J. delivered a written judgment, in the course of which His Lordship found that the defendants had failed to prove the impossibility of loading by the date fixed by the contract and therefore had committed a breach of contract. His Lordship proceeded:—

The only remaining question is as to the measure of damages. The freight under the charter-party was 28s. 6d. The market rate at the time of the breach was 17s. The plaintiffs, however, were not owners of the ship. They held her under charter at 21s, and that charter-party would come to an end after the voyage for which they had re-chartered to the defendants. Further, the charter between the owners and plaintiffs contained a cancelling clause which in the events that had happened entitled the plaintiffs at the time of the breach by the defendants to cancel and get rid of the ship; and this they did.

As the plaintiffs only had the ship for this voyage, giving her up and saving 21s. per ton was the same thing as finding a charterer for her at 21s. for that voyage, though if they had held her under a longer charter the effect of surrendering her could not have been so measured. Under these circumstances the defendants say that the only damages suffered by the plaintiffs is the difference between 28s. 6d. and 21s., whereas the plaintiffs say it is 11s. 6d., the difference between the freight defendants were to pay and the market rate.

It is to be observed that if this is right the plaintiffs would put in their pockets 11s. 6d. as the result of the defendants' breach of contract, whereas if the contract had been fulfilled they would have put in their pockets only 7s. 6d.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

per ton. It was said for the plaintiffs that the circumstance that the plaintiffs had the right to cancel their own charter was collateral, and had no more effect upon the measure of damage than if the ship had been lost. In that case, however, the plaintiffs would merely have been delivered from an accrued loss by an independent circumstance accidentally supervening.

The true position in the case before me is that the right of the plaintiffs to cancel, that is to say, to dispose of the ship for 21*s.*, saved to themselves, was a circumstance essentially affecting the value to the plaintiffs of the specific thing which was thrown upon their hands—namely, the use of the ship for this voyage. They could either fix her in the market, receiving 17*s.* and paying 21*s.*, or save the 21*s.* and receive nothing. I think they were bound to choose the latter course, as they in fact did.

It all turns, of course, on the circumstance that the plaintiffs' charter was co-extensive with the defendants', otherwise they could not have dealt with the specific interest thrown on their hands, but only with a different and larger interest at 21*s.* It was, however, urged that the case is covered by the authority of *Williams Brothers* v. *E. T. Agius Limited* (*sup.*).

That, however, in the view which the House of Lords took of the facts, was simply a case of breach of contract to deliver unascertained goods, the vendee having made a forward contract to deliver similar goods. In such a case the well-established rule, which the House of Lords were asked to disturb but would not, is that goods to be delivered under a contract of sale must be taken to be worth to the purchaser the market price of the day, and that the state of his own contracts is immaterial.

Upon the whole, therefore, I am of opinion that the plaintiffs are entitled to recover damages at the rate of 7*s.* 6*d.* per ton on a full and complete cargo agreed at 2730 tons, that is to say, 955*l.* 10*s.*

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Pritchard, Englefield,* and *Co.*, for *Simpson, North, Harley,* and *Co.*, Liverpool.

Friday, May 26, 1916.

(Before ATKIN, J.)

MITCHELL, COTTS AND CO. *v.* STEEL BROTHERS AND CO. LIMITED. (*a*)

Charter-party—Charter of vessel for an illegal voyage of which owners are ignorant—Rights of the owners.

The shipment of goods upon an illegal voyage, i.e., *a voyage that cannot be performed without violating the law of the flag of the country or the law of the place where the goods are to be carried to, being a voyage which would involve the ship in consequences either of forfeiture or delay, is analogous to the shipment of dangerous goods which may involve the destruction of the ship. The shipper undertakes that he will not ship goods which involve the risk of unusual danger or delay to the ship which the owner does not know of, or might not reasonably know of, without communicating to the owner facts which are within his knowledge indicating that there is such a risk.*

AWARD in the form of a special case.

This was a case arising on a claim for demurrage, brought by the owners of the steamship *Kaijo Maru* against the charterers. It arose upon a case stated by the arbitrator. The charter-party was dated March 1915, for the carriage of a cargo of rice from Bassein to Alexandria at a certain fixed price per ton. There was fifteen days' demurrage over and above the stipulated number of lay days at a certain rate per ton. The ship was loaded under the charter-party, and left her port of loading on the 18th April bound for Alexandria.

While she was on her way to Alexandria the parties had negotiations for a variance in the charter-party. There had been a conversation with reference to an option to send the ship to Piræus, and on the 28th April the charterers wrote:

> With reference to our conversation with Mr. Cotts in regard to the Piræus option for this steamer, we are now working this cargo to the Piræus at a difference of 7*s.* 6*d.* per ton over the Alexandria rate, say 77*s.* 6*d.* per ton, as agreed to by Mr. Cotts, and there is a good prospect of the cargo being fixed to that port.

On the 29th April the shipowners wrote to the charterers:

> We are in receipt of your favour of yesterday, from which we note you confirm the terms on which you are working Piræus option. These are in order, and we await to hear definitely just what you are able to do.

On the supposition that it was an option, which is possibly what the parties meant, on the 30th April the charterers wrote to the shipowners:

> We confirm our telephone conversation, &c., and shall be glad if you will instruct the captain at Port Said to proceed to Piræus.

Accordingly on the 6th May the owners sent orders to the captain of the vessel at Suez to arrange to discharge at Piræus at 7*s.* 6*d.* extra freight.

The ship arrived at Suez on the 10th May, and when she arrived at Suez the charterers tried to get the consent of the Admiralty authorities to her proceeding on the voyage, which they had agreed, to Piræus. There were negotiations about it, and eventually it was refused. The Admiralty never would consent to her going to Piræus, and eventually, after she remained there at Suez about twenty-one or twenty-two days, she was sent to her original destination, Alexandria, and the Piræus voyage became impossible.

The shipowners alleged that they were entitled to recover damages caused by the ship being delayed.

The arbitrator found that the ship was delayed at Port Said for twenty-two days; that such detention was wholly due to the fact that the charterers had not obtained permission of the Government authorities for the destination of the ship and cargo being changed to Piræus; that, when negotiating with the owners to send the ship to Piræus, the charterers were aware of the fact that to send the ship to that destination the permission from the Government authorities was

(*a*) Reported by W. V. BALL, Esq., Barrister-at-Law.

necessary; that they did not communicate this to the owners; and that the charterers were aware in May 1915 that the required permission would not be granted.

On those findings the arbitrator made an award in favour of the shipowners.

In the course of the argument it became necessary to ascertain whether or not the shipowners were also aware that permission was or might be required. The case was sent back to the arbitrator with the view of dealing with that question. In a supplemental award made by the arbitrator in April 1916, he found that the owners had no knowledge and might not reasonably have known that permission from the Government authorities was necessary to discharge the cargo at Piræus.

Roche, K.C. and *Norman Raeburn* for the shipowners.

Leslie Scott, K.C. and *R. A. Wright* for the charterers.

The arguments of counsel sufficiently appear in the judgment of the court. The following cases were referred to:

Brass v. *Maitland*, 6 E. & B. 470; 26 L. J. 57, Q. B.;
Dunn v. *Bucknall*, 9 Asp. Mar. Law Cas. 336; 87 L. T. Rep. 497;
Greenshields, Cowie, and Co. v. *Stephens and Sons*, 11 Asp. Mar. Law Cas. 167; 99 L. T. Rep. 597.

Atkin, J.—This is a case which arises on a claim for demurrage, brought by the owners of the steamship *Kaijo Maru* against the charterers. It arose upon a case stated by the arbitrator. The charter-party was dated March 1915 and the charterers of the ship required it for the carriage of a cargo of rice from Bassein to Alexandria at a certain fixed price per ton. There was fifteen days' demurrage over and above the stipulated number of lay days at a certain rate per ton.

The ship was loaded under the charter-party, and left her port of loading on the 18th April, bound for Alexandria. While she was on her way to Alexandria the parties had negotiations for a variance in the charter-party. There had been a conversation with reference to an option to send the ship to Piræus, and on the 28th April the charterers write: [His Lordship read the two letters of the 28th and 29th April as above set out and continued:]

I am inclined to think that, in itself, did amount to a variation of the charter, and was intended to fix Piræus. But on the supposition that it was an option, which is possibly what the parties meant, on the 30th April the charterers wrote to the shipowners:

> We confirm our telephone conversation, &c., and shall be glad if you will instruct the captain at Port Said to proceed to Piræus.

Accordingly on the 6th May the owners sent orders to the captain of the vessel at Suez to arrange to discharge at Piræus at 7*s.* 6d. extra freight. It appears to me that after that had happened, the terms of the charter-party had been varied, and the port of destination became Piræus instead of Alexandria. I do not think there was any longer, after the 30th April, any question of option. The charterers had determined the option they had, and it appears if they had wanted to send the ship to any other destination after that date they would have had to bargain again. I think after that date there was a fresh agreement made for a voyage to Piræus.

The ship arrived at Suez on the 10th May, and when she arrived at Suez the charterers tried to get the consent of the Admiralty authorities to her proceeding on the voyage, which they had agreed, to Piræus. There were negotiations about it, and eventually it was refused. The Admiralty never would consent to her going to Piræus, and eventually, after she remained there at Suez about twenty-one or twenty-two days, she was sent to her original destination, Alexandria, and the Piræus voyage became impossible.

Thereupon the shipowners say they are entitled to recover damages caused by the ship being delayed. I think that the right view in law is that the liabilities of the parties must be taken to be the same as though the cargo had been shipped at its port of loading on the original charter for Piræus. What was the position?

The arbitrator has found: [His Lordship read the findings of fact as above set out and continued:]

On those findings the arbitrator has made an award in favour of the shipowners. In the course of the discussion it appeared relevant to discover whether or not the shipowners were also aware that permission was required or might be required. The case was sent back to the arbitrator with the view of dealing with that question. In the supplemental award that the arbitrator has made, in April of this year, he found that the owners had no knowledge and might not reasonably have known that permission from the Government authorities was necessary to discharge the cargo at Piræus.

It was said by the shipowners first of all that this was a case where the charterers detained the ship at a port of call with a view of determining what port they should finally order her upon the then existing option that they had. I do not think that is the state of facts, because I think at the time when she was delayed there was no question of any option. Therefore, upon that footing, I do not think they would be entitled to recover. They further say the case is analogous to the case of shipping goods which are known to the charterers to be dangerous, in which case the charterers would be responsible for such damage as happened to the ship or shipowners in the course of the voyage. I was referred to *Brass* v. *Maitland* (*sup.*), where the majority of the court seem to have laid down that there is an absolute obligation on a shipper to make good damage caused by a shipment of dangerous goods. Crompton, J., however, took a narrower view. He said (at 26 L. J. 57, Q. B.): "Suppose, for instance, that a shipment was made of goods to a foreign port to which, according to the information known at the shipping port, such consignments might be properly and safely made, but that by some recent law the foreign country has made such shipment illegal, would the shipper be liable in such case? I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge or means of knowledge of the dangerous nature of the goods when shipped or when he has been guilty of some negligence as shipper, as by shipping without

communicating danger which he had the means of knowing and ought to have communicated."

I think there can be no question but that the shipment of goods upon an illegal voyage, viz., upon a voyage that cannot be performed without violating the law of the flag of the country or the law of the place where the goods are to be carried to—a shipment of goods which would involve the ship in consequences either of forfeiture or delay—is precisely analogous to a shipment of dangerous goods which might cause the destruction of the ship. What is the full extent of the shipper's obligation? It appears to me that it amounts to this, that he stipulates that he will not ship goods which involve the risk of unusual danger or delay to the ship, which the owner does not know of or might not reasonably know of without communicating to the owner facts which are within his knowledge indicating that there is such a risk. That, I think, is to be the stipulation on behalf of the shipper within certainly very moderate limits. I do not say it is not wider than that.

I take the findings of the arbitrator to be here that the shippers did know when they made this contract of affreightment with the shipowners that the goods could not be taken to Piræus; that that was the position in respect of them, though the Government might, if the shippers succeeded in inducing them to do so, give them a licence. In other words, that the destination in itself was an illegal destination because the British Government would not allow the goods to go through unless a special permission was given.

I think it must be taken on the findings themselves, by which of course I am bound, that the shippers knew, and the shipowners did not know, and could not reasonably have known, that the vessel would not be allowed to proceed without special permission. The arbitrator has found that as a fact, and I am bound by his finding in that respect. In these circumstances it appears to me that it follows on the findings of the arbitrator that this delay arose from a breach by the charterers. I think, therefore, the shipowners have a cause of action against the charterers for the delay so caused, and the arbitrator has found what that should be, and with that, of course, I cannot interfere.

Therefore, I think this award on the findings of the arbitrator must stand, and the shipowners must have the costs of this hearing.

Award upheld.

Solicitors: *Waltons* and *Co.*; *Botterell* and *Roche.*

July 17 *and* 18, 1916.

(Before Rowlatt, J.)

Law and Bonar Limited *v.* British American Tobacco Company Limited. (*a*)

Sale of goods—C.i.f. contract—Contract made during time of peace—Declaration of war—Obligation of seller to give notice of sea transit to buyer to enable him to insure against war risks—Sale of Goods Act 1893, *s.* 32 (3).

Sect. 32 (3) *of the Sale of Goods Act* 1893 *provides that: "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."*

In May 1914 *buyers agreed to buy from sellers goods at a price c.i.f. Smyrna, shipment from Calcutta so as to arrive at Smyrna by Sept.* 1914. *The sellers took out a f.c. and s. policy insuring the goods. On the* 20*th July the goods were shipped on board a British ship, the* W. *On the* 4*th Aug. war broke out between Great Britain and Germany, and on the* 13*th Aug. the* W. *was sunk with her cargo. Advice of the shipment was not sent by the sellers to the buyers in time for them to insure the goods against war risks.*

Held, that sect. 32 (3) *did not apply to the case because it did not apply to a c.i.f. contract in normal circumstances* (e.g., *in time of peace*), *since such a contract provided for all the insurance which was customary, and the intervention of new circumstances* (e.g, *a state of war*) *did not impose a new obligation on the seller, since the application of the section must be considered as at the time of the making of the contract.*

Commercial List.

Action tried by Rowlatt, J. without a jury.

In May 1914 the defendants agreed to buy from the plaintiffs a quantity of Calcutta hessian at a price c.i.f. Smyrna, to be shipped from Calcutta so as to arrive at Smyrna in Sept. 1914. On the 20th July 1914 the hessian was shipped at Calcutta on the British steamship *City of Winchester*, being insured by a policy containing the f.c. and s. clause. On the 4th Aug. 1914 war was declared between this country and Germany, and on the 13th Aug. the *City of Winchester* was sunk with her cargo by a German vessel.

The defendants were not informed that the goods had been shipped by the *City of Winchester* in time to enable them to effect an insurance of the goods against war risks. They complained that they should have been given this information in time for them to effect such insurance, and refused to take up the shipping documents and pay for the goods.

The plaintiffs thereupon brought this action for damages for breach of contract.

The defendants denied liability, and counterclaimed for damages for breach of duty.

Leslie Scott, K.C. and *Stuart Bevan* for the plaintiffs.—Under a contract on c.i.f. terms entered into in peace time a seller is only liable to insure against those risks against which it is usual to insure. Therefore, if a state of war subsequently arises, he is not liable to insure against war risks. They referred to

Groom v. *Barber*, 12 Asp. Mar. Law Cas. 594; 112 L. T. Rep. 301; (1915) 1 K. B. 316.

Roche, K.C. and *Harold Smith* for the defendants.—Sect. 32 (3) of the Sale of Goods Act 1893 provides:

Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and

(*a*) Reported by Lucius Eiffe, Esq., Barrister-at-Law

if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

That section clearly applies here. The goods were sent by the plaintiffs to the defendants by a route involving sea transit, and under the circumstances at the time of shipment (*i.e.*, at the end of July 1914), owing to the strained relations between Great Britain and Germany, it was usual to insure against war risks. The plaintiffs, therefore, should have given notice to the defendants so as to enable them to insure the goods against war risks during the voyage from Calcutta to Smyrna. As they failed to do so, the goods are at their risk, and the defendants are entitled to succeed on the counter-claim. They referred to

Arnot v. *Stewart*, 5 Dow. 274;
Wimble v. *Rosenberg*, 12 Asp. Mar. Law Cas. 373; 109 L. T. Rep. 294; (1912) 3 K. B. 743.

Leslie Scott, K.C. replied.

ROWLATT, J. stated the facts and dealt with other points raised in the case, and then continued:—In my opinion sect. 32 (3) of the Sale of Goods Act 1893 clearly does not apply to this case. It does not apply to a c.i.f. contract in time of peace when war is not contemplated, because such a contract provides for all the insurance which is customary. The contract in this case is a c.i.f. contract and was made at a time when no one anticipated that within three months a state of war would be in existence. Subsequently, it is true, strained relations between Great Britain and Germany came into being, followed by an outbreak of hostilities, and there were risks which were in addition to those insured against in times of peace. But I do not think that a new obligation thereby arose for the seller, for sect. 32 (3) applies to a contract as at the time that contract is made—that is to say, in this case, in May 1914. The question whether sect 32 (3) would apply to a c.i.f. contract made when insurances other than those to be provided by the seller—*e.g.*, war risks—are usual does not arise, and I leave it open. There is no real evidence here that it was usual to insure against war risks at any material time. The plaintiffs are, therefore, entitled to judgment.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Coward* and *Hawksley, Sons*, and *Chance*.

Solicitor for the defendants, *Joseph Hood*.

House of Lords.

June 27, 29, 30, *and July* 25, 1916.

(Before Lord PARKER OF WADDINGTON, Lord SUMNER, and Lord WRENBURY)

LOVE AND STEWART LIMITED *v.* ROWTOR STEAMSHIP COMPANY LIMITED. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND

Charter-party — Lay days — Demurrage — Loading and discharge at a certain rate "Reversible" — Custom of port.

Under a charter-party the appellants chartered a ship belonging to the respondents to carry a cargo of pit-props from the Baltic to Newport, Mon., the cargo "to be loaded at the rate of 125 fathoms daily and discharged at the rate of 125 fathoms daily reversible with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted."

The agreed rate was equivalent to thirteen days for loading and discharging respectively.

At the port of loading the ship was loaded in nine days and, by arrangement between the master and the shipper, four days' dispatch money was deducted from freight and thirteen days were stated in the bill of lading to have been used. According to the custom of the port at Newport, Monmouth, the discharge of Baltic pit-props is suspended during wet weather and during the half of each Saturday. The ship began discharging on the 19th July, but owing to wet weather did not complete doing so until midday on the 9th Aug., and the shipowners contended that the thirteen days available for discharge expired on the 2nd Aug. and that the ship was on demurrage six and a half days, and to this contention the Court of Session gave effect.

Held, that as the intention was to have a fixed number of lay days, and these could not be affected by the custom of the port, the charterers could not except Saturday afternoons or wet days; but the effect of the word "reversible" was to entitle them to add the four days saved in loading to the days available for discharge as the shipper had no authority to "sell" the four days, and that in the circumstances the charterers were not barred from disputing the statement in the bill of lading that thirteen days had been "used for loading." The ship was accordingly only on demurrage for half a day.

Decision of the Court of Session (1916, *S. C.* 223; 53 *S. L. R.* 28) *reversed.*

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (Lord Justice-Clerk (Scott Dickson), Lord Dundas, Lord Salvesen, and Lord Guthrie) which reversed a decision of the Lord Ordinary (Lord Hunter).

The respondents were the registered owners of the steamship *Glamorgan* of Cardiff; the appellants were pitwood importers and coal exporters at Glasgow.

By charter-party in form of the Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom 1899 between the respondents and the appellants, dated the 11th June 1912, the appellants chartered the steamship *Glamorgan* to carry a cargo of pit-props from the Baltic to Newport, Monmouth.

By clause 3 of the charter-party it was provided that the cargo was to be loaded at the rate of 125 fathoms daily and discharged at the rate of 125 fathoms daily reversible with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted."

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

The cargo consisted of 1613 fathoms, so that the stipulated time for discharging amounted to thirteen days.

At the port of loading the *Glamorgan* was loaded in nine days, and four days' dispatch money was deducted from the freight. At Newport, Monmouth, where the *Glamorgan* was ordered to discharge, it is the custom not to work on Saturdays and not to unload pit-props in wet weather.

The ship began to unload on the 19th July, but owing to wet weather did not complete her discharge until midday on the 9th Aug.

The shipowners claimed six and a half days' demurrage. The charterers denied the claim, and alternatively said that they were entitled to add the four days saved in loading to the days available for discharge. In that case seventeen days were available for discharging, and, the 4th Aug. having been a Sunday and the 5th Aug. a Bank Holiday, which admittedly did not fall to be computed as lay days, the lay days did not expire till the 8th Aug. The steamer was accordingly only on demurrage for half a day.

In an action by the shipowners to recover demurrage for six and a half days, the Lord Ordinary held that only demurrage for half a day could be claimed.

On appeal that judgment was reversed, and the claim for six and a half days' demurrage allowed.

The charterers appealed.

C. Sandeman, K.C. and *D. Jamieson* (both of the Scottish Bar) for the appellants.

Horne, K.C. and *C. E. Lippe* (both of the Scottish Bar) for the respondents.

The following cases were referred to:

Cochran v. *Retberg*, 3 Esp. 121;
Brown v. *Johnson*, 10 M. & W. 331;
Dunlop and Sons v. *Balfour, Williamson, and Co.*, 7 Asp. Mar. Law Cas. 181; 66 L. T. Rep. 455; (1892) 1 Q. B. 507;
Freeman v. *Cooke*, 2 Ex. 654;
Hulthen v. *Stewart*, 9 Asp. Mar. Law Cas. 403; 89 L. T. Rep. 702; (1903) A. C. 389;
Gardiner v. *Macfarlane, M'Crindell, and Co.*, 20 R. 414;
Castlegate Steamship Company v. *Dempsey*, 7 Asp. Mar. Law Cas. 186; 66 L. T. Rep. 742; (1892) 1 Q B 854;
Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 App. Cas. 599;
Wyllie v. *Harrison*, 13 R. 92;
Nielsen and Co. v. *Wait, James and Co.*, 54 L. T. Rep. 344; 16 Q. B. Div. 67;
Aktiecelskabet Argentina v. *Von Laer*, 20 Times L. Rep. 9;
Yeoman v. *The King*, (1904) 2 K. B. 429;
Horsley Line Limited v. *Roechling Brothers*, 1908, S. C. 866;
Harman v. *Gaudolph*, Holt's Report, 38;
Gullischen v. *Stewart*, 50 L. T. Rep. 47; 13 Q. B. Div. 317;
Calcutta Steamship Company v. *Weir*, 11 Asp. Mar. Law Cas. 395; 102 L. T. Rep. 423; (1910) 1 K. B. 759.

The House took time for consideration.

Lord PARKER OF WADDINGTON —In this case I have had the advantage of reading and I agree with the opinion about to be read by Lord Sumner. To that opinion I desire to add nothing.

Lord SUMNER then read the following judgment:—The defenders, Messrs. Love and Stewart Limited, by a contract dated the 21st Oct. 1911, bought from Erland Grankull, of Kristinestad, in Finland, a large parcel of pit-props for delivery in the following season, f.o.b. at Kristinestad, by steamers which they would provide for the purpose. Payment was to be by bill at sight in Glasgow for the invoice amount against indorsed bills of lading. There was a further term for Grankull's benefit, that the ship should clear with him or his agents and also employ his stevedores, paying him for the services rendered.

To provide for the carriage of part of this parcel Messrs. Love and Stewart Limited chartered the pursuers' steamship *Glamorgan*, by a charter dated the 11th June 1912. It was in the well-known "Scanfin" form with some manuscript alterations. In particular, clause 3, the lay day and demurrage clause, was altered by interlineating after "loaded" the words "at the rate of 125 fathoms daily," and after "discharged" the words "at the rate of 125 fathoms daily, reversible." None of the printed words as to loading were struck out and no question of mistake or rectification was raised. The ship loaded and discharged a quantity of pit-props, which at the agreed rate gave thirteen days each at the ports of loading and discharge respectively. She was ordered to Newport, Monmouth, and there discharged her cargo to Messrs. Love and Stewart Limited.

The question which arises on this clause relates to wet days and Saturday half-holidays. The pursuers admitted that "according to the custom of the port at Newport, Monmouth, the discharge of Baltic pit-props is suspended during wet weather and during the half of each Saturday." The question is whether on the words of the charter the time when the discharge of the *Glamorgan* was suspended for these reasons counts as laying time against the receivers of the cargo.

I think that the parties have manifested a clear intention in the charter to contract on the basis of a fixed number of lay days, for discharge at a daily rate enables the number of lay days to be fixed as soon as the quantity of the cargo is known and is equivalent to fixing the number of lay days beforehand. The clause, having begun with the expression of such a stipulation, then proceeds in the words of the form, words which refer to the customs of the port and to the circumstances of the shipowner and his ship and of the receiver and his appliances as they happen to exist at the particular port at the time of the loading or discharge as the case may be. Your Lordships' House placed an interpretation on these printed words in *Hulthen* v. *Stewart* (9 Asp. Mar. Law Cas. 403; 89 L. T. Rep. 702; (1903) A. C. 389), which is not only final in law, but is exceedingly well known among all persons concerned in chartering steamers in this trade. That decision was in accordance with the earlier decision in *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 A. C. 599). In view of those cases I think it is so clear that these printed provisions for lay days based on a time which is reasonable under all the circumstances stand in antithesis to lay days based on a number of days fixed or capable of being fixed, such as the written words provide for, as to make it impossible in the present case to give effect to both sets of words as measures

of the time allowed for loading and discharging. The intention to have fixed lay days is clear and must prevail. Furthermore, the days which are to be excepted in computing the lay days are the subject of an express provision which is complete in itself. Accordingly, as I think that in view of this circumstance neither the ordinary working hours nor the custom of the respective ports can be availed of to introduce into the fixed lay days further exceptions of days or parts of days, it is sufficient to say that these printed provisions must refer to the manner of discharge for any effect they may have, and that matter need not further be considered.

I think that time during which the weather is wet, which is time that may be measured by minutes or by hours, and the half of each Saturday, which though half of a calendar day may not be the same as a moiety of the number of working hours on an ordinary day, cannot be brought within the exception of "Sundays, general or local holidays." They are not days within the exception in the clause. A wet day, even if it rains all day, is not a day in the sense in which Sunday or Monday or Bank Holiday is a day. Consecutive days are running even though rain may prevent the receiver from getting any benefit from them. Saturday afternoons are the more plausible case of the two, but the exception in the charter is clearly based on days, not on parts of days. I do not think the term extends to the latter part of a weekday, on which it is usual not to work, although we all call it and enjoy it under the name of a Saturday half-holiday. Really it is a half-day, which while it lasts is wholly holiday, and I do not think that "general or local holidays" cover it. No case to that effect was cited out of the many cases decided on lay days, and one must remember that this form of words was meant to apply to the varying conditions of a great variety of foreign ports as well as to those of ports in the United Kingdom.

At Kristinestad the whole cargo was loaded in nine days, and the effect of the word "reversible" in the charter is that the receivers were entitled to seventeen lay days under the charter for discharging the ship at Newport. The pursuers claim (and the burden is on them) to be able to show that in the circumstances only thirteen days were available for the receiver. The circumstances are these. By a memorandum written in the margin of the charter the captain was instructed to apply for cargo to a Mr. Easton, of Wiborg. Mr. Easton was the defenders' general agent in Finland, though what the precise limits of his authority may have been we do not know. By him the captain was referred to Mr Grankull. In loading the cargo Mr. Grankull partly acted on his own account to deliver the pit-props on board of a ship of the purchasers' providing in accordance with the contract of sale, partly as the charterers' agent to fulfil their charter obligations to load a full cargo and to make advances on account of freight for ship's disbursements, and partly as the ship's agent to report and clear her at the custom house at Kristinestad, and to do her business generally, and particularly to engage her stevedores, all for some moderate fees to himself.

As is very commonly done, the captain and Grankull made an arrangement for a payment to the latter, if he gave the ship dispatch. Accordingly he worked overtime, saved four days on the total of thirteen which the ship was bound to allow him under the charter, and earned 31*l.* 10*s.* If the captain had carried 40*l.* or 50*l.* about with him in cash he might have paid the money then and there. Instead, the amount was, by agreement, included in the ship's disbursements and brought up the sum of 436*l.* 5*s.* 6*d.* disbursed for customs and port dues, stowage, and so forth, to a total of 467*l.* 15*s.* 6*d.* The captain was to acknowledge this sum to have been received by him under the charter as an advance on freight to be earned on the voyage. In substance, having to pay Grankull 31*l.* 10*s.* for himself, he did so by borrowing the money for the purpose from Grankull as the charterers' agent under the charter to advance money for ships' disbursements at the port of loading. He then enabled Grankull to obtain the money for himself from the defenders by including it in the sum acknowledged by him on the bill of lading as advance freight, and Grankull in due course included in his invoice for the timber sold the sum of 467*l.* 15*s.* 6*d.* advanced for disbursements, and his bill for the total amount was duly met by the defendants on taking up the bill of lading.

What is the effect of this? The captain, using a familiar phrase, says that Grankull "sold" him the four days, and when the bill of lading came to be made out he wished to write in the margin "thirteen days left for discharging,' pursuant to instructions from his owners to "try and get under the bill of lading the days left for discharging inserted in the margin." A Mr. M'Kerrachar, a clerk of Mr. Easton's, whose business had been to superintend the loading in the interest of the defenders, was present when the bill of lading was completed and successfully stood out for the words "thirteen days used for loading." They were written seemingly by M'Kerrachar himself in the margin of the bill of lading, but not among the words which express a contract of carriage. The bill of lading incorporated the charter, of which the captain had a copy.

There is no evidence that M'Kerrachar had any authority or purported to have or to exercise any authority to bind the defenders in this matter. The insertion of the note in the bill of lading evidenced no new bargain with the captain. His bargain for dispatch money had been made with Grankull some days before. Grankull had no authority to make any variation of the terms of the charter so as to bind the defenders, and as far as we know he purported to act on his own behalf. The captain says he looked on him as the defenders' agent, but, having the charter before him which showed the scope of the authority, such as it was, he could not rely on any ostensible authority *ultra*, even if Grankull had purported to act for the defenders in the matter, which was not the case. It is said that if the days "bought" from Grankull were to be added to the defenders' days at Newport, the captain was throwing his owners' money away, for they might have to "buy" them over again at the port of discharge, and that was plain to the captain, to Grankull and to M'Kerrachar at Kristinestad, and must have been plain to the defenders too at Newport. There is some truth in this. If the defenders had insisted on their pound of flesh they might have

detained the ship at Newport for seventeen days, when thirteen would have sufficed, or have extorted more dispatch money as the price of earlier discharge, but there is no evidence that this was feared on the one side or intended on the other. If they did not do so, then four days' dispatch at Kristinestad was worth money to the ship, for this might be the saving of another open water voyage to the Baltic in the autumn, and in any case four days of the steamship's time somewhere were saved. The bargain itself evidently did not purport to include as a term that there should only be thirteen days for discharging, for the captain was only to "try" to get this on the bill of lading. He failed, and the statement put on it was incorrect to the knowledge of all parties, nor did it operate as an admission against the defenders, for M'Kerrachar had no authority to admit anything.

I think that what occurred at Kristinestad in itself effected no alteration of the defendants' rights under the charter. At Newport they presented the bill of lading, knowing by that time from M'Kerrachar's letters that some dispatch had been given and paid for, but not the number of days nor the price, and knowing also that the advance freight came to 467*l.* 15*s.* 6*d.*, but not how the disbursements were made up. They knew that the note on the bill of lading as to days used was wrong, but not how far it was wrong. They drew no attention to the matter on presenting the bill of lading. The witness who gave this evidence was expressly accepted by the Lord Ordinary as truthful. As was natural the balance of freight was not paid in one sum, but in instalments as the discharge proceeded. The first payment of 350*l.* was on the 1st Aug., the twelfth lay day; there were several other payments on account, and the balance, partly made up of 467*l.* 15*s.* 6*d.*, the advance of freight for disbursements at Kristinestad, was only settled on the 18th Aug., nine days after the end of the discharge.

It is suggested by the pursuers that in some way the defenders are barred by this conduct from disputing that thirteen days were in fact used at Kristinestad, and from disputing that Grankull had authority to sell four days for them for 31*l.* 10s., which he kept for himself. In the alternative it is suggested that in presenting the bill of lading without protest and in taking the benefit of the amount of 467*l.* 15*s.* 6*d.* as an advance of freight the defenders either ratified what was done at Kristinestad or approbated it in part, namely, the advance of 31*l.* 10*s.* to the captain by Grankull as their agent, and must approbate the transaction in whole or not at all.

With all respect to the learned judges of the Extra Division of the Court of Session, with whom these considerations prevailed, I think the arguments are unfounded. Grankull did not purport to act for the defenders, so there can be no ratification. If the presentation of the bill of lading could be treated as a representation by the defenders to the pursuers that thirteen days had been used at Kristinestad, it was a representation as to which the pursuers knew the truth, and they did not act or change their position on the faith of it. When the defenders took the benefit of the alleged advance of freight up to 467*l.* 15*s.* 6*d.*, the present dispute as to lay days at Newport was in full swing. They had, in fact, allowed Grankull that amount as money advanced for ship's disbursements and they declined to pay any more freight to the shipowners. Whether they need have paid Grankull or not is a matter which cannot affect the shipowners' rights; that could only be done by some bargain binding between the defenders and the pursuers. Grankull found the captain the money with which to pay for dispatch, not in a cash loan, but by an entry in an account, which was intended to be available to the defenders, as in fact they have availed themselves of it, but it was not accompanied by any agreement binding on them that they should be prejudiced in respect of discharging time.

Furthermore, in presenting the bill of lading the defenders merely did what they must needs do in order to get delivery of their cargo. They received it from Grankull under the contract of sale as the symbol of the delivery of goods while afloat. Nothing had occurred by which any contract for the carriage of the goods arose between them and the shipowners other than the charter itself. No new bargain had been made, under which the pursuers carried for the defenders under a bill of lading instead of a charter. The freight earned was chartered freight and the bill of lading in the defenders' hands was only the ship's receipt for the goods. This is the ordinary effect of documents such as these under such circumstances, and the cases cited do not bear upon them.

In the result the defenders were entitled to seventeen, not thirteen, lay days at Newport. As they cannot except days when it rained and Saturday afternoons the ship was on demurrage but for half a day only, and not, as the Lord Ordinary held, for two and a half days, or, as the Extra Division held, for six and a half. I think, therefore, that this appeal should be allowed with costs; that the interlocutor appealed from should be discharged with costs here and in the Extra Division, and that the interlocutor of the Lord Ordinary should be restored with the substitution only of 23*l.* 10*s.* for the sum of 117*l.* 12*s.* 1*d.* which he awarded.

Lord Wrenbury.—I agree with the opinion delivered and I have nothing to add.

Appeal allowed.

Solicitors for the appellants, *Ince, Colt, Ince,* and *Roscoe,* for *Dove, Lockhart,* and *Smart,* S.S.C., Edinburgh, and *Borland, King, Shaw,* and *Co.,* Glasgow.

Solicitors for the respondents, *Holman, Fenwick,* and *Williams,* for *Boyd, Jameson,* and *Young,* W.S., Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

July 21, 24, 25, *and* 28, 1916.

(Before Swinfen Eady, Phillimore, and Bankes, L.JJ.)

James Morrison and Co. Limited *v.* Shaw, Savill, and Albion Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriage by direct route—Liberty to call at intermediate port—Exception of King's enemies—Deviation to intermediate port not usually visited by owners' ships—Destruction by enemy vessel—Liability of owners.

In Nov. 1914 *the defendants, a steamship company, contracted to carry a cargo of wool from New Zealand to London in their steamship the* T. *The bills of lading provided for "direct service between New Zealand and London," and contained these two clauses: Clause* 1. "*With liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies.*" *Clause* 3. "*The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat and reship and forward the same at the owner's expense, but at merchant's risk.*" *The exception clause excepted the "King's enemies." Besides the wool the* T. *carried a quantity of frozen meat for delivery at Havre. The vessel kept a direct course from New Zealand to London until she reached the Casquets, when she turned and made for Havre, which was not one of the usual ports visited by the defendants' steamships. When a few miles from Havre she was sunk by a German submarine. The plaintiffs, who were indorsees and holders of the bills of lading under which the wool was shipped, brought an action against the defendants claiming damages for breach of contract.*

Held, that Havre was not an intermediate port within the meaning of the bills of lading on the voyage of this vessel from New Zealand to London, and that in making for that port she was deviating from her voyage and the defendants thereby lost the benefits of the exceptions in the bill of lading.

And, further, that, inasmuch as the defendants by deviating were breaking their contract as carriers, they were liable for the loss occasioned by the King's enemies.

Decision of Bailhache, J. (13 *Asp. Mar. Law Cas.* 400; 114 *L. T. Rep.* 746; (1916) 1 *K. B.* 747) *affirmed.*

Appeal from the decision of Bailhache, J. (reported 13 Asp. Mar. Law Cas. 400; 114 L. T. Rep. 746; (1916) 1 K. B. 747). The plaintiffs were consignees and owners of 158 bales of wool shipped from Wellington, New Zealand, in the steamship *Tokomaru*, owned by the defendants, the Shaw, Savill, and Albion Company Limited. The *Tokomaru* was one of the defendant company's regular line from New Zealand to the United Kingdom. The goods were shipped under a bill of lading dated the 19th Nov. 1914, which was headed: "Direct service between New Zealand and London." The bill of lading gave the shipowners extensive liberty to load at any port in New Zealand, and contained these clauses:

1. . . . And bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and (or) Montevideo and (or) La Plata.

3. The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or load and store goods either on shore or afloat and reship and forward the same at the owner's expense, but at merchant's risk.

The exceptions clause included "act of God" and the "King's enemies."

The regular course taken by steamers of the defendant line from New Zealand to London after leaving Ushant was to proceed direct to the south side of the Isle of Wight and thence up the Channel, through the Straits of Dover, to the Thames. On the occasion in question the defendants undertook the carriage of a quantity of frozen meat to Havre.

The *Tokomaru* commenced her voyage and was within seven or eight miles from Havre when she was torpedoed by a German submarine and sank, all her cargo being lost.

The plaintiffs thereupon commenced this action claiming 4013*l.* agreed damages from the defendants for loss of the cargo. Bailhache, J. held (1) that clause 3 of the bills of lading did not avail the defendants, since it only applied when transhipment of the cargo from the *T.* to another vessel had taken place, and, even if that were not so, the bills of lading would be ambiguous (*Elderslie Steamship Company* v. *Borthwick*, 92 L. T. Rep. 274; (1905) A. C. 93); (2) that the provisions of clause 1 did not constitute a defence to the plaintiffs' claim, since, assuming that Havre was an intermediate port within the meaning of the clause, when the route and ports of call of a line of steamships had become stereotyped, mere general words in the owners' own bill of lading giving liberty to call at intermediate ports would not justify their calling at some entirely fresh intermediate port; (3) that after deviation the defendants were only common carriers and were not protected by the common law exception of the King's enemies, since in deviating they were breaking their contract with the plaintiffs and not fulfilling it; and (4) that it was unnecessary for the plaintiffs, in order to substantiate their claim, to show that the natural and probable result of deviating to Havre was

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

that the *T.* would be sunk by hostile craft. The plaintiffs were therefore entitled to judgment.

The defendants appealed.

Sir *Robert Finlay*, K.C, Sir *Maurice Hill*, K.C., and *W. N. Raeburn* for the appellants.

F. D. MacKinnon, K.C. and *R. A. Wright* for the respondents.

The following cases were cited:

Internationale Guano - en - Superphosphaatwerken v. *Robert MacAndrew and Co.*, 11 Asp Mar. Law Cas. 271; 100 L. T. Rep. 850; (1909) 2 K. B. 360;

Leduc and Co. v. *Ward and others*, 6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475;

Glynn v. *Margetson*, 7 Asp. Mar. Law Cas. 148; 66 L. T. Rep. 142; (1892) 1 Q. B. 337; affirmed, 7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351;

White v. *Granada Steamship Company Limited*, 13 Times L. Rep. 1;

The Dunbeth, 8 Asp. Mar. Law Cas. 284; 76 L. T. Rep. 658; (1897) P. 133;

Evans, Sons, and Co. v. *Cunard Steamship Company Limited*, 18 Times L. Rep. 374;

Balian and Sons v. *Joly, Victoria, and Co. Limited*, 6 Times L. Rep. 345;

Joseph Thorley Limited v. *Orchis Steamship Company Limited*, 10 Asp. Mar. Law Cas. 431; 96 L. T. Rep. 488; (1907) 1 K. B. 660;

Parker v. *James*, 4 Camp. 112;

Davis v. *Garrett*, 6 Bing. 716;

Lilley v. *Doubleday*, 44 L. T. Rep. 814; 7 Q. B. Div. 510.

Cur. adv. vult.

July 28. — Swinfen Eady, L.J. read the following judgment:—The plaintiffs are holders for value of two bills of lading for a quantity of wool shipped at Napier, New Zealand, for London by the defendants' steamship *Tokomaru*. This ship was torpedoed on the 30th Jan. 1915 by a German submarine when between seven and eight miles from Havre, and ship and cargo were an actual total loss. The plaintiffs sue for breach of the contract evidenced by the bill of lading. The defendants, while admitting the total loss of the goods, dispute their liability. They say that the loss occurred by an excepted peril, the King's enemies. The plaintiffs contend that the defendants are not entitled to rely upon the exception contained in the bill of lading, as they say the *Tokomaru* was deviating from the contract voyage by leaving the direct course for London and proceeding to Havre when the disaster occurred, and that the liberties contained in the bill of lading did not permit that to be done. This raises the first question—namely, whether the *Tokomaru* was deviating in proceeding towards Havre. If not deviating, there is an end of the matter, and the shipowners are protected from liability by the bill of lading. If, however, the *Tokomaru* was deviating, the further question arises as to the liability of the defendants as carriers under the circumstances. The defendants contend that they incurred no greater liability than that of common carriers, and are therefore not liable for acts of the King's enemies.

The bills of lading are dated in Nov. 1914, and are in the following form: [His Lordship read the words in the margin of the bills of lading, "Direct service between New Zealand and London," and the clause set out above.] Clause 3 of the bill of lading was referred to, but seems to me to have no bearing on the present dispute. There was not any transhipment.

The ordinary route for steamers of this line is, outbound bound, *viâ* Cape of Good Hope to New Zealand; homeward bound, from New Zealand *viâ* Cape Horn and west of the Falkland Islands to Montevideo, then to Teneriffe or Madeira, and thence direct to London.

Owing to certain instructions given by reason of the war the *Tokomaru* on her last voyage passed east of the Falkland Islands, and when off Pernambuco passed considerably to the east of her ordinary course. But nothing turns in this case upon any such variation, upon Admiralty instructions given by reason of the war. This ship was a cargo boat. Passenger ships of the same line going to and from New Zealand frequently call at Plymouth, but not so cargo boats. So far as appears from the evidence, this was the first time that a vessel of this line coming from New Zealand and bound for London had been instructed to call at Havre. The intended call was brought about in this way. A special arrangement was made to carry some frozen meat to France. At one time it was contemplated calling at Bordeaux to discharge this cargo, and in some of the bills of lading for part cargo of this ship liberty to call at Bordeaux was inserted, but on reaching Teneriffe the captain was instructed by the owners to proceed to Havre and discharge the meat cargo there. On leaving Teneriffe the course, whether for Havre or to London direct, is the same to a point about ten miles off the Casquets. There the routes diverge. From the point of divergence it is 107 miles to Havre and 118 miles Havre to Dover. Thus from the point of divergence to Dover *viâ* Havre it is 225 miles; from the point of divergence to Dover direct it is 171 miles; so by proceeding to Havre the length of the voyage would be increased by fifty-four miles. From Havre to the nearest point of the ship's ordinary route to Dover is a distance of sixty-eight miles. The direct service between New Zealand and London by the Shaw, Savill, and Albion Line has been long established and is well known, and the boats always follow substantially the same route outwards or homewards, as the case may be.

The first question is, Can it be said that the ship had liberty to go to Havre to discharge cargo by reason of the "liberty on the way to London to call and stay at any immediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies"? It must be borne in mind when considering the true construction and effect of bills of lading that it is important to everyone concerned in the carriage of goods by sea—whether shipper, shipowner, or insurer—that the route by which the ship and goods are to pass should be determined, that the risks may be estimated on that basis. Lord Esher said in *Leduc and Co.* v. *Ward and others* (*sup.*): "It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined," and he has referred just previously to the difficulty of insuring the goods if it is not known for what voyage they were to be insured. Bowen, L.J. in *Glynn* v. *Margetson* (*sup.*) and Cozens-Hardy, L.J. in *Joseph Thorley Limited* v. *Orchis*

Steamship Company Limited (*sup.*) regarded the matter from the same point of view.

Again, where parties have agreed upon a voyage, and have specified that voyage in the bill of lading, the definition of the voyage must, as a matter of business, cut down the general words of the bill of lading to what is fairly applicable to the voyage which has been agreed upon and defined. Any other construction would make business impossible: (*Glynn* v. *Margetson*, *sup.*). In the same case in the House of Lords Lord Herschell referred to the necessity of construing a bill of lading from a business point of view and in limiting general words by the main object and intent of the contract. He said: "The ports a visit to which would be justified under this contract would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that I am, of course, speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants) inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given." In the bill of lading in question in this action there is given a very wide liberty to proceed backwards and forwards to ports and places in New Zealand, and notwithstanding that such ports or places are out of or away from the customary or geographical route to the port of discharge. This gives the shipowners wide facilities for taking in cargo in New Zealand, but after having done so the ship is "bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London." This is the main object of the voyage. It is a voyage from New Zealand to London. Then follows the liberty "on the way to London" to call and stay at any intermediate port or ports, and then with permission to call at three named places in South America, but for a limited purpose only—taking on board coal, supplies, and (or) cargo, and (or) live stock. There is no liberty to call there for discharging cargo. The ships of this line habitually avail themselves of the liberty "on the way to London" to call at any intermediate port or ports by calling at Teneriffe or Madeira, where they coal. That port lies on the route which they habitually take "on the way to London." But can it be said that Havre is an intermediate port in any proper sense of the term, as used in the bill of lading? It is distant sixty-eight miles from the nearest point of the route to London, and in order to reach it involves the vessel going off her course in one direction 107 miles. It is not shown to be a usual or customary port for vessels of this size and class coming from New Zealand to enter. In this particular case it was only for a special purpose, and by reason of a special bargain made after the plaintiffs' goods were shipped, that the captain was instructed to go to Havre. If the question be put, as in *Leduc and Co.* v. *Ward and others* (*sup*), is Havre substantially a port which will be passed on the named voyage, New Zealand to London? the answer must be in the negative. If the question be put is Havre a port which would naturally and usually be a port of call on the named voyage? the answer must be certainly not. If the question suggested by Lord Esher's judgment in *Glynn* v. *Margetson* (*sup.*) be put is Havre a port in the course of the voyage, in the sense that it may be reached by the ship going slightly out of her course? the answer must again be in the negative. By slightly out of her course is meant does the ship on her course go fairly close to the port, and in order to enter the port, or call off it, would she only have to go a very short distance out of her course? Whether you take the distance in the present case as 107 miles or as sixty-eight miles only, the departure from the course of the voyage is quite substantial, and not slight.

Again, the liberty is to call and stay at any intermediate port or ports, and if this liberty extends to Havre it seems to follow that almost any port in the English Channel available for a steamer of this size and draught, and on either the French or English coast, would be within the liberty, which certainly cannot have been intended or contemplated by the parties. The defendants take advantage of the liberty by calling at Teneriffe or Madeira, which are intermediate ports, but, in my judgment, Havre is not such port within the meaning of this bill of lading. The defendants' letter to Mr. Findlay dated the 8th Jan. 1915 shows that they themselves correctly appreciated the risk they would run in departing from their accustomed route.

I am of opinion that it is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an intermediate port within the meaning of a bill of lading. In construing the document all the surrounding circumstances must be taken into consideration. The size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the port in question. It is a question of fact in each case, and, in my judgment, Bailhache, J. was right in deciding that Havre was not an intermediate port on the voyage of this vessel from New Zealand to London, and that the *Tokomaru* in making for that port was deviating from her voyage, and that the defendants thereby lost the benefit of the exceptions in the bill of lading: (*Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*sup.*); *Internationale Guano-en-Superphosphaatwerken* v. *Robert MacAndrew and Co.* (*sup.*).

If that be so, the remaining question is whether the defendants are protected from liability as carriers by the fact that the loss occurred through the King's enemies. If they, as carriers, were duly performing their contract of carriage, they would not be liable for loss occasioned by the King's enemies. But they are breaking their contract. They are quite unable to show that the loss must have occurred in any event, and whether they had deviated or not. True it is that there had been no previous warning of danger from submarines, and that the event which occasioned the loss was wholly unexpected, but this does not

assist the defendants. The answer to the argument of the defendants on this point is that given by Tindal, C.J. in *Davis* v. *Garrett* (*sup.*): "But we think the real answer to the objection is that no wrong-doer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case." In *Parker* v. *James* (*sup*) the loss occurred from capture by the King's enemies while the vessel was deviating, and Lord Ellenborough held that the plaintiffs were entitled to recover the value of their goods on board the ship at the time she was captured by reason of the deviation. *Sleat* v. *Fagg* (5 B. & Ald. 342) and *Lilley* v. *Doubleday* (*sup.*) are also authorities against the defendants' contention.

In my judgment the appeal fails and should be dismissed.

PHILLIMORE, L.J. read the following judgment:—

The plaintiff company, owners of two parcels of goods shipped on board the *Tokomaru*, a vessel belonging to the defendant company, complains of the loss of these goods, which were sunk with the ship when she, being on a course for Havre and not far from that port, was torpedoed by a German submarine. The plaintiff company complains that it had shipped the goods for a voyage from New Zealand to London, and that the ship was deviating from her course and on a deviated course when she was lost.

This makes it necessary to determine, first, what was the course of the voyage; and, secondly, if there was a departure from that course, whether it was justified by the liberties given by the bill of lading. The material parts of the bill of lading are as follows: It is stated that certain bales of wool are shipped in good order and condition at the port of Napier. Then follow wide liberties as to trading in New Zealand. Then the ship is described as "bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London, and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coals, or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and (or) Montevideo and (or) La Plata for the purpose of taking on board coal, supplies, and (or) cargo, and (or) live stock," the goods to be delivered, subject to all the above liberties to deviate and to the exceptions and conditions at foot thereof, in like good order and condition at the Port of London. I do not think it necessary to dwell upon the exception 3, although it was relied on by the shipowners.

The course adopted by the ships of this line not being mail boats) is to come round the Horn, then put into one of the three named ports on the east coast of South America, then make a call at one of the coaling ports in the Atlantic islands, generally Teneriffe, and thence proceed straight to London. This is the usual course, and (except in respect of the South American ports) needs, I think, no use of any of the liberties or permissions to justify it. It was suggested that the call at the coaling port could only be justified under the liberty to call at intermediate ports. I do not think so. This call is one of the incidents of the voyage and is no departure. There are many similar instances, such as calling at weather stations to inquire about ice, or going to some station for a Government pass through territorial waters, or to pick up a pilot, or calling at a preliminary port to lighten the ship in order that she may finish the voyage with a less draught. These are not, in my view, departures from the usual and customary course of the voyage.

It is possible to carry the rule as to acceptance of that which is customary even further. It may be, if it is customary for the line to which the ship belongs, and of which the shipper knows, to touch at some intermediate port, not mentioned in the bill of lading, that touching at this port may be regarded as part of the customary course of navigation. For instance, it is possible that the practice of the mail boats of this line to call at Plymouth might be justified even without having recourse to the liberty to call at intermediate ports. The case of *Evans, Sons, and Co.* v. *Cunard Steamship Company Limited* (*sup.*) seems to support this. I only mention this suggestion to show that I have not forgotten it, but I do not want to pronounce any opinion upon it.

I now come to the liberty clause. Bailhache, J. seems to give no effect to this liberty, or only to give it effect as enforcing the proposition that such departures from the direct geographical route as are incidental to the navigation may be be made—that is, to justify that which I think needs no justification. In this I cannot agree with him. Lord Esher in *Leduc and Co.* v. *Ward and others* (*sup.*) and Lord Herschell in *Glynn* v. *Margetson* (*sup.*) treat the clause as having a meaning and one to which effect must be given. I will quote the passages. Lord Esher in *Leduc and Co.* v. *Ward and others* (*sup.*) says: "Here again it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning—namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named." In *Glynn* v. *Margetson* (*sup.*) Lord Herschell said: "There is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage. That port or those ports would differ according to what the stipulated voyage was, inasmuch as at the time when this document was framed the parties who framed it did not

know what the particular voyage would be, and intended it to be equally used whatever that voyage is. The ports a visit to which would be justified under this contract would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that I am, of course, speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants) inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given." On the other hand, the words, however large, do not warrant more than a limited extent of departure. This is well settled. None, however, of the cases cited come close to this one. They are all cases where either the ship went back on her track or made an enormous change of voyage, bringing her when at the so-called intermediate port no nearer her port of destination than she had been at the beginning of her deviation. Some guide, I think, can be got from the limited permission to use the three named ports in South America. This is evidence that the parties did not contemplate an unspecified departure from the course which would be as great as that involved in touching at these ports. But the alteration of course necessary for going to Havre is less than the alteration for the nearest of those named ports. It is very difficult to draw the line, and the question is largely one of degree, but, on the whole, I think that the degree has been exceeded in this case. And there is another ground which seems to me a safer one for affirming this decision. Lord Esher indicates—and I think rightly indicates—that there is a necessary condition which must be present to make a port an intermediate port. It must be one which "would naturally and usually be a port of call on the voyage." By this he does not mean so much as "customary." What he means is that as a matter of commerce and business ships are frequently sent upon an adventure which includes touching at these intermediate ports. If, for instance, it was common for vessels dispatched to Rouen to call at Havre, or dispatched to Malaga to call at Cadiz, to this extent Havre and Cadiz would be intermediate ports. Now, as Bailhache, J. points out, no evidence was given to show that it was usual for New Zealand vessels, or, I may add, vessels from South America, bound for London to call at Havre. It is indeed true that the *Ikaria* was bound from the South American coast to London *viâ* Havre, but this one instance is not enough. It is not, as far as we are informed, a known or usual voyage for vessels bound from New Zealand, or even from South America, to call at Havre on the way to London. I may add that the burden is on the shipowner to bring himself within the liberty.

As to the second point in the case, I can deal with it shortly. The cases of *Davis* v. *Garrett* (*sup.*) and *Lilley* v. *Doubleday* (*sup.*) lay down the true principle. As the accident occurred at the time and place when it did, the ship being then on her deviating course, the shipowner is responsible unless he can show that the loss or damage would have occurred if she had been on her proper course for London. There are circumstances in which conceivably this could be proved, but it could not be and was not proved in this case. Therefore the judgment is right and must be affirmed.

Bankes, L.J. read the following judgment:—It is well settled that where in a printed form of charter-party or bill of lading general words are found giving liberty to deviate those words must be construed in reference to the main intent and object of the contract. In *Glynn* v. *Margetson* (*sup.*), both in the Court of Appeal and in the House of Lords, and in *Leduc and Co.* v. *Ward and others* (*sup.*) some rules will be found indicating some necessary limitations upon such general words. In the last of these cases Lord Esher speaks of the liberty as extending only to putting into a port which is substantially on the course of the voyage. In *Glynn* v. *Margetson* (*sup.*) in the House of Lords, Lord Herschell restricts the liberty to a port which is in a business sense on the way to the port of destination. In the same case in the Court of Appeal Lord Esher speaks of what is permissible as a going slightly out of the sea course which the ship would take on the way to her destination. In the absence of any special considerations arising out of the terms or the subject-matter of any particular contract the question of what is or is not permissible under a general liberty to deviate must resolve itself largely into a question of fact, in which the geographical position of the port visited in relation to that of the port of destination and the additional distance to be covered as the result of departing from the direct or customary course will be material, but not necessarily the only material, matters for consideration.

There may, however, be cases where as a matter of construction of the contract it may be necessary to give a much wider limitation to the general words than those indicated above in order to give effect to the manifest object and intention of the contract: (see per Lord Herschell in *Glynn* v. *Margetson, sup.*). This, as I understand his decision, is the principle upon which Bailhache, J. has acted in the present case. The bill of lading describes the service provided by the defendants' fleet of steamers as a "Direct service between New Zealand and London." It describes the course to be taken by the steamers as "the customary or geographical route to the port of discharge." It confines the liberty to call at "intermediate ports on the way to London." Bailhache, J. treats the subject-matter of the agreement between the parties as a contract to carry wool from New Zealand to London by one of this regular line of steamers trading between London and New Zealand ports, and having a recognised route and recognised ports of call both out and home. To such ports the liberty to call will naturally apply; but it seems obvious that in such a contract some limitation must be placed upon the number of ports at which it is permissible to call, even though they may come within the description of being "intermediate ports on the way"

to London; otherwise, from a business point of view, the manifest object and intention of shipping goods by such a line of steamers as those in question would appear to be defeated. If some limitation is to be placed upon the number, then where is the line to be drawn? It must be a question of degree. The circumstances may be such that, from a business point of view, any exercise of the liberty, even to a single port outside the recognised ports of call, must, except in cases of emergency, be considered as beyond the contemplation of the parties and therefore as defeating the object and intention of the contract. That, I take it, is the view adopted by Bailhache, J., who had evidence before him as to the regular route and ports of call of this line of steamers, and who had also the evidence of the owners as contained in their letter in reference to the course of business as between themselves and shippers by their line of steamers. This view is strengthened and confirmed by the special liberty inserted in the bill of lading to call at Rio de Janeiro, Montevideo, or La Plata for limited purposes only, a provision which would not have been necessary had the intention been to give full effect to the general words. The owners in their letter to which I have already referred emphasise this point when they ask that in future liberty shall be inserted in the bill of lading to call at French ports. In my opinion Bailhache, J. took a view which was quite justified by the evidence before him and I am certainly not prepared to differ from him upon it.

With regard to the appellants' second point that they can only be made responsible for such results of the deviation as could have been reasonably anticipated, I can see no ground derived either from principle or from authority in support of it. On the contrary, I think that the authorities to which reference has been already made are distinctly against it.

I agree that the appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs, *Parker, Garrett,* and *Co.*

Solicitors for the defendants, *Ince, Colt, Ince,* and *Roscoe.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

June 2 *and* 4, 1915.

(Before Sir S. T. EVANS, President.)

THE NINGCHOW. (*a*)

Prize Court—Enemy goods—Enemy pledgor of goods—Default of pledgor—Contract of sale by pledgees — Right of pledgor to redeem — Loss of right—Release to purchaser.

Before the outbreak of war in Aug. 1914, *a firm of enemy subjects contracted to sell to a British firm a certain quantity of vegetable tallow. The tallow was shipped in a British steamship at Hankow, and the steamship started for Liverpool before the declaration of hostilities. The vendors of the tallow pledged the same, also before the outbreak of war, to a firm of Japanese bankers, who were indorsees and holders of the bills of lading, both at the time of the shipment of the goods and of their arrival at Liverpool. The steamship did not arrive at Liverpool until after the outbreak of the war, and thereupon the consignees declined to take delivery of the tallow, as being the goods of enemy subjects. The Japanese bankers, owing to the refusal of the purchasers to take delivery of the goods, entered into a contract to sell the tallow to a British firm. The tallow was afterwards seized by the Customs officers as being enemy property.*

Held, that the enemy pledgors had lost their right to redeem the tallow when the contract of sale was made, and that by such contract they had ceased to be owners of the same. The tallow, therefore, was no longer enemy property and was not liable to seizure.

THIS was a case in which the Crown claimed (*inter alia*) the condemnation of a certain quantity of vegetable tallow, shipped in the British steamship *Ningchow*, on the ground that the same was enemy property.

The *Ningchow*, a British ship, sailed from Hankow, in China, in July 1914, before the outbreak of hostilities between Great Britain and the German Empire, and a part of her cargo consisted of vegetable tallow, which was shipped by a German firm in China and consigned to a British firm. The steamship did not arrive at Liverpool until the 17th Aug. 1914, a fortnight after the declaration of war, and the consignees refused to take acceptance of the tallow, as being the goods of enemy subjects. The tallow was seized by the officers of His Majesty's Customs on the 29th Oct. 1914. At the time of the shipment of the tallow and also at the date of its arrival at Liverpool the Yokohama Specie Bank Limited were the indorsees and holders of the bills of lading representing the tallow, in respect of advances made before the outbreak of war. On the refusal of the consignees to take acceptance, the Yokohama Specie Bank Limited sold the tallow, as pledgees of the same, to Messrs. Thornett and Fehr, a British firm. The sole question for the court was whether, at the date of seizure, the tallow was the property of enemy subjects.

Aspinall, K.C., *Dumas*, and *Trehern* (for *G. P. Langton*, at present serving with His Majesty's forces) for the Procurator-General.

Hogg for the claimants, the Yokohama Specie Bank Limited and Messrs. Thornett and Fehr.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

June 4, 1915.—The PRESIDENT.—The subject-matter of this claim consists of 233 packages of green vegetable tallow, which formed part of the cargo laden on the steamship *Ningchow*, of Liverpool. This part of the cargo was seized by the officers of His Majesty's Customs at the port of Liverpool on the 29th Oct. 1914.

The claimants are the Yokohama Specie Bank Limited, of 7, Bishopsgate, in the City of London, subjects of His Majesty the Emperor of Japan, and Messrs. Thornett and Fehr, of Baltic House, in the City of London, tallow brokers, subjects of His Majesty the King of this realm.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

The goods were shipped at Hankow before the war, and were consigned by subjects of the German Empire. The vessel in which they were laden arrived in the port of Liverpool on the 17th Aug. 1914.

The Yokohama Specie Bank were indorsees and holders of the bills of lading, representing the goods at the time of their shipment and at the time of their arrival at Liverpool, and were, at all material times up to the contracts of sale of the 14th and 22nd Oct. 1914, hereinafter referred to, the pledgees of the goods, in respect of advances amounting to about 660*l.* made upon the security of this pledge. These advances had been made before the commencement of the war. The rights of the bank have therefore to be regarded upon principles applicable to *ante bellum* conditions, as nothing happened subsequently which affected these rights. The pledgors were enemy subjects—Messrs. Schnabel, Gaumer, and Co.

The enemy subjects had contracted to sell the goods to a British firm (Messrs. MacAndrew, Moreland, and Co.), who declined to take up the documents representing the goods, or to take delivery of the goods themselves after the declaration of war, from enemy subjects.

Thereupon the bank, as pledgees, proceeded to deal with the goods. It was admitted by counsel for the Crown that the enemy subjects, who were the pledgors to the bank, were in default, and that the bank, as pledgees by reason of such default and after the requisite notice to their pledgors, became entitled to exercise their power of sale, in order to make the pledge effective, before the goods were seized as prize.

The bank accordingly, in exercise of their rights as pledgees, entered into two contracts of sale with Messrs. Thornett and Fehr, dated respectively the 14th and 22nd Oct. 1914, whereby they contracted to sell the goods in question to Messrs. Thornett and Fehr on the terms set out in the written contracts.

Counsel for the Crown contended (1) that Messrs. Thornett and Fehr were not the real purchasers, but only brokers, acting on behalf of the bank; and (2) that, even if they were the purchasers, the property in the goods had not passed to them; and that, notwithstanding the contracts of sale, the goods remained confiscable as enemy property belonging to the pledgors.

As to the first contention, I was satisfied upon the evidence, and find as a fact, that Messrs. Thornett and Fehr were not acting as brokers, but as principals. Upon the second contention, arguments were addressed to the court that, according to the law applicable to the sale of goods, the property in the goods had not at the time of their seizure passed to the intending purchasers; and that the goods still remained the property of the enemy subjects, notwithstanding their pledge to the bank, and the action that the bank took.

In my view, the inquiry as to whether the property in the goods had so passed is irrelevant to the question which has to be determined in this case, which is whether the goods belonged to enemy subjects at the time of the seizure.

The rights of a pledgee have been succinctly stated in the judgment of Cotton, L.J. (which was the joint judgment of the Lord Justice himself and of Lindley and Bowen, L JJ.) in the case of *Ex parte Official Receiver; Re Moyritt* (56 L. T. Rep. 42; 18 Q B Div. 222) in this passage: "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment, and after notice to the pledgor, although the pledgor may redeem at any moment up to sale."

As I have before said, it was admitted by counsel for the Crown that in this case there was default by the pledgors, and that notice had been given by the pledgees before they entered into the contracts for sale. In short, it was admitted that the pledgees were entitled to exercise their power of sale. I think that the phrase in Cotton, L J.'s judgment that the pledgor may redeem "at any moment up to sale" means at any moment up to the time of the exercise by the pledgee of his power of sale by entering into a valid contract for sale.

The right of the enemy pledgors to redeem had therefore been lost to them, and accordingly they ceased to be in any sense the owners of the pledged goods when the bank contracted to sell, apart entirely from any question which might exist as between the sellers (the pledgees) and their purchasers, of whether, according to the law of the sale of goods, the property remained in the sellers or had passed to the purchasers.

In the view that I take of the case it is unnecessary to deal with the facts relating to the orders to the warehousemen to hold the goods for the purchasers.

I hold that when the contracts for sale of the 14th and 22nd Oct. 1914 were made the enemy pledgors had ceased to be the owners of the goods which were subsequently seized. These goods were therefore not subject to seizure as enemy goods.

The bank and the purchasers from them make common cause, and the bank assent to the claim of their purchasers.

I decree accordingly that the goods in question be released to the claimants, Messrs. Thornett and Fehr.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Crosley* and *Burn.*

Thursday, March 23, 1916.

(Before Sir S. T. EVANS, President.)

THE SCHLESIEN.

(Claim of ALOIS SCHWEIGER AND CO.). (*a*)

Prize Court—Austrian goods on German ship—Seizure of ship after declaration of war with Germany, but before declaration of war with Austria — Continuous seizure — Writ issued against goods before outbreak of war—Writ issued after outbreak of war—Crown in possession of goods—Jurisdiction of court—Hague Conference 1907*—Convention VI., arts.* 1, 2, 3, 4.

After the outbreak of war between Great Britain and Germany, a German ship, laden with a cargo which was the property of Austrian

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

subjects, was captured on the high seas and brought into a British port. A writ was issued against the cargo on the day before hostilities broke out between Great Britain and Austria. Subsequently, after the outbreak of war between the last-named countries, a second writ was issued, the cargo being all the time in the custody of the Crown authorities. Later on, before the case was heard, the goods were sold and the proceeds paid into court.

Held, that the goods or their proceeds were liable to condemnation as enemy property, as Germany had refused to accede to the protective articles of the Sixth Hague Convention.

THIS was a case in which the Crown claimed the condemnation of the cargo of the steamship *Schlesien*. The vessel was a German one, belonging to the port of Bremen, and she sailed from Bangkok before the outbreak of war with a cargo which consisted of white gum, rubber, and gamboge. The *Schlesien* was the property of the Norddeutscher Lloyd Steamship Company, a German company, and the cargo was shipped by the branch house at Bangkok of Messrs. Alois Schweiger and Co. Limited, a company incorporated in Vienna. Counsel for the claimants appeared on behalf of Mr Kempton, the manager of the Manchester branch of the Austrian company, and the claim was made by the branch at Bangkok as shippers of the goods to the Manchester branch. The *Schlesien* was captured in the Bay of Biscay on the 7th Aug. 1914, three days after the outbreak of war between Great Britain and Germany. She was brought into Plymouth. Proceedings were taken against the vessel, and both the ship and her submarine signalling apparatus were condemned as prize on the 30th Nov. 1914 (13 Asp. Mar. Law Cas. 26; 112 L. T. Rep. 353).

The writ against the cargo on board the *Schlesien* was issued on the 11th Aug. 1914. This was the day before the outbreak of hostilities between Great Britain and Austria. Unlivery began on the 15th Aug. 1914. An appearance to the writ was entered on the 21st Aug. 1914. Some doubt having arisen as to the regularity of the procedure, a new writ was issued on the 7th Dec. 1914, in which the Crown claimed the goods, alleging continuous seizure, and asked for a decree "that the said goods, which on and after the outbreak of war between Great Britain and Austria-Hungary were and remained in the custody and possession of His Majesty's Officer of Customs at Plymouth as prize of war and as droits of Admiralty, belonged on the outbreak of war as aforesaid and afterwards to enemies of the Crown."

By the consent of all parties the goods were sold during the year 1915 and the proceeds of the sale were in court.

By Convention VI. of the Hague Conference 1907 it is provided:

Art. 1. When a merchant ship of one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a sufficient time of grace, and to proceed direct, after being furnished with a passport, to its port of destination or such other port as shall be named for it. The same applies in the case of a ship which left its last port of departure before the commencement of the war and enters an enemy port in ignorance of the hostilities.

Art. 2. A merchant ship which, owing to circumstances of *force majeure*, may have been unable to leave the enemy port during the period contemplated in the preceding article, or which may not have been allowed to leave, may not be confiscated. The belligerent may only detain it, under an obligation of restoring it after the war, without indemnity, or he may requisition it on condition of paying an indemnity.

Art. 3. Enemy merchant ships which left the last port of departure before the commencement of the war and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation, or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers. After touching at a port in their own country, or at a neutral port, such ships are subject to the laws and customs of naval war.

Art. 4. Enemy cargo on board the vessels referred to in arts. 1 and 2 is likewise liable to be detained and restored after the war without indemnity, or to be requisitioned on payment of indemnity, with the ship or separately. The same applies in the case of cargo on board the vessels referred to in art. 3.

Maurice Hill, K.C. and *Balloch* for the Procurator-General. — The Crown was entitled to an order of condemnation of the goods, or rather of their proceeds. The vessel and its cargo were seized and brought into Plymouth on the 7th Aug. 1914, after the outbreak of war with Germany, and they lay at Plymouth until the 15th Aug 1914. This was three days after hostilities commenced between Great Britain and Austria-Hungary. The goods remained in the custody of the Customs during the whole of the time, and they were enemy property within the jurisdiction of the Prize Court. This point had been decided in the case of *The Roumanian* (13 Asp. Mar. Law Cas. 8; 112 L. T. Rep. 464; (1915) P. 26; affirmed, 13 Asp. Mar. Law Cas. 208; 114 L. T. Rep. 3; (1916) 1 A. C. 124). This was a case of continuous seizure. As Germany had refused to accede to the terms of arts. 3 and 4 of the Sixth Hague Convention, the rules laid down there as to mere detention as opposed to condemnation as prize did not apply. There was a presumption as to identification of ship and cargo. The vessel was German and not protected. The same applied to the cargo, although the owners were Austrians, who were not actually enemies at the date of the seizure.

Latter for the claimants.—No point in connection with that Convention was raised in the present case. But the seizure was wrongful in the first instance. The goods were the property of neutrals on the 7th Aug. 1914, and so they were also at the date of the issue of the writ—namely, the 11th Aug. 1914. The wrongful seizure could not be cured by the issue of a second writ. The suggestion that the character of the goods was decided by the enemy character of the ship could not be upheld.

Maurice Hill in reply.

THE PRESIDENT.—In this case the court is now dealing with three consignments on board the steamship *Schlesien*—white gum, rubber, and yellow gamboge. All the goods have been sold in the course of the prize proceedings, and they are

now represented by the proceeds which have been paid into court as the result of those sales. It is admitted that the cargo belonged to Austrian subjects, and in that sense it was enemy property.

Certain curious points arise in the case. The cargo in question was laden on board an enemy ship, and the ship was in fact condemned in this court as a German ship. She was encountered on the high seas on the 7th Aug. 1914, and brought into a British port. This was three days after the outbreak of hostilities between Great Britain and Germany, but before a state of war existed between this country and Austria Whether the ship when encountered on the high seas was or was not ignorant of the outbreak of war I do not know. But in any event that does not matter, because, however binding the Hague Convention may be in general, as I have assumed it to be in so many cases, Germany cannot claim any privilege under art. 3 of the Convention, as that is one of the articles in respect of which Germany made a reservation. She also made a reservation as to the privileges which would have been accorded to the cargo on a vessel to which art. 3 applied by the second part of art. 4.

Two points have been raised by counsel on behalf of the claimants to these goods. The first is that there was no seizure of their property after the seizure of the 7th Aug 1914, and that that was not a proper seizure, because on that date the goods were not enemy property, but the property of neutrals on board an enemy ship, and as such should have been protected The goods were brought into a British port, Plymouth, and the writ was originally issued on the 11th Aug. 1914 When the case came before me in the first instance, it was pointed out that at the time of seizure war had not broken out between Great Britain and Austria-Hungary, and consequently the case was adjourned in order that a new writ might be issued. The new writ was issued. But all this time the goods were under the control of the Crown, and whatever might have been said before the 12th Aug. 1914, on which date war was declared between this country and Austria, as to an improper seizure of the goods, that point has not been raised, and, under the circumstances, I cannot come to any other conclusion than that the goods were seized and were intended to be held by the authorities on behalf of the Crown after the 12th Aug. 1914, when war broke out between Great Britain and Austria-Hungary. If that is so, then, according to the decision in the case of *The Roumanian* (*ubi sup.*), these goods, although still on board the vessel in port, were goods subject to seizure and must be regarded as enemy property. The goods have been sold by consent, but what applies to the goods applies equally to the proceeds of the sale.

Counsel for the claimants has practically abandoned any claim under the Hague Convention, and, for reasons which I have stated on various occasions, I do not think that the articles of the Convention apply at all in the present case.

The judgment of the court, therefore, is that the proceeds of these goods, seeing that the goods have been sold, must be considered as good and lawful prize.

Solicitors: for the Procurator-General, *Treasury Solicitor*; for the claimants, *Burk Mellor*, and *Norris*, for *Slater, Heelis*, and *Co.*, Manchester.

May 5, 9, *June* 20, *and July* 31, 1916.

(Before Sir S. T. EVANS, President.)

THE PALM BRANCH. (*a*)

Prize Court—Cargo—Neutral goods—War risks—Insurance—Seizure of goods before outbreak of hostilities—Transfer of property in goods to enemy—Payment of insurance by enemy underwriters—Condemnation.

A certain cargo was shipped in a British vessel before the war from a neutral country by a neutral firm to their own order, and under an option the same was to be delivered to a German firm at a German port, and this German firm were to act as the shippers' agents for sale. The goods were insured against war risks by enemy underwriters. At the time of the seizure the property in the goods was still in the shippers. The shippers' German agents claimed against the underwriters for a total loss, which claim was paid in full, and the underwriters became the owners of the goods, there thus being a transfer of ownership from neutrals to enemies. The cargo was sold and the proceeds paid into court. In a suit for the condemnation of the cargo or its proceeds as prize and droits of Admiralty, the shippers put in a claim, doing so at the instigation of the German underwriters, that the cargo was at the time of seizure and still remained their property.

Held, that the cargo was enemy property and must be condemned.

THIS was a case in which the Crown asked for the condemnation of the proceeds of 4000 bags of cocoa, part of the cargo of the British steamship *Palm Branch*.

Prior to the outbreak of hostilities between Great Britain and Germany—namely, the 4th Aug. 1914—the British steamship *Palm Branch* sailed from Guayaquil, in Ecuador, South America, with a cargo of cocoa, 4000 bags, which was shipped by the Associacion de Agricultores del Ecuador. The cocoa was consigned to the order of the shippers, at Hamburg, and under an option the cocoa was to be delivered at Hamburg to a German firm, as agents for sale of the shippers. On the 3rd Aug. 1914 the *Palm Branch* arrived at Liverpool, and on the 18th Sept. 1914 the cocoa was seized as prize. It was subsequently sold, and the proceeds were paid into court. After the seizure the German firm claimed against the German underwriters at Hamburg, who paid the claim in full. More than a year later a claim to the proceeds of the sale of the cocoa was put in by the Associacion de Agricultores del Ecuador under circumstances which are fully set out in the judgment.

The *Solicitor-General* (Sir George Cave, K.C.) and *Hull*, for the Procurator-General.

MacKinnon, K.C. and *Dunlop* for the claimants.

The following authorities were referred to:

The Ariel, 11 Moo. P. C. 119;
Simpson v. *Thomson*, 3 Asp. Mar Law Cas. 567; 38 L. T. Rep. 1; 3 App. Cas. 279;
The Crystal, 7 Asp. Mar. Law Cas. 513; 71 L. T. Rep 346; (1894) A. C. 508;
The Red Sea, 8 Asp. Mar. Law Cas. 102; 73 L. T. Rep. 462; (1896) P. 20;

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law

King v. *Victoria Insurance Company*, 74 L. T. Rep. 206; (1896) A. C. 250;
Ruys v. *Royal Exchange Assurance Corporation*, 8 Asp. Mar. Law Cas. 294; 77 L. T. Rep. 28; (1897) 2 Q. B. 135;
The Commonwealth, 10 Asp. Mar. Law Cas. 538; 97 L. T. Rep. 625; (1907) P. 216;
The Miramichi, 3 Asp. Mar. Law Cas. 21; 112 L. T. Rep 349; (1915) P. 71;
The Odessa, 13 Asp. Mar. Law Cas. 27; 112 L. T. Rep. 473; (1915) P. 52; 13 Asp Mar Law Cas. 215; 114 L. T Rep. 10; (1916) 1 A. C. 145;
Polurrian Steamship Company v. *Young*, 13 Asp. Mar. Law Cas. 52; 112 L. T. Rep. 1053; (1915) 1 K. B. 922;
The Schlesien, *ante*, p. 555; (1916) P. 225;
Arnould's Marine Insurance, 9th edit., sects. 1187, 1213.

The following sections of the Marine Insurance Act 1906 (6 Edw. 7, c. 41) were also referred to in the course of the arguments:

Sect. 63 (1). Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto. (2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Sect. 79 (1). Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of the subject-matter as from the time of the casualty causing the loss. (2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all the rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to the Act, by such payment for the loss.

Sect. 81. Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

The facts and the arguments are sufficiently set out in the judgment.

Cur. adv. vult.

July 31.—The PRESIDENT.—A novel point has arisen with regard to this claim by reason of a change of ownership of the goods seized between the dates of the seizure and the claim.

The goods seized were 4000 bags of cocoa laden on the *Palm Branch*, which is a British vessel and were shipped before the war. They were consigned by the shippers, the Associacion de Agricultores del Ecuador, to their own order, and under an option they were to be delivered at Hamburg to a German firm, Messrs. Schlubach, Thiemer, and Co., as agents for sale of the shippers. They were invoiced at 18,676*l*., with a deduction of 1143*l*. for freight. After the goods were seized they were sold under an order of this court, and realised 20,285*l*. gross. The claim, as it stands at present, is for the release of the proceeds of sale. The goods were insured against war risks by German underwriters of Hamburg. At the time of the seizure the property in the goods had not passed from the neutral shippers. After the seizure Messrs. Schlubach, Thiemer, and Co., the shippers' agents in Germany, made a claim against the Hamburg underwriters for a total loss. The underwriters paid the claim in full. Messrs. Schlubach, Thiemer, and Co. received it for the claimants and, according to an affidavit filed by one of the partners, Mr. Schlubach, dealt with it in account. It was admitted that thereupon the German underwriters became owners of the goods.

The claim in these proceedings was not made until nearly a year after the seizure. The position is not in dispute. It is that at the time of the seizure the property in the goods was in the neutral shippers, and at the time of the claim in the German underwriters. The question is what, in view of this position, the judgment of this court should be. For some time the shippers were disposed to put forward a claim to the goods upon the assumption that the property remained in them. Messrs. Schlubach, Thiemer, and Co., however, protested against that attitude, and practically said to the shippers "hands off," on the ground that the goods belonged to the underwriters. In accordance with their view of the matter, and pursuant to the request of the underwriters, the bills of lading were indorsed successively to Messrs. de Waal, Duyvis, and Co., Messrs. Wambersie and Co., Messrs. Kruthoffer and Doll, and generally.

Explanations of these indorsements have been put forward. They are not satisfactory. What is plain is that they were intended to found or to support a claim by or on behalf of the underwriters. Mr. Schlubach, in his affidavit already referred to, deposed that his firm were requested by the underwriters to forward the bills of lading and all the documents relating to the goods in question to Messrs. Kruthoffer and Doll, of Rotterdam, in order that they might claim the goods from the British authorities.

For this purpose Messrs. Kruthoffer and Doll engaged the services of the firm of Messrs. Wendt and Co., of London. This firm for some time were under the impression—and naturally under the impression—that Messrs. Kruthoffer and Doll, being a Dutch firm, were the neutral receivers of the goods. It is clear that Messrs. Kruthoffer and Doll so claimed the goods. Ultimately Messrs. Wendt and Co. knew that Messrs. Kruthoffer and Doll were not genuinely the receivers, but were only acting for the German underwriters to try and secure the goods for them. The underwriters had not only become in law the owners of the goods upon payment of the total loss claim, but they asserted their position, and assumed and asserted dominion over them.

When the case first came before me a long correspondence was given in evidence which, however, did not go beyond the 10th May 1915. In order to ascertain how the claim came to be made ultimately on behalf of the Associacion de Agricultores del Ecuador in Oct 1915, and in order to find out who the real claimants were, I adjourned the hearing and directed that all the communications between the German and the Dutch firms, and the Associacion de Agricultores

del Ecuador and their representatives, and Messrs. Wendt and Co., should be placed before the court. The complete correspondence is voluminous. It would be a waste of time to refer to it in detail. It speaks for itself. Messrs. Schlubach, Thiemer, and Co. protested against any claim or interference by the shippers on the ground that they had agreed to abstain from so acting, and that the goods had become the property of the underwriters, and that the latter had the sole right to claim the proceeds of the sale of the goods, including the excess of their insured value. Messrs. Wendt and Co. were not acting for the shippers. Messrs. Schlubach, Thiemer, and Co., however, insisted so far as they could upon the shippers' London representatives co-operating with Messrs. Wendt and Co. to protect the interests of the German underwriters before the Prize Court in order that the proceeds of the sale of the cocoa might be refunded to them.

The shippers, after having received from Messrs. Schlubach, Thiemer, and Co. account sales for the amount paid for the total loss by the underwriters, instructed their representatives not to make any claim to the goods or to their proceeds, or to do anything further in the matter. They appreciated the situation perfectly, as is seen by their letter to their representative on the 20th March 1915, in which they say:

The underwriters when paying Schlubach and receiving from him the bills of lading in order to make themselves the owners of the cocoa no doubt thought that they would completely avoid their loss and even do a good stroke of business with the present high price of cocoa, and therefore they no doubt commenced to take steps in order to recover it.

The cocoa was sold above the invoice price in this country, and would have fetched a much higher price still if it had been sold in the German markets.

The correspondence disclosed after the adjournment shows that Messrs. Schlubach, Thiemer, and Co., by threats and otherwise, continued to insist upon the neutral shippers at Ecuador either making a claim in their own name or allowing a claim to be made in their name by the German underwriters. In a letter of the 26th April 1915 Messrs. Schlubach, Thiemer, and Co. write to the Asociacion de Agricultores del Ecuador as follows:

We will inform the underwriters of your communications and we hope that we shall be able to convince them that you, in intervening in this matter, have acted with the best intention of protecting, not merely your own interests, but also those of the underwriters. But the charge which they may make against you is that your representatives in London have refused to take legal steps in conjunction with Messrs. Wendt and Co. in order to obtain from the English Government the delivery of the proceeds of sale of the cocoa. Those steps with the hope of good success of course can only be taken by you because you can rely on your character and your rights as neutrals, whereas for the underwriters it is very difficult or impossible to litigate with a probability of winning their case. For these reasons the judicial steps must be taken in your name, but it is obvious that all expenses will be for the account of the underwriters, which according to what they tell us Messrs. Wendt and Co. will without doubt have mentioned and confirmed to Messrs. Stagg and Nevares. For these reasons these gentlemen ought not to have refused to give their co-operation to Messrs. Wendt and Co., and in order to avoid difficulties we have thought fit to write your said agents through our agent in Copenhagen a letter of which we inclose a copy, in which, of course, so that it may reach its destination, we have had to suppress the name of our firm. We trust that in this way Mr. Stagg will receive it and will understand what its contents treat of and that he will place himself in communication with Messrs. Wendt and Co.

In a long letter of the 17th May 1915 in reply the Asociacion de Agricultores del Ecuador says:

In this way we fulfilled your instructions and the matter of the *Palm Branch* was definitely finished for us. As this cocoa is confiscated by the English authorities, which cocoa we had insured against war risks, the value paid to you by the insurance legitimately belongs to us without our having anything to do with the result of the claim for the return of the cocoa. [And:] Our opinion is that the underwriters ought to resign themselves to lose the insured value which they have paid, for it was for that reason that the premium was paid to them. They can take their steps in order to recover the cocoa, if it is possible for them to do so, but they must not make us forcibly intervene for that purpose, and still less with the threat of serious consequences, no doubt to us, without any reason or ground whatsoever.

The Asociacion de Agricultores del Ecuador again on the 31st May 1915 write fully to Messrs. Schlubach, Thiemer, and Co. Although it takes a little longer, it is better to set out the material part of the letter than to summarise it. They say:

As you recognise in your letter of the 26th April, we acted in this matter with the best intentions of protecting not merely our own interests, but also those of the underwriters, and we had no doubt for a single moment about taking up that attitude in order to recover from the English authorities the cocoa per *Palm Branch* or its value, because we understood that it was not the agents of the German underwriters who could obtain from the British authorities even a single penny for the payment of the said cocoa. However, that attitude on our part received the strong censure of the underwriters, which you transmitted to us in your turn, impugning our steps, and the underwriters, with an intervention which from the outset we qualified most certainly as inopportune, alleged that they could obtain more than we could, and then had to recognise that we, owing to our capacity as neutrals, are the only ones in this case capable of realising the claim with success. As a matter of fact, that was what we thought from the beginning, but what we so thought was impugned, and direct intervention took place on the part of the underwriters, with the result that our first well-directed measures were cancelled, because no doubt the intervention of the agents of the underwriters caused the English authorities to presume, to say the least, that it was a question of the protection of German interests. We therefore were willing to protect the interests of the underwriters, taking all possible steps, and in acting thus we fulfilled the obligations, namely, according to what you state, that we had to avoid by our intervention any possible prejudice to the underwriters, but we would not agree to that, because we are certain that no law can impose such an obligation on us, namely, to enter into litigation with the English authorities in protection of interests which we are almost certain those authorities know are German interests, because by so doing our agent exposes himself, and even we expose ourselves, to who knows what serious consequences, having regard to the present circumstances due to the present war. You yourselves say that the only thing which the underwriters complain of is that we did not

commence legal proceedings, but we do not think for a single moment that one could demand from us that we should take such proceedings, because they are com pletely outside our sphere of action, and they can, as stated above, expose us to consequences which we ought not to suffer.

They stated their attitude briefly in a letter of the 21st June written to their London representative:

As the cocoa was ours before the underwriters paid Schlubach for it, we did right in claiming it on the basis that it was the property of neutrals; but if we have been paid for it by the underwriters, and it is already their property, how can we come forward and claim it as our property?

Their representative had an interview with Mr. Wendt, the head of the firm of Messrs. Wendt and Co., on the 30th June, which he reported to his principals as follows:

He did not know, or he feigned that he did not know, that the underwriters had paid the insured value to the consignees, and asked me what object they would have had in making that payment. Although they must presume it, I told him that it was evidently for the purpose of speculating on the cocoa, which was insured for its cost price, very low, while the prices had risen to almost double by reason of the war. That made a great impression on him. We did not go into this shipment any further.

On the 28th Aug. the Associacion de Agricultores del Ecuador wrote to Messrs. Schlubach, Thiemer, and Co.:

We think that in England we shall not be deemed to be the owners of that cocoa in consequence of the various indorsements stamped on the corresponding bills of lading, and still less if the British authorities come to suspect that that cocoa has been paid for by the German underwriters, or even that it was insured by German companies. The English would certainly pay for the cocoa if there were no intervention of German interests in this matter; but if they know that the payment for it, even though it is not in order to benefit German interests, serves to avoid prejudice to German interests, they will abstain from making such payment in their desire that the said prejudice should take place.

Messrs. Wendt and Co., in Sept. 1915, for some reason not stated, changed their name to Messrs. W. K. Webster and Co., in which guise they appear after that date. They displayed under both appellations a zeal and energy for the German underwriters which may deserve and possibly obtain praise and recognition from them. Knowing the real claimants, they pressed for a power of attorney from the neutral shippers to make a claim to the goods in this court.

Meantime Messrs. Wendt and Co. (then Messrs. W. K Webster and Co.) caused an appearance to be entered for the Associacion de Agricultores del Ecuador on the 6th Oct. They also caused a claim to be filed on the 29th Oct. 1915 on the ground that "the goods were and are the property of the claimants, who are neutrals."

A couple of months afterwards they received an authority, prepared by themselves, signed by the Associacion de Agricultores del Ecuador at Guayaquil on the 26th Nov. 1915, to instruct solicitors to appear and to claim the goods or the proceeds thereof, or such part thereof as such solicitors should consider that they were entitled to claim.

The method and the object with which this was obtained have been sufficiently indicated. The underwriters were to pay the costs of the proceedings. Before this authority was received or even signed, Messrs. Wendt and Co. had been advised by counsel that after the seizure of the goods the property had passed to enemy underwriters. The claim is undoubtedly made on behalf of these underwriters, and if the proceeds were released to the claimants it was admitted that they would receive them as trustees for the Germans, and would have to pay them over accordingly.

What, in the circumstances, is the order which the court should make?

It was contended that the court should only inquire into the real tangible ownership at the time of seizure without regard to any contractual obligations or complications on the principles in *The Miramichi* (*ubi sup.*) and *The Odessa* (*ubi sup.*). I adhere to the views which I expressed in those cases. But I apprehend that the question now raised is a different one. The absolute ownership of enemy traders at the time of claim and the hearing is as clear as that of the neutral consignors at the time of seizure. When, at the time of the claim and now, the goods were and are the property of enemy owners, who are the claimants in reality—although not in name—should the court order the release of the goods to the nominal claimants admittedly for the benefit of the enemy owners?

There does not appear to be any reported decision governing the case. But the practice and forms of the Prize Court for a lengthened period aid to a decision consonant with recognised principles and sound sense. In the "Formulare Instrumentorum" of Sir James Marriott, a judge of the Courts of Admiralty in Prize and Instance (published as "perused and approved as correct" by that learned judge in 1802) will be found an order of the Prize Court, dated the 29th April 1779. It is as follows:

Ordered that in every affidavit to be offered by any neutral claimant in further proof of his property, the claimant shall make oath that the several goods claimed did belong to the claimant at the time of lading, and at the time of the capture, and do belong at the present time, and would have so belonged in case that the said goods had not been seized and taken, and will belong to the claimant in case the same shall be restored and arrive, and be unladen at the original and true port of destination, until the said goods shall be sold or disposed of for the sole account and benefit of the said claimant. And that neither the King of France, nor his vassals and subjects, nor any persons inhabiting within his territories or dominions, nor any inhabitants of the British American Colonies in rebellion, nor their factors or agents, nor any person whosoever, other than the said claimant, have, hath, or had any right, title, or interest in the said goods at the said several periods of time, nor will have until sold or disposed of in manner and for the real account of the claimant as aforesaid.—JAMES MARRIOTT.

So in the form of an attestation in support of a claim for a ship, there is an oath that "no enemies of the Crown of Great Britain had at the time of capture, or now have, directly or indirectly, any right, title, or interest in the ship, her tackle, apparel, or furniture, or in any part thereof": (see the Formulare, pp. 209, 211; also the usual form of claim as made in *The Fortuna*, 2 Ch. Rob. 170, and App. V. to that volume).

In the Standing Interrogatories in force at the end of the eighteenth century is the following:

XII. Interrogate. What are the names of the respective laders or owners, or consignees, of the said goods? What countrymen are they? Where do they now live and carry on their business or trade? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk, or benefit? Have any of the said consignees or laders any and what interest in the said goods? If yea, whereon do you found your belief that they have such interest? Can you take upon yourself to swear that you believe, that at the time of the lading the cargo, and at the present time, and also if the said goods shall be restored and unladen at the destined parts, the goods did, do, and will belong to the same persons, and to none others?

And also in Interrogatory XXX. as to the ship is contained this question:

Do you verily believe that, if the ship should be restored, she will belong to the persons now asserted to be the owners, and to none others?

In the letter of Sir William Scott and Sir John Nicholl (dated the 10th Sept. 1794) to Mr. Jay, United States Minister to England (afterwards Chief Justice Jay), in describing the steps to be taken in prize proceedings by claimants, they say:

The master, correspondent, or consul applies to a proctor, who prepares a claim, supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest in them.

This was reproduced in Story's Notes on the Practice (Pratt's Story, p. 7).

This practice was adopted in the United States of America. In the schooner *Adeline* (9 Cranch, 244) it was said by the Supreme Court that:

The test affidavit should state that the property, at the time of shipment, and also at the time of capture, did belong and will, if restored, belong to the claimant.

The forms of claim and affidavit in support were the same at the time of the Crimean War. The form of affidavit will be found in a note to the *Panaja Drapaniotisa* (Roscoe's English Prize Cases, vol. 2, 560; Spinks, 337). I extract from the affidavit the following paragraph:

And the appearer further made oath that he verily believes that neither the Emperor of All the Russias, nor any of his subjects or others inhabiting within any of his countries, territories, or dominions, their factors or agents, nor any other enemies of the Crown of Great Britain and Ireland, had, at the time of the seizure thereof, or now have, directly or indirectly, any right, title, or interest in or to the said ship or freight, but that the same were at the time of the seizure thereof, and still are, and when restored will still be, the property of the claimants only, being neutral subjects.

The forms of standing interrogatory, to which I have already referred, were maintained until the reign of the present King of Great Britain and Ireland. In the forms of the existing Rules of the Prize Court, if an order for release of captured goods is made, they are expressed to be released to the claimants for the use of the owners thereof. If in the present case the cargo of cocoa or its proceeds were ordered to be released to the claimants without qualification the release would in fact be to the trustees for enemy merchants. And if the release was made to the claimants for the use of the owners of the goods, it would be for the use of enemy merchants likewise.

I may add that this is not a claim for damages or compensation for wrongful seizure or detention. It is a claim to the goods themselves. The hands of the captors have remained on the goods and their proceeds from the time when the underwriters obtained and claimed the ownership. No fresh act of seizure was necessary. It was suggested in the course of the argument that my judgment in the case of *The Gothland* (unreported), on the 3rd April 1916, supported the contention of the claimants. That was a wholly different case. The insurance company in that case, when they paid the claim for total loss, had full knowledge of the seizure of the goods as enemy property, and any rights of ownership which passed to them were subject to the rights already acquired by the captors by the seizure.

In the case now before me my conclusions of fact are:—

(1) That the real claimants are the German underwriters, and not the neutral shippers.

(2) That the owners of the goods at the time of the claim were and now are the German underwriters.

(3) That if by the order of this court the goods or the proceeds were released to the nominal claimants, the claimants would hold the goods or the proceeds thereof as trustees of and for the benefit of the German underwriters.

Upon these facts my judgment is that the claim is disallowed, and that the proceeds of the goods now in court must, as enemy property, be condemned to the Crown as good and lawful prize in the Crown's rights to the droits and perquisites of Admiralty.

The claimants have put forward the claim at the request and on behalf of the German underwriters on the terms that the latter should bear the costs. I therefore order that the claim be disallowed with costs against the claimants.

There will be leave to appeal within one month upon payment of 300*l.* as security for costs.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Stokes* and *Stokes.*

July 26 *and* 28, 1916.

(Before Sir S. T. EVANS, President.)

THE ST. TUDNO (*a*)

Prize Court—British ship—Registration—Real ownership — Enemy corporation — Control of British company by enemy corporation—Seizure of ship as prize—Seizure in British port—Condemnation or detention—Merchant Shipping Act 1894 (57 *&* 58 *Vict., c.* 60), *s* 1.

In ascertaining whether a vessel is or is not enemy property, the Prize Court must consider the whole of the circumstances connected with its registration, management, and employment. If, therefore, a vessel flying the British flag is registered in the name of a British company, which company is bound to an alien enemy corporation in such a manner as to show that the

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

ownership of the British company is simply nominal, whilst that of the enemy corporation is real, the vessel will be treated as enemy property, and either condemned or ordered to be detained in the same manner as any other enemy vessel.

The T. *was a steamship, registered as a British ship, and nominally owned by a British company; but in reality the British company was under an agreement entirely controlled by a German corporation, which appointed the directors and found their qualification shares, owned the entire share capital of the company in the person of its nominees, gave all instructions as to the working of the company, and received the whole of the profits earned by the vessel. For some time after the outbreak of war the vessel was used by the Admiralty, but was eventually seized as prize at Southampton.*

Held, that under the whole circumstances of the case, the T. *was really owned by the German corporation, and not by the British company in whose name she was registered, and must therefore be held to be a German vessel; but that, as she was in port at Southampton at the outbreak of war, the order to be made against her was one of detention, under the Sixth Convention of the Hague Conference* 1907, *and not of condemnation.*

THIS was a suit in which the Crown claimed the condemnation as prize of the *St. Tudno*, on the ground that at the time of capture and seizure she belonged to the enemies of the Crown, or, alternatively, to a company controlled by enemies of the Crown.

The *St. Tudno* was a steel paddle steamer of 754 tons register, and was built at Glasgow in 1891. She was originally the property of the Liverpool and North Wales Steamship Company Limited, but on the 17th Sept. 1912 she was purchased by a Mr. Tamplin from the original owners on behalf of the Hamburg-Amerika Linie for 19,500*l.* Acting further on the instructions of the Hamburg Amerika Linie, Mr Tamplin transferred the *St. Tudno* to the MacIver Steamship Company Limited by a bill of sale, dated the 1st Oct. 1912. The bill of sale was duly registered. At the same time an agreement was entered into between the Hamburg Amerika Linie and the MacIver Steamship Company Limited, by which the former obtained complete control over the latter, and in accordance with the terms of which all dividends earned in connection with the *St. Tudno* had to be accounted for to the German company. From Oct. 1912 until the outbreak of war in Aug. 1914 the vessel was used as a tender at Southampton to the ships of the Hamburg-Amerika Linie, to whom she was chartered at 330*l* a month. On the 21st Sept. 1914 the *St. Tudno* was requisitioned by the Admiralty, and from time to time payments were made, without prejudice, to the MacIver Steamship Company Limited in respect of the working expenses of the vessel. On the 24th Dec. 1915 the vessel was seized, and a writ was issued on the 3rd Jan. 1916 claiming the vessel as prize. The claim was resisted by the MacIver Steamship Company Limited.

In an affidavit filed by Mr. Robert Morrell Greenwood, of the Treasury Solicitor's office, it was stated that the number of shares taken up and held by existing members of the MacIver Steamship Company Limited on the 24th Dec. 1915, the date of the seizure of the *St. Tudno*, was 2500, and of these 2250 were held by the Direction der Disconto Gesellschaft, an enemy company. The position of the MacIver Steamship Company Limited, the nominal owners of the *St. Tudno*, was set out in the following letter, addressed by Messrs. Pritchard and Sons to the Director of Transports on the 8th Oct. 1914, which letter was made an exhibit to the affidavit:

We have been instructed by the MacIver Steamship Company Limited, and by Mr Tamplin, respectively the owners and registered manager of the *St. Tudno*, which has been requisitioned by the Government and is now being employed by the Admiralty in Southampton Water and the Solent, to lay before you the following facts as to the constitution of the MacIver Company and the ownership of the steamship *St. Tudno*.

The *St. Tudno* is owned by the MacIver Steamship Company Limited, an English company registered in England in accordance with the English Companies Act. The *St. Tudno* therefore is clearly a British ship and entitled to fly the British flag and to be registered, as she is registered, as a British ship. She is under charter to the Hamburg-Amerika Linie

The MacIver Steamship Company Limited, which was registered as far back as the 6th June 1891, found it impossible to raise sufficient money for the purposes of the company, and the company never before 1911 allotted more than seven shares, or, in fact, did any business. The memorandum of association was signed by seven signatories, who were all British, and who thereby became bound to take one share each in the company. These were the whole of the shares issued or applied for until 1911.

In 1911, four of the original subscribers being dead, there therefore remained only three shareholders holding one share each. The Hamburg-Amerika Linie, a German corporation, came forward and practically took over the company and reconstituted it; that is to say, they procured the alteration of the articles of association so as to bring them up to date, and they appointed and qualified the directors of the company, taking from them an agreement to conform to their instructions.

The directors included Count Friedrich von Wengersky, who was the representative in London of the Hamburg-Amerika Linie He automatically ceased to be a director on the war breaking out. Mr. Gutschow, a Russian subject, and the manager of the Direction der Disconto Gesellschaft, has resigned since the war commenced. The only three directors left are British. The Hamburg-Amerika Linie, also in the name of their nominees, acquired 2500 shares in the company, upon which they paid amounts ranging from 6*l.* to 10*l.*

The following list shows the present members of the company and the number of shares held by each. All the members are nominees of the Hamburg-Amerika Linie:—

Mr. George Adams, fifty shares.
Mr. Ludwig Alexander Gutschow, fifty shares.
Mr. Henry MacIver, fifty shares.
Mr. Thomas Ward Tamplin, fifty shares.
Count Friedrich von Wengersky, fifty shares.
Direction der Disconto Gesellschaft, 2250 shares.

We have advised the company and the directors that the MacIver Steamship Company Limited, being an English corporation, the domicil of the company is English irrespectively of the nationality or residence of its members, that the shareholders have no interest in the company's property, that the title to the property is in the company and not in its members, that the business which is carried on by the directors is the business of the company and not of the members of the company, that the company may hold property although all its members are aliens and disqualified from doing so, that all profits that are made are the profits of the company and not the profits of the individual shareholders, that

the individual shareholders have no interest in the real or personal property of the company but merely a right to a share of the profits of the company when realised and divided amongst its members, that the directors are carrying on the business solely for the benefit of the company and not of its shareholders, and that there is no legal objection to the directors receiving from the Government the hire of the *St. Tudno*, provided the directors pay no dividends until the war is over.

The directors, however, are most anxious not to do anything whatever which might be considered either as unpatriotic or as a trading for the benefit of an enemy, or as infringing the Royal proclamation or their responsibilities as British subjects, and therefore before the question of the hire to be paid by the Government proceeds they are desirous of laying the full facts of the case before the Admiralty, and of asking whether, the facts being as we have stated them, there is any objection on the part of the Admiralty to proceed with the negotiations.

By sect. 1 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) it is provided (*inter alia*):

A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships), namely: (*a*) Natural-born British subjects; (*b*) Persons naturalised by or in pursuance of an Act of Parliament of the United Kingdom, or by or in pursuance of an Act or Ordinance of the proper legislative authority in a British possession; (*c*) Persons made denizens by letters of denization; and (*d*) Bodies corporate established under and subject to the laws of some part of Her Majesty's Dominions, and having their principal place of business in those dominions.

By the Hague Convention 1907, No. VI., it is provided (*inter alia*):

Art. 1. When a merchant ship belonging to one of the belligerent Powers is, at the commencement of hostilities, in an enemy port, it is desirable that it shall be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

Art. 2. A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

Attorney-General (Sir F. E Smith, K.C.) and *Ricketts* for the Procurator-General. — It was admitted that the *St. Tudno* was owned nominally by a British company, but the affidavits put in showed clearly that the British company was absolutely under the control of the Hamburg-Amerika Linie, and that the latter were the real owners. The directors of the British company were bound hand and foot by the agreement which was entered into at the time of the transfer of the vessel to the MacIver Steamship Company Limited. Therefore, in reality the *St. Tudno* belonged to an enemy corporation. It was the duty of the Prize Court in dealing with a ship flying the British flag to look beyond the nominal ownership of the vessel. The question as to what might happen in case of seizure if a vessel was owned by a British company composed entirely of enemy shareholders had been discussed, though not decided, by the Prize Court in the cases of *The Tommi* and *The Rothersand* (13 Asp. Mar. Law Cas. 5; 112 L. T. Rep. 257; (1914) P 251), and in the case of *The Poona* (112 L. T. Rep. 782). True, in the present case the directors and shareholders of the British company were not alien enemies, but as they had completely surrendered their rights to an enemy corporation they were in the same position as though they were enemies. And if that was so, the ship, though nominally owned by a British company, was really the property of alien enemies, and as such liable to condemnation. This proposition followed from the decision of the House of Lords in the case of *Daimler Co.* v. *Continental Tyre and Rubber Company (Great Britain) Limited* (114 L. T. Rep. 1049; (1916) 2 A. C. 307), which reversed the judgment of the Court of Appeal. The whole object of the Hamburg-Amerika Linie had been to evade the provisions of the Merchant Shipping Acts, which made it imperative that a ship flying the British flag should be owned by a British subject or subjects or by a British corporation. The *St. Tudno* was not really owned by a British corporation, but was the property of an enemy corporation, and as such should be dealt with in the same manner as the Court of Appeal had dealt with *The Polzeath* (1916) P. 241). They further referred to *The Vigilantia* (Roscoe's English Prize Cases, vol. 1, 31; 1 Ch. Rob. 1) and *The Roumanian* (112 L. T. Rep. 464; (1915) P. 26; 13 Asp. Mar. Law Cas. 8, 208; 114 L. T. Rep. 3; (1916) 1 A. C. 124).

Dunlop for the claimants.—In order to decide whether a vessel was or was not enemy property, it was necessary to apply two tests: (1) Under what flag did the vessel sail, and what did her papers say; and (2) in what employment was she engaged at the date of seizure? Nothing that took place prior to the outbreak of war was material. On the 24th Dec. 1915, when the *St. Tudno* was seized, the vessel was engaged in work for the British Admiralty, and any connection that might have existed between the British company in whose name she was registered and the Hamburg-Amerika Linie had long since come to an end. Indeed, there had been no intercourse whatever between the directors of the MacIver Steamship Company Limited and the Hamburg-Amerika Linie since the outbreak of war, and the only German director on the board had been struck off the register after hostilities had begun. The *St. Tudno* was clearly entitled to fly the British flag, and if the vessel had been captured by the Germans she would certainly have been condemned as a British vessel by a German Prize Court. It was urged against the claimants that the Hamburg-Amerika Linie would derive benefits after the war from the employment of the vessel during the war. That was not a sound reason for condemnation as enemy property: (see Lord Parker's judgment in *Daimler Company* v. *Continental Tyre and Rubber Company* (*Great Britain*) *Limited* (*ubi sup*). He cited

The Pedro, 175 U. S. 354;
The Venture, 11 Asp. Mar. Law Cas. 93; 99 L. T. Rep. 385; (1908) P. 218;
The Tommi and *The Rothersand* (*ubi sup.*).

In any case, if the court was of opinion that the *St. Tudno* was to be treated as a German vessel,

she should not be confiscated, but detained under Convention VI. of the Hague Conference 1907, in accordance with the order made in the case of *The Chile* (12 Asp. Mar. Law Cas. 598; 112 L. T. Rep. 248; (1914) P. 212), as she was in the British port of Southampton at the date of the outbreak of war.

Ricketts in reply.

The PRESIDENT.—In this case the Crown asks for the condemnation of a paddle steamer called the *St. Tudno*, which, up to the time of the outbreak of war between this country and Germany, was at all material times used as a tender in or about Southampton for the big liners of the Hamburg-Amerika Linie. The claim of the Crown is founded upon the contention that this steamer was enemy property, and that is the question which I have to determine.

The status of companies registered in this country but controlled, and, so far as the possession of shares is concerned, in that sense owned, by enemy persons, has been very much considered during recent months by the courts of this country, and, finally, by the House of Lords in the case of *Daimler Company* v. *Continental Tyre and Rubber Company* (*Great Britain*) *Limited* (*ubi sup.*). The question which arose in that case was not precisely the same as the question which arises here. The question there mainly was whether the position of the company was such as to give it an enemy character, whether that was a prohibition against anybody in this country doing anything for it or entering into any commercial intercourse with it, or in any way trading with it against the provisions of the Trading with the Enemy Act, and the proclamations made thereunder. But nevertheless much light is thrown upon the position and status of companies of that description by the discussion and the judgments in the case to which I have referred.

The *St. Tudno* belonged nominally to a British company registered in this country, the MacIver Steamship Company Limited In my opinion in this court I am entitled, and I think I am bound, to look at something beyond the nominal ownership. The British company had three British directors and some British shareholders, but the documents which are now before me show clearly what is the position of these directors as directors, and what is the position of these gentlemen as shareholders. By an agreement of the 24th Oct. 1911, which has been put in, nothing can be clearer than this, that the whole control and domination over this ship were vested in and exercised not by anybody in this country at all, but by the Hamburg-Amerika Linie, which is well known to be the biggest shipping corporation in Hamburg. The directors were bound hand and foot by fetters of the most complete kind to do anything that they might be required to do at the direction of and by the instructions of the Hamburg-Amerika Linie. They were bound not only to act as directors in accordance with instructions received, but were bound to remove themselves from the position of directors if they had directions to that effect.

The first clause of the agreement says:

Each of the parties hereto of the first five parts in acting as such director will, in all matters which come before the board or a committee of directors of the company, follow the views and conform to the instructions of the Hamburg-Amerika Linie, as the same may be communicated to the said parties individually or to the board in writing under the hand of Director Thomann or other director of the Hamburg-Amerika Linie, or Dr. H pff, or verbally by Director Thomann or other director of the Hamburg-Amerika Linie, or Dr. Hopff, and will, upon the like request, resign his office as director.

For the purpose of qualifying as directors of the company they each acquired fifty shares. They did not pay one penny for these shares, and they were at once called upon to execute, and did execute, blank transfers of the shares. Another clause in this agreement provides clearly for that, and provides for what they were to do in case there was a declaration of a dividend on the shares. The clause to which I refer, namely, clause 2, says:

Each of the parties hereto of the first five parts will execute a blank transfer in the form hereto annexed of his qualification shares and deposit such transfer and the certificates of such shares with the Direction der Disconto Gesellschaft, London, and hereby irrevocably authorises the Hamburg-Amerika Linie to appoint at any time any person to apply to the Direction der Disconto Gesellschaft for the said certificates and transfers so deposited by him and to receive and give a receipt for the same, and fill up the blanks in the said transfers in such manner as the Hamburg-Amerika Linie shall direct, and to lodge the said transfers and certificates with the MacIver Steamship Company Limited for registration.

Clause 3 deals with the dividends. It reads thus:

Until the transfer of the said shares shall have been completed each party of the first five parts, his executors or administrators, shall stand possessed of the said shares in trust for the Hamburg-Amerika Linie, and shall from time to time execute all rights incident to the ownership of the said shares in such manner as the Hamburg-Amerika Linie shall from time to time direct by writing under the hand of the Director Thomann or other director of the Hamburg-Amerika Linie, or Dr. Hopff, and shall account to the Hamburg-Amerika Linie for all dividends and other sums receivable in respect of the said shares.

On one occasion a dividend of 8½ per cent. was declared and duly recorded in the minute book. Cheques were drawn in favour of the various directors representing dividends at that rate, and immediately the cheques were received by them, without even the formality of paying the same into their own banking accounts, they paid the cheques to the Direction der Disconto Gesellschaft to the credit of the Hamburg-Amerika Linie. Not a single person other than the Hamburg-Amerika Linie had the slightest pecuniary interest in this ship.

Now apart from all technicalities, could anybody say that this ship therefore belonged to a British company? If it does belong nominally to a British company it is under the covering of the very thinnest shell, and I intend to break through that shell in order to ascertain who are the real owners of the ship.

There can be no question about it that the real owners of the ship are the Hamburg-Amerika Linie, and the ship's earnings during the war—and it has earned up to now considerable sums—will have to be accounted for to that company. I do not mention that as determining the question, because it may be that sums may be acquired in

this country quite properly which have to be accounted for to citizens of Germany after the war. I merely point it out to show that the sole ownership of the ship and everything appertaining to it was and is in the Hamburg-Amerika Linie.

The ship was actually flying the British flag because she had been registered in the name of this British company. But another question might arise upon that in a different form of proceedings, and in some sense it arises in these proceedings, whether she was entitled to fly that flag. Under sect. 1 of the Merchant Shipping Act 1894 there is a provision that a ship shall not be deemed to be a British ship unless owned wholly by persons of the descriptions mentioned, including registered companies and bodies incorporated under and subject to the laws of some part of His Majesty's Dominions, and having their principal place of business in those dominions. Now, it is quite clear from what was said by the learned lords in the case of *Daimler Company* v. *Continental Tyre and Rubber Company (Great Britain) Limited* (*ubi sup.*) that the place of the registered office of the company does not determine the principal place of business. That phrase "principal place of business" was not very much discussed in the House of Lords, but an analogous phrase was discussed—namely, what was the real "residence" of the company, and upon that I would refer to two passages, one in the judgment of Lord Atkinson, another in the judgment of Lord Parker, speaking for himself and other learned Lords who agreed with him.

Lord Atkinson says: "Strange as it may appear, the minute book of the company, showing, presumably, from what centre the business of the company was managed and directed, was not given in evidence before any one of the three tribunals. The embarrassing, and, as I think, rather unfortunate result of this omission is that the full facts showing in what country, England or Germany, lay the real business centre from which the governing and directing minds of the company or its directors operated, regulating and controlling its important affairs, were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which for the purpose of income tax at all events, have been held to determine the place of residence of a company like the respondent company so far as such a fictitious legal entity can have a residence." There Lord Atkinson clearly shows that in his opinion the place or country where "lay the real business centre from which the governing and directing minds of the company or its directors operated, regulating and controlling its important affairs," was to be taken as the real test of residence.

Lord Parker in his judgment, when dealing with this question of residence, says: "I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance, and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts, and may invest it definitely with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company." Those words are so apt to the circumstances of this case that one would be almost inclined to think that Lord Parker had in his mind the facts either of this case or of a similar one when he said: "The character of those who can make or unmake those officers dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company." All these are matters in the present case which were controlled from Hamburg by the officers of the Hamburg-Amerika Linie. Accordingly, if the case had come before me on an application by proper officials for the forfeiture of this ship to the Crown, on the ground that she was not owned by a person qualified to own a British ship, because the principal place of business, where the whole direction of the business was carried out, was not in this country, I should have held in favour of the Crown and should have ordered the forfeiture of the vessel. That is only another way of saying that I have come to the conclusion in this case that the use of the name of the British company is a mere sham, and that to the very minutest particular there was no kind of beneficial interest in this ship residing in anyone except in the Hamburg-Amerika Linie, whose headquarters are, of course, at Hamburg.

The question, therefore, which I have to determine, namely, was this ship of enemy character, and was it enemy property at the time of the seizure, is one which I answer in the affirmative. I only want to say one other thing in deference to the argument put forward on behalf of the claimants. It is argued that you must look at what this ship was actually doing after the outbreak of war. The actual control, wrongfully or otherwise, was that exercised by the English directors. That is not what I have to determine. What I have to find out is what was the character of this vessel at the time of her seizure. Then it is urged that one ought also to have regard to the fact that the English directors actually chartered this ship to the Admiralty. That is perfectly true, and it is a peculiar circumstance that the ship was seized when she was actually employed by the Admiralty. That again is not material to the question I have to determine. Whatever view the Admiralty took—even if they knew all the facts—would not bind this court. Of course, they did not know all the facts. The agreement which is the all-important document here regulating the position of the English nominees with reference to their German masters was not known to the Admiralty.

The Crown are entitled to claim that this was an enemy ship I do not know whether such a case was contemplated—you cannot possibly have in contemplation every case which may arise—by the Hague Convention, but she was undoubtedly an enemy merchant vessel, according to my finding, in a British port, an enemy port within the meaning of the Convention after the war, and I think I should be wrong in saying that this ship should be condemned out and out. She must be treated as any other merchant ship in an enemy port at the outbreak of war, that is, she must be detained, and the proper order to make

is the order which was made in the case of the *Chile* (*ubi sup.*).

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Pritchard* and *Sons.*

Tuesday, Aug. 22, 1916.

(Before Sir S. T. EVANS, President.)

THE SYDNEY. (*a*)

Prize Court—Prize bounty—Enemy warship—Destruction—Number of crew—"On board"—Meaning of phrase—Amount of prize bounty to be divided—Naval Prize Act 1864 (27 & 28 *Vict., c.* 25), *s.* 42—*Order in Council the* 2*nd March* 1915.

By the combined effect of sect. 42 *of the Naval Prize Act* 1864 (27 & 28 *Vict., c.* 25) *and the Order in Council, dated the* 2*nd March* 1915, *a prize bounty is payable amongst such of the officers and men of any of His Majesty's warships as are actually present at the taking or the destroying of any of the armed vessels of the enemy, calculated at the rate of* 5*l. for each person on board the enemy's ship at the beginning of the engagement.*

The Australian cruiser S. *encountered and destroyed the enemy cruiser* E. *at a time when certain members of the crew of the* E. *were not on the vessel, but were engaged in operations of a warlike character, and in attendance upon the ship.*

Held, that in calculating the amount of the prize bounty to be distributed the whole ship's complement was to be taken into consideration, and not merely the number actually on the vessel. So long as the members of the crew are engaged on work which is ancillary to the main object of the enemy vessel they are "on board" within the meaning of sect. 42 *of the Naval Prize Act* 1864.

THIS was a motion on behalf of H.M.A.S. *Sydney* for participation in prize money in respect of the destruction of the German cruiser *Emden.*

On the 9th Nov. 1914 the *Sydney*, together with other warships, was on escort duty in the Southern Indian Ocean, and encountered the German vessel *Emden* off the Cocos Islands. After an action which lasted for over an hour and a half, the German boat ran ashore and surrendered. It was found impossible to salve the vessel. The full complement of the *Emden* was 397. Of these sixteen had been placed on board a collier as a prize crew, and fifty-two were ashore, having been sent to dismantle the telegraph station on the Cocos Islands. When the *Emden* was destroyed, therefore, the number of persons on board was 329, and the question was whether prize money was to be paid on the basis of this number or upon that of the ship's full complement—namely, 397.

By sect. 42 of the Naval Prize Act 1864 (27 & 28 Vict. c. 25), it is provided :

If, in relation to any war, Her Majesty is pleased to declare, by proclamation or Order in Council, her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement.

An Order in Council was made under the above section of the Act, dated the 2nd March 1915.

Commander *Maxwell Anderson*, R.N. in support of the motion.

M. Shearman for the Procurator-General.

The PRESIDENT.—I declare that the officers and crew of H M.A.S. *Sydney* were present at the destruction of the *Emden*, an armed cruiser belonging at the time of her destruction to the German Empire.

I have now to ascertain what prize money can be allowed at the rate of 5*l.* per head of the number of persons who have to be brought into the calulation. The full complement of the crew of the *Emden* was 397. Of these fifty-two had been sent ashore for the purpose of destroying the telegraphic apparatus on land, and in that way they were doing part of the work that the *Emden* was set to do. The object of their going on shore was to make it impossible, or, at any rate, difficult for any communications to be sent from the land to the British cruisers which might come otherwise in the way of the *Emden* as the *Sydney* did. With regard to the sixteen men, they were part of the crew of the *Emden* put upon the British vessel which the *Emden* had captured, and which she was using by compulsion as an attendant ship, as she had done in the case of ships of other nationalities.

If I deduct the fifty-two members of the crew who were ashore for the purpose which I have indicated, as well as the sixteen members of the crew of the *Emden* who were put in the ship which was in attendance upon her under compulsion, the number of persons on board the *Emden* which will regulate the amount of prize money will be 329, and the prize bounty, calculated at the statutory rate of 5*l.* per head, will be 1645*l.* If, on the other hand, I take the full complement of the crew—namely, 397, including the fifty-two and the sixteen—the prize bounty will amount to 1985*l.*

In my view, it would be placing a very narrow construction upon the meaning of sect. 42 of the Naval Prize Act 1864 if I was to hold that the words "on board" meant the persons who were actually on the vessel at the time of her destruction. Neither the fifty-two nor the sixteen had gone away of their own accord, nor had they left the vessel entirely. Each party was occupied in belligerent work as a part of the crew of the *Emden*, and as such were entitled to be considered as a portion of the vessel's fighting complement. To my mind they were clearly in attendance upon her, and for that reason I think that I am entitled to hold that they must be considered to have been "on board" within the meaning of the statute.

I therefore have pleasure in allotting 5*l.* per head, calculated upon the basis of a full crew of 397, and the prize bounty will be 1985*l.*

Solicitors for the claimants, *Botterell* and *Roche*, for *Holt* and *Co.*, Navy and Prize agents.

Solicitor for the Procurator-General, *Treasury Solicitor.*

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Oct. 12, 16, *and Nov.* 6, 1916.

(Before Sir S. T. EVANS, President.)

THE MARACAIBO. (*a*)

Prize Court—Neutral vessel—Cargo—Contraband goods—Voyage to neutral port—Ultimate enemy destination of cargo—"Continuous voyage"—Knowledge of shipowner—Whether such knowledge necessary—Liability of vessel to condemnation.

A neutral vessel carrying contraband cargo, which cargo by value, weight, volume, or freight forms more than one-half of the whole, is subject to confiscation and to condemnation as good and lawful prize, even when bound to a neutral port, if such cargo is destined ultimately for an enemy country, either by transhipment or land transit.

There is no need for the captors to prove that the shipowner was aware of the ultimate destination of the contraband cargo.

The principle laid down in The Hakan (13 *Asp. Mar. Law Cas.* 479; 115 *L. T. Rep.* 389; (1916) *P.* 266) *applied and extended.*

THIS was a case in which the Crown claimed the condemnation of the *Maracaibo*, a Danish steamship, on the ground that at the time of her seizure and detention she was carrying contraband goods to a neutral port, such goods being destined ultimately for the enemy country Germany.

The *Maracaibo* was owned by a person named Clausen, and in March 1915 she was at Hamburg. In that month she was chartered by one Engelbrecht, a merchant of Amsterdam, to proceed to South America. On her arrival at the port of Maracaibo in Venezuela, she loaded a full cargo of divi-divi, and started for Amsterdam in Aug. or Sept. 1915. On the 18th Oct. 1915, whilst on her voyage, the *Maracaibo* was met by a British warship and ordered to proceed to Lerwick, where the cargo and the ship were respectively seized as prize on the 9th Nov. and the 5th Dec. Prior to the 14th Oct. 1915 divi-divi had been declared conditional contraband, but on this last-named date it was declared absolute contraband. The writ in the case was issued on the 24th Dec. 1915. The cargo was condemned as absolute contraband destined for the enemy on the 31st July 1916, and the question now before the Prize Court was whether the vessel was liable to condemnation. The claim of the Crown was resisted by the shipowners, the Aktieselskabet Tremast Skonnest Maracaibo's Rederei, of Nordby, Fanö, Denmark.

Sir *Maurice Hill*, K.C. and *T. Mathew* for the Procurator-General.—The *Maracaibo* had been chartered to carry divi-divi to Hamburg on previous occasions. The vessel had on these occasions been chartered to one Weil, a merchant of Hamburg, and the introduction of Engelbrecht was merely a blind. It was well within the knowledge of all the parties that the cargo was contraband—conditional contraband when loaded, and absolute contraband at the time of the capture of the vessel. But knowledge is not essential. All depends upon the proportion of the cargo carried which was contraband. It might be objected that as the *Maracaibo* was sailing for a neutral port there could be no condemnation. But it was clear that the cargo was intended ultimately for the enemy, and in such a case condemnation should follow capture just in the same manner as if the vessel had been proceeding direct to an enemy port. The principle laid down in the case of *The Hakan* (*ubi sup*) should be applied and extended to the *Maracaibo*. This was clearly in accordance with the rule of international law. The American rule was in some cases too indulgent and should not be followed. They cited

The Ringende Jacob, Roscoe's English Prize Cases, vol. 1, 60; 1 Ch. Rob. 89;
The Jonge Tobias, Roscoe, vol. 1, 146; 1 Ch. Rob. 329;
The Neutralitet, Roscoe, vol. 1, 309; 3 Ch. Rob. 295;
The Atalanta, Roscoe, vol. 1, 607; 6 Ch. Rob. 440;
Carrington v. *Merchants Insurance Company*, 8 Peters, 495;
The Bermuda, 3 Wall. 514;
The Springbok, 5 Wall. 1;
The Peterhoff, 5 Wall. 28;
The Dolphin, 7 Fed. Cas. 868;
Pyke's Law of Contraband of War, pp. 231-236.

MacKinnon, K.C. and *R. A. Wright* for the claimants.—There should be no condemnation unless it was shown that the shipowners had been guilty of unneutral service. There was no evidence of such knowledge in the present case. Again, this was a case of carriage to a neutral port, and there was no precedent in our courts for condemning a neutral vessel under the doctrine of "continuous voyage." The question had arisen in the course of the American Civil War, but the result appeared to be, from a consideration of such cases as *The Bermuda* (*ubi sup.*), *The Springbok* (*ubi sup.*), and *The Peterhoff* (*ubi sup.*), that there could be no condemnation unless the vessel implicated had been guilty of fraudulent practices. That did not arise here, and the ship ought not, therefore, to be condemned. They cited

The Stephen Hart, Blatch. P. C. 387;
The Mashona, 17 Cape S. C. 135.

Sir *Maurice Hill*, K.C. in reply.

Cur. adv. vult.

Nov. 6.—The PRESIDENT.—This Danish ship was captured in Oct. 1915, in the course of a voyage from Venezuela to Amsterdam. She carried a full cargo of divi-divi, 287,654 kilos. At the time of the commencement of the voyage divi-divi had been declared conditional contraband. Before the capture it has been declared absolute contraband. The cargo has already been condemned by a judgment of this court. The question now remaining to be determined relates to the vessel. Her owners claim her release, and also freight, costs, and expenses. The Crown asks for judgment for her condemnation.

The application of the Crown is founded upon two contentions, one of fact and the other of law. In the first place it is contended that the vessel is subject to condemnation because her owners or her master—who was also part owner—knew that the vessel was laden with a full cargo of contraband destined ultimately for the enemy at Hamburg; and, further, that they or he participated in the deception by which it was intended and attempted to convey the contraband goods to one Mr. Isidore Weil, at Hamburg, through a nominal agent or intermediary of the name of Mr. William Engelbrecht, at Amsterdam. In the

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law

second place, it is contended that the carriage of the contraband goods, forming the whole of her cargo upon a continuous voyage or transit which was to end in enemy territory, renders the vessel subject in law to confiscation and condemnation, whatever the state of knowledge of the owners or the master may have been.

If the Crown succeeds in the first contention upon the facts, the legal question need not be decided. But the question of law has been fully argued; and as it is one of considerable and general importance, and the parties are all anxious that it should be decided, I have thought it right to pronounce the judgment of the court upon this point also.

It is not necessary to repeat what I said about the facts when the cargo was condemned. The charter-party was made on the 27th March 1915, and purported to be signed by Mr. Svarrer, the master, and Mr. William Engelbrecht, the charterer. Where it was signed I was not told. The vessel was at Hamburg at the time. She had been lying at Hamburg from the 16th Sept. 1914. Her last voyage had been from Venezuela to Hamburg with a cargo of divi-divi for Mr. Isidore Weil. The voyage had commenced before the war. She was given a clearance certificate to continue that voyage by one of His Majesty's boarding ships off our shores on the 3rd Sept. 1914. The vessel lay at Hamburg from the 16th Sept. 1914 until the 1st April 1915, when she started upon her outward voyage under the charter-party referred to. She had been chartered for other voyages in previous years by Mr. Isidore Weil to carry divi-divi to Hamburg. On all these voyages Mr. Svarrer was the master of the vessel. What he did, or where he was, while the vessel lay at Hamburg, or when the charter-party was signed, his affidavit does not disclose. He says that the charter-party was arranged between Mr. Hans Hansen Clausen and the said Mr. William Engelbrecht. He gives no information whatsoever as to the position of Mr. William Engelbrecht, nor as to any communications with him.

The Danish Insurance Institute informed the said Mr. H. H. Clausen before the voyage began that divi-divi had been declared contraband by the English. They did not in their communication distinguish between conditional and absolute contraband. When the ship left Hamburg on her outward voyage she proceeded through the Kaiser Wilhelm Canal. Earlier in the proceedings I decided that Mr. William Engelbrecht, of Amsterdam, was a mere tool of Mr. Isidore Weil, of Hamburg. He filed no evidence Later he and Mr. Isidore Weil fell out, and Messrs. Toe, Laer, and Co., of Amsterdam, were installed by Mr. Isidore Weil in Mr. William Engelbrecht's place, and were, by Mr. Isidore Weil's arrangement, to be called "Smith" in any cables which might be sent. The shippers, Messrs. Juan E. Paris and Co., were the same firm who had sent the previous cargoes of divi-divi to Mr. Isidore Weil, at Hamburg, on the same vessel with Mr. Svarrer as master. No evidence was given of any business acquaintanceship or connection between the shippers and Mr. William Engelbrecht. I cannot accept the bald uncorroborated story of the master that neither he nor the owners had any knowledge or suspicion that the goods had an enemy destination or were enemy property, or that they were contraband of war. The last statement is refuted by the letter of the 29th March 1915 from the Danish Insurance Institute to Mr. H. H. Clausen informing him that divi-divi was contraband.

On the whole of the facts I think that the right conclusion is that the master and the owners knew that the goods laden on board this vessel were destined for Mr. Isidore Weil in Hamburg; and that the master of the vessel knew this when he put forward Mr. William Engelbrecht as the *bonâ fide* neutral consignee in order to form the basis of his support of the owners' claim. It is hardly necessary to add that the claims for the release of the ship, and for freight, expenses, &c., are all barred.

It remains to consider the question of law. It can be done with more brevity, because I have expressed my views upon the penalty attaching to vessels carrying contraband in the judgment pronounced in the case of the steamship *Hakan* (*ubi sup.*).

It has been argued that the present case is distinguishable from *The Hakan* (*ubi sup.*), on the ground that the voyage of *The Hakan* (*ubi sup.*) was to an enemy port, whereas the voyage of *The Maracaibo* was to a neutral port, and that her cargo was only condemnable because it was carried over part of a "continuous voyage" to the enemy in enemy territory. The principles on which *The Hakan* (*ubi sup.*) judgment was based, it was said, did not apply to "continuous voyage" cases. It was contended that in these latter cases knowledge must still be proved, and proved affirmatively, by the captors. There does not seem to me to be any good reason for any such distinction.

A vessel may be carrying conditional contraband to an enemy port, but it is only in certain cases—*e.g.*, where it is proved that the contraband was destined for the enemy Government or forces, or for a base of supply—that they can be condemned. A vessel may also be carrying absolute contraband to a neutral port; but, again, it is only on proof that the contraband goods were destined, by transhipment or land transit, for the enemy country, that they are subject to condemnation. The effect on belligerents would be similar in either case. The trade, if successful, would in both cases be injurious to the belligerent entitled to make the capture, and helpful to the enemy. It is difficult to see why the penalty in the case of the vessel should be different.

It is to be noted that art. 40 of the Declaration of London applied to the carriage even of conditional contraband by continuous voyage and transit over land where the enemy country has no seaboard. Knowledge did not enter into the question. The vessel suffered the same penalty.

I think that in the present state of the law as agreed and understood between nations the element of knowledge of the owners or the master of the vessel has been eliminated altogether, where such a proportion of contraband is being carried as forms half of the cargo in weight, bulk, value, or freight. This principle applies, in my view, whenever the vessel carries that proportion or amount of confiscable contraband (absolute or conditional), whatever the circumstances or the facts may be which make it subject in law to con-

fiscation. In other words, if a vessel proceeding to a neutral port carries such a cargo as is properly captured as prize because it is absolute or conditional contraband destined ultimately for enemy territory, or for enemy forces or bases of supply, the offence of the vessel is the same as if she was carrying conditional or absolute contraband to an enemy port; and it would seem to me that the same penalty in respect of the vessel should follow. If it is not necessary to prove the knowledge of the owners in the one case, it ought not to be so in the other. I cannot see the reason for a distinction between the two cases either in logic or in practice.

The trade in contraband, though one in which neutrals may like to engage, is necessarily of a risky nature. Great risks often mean huge profits. But the risks are ascertainable. And if belligerents are to avail themselves of their acknowledged rights to capture at sea, neutrals must, in order to garner the profits, either face the risks and the ensuing penalties, or provide for them by their contracts, or protect themselves from them by insurance.

The practical rule (adopted in the *Hakan* case (*ubi sup.*) of making the quantitative or qualitative extent of the contraband the test instead of knowledge avoids the necessity for the courts embarking upon the very difficult and often unsatisfactory inquiry as to the state of mind or the extent of information of the persons concerned. From experience in this court I can testify to the difficulty. The tribunal might often feel a certainty that knowledge existed which would satisfy any conscientious person, without being able, perhaps, to set out step by step sufficient or precise proof of it. Experience also shows not only the ingenuity and multitudinous character of the devices and shams resorted to in carrying on contraband trading, but how often it is only by the interception of letters, or cables or wireless messages, that the deceptions can be detected and disclosed.

And even if there is not, in truth, any actual knowledge, is the trader to defeat belligerent rights by taking care not to know by a species of "voluntary ignorance"?

I hazard the opinion that not many of the shipowners or masters of ships belonging to the Scandinavian or Dutch countries are suffering from any want of knowledge of how articles of a contraband character are sent to Germany either by water or by land from neutral ports, which could not reach Germany by direct voyages to her own ports. Knowledge of the destinations of such articles in particular cases may be difficult to establish by actual and direct proof. If the rule of law is now as I have stated it, Prize Courts will be able to do substantial justice and to act in accordance with the law, without any apprehension in the mind of anyone that their conclusions are founded on suspicions rather than on facts established by strict proof.

For the reasons which I have given, I decide that upon the facts the *Maracaibo* must have been condemned on the ground of the knowledge of the owners and the master; and, furthermore, that the principles of *The Hakan* (*ubi sup.*) decision apply to "continuous voyages," and that therefore in law, apart from any question of knowledge, the *Maracaibo* must be condemned.

There will be no order as to costs.

I give leave to appeal if the appeal is entered within six weeks, and I fix the security for costs at 350*l.*

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Stibbard, Gibson,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 1 *and* 2, 1916.

(Before SWINFEN EADY and BANKES, L.JJ. and A. T. LAWRENCE, J.)

OWNERS OF STEAMSHIP NOLISEMENT *v.* BUNGE AND BORN. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Lay days—Completion of loading before expiration of lay days—Acceptance of dispatch money—Failure to free ship as soon as possible—Whether charterers liable in damages.

By a charter-party dated the 1*st Feb.* 1915 *a steamer was to be loaded at an Argentine port and to proceed therefrom as ordered by the charterers to a European port as port of discharge. Dispatch money at the rate of* 15*l. per day was payable for all time saved in loading, and the charterers had the right to keep the steamer for twenty-four hours after completion of loading, for the purpose of settling accounts. The steamer was loaded nineteen days before the expiration of the lay or loading days, and in respect of the nineteen days the charterers received dispatch money. Owing to delay by the charterers in deciding as to the port of call, the steamer was kept waiting for the bills of lading and orders for three days. The shipowners claimed damages in respect of this delay, and in arbitration proceedings were awarded* 300*l., being damages at the rate of* 150*l. for two days.*

Held, that the charterers were entitled to dispatch money for the days saved in loading, but that, when the loading was completed, they were not entitled to detain the ship, even if the lay days had not expired, and that the damages for detention, not being provided for by the charter-party, were at large, and the arbitrator had power to award the shipowners 300*l. as such damages.*

Decision of Atkin, J. (13 *Asp. Mar. Law Cas.* 364; 114 *L. T. Rep.* 850; (1916) 1 *K. B.* 805) *reversed.*

APPEAL by the plaintiffs from a decision of Atkin, J. on an award in the form of a special case stated by an arbitrator.

By a charter-party dated the 1st Feb. 1915, made between the owners of the steamship *Nolisement* and Ernest A. Bunge and J. Born (hereinafter called "the charterers"), it was agreed (by clause 2) that the steamer should with all convenient speed after arrival at Montevideo proceed as ordered by the charterers to various ports or places to receive a full and complete cargo of wheat or other grain.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law

By clause 4 the steamer when loaded was to proceed to one or other of various European ports at the master's option for orders, "unless these be given to him by the charterers on signing bills of lading to discharge at a safe port on the Continent. . . ."

By clause 13 the steamer was to load at a certain rate (the details of which are not material to this report), otherwise demurrage to be paid at the rate of 3*d.* sterling per ton per running day, the time for loading to commence twelve hours after written notice to be given by the master to the charterers or their agents that the steamer was ready to receive cargo.

By clause 16 dispatch money, which was to be paid to the charterers before the steamer sailed, was payable for all time saved in loading at the rate of 15*l.* sterling per day.

By clause 30 disputes were referred to arbitration.

The cargo was duly loaded under the said charter-party and a dispute arose between the parties as to what damages (if any) the owners were entitled to receive in consequence of the steamer being unable to sail from her port of loading for three days after she was ready to sail and the loading was completed owing to the failure of the charterers to make out the bills of lading, they not having made up their minds as to the port of discharge, although they had decided to give orders as to the destination pursuant to clause 4 (*sup.*) on signing the bills of lading.

The loading of the vessel proceeded so rapidly that it was completed nineteen days before the lay days were completed, and the charterers received in account dispatch money in respect of those nineteen days.

The arbitrators having failed to agree, their umpire found the following facts in a special case:

That on the 16th March 1915 at 4 p.m. the loading of the steamship *Nolisement* was finished, and at that time the master applied for his bills of lading and orders as to destination from the charterers, but the same were not forthcoming. The steamer was kept waiting for the bills of lading and orders for three days, viz., until 4 p.m. on the 19th March 1915, owing to the charterers, who had decided to give orders for the discharging port on signing bills of lading, not having made up their minds as to the port to which they should order the steamer. The steamer sailed at 5 p.m. on the said 19th March 1915. It was agreed between the parties and I find that the charterers had the right to keep the steamer for twenty-four hours for the purpose of settling accounts, and that the dispute arises in relation to two remaining days that the steamer was kept waiting.

I find as a fact that the steamer was kept two days over and above the said twenty-four hours owing to a breach by the charterers of their obligation to present to the captain the bills of lading and orders as to the port of discharge.

I further find the fact that the owners paid to the charterers on accounts made out by the charterers dispatch money pursuant to clause 16 of the charter-party on the footing that the loading of the steamer was completed at 4 p.m. on the 16th March 1915, and that they included in their account for dispatch money the time the captain was waiting for his bills of lading and orders, and that the time taken was not paid under any mistake of fact.

The charterers contended:—

(*a*) That the loading time granted by the charter-party not having been exceeded, the shipowners were not entitled to claim for demurrage or detention, but only to a return of the dispatch money so paid under a mistake of fact.

(*b*) Alternatively, that if the shipowners were entitled to claim for the time occupied at the port of loading in waiting for orders, their claim should be for a return of the dispatch money paid for the two days on the ground that the freight was based on ten days being occupied in loading, or, in the alternative, their claim should be for demurrage at the charter-party rate.

[There were other contentions which are immaterial to this report.]

The shipowners contended:—

(*a*) That on completion of the loading of the steamer the charterers were bound within twenty-four hours to present to the captain his bills of lading and orders and so enable the steamer to sail.

(*b*) That on the expiration of the said twenty-four hours the steamer was entitled to proceed to sea, and that, having been prevented for two days from doing so owing to the wrongful action of the charterers in not giving orders and presenting the bills of lading, they were entitled to claim damages for such detention.

(*c*) Alternatively, that, having paid the charterers dispatch money for the unexpired time within which they were bound to load the steamer, the loading time must be taken to have expired on the completion of the loading, and that for any time during which the steamer was prevented from sailing by the charterers they were entitled to claim damages for such detention subject to allowing the charterers twenty-four hours for making out the accounts and the bills of lading and giving orders.

Subject to the opinion of the court, he found that the shipowners were right, and were entitled to 300*l.* and costs. Alternatively, if the charterers were correct, he awarded that they should only pay 30*l.* to the owners. He also found that, assuming the damages should have been assessed upon the basis of the demurrage rate, they came to 94*l.* 14*s.*

By clause 12 of the charter-party:

Lay days shall not commence before the 1st March 1915, unless charterers begin loading sooner, and, should the steamer not be ready to load by 6 p.m. on the 31st March 1915, charterers shall have the option of cancelling.

Atkin, J. held that, the loading time granted to the charterers not having been exceeded, the shipowners were not entitled to claim for demurrage or detention, but only to a return of the dispatch money as money paid for a consideration which had failed.

The shipowners appealed.

Sir *Maurice Hill*, K.C. (*W. N. Raeburn* with him) for the appellants.—The charterers had no right to detain the ship after she was once loaded. The fact that she was loaded at an accelerated rate is immaterial in this regard, except as regards the dispatch money. When once the ship was loaded, it was the duty of the charterers to present the bills of lading so as to enable the ship to sail:

Moel Tryvan Ship Company v. *Kruger and Co.*, 10 Asp. Mar. Law Cas. 416, 465; 96 L. T. Rep. 429, at p. 432; (1907) 1 K. B. 309, at p. 319; 97 L. T. Rep. 143; (1907) A. C. 272

Oriental Steamship Company v. *Tylor*, 7 Asp. Mar. Law Cas. 377; 69 L. T. Rep. 577; (1893) 2 Q. B. 518.

Secondly, the charterers, having received dispatch money for the days saved in loading, cannot be heard to say that the loading was not completed on the date from which they claimed and received dispatch money:

Oakville Steamship Company Limited v. *Holmes*, 5 Com Cas. 48.

D. C. Leck, K.C. (*R. A. Wright* with him) for the respondents.—On the true construction of the charter-party the charterers had a number of days in gross in which to load, and, provided they loaded within those days, there could be no detention of the ship. In any case, if the ship had not been so detained she would have lost time at the port of call, so little or no damage resulted to the shipowners. The charterers were under no obligation to present any bills of lading to the master at all, and, the facts in *Oriental Steamship Company* v. *Tylor* (*sup.*) being different, that case has no bearing on this. Assuming the shipowners are entitled to damages for demurrage, those damages are assessed by clause 13 of the charter-party, and the arbitrator was not entitled to assess the damages except under that clause. The shipowners are entitled to a return of the dispatch money for the two days.

Nov. 2, 1916.—Swinfen Eady, L.J.—This is an appeal of the owners of the steamship *Nolisement* from the judgment of Atkin, J. upon a special case stated by an umpire. The question arises in respect of a charter-party dated the 1st Feb. 1915, whereby the ship *Nolisement* was to proceed to the River Plate and there load a full and complete grain cargo. The charter-party provides for the rate at which the steamer is to be loaded, and it provides for dispatch money. It appears from the facts stated in the case that the ship was loaded in eight days and earned dispatch money for about nineteen and a quarter days, and was duly paid on that basis, but her sailing was delayed for three days after the loading was completed. The umpire found that there was an agreement between the parties that the detainer for one day was proper. He says: "It was agreed between the parties and I find that the charterers had the right to keep the steamer for twenty-four hours for the purpose of settling the accounts, and that the dispute arises in relation to the two remaining days that the steamer was kept waiting"—in other words, after the steamer was fully loaded, at the expiration of the eight days that it took to load her, she was detained a further three, one of which was justified; and so the claim was in respect of the remaining two days that she was detained. The umpire states why she was detained. He says that she was unable to sail from her port of loading for three days after she was ready to sail and the loading was completed, owing to the failure of the charterers to make up the bills of lading, as they had not made up their minds as to the port of discharge, although they had decided to give orders as to the destination pursuant to clause 4 of the charter-party on signing the bills of lading. So that the reason for the detention for the two days was that the charterers were unable to make up their minds as to the port of discharge; and it is in respect of the claim for that two days' detention that the owners' claim went to arbitration. There were two arbitrators and an umpire, and the umpire made his award in an alternative form. He first found that the claim of the shipowners was well founded, and that there was payable by the charterers to the owners a sum of 300*l.* in respect of the detention of the ship. Then he awarded, in the alternative, that, if his award was wrong and the contention of the charterers that at most only dispatch money for those two days should be returned, then he found that 30*l.* was the dispatch money that was payable to the owners. Then, in a further alternative, the umpire awarded that, if his award was wrong and if the contention of the charterers was wrong as to the return of dispatch money, but that the right to damages was to be ascertained on the basis of the demurrage rate in the charter-party, then he fixed that amount at 94*l.* 14*s.* The umpire having made his award in that alternative form, the matter came before the learned judge, who decided, not in accordance with the first finding, but that there was no liability upon the charterers in respect of the detention of the ship; and that they were entitled as of right to detain the ship for all the lay days—that is to say, for the period of time that was necessary for the loading of the ship, if she had been loaded only according to the rate of loading prescribed by the charter-party. But he says on that footing that, although the charterers had the right to detain the ship for the whole of the lay days, nevertheless they could not claim dispatch money when the ship was detained in respect of those two days, and the shipowners had gained nothing by the accelerated rate of loading; and, therefore, he held that the dispatch money in respect of the two days was money paid without consideration, and the charterers must return to the owners that amount.

From that judgment the owners appeal; they contend that they are first entitled to damages for the detention of the vessel; secondly, that there is no contract rate of damage, that the damage is at large; that the umpire, a business man, a man in the shipping world, has arrived at a sum which is a fair and reasonable sum, and which there is no ground to disturb; and that in other respects the award is right.

The charter-party provides, by clause 4, that the steamer being loaded "shall with all reasonable speed therewith proceed to St. Vincent (Cape Verdes), or Las Palmas, or Teneriffe (Canary Islands), or Madeira or Dakar, at the master's option, for orders (unless these be given to him by charterers on signing bills of lading)." So that the charter-party gives to the charterers the option, on signing bills of lading, to name the port of discharge; and it is on that option that the umpire finds that the charterers had decided to give orders as to the destination on signing bills of lading—that is to say, the charterers had decided, not that the ship was to sail and call for orders, but that the port of discharge was to be named by them on signing bills of lading, but before the ship sailed, but they had not made up their minds as to the particular port. Then the provision for lay days is in this way. Clause 12 provides that the lay days shall not commence before the 1st March 1915 unless charterers begin loading sooner; and, should the steamer not be ready

to load by 6 p.m. on the 31st March, the charterers should have the option of cancelling; and then by clause 13 it provides for the rate of loading: "The steamer shall be loaded at the rate of 225 tons per running day up to the first 3000 tons, and at the rate of 400 tons per running day for any quantity above 3000 tons, Sundays and holidays excepted, otherwise demurrage shall be paid" at a certain specified rate. The parties have worked out, and there is no dispute between them as to this, the number of days which that rate of loading would give the vessel to load; having regard to the eight days that were occupied in the actual loading, there were nineteen or nineteen and a quarter in respect of which the dispatch money was payable. But it will be observed that demurrage is only payable under clause 13 if the steamer is not loaded at the agreed rate. It says the steamer shall be loaded at a particular rate, otherwise demurrage is to be paid. The steamer was loaded at an accelerated rate; and, in my opinion, the fact that after loading she was detained would give no claim to demurrage under that clause, and, therefore, that clause does not give any contract rate for detention of the steamer after she is fully loaded. It is merely that, unless she is loaded at a particular rate, demurrage shall be paid; and in this case, the steamer having been loaded at an accelerated rate, no claim can arise under that clause. Then clause 16 provides for dispatch money, which the vessel earned and received; and clause 20 provides for advance freight; and clause 21 provides for the signature of the bills of lading: "The master to sign bills of lading in the form indorsed hereon, at any rate of freight that the charterers or their agents may require, but any difference in amount between the bills of lading freight, and the total gross chartered freight, as above, shall be settled at port of loading before the steamer sails; if in the steamer's favour, to be paid in cash on (or) before signing bills of lading; if in charterers' favour, by usual master's bill payable five days after arrival at port of discharge, or upon collection of freight (whichever occurs first), and such bill is hereby made by owners a charge upon bill of lading freight, and the said freight is hereby hypothecated as security for said bill." So that the master was under an obligation to sign bills of lading at any rate of freight that the charterers or their agents might require; and that, no doubt, was a provision for the benefit of the charterers, who could have required the master to sign bills of lading, and, of course, before sailing. Under those circumstances one must consider, in the first place, that it is the duty of the charterers to prepare and present the bills of lading. In the case of *Moel Tryvan Ship Company* v. *Kruger and Co.* (10 Asp. Mar. Law Cas. 416; 96 L. T. Rep. 429, at p. 432; (1907) 1 K. B. 809, at p. 819) the President, Lord Gorell (Sir Gorell Barnes as he then was), after considering the terms of the contract, said he was proposing to apply to the terms of the contract one or two well-known propositions: and the second proposition he puts is this: "That, as a matter of business—and it necessarily must be so—the charterer has to prepare the bills of lading; he has to select how many parcels of goods he wishes the shipment to be divided into, and whether he will send the bills of lading to certain specific persons named or have them made out to order and indorse them. It is obvious that it must be for the charterer, if he wishes to have bills of lading signed, to make out the bills of lading and tender them for signature." Here, of course, it is essential that they should be made out by the charterers, because the rate of freight to be mentioned in the bill of lading is to be the rate of freight directed by the charterers.

If that is their duty, then within what time and when ought the charterers to make out the bills of lading and present them to the master? In the case of *Oriental Steamship Company* v. *Tylor* (7 Asp. Mar. Law Cas. 377; 69 L. T. Rep. 577; (1893) 2 Q. B. 518, at p. 523) Lord Esher said: "Now, with regard to what time is the signing of the bill of lading to be determined? What is the time at which, or from which, you are to calculate the necessity or the obligation to sign the bill of lading? It is not from the sailing of the ship; it is from the loading of the cargo. No captain has authority to sign a bill of lading unless there is cargo on board, and he has only authority to sign for the cargo which is on board. But when there is a cargo on board, what is the time within which the bills of lading are to be signed? The bills of lading are almost invariably signed before the ship sails. Take an ordinary charter, where there are not the words 'or agent' in it, where the bills of lading are to be signed by the captain only: is it not elementary to say that those bills of lading are to be signed before the ship sails? It is obvious, in almost every case, the bill of lading is signed before the ship sails, and the time from which you are to determine the obligation as to the time of signing the bill of lading is from the time of loading the cargo. Therefore, the time for the signing of these bills of lading is to be calculated from the time of the loading on board." Then, a little later on, he points out that the charterers ought to have presented the bills of lading almost immediately—that is to say, within a reasonable time after the ship was loaded there was an obligation on the charterers to present the bills of lading. Not having done so, was it any breach of duty by the charterers to detain the ship beyond the stipulated number of lay days? The learned judge has held that it was not. In his judgment he says that the true view is that the charterer had a stipulated period of lay days during which he may delay the ship at the port of loading without incurring liability for demurrage or for damages. In other words, he commits no breach for detaining the ship for that particular period. Of course it may well be that if all the lay days are consumed in loading, then there is no breach for which the charterer is liable; but in a charter-party in this form, where the ship is fully loaded at an accelerated rate, the charterer has no right to detain the ship after she is loaded. The charterer has no right under a contract in this form to say: "Although I might have taken more time to load the ship than I did, although I might have taken another nineteen days to load the ship, yet after the ship is fully loaded I can detain her for the rest of the period that I might have occupied in loading without being liable in damages for forfeiting or not retaining any right to the dispatch money." In my opinion, in a charter-party in this form the charterer had no such right, and, after the expiration

of the one day allowed by the parties, it was a breach by the charterers to detain the ship by not presenting the bills of lading and enabling the ship to sail.

Then the learned judge has held that acceptance of the dispatch money did not prevent the charterers saying that they were under no obligation to let the ship sail before the lay days expired; and that the charterers could not retain the two days' dispatch money. I am of opinion that the charterers had earned and were entitled to retain the dispatch money. In clause 16 dispatch money which is to be paid to the charterers before the steamer sails shall be payable for all time saved in loading at a certain rate. The time was saved in loading her. True it is the ship was afterwards delayed, but, according to the terms of the contract, the dispatch money is payable for time save in loading; and when once it is ascertained that nineteen or nineteen and a quarter days were saved in loading the ship, then the dispatch money became payable for that time; and the charterers were entitled to receive and retain it, although they might also be liable in damages for afterwards detaining the ship.

Then the next question is: Is there any contract rate for damages? I can find none. I have already pointed out that the demurrage payable if the steamer does not load within the contract time is inapplicable; and I can find no contract for the payment of damages where the ship is detained. Where the umpire finds that she is unreasonably detained for two days at the port of loading, the damage is such sum as may reasonably be taken to be within the contemplation of the parties for the breach of it. It has been referred to a commercial umpire, and he has awarded the sum of 300*l.* as damages. It is urged by counsel for the defendants that the damages were practically *nil*, because they were damages for detaining the ship two days at the port of loading, and, by reason of that detention, a detention later on in the voyage at the port of call was obviated; and that otherwise, as she would have had to call for orders, she at all events would have been detained under the contract for twenty-four hours there; and if it is a question of only two days at the port of loading, it is merely detaining her two days there instead of later on a similar number of days when she calls at the port of call for orders. In my opinion as a matter of law that cannot be sustained. They are matters to be considered in arriving at the true amount of damage. The ship may not have been detained for that time at the port of call. A commercial arbitrator takes those matters into consideration. I think it was rather put before him, having regard to the contention of the owners, that "in calculating the damages regard must be had to the terms of clause 22 and the consequent saving to the shipowners by reason of waiting for orders at the loading port of time which would otherwise have been lost in calling for orders and waiting for twenty-four hours or more for orders under clause 22." Of course, the commercial arbitrator may well say that, having regard to the state of business, the ship would not have been detained for that time, or anything like it; but that is a matter for the umpire merely to take into consideration with all the rest of the facts of the case in ascertaining the amount of damages. I am of opinion that there is no contract rate, that the dispatch money does not apply, that the demurrage rate does not apply by contract, and that, therefore, the damages were open to be assessed by the arbitration tribunal; and, the amount having been assessed at 300*l.*, I see no ground for disturbing that assessment.

In my opinion the judgment below ought to be reversed; and the judgment should be in accordance with par. 1 of the umpire's award.

Bankes, L.J.—I agree.

As presented to the arbitrators and umpire, it does not appear to me, from the statement of the case, that the charterers disputed their liability to pay something to the shipowners; but they contend that it ought to be limited to the amount of the dispatch money, which they alleged had been paid under a mistake of fact. When the matter came before Atkin, J. the argument which was developed and the case which was presented to the learned judge was this: that the charterers were under no obligation to present any bills of lading to the master at all, but in any event, having regard to the provision in the charter-party with regard to the lay days, the time which the shipowners contended had been wrongly occupied falling within the named lay days, the charterers were under no obligation to pay any damages at all; and, secondly, that with regard to the payment of dispatch money, the right ground upon which to put that question was that there had been a total failure of consideration, and that the money was properly repayable to the shipowners.

To take the second point first. The provision in the charter-party dealing with the dispatch money is contained in clause 16, and it provides that dispatch money shall be payable for all time saved in loading; and that is a short and convenient way of expressing what the parties meant. But time saved in loading must mean for any portion of the full time allowed by the charter-party for loading which remains after the vessel has been fully loaded, and for that time the language of the clause is plain that dispatch money has to be paid. Therefore dispatch money under this case in the contract had to be paid for the full period which remained between the completion of the loading and the last day allowed under clause 13 for the operation of loading. If the construction adopted by Atkin, J. with regard to the other question in dispute is accepted, this, as it seems to me, extraordinary and absurd result follows: that dispatch money is payable under the terms of the charter in respect of a period of time during which the ship is not free to sail, and not free to sail owing to the action of the charterers. That difficulty was, no doubt, felt by the parties when they were at the arbitration, and they tried to get out of it by saying that the dispatch money had been paid under a mistake of fact. That way of getting out of the difficulty obviously fails. Then another attempt was made, and this attempt was accepted by Atkin, J. It was said: "The money ought not to be retained by the charterers because of the total failure of consideration." Now, I am quite unable to accept that view of the position. It seems to me that the consideration for the payment of dispatch money was diligence in loading, and, so far from there being a total failure of consideration, it seems to me that the facts show that the consideration was fully

executed. In those circumstances, I can see no ground at all for coming to the conclusion that this dispatch money in respect of those two particular days was not properly payable.

That brings me now to consider the first question, and that depends upon the proper construction of this particular charter-party. Atkin, J. has treated the charter-party and this clause 13 as though it gave some right to the charterers and some right in respect of the ship, and a right in respect of the ship that was not limited to the time actually occupied in loading, but a right in respect of the ship which extended to the full period which might have been occupied, but which was not in fact occupied.

In my opinion, that is not the correct view of clause 13 of the charter-party. It does not specify any number of lay days at all; but, so far from giving the charterers a right, in my opinion, the correct view of this clause is that it places them under an obligation, and the obligation is to load at a certain minimum rate, and there is a further obligation that if they do not so load they must pay demurrage at a certain agreed rate. That is the effect of the clause, as it seems to me—a clause indirectly, you may say, conferring a right, because of the obligation it places upon them; but the primary effect of the clause is to place them under an obligation to load at a certain minimum rate, and an obligation that, if that fails, they are to pay demurrage at a certain rate. If they fail in performing the obligation, the penalty is to pay demurrage. If they, fulfil the obligation and do not occupy the full time which they were entitled to occupy, they receive dispatch money. If they occupy the exact time, they neither pay demurrage nor receive dispatch money. If that is the correct view of the clause, the right upon which the learned judge founded his decision does not appear to me to exist, and the charterers have no right to say: "Although we did not occupy the time which the charter-party allowed us to occupy, we are still in a position to claim the right to detain the ship in the sense of refusing to take action which will allow her to depart just as long as we please, so long as our full loading time is not exceeded."

The next point is this; that, assuming the view of the contract to be right that when the ship is once fully loaded any right (if you call it a right) of the charterers in respect of the ship ceases, then the question arises, what is the position of the parties with reference to the bills of lading? I suppose in practice in almost every case the charterers desire that there shall be a bill of lading, and the owner of the ship, or his representative, the master, also desires that there shall be a bill of lading; and a certain amount of time is necessarily occupied in preparing the necessary document or documents and submitting them to the master; and in this particular case the parties are agreed that a reasonable time would be twenty-four hours. Is there any obligation upon the charterers under those circumstances to present a bill of lading? I should certainly have thought there was; but this case, it seems to me, goes beyond that, because it does not rest upon ordinary commercial practice. It appears to me that upon the correct reading of clause 21 there is an obligation upon the charterers to present bills of lading, and on the master to sign them. The obligation is not inserted there in the interest of the charterers only. It seems to me that the provisions of the clause are for the mutual benefit of the master and the charterers. In this particular contract it is obviously within the contemplation of the parties that the bill of lading is to be presented by the charterers to the shipowner or master. Under those circumstances, within what time? As I have said, the parties have agreed that twenty-four hours would be a reasonable time. If it is within the contemplation of the parties that the act shall be done, there shall be an implied condition that it shall be done, and shall be done within what the parties have agreed is a reasonable time. Under those circumstances it seems to me that there was in this case, upon the facts as found, a breach by the charterers of that implied condition that they should present a bill of lading to the captain for signature within a reasonable time; and as they failed to comply with that condition, they are liable in damages. The damages do not come within any provision of the charter-party fixing the amount of damages for this particular breach. Under those circumstances, the damages were at large; and I see no reason why we should interfere with the view of the umpire, who had all the matters before him, as to the amount of damages that ought to be awarded in this particular case.

A. T. Lawrence, J.—I am of the same opinion.

The question depends upon whether Mr. Leck's contention, that the lay days provided by clauses 12 and 13 are to be taken as a gross period which the charterers are entitled to have the ship at their disposal for absolutely is right; or whether they are really only a means of calculating the rate of loading, and that if the rate of loading does not rise to that level then demurrage is to be paid. I think that they are not gross days at all, but that they are days given for the operation of loading. That is made clear by clause 16, which provides for dispatch money in the event of the loading being at a more rapid rate than the calculation under clauses 12 and 13 would work out at. In this case the loading was completed in a lesser time, and dispatch money was earned and paid; and, in that event, in does not seem to me possible to say that those days were still to the credit of the charterers. Directly the ship was finally loaded it became the charterers' duty, within a reasonable time, to present their bills of lading for signature. If they did not do so, but for an unreasonable time delayed the ship before they presented the bills of lading, that was a breach of duty for which damages are recoverable. Here it is agreed that the reasonable time within which to have done it was twenty-four hours; and that after that period the ship was delayed for two days. Mr. Leck argues that the ship might have gone away without waiting for the bills of lading. I do not think that is a correct view of the charter-party. Clause 21 seems to me to clearly mean that the master has to sign bills of lading at the port of loading before the steamer sails. He could not, in point of fact, have complied with this charter-party by leaving a bill of lading as suggested and going away. He would have had to declare his option as to what port of call he was going to in writing before signing the final bill of lading. It seems to me it is not

possible to read this charter-party as one intended to give the charterers the twenty-seven and a quarter days calculated in this case as a time in gross in which the ship was to be at their disposal, and to mean that during that time they could retain her for any purpose they liked. I think they could not. They could only detain her in the operation of loading for that time, and if they detained her otherwise they were committing a breach of duty.

Then as to the measure of damages, that was perhaps a point of some difficulty, but, on the whole, I think that there is no agreed rate of demurrage here for detention. The demurrage provided for in clause 13 is a detention caused by delay in loading, and there are a number of other assessments of damages in the charter-party, none of which apply to this particular detention; and, consequently, I think the damages for the detention in question were at large, and the umpire was entitled to find the sum which he did. I think the judgment which was given by my Lord is correct.

Appeal allowed.

Solicitors: *Thomas Cooper* and *Sons*; *Church, Rackham*, and *Co.*, for *Donald Maclean* and *Handcock*, Cardiff.

Nov. 6 and 7, 1916.

(Before Swinfen Eady and Bankes, L.JJ. and A. T. Lawrence, J.)

William Cory and Sons Limited *v.* Lambton and Hetton Collieries Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriage of goods—Indemnity—Implied request by shipowners to charterers to unload cargo—Accident happening to charterers' servant while unloading—Compensation paid by charterers to workman's dependants—Implied undertaking by shipowners to indemnify—Liability of shipowners.

The plaintiffs, who were the charterers of a ship from the defendants, the shipowners, gratuitously removed some hatch beams on behalf of and at the implied request of the shipowners. While the beams were being removed by the plaintiffs' servants, one of the plaintiffs' servants engaged in the work was accidentally killed. The plaintiffs paid to his dependants compensation in accordance with the Workmen's Compensation Act 1906. *The plaintiffs claimed to recover the sum paid as compensation from the defendants on the ground that the defendants had impliedly undertaken to indemnify the plaintiffs for loss or damage occasioned by the discharge of the cargo.*

Held, that there was no evidence of an implied undertaking by the defendants to indemnify the plaintiffs. The accident was not the direct or natural consequence of doing the discharging of the cargo, but was a consequence of the manner in which the discharging was done.

The proposition of Tindal, C.J. in Toplis *v.* Grane (5 *Bing. N. C.* 636), *cited by Brett, J. in* Dugdale *v.* Lovering (32 *L. T. Rep., at p.* 158; *L. Rep.* 10 *C. P., at p.* 200), considered.

Decision of Ridley, J. reversed.

Defendants' appeal from a decision of Ridley, J., sitting with a jury.

The jury found that the plaintiffs in discharging the cargo from a ship were doing the work of the defendants, the shipowners; that the plaintiffs were doing the work at the implied request of the defendants; and that the defendants had impliedly undertaken to indemnify the plaintiffs for damage or loss occurring during the discharging of the cargo. While the cargo was being unloaded, Peacock, a servant of the plaintiffs employed in the unloading, was accidentally killed. The plaintiffs paid to the dependants of Peacock 283*l.* as compensation in accordance with the Workmen's Compensation Act 1906, and claimed to recover that sum from the defendants, as on an implied indemnity. Ridley, J. gave judgment for the plaintiffs.

The defendants appealed.

Holman Gregory, K.C. and *Alexander Neilson* for the appellants.—There was no evidence of any implied undertaking by the defendants to indemnify the plaintiffs. The accident to the plaintiffs' servant was not the natural or direct consequence of the plaintiffs' doing the unloading at the implied request of the defendants, if in fact there was any such request. The accident was due to the negligence of the plaintiffs' servants, and it cannot be supposed that if the defendants had been asked if they would be responsible for any injury to the plaintiffs' servants during the unloading, whether due to negligence or not, they would have answered that they would.

Rawlinson, K.C. and *M. M. Macnaghten* (for *Harold Morris*, serving with His Majesty's forces) for the respondents.—There was evidence of an implied undertaking by the defendants to indemnify the plaintiffs. They did the work at the request of the defendants, and it must have been understood between the parties that the defendants would be liable for any ordinary consequence, at any rate in the absence of negligence, of the plaintiffs doing the defendants' work. The defendants knew perfectly well that an accident might happen, and the plaintiffs would then have to pay compensation. The defendants asked the plaintiffs to stand in their shoes as regards the work to be done, and took the risk of an accident happening. They ran no greater risk of having to pay compensation than if they themselves had undertaken their own work. In *Dugdale* v. *Lovering* (32 L. T. Rep., at p. 158; 10 L. Rep. C. P., at p. 200) Brett, J. said: "In *Toplis* v. *Grane* (5 Bing. N. C. 636) Tindal, C.J., one of the most careful expositors of the law ever known, laid down the proposition on the subject in these terms: 'We think this evidence brings the case before us within the principle laid down in *Betts* v. *Gibbins* (2 Ad. & E. 57), that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.'" This case comes within those words of Tindal, C.J. In *Groves and Sons* v. *Webb* and *Kenward* (115 L. T. Rep., at p. 1089) Bankes, L.J. said: "It seems to me plain, from a consideration of the cases, that this doctrine of implied warranty is not confined to risks which are in the contemplation of the parties at the time the

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

request was made, but it extends to risks which actually occur, provided they are the direct result of acting upon the request. . . . The plaintiffs had been exposed to a risk in consequence of acting upon the request of the defendants. Under these circumstances the true inference to draw . . . is that the defendants must be taken to have impliedly promised, that is, they would have promised as a matter of ordinary business, had the circumstances been brought to their attention . . . that they would accept responsibility and not the plaintiffs." That, it is submitted, is this case. They also referred to

Barclay v. *Sheffield Corporation*, 93 L. T. Rep. 83; (1905) A. C. 392;
Donovan v. *Laing, Wharton, and Down Construction Syndicate Limited*, 68 L. T. Rep. 512; (1893) 1 Q. B. 629;
Rourke v. *White Moss Colliery Company*, 35 L. T. Rep. 100; 2 C. P. Div. 205;
Coggs v. *Bernard*, 2 Ld. Raym. 909; Salk. 26.

Further, the plaintiffs did this work gratuitously, and there was an implied promise by the defendants to indemnify the plaintiffs for anything and everything they might have to pay out of their own pockets.

No reply was called for.

SWINFEN EADY, L.J.—This is the appeal of the defendants, the Lambton and Hetton Collieries Limited, against the verdict and judgment at the trial of the action before Ridley, J., where, upon certain questions being left to the jury, a verdict was returned for the plaintiffs for 283*l*. Against that verdict and judgment the defendants appeal, and they ask in the alternative, first, to have the judgment set aside and judgment entered for the defendants, upon the ground that there was no evidence to go to the jury with regard to the liability to indemnify the plaintiffs in respect of which the action was brought, or, in the alternative, they ask for a new trial.

The facts out of which this action arises are these. On the 23rd April 1915 the plaintiffs, William Cory and Sons Limited, chartered from the defendants, the Lambton and Hetton Collieries Limited, a steamship for the purpose of carrying a cargo of coal. The ship arrived in the Thames, and was moored at the Albert Dock coal hoists, where the plaintiffs, William Cory and Sons Limited, have certain machinery and hoists for quickly discharging cargoes of their coal. According to the terms of the charter-party, the time for discharging was to commence when the steamer was moored in her discharging berth ready to discharge cargo. What happened was that, on the arrival of the steamer, and after she was moored, the ship's crew removed the hatches. Then the next step, before having the hatchways cleared to discharge the coal, was the removal of the hatch beams. These hatch beams, which rest by their own weight, are heavy, and no tackle of the ship had been rigged for the purpose of removing them, and there was evidence from which I think the jury were entitled to take view which they did, that William Cory and Sons Limited, at the implied request of the ship, proceeded to use their powerful machinery for the purpose of lifting and removing the hatch beams. Now, in doing so, unfortunately an accident occurred to Peacock, who was one of William Cory and Sons' men; he was killed, or he died from the effects of the injuries that he received during the operation. After his death his dependants took proceedings under the Workmen's Compensation Act and obtained a sum of about 283*l*. compensation. This action was brought by Messrs. William Cory and Sons Limited to obtain from the defendants, the owners of the ship, that sum of 283*l*. upon an implied indemnity, their case being that the plaintiffs did the work of removing the hatch beams at the request of the defendants and under circumstances from which an indemnity can be implied against all consequences of the act they were requested to do, including in those consequences the liability of the plaintiffs to pay compensation to the dependants of a workman who was killed by the operation which they were asked to undertake.

The accident happened in this way. After the removal of the hatches the ship lay there, and William Cory and Sons Limited proceeded to remove the hatch beams. There was evidence that the ship was not ready to discharge within the meaning of the charter-party until the hatch beams had been removed. Thereupon William Cory and Sons' men proceeded to do what was necessary to remove the hatch beams. The deceased, Peacock, went into the hold, either standing on the coal, or on the hatch beam itself, but he passed into the ship, and there was a crane man working the crane. Then, according to the evidence of the crane driver, Robert Wing, Peacock, who was a fellow employee of Wing, both Peacock and Wing being in the employ of William Cory and Sons Limited, gave him from the ship the order to lower the grab. It was intended doubtless to have a chain or something fastened to the end of the grab to remove the hatch beams. "He gave me the order to lower the grab, and it touched the fore and aft, and the grab slipped," and then he tried to pull it up, but it was too late—that is to say, the grab had rested on the beam which had slipped and tipped over, and injured the deceased or pinned him to the side of the ship. Then in cross examination Wing said that "Peacock let me"—the crane man—"go too far; and so it happened." That is to say, Peacock did not give Wing the sign by which he was to stop lowering the grab down, and he let the grab down too far and it tipped over, and although he tried to pull it up and tried to recover himself it was too late. It was in that way that the accident happened. The plaintiffs being liable, and having paid 283*l*. as compensation to their deceased workman, having paid it to, or for the benefit of, his dependants, brought this action, on the ground that the work was done by them for the shipowners; it was the shipowners' duty to remove these hatch beams. William Cory and Sons Limited had done the work for them at their request, and they say the circumstances were such that there must be implied a promise to indemnify them from consequences, including this liability to pay compensation.

The claim was put forward originally in the alternative. It was based upon a usage or custom of the Port of London. That was one part of the claim, and it was alleged by the plaintiffs that there was a usage or custom of the Port of London, in reference to colliers at the port, that when a workman employed by the dischargers is injured

by accident arising out of and in the course of his employment in the work of removing the hatches and (or) the hatch beams of a ship, the shipowners indemnify the dischargers against their liability to pay compensation, or the injured workman or his dependants. That was alleged to be a custom or trade usage of the Port of London. That is now out of the way in this case, because it was conceded in the court below, when the matter was before the jury, that there was no evidence upon which the jury could be asked to find such a custom.

Then the plaintiffs put their case in the alternative; they put it upon an implication in law from the facts of the case, and they say that where persons request work to be done they impliedly promise, as a necessary implication of law, to indemnify the party doing that work. The learned judge at the trial left three questions to the jury. The first was: "Were the dischargers"—that is, William Cory and Sons Limited—"doing the working of the ship?" That is to say, were they, in removing the hatch beams, doing the work which the shipowners, as between the ship and charterers, ought to do? The jury answered that they were. The second question the learned judge put was: "Were they doing it by implied request?" and the answer was, Yes. That was having regard to the circumstances, the ship drawing up, and there being no machinery immediately available for removing the hatch beams, and the ship not making preparation for doing it, obviously waiting for William Cory and Sons Limited to do it, and one of their men proceeding on to the ship for the purpose of doing it, there was evidence from which the jury were entitled to draw the conclusion that William Cory and Sons Limited were doing the work of removing the hatch beams at the request of the ship. In respect of those two findings there is really no complaint.

The matter turns upon the third question which was put to the jury: "Was there an implied indemnity?" and the jury said, Yes.

The question which we have to consider is not only whether that verdict of the jury was in accordance with the evidence, but whether there was any evidence to go to the jury from which they could arrive at such a decision.

The learned judge left it to the jury in this way: After dealing with the first and second questions that I have already dealt with, he said, as to the third question, "Was there an implied indemnity?" That is to say, "when they"—the plaintiffs—"were doing it at the request of the ship, if anything should happen which put a liability upon them, an unforeseen liability in the course of doing it, have they a right to say, 'You ought to indemnify us because we were doing this work for you?'" His Lordship says: "Mr. Rawlinson has been able to quote a sentence which was approved by the courts some time ago on a very similar subject, and it is this," and then he reads the extract, which Mr. Rawlinson had read from *Dugdale* v. *Lovering* (*sup.*). Then the learned judge proceeds: "Gentlemen, it seems to fall within that principle. I do not see any fact in this case which militates against it. I do not know whether you do; but, unless you see there is any reason in the facts of this case which would make it unjust that the responsibility for the accident should fall upon those whose work it was when the accident occurred, I think it would be a proper finding on your part to say that there was an implied indemnity." Then the jury answer that by saying there was an implied indemnity.

Was that direction of the learned judge right? The passage which Mr. Rawlinson read was this—it is in *Dugdale* v. *Lovering* (*sup.*), where Brett, L.J. (Brett, J. as he then was) refers to the case of *Toplis* v. *Grane* (5 Bing. N. C. 636): "In which," he says, "Tindal, C.J., one of the most careful expositors of the law ever known, laid down the proposition on the subject in these terms: 'We think this evidence brings the case before us within the principle laid down in *Betts* v. *Gibbins* (2 Ad. & E. 51) that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet, if such an act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.'" Then it is said that this act was done by the plaintiffs, William Cory and Sons Limited, under the express directions or under the implied directions—it is immaterial whether it is express or implied if it was under the directions—of the defendants, and they say that that has occasioned an injury to the rights of a third person, the deceased workman, Peacock, so that if the act is not apparently illegal, but is done honestly and in good faith, then the defendants are bound to indemnify the plaintiffs against the consequences thereof. Mr. Rawlinson and Mr. Macnaghten have urged before us that this case comes within the principle as there laid down.

In my opinion it does not, and I am satisfied that in the present case there was no evidence to go to the jury of any implied indemnity by the defendants, the shipowners, in respect of any liability of the plaintiffs, William Cory and Sons Limited, to their workmen under the Workmen's Compensation Act. The statement of the law which I have just read, in which it is held that the defendant is bound to indemnify the plaintiff against the consequences thereof, must be read as meaning that the plaintiff claiming the indemnity must have acted without negligence, and that the injury to the third party, when it says "the consequences thereof," must be the direct result—that is, the natural and direct consequences—of doing the particular act which he was requested to do, and not a consequence merely arising from the manner in which the act was done.

In my opinion there are no facts in the present case from which any inference whatever can be drawn of any agreement by the ship to indemnify William Cory and Sons Limited, the plaintiffs, against any liability of William Cory and Sons Limited to their workmen under the Workmen's Compensation Act in doing the act complained of.

It was an unfortunate injury to Peacock, but it was not the direct or natural consequence of doing the act—that is, removing these hatch beams—it was but an unfortunate consequence of the manner in which the act was done.

For these reasons I am of opinion that there was no evidence to go to the jury upon the third issue which was material to the success of the plaintiffs, and, that being so, the verdict and

judgment ought to be set aside and judgment entered for the defendants.

BANKES, L.J.—I quite agree.

It seems to me that in the court below and here the doctrine, or the principle of the implied request and implied indemnity, or implied contract of indemnity arising out of the request has been attempted to be pressed too far. I think that what Swinfen Eady, L.J. has just said is a necessary correction or addition to the statement of the law as laid down in *Dugdale* v. *Lovering* (*sup.*), and I think what I said myself in the case which has been referred to of *Groves and Sons* v. *Webb and Kenward* (114 L. T. Rep. 1082) was substantially correct, and I need say nothing more upon that part of the case.

But Mr. Macnaghten has advanced another and different argument, as I understand it, and his contention is that where a request is made to a person to do an act gratuitously, and he does that act gratuitously, the law implies a contract to indemnify him against all the consequences of that act, whatever they may be. Now, there are two objections to that contention, as it seems to me, as applied to this case, and the first is this: That no such contention was raised in the court below, and no question was asked of the jury upon which they could have come to a decision with regard to that particular point, and it seems to me impossible to contend that such an implied promise could arise as a matter of law. It may be that in some cases the fact that the service is done gratuitously may be an element for consideration. I am expressing no opinion about that, but I say that, so far as my opinion goes, it is impossible to contend, and there is no authority to contend, that the law implies such a contract as Mr. Macnaghten contends for, from the mere fact that the person performing the act is doing it gratuitously. I agree that there was no evidence fit to go to the jury.

A. T. LAWRENCE, J.—I am of the same opinion.

I am assuming that there was sufficient evidence, to justify it being left to the jury, of request to the plaintiffs to do this work. I have some doubt about it myself, but I will assume it for the purpose of the argument. I think the further contention based upon it, that it implied a promise of indemnity, is unsupported by any authority, and is wrong. Mr. Rawlinson applies the doctrine of *Dugdale* v. *Lovering* (*sup.*), but the doctrine is applicable to different facts altogether. There the request was to do an act that was apparently quite lawful, but was in fact tortious, and it is the same thing in the case cited in that case of Tindal, C.J. which is mentioned there; the act was in fact illegal, though it was not known to be so, and it was from that that the indemnity was implied. But here the request was to do a perfectly lawful act, and there was, therefore, no implied promise of indemnity.

Then Mr. Macnaghten tries to get over that difficulty by suggesting that in all cases in which the request is to do the act without reward the law imports an indemnity. I do not think that is so. There is no case that I am aware of that goes that length, and I know many instances in which there would be the most astounding results if an indemnity were imported into the law. It seems to me that here there was no evidence at all upon which the jury could find the promise to indemnify the plaintiffs for what appears upon the evidence to have been the clear negligence of one of their workmen in doing this act.

I therefore think that the appeal succeeds, and that judgment must be entered for the defendants.

Appeal allowed.

Solicitors for the appellants, *Botterell* and *Roche*, for *Botterell* and *Roche*, Sunderland.

Solicitors for the respondents, *Barlow, Barlow*, and *Lyde*.

Nov. 28, 29, 30, *Dec.* 1 *and* 8, 1916.

(Before SWINFEN EADY and BANKES, L.JJ. and A. T. LAWRENCE, J.)

BOLCKOW, VAUGHAN, AND CO. LIMITED *v.* COMPANIA MINERA DE SIERRA MENERA.

NORTH-EASTERN STEEL COMPANY LIMITED *v.* SAME. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract of sale—Provision for suspension of deliveries "in case of war"—War—Rise in freights—"Restraint of princes"—Frustration of adventure—Liability of sellers.

Sellers in Spain agreed to deliver iron ore to buyers in Middlesbrough, the contract of sale (which was made after the outbreak of the war in 1914*) providing that: "In case of strikes, combinations of workmen, accidents, war, or any unavoidable total or partial stoppage of works or mines, the supplies of minerals now contracted for may be wholly or partially suspended during the continuance thereof, and the time for delivery extended proportionately. In the case of partial stoppage of works or mines the deliveries to be* pro rata *with other then existing engagements." Owing to the course of events during the war, freights rose very considerably, and the sellers contended that, the character of the war having largely been changed since the making of the contract, they were entitled under the above provision to "suspend wholly or partially" further deliveries.*

Held, that the words of the provision should be read as if they were "In case of strikes, combinations of workmen, accidents, war, or any other unavoidable cause occasioning total or partial stoppage of works or mines," and that there was no exception on which the sellers could rely as excusing them from the performance of the contract.

Held, further, that a mere rise in the rate of freights was not alone a sufficient excuse for non-delivery, and the doctrine of "frustration of an adventure" had no application to the case.

Decision of Bailhache, J. (114 *L. T. Rep.* 758) *affirmed.*

In the second-named appeal the contract, dated the 14*th Dec.* 1914*, provided that: "In the event of a European war, restraint of princes or Governments, civil commotion, accidents, strikes, imminent hostilities preventing the carrying out of this contract, and all other causes . . . beyond the personal control of the seller, the contract to be suspended during that period at the sellers' option."*

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Held, on similar facts, that the sellers were not prevented from fulfilling their contract by any of the excepted perils.

Decision of Bailhache, J. affirmed.

Appeals by the defendants from the judgments of Bailhache, J. The two appeals were heard together.

The further facts and the arguments appear sufficiently from the judgments.

Sir *Maurice Hill*, K.C. and *R. A. Wright* for the appellants.

Adair Roche, K.C. and *C. F. Lowenthal* for the respondents.

Cur. adv. vult.

Dec. 8, 1916.—Swinfen Eady, L.J.—These two cases, which were heard together, are appeals of the defendants from the judgments of Bailhache, J., who tried the cases without a jury. In each case they are actions for breach of contract for the sale of considerable quantities of iron ore. They are very similar in their facts, but they are not identical, and it will be convenient to take the *Bolckow, Vaughan* case first separately and to deal with the *North-Eastern Steel* case afterwards.

The plaintiff company, who are ironmasters and manufacturers, entered into a contract dated the 4th Nov. 1914 with the defendant company. The defendants are a Spanish mining company, and by the contract the defendants agreed to sell and the plaintiffs agreed to purchase 50,000 tons of iron ore, described as "Sagunto Rubio." The price was to be 13*s.* 6*d.* per ton. It was to be delivered free ex ship at Middlesbrough at the buyers' Middlesbrough or South Bank Wharf, or any good and safe wharf on the Tees. Then there is the price of 13*s.* 6*d.* per ton on a certain basis with regard to the metallic contents, on which nothing turns, and then there is an important clause at the end, beginning "In case of strikes," &c. The terms of the contract will require to be carefully considered later. That contract was entered into on the 4th Nov. with the defendants. The mining company is managed by a Spanish firm of Sota and Aznar. Messrs. Sota and Aznar signed the contract for the defendant mining company, whose affairs Sota and Aznar managed. There is another company which is called the Navigation Company, incorporated under Spanish laws, with a large share capital, of which Sota and Aznar hold a considerable amount, apparently sufficient to carry the majority of the votes, but that company also is managed by Sota and Aznar. It is a large shipping company with a very considerable number of ships, many of which are engaged in carrying ore both from the Valencia district and from the Bilbao district of Spain. The contract having been made on the 4th Nov., the deliveries were to be extended over, and spread equally over, the year 1915. In order to carry out that contract, on the 25th Nov. a contract was entered into between the defendant company, the mining company, and this shipping company whereby the shipping company agreed to carry the ore, 50,000 tons or thereabouts, at this price of 5*s.* 9*d.* mentioned in the original agreement. In the month of December the defendants delivered under the contract one shipment of 5439 tons, and a further cargo in Feb. 1915 of 1365 tons, but no further deliveries have been made under the contract, and the claim of the plaintiffs is for damages for breach of contract to make further deliveries. I should say that after the bought and sold notes had been passed and the contract made there was further correspondence between the parties under which one or two additional terms were added to the contract. On the 16th Nov. Messrs. Bagley and Co., who represent the defendants and where the defendants' agents at Middlesbrough, wrote to the plaintiffs that with regard to the contract notes for the ore in question, "the Sagunto Rubio for next year's delivery, our principals, Sota and Aznar, wish it to be understood that, in the event of the North Sea being closed to Spanish tonnage by the Admiralty authorities, they will be compelled to suspend deliveries. Similarly should you have to stop your furnaces from causes beyond your control the deliveries would also be suspended." The plaintiffs agreed to those terms and their agreement is embodied in the contract.

The first shipment which was delivered under the contract was by the *Urkomendi*, which sailed from Sagunto about the 24th Nov. with the cargo that I have mentioned. It was advised 5300 tons, but it was, I suppose, 5439 tons, and that was delivered in due course. This particular ore, the Sagunto Rubio, appears to be mined from the defendant company's mines in the district of Valencia and is shipped from the port of Sangunto on the Mediterranean. About the middle of Dec. 1914, complaints began to arise with regard to the delays in the ore boats bringing ore to the East Coast ports, and a complaint was made of the delay especially in respect of vessels arriving at Dover and passing from Dover thence to Middlesbrough. On the 18th Dec. the defendants—I call them the defendants, but the letters are written by Sota and Aznar—wrote that they had just enough tonnage to perform their contracts, and then they refer to the further delays on the East Coast going to throw out their calculations. Early in the following month the defendants took up the position that they ought to have some additional payment for their ore by reason of the extra cost of sending it. The freight contract that was made between the defendant mining company and the shipping company had agreed the freight on the ore at 5*s.* 9*d.* In the beginning of January the defendants first began to press for some extra payment beyond their contract price. There is a letter of the 8th Jan. 1915 in which they disclosed their position to their agents at Middlesbrough, which letter was produced on discovery of documents: "The position on the East Coast is getting so serious, especially with regard to crews of vessels, that we think we are entitled to some relief for the extra freights caused by the difficulties of the crews, the new regulations of the Government since the contracts were made causing delays, and also for the extra insurance." Then they say: "Others"—that is, other people—"are receiving some compensation, and because we may be richer people that is no reason why we should receive different treatment." There we trace the origin of what afterwards led up to the dispute between the parties. It was instructions from the defendants to their agents at Middlesbrough that they must have the claim for extra freight. Then that claim was passed on by the defendants' agents at Middlesbrough to Messrs. Bolckow, Vaughan, and on the 14th Jan. 1915 this claim is made. Messrs. Bagley

and Co. write on behalf of the defendants to the plaintiffs: "Our principals, Messrs. Sota and Aznar, advise that the freights from the Mediterranean are now equal to the c.i.f. price of the ore, and there is a probability of their going still higher. Under the circumstances they consider that they are entitled to ask you for some relief, as the conditions now prevailing in the North Sea are very much worse than they were at the time the contract was made. Since the bombardment of Hartlepool a new set of circumstances has arisen, notably the much greater delay and risk by mines, seeing that the whole of the coast is now mined by the British Government, resulting in increased rates of freight to the East Coast by at least 6*s*. to 7*s*. a ton as compared with the West Coast, while the crews have to be paid double, and in many cases will not even come at all. Messrs. Sota and Aznar reluctantly have to ask for your assistance, but, under the exceptional circumstances now current, we trust you will appreciste their point of view and make them some contribution towards the extra rate of freight which they have to pay." The learned judge at the trial found, and no doubt it was a fact, that the statements in that letter were exaggerated; that there was a rise in freights although the amount is exaggerated by the defendants. The position taken up by the plaintiffs was that there was a contract and that the contract ought to be carried out. That is reported on the 25th Jan. by Bagley to his principals. He refers to a meeting of the iron-masters the previous week, and in substance reports to his principals that they will not make any increase. On the 27th Jan. there is a further letter from Sota and Aznar, in which they say that "they are not being fairly treated by the Middlesbrough Works, who ask us to deliver cheap contracts as though nothing had happened. We have told the representative that we are quite willing to deliver the ore we have sold and additional quantities provided the Middlesbrough Works meet our reasonable claim for relief. This representative has found our attitude perfectly reasonable, and quite appreciates the necessity of receiving relief on cheap contracts." Now, the importance of this letter is that it is the defendants pressing for increased payment, complaining that they have to deliver on what they call cheap contracts, but the great importance of it is the words: "We are quite willing to deliver the ore we have sold and additional contracts provided the Middlesbrough Works meet our reasonable claim for relief." That is to say, there is no difficulty in delivering either the whole of the ore that they have contracted to sell, or additional quantities as well, but they want more money for doing it. Then on the 27th Jan. there is a further complaint by the defendants, in which they refer to having to wait for pilots and the limitation only of running in daylight, and other causes of delay to their steamers. "This delay," they say, "with the current earning power of steamers, can be taken as representing 4*s*. per ton of ore carried." In other words, they say at that time the delay was amounting to 4*s*. a ton. They then give other items, such as extra payments to their crew, and so on, under which they bring it up to an additional quantity of about 6*s*. a ton to the East Coast, as compared with going to equivalent places on the West Coast. Then there are further letters to the same effect. We may pass on to the next month of February, and then there is a suggestion that unless relief is given, unless more money is paid than the contract requires to be paid, the greater part of the ore will not be delivered, and, if relief is given, the greater part will be delivered and will be quite sufficient to prevent any scarcity of iron. In that letter they ask for relief, which they say would amount to from 5*s*. to 10*s*. a ton. Then they suggest that the Government shall make a payment, and they wind up the letter by saying—that is, the defendants' representative said: "I have no hesitation in saying that, if this relief is given, an ample supply of suitable iron ore can be supplied during the first quarter to the East Coast ports." It was manifest from this correspondence that there was no difficulty about keeping up the supply except that it was more expensive to do so. The correspondence throughout February is upon the same lines. It is not necessary to go through it. In terms the defendants offer to deliver a cargo if they receive extra payment for so doing. On the 25th Feb. they wrote to their agents with regard to the North-Eastern Steel Company and Messrs. Bolckow, Vaughan, and Co., the plaintiff company: "We confirm telephonic conversation, and we will ship them each a March cargo of Sagunto Rubio under contract with 5*s*. relief, and we would settle future cargoes in due course on mutually acceptable conditions." Then they add: "Also we would like to receive an order for an odd cargo of screened Menera outside our contracts, in order to assist us. This screened Menera is the only ore we have left, and is much lower in silica than Sagunto Rubio, and will anyhow suit Messrs. Bolckow better." So that what they were proposing to do by that letter was this: If they, Bolckow, Vaughan, and Co. and the North-Eastern Steel Company, would only do what the other purchasers from them are doing, pay extra, they will deliver the March cargo to each of them, and remark: "We should like to have an order for an odd cargo—that is, a cargo not contracted for. We could not only deliver the ore that we have contracted to deliver, but we could deliver additional ore ontside the contract if they will give us the order and pay us a little more" Now, there are other instances to the same effect, making the position abundantly clear. But it is not necessary to go into that. The parties were now at arm's length, and on the 6th March the plaintiffs' solicitors write a letter saying that the matter has been placed in their hands. The say: "We are instructed by Messrs. Bolckow, Vaughan, and Co. in this matter, and have had an opportunity of reading all the correspondence which has taken place between you, and it relates particularly to the question raised by you as to delivery of ore against contract, owing to circumstances which you mention." Then they ask for an answer, and then say: "If you intend to maintain your position, will you kindly let us have the name of your solicitor who will accept service of process on your behalf." That is, if you let us know by return of post whether you maintain the position taken up by you, that position being that they will not deliver at contract price, but will deliver if the plaintiffs will pay them something additional. Then the name of the solicitor is given, and then Messrs. Crump and Son write a letter that makes quite

clear and definite the position that the defendants take up. On the 17th March they say: "We will accept service of process on behalf of Messrs. Sota and Aznar. We think that the communications which have already passed sufficiently indicate our clients' intention to claim a total suspension of deliveries during the continuance of the war; but, in order that there may be no misunderstanding on this point, we think it better to give you formal notice that our clients do take up this position." Then on the 26th March the plaintiffs accept that definite letter as a repudiation of the contract, and on the 7th April they issued their writ.

I think it is clear that the acts and conduct of the defendants, having regard to the correspondence, amounted to a repudiation by them of the whole contract, and was not merely, as was suggested, a severable breach in respect of the next or March delivery. The defendants' repudiation gave the plaintiffs a right to treat the whole contract as repudiated, which the plaintiffs did by bringing this action, the writ claiming damages for breach of contract generally, and not being limited to March delivery. The plaintiffs were entitled to regard the defendants as repudiating the whole contract, and they did so, and accepted and acted upon the repudiation.

The question, therefore, is whether the defendants are protected by the terms of their contract from liability to the plaintiffs under the circumstances which have arisen. The defendants rely upon a particular clause in the contract, and that clause I will refer to. It is the last clause in the contract: "In case of strikes, combinations of workmen, accidents, war, or any unavoidable total or partial stoppage of works or mines, the supplies of mineral now contracted for may be wholly or partially suspended during the continuance thereof, and the time for delivery extended proportionately. In the case of partial stoppage of works or mines the deliveries to be *pro rata* with other then existing engagements. This clause applies to buyers and sellers." Having regard to that last paragraph, it is difficult to see why one of the two added terms was necessary with regard to the stoppage of Messrs. Bolckow, Vaughan's works. But I pass that by.

The clause, of which the marginal note is "Strikes, &c.," is elliptical in form and requires the insertion of some words which must be deemed to be understood in order to give a sensible and intelligible meaning to it. The "strikes," "combinations of workmen," "accidents" mentioned in the clause must be events of that character having some reference to the contract. Bailhache, J. read the clause as meaning "In case of strikes, &c.," preventing "the performance of the contract," and he held, as is undoubtedly true, that in fact the defendants were not "prevented" from carrying out their contract by any of the events mentioned in the clause. The defendants, upon the hearing of this appeal, have contended that the clause ought to be read as meaning "In case of strikes, combinations of workmen, accidents, war, preventing, interfering with, or affecting the performance of the contract in a manner or to a degree substantially different from what was prevailing at the date of the contract, or any unavoidable total or partial stoppage of works or mines," &c. The reason why the defendants insist on the first four events—namely, strikes, combinations of workmen, accidents, and war—being regarded as independent of any cause occasioning total or partial stoppage of mines or works is that in fact there was not any total or partial stoppage of works or mines at any time material to the decision of this case; and, moreover, in the event of any partial stoppage and consequential partial suspension of supplies, deliveries of ore were to be made to the buyers *pro rata* with other then existing engagements, and the defendants refused to make any deliveries whatever to the plaintiffs under their contracts although fulfilling the other contracts.

I am of opinion that the true construction of the contract is that it should be read as if the words were: "In case of strikes, combinations of workmen, accidents, war, or any other unavoidable cause occasioning total or partial stoppage of works or mines." The contract then provides for a suspension of deliveries, total or partial, as the case may be, and, if only partial, then for a delivery to buyers *pro rata* with other buyers. That is, in my view, the sense and meaning of the words as they stand in the contract. Strikes, combinations of workmen, and accidents are specially mentioned as being very usual, perhaps the most usual, causes of stoppage of works or mines. Again, a war in which Spain was engaged might also necessitate the mines stopping work. A total or partial stoppage might also arise from other unavoidable causes, such as scarcity of labour, or the output might cease for a time by reason of development work being necessary.

The reading contended for by the appellants does not fit in with the structure of the clause. The clause contemplates some event occasioning a total or partial stoppage of works or mines, and provides for a corresponding total or partial suspension of deliveries. It is obvious that this suspension is to be total or partial according to whether the stoppage of works or mines is total or partial, and a *pro rata* delivery is only provided for in the case of partial stoppage of works or mines. If the first four events were mentioned with reference to, and were intended to provide for, some occurrence not bringing about a total or partial stoppage of works or mines, one would have expected the clause to provide extensively for what was to be done on the occurrence happening, in the same manner as complete provision has been made for what is to happen in the event of a total or partial stoppage of works or mines.

Upon the construction which I hold to be the true construction of the contract, there is no exception upon which the defendants can rely as excusing them from the performance of the contract. They made a freight contract with the shipping company, and there is not any evidence to show that such company was not always ready and willing to carry out the same, notwithstanding the rise in freights. Indeed, the curious letter of Messrs. Sota and Aznar, Bilbao, to Messrs. Sota and Aznar, London, of the 31st Dec. 1914 points distinctly in the opposite direction. Sent with that letter was a list of the contracts for which the shipping company had guaranteed the necessary tonnage at the rates of freight mentioned in the list. This included the plaintiffs' contract, and the rate of freight was 5*s.* 9*d.* a ton, and the instructions contained in this letter are that,

whatever freight was shown in the bill of lading and was, therefore, paid by the plaintiffs on obtaining delivery of their goods, only 5*s*. 9*d*. was to be credited to the shipping company, and the balance carried to the credit of the mining company. Moreover, the shipping company continued to make frequent voyages with ore to the East Coast of England, and by preference sent their own ships there, as the additional tonnage which was chartered went mostly to West Coast ports. There is no trace in the documents before us of Messrs. Sota and Aznar, as representing the shipping company, taking up the position with Messrs. Sota and Aznar as representing the mining company, that the charter-party at 5*s*. 9*d*. was no longer binding, or that the shipowners were excused from the further performance of it by reason of any exception contained in it. Moreover, this charter-party was merely an arrangement between the mining company and the shipping company, to which the plaintiffs were not parties, which was not communicated to them and with the terms of which they were not concerned. The defendants had agreed to deliver the ore at Middlesbrough; and, although freights had risen, tonnage was available for the shipments contracted for. Indeed in 1915 the shipping company sent more ships to the Tees than they had ever done before. The defendants delivered in 1915 257,000 tons of ore by Messrs. Sota and Aznar's line, and 131,000 tons by the chartered vessels, and the only ore not delivered appears to have been that contracted to be sold to the plaintiffs and to the North-Eastern Steel Company Limited, who declined to alter their contracts and pay at an increased price. If the shipping company had in fact refused to carry out their freight contract and claimed that they were justified in so doing by an excepted peril, and if they could have sustained that position by reason of the terms of their charter-party, this would not avail the defendants as a defence for not delivering, seeing that other tonnage was available, although at an increased rate of freight.

It was urged that the rise in freight owing to the war and to the German notice of the 4th Feb. proclaiming the waters round Great Britain and Ireland a war region, and to the German submarine attacks, was quite abnormal, and far beyond ordinary market fluctuations, and that by "commercial prevention" the defendants were unable to deliver the ore. This can only mean that the defendants would incur a loss in carrying out their contract. But a mere rise in the price of a commodity to be supplied, or in the rate of freight, is not alone a sufficient excuse for non-delivery. A person is not entitled to be excused from the performance of a contract merely because it has become more costly to perform it. This case has nothing to do with the doctrine of "frustration of an adventure" upon the breaking out of war. The contract was made during the war; iron ore had been declared contraband by the British Government before the date of the contract, and a term was added to the contract immediately after it was made that deliveries would have to be suspended if the North Sea became closed to Spanish tonnage. The parties to the contract were mindful of the existence of a state of war and contemplated its continuance and contracted with reference to it.

In my opinion the appeal fails and should be dismissed.

In the case of the North-Eastern Steel Company the circumstances are very similar, but they are not identical. The contract in this case is dated the 4th Dec. 1914 and is made between the defendant company and the North-Eastern Steel Company Limited. By it the defendants agreed to sell and deliver 25,000 tons of ore in the first half of 1915. This contract is not in the same form as in the previous case. The price is a little more—namely, 13*s*. 9*d*. a ton. The freight contract, too, is for 6*s* 3*d*. a ton as against 5*s*. 9*d*. in the case of Messrs. Bolckow, Vaughan, and Co. Limited. There is a provision for the deliveries being delivered over the first half of 1915, and then comes this clause: "In the event of a European war, restraint of princes or Governments, civil commotion, accidents, strikes, imminent hostilities," that means "preventing the carrying out of this contract," "and all other causes of what nature and kind whatsoever beyond the personal control of the seller, this contract to be suspended during that period at the seller's option. The strike and accident clause applies to buyers." Now, it will be observed that that is a contract only for 25,000 tons over the first half of 1915. But a few days later a further contract was made for a further 25,000 tons of the same ore at the same price and on the same terms, except that it was for deliveries extending over the second half of 1915. Then in the letter making the second contract—that is, the letter dated the 9th Dec. 1914—there is an added term which is not quite in the same language as the added term in the *Bolckow, Vaughan* case. "Of course it is understood that, should the conditions in the North Sea become worse than they are to-day, and the North Sea should be closed to Spanish tonnage, then these contracts shall be suspended, as Messrs. Sota and Aznar rely mainly upon their own steamers for the fulfilment of these contracts." There was at the same time a corresponding freight contract entered into between the defendants and the shipping company providing for the delivery of this consignment at 6*s*. 3*d*.

There is a similar correspondence with regard to the rise in freights and the demand for extra freight in this case as in the other, and it is not necessary to go through all the correspondence. It is manifest that the defendants' agents at Middlesbrough, Messrs. Bagley and Co., who were putting forward the defendants' claim to be paid additional sums, did not think much of the claim. It was pointed out that the defendants, Sota and Aznar, could not have it both ways, because some of their boats at this time were probably taking advantage of the great increase in the rise of freights; but ultimately the matter passed into the hands of the solicitors, and on the 6th March there is a letter from the plaintiffs' solicitors to the defendants: "We have had an opportunity of perusing the correspondence. We would be much obliged if you would let us know by return of post as to whether you will deliver in the terms of the contract, or whether you maintain the position taken up by you in your letter of the 10th Feb." That is a position similar to that in the *Bolckow, Vaughan* case, that they would not deliver except they were paid sums additional to the contract price. On the 17th March Messrs.

Crump and Son answer: "We think that the communications which have already passed between the parties are sufficient indication that our clients claim to have exercised their option of suspending all deliveries during the continuance of the war. If there is any question as to this, you may take this letter as our clients' intimation of their position in the matter—namely, that they exercise their right to suspend the contract." Now, it is manifest that in this case, as in the other, the defendants repudiated the contract, and the plaintiffs accepted the repudiation, acted upon it, and brought their action at once. It was urged that this repudiation was really a repudiation of both the contracts, the contract for the first half of 1915 as well as the contract in respect of the second half, but we relieved the counsel for the defendant during the arguments from this part of the case, because it is manifest that here the parties were only corresponding with reference to the contract that was then being performed. The plaintiffs' solicitors letter of the 10th March said: "You will doubtless have looked at the contract." That was the contract that was then in course of performance, the contract for the first half of 1915. The answer of Messrs. Crump and Son has reference to that contract in which they say they exercise their right to suspend the contract. The contract relating to the second half of 1915 was not yet come into operation. There were no deliveries due under it, and no correspondence with regard to it. So that in my opinion it must be taken that the only contract that was the subject of this repudiation was the contract for the first half of 1915.

That being the position, I return to the contract. The question is whether the defendants, having refused further to carry out their contract except on terms that they were not entitled to insist upon, can rely upon any condition in the contract as exempting them from liability "in the event of European war, restraint of princes or Governments," &c. It was urged that the contract in this case between the plaintiffs and the defendants, containing as it does this exception of restraint of princes, the defendants were, in the events that have happened, prevented by restraint of princes from carrying out their contract, and therefore they were under no liability. In my judgment they were not so prevented in fact. This is shown by the facts already stated. The large quantity of ore carried by Sota and Aznar's boats to the East Coast ports over the period in question is conclusive of this. It is shown by the correspondence that it was simply by reason of the refusal of the plaintiffs to pay the increased price that the defendants refused to deliver.

The German notice of the 14th Feb. 1915 with regard to the war region of the waters round Great Britain could not extend to prevent neutral ships sailing with innocent cargoes, and did not even purport to do so. The fact that ships were delayed, or for a time had the protection of a convoy or of an armed guard on board, did not in fact operate to prevent deliveries of ore being made. On the contrary the evidence shows that almost if not quite all of the ore contracts other than plaintiffs' and Bolckow, Vaughan, and Co.'s were fulfilled, and the defendants even offered to deliver ore beyond the amounts contracted for. Moreover, convoy was for the purpose of assisting the defendants to carry their ore to Middlesbrough, and not to prevent their doing so, and, in their letter of the 27th Jan. 1915 to the Board of Trade, Messrs. Sota and Aznar express their gratitude to the British Navy. In no single instance does it appear that any ship belonging to or chartered by the shipping company yielded to any restraint or were prevented by any restraint of princes from carrying out their contract; nor does it appear that the shipping company ever raised any objection to fulfilling the terms of their charter-party on any such ground. The contrary appears, that the ore ships of the defendants continued to make their regular voyages without prevention and without accident and in increasing numbers at all times material for the decision of this case.

In my opinion the defendants were not prevented from fulfilling their contract by any exception, and the appeal fails and should be dismissed.

Bankes, L.J.—I agree.

The Lord Justice has dealt with the facts of the case so very fully that I only need state quite shortly the grounds on which I agree that the appeal should be dismissed. In *Bolckow, Vaughan's* case the contract was a contract made in November of 1914 for the delivery of 50,000 tons of ore over 1915. The defendants made default in delivery, and they claim that they were excused from delivering by a clause contained in the contract—the clause which refers to strikes and combinations of workmen, and so forth, and if they fail in their construction which they sought to put upon that clause, they fail in their action, because the clause would not apply to the case.

The clause is one in which it is agreed that some words must be inserted in order to make it intelligible, and it seems to me that the rules to be adopted with regard to supplying those words should be these: First of all, as few words as possible should be supplied, and, secondly, the words supplied should be those which, when inserted, render the clause as clear and as definite as possible. Looking at the clause from that point of view, you see that the relief afforded the shipper is a relief which should consist either of a partial suspension or of an entire suspension of deliveries during the period, and, if the construction suggested by the defendants is adopted, it would leave it at the will, apparently, of the sellers as to whether the suspension should be an entire one or a partial one. On the other hand, the construction suggested on behalf of the respondents is that the clause should be confined to a total or partial stoppage of mines, and, if that construction is adopted, the relief will be automatic, if I may use the expression, or the extent of the relief will be automatic, because, if the stoppage of the mines is total, the stoppage of the supply of minerals will be total; if the stoppage of the mines is partial, the supply of minerals will be partial. In my opinion that is sufficient to indicate that the words to be inserted should be words confined to total or partial stoppage of the mines. On that ground I agree with the words suggested by the Lord Justice, the words which, according to the intention of the parties, must have been intended to be supplied, and ought to be supplied. On that ground this appeal fails, because the defendants have failed to bring themselves within

the clause of the contract, and the only clause of the contract which would excuse non-delivery. I also agree that upon the facts it is plain there was a repudiation of the contract and not a mere repudiation of one delivery under the contract.

Then with regard to the North-Eastern contract, the words there that are used in the clause are wide enough to cover an interference or a prevention of deliveries under the contract if the appellants had been in a position to show that there was either such a prevention or such an interference; but this is just one of those cases where the arguments are excellent and very full. But the facts are scanty, and, when you consider the facts here, it seems to me that the facts stare one in the face that there was no prevention in fact, and if there was no prevention in fact, if there was no restraint of princes in fact, it is impossible to contend that the appellants in this case were excused. The ground upon which they rest their excuse is this: They say, "We were in fact prevented, or interfered with, in the deliveries, and we were in fact prevented or interfered with because we had a shipping contract, and that shipping contract contained a clause which enabled the shipping company to excuse themselves, or to suspend the contract, or to relieve themselves from the contract in the event of there being a restraint of princes." Now, in order to take advantage of such a clause, it seems to me that the appellants have to show two things. First of all, that this clause which was inserted in the shipping contract for the benefit of the shipping company, and which they could either waive or not as they please, or act upon or not as they please, was in fact acted upon; and, secondly, that, if acted upon, there was a restraint of princes that would justify them in acting upon it.

It seems to me that the appeal fails on both grounds. It is quite true to say that Sota and Aznar were managing both the mining company and the shipping company, and therefore it rested on Sota and Aznar really to say to the shipping company: "You must rely upon this clause in your contract, and you must claim the relief and the benefit of the clause in the contract which deals with the restraint of princes." But the answer is that they never did do that, and it seems to me essential that the appellants should be in a position to prove, in order to succeed in this defence, that the shipping company did in fact take up the attitude and did in fact claim to be relieved from their contract before they could set up this as a defence as against the claim of the plaintiffs. The second ground is that it seems to me plain that there was, as I have said, in fact no restraint of princes. It is quite true that there were many causes in operation which rendered the conveyance of ore to this country more difficult. Voyages were delayed, there was very considerable increase of the risk of conveying ore from Spain to this country, and there were other causes operating to which our attention has been called, and which are claimed to amount to restraint, but which, in my opinion, did not amount to restraint, but all of which operated, of course, to very greatly increase the freights which shipowners were demanding for the carriage of ore under the circumstances then existing.

I only desire to say this on that point, that Bailhache, J., although it was unnecessary for him to decide it, did, in the *Bolckow, Vaughan* case, indicate that, under those circumstances, there was, in his opinion, such a rise in freight as indicated such a scarcity of tonnage due to the war as amounted to commercial prevention. I only desire to say this, that in my opinion that view was not justified upon the particular circumstances of this case. The Lord Justice has indicated why, and it seems to me that, taking all the circumstances into account, all those circumstances amount to was that there was a very great increase of freights; that although they were very greatly increased and you might call them abnormal, yet the fact was that they were current rates of freight freely paid. Under those circumstances I think it is impossible to say there was anything in the nature of commercial prevention.

A. T. LAWRENCE, J.—I have had the advantage of reading the judgments of Swinfen Eady, L.J. and of Bankes, L.J., and I agree with them. I do not propose to add anything to them.

Appeal dismissed.

Solicitors for the plaintiffs, *Van Sandau* and *Co.*, for *Belk, Cochrane*, and *Belk*, Middlesbrough.

Solicitors for the defendants, *W. A. Crump* and *Son.*

Oct. 24, 25, 26, 27 *and Nov.* 17, 1916.

(Before SWINFEN EADY, and BANKES, L.JJ., and A. T. LAWRENCE, J.)

SCOTTISH NAVIGATION COMPANY LIMITED *v.* W. A. SOUTER AND CO.

ADMIRAL SHIPPING COMPANY LIMITED *v.* WEIDNER, HOPKINS, AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — "Baltic round" — Outbreak of war—Ship detained indefinitely in Baltic port—Restraint of princes—Whether commercial object of voyage frustrated—Proviso for cessation of hire —Cancellation clause.

In the first-named case shipowners by a charter-party, which was headed "time charter," let the steamship D. to charterers for "one Baltic round," the charterers to pay hire at a certain rate per month in advance until redelivery (unless lost) at a coal port in the United Kingdom. Arrests and restraints of princes were mutually excepted. In the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter-party, there was an option to the charterers to cancel the charter or insure the steamer for full value against war risks. The D. came on hire on the 4th July 1914, *and the charterers paid the first month's hire. The D. was loading a cargo for sub-charterers at a Baltic port when the war broke out. She was not allowed by the Russian authorities to leave the Baltic, and was uninsurable against war risks. On the 5th Aug., when the D. was partly loaded and the sub-charterers had received bills of lading from the master, the charterers purported to exercise their*

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

option to cancel the charter-party. In Nov. 1914 *the shipowners sued to recover the hire of the vessel to the 4th Nov.* 1914.

In the second-named case the charter-party was the same in form, and the facts were very similar, except that the ship was chartered for two "Baltic rounds," and the charterers did not purport to cancel the charter-party. On an arbitration the arbitrators found that there had been a frustration of the commercial adventure, and that therefore no hire was due from the charterers.

Held, that the cancellation clause was not applicable in the circumstances; that the commercial adventure of a Baltic round had been contemplated by both the shipowners and the charterers; that the delay resulting from the outbreak of war being of indefinite duration had frustrated the commercial adventure; and that the contract having been determined the shipowners could not recover the hire.

Judgments of Sankey, J. (infra; (1916) 1 *K. B.* 675) *and of Bailhache, J.* (13 *Asp. Mar. Law Cas.* 246; 114 *L. T. Rep.* 171; (1916) 1 *K. B.* 429) *reversed.*

The two appeals were heard together.

SCOTTISH NAVIGATION COMPANY LIMITED *v.* W. A. SOUTER AND CO.

APPEAL by the defendants from a judgment of Sankey, J., without a jury, in the commercial list.

The following statement of facts is taken from the written judgment of Sankey, J.

The plaintiffs claimed 3412*l.* 10*s.* for hire alleged to be due to them for the use of their steamship *Dunolly* to the 4th Nov. 1914, when the writ was issued.

The defendants alleged that no hire was due because of the frustration of their adventure, or, alternatively, because they gave notice, as they claimed to be entitled to do, to cancel the charter-party. They further said that in any event no hire was due after the 31st Aug., when the owners removed their crew from the vessel.

By a charter-party, headed "Time Charter," dated the 30th June 1914, the plaintiffs let and the defendants hired the steamship *Dunolly* for one Baltic round at the rate of 975*l.* per calendar month, payable half monthly in advance. The *Dunolly* came on hire at 6 a.m. on the 4th July 1914, and the defendants duly paid the hire for the first month. The defendants in their turn let the ship to Messrs. Horsley by a sub-charter dated the 2nd July 1914.

The charter-party of the 30th June 1914 contained the following provisions: First, in the event of Great Britain or other European Power being involved in war affecting the working of the steamer, at the commencement or during the currency of the charter-party, the defendants had the option of cancelling it; secondly, the acts of enemies and restraints of princes were mutually excepted; and, thirdly, in the event of loss of time from deficiency of men, payment of hire was to cease.

The vessel duly sailed to the Baltic, there to load timber for the sub-charterers, and upon the 27th July she began taking in cargo at Friedrickshamn. On the 30th July she arrived at Klamira to take in further cargo, and while there the half-monthly instalments of hire became due. On the 5th Aug. she arrived at Hurppu, where she finished loading on the 8th Aug.

Meanwhile, war broke out between Russia and Germany on the 1st Aug. and between Great Britain and Germany on the 4th Aug. Upon the 5th the defendants purported to cancel the charter-party by the following telegram of that date addressed to the plaintiffs: "We hereby notify you that, owing to Great Britain being at war affecting the working of the *Dunolly*, we exercise our option and now cancel this steamer's charter, with the proviso that we reserve our claim to proportion of freight to cover hire and charges already paid, and also reserving our right to claim any other losses or damages."

As to the exact position of affairs at the various ports at which the *Dunolly* had been loading timber, considerable evidence, both oral and documentary, was adduced, and I was satisfied that after the 1st Aug. it was impossible for the *Dunolly* to leave the Baltic for England. The Russian authorities upon that date proclaimed martial law in the Wiborg district, where Friedrickshamn and Hurppu are situated, and issued an order forbidding all vessels within the district from leaving the same. Permission was later given, but only to neutral vessels, to go *viâ* Baltischport at their own risk. Upon the 10th Aug. the Russian authorities prohibited the export of wooden goods, and the *Dunolly* in fact got no permission to carry such goods. No insurance of any sort could be obtained which would cover the ship on leaving Hurppu; and there were a number of other English vessels similarly caught in the Baltic, some of which found their way, as did the *Dunolly* at a later period, to Petrograd.

When the defendants gave their cancellation notice on the 5th Aug. the vessel had been partly loaded and the master had given bills of lading, which were held by the sub-charterers. She was, therefore, neither free from cargo or commitments. On the 26th Aug. the sub-charterers telegraphed to Friedrickshamn to ascertain the cost of discharging the cargo, and eventually they received the reply, dated the 29th Aug., that it would be 6500 marks. On the 31st Aug. the owners brought the crew home with the exception of the master and the engineer. Mr. Wilson, one of the firm of sub-charterers, stated that this affected the possibility of the discharge of the ship. I do not agree with this statement. The master and the engineer remained behind, and I accepted the evidence of the former that he could have obtained shore labour, which was cheap and plentiful, to discharge.

The defendants on the 7th Sept. wrote making certain offers, both with regard to the cargo and the bills of lading; but they were refused by the plaintiffs on the next day. In my opinion the defendants never took any proper or definite steps as to the cargo, and never came forward with any proper or definite proposals as to the bills of lading. They thought they were entitled to rely on their cancellation notice of the 5th Aug., and washed their hands of the matter. I was confirmed in this opinion by their solicitors' letter of the 21st Sept., where they said: "Our clients' contention is and has always been that in the events which have happened the time charter came to an end on the 4th Aug., and that it has since been your duty to deal with the cargo on account of whom it might concern."

Dec. 21, 1915.—Sankey, J. read the following judgment, which, after stating the facts as set out above, continued: In these circumstances the defendants rely, first, upon the well-known cases of *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125) and *Embiricos* v. *Reid and Co.* (12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45), and contend that they were entitled to throw up the charter-party upon the ground of the frustration of the adventure. They say that the charter-party, although headed "Time Charter," was really a voyage charter for a Baltic round; and after the 1st Aug. the adventure became impossible, and both parties were discharged.

In my view this contention is not correct. I think that the charter is a time charter. It is expressed to be such; the hire is calculated monthly, and there is a wide area in which the vessel may trade. The real meaning of the contract between the parties is that the plaintiffs agreed to allow the defendants to have the use of the vessel, subject to restraint of princes. This they have done, and have always been willing to do. The doctrine of frustration of adventure appears to me to apply only where the object which both parties have in view is frustrated. I doubt whether the doctrine is ever applicable to the general hiring of a vessel under a time charter-party, where the owner's only object is to earn freight. I think that it is confined to cases where it can be inferred from the charter itself that it is a contract for a definite voyage, or a definite object contemplated at first by both parties — *Jackson* v. *Union Marine Insurance Company* (*sup.*) and *Hudson* v. *Hill* (30 L. T. Rep. 555). In the present case the object of the plaintiffs has not been frustrated, the restraint of princes has not prevented the payment of hire by the defendants, nor have any of the events occurred which under the charter-party excuse them from that obligation. I therefore decide against the defendants' first contention, and proceed to the consideration of the cancellation points.

The first one which falls for decision is, When and in what circumstances are charterers entitled to give notice of cancellation? In my view charterers are only entitled to give such a notice when they are ready and willing to hand over the vessel free of cargo and free of commitments, or when they will be ready and are willing to do so in a reasonable time. In the circumstances of this case I hold that the defendants were not in a position to, and did not, hand the vessel over free of cargo and free of commitments in a reasonable time, and are therefore not entitled to rely upon their cancellation notice. The hire ran on, because the events which happened were not such as entitled the defendants to rely upon the hire-cesser clause.

As to the validity of the cancellation notice, I consider, on the whole, that the notice is not a good one. I am disposed to think that such a notice should make it clear that the vessel is free of cargo and free of commitments, or will be so in a reasonable time. The present notice does neither, but rather seems to make certain reservations. In the view I take, however, it is not necessary to decide this question.

Finally, the defendants contend that hire does not run after the 31st Aug., the day on which the crew were sent home, because there was then a deficiency of men within the meaning of the hire-cesser clause. In my opinion this is unsound. The point could not have been taken if the plaintiffs had kept all their men upon the ship with practically nothing to do. I cannot think that the rights of the parties depend upon the plaintiffs having to take such an unreasonable course; but beyond that, as I have above found, the master had at his disposal all the labour necessary for the defendants' use for the discharge of the ship.

The result is that the defences fail, and the plaintiffs are entitled to my judgment.

Judgment for plaintiffs.

The defendants appealed.

Admiral Shipping Company Limited *v.* Weidner, Hopkins, and Co.

Appeal by the defendants from a judgment of Bailhache, J. on an award stated in the form of a special case, reported 13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171; (1916) 1 K. B. 429:—

1. Differences having arisen between the Admiral Shipping Company Limited (hereinafter called "the owners") and Weidner, Hopkins, and Co. of Newcastle-upon-Tyne (hereinafter called "the charterers"), under a contract of affreightment dated the 22nd June 1914, for the hire of the steamship *Auldmuir*, as to whether any time hire is due by the charterers to the owners during the time the said vessel has been and is stopped at the port of Kotka in the Gulf of Finland, such differences and any other matters incidental thereto were by agreement dated the 25th Sept. 1914, and made between the owners of the one part and the charterers of the other part, referred to the arbitrament, &c., of Thomas Walter Purchas and George Morrel Stamp, and an umpire, if necessary, appointed by the said arbitrators, whose decision, or the decision of any two of them, should be final and binding upon all parties.

2. [Reciting disagreement of arbitrators and appointment of umpire.]

3. And whereas Thomas Walter Purchas, George Morrel Stamp, and William Robertson Heatley, having on the 21st Oct. 1914 heard and considered the evidence and arguments of both parties, find that the following facts were proved or admitted: (*a*) By the said charter-party dated the 22nd June 1914 the owners agree to let and the charterers to hire the said steamship *Auldmuir* for two Baltic rounds, commencing as therein mentioned. The said charter-party and the copy bills of lading which were put in evidence at the said hearing are fastened together and appended hereto and are to be deemed part of this case. (*b*) The said steamship was delivered to the charterers on the 29th June 1914. She left Hull on the 4th July for Cronstadt with a cargo of coals. (*c*) By a charter-party dated the 9th July 1914, and made between the charterers as time-chartered owners of the said steamship and Pyman, Bell, and Co. as charterers, the said steamship was chartered for a voyage from Sorfs, in Finland, to, amongst other places, Blyth, in Northumberland. (*d*) On the 17th July, having discharged her cargo of coals at Cronstadt, the said steamship left for Viborg and Kotka to load a cargo of wood goods for Blyth. (*e*) The said steamship arrived at Viborg on the 18th July and there loaded part of her cargo. She left Viborg on the 25th July and arrived at Kotka on the 26th July for the purpose of receiving the balance of her cargo. (*f*) On the 30th July 1914 the agents of the owners, by telegram addressed to the said steamship at Kotka, instructed the captain of the said steamship to hurry departure from Kotka. (*g*) On the 1st Aug. the loading of the said

steamship was completed at Kotka, and bills of lading in respect of the cargo were duly signed, and the said steamship was on that day ready to sail for Blyth. (*h*) On the 1st Aug. the customs authorities at Kotka refused to allow the said steamship to be cleared or to authorise her to leave Kotka. On the same day a state of war came into existence between Russia and Germany. (*i*) Notwithstanding the said refusal of the said customs authorities, the captain of the said steamship sailed with the said steamship from Kotka on the 1st Aug. (*j*) When the said steamship arrived in the neighbourhood of Revel (in the Gulf of Finland) she was stopped by the Russian naval authorities and ordered back to Kotka, where she returned on or about the 2nd Aug. (*k*) The hire for the said steamship had been paid by the charterers to the owners in advance up to and including the 14th Aug. 1914, and no hire has since been paid. (*l*) On the 14th Aug. the agents of the owners, by telegram addressed to the said steamship at Kotka, instructed the captain of the said steamship to remain in port and await further orders, and on the 19th Aug. the said agents telegraphed to the British Consul at Kotka that the said steamship must remain in port. (*m*) On the 25th Aug. the said agents of the owners by telegram instructed the British Consul at Kotka to repatriate the crew of the said steamship (other than the captain and chief engineer). (*n*) The said steamship has been detained at Kotka by or in consequence of the Russian naval authorities as aforesaid, and at the date of the hearing of the evidence herein—namely, the 20th Oct.—the said steamship was still so detained.

4. A copy of the correspondence put in evidence is appended hereto for the purpose of reference in the event of the point of law being argued before the court and for the purpose of identification is marked "b" and initialed by the undersigned William Robertson Heatley.

5. On behalf of the owners it was contended that the words "restraints of princes, rulers, and people" contained in the charter-party of the 22nd June did not under the circumstances above mentioned relieve the charterers from the obligation to pay hire, and that they continued liable for the hire of the said steamship notwithstanding the detention of the said steamship at Kotka. They further contended that the charter-party contained a clause providing in what events payment of hire was to cease, and, "restraints of princes, of rulers, and people" not being one of such events, the exception of "restraints of princes, rulers, and people" contained in the general exceptions clause must be disregarded in connection with the cessation of hire. They also contended that as the said steamship was burdened with obligations to third parties by reason of the presence of cargo on board shipped under the charter-party of the 9th July, and in respect of which bills of lading had been signed, the charterers were liable for the hire of the said steamship. It was further contended on behalf of the owners that the owners by communicating with the captain of the said steamship did not commit a breach of the charter-party, but that they were justified in so communicating, having regard to the circumstances, and that though the crew, with the exception of the captain and chief engineer, had been repatriated, the said steamship was still efficient and efficiently manned for the purpose required of her—viz., lying at Kotka. Further, that repatriation of the crew as aforesaid took place after the initial breach of the charter-party by the charterers in failing to pay the hire due on the 14th Aug. 1914.

6. On behalf of the charterers it was contended that the meaning and intention of the parties to the charter-party of the 22nd June 1914 must be ascertained at the time the charter-party was entered into. That both parties at the time meant and intended by the expression "restraints of princes, rulers, and people . . . always mutually excepted" that this had relation to the use and hire of the said steamship, and that in the event of the use of the said steamship being restrained by princes, rulers, or people, no hire was due from the charterers during such restraint. They further contended that the owners had committed breaches of the said charter-party of the 22nd June: (*a*) By instructing the captain by the telegram of the 13th July to hurry his departure from Kotka. (*b*) In ordering by the telegram of the 14th Aug. the captain to remain in port. (*c*) By removing the crew from the said steamship, and that under no circumstances could hire be due on and after the 14th Aug.

7. Now we, the undersigned arbitrators and umpire, find and award (subject to the opinion of the court if either of the parties should decide to take it upon the question of law hereinafter mentioned) that no time hire is due by the charterers to the owners during the time the said vessel has been at the said port of Kotka under the circumstances aforesaid.

8. (Provision as to costs.)

9. If either of the parties should decide to take the opinion of the court, then the question for the court is whether upon the facts herein stated and the true construction of the charter-party of the 22nd June, we are right in finding an award or whether the charterers are liable to pay any hire to the owners during the time the said vessel has been and is stopped at the said port of Kotka under the circumstances aforesaid.

10. If the court should hold that the charterers are liable to pay hire to the owners during the time the said vessel has been stopped at the said port of Kotka under the circumstances aforesaid, then we find the amount hereof to be the sum of 1897*l.* 8*s.* 4*d.* up to and including the 20th Oct. 1914 (being the date of the hearing of the said arbitration), and we award that the charterers do pay that sum to the owners with interest at 5*l.* per cent. per annum from the date of this award until payment.

11. If the court should hold that the charterers are liable to pay hire to the owners during the time the said vessel has been and is stopped at the said port of Kotka under the circumstances aforesaid then we award and direct that the owners and charterers shall bear and pay their own costs and expenses of and incidental to the reference, and that the charterers do pay the costs, amounting to 74*l*, relating to this award, including our fees as arbitrators and umpire respectively.

12. In any event we leave to the court the costs of all proceedings subsequent to this award.

By a supplementary award dated the 21st Sept. 1915 the arbitrators found—

(*a*) That at no time between the 14th Aug. and the 20th Oct. was there any reasonable probability of the steamship *Auldmuir* proceeding with the chartered voyage in such a time as that the commercial adventure would not have been frustrated; (*b*) that no voyage could have been taken from Kotka between the 14th Aug. and the 20th Oct. 1914 which would not have involved risk of seizure or capture by a foreign ruler; (*c*) that neither the charterers nor their agents had been given any information as to or were aware of the facts contained in the telegram of the 30th July 1914 (referred to in clause 3 (*f*) of the special case), in the telegrams of the 14th and 19th Aug. 1914 referred to in clause 3 (*l*) of the special case), and in that of the 28th Aug. 1914 (referred in clause 3 (*m*) of the special case) before the 19th Oct., the day previous to the day on which the matter first came before the arbitrators.

Bailhache, J. held (13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171) that the charterers were liable for hire, that the telegram of the owners directing repatriation of the crew did not amount to a withdrawal of the ship; that even if the vessel was detained by "restraint of princes" that did not excuse payment of hire;

and that in finding "frustration" as a fact, the arbitrators had misdirected themselves, inasmuch as delay due to a cause contemplated and provided for by the charter-party, even though the delay itself is protracted beyond what might have been expected, does not amount to frustration of the adventure.

The charterers in both cases appealed.

The appeals were heard together.

Sir *John Simon*, K.C., Sir *Maurice Hill*, K.C., and *R. A Wright* for W. A. Souter and Co.; and Sir *John Simon*, K.C., *F. D. MacKinnon*, K.C., and *R. A. Wright* for Weidner, Hopkins, and Co.—These charter-parties were not time charter-parties; they were in the one case for a "Baltic round," and in the other case for two "Baltic rounds"—that is, for the commercial adventure of a "Baltic round." The adventure of a "Baltic round" means taking cargo into the Baltic, calling at ports in the Baltic, putting out and taking in cargo thereat, returning from the Baltic, calling at ports *en route* for home, and returning to a coal port in the United Kingdom. In both cases the adventure was frustrated by the act of the Russian Government which prevented the adventure being proceeded with. It was an implied term of the charter-parties that the contract should be dissolved if circumstances beyond the control of the defendants should render the performance of the round impossible; and the implied term does not contradict any express terms of the charter parties. An express term dealing with the same subject matter does not exclude an implied term on which the whole basis of the contract rests. They referred to

Bigge v. *Parkinson*, 7 L. T. Rep. 92; 7 H & N 955;
Sale of Goods Act 1893, s. 14, sub-s. 4;
Quebec Marine Insurance Company v. *Commercial Bank of Canada*, 22 L. T. Rep. 559; L. Rep. 3 P. C. 234;
Sleigh v. *Tyser*, 9 Asp. Mar. Law Cas. 97; 82 L. T. Rep. 809; (1900) 2 Q. B. 333;
Embricos v. *Reid and Co.*, 12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45;
Jackson v. *Union Marine Insurance Company*, 12 Asp. Mar. Law Cas. 513; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;
Taylor v. *Caldwell*, 8 L. T. Rep. 356; 3 B & S. 826;
Krell v. *Henry*, 89 L. T. Rep. 328; (1903) 2 K. B. 740;
Civil Service Co-operative Society v. *General Steam Navigation Company*, 9 Asp. Mar. Law Cas. 477; 89 L. T. Rep. 429; (1903) 2 K. B. 756;
Poussard v. *Spiers*, 34 L. T. 572; 1 Q. B. Div. 410;
Tully v. *Howling*, 3 Asp. Mar. Law Cas. 368; 36 L. T. Rep. 163; 2 Q. B. Div. 182;
Horlock v. *Beal*, 114 L. T. Rep. 193; (1916) A. C. 486;
The Savona, (1900) P. 252;
Braemont Steamship Company v. *Weir and Co.*, 11 Asp. Mar. Law Cas. 345; 102 L. T. Rep. 73; 15 Com. Cas. 101;
Arnhold, Karberg, and Co. v. *Blyth and Co.*, 13 Asp. Mar. Law Cas. 235; 114 L. T. Rep. 152; (1916) 1 K. B. 379;
Blakeley v. *Muller*, 88 L. T. Rep. 90; (1903) 2 K. B. 760.

The doctrine of commercial frustration applies to both a time charter and a voyage charter. In *F. A. Tamplin Steamship Company* v. *Anglo-American Products Company* (13 Asp. Mar. Law Cas. 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397) Lord Parker did not say that the principle of commercial frustration did not apply to a time charter, though he said that it was more difficult to apply it to a time charter than to a voyage charter. In that case the House of Lords only held that on the facts the interruption by the requisition did not put an end to the charter-party.

Leck, K.C. and *W. N. Raeburn* for the shipowners in both cases.—Although the charter-parties contemplated a "Baltic round," they were nevertheless time charter-parties. The forms were time charter-party forms, and in the sub-charter-parties the charterers were described as time chartered owners" and "time charterers." In a voyage charter the charterers and the owners have a common object, and are both interested in the completion of the voyage; but in a time charter the only object of the shipowner is to receive the time freight, and to have his ship redelivered. Here, provided that the shipowner received the freight, his object in letting the ship was in no way frustrated. In the present cases the mercantile adventure was not completely frustrated, for the charterers had the use of the vessel for a considerable period, and the interruption was not so great as in the *Tamplin* case, where the contract was held not to have been determined. There was no frustration of the commercial adventures in the present cases. They referred to

Hudson v. *Hill*, 30 L. T. Rep. 555
Tully v. *Howling* (*sup.*);
Horlock v. *Bew* (*sup.*);
Braemont Steamship Company v. *Weir* (*sup.*);
Herne Bay Steamboat Company v. *Hutton*, 19 Asp. Mar. Law Cas. 472; 89 L. T. Rep. 422.

Further, the term sought to be implied is inconsistent with the express provision of the charter-party as to insuring or cancelling in case of war affecting the working of the ship. By that provision the charterers had the option of either cancelling or maintaining the charter-party, but if they maintained it they were bound to insure. The charterers cannot say that the charter-party was determined by frustration of the adventure, when they had the option to cancel.

Sir *John Simon*, K.C. in reply.—If the parties contracted on the basis of a certain state of circumstances subsisting, and that state of circumstances fails to subsist, it is no answer to say that the shipowner's sole interest was to receive his freight. In *Krell* v. *Henry* (*sup.*) the plaintiff's only interest was to receive the money payment.

Nov. 17, 1916.—SWINFEN EADY, L.J. read the following judgment:—

The circumstances in these two appeals are very similar, but I will deal first with *Scottish Navigation Company* v. *W. A. Souter and Co.* The question raised by the appeal is whether the defendants are liable to pay to the plaintiffs certain arrears of hire under a charter-party.

By a charter-party dated the 30th June 1914 the plaintiffs agreed to let and the defendants to hire the steamship *Dunolly* for "one Baltic round" at the rate of 975*l.* per calendar month, commencing on and from delivery of the vessel to the defendants as therein provided, and at

and after the same rate for any part of a month used to complete a voyage until redelivery (unless lost) to the owners in the same good order and condition as when accepted at a coal port in the United Kingdom, the said hire to be paid half-monthly in advance at Glasgow, charterers to have the option of sub-letting. The charter-party provided for cesser of hire in the event of loss of time from deficiency of men or stores or break-down of machinery; but should the vessel be driven into port or to an anchorage by stress of weather, or from an accident to the cargo, such detention or loss of time to be at charterers' expense; and should steamer be detained by ice or quarantine, same to be for charterers' account, and time to count. Arrests and restraints of princes (*inter alia*) always mutually excepted. Should the vessel be lost, hire to cease and determine on the day of her loss, and any hire paid in advance and not earned to be returned to the charterers. The vessel came on hire on the 4th July, and proceeded from Hull to Kronstadt with a cargo of coals.

The parties were agreed that a "Baltic round" ordinarily means a voyage to a Baltic port or ports, with leave to call at a port or ports substantially on the route thither, and returning from the Baltic to a coal port here, with leave to call at a port or ports substantially on the route to such coal port. By a sub-charter-party dated the 2nd July 1914, the defendants sub-chartered the vessel to Messrs. George Horsley and Co. Limited, for a voyage from Petrograd or 1/2 places in one district between Viborg and Helsingfors districts inclusive, with a full and complete cargo of props to the Tyne, Wear, West Hartlepool, or Humber (one place only), on being paid freight at the rate of 27*s.* 6*d.* per intaken piled fathom of 216 cubic feet.

By the 27th July 1914 the vessel had discharged her outward cargo of coal and had begun loading props under the sub-charter at Frederikshamn in the Gulf of Finland, whence she proceeded to Kalciyarvi, where she continued loading. On the 1st Aug. 1914 war broke out between Russia and Germany. Ever since this date the vessel has been, and still is, detained in the Gulf of Finland by orders of the Russian Government and is not allowed to leave. Considerable difficulty and delay arose in telegraphic communication. The master of the steamer on the 2nd Aug. sent a telegram to the charterers that the Customs refused clearance for the vessel. On the 4th Aug. war broke out between this country and Germany. On the 5th Aug. the defendants telegraphed a notice to the plaintiffs that owing to Great Britain being at war, affecting the working of the steamer, they exercised their option and cancelled the steamer's charter, reserving their claim to proportion of freight to cover hire and charges already paid. On the same day the defendants wrote to plaintiffs confirming this telegram; and in a letter of the 14th Aug. 1914 the defendants added:

> Now that we know the whereabouts of the vessel, it is our duty to notify you that we transfer her homeward charter to you, also the responsibility for any expenses and charges connected therewith. Enclosed we beg to hand you copy of the homeward charter for your guidance. The rate of freight inserted in same, namely, 27*s.* 6*d.* per fathom, is our contract rate with Messrs. Horsley. The current rate at the time the vessel was stemmed was 25*s.* 6*d.* and we reserve our right to claim this difference of freight. Any further documents or charges that we may receive we will pass on to you in due course.

The plaintiffs declined to accept the notice of cancellation of the charter, and the parties were at issue. On the 31st Aug. 1914, pursuant to the instructions of the owners, the crew left the vessel and returned home to England, only the captain and the engineer remaining on board in charge of the vessel. The detention of the vessel, owing to the existence of a state of war, has continued now for two years and three months, and may continue for an indefinite longer period. The judge was satisfied that it was impossible for the *Dunolly* to leave the Baltic for England after the 1st Aug. No insurance could be obtained which would cover the ship on leaving the Gulf of Finland.

The plaintiffs contended that the notice of cancellation was invalid, and that there was not any right to cancel under the circumstances, and that the hire had continued to run on and that the arrears were payable because the events which had happened did not bring the case within the cesser clause.

The writ in the action was issued on the 6th Nov. 1914, and the plaintiffs thereby claim 3412*l.* 10*s.*, being the amount of hire alleged to have accrued under the charter-party between the 4th Aug. and the 4th Nov. 1914, and at the trial the plaintiffs obtained judgment for that amount. The hire for the calendar month the 4th July to the 3rd Aug. was paid in due course in July.

I am of opinion that according to the true construction of the charter-party the defendants had not any right to give a notice cancelling it under the circumstances which arose. The clause in the the charter-party provides that no voyage is to be undertaken that would involve risk of seizure or capture, and this provision alone was sufficient to preclude the vessel from sailing from the Gulf of Finland on and after the 1st Aug. 1914. The clause next provides that in the event of Great Britain or other European Power being involved in war, affecting the working of the steamer, at the commencement or during the currency of the charter, the charterers are to have the option of cancelling the charter or insuring the steamer against all war risks for its full value. This clause on its true construction provides for a particular contingency—namely, the event of war—at a time when the charterer is able to take either of two courses, both of which are open, but he must elect which he takes—namely, cancel or insure against war risks. On the 1st Aug. this vessel in the Gulf of Finland was no longer insurable against war risks. It was quite uninsurable. The clause does not in my opinion enable the charterer to cancel the charter after the vessel has been exposed to the risk and has been detained indefinitely by a Sovereign who has become involved in war when the vessel is no longer insurable, and when the charterer is unable to redeliver it to the owner either immediately or within any reasonable time. The notice of cancellation did not when given and could not under the circumstances determine the charter.

There remains the question whether the charterers remain liable for the hire claimed in the action. The charter was for a particular marine

adventure compendiously described as a "Baltic round"—a voyage to the Baltic and home, with the liberties before mentioned, and accepted by the parties as coming within what is described as a "Baltic round." The ship is not hired for any definite time, although payment for the Baltic round is calculated by reference to the time occupied. It is not true to say that the ship was merely hired for such period of time as is ordinarily taken in completing a Baltic round. The charterers had no right under the charter-party to require the ship to go elsewhere than on a Baltic round (as, for instance, on a voyage to the Mediterranean), nor had they any right to lay up the ship for a time, instead of sailing her, as they would have under an ordinary time charter for a definite period.

In my judgment, the principle upon which this case falls to be determined is that both parties contemplated from the first a mercantile adventure—a Baltic round; a voyage to the Baltic and back again to be paid for according to the time occupied—and that the enforced delay by reason of the war is of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense, and that the original contract is thereby determined and cannot be enforced. The "Baltic round" which is the subject of the adventure is quite impracticable in a commercial sense. It is not a case in which the charterers have bound themselves absolutely and in any event to continue to pay the hire until the ship is restored to the owners. If that were so, they would continue liable to make the monthly payment of 975*l.* for an indefinite period.

Paraphrasing the language of Lord Loreburn in *Horlock* v. *Beal* (*sup.*), I think it was an implied term of this charter-party that it should be practicable for this ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the contemplated adventure being carried out. Both shipowner and charterer made their bargain on the footing that, whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure of a Baltic round. The further performance of the contract contained in the charter-party became impossible upon the ship being detained for a long and indefinite period. It was urged that here there was no impossibility, as all that the charterers had to do was to continue to pay the monthly hire, and the detention of the ship did not render that impossible. The same argument would have equally applied in *Horlock* v. *Beal* (*sup.*) in the claim for seamen's wages—namely, that the detention of the ship did not prevent the owners from paying the amount of the allotment note, which was all that the plaintiff there claimed. It is the further performance of the contract by one party which formed the consideration for the payment by the other, which has become impossible, and this effects a dissolution of the contract.

It was contended that the charter-party in the present case contained a clause providing for the cesser of hire under certain circumstances, and that the effect of such a clause was to exclude any implication that the hire might cease under other circumstances. The answer to this argument is that the effect of what has happened is not merely to suspend liability to pay hire, but to dissolve the contract, and accordingly there is no longer any subsisting contract under which hire is payable.

In my judgment the charter-party must be taken to have been entered into under the implied condition that, if supervening events (not due to the default of either party) rendered the performance of the "Baltic round" indefinitely impossible, the contract should be deemed to be dissolved: (see *Geipel* v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404, and *Horlock* v. *Beal*, *sup.*). Here a contract has been entered into which by a supervening cause beyond the control of either party has become impossible or impracticable in a commercial sense, and the charterers have not, according to the true construction of the written contract, expressly taken upon themselves the risk of such a supervening cause; upon the occurrence of that cause both parties were and are excused from any further performance. The case comes within the principle of *Taylor* v. *Caldwell* (*sup*) and *Appleby v. Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651) In *Taylor* v. *Caldwell* (*sup.*) and in *Appleby* v. *Myers* (*sup.*) the further performance of the contract had become absolutely and physically impossible, and not merely impossible in a commercial sense. In the former case the one party could not give to the other the use of a certain music-hall, as it had been destroyed by fire. In the latter case the steam engine and machinery could not be erected upon and affixed to the defendants' premises unless these continued in a fit state to enable the work to be performed on them, and they had in fact been burnt down. Nevertheless, the principle which was applied in these cases is not limited in English law to cases of physical impossibility. In *Krell* v. *Henry* (*sup.*) it was quite possible for the plaintiff to give possession of the flat in Pall Mall, for the occupation of which the defendant had agreed to pay. In that case Vaughan Williams, L.J. pointed out the wider application of the principle, and said that it applied to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance. It was urged that such a doctrine cannot from its nature properly apply to a charter where there is no "adventure" in which the parties are jointly interested liable to be "frustrated," and reliance was placed upon the observations of Lord Parker in *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (*sup.*): "Without laying it down that the principle" (of the frustration of a commercial adventure) "can in no circumstances be applicable to time charter parties, I am of opinion that its application is in such cases much more difficult than in the case of charter-parties which contemplate a definite voyage within certain limits of time." Whatever difficulty there may be in the application of the principle to ordinary time charters, where no particular voyages are contemplated, and where the time charterer is at liberty to sail the ship or not as he likes, and where he obtains the control of the ship for a definite period, whether he sails her or not, such difficulty is not insuperable in a case like the present, where the charter-party is for a definite voyage out and home, the limits of which are completely defined by the mercantile

language used, and which furnishes a definite standard for the computation of the time for which the charter is expected to continue.

I am of opinion that the appeal should be allowed and judgment entered for the charterers, the defendants.

In the case of *Admiral Shipping Company* v. *Weidner, Hopkins, and Co.* the facts are fully set out in the report of the case before Bailhache, J. The steamship *Auldmuir* was the subject of a charter-party dated the 22nd June 1914, and the position is very similar to that of the *Dunolly;* but the *Auldmuir* was chartered for two Baltic rounds, the charterers to have the option of cancelling the charter at the end of the first round, paying in that event a slightly increased hire for the period used. No notice of cancellation was ever given. This vessel discharged her outward cargo, and when fully loaded with a return cargo of wood goods for Blyth she was detained by the Russian authorities at Kotka in the Gulf of Finland on the outbreak of war on the 1st Aug., and has not since been allowed to leave. The dispute between the parties was the subject of an arbitration, and the award was made in the form of a special case. It came before Scrutton, J., and he made an order on the 17th March 1915, remitting the case to the arbitrators to find whether at any and what time between the 14th Aug. (up to which date hire had been paid in advance) and the 20th Oct. 1914 (the date of the hearing of the arbitration), there was any reasonable probability of proceeding with the chartered voyage in such a time as that the commercial adventure would not be frustrated, and whether any voyage could have been taken from Kotka in the Gulf of Finland between the 14th Aug. and the 20th Oct. 1914 which would not have involved risk of seizure or capture by a foreign ruler.

On the 21st Sept. 1915 the arbitrators made a further award and found and declared that at no time between the 14th Aug. and the 20th Oct. was there any reasonable probability of the steamship *Auldmuir* proceeding with the chartered voyage in such a time that the commercial adventure would not be frustrated. And they also found that no voyage could have been taken from Kotka between the 14th Aug. and the 20th Oct. 1914 which would not have involved risk of seizure or capture by a foreign ruler.

In my judgment the same considerations apply in the case of this vessel as in the steamship *Dunolly*. The contract comprised in the charter-party became impossible of performance and was dissolved and both parties excused from its further performance.

In giving judgment on the hearing before him of the special case and the further award, Bailhache, J. gave a very careful definition of the meaning of the commercial frustration of an adventure by delay. If the object which both parties had in view, when they entered into the charter-party in the present case, was one or two "Baltic rounds," and if it was for the accomplishment of that object that the contract was made and the delay is such as to prevent the fulfilment of that object, then the delay amounts to frustration within that definition. I regret to differ from the learned judge upon the construction of the charter-party, as, in my opinion, the charterers were not entitled, if they pleased, to lay up the *Auldmuir*, nor might they have sent her to the Mediterranean instead of on a Baltic round. The voyage out and home is particularly defined and described, for which the payment is not to be an agreed sum or at an agreed rate of freight, but is to be according to the time occupied.

By reason of the detention of the ship in the Gulf of Finland the charterers are wholly deprived of the use of her for an indefinite period. Again, it was urged that it was impossible to apply the doctrine of frustration to a case where one of the parties to a contract is fulfilling his part of the contract according to its terms. But this leaves out of consideration the implied term. In *Jackson* v. *Union Marine Insurance Company* (*sup.*) the shipowner had observed the terms expressed. He had agreed to send his ship to Newport to load rails there, dangers and accidents of navigation excepted. He did fulfil his part of the contract according to its terms, the vessel being duly sent and only delayed by an accident of navigation. But the court held that an additional term was implied, that the ship should arrive there "at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterers should not be at an end, but in existence." Not arriving at such a time put an end to the contract, though, as it arose from an excepted peril, it gave no cause of action.

It was also contended that the charter-party had made provision for the war—a contingency that had happened; and where the contract provides for a given contingency it is not for the court to import into the contract a different provision for the same contingency under another name. The provision referred to was the option to cancel the charter, and this option I have already dealt with in the previous case. For the reasons already stated in this case and in the one which has just preceded it, I am of opinion that the appeal should be allowed and the special case should be answered by saying that upon the facts therein and in the further award stated and found, and upon the true construction of the charter-party of the 22nd June 1914, the arbitrators were right in their finding and award that no time hire is due by the charterers to the owners during the time when the vessel has been and is stopped at Kotka. That is the form in which the question was raised before the arbitrators.

Bankes, L.J. read the following judgment:—These two appeals were heard together. The one is an appeal from a judgment of Sankey, J. after the trial of the action in the Commercial Court. The other is an appeal from the judgment of Bailhache, J. on a case stated by arbitrators for the opinion of the court.

It is not necessary that I should restate the facts. They are fully set out in the report of the judgments in the court below. It is sufficient for my purpose to say that except upon one point, to which I refer later, I consider that no material distinction can be drawn between the facts in the two cases. In each case the claim of the respondents was for a sum alleged to be due for the hire of a vessel chartered by the respondents to the appellants. In each case the main defence of the appellants was that the doctrine commonly spoken of as "the frustration of the adventure" applied

to their case, and that in consequence they were relieved from any obligation to pay the sums claimed. In each case the judgment in the court below was in favour of the respondents upon the ground that the doctrine had no application having regard to the terms of the contracts into which the appellants had entered.

So far as the facts are concerned both cases must, I think, be treated on the footing that from a business point of view there had been a frustration of the adventure in each case. In the *Admiral Shipping Company's* case the special case stated by the arbitrators was remitted to them by Scrutton, J. for a finding upon the question whether between the 14th Aug. and the 20th Oct. 1914 there was any reasonable probability of proceeding with the chartered voyage in such a time that the commercial adventure would not be frustrated, and whether any voyage could be taken from Kotka between the 14th Aug. and the 20th Oct. 1914 which would not involve risk of seizure or capture by a foreign ruler. The arbitrators' answer to both questions was in the negative. In the *Scottish Navigation Company's* case Sankey, J. gave no decision on this point. From the view he took of the case it was not necessary for him to do so. No distinction was sought to be drawn during the argument before us between the two cases so far as the facts material to this point are concerned. I therefore treat the two cases as though in both of them the facts on this point had been found against the respondents.

It remains, therefore, only to consider whether the doctrine of the frustration of the adventure has any application to these cases. Bailhache, J. defines the doctrine thus: "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made." As applicable to the present cases no objection was taken to this definition by any of the counsel for the parties concerned; and it appears to me to be entirely in accordance with the previous decisions upon the point. It is not, I think, necessary to travel through the cases to which our attention has been called in support of this conclusion, and I refer only to the judgment of Vaughan Williams, L.J. in *Krell* v. *Henry* (*sup.*), where the development of the doctrine is historically treated. The speech of Lord Parker in the very recent case of *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (*sup.*) appears to me to contain several passages which are of great value in considering whether the doctrine in question is applicable in the cases which we have now under consideration. In the first place he disposes of the suggestion which has often been made that the doctrine has no application to time charters by pointing out that the true view on this point is, not that the principle can in no circumstances be applicable to time charter-parties, but that its application is in such cases much more difficult than in the case of charter-parties which contemplate a definite voyage within definite limits of time. This view of the law is accepted by the respondents' counsel in these appeals. Again, in speaking of conditions which may be implied as frustrating an adventure he deals both with conditions precedent and conditions subsequent, and points out that though the former may be more easily applied than the latter, it is legitimate to imply the latter where circumstances warrant it. He deals expressly with the case of charter-parties where he says: "It" (the principle) "applies also to charter-parties where some commercial adventure contemplated by the parties, and in the fulfilment of which both are interested, is brought to an end by the happening of some event for which neither is to blame." He deals also with the foundation on which the principle rests, and points out that the principle is one of contract law depending upon some term or condition to be implied in the contract itself, from which it follows that no term or condition can be implied in a contract which is inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions.

I come now to the two questions which, after a consideration of the authorities and the arguments addressed to us, appear to me to be the two questions which require answering in order to dispose of the main point in contest between the parties and which is common to both appeals. These questions are, first, Do the charter-parties which were entered into between the shipowners and the charterers contemplate an adventure in which both were interested? Secondly, If they do, do the terms of those charter-parties exclude the implied condition relied on by the charterers? Both Sankey, J. and Bailhache, J. have answered the first question in the negative, and on that ground have decided against the appellants. There is no doubt as to Bailhache, J.'s view. He construes the charter-parties as time charters pure and simple. He considers that the charterers in the case he was considering might have laid the vessel up, or sent her to Continental ports or to the Mediterranean, and that there was no obligation on the charterers, if they did not lay her up, to employ her in trading to a Baltic port at all. Sankey, J. was content to express the opinion that the charter was a time charter which did not provide for either a definite voyage or a definite object contemplated at first by both parties. I hesitate to differ from these two learned judges who have so much experience in shipping matters, but upon the construction of these particular charter-parties I cannot bring myself to agree with them. After the expression of opinion by Lord Parker to which I have already referred and to which counsel assent, it seems to me immaterial to consider whether these charter-parties can or cannot properly be called time charters. In some senses no doubt they are. The material question, however, which has to be decided is whether the expressions "one Baltic round" in the case of the *Dunolly* and "two Baltic rounds" in the case of the *Auldmuir* are, having regard to the other provisions in the charter-parties, words of description of the voyage or voyages, or of parts of the voyage or voyages, to be undertaken by the vessels, or whether they are words descriptive merely of the area within which

the charterers may employ the vessels and of the measure of time for which the vessels are respectively chartered. In the one case the doctrine relied upon by the appellants would, in my opinion, apply; in the other it would not. The question is one of construction. In the first place, what is the natural meaning of the words? What is the natural inference to be drawn where one party agrees to let and the other to hire a vessel for "one Baltic round" or for "two Baltic rounds" as the case may be? Are the parties agreeing that the vessel is to be employed as the charterer pleases for the time usually occupied or reasonably occupied in going a Baltic round, or are they agreeing that the vessel shall be employed in actually going a Baltic round? In my opinion the latter is the natural and proper meaning to be given to the language used. It was assumed in the court below that the expression "Baltic round" has a well-known meaning in the shipping trade, but the exact meaning was not gone into. During the hearing in this court counsel were content for the purposes of these appeals to treat a Baltic round as meaning a vogage from a port in the United Kingdom to a port or ports in the Baltic, with liberty to call at United Kingdom or Continental ports substantially on the way there, and returning from a Baltic port or ports to a coal port in the United Kingdom, with the same liberty to call at ports *en route*.

There is nothing in the charter-parties, in my opinion, which is inconsistent with the view that these charter-parties must be construed as if the words "Baltic round" had been written out at length as above defined. On the contrary I think that the other provisions of the charter-party confirm this view. In both charter-parties the payment of hire is per month commencing on and from delivery and continuing until redelivery of steamer (unless lost) to owners at a coal port in the United Kingdom. When is the redelivery to take place? Is it when the vessel shall have completed the contemplated voyage which fixes the time with certainty, though it may have been longer or shorter than one or both of the parties anticipated; or is it to take place at a time selected by the charterer upon his estimate of what the proper time to be allowed for a Baltic round should be? It seems to me that the latter would be so unlikely an arrangement to make and one so likely to lead to disputes that it is improbable that business people would ever have consented to it. The written clause inserted at the end of each of the charter-parties confirms me in the view I have taken of these contracts. The language employed in the case of the *Auldmuir* is perhaps stronger than that used in the case of the *Dunolly*. When the parties in the former case speak of "the end of the first round" the natural meaning of the words appears to me to be when the round is in fact completed, and not at the expiration of a period of time ordinarily or reasonably allowed for a round.

The conclusion, therefore, to which I come on this part of these cases is that the parties did by the language they used contemplate and provide for an adventure—namely, a "Baltic round"—in which they were both interested, and that the doctrine invoked by the appellants applies just as much as if the expression "Baltic round" as explained above had been written out in full in both charter-parties.

I pass now to the second question, and to this I apply the language of Lord Parker to which I have already referred. Is there anything in the express provisions of these charter-parties or in the intention of the parties as gathered from those provisions which is inconsistent with the implied condition sought to be introduced by the appellants? I think not. On the first branch of this question the respondents rely upon the clause with reference to the cancellation of the charter-party, and contend that this clause expressly deals with the event which happened and provides the course, and the only course, the charterers can take if they desire to be relieved from the obligations of the charter. The clause relied on provides that in the event of Great Britain or other European Power being involved in war affecting the working of the steamer charterers to have the option of cancelling the charter or to insure at their expense the steamer against all war risks for the full value under the present policy as approved by the owners. The construction of the clause is not free from difficulty, but, having regard to the language used, it appears to me not to apply at all in the events which have happened. Assuming the existence of the adventure, and the fact that it has become frustrated, the contract as contained in the charter-party has come to an end. Under these circumstances how can the charterer cancel the charter-party or insure the vessel in which he has no longer any insurable interest? To speak, therefore, of the charterers' option to take one or other of these courses is to speak of a state of things which assumes the continued existence of the contract, or in other words a temporary affecting of the working of the steamer as opposed to something of so serious a character as to prevent any working of the steamer at all for a period sufficient to amount to a frustration of the adventure. Assuming this construction of this clause to be correct it practically disposes of any argument on the second branch of this question, because, if the parties have deliberately restricted the expressed provisions of the charter-party to some temporary interruptions by reason of war, they cannot be assumed to have excluded the implied condition which would come into operation in the event of the more serious interruption taking place. Apart from this consideration of this clause I should arrive at the same conclusion from a consideration of the other provisions in these charter-parties. The mere introduction of exceptions or stipulations dealing with certain contemplated contingencies, even if they may be many in number, is not of itself sufficient to indicate an intention to exclude the implied condition. The charter-party in the case of *Jackson* v. *Union Marine Insurance Company* (*sup.*) contained an exception of perils of the seas, but this did not prevent the stranding being treated as putting an end to the adventure. The charter-party in the recent *Tamplin Steamship Company's* case (*sup.*) contained an exception of restraint of princes, but this, in the opinion of Lord Haldane, did not extend to every restraint however prolonged and the effect of which was to frustrate the adventure. In the present cases I find nothing in the charter-parties which appears to me to indicate an intention that the doctrine relied on should be excluded. On the contrary, the intention

apart from the expressed provisions appears to be the other way. Take for instance the payment of the hire. Hire must continue to be paid until the vessel is redelivered at a United Kingdom coal port. No voyage may be undertaken which may involve risk of seizure or capture. Delay in consequence of not being able to start on the homeward voyage in consequence of such risk is not within the cesser of hire clause. It seems to me possible that the parties may from the language they used have contemplated a mere delay in the prosecution of the adventure being at the risk of the charterer, but I cannot gather from that language the intention that the charterer should, after the adventure had become commercially impossible, continue liable to pay the hire for a vessel which by the terms of the charter he was forbidden to bring to the only place at which he could terminate his obligation to pay that hire.

For these reasons I come to the conclusion that the appellants are entitled to succeed on both the questions which I have indicated above.

With the consequences of this decision we are not concerned. It is one of those cases in which one of two innocent parties must suffer. In the present case the shipowner has apparently only been able to reduce the loss by bringing home the crew; but in many cases the circumstances may be such that either by a sale of the vessel or by employing her in some other way a loss may be reduced or altogether avoided; whereas the charterer would under any circumstances be helpless to reduce his loss by a single penny.

Having regard to the conclusion to which I have come with regard to the main point, it is unnecessary to express any opinion upon the point raised in Messrs. Souter's appeal as to the cancellation of the charter-party. In my opinion both appeals succeed, and judgment should be entered in the manner indicated by Swinfen Eady, L.J.

A. T. LAWRENCE, J. read the following judgment:—The facts of these cases have been sufficiently stated. I will only mention two upon which this judgment is founded. (1) It is found as a fact that the steamship *Dunolly* has since the 1st Aug. 1914 been and still is detained in Russian territorial waters under and by virtue of an order of the Russian Government amounting to a "restraint of princes." (2) In the case of the steamship *Auldmuir* there is a finding by the arbitrators that her detention under a like order amounted to a "frustration of the adventure" contemplated by the charter-party. The only material difference in the facts of these cases is that in that of the *Dunolly* a notice purporting to be a cancellation of the charter-party under the clause in line 74 was given by the charterers, whereas in the case of the *Auldmuir* there was no such notice.

The clause (line 74) does not apply in the circumstances which have occurred. It was not the "working" of the steamer upon the adventure which was "affected." No insurance was possible, and the vessel could not sail down the Baltic at all. This clause was intended to meet and its language covers an entirely different set of facts to those which had arisen in Aug. 1914. I agree with Sankey, J. that the charterers are only entitled to give such a notice when they are ready and willing to hand over the vessel free (within a reasonable time) of cargo and of commitments.

Sir John Simon suggested that the claimants could terminate the contract by cancellation and pay damages for any loss or damage the shipowners might sustain by reason of the circumstances under which the ship then was. I do not think this contention can be sound. They cannot at one and the same time have a right to cancel and a liability in damages for having exercised their right.

This leaves but one question for consideration in the case of each of these vessels—namely, Does the doctrine of the frustration of the commercial adventure apply here? I am inclined to think these are time charters and not voyage charters. I think so because the form is a time charter form, the charterer is called at least once (line 88) a time charterer, and he so describes himself in his sub-charter; but chiefly I think so because the charter-party seems to me to provide for two quite different kinds of voyage—one a round voyage in the Baltic, calling, it may be, at several ports in that sea; the other a voyage to ports on the Continent of Europe and merely entering the Baltic for one port. I agree that it is more difficult to imply a condition defeating the contract in the case of a time charter than in the case of a voyage charter. Especially is this so if the time for which the ship is still under charter when the question arises is of long duration; this because it is then difficult if not impossible to say that the adventures contemplated by the parties are all defeated. It becomes comparatively easy when the adventure is definite and specific as in the case of a voyage charter. Here the charter-party is of very limited duration and scope. The doctrine is not peculiar to charters; it is applicable to all contracts. No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.

I think that all reasonable commercial men would agree that charters are subject to the condition that the circumstances remain such that the chartered services of the ship shall not for an unreasonable time be rendered unavailable; that if from no default of either party those services can neither be rendered by the shipowner nor enjoyed by the charterer for an unreasonable time then the contract shall be at an end. In commerce time and money depend the one upon the other. Here a Baltic round, though of uncertain duration, is admittedly a matter of a few months. During the argument counsel on both sides seemed to speak of it as occupying three or four months, and I should think this is about the usual duration. These ships are still in the Baltic unable to get away; this war may last for many more months, or even years.

If some such condition is not to be implied the charter-party still binds the parties, the one to pay the hire, the other to have the ship ready and willing to sail under the charter. The one who contemplated an expenditure of 5000*l.* or 6000*l.* may have to pay 30,000*l.*—40,000*l.* or even 100,000*l.* The other who contemplated having his ship free and at his own disposal in a few months has to wait years. It seems to me that a condition whereby such a restraint as this deter-

mines the charter-party must be implied if we are to attribute ordinary commercial reason to the parties to it. The charterer pays hire and gets no commercial advantage; the shipowner keeps his ship ready to sail and gets only pre-war rates of hire. Unless the Russian Government is much more farsighted than the English Government, freights have risen there as here, and the shipowner might be earning the higher rates in that portion of the Baltic commanded by the Russian fleet.

Sankey, J. holds that "frustration of the adventure" cannot be applied upon these facts because he regards the shipowner's only object as being to earn the charter-party freight or hire. I cannot agree with this. The subject of the contract is the service of the ship in accordance with the terms of the charter-party; the owner's object is, or should be, to afford those services, while the charterer's object is to enjoy them; it is true that the motive of each is money. Bailhache, J. in his judgment states the common object, and also states in language that I adopt the doctrine as to frustration of the adventure. He declines to apply it to the facts of the case before him (notwithstanding the finding of the arbitrators) because he would have to consider the duration of the restraint in order to see whether it amounted to a "frustration" of the adventure, and this would be to make a new contract for the parties.

I cannot accept this view. One must, of course, consider the duration of the restraint in order to see whether it determines the contract; but doing so does not make a new contract. Whenever a term is implied in a contract, it is a term added to those which are expressed; but it is not a new contract, because, if it is properly implied, then by the hypothesis it was in the contract already. The fact that if you improperly imply a term you make a new contract for the parties is a strong reason for being careful in seeing that it must have been intended by the parties, if you are to regard them as reasonable men entering upon a commercial adventure. In *Jackson* v. *Union Marine Insurance Company* (*sup.*) the exception "perils of the seas" was expressed, yet because the delay caused by the stranding was unreasonable in duration the adventure was held to be frustrated. In *Tamplin Shipping Company's* case (*sup.*) Lord Parker of Waddington does not deny, he admits, the doctrine of frustration; he merely declines to apply it to the facts of that case. There the facts were widely different from these. There was a time charter of five years, of which time there was still nearly one-third unexpired when the judgment in the House of Lords was delivered; the charterer was ready and willing to continue to pay the hire, and the British Government, who were imposing the restraint, were ready and willing to pay both owner and charterer according to their respective interests. I think that case cannot govern these cases. It is to be observed that in *Hadley* v. *Clarke* (*sup.*) the exception is stated to be "the dangers of the seas only excepted." There appears to have been no exception of restraint of princes, and therefore nothing to cover "embargo." The shipowner's promise to carry thus stood as an absolute promise, and there was no finding in the special case that the adventure had been frustrated. This case, therefore, is not an authority against the view I have stated.

I think the findings of fact in these cases, taken with the great lapse of time that has occurred, show that in each the "adventure" was "frustrated" and the contracts at an end.

The appeals should be allowed.

Appeals allowed.

Solicitors in the first case: for the plaintiffs, *Lowless* and *Co.*; for the defendants, *Maples, Teesdale,* and *Co.*, for *Bramwell, Bell,* and *Clayton,* Newcastle-upon-Tyne.

Solicitors in the second case: for the shipowners, *Botterell* and *Roche,* for *Botterell, Roche,* and *Temperley,* Newcastle-upon-Tyne; for the charterers, *Thomas Cooper* and *Co*, for *Dixon Jacks,* Newcastle-upon-Tyne.

Oct. 30, 31, *and Nov.* 10, 1916.

(Before Swinfen Eady and Bankes, L.JJ. and A. T. Lawrence, J.)

Bruce Marriott and Co. *v.* Houlder Line Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—General ship—Restowage of cargo at intermediate port — Damage to cargo on quay during restowage—Liability of shipowners.

The plaintiffs were shippers of certain mining machinery on board the defendants' steamship from London to Buenos Aires via *Newport. A cylinder, part of this machinery, was accidentally injured on the quay at Newport during restowage operations there. The defendants admitted the accident, but relied upon an exception contained in the bill of lading which excepted breakage, even though occasioned by the negligence of the shipowners' servants. The plaintiffs contended that the shipowners had no right, having once stowed their goods in one hold, to remove them from the ship in order to restow them in another hold and to deposit them on the quay for this purpose, and that, as the defendants were acting in breach of their contract of carriage when the accident occurred, they were not protected by the exception.*

Held, that the defendants were protected by the exception of the bill of lading. Where a general ship loads cargo at various ports which is intended to be discharged at different places, the cargo could not always be taken on board in such order that the last loaded shall be the first to be discharged; the proper stowage of the cargo and the necessary readjustment of weight to preserve the proper trim of the ship may necessitate changes in stowage from time to time, and in the present case these were necessarily incidental to the voyage of the ship. The defendants, therefore, in removing and restowing the cargo were not acting in breach of the contract of carriage.

Appeal by the defendants from a decision of Rowlatt, J., sitting without a jury.

The plaintiffs' claim was for damages for breach of contract and breach of duty in and about the carriage of goods by sea by the defendants' steamship *Denby Grange.*

The plaintiffs shipped on board the *Denby Grange* in London some packages of mining

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

machinery for Buenos Aires, the bill of lading being dated the 14th March 1914. According to the bill of lading, the machinery was shipped in apparent good order and condition on the *Denby Grange*,

Sailing from the Port of London for carriage to Buenos Aires *viâ* Newport, but with liberty to the steamer, either before or after proceeding towards that port, to proceed to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route to the said port of discharge) once or oftener in any order, backwards or forwards, for loading or discharging cargo or passengers, or for any purpose whatsoever, and all such ports, places, and sailings shall be deemed included within the intended voyage.

The goods were, subject to the exceptions, to be delivered

In the like apparent good order and condition from the ship's tackle (where the ship's responsibility shall cease) at the port of Buenos Aires or so near thereto as she may safely get and always afloat.

Clause 1 of the exceptions and stipulations provided

That the master, owners, or agents of the vessel, or its connections, shall not be responsible for loss, damage, or injury arising from any of the following perils, causes, or things, namely: . . . breakage . . . whether any of the perils, causes, or things above mentioned, or the loss, damage, or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, workmen, or other persons in the service of the shipowners or their agents, whether on board the said ship or any other ship belonging to or chartered by them, for whose acts they would otherwise be liable, or otherwise howsoever.

Clause 4:

The master, owners, or agents of the vessel have liberty to carry the said goods by the above steamer or other steamer or steamers . . . and, in so doing, without notice to shippers or consignees, to carry the goods past their port of destination, or land them at intermediate ports, and to tranship or land and store the goods, either on shore or afloat, and re-ship and forward the same by land, or by water, by craft steam, sail, or barge, whether in tow or otherwise, at the steamer's expense but merchant's risk, it being understood that all claims for loss or damage consequent upon delay or detention of the goods from the foregoing or any other cause are excluded.

The *Denby Grange* was a general ship carrying cargoes to different ports in the River Plate. She started from Antwerp, put on board the plaintiffs' machinery in London, and then proceeded to Newport, where the plaintiffs' machinery was taken out of one hold for the purpose of restowage in another and was damaged by accident while on the quay.

Before Rowlatt, J. the facts as to the restowage at Newport were agreed as stated in a letter of the 22nd March 1914 from the defendants' representative at Newport to the defendants in London, which was as follows:

As informed you previously, we had to shift the cylinder forming portion of condensing plant on account of the Bruce Marriott and Co. shipped in London in order to make stowage for earthenware pipes here. This we landed on the quay alongside the ship for the time being, and whilst shipping underframes yesterday in the No. 3 hold a gust of wind caught one of the frames as it was being lifted on board, with the result that it swung round, breaking the sling, and the underframes fell on the quay on to the cylinder No. 2366, breaking the cast-iron flange, indenting the tube and crushing same.

Rowlatt, J. gave judgment for the plaintiffs on the ground (*inter alia*) that the defendants were not entitled under the bill of lading to take the cylinder out of the ship and place it on the quay for the purposes of restowage, and that, therefore, they were not protected by clause 1 of the exceptions of the bill of lading.

The defendants appealed.

On the 8th Feb. the Court of Appeal directed the appeal to stand over for further evidence, and consequently the defendants' manager at Newport made an affidavit to the following effect:

(3) On the steamer's arrival at Newport two cylinders for San Juan had been stowed in the wings of No. 4 'tween deck and a casting for Zarate had been stowed in the square of the hatch. These cylinders weighed 3 tons 11cwt., but occupied very large space and were light cargo. (4) The steamer loaded a quantity of railway material at Antwerp and also at Newport, including several heavy lifts. She was to discharge this cargo at Zarate, and I was informed that there was no crane there capable of dealing with this heavy stuff. The owners accordingly arranged that the steamer's masts should be specially strengthened to enable them to deal with it. (5) The steamer's masts had to be lifted out, and it was therefore impossible to load any cargo in the after part of Nos. 1 and 3 'tween decks until this work was completed. (6) No. 2 'tween deck was to be used for bunker coals as that is the only 'tween deck available for the purpose. It was for these reasons that the casting for Zarate and the cylinders were loaded in No. 4 'tween deck.

Par. 7 stated that the cargo to be loaded at Newport weighed 1756 tons, and included railway material, galvanised sheets, tinplates, ironplates, and a very large quantity of earthenware pipes for Buenos Aires. "These pipes were very brittle and require very careful stowage, and should not be stowed with any other heavy cargo. It is also most important that any broken stowage should be avoided, otherwise the pipes are apt to get adrift and get broken."

(8) The steamer was to discharge at several ports in the River Plate and to go up to Zarate, which was some way up the river. The cargo had therefore to be stowed so as to maintain the steamer as far as possible on an even keel after the discharge of part of it in order that she might draw as little water as possible. In order to effect this it was necessary to stow light cargo in No. 4 so that the steamer might start a little down by the head. If the cylinders and casting had been left in No. 4 'tween deck it would have been necessary to block them off with heavy cargo, which would have put the steamer down by the stern. As the bunker coal in No. 2 'tween deck was consumed on the outward passage, the steamer would get to some extent down by the stern, and it was for this reason that she had to start down by the head. (9) The draft of the steamer on sailing was 22ft. 5in. forward and 22ft. 2in. aft. (10) For those reasons I found that the only practical method of stowing the ship safely was to take the castings out of No. 4 'tween deck and put them into No. 1 'tween deck. By this means the whole of No. 4 'tween deck contained earthenware pipes. The cylinder and casting were placed in No. 1 'tween deck in the square of the hatch, where they could be safely stowed. The earthenware pipes in No. 1 hold were shut off from the rest of the cargo at the forward end by a number of cases of stone-

work which were well secured. It was absolutely necessary for the safe stowage of the cargo and for the trim of the ship that this method of stowage should be adopted, and this could only be done by shifting the cylinders. (11) It is by no means unusual with liners like the *Denby Grange* loading cargo at various ports and discharging at various ports to find it necessary to restow part of the cargo at Newport, and in some cases it is necessary to take the cargo out of the ship and put it on the quay for a short time in order to enable the cargo to be safely stowed. It is not always possible to ascertain what cargo will be available for a particular ship at Newport before she commences to load her cargo at Antwerp or London, and even if this were possible sometimes it is impossible to stow the cargo at the previous ports in such a way that it does not require restowage at Newport when the fresh cargo is put in owing to the order in which the cargo has to be discharged. (12) In the circumstances wherever these cylinders and casting had been stowed in London it would have been necessary to take them out and restow them at Newport. (13) To shift the cargo is a source of great trouble to the shipowner and delay to the steamer, and I never shift any cargo unless it is absolutely necessary for safety.

The appeal was reargued upon this statement of facts on the 30th and 31st Oct. 1916.

Roche, K.C. and *Lewis Noad*, for the defendants, referred to

Davis v. *Garrett*, 6 Bing. 716;
Le Duc v. *Ward*, 6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475;
Lillcy v. *Doubleday*, 44 L. T. Rep. 814; 7 Q. B. Div. 510;
Roberts v. *Shaw*, 8 L. T. Rep. 634; 4 B. & S. 44.

MacKinnon, K.C. and *L. F. C. Darby*, for the plaintiffs, referred also to

Hamlyn v. *Wood*, 65 L. T. Rep. 286; (1891) 2 Q. B. Div. 488;
The Moorcock, 6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; 14 P. Div. 64;
Sleat v. *Fagg*, 5 B. & Al. 342.

Cur. adv. vult.

Nov. 10, 1916.—The following judgments were read:—

SWINFEN EADY, L.J. — The plaintiffs were shippers of certain mining machinery on board the defendants' steamship *Denby Grange* for conveyance from London to Buenos Aires *viâ* Newport, Mon. A large cylinder 16ft. by 5ft. diameter, part of this machinery, was accidentally injured on the quay at Newport during the course of restowage operations there. The plaintiffs claim the amount of the damage sustained by them by reason of the defendants' failure to deliver the goods at Buenos Aires in the like good order and condition as at the time of shipment. The defendants admit the accident, but rely upon the exceptions contained in the bill of lading as exempting them from liability. Rowlatt, J. at the trial held that the defendants were not protected from the loss which had happened by the terms of the bill of lading, and against this decision the defendants appeal.

The case was tried before the judge upon an agreed statement of facts, but during the hearing of the appeal on the 8th Feb. 1916 it became manifest that the facts were insufficiently stated to enable the court to determine the real dispute between the parties, and, moreover, the parties were at issue as to the meaning of their respective admissions, and the court allowed the matter to stand over for further evidence. This has since been filed, and the case now comes on again for rehearing before a court differently constituted, and with this further evidence before it.

The *Denby Grange* is a steamer of the Houlder Line, of a dead weight capacity of upwards of 7000 tons, carrying a general cargo on this voyage. She commenced her voyage at Antwerp, where she loaded a quantity of railway material; she then proceeded to London, where she took on board a quantity of general cargo, including the plaintiffs' machinery, which consisted of 105 pieces or packages in all, weighing upwards of 43 tons. She then proceeded to Newport, where she was to take on board upwards of 1750 tons of cargo, including a large quantity of heavy railway material, galvanised sheets, tinplates, and ironplates, and including also a very large quantity of earthenware pipes for Buenos Aires, which are very brittle, require careful stowage, and should not be stowed with any other heavy cargo.

Amongst the plaintiffs' machinery loaded in London were two cylinders, each weighing 3 tons 11cwt., one of which was subsequently damaged at Newport. On the voyage from London to Newport these cylinders had been stowed in the wings of No. 4 'tween deck hold. The steamer was to discharge at several ports in the River Plate and to go up to Zarate, which is some way up the river. The cargo had to be stowed so as to maintain the steamer on an even keel after the discharge of part of it in order that she might draw as little water as possible.

The defendants established by their evidence, which was uncontradicted, that the only practicable method of stowing the ship safely, having regard to the nature and extent of her cargo and the ports and places to which it was consigned, was to take the plaintiffs' cylinders out of No. 4 'tween deck hold and put them into No. 1 'tween deck hold. The defendants' manager at Newport deposed that it was absolutely necessary for the safe stowage of the cargo and for the trim of the ship that the method of stowage which was adopted, and which in the evidence is described in detail, should be followed, and this could only be done by shifting the plaintiffs' cylinders. There was also evidence that it is by no means unusual with liners like the *Denby Grange*, which load cargo at various ports and discharge at various ports or places, to find it necessary to re-stow part of the cargo, and in some cases it is necessary to take the cargo out of the ship and put it on the quay for a short time in order to enable the cargo to be safely stowed. Moreover, it is not always possible to ascertain what cargo will be available for a particular ship at Newport before she commences to load her cargo at Antwerp or London, and, even if this were possible, it is sometimes impossible to stow the cargo at the previous ports in such a way that it will not require restowage at Newport, when the fresh cargo is put on board, owing to the order in which the cargo has to be discharged. Shifting the cargo is a source of trouble and expense to the shipowner and delay to the steamer, and according to the evidence of the defendants they never shift any cargo unless absolutely necessary for safety.

The damage in question in this action occurred while the cylinder was resting on the quay; an

underframe of a railway carriage was caught by the wind, broke several strands of a wire hawser, and fell upon and fractured a portion of the cylinder. Breakage, even though occasioned by the negligence of the shipowners' servants, is an excepted peril; but the plaintiffs contended that the rule was "once stowed always stowed"; that the shipowners had no right, having once stowed their goods in No. 4 hold, to remove them to No. 1 hold, and certainly not to remove them from the ship and deposit them on the quay in order to re-stow them in No. 1 hold; and that, as the defendants were acting in breach of their contract of carriage when the accident occurred, they were not protected by the exception. The defendants did not dispute that if they were acting in breach of their contract they could not rely upon the protection afforded by the bill of lading, but they claimed that the contract of affreightment entitled them to restow in the manner they did.

The question therefore resolves itself into this: Were the defendants, under the circumstances which I have stated, entitled to remove the cylinder from No. 4 to No. 1 'tween deck hold? In my opinion they were. Both parties must be presumed to have contracted with reference to the known, ordinary, usual, well-established, and necessary course of business. The presumption is that the parties intended to contract with regard to the well-known usages of trade. When necessary to restow for the safety of the ship, or to obtain and preserve a proper trim, or to enable the rest of the cargo to be safely and properly stowed, a usage to do so is certainly reasonable.

Where a general ship loads cargo at various ports which is intended to be discharged at various different places, it is manifest that the cargo cannot always be taken on board in such order that the last loaded shall be the first to be discharged, or that the cargo last taken on board is suitable for being overstowed on cargo already shipped. The proper stowage of the cargo and the necessary readjustment of weight to preserve the proper trim of the ship may necessitate changes in stowage from time to time, and these were necessarily incidental to the voyage of this ship.

I am of opinion that in removing the cylinder from No. 4 with a view to stowing it in No. 1 and in the meantime temporarily depositing it on the quay the defendants were not committing any breach of their contract of carriage as contained in the bill of lading, and accordingly that they are exempted from liability for the damage which occurred. The appeal must be allowed and judgment entered for the defendants with costs here and below.

Bankes, L.J.—In this case the respondents shipped a quantity of mining machinery, including two cylinders, on board the appellants' steamship *Denby Grange*, then in the Port of London, for conveyance to Buenos Aires. The said vessel was one of the appellants' line trading with general cargo between English and Continental ports and ports in South America. The next port at which the vessel was due to call for cargo after leaving London was Newport. The bill of lading described the intended voyage as a voyage from London to Buenos Aires *viâ* Newport, but with liberty to the steamer, either before or after proceeding towards that port, to proceed to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route to the said port of discharge) once or oftener in any order, backwards or forwards, for loading or discharging cargo or passengers, or for any purpose whatsoever, and all such ports, places, and sailings should be deemed included within the intended voyage.

The bill of lading contained the usual long list of exceptions in which stowage, breakage, landing at any time or in any place, and negligence of the shipowners' servants or agents are included. It also contained a special clause dealing with transhipment. The cylinders when loaded on board in London were stowed in No. 4 'tween deck hold. On arrival at Newport the cylinders were taken out of that hold and laid on the quay, the intention being to replace them into No. 1 'tween deck hold. While on the quay one of the cylinders was damaged. The respondents brought their action alleging that the appellants had committed a breach of contract in unloading the cylinder and placing it on the quay and in failing to deliver it at Buenos Aires. The appellants denied the alleged breach of contract, and asserted their right to deal with the cylinder under the contract of carriage in the way in which they had dealt with it.

The action was tried before Rowlatt, J. upon an agreed statement of the facts relating to the damage to the cylinder contained in a letter dated the 22nd March 1914. The statement in this letter was in the following terms: [His Lordship read the statement as set out above.]

On this statement of facts Rowlatt, J. decided in favour of the respondents. When the appeal came on it appeared to the court that upon the agreed statement of facts the question as to the circumstances under which the cylinder came to be taken out of No. 4 hold and laid on the quay was left in a very uncertain and unsatisfactory position. The appeal therefore stood over for a further statement, and as a result the appellants' manager at Newport made an affidavit upon which he has been cross-examined. The effect of his affidavit is that it was necessary to remove the cylinder from the No. 4 hold and to place it where it was temporarily, with a view to its being stowed in No. 1 hold in order to enable the ship to be properly stowed and to secure a proper trim. He also stated that such a dealing with portions of the cargo was quite usual. In my opinion the cross-examination did not displace the statements contained in the affidavit.

Under these circumstances the question which has to be decided is whether, upon the facts as now disclosed, a term must be implied in the contract as contained in the bill of lading by which the appellants are entitled to move any goods after they have been placed on board, even to the extent of taking them out of the ship, if such moving is either usual in the course of loading or unloading the vessel at the authorised ports of call, or necessary for the safety or trim of the ship or the safety of the cargo. We were referred to the test applied by Lord Esher in *Hamlyn and Co.* v. *Wood and Co.* (*sup.*), where he says: "I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless on considering the terms of the

contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

Having regard to the fact that this vessel was, under the terms of the contract, to call at a number of ports to take in cargo, and at a number of ports to discharge cargo, it appears to me a necessary implication that the parties must have intended that the shipowners should have liberty to shift the cargo, should necessity arise to do so, either for the safety of the ship or cargo, or in the usual course of loading or unloading at the port of call. I cannot see any limitation to that right to shift provided what is done comes within the limits of what is reasonable or customary. If the right to shift extends to a right to shift from one part of a hold to another part of the same hold, or from one hold to another hold, it must, I think, necessarily extend to placing the cargo on the quay for such time as may be reasonably necessary to enable this to be effectively done.

The question is necessarily a business question. The only evidence before the court is that of the appellants' manager. So far as my own experience of such matters is concerned, it appears to me that the view he presents is a reasonable one, and that the stowing and discharging of a general cargo, consisting possibly of very many parcels of goods belonging to different owners, taken in at a number of ports, and to be discharged at a number of other ports, would be practically impossible unless such a liberty existed. In this view of the contract the appellants are entitled to succeed, because it is not disputed that if what the appellants did was within the terms of the contract the exceptions are wide enough to protect them from liability.

For these reasons I think that the appeal succeeds.

A. T. LAWRENCE, J.—The question in this case is whether the landing of these cylinders at Newport for the purpose of restowing them was within the contract of carriage, that is, was the exercise of a right of the shipowner under it. I think it was. In my opinion it was incident to the voyage contemplated by this bill of lading. The ship was a general ship, intending to call at several ports, and the voyage involved going up the river, where banks and shallows make the trim and handiness of the ship of great importance. The cylinders were very light relatively to the space they occupied. It must have been obviously probable that the cargo to be taken in after the ship left London would involve some readjustment of weights to enable her to keep her trim. These considerations make it easy to accept the evidence called after the first hearing by the leave of the court. This evidence is to the effect that upon such a voyage it is the ordinary course to land and re-stow cargo where necessary.

The next question is: Does the bill of lading contain exceptions covering the shipowner against risks in so doing? I think it does. I agree with my brother Rowlatt that clause 4 of the exceptions does not apply here. It is directed to a different set of circumstances, namely, to a case of transhipment to another ship or to some form of land carriage. But I think clause 1 excepts the shipowner from liability for this damage to the cylinder. It excepts liability for loss or damage arising from (*inter alia*) "breakage" "stowage," "landing," and this even though due to negligence. The "delivery" to be made by the ship is "from the ship's tackle at . . . the port of Buenos Aires or so near thereto as she may safely get and always lie afloat." These exceptions seem to me to include such a "breakage" as occurred to this cylinder when landed for re-stowage at Newport.

I think, therefore, that the defendants are not liable, and that this appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendants, *William A. Crump and Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, Oct. 26, 1916.

(Before Lord READING, C.J. and LOW, J.)

SHELFORD (app.) *v.* MOSEY (resp.). (*a*)

Seaman — Agreement — Rate of wages — Special stipulation as to bonus—Nature of bonus—"Wages"—"Emoluments"—Stipulation as to forfeiture of bonus—Legality—Desertion of seaman—Delivery account—Payment of amount due to "proper officer"—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 114, 742—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 28.

By sect. 28 *of the Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48) *it is provided* (inter alia) *that the master of a British ship shall, within forty-eight hours of the termination of the voyage at the port where the voyage terminates, deliver to the "proper officer"—as defined by sub-sect* 11 *of the said section—the amount due on account of wages as shown in the delivery account, and subject to any deductions allowed under the section, to any seaman belonging to the ship who has been left behind out of the British Islands during the course of the voyage.*

The appellant was the master of the British ship O., *which started on a voyage to Australia and back in Feb.* 1916 *and terminated its voyage at T. in June* 1916. *Among the members of the crew was one F., and it was a special term of the agreement made in accordance with sect.* 114 *of the Merchant Shipping Act* 1894 *that all members of the crew, with the exception of certain classes of the crew to which F. did not belong, were to be paid a* 15 *per cent. war bonus over and above the rates appearing against their names on the articles for the voyage or during the period of the war, whichever terminated first, but "in cases of desertion and/or being paid off abroad the above bonuses will be forfeited." F. deserted at Sydney, and on the return of the ship to England the appellant paid to the proper officer—namely, the Superintendent of Mercantile Marine at T.—the proportion of the wages due up to the time of desertion, after deductions, but paid no part of the bonus, as it was contended that the bonus was not wages, but consideration for the performances of an entire contract, which contract had been broken by F., and*

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

that under the above term F. had forfeited any right to any share in such bonus. An information was laid by the respondent, the proper officer, against the appellant, for failing to comply with the provisions of sect. 28 *of the Act of* 1906, *and the justices held that the sum stipulated for as a bonus in the agreement was "wages" within the meaning of the Merchant Shipping Acts of* 1894 *and* 1906, *and that as such wages it could not be forfeited by agreement between the master and the seamen. The justices accordingly convicted the appellant.*

Held, on appeal, that the decision of the justices was correct.

CASE stated by justices of the peace for the county of Essex.

At a court of summary jurisdiction sitting at Grays, in the county of Essex, an information was preferred by James Yeoman Mosey (hereinafter called "the respondent"), he being an officer of the Board of Trade and the "proper officer" under sect. 28 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48), against William Sopwith Shelford, master of the British ship *Omrah* (hereinafter called "the appellant") for that he, the appellant, on the 12th June 1916, at the Mercantile Marine Office, Tilbury, in the county of Essex, after the termination of the voyage of the said ship at Tilbury on or about the 11th June 1916 did unlawfully fail without reasonable cause to comply with the above section of the Merchant Shipping Act 1906 in that he, the said appellant, having dealt with the account of the wages of a certain seaman named Joseph Fay, the said seaman having been left behind out of the British Islands, and the absence of the said seaman being alleged to be due to desertion, refused or neglected to deliver to the proper officer, to wit, the superintendent of Mercantile Marine at the Mercantile Marine Office, Tilbury, the sum of 3*l.* 5*s.*, being the amount due on account of wages as shown on the delivery account furnished by the appellant in respect of the said seaman as amended by the proper officer in red ink after deducting such sums as were set out in the said account, there being no re-imbursement account allowed under the said section, contrary to the form of the statute in such case made and provided.

The appellant, Lieutenant-Commander William Sopwith Shelford, was the master of the British steamship *Omrah*, owned by the Orient Line. The ship signed on a crew at Tilbury in the month of February 1916 for a voyage to Australia and back to this country. Amongst those who signed on was Joseph Fay, who was employed as a hospital attendant on board ship. The wages of Fay were 5*l.* 5*s.* per month, and there was a clause added to the agreement as follows:

It is further agreed that all members of the crew will be paid 15 per cent. war bonus over and above the rates appearing against their names on the articles for the voyage or during the period of the war, that is, whichever terminates first, with the exception of the seamen, storekeepers, donkeymen, greasers, firemen, and trimmers. In cases of desertion and (or) being paid off abroad the above bonuses will be forfeited. The wages entered against the respective names therein represent increases over the company's scale of rates ruling at the outbreak of war, which increases are added as a war bonus.

Fay deserted at Sydney on the 21st April 1916. The *Omrah* returned to England and arrived at Tilbury on or about the 11th June 1916, and the appellant then tendered the balance of the wages due to Fay to the superintendent of the mercantile marine at his office at Tilbury, but no part of the special war bonus. The superintendent wrote a letter dated the 13th June 1916 to the appellant demanding the proportion of the 15 per cent. war bonus, and as the applicant declined to pay proceedings were taken as above stated.

The information was heard on the 30th June 1916, and the justices convicted the appellant, imposing a fine of 2*l.*

Upon the hearing of the information the following were proved or admitted:—

(*a*) A certified copy of the register of the steamship *Omrah*.

(*b*) The agreement with the crew of the steamship *Omrah* for the voyage in question.

(*c*) The official log of the vessel.

(*d*) The delivery account furnished by the appellant to the respondent in respect of the wages of the said Joseph Fay.

(*e*) A letter, dated the 13th June 1916, from the respondent to the appellant.

(*f*) The agreement with the crew of the steamship *Omrah* on the previous voyage of the ship.

It was conceded and the justices found as facts: (1) That the seaman Joseph Fay was to be treated for the purposes of the case as a seaman left behind out of the British Islands; and (2) that the proper proportion of wages as distinct from any question of bonus due to the seaman had been tendered by the appellant to the respondent and refused by him.

On behalf of the appellant it was contended:

(1) That the bonus in question was not "wages," but consideration for the performance of an entire contract.

(2) That no part of such bonus accrued due or became payable till the fulfilment of the said contract on completion by the said seaman of the return voyage.

(3) That by his desertion the seaman had forfeited any rights under the said stipulation.

(4) That the stipulation in the said agreement with the crew of the steamship referring to the bonus had been duly initialled and passed as being in compliance with the requirements of the Board of Trade and the provisions of the Merchant Shipping Acts 1894 and 1906, both on this voyage and on the previous voyage by the proper officer.

(5) That if the said stipulation was contrary to law no demand for its inclusion in the delivery account would lie, and the seaman could not claim thereunder for the whole or any part of the bonus.

On behalf of the respondent it was contended:

(1) That the bonus was "wages" or "emoluments" as defined by sect. 742 of the Merchant Shipping Act 1894.

(2) That it therefore accrued *de die in diem* and should have been included in the "wages" in the delivery account.

(3) That if the bonus was "wages" or "emoluments" it was only liable to forfeiture under the decision of a court of law and not by virtue of any agreement between the master and the crew.

The following cases were referred to:

Keslake v. *Board of Trade*, 9 Asp. Mar. Law Cas. 491; 89 L. T. Rep. 534; (1903) 2 K. B. 453;
Mercantile Steamship Company Limited and Dale v. *Hall*, 11 Asp. Mar. Law Cas. 273; 100 L. T. Rep. 885; (1909) 2 K. B. 423;
Halliday v. *Taffs*, 11 Asp. Mar. Law Cas. 574; 104 L. T. Rep. 188; (1911) 1 K. B. 594;
Deacon v. *Quaile* and *Neate* v. *Wilson*, 12 Asp. Mar. Law Cas. 125; 106 L. T. Rep. 269; (1912) 1 K. B. 445.

The justices were of opinion that the sum stipulated for as bonus in the agreement was "wages" within the meaning of the Merchant Shipping Acts, and as such "wages" it could not be forfeited by agreement between the master and the seaman, and accordingly held that the appellant had failed to comply with the requirements of sect. 28, sub-sects. 1 and 2, of the Merchant Shipping Act 1906. They convicted the appellant of the offence alleged against him as before stated.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) it is provided:

Sect. 742. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is say . . . "wages" includes emoluments.

By sect. 28 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48) it is provided:

(1) If a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall, subject to the provision of this section, (*a*) as soon as may be, enter in the official log-book a statement of the effects left on board by the seaman and of the amount due to the seaman on account of wages at the time when he was left behind; (*b*) on the termination of the voyage during which the seaman was left behind, furnish to the proper officer within forty-eight hours after the arrival of the ship at the port at which the voyage terminates, accounts in a form approved by the Board of Trade, one (in this section referred to as the delivery account) of the effects and wages, and the other (in this section referred to as the reimbursement account) of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion, neglect to join his ship, or any other conduct constituting an offence under sect. 221 of the principal Act. The master shall, if required by the proper officer, furnish such vouchers as may be reasonably required to verify the accounts. (2) The master of the ship shall deliver to the proper officer the effects of the seaman as shown in the delivery account, and, subject to any deductions allowed under this section, the amount due on account of wages as shown in that account, and the officer shall give to the master a receipt, in a form approved by the Board of Trade, for any effects or amount so delivered. (3) The master of the ship shall be entitled to be reimbursed out of the wages or effects any sums shown in the reimbursement account which appear to the proper officer, or, in case of an appeal under this section, to a court of summary jurisdiction to be properly chargeable, and for that purpose the officer, or, if necessary, in the case of an appeal, the Board of Trade, shall allow those sums to be deducted from the account due on account of wages shown in the delivery account, and, so far as that amount is not sufficient, to be repaid to the master out of the effects. The proper officer, before allowing any sums to be deducted or repaid under this provision, may require such evidence as he thinks fit as to the sums being properly chargeable to be given by the master of the ship, either by statutory declaration or otherwise. Where the master of a ship whose voyage terminates in the United Kingdom is aggrieved by the decision of the proper officer as to the sums to be allowed as properly chargeable on his reimbursement account, and the amount in dispute exceeds ten pounds, he may appeal from the decision of the proper officer to a court of summary jurisdiction. . . . (10) If the master of a ship fails without reasonable cause to comply with this section he shall (without prejudice to any other liability) for each offence be liable on summary conviction to a fine not exceeding twenty pounds, and, if he delivers a false account or makes a false statement or representation for the purposes of this section, he shall in respect of each offence be guilty of a misdemeanour. (11) The proper officer for the purpose of this section shall be: (*i.*) At a port in the United Kingdom, a superintendent; (*ii.*) at a port in a British possession, a superintendent, or, in the absence of any such superintendent, the chief officer of customs at or near the port; (*iii.*) at a port elsewhere, the consular officer at the port. (12) This section shall not apply in the case of an absent seaman: (*a*) Where the master of the ship satisfies the proper officer that none of the effects of the seaman have to his knowledge been left on board the ship, and that he has paid the wages due to the seaman; or (*b*) where the amount of wages earned by the seaman (after taking into account any deductions made in respect of allotments or advances for which provision is made by the agreement with the crew) appears from the agreement to be less than five pounds, and the master does not exercise his option to deal with the delivery and reimbursement accounts collectively; or (*c*) where the master of the ship satisfies the proper officer that the net amount due to the seaman on account of wages (after taking into account any deductions lawfully made in respect of allotments, advances, or otherwise) is less than three pounds, and the master does not exercise his option to deal with the delivery and reimbursement accounts collectively; or (*d*) where the question of the forfeiture of the wages and effects of the seaman has been dealt with in legal proceedings lawfully instituted before the termination of the voyage, or within forty-eight hours of the arrival of the ship at the port at which the voyage terminates.

W. H. Duckworth for the appellant.—The point for consideration was whether the bonus in question was to be included in the wages payable to the man Fay. It was an amount stipulated for quite distinct from the rate of pay set out in the agreement. It was a valid contract, one which had been approved by the Board of Trade, and it was an entire contract. As Fay deserted in Australia he had no claim at all to any part of the bonus. Indeed, unless he completed the voyage out and home again, he had no right to it. That the bonus was distinct from wages was shown by what had taken place with regard to some of the men. A certain portion of the seamen and firemen, backed by their union, had arranged to get an increase of wages instead of a war bonus. That made it clear that the two things were kept distinct. Under all the circumstances of the case Fay had forfeited whatever rights he might have possessed upon the completion of the voyage, and the appellant was justified in withholding the proportion of the bonus when he tendered the amount of the wages due.

The *Attorney-General* (Sir F. E. Smith, K.C.), *Branson*, and *Ginsburg*, for the respondents, were not called upon.

LORD READING, C.J.—Notwithstanding all the ingenious and subtle attempts on the part of counsel for the appellant to introduce other

questions into this case, there is really but one point for us to consider, and that is whether or not a bonus agreed to be paid to a man sailing on a vessel and recorded in the ship's articles is to be treated as wages, or whether it can be regarded as something altogether apart from wages. That is a question of importance in these times of war. Familiar as we are with the many cases, the vast majority of cases presumably of ships that sail have either some agreement to pay extra wages or higher wages than were paid before the war, or else have a stipulation to pay a bonus.

In the present case the seaman did not return with the ship—he did not complete the voyage. Whatever the reason he did an act which put an end to his contract. But by virtue of the Merchant Shipping Act it is provided that when a seaman does that, notwithstanding the strict reading of the contract, if you have to deal with it according to the common law, he is to be entitled to the payment of his wages up to the time when he leaves the ship. That is something which applies peculiarly to seamen. There are special provisions in the Act regarding seamen. That part of the law is not, and cannot be, impugned. There is no question but that the wages of the seaman would become payable up to a certain time in accordance with the provisions of the Act, notwithstanding the man had deserted at a port abroad, or had forfeited his right of continued employment. That being so, it disposes of any question as to wages. But that is a point which is not raised before us in the present case, and the only reason why I mention it is because the moment it is admitted that that is the law with regard to wages, it seems to me to follow inevitably that it is also the law with regard to bonus. The bonus in such a case as the present is really nothing else than a euphemism for an addition to wages. There may be special reasons for calling it a bonus. It may be a convenient method of conveying to the seaman that he is receiving extra pay during the period of the war; but whatever it is it means an addition to wages. It has been argued on behalf of the appellant that it is not really an addition to wages, because the seaman is only entitled to the payment if he returns with the ship, and because it is stated at the end of the stipulation as to the payment of the 15 per cent. bonus that "in cases of desertion and (or) being paid off abroad the above bonuses will be forfeited." If that clause stood, if it could be regarded as a part of the contract, the appellant would be right in his contention. The seaman did not return, and according to the wording of the contract he had forfeited his bonus. But the law says that there shall be no forfeiture of the wages of a seaman, and consequently, if such a clause is inserted in the agreement providing for the payment of wages, it is inoperative because it is illegal.

The true effect of the argument of counsel for the appellant is this: Either you must regard this particular clause, which would defeat the right of the seaman to payment unless he returns home with the ship, or if you say that it is to be regarded as inoperative, then you must delete the whole clause as to the bonus. But there is this difficulty about the matter, namely, that it is clearly not the law. The grant of the bonus is a payment which is agreed to be made to the seaman for sailing in the ship just as much as an agreement for wages. Now, suppose there was an agreement with a seaman that he should be paid so much, but that if he deserted or was put off abroad he should get nothing, it is perfectly clear law that such a stipulation would be of no avail whatever, and that the Legislature interferes, as it had done long before the Merchant Shipping Act 1894, for the protection of the seaman, who, whatever his merits and qualifications may be in other affairs of life, does not as a rule pay too much attention to the documents which he signs. The Legislature has said: "Although a seaman may agree to something of the kind, he shall not be held to it, and shall be paid his wages notwithstanding any stipulation, and we shall interfere to see that he gets them, notwithstanding that a crafty shipowner or master may have got him to sign a document containing a stipulation which puts him absolutely at the mercy of the owner or the master." The Legislature interfered to do that which it alone could do, namely, to say that such a contract should be invalid.

The stipulation is invalid, but the agreement to pay wages remains. That is really the whole question in the case. In my view it is not possible to separate bonus from wages. The bonus is nothing else but an addition to wages, and if the clause is examined there can be no doubt about it. In this very clause you have an addition of fifteen per cent. as a war bonus. Therefore, in my judgment, we are bound to hold that a bonus is part of the emoluments, and that the Act of Parliament applies to wages and emoluments—a word added expressly to include something which might strictly not come within the term wages. We need not stop to define "emoluments," a term not usually applicable to wages paid to a seaman, but it is meant to include something paid to him for his work over and above the actual wages agreed to be paid. Wages and emoluments are the things to which the Act applies.

The definition of the word "wages" in sect. 742 of the Merchant Shipping Act 1894 makes that perfectly plain by saying in terms that wages include emoluments, and I would add, although it is not in the Act of Parliament, it includes bonus. That being so, the law is quite simple and plain that this defeasance clause, the right of forfeiture given to the shipowner, falls to the ground, and this man is entitled to be treated just as if it had been stated in the articles of the ship which he signed that he shipped on the terms of being paid wages at so much, plus 15 per cent.

For the reasons I have stated, I think that the justices arrived at a correct decision in this case, and the appeal will be dismissed. As the point raised is one which it was desirable should be settled, there will be no order as to costs.

LOW, J.—I agree.

Appeal dismissed. No order as to costs.

Solicitors for appellant, *Botterell* and *Roche*.
Solicitor for respondent, *Treasury Solicitor*.

House of Lords.

July 20, 21, *and Dec.* 19, 1916.

(Before Earl LOREBURN, Lord PARKER OF WADDINGTON, and Lord SUMNER.)

THE AMERIKA. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Admiralty—Collision—Submarine sunk by liner—Liner alone to blame—Cause of action for loss of life of seaman apart from statute—Pensions and grants to relatives of deceased officers and seamen.

A submarine having been sunk through the negligent navigation of a steamship and all but one of her crew drowned, the Commissioners of the Admiralty brought an action against the steamship owners to recover the damage they had sustained. They included in their claim a number of items, one of which was a sum representing the capitalised amount of pensions and grants paid or payable by them to the relatives of the crew who were drowned. At the reference the assistant registrar disallowed this item of claim on the ground that loss or damage suffered by the plaintiffs due to the loss of life of the crew of the submarine was not recoverable in civil action. This decision of the assistant registrar was upheld by the President and subsequently by the Court of Appeal who expressed themselves bound to follow the ruling of Lord Ellenborough in Baker *v* Bolton (1808, 1 *Camp.* 493) *that "in a civil court the death of a human being could not be complained of as an injury."*

Held, (1) *that, whether or not the common law ought originally to have been differently interpreted than as interpreted by Lord Ellenborough in* Baker *v.* Bolton (sup.), *it was too late to disturb it; and* (2) *that the damages claimed were in no way recoverable, because, being money which the Admiralty Commissioners were not legally required to pay to the relatives of the deceased men, such damage was too remote.*

Decision of the Court of Appeal (12 *Asp. Mar. Law Cas.* 536; 111 *L. T. Rep.* 623; (1914) *P.* 167) *affirmed.*

APPEAL by the Commissioners for executing the office of Lord High Admiral of the United Kingdom from a judgment of the Court of Appeal, reported 12 Asp. Mar. Law Cas. 536; 111 L. T. Rep. 623 affirming a judgment of the President (Sir S. T. Evans), which confirmed a report of the assistant registrar disallowing a claim made by the commissioners as plaintiffs in an action for damage by collision in respect of the loss of life of the crew of His Majesty's submarine B2.

The Court of Appeal decided that the effect of the decisions in *Osborn* v. *Gillett* (L.Rep. 8 Ex. 88), *Clark* v. *London General Omnibus Company* (95 L. T. Rep. 435; (1906) 2 K. B. 648), and *Jackson* v. *Watson and Sons* (100 L T. Rep. 799; (1909) 2 K. B. 193) was to render binding upon the Court of Appeal the ruling of Lord Ellenborough in *Baker* v. *Bolton* (1808, 1 Camp. 493) that "in a civil court the death of a human being could not be complained of as an injury," and that the law as to damages suffered owing to the death of a human being not being recoverable must be reviewed, if at all, in the House of Lords.

The sole question involved in the appeal was whether any claim in respect of the loss or damage suffered by the appellants owing to the loss of life of the crew of the submarine was recoverable in law.

Sir *George Cave* (S.-G.), *Laing*, K.C., Sir *John Simon*, K.C., and *Dunlop* for the appellants.

Inskip, K.C. and *Arthur Pritchard* for the respondents.

At the close of the appellants' case judgment was reserved.

The cases cited are fully dealt with in the judgments.

Earl LOREBURN.—In my opinion this appeal fails. It is far too late for this House to disturb the rule expressed by Lord Ellenborough in *Baker* v. *Bolton* (1 Camp. 493), even were we of opinion that the common law ought originally to have been differently interpreted, of which I am by no means persuaded. When a rule has become inveterate from the earliest time, as this rule appears to have been, it would be legislation pure and simple were we to disturb it. I also think that the damages sought are not in any way recoverable, because they represent sums of money which the appellants were not legally required to pay.

Your Lordships have been interested in ascertaining the origin of Lord Ellenborough's decision. I share in that interest, but I cannot throw any light on the subject beyond what may be derived from the opinions of Lord Parker and Lord Sumner, both of which I have had the advantage and the pleasure of reading.

Lord PARKER OF WADDINGTON.—I agree.

There are in my opinion two sufficient reasons why this appeal cannot succeed. The first is that the items of damage which the appellants desire to be allowed are too remote. The second is that no sufficient case has been made for overruling Lord Ellenborough's decision in *Baker* v. *Bolton* (1 Camp. 493) to the effect that in a civil court the death of a human being cannot be complained of as an injury. I will deal with each of these reasons separately.

The items of damage which the appellants desire to have allowed consist of certain pensions and allowances, particulars of which they set out in the appendix. These pensions and allowances are granted under statutory authority, but it does not appear that their grant formed any part of the contract between the Admiralty and the seamen whose lives have been lost through the respondents' negligence. They are, it seems, compassionate pensions and allowances only, which, from a legal standpoint, the Admiralty might have granted or withheld at its discretion. Under these circumstances they cannot constitute an item of damage. No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased. But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion

(a) Reported by W. E. REID, Esq., Barrister-at-Law.

that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

Passing to the second of the reasons above mentioned, I may point out that the correctness of the ruling in *Baker* v. *Bolton* (*sup.*) has since been accepted, not only by all courts in this country, but by the Supreme Court of the United States, nor can anything be found in the earlier authorities inconsistent with it. It was, it is true, severely criticised by Lord Bramwell in *Osborn* v. *Gillett* (L. Rep. 8 Ex. 88). It was, he considered, anomalous that a master should be entitled to recover for loss of service if his servant were wrongfully injured, but should be without any remedy if his servant were wrongfully killed. If it were any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence, much might no doubt be said for this criticism; though it is not, in my opinion, by any means clear that the anomaly does not in reality consist rather in granting the remedy in the former case than in refusing it in the latter. In a society based so largely as our own is at the present day upon contractual obligations, it does not appear why the wrongful injury of A., whereby he is prevented from fulfilling his contractual obligations to B., should confer on B. a right of action only where these obligations are those arising out of the relationship of master and servant, or, indeed, why the right should not be extended so as to cover all loss, whether arising out of inability to perform a contract or otherwise.

This House, however, is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision. The appellants have accordingly attempted to show that Lord Ellenborough's ruling was erroneous, as being based either (1) upon a misconception of the limits within which the maxim *Actio personalis cum personâ moritur* is applicable, or (2) upon the mistaken notion that the rule of public policy which, in cases of felony, admittedly requires the person aggrieved to institute criminal proceedings before pursuing any civil remedy against the felon, precluded such civil remedy altogether, or (3) upon doctrines of Roman law which ought not to be applied at all. It is to be observed that Lord Ellenborough gave no reasons for his ruling; he treated the proposition he laid down as a well-known proposition of law, and the reasoning on which the proposition was based must therefore be found, if at all, in the earlier authorities. The only earlier authority to which your Lordships' attention was called was the case of *Huggins* v. *Butcher* (Noy, 18; Yelv. 89). This was an action in trespass by a husband for wrongful injury causing his wife's death. The action was dismissed. If it were looked on as an action in right of the deceased wife, the maxim *actio personalis*, &c., was clearly applicable. If on the other hand it were looked on as an action by the husband in his own right, then the trespass was "drowned in the felony." Obviously the limits within which the maxim mentioned is applicable were already well known when *Huggins* v. *Butcher* was decided, and Lord Ellenborough with that case in his mind can hardly have fallen into the error suggested. Nor can I find any reason to suppose that any weight has ever been given in the courts of this country to the Roman law on the subject. It remains, therefore, to consider whether the reason given in *Huggins* v. *Butcher* that the trespass was drowned in the felony can be rejected as erroneous. It was contended that the reason must be rejected as a misconception of the rule of public policy above referred to. Whatever may have been thought in the early part of the seventeenth century, or even in Lord Ellenborough's day, it is now quite clear that the rule only suspends and does not require the destruction of the civil remedy. There can, therefore, it is argued, be no drowning of the trespass in the felony, and if the reason given for the decision in *Huggins* v. *Butcher* be bad, there is, it is contended, no reason why that case should stand, or why Lord Ellenborough's ruling, which was dependent on it, should not now be overruled by this House.

Before proceeding to deal with this point, I should like to call the attention of the House to certain historical considerations which appear to me to be of considerable materiality. I do this with some diffidence, as I cannot lay claim to any special knowledge. I have, however, read a good deal of history in connection with this case, for it is almost a commonplace that apparent anomalies in our law can generally be explained if we consider the conditions of its historical growth.

If we carry our minds back to a period prior to the development under the influence of the Statute of Westminster II. (13 Edw. 1, c. 24) of the action on the case, we find that the law of contract based on the doctrine of consideration had not yet taken shape. The basis of society was still status rather than contract, and the King's courts had not yet invented any procedure for the enforcement of simple contract obligations. Nevertheless, among the writs which had become *de cursu*, there were several writs which a master could obtain from the Chancery in respect of wrongs done to his servant. Fitzherbert, in his De Natura Brevium, mentions (1) a writ of trespass for taking away an apprentice or servant, and (2) a writ of trespass for injury done to a servant *per quod servitium amisit*. These writs are in all respects analogous to the writs of trespass for taking away a wife or child, or for injury done to a wife or child *per quod consortium* or *servitium amisit*; and also to the writs of trespass for debauching a wife, daughter, or female servant. The inference is that all these writs arose out of status at a time when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract. This would appear to me to account for the fact that, except in the case of master and servant, the loss of A. arising out of an injury, whereby B. is unable to perform his contract, is not actionable. It is only in a society based on contractual obligation that the existence of such an action in the case of master and servant and in no other case can appear illogical.

Further, during the period in question the writ of trespass was the only remedy for wrongs such as those we are considering. According to Professor Maitland, trespass was a remedy for acts of violence not amounting to a felony. Certainly no writ of trespass can be found in which the acts of which the plaintiff complains necessarily amount to a felony. In some cases they may or they may not. Take for example the writ for breaking into the plaintiff's house and taking away his money. The acts complained of do not constitute burglary or larceny. There may be a burglary or larceny, according to whether certain additional facts be or be not proved, but the defendant cannot plead these additional facts: (*Lutterell* v. *Reynell*, 1 Mod. 282). He cannot set up his own felony by way of defence. The facts alleged in the writ are wrongful and actionable, whether these additional facts be proved or otherwise. It is not the felony which is made the subject of complaint. It should be remembered that for felony there was the appeal, and that, to use Professor Maitland's expression, the writ of trespass may be called "an attenuated appeal" dealing with acts of violence for which the appeal did not lie. It arose out of the appeal, and was a criminal as well as a civil proceeding, leading not only to the plaintiff recovering damage, but to the defendant being fined or imprisoned.

During the period we are considering it is probable that all homicide by act of violence amounted to felony. Certainly intentional homicide or homicide through negligence was felonious. It follows that the death of a human being occasioned by an act of violence on the part of the defendant could not be the ground of complaint in an action of trespass. It could not be alleged without alleging felony, and for felony trespass would not lie. If the writ alleged only an injury *per quod servitium* or *consortium amisit*, the writ would be unobjectionable, but if death ensued, damage could be obtained up to the date of the death only. If the injured person had been killed on the spot the action would fail altogether. The plaintiff's remedy, if he had any, would be the appeal.

If for the reasons above suggested trespass did not lie on the part of a master for an injury causing the death of his servant, it is easy to see how this fact would influence the subsequent development of the action on the case. The writ-making powers of the Chancery, which for a time had fallen into disuse largely because they were thought to infringe on the legislative function of Parliament, received in 1285 A.D. a new impulse by the passing of the Statute of Westminster II., and began to be again used, as they had been originally used, to meet the needs of a growing civilisation by providing legal remedies for grievances which, however much they might be recognised as such by the general sense of the community, were not yet actionable in the King's courts. Consider for a moment the following examples: First, A.'s servant, in the course of serving A., negligently throws a beam of wood on to a highway, and in so doing injures B.'s servant. Under these circumstances B.'s servant had a writ of trespass against the wrongdoer, and B. also had a writ of trespass (*per quod servitium amisit*), but neither of them had any remedy against A., for trespass was in fact a criminal proceeding, and according to the common law no one could be called upon to answer in a criminal proceeding for another's crime. Nevertheless, the general sense of the community demanded such a remedy, and this was supplied by giving B. and B.'s servant an action on the case against A. By this means the modern law as to a master's liability for the acts of his servant was enabled to develop. The remedy of B.'s servant against A.'s servant was always confined to an action in trespass: (see *Holms* v. *Mather*, L. Rep. 10 Ex. 241, per Lord Bramwell at p. 268). Secondly, suppose A.'s servant, in the course of serving A., placed a beam of wood on the highway and negligently left it there, so that B.'s servant fell over it and was injured. Under these circumstances neither B.'s servant nor B. himself had any remedy in trespass, for A.'s servant had committed no act of violence for which alone a writ of trespass could be obtained from the Chancery. Nevertheless, the general sense of the community demanded a remedy and such a remedy was again supplied by giving both B. and B.'s servant an action in case against both A.'s servant and A.

If in the first of the two examples I have given B.'s servant had been killed and not injured only, A.'s servant would have committed a felony and no action against him would lie in trespass. In developing the principle of *respondeat superior*, it may well have been thought that A.'s liability for the act of his servant ought not in any case to be greater than the liability of the servant himself. Again, if in the second of the two examples B.'s servant, in falling over the beam, had broken his neck, it may well have been thought that neither A.'s servant nor A. himself ought to incur, by reason of mere nonfeasance, a liability greater than would have been incurred by actual violence. These considerations may well account for the doctrine that the death of a human being could not be complained of as an injury in an action on the case any more than it could in an action of trespass.

I will now return to the case of *Huggins* v. *Butcher*, and I desire to suggest that it was not really based on any rule or supposed rule of public policy, but merely on the nature of an action in trespass. The declaration was by a husband for an injury to his wife. *Primâ facie*, therefore, what was complained of was a trespass, but the declaration proceeded to state that the wife died of the injury. What was *primâ facie* a trespass thus became a felony, for which no action in trespass lay. The trespass was "drowned in the felony. It was for the King only to punish, except the party brought an appeal": (Noy, 18). If the case had turned on a rule of public policy, such rule would have been applicable to a writ in trespass for breaking into the plaintiff's house and taking away his money, where what had been done in fact amounted to burglary or larceny. I cannot discover that it was ever so applied. On the contrary, *Markham* v. *Cobb* (Latch, 144; Noy, 82) decided in 1625, and *Dawes* v. *Coveneigh* (Style, 346) decided in 1652, are authorities that in such a case the trespass is not drowned in the felony, so as to preclude an action for the trespass provided the requirements of public policy are first satisfied. These cases were quoted with approval by Sir Matthew Hale

(1 Hale, P.C. 546), and it cannot be disputed that they are good law. Lord Ellenborough himself acted on them in *Crossby* v. *Leng* (12 East, 409) without any apparent hesitation, though *Baker* v. *Bolton* had been decided by him only a few years previously, namely, in 1808. It is true that neither *Huggins* v. *Butcher* nor *Baker* v. *Bolton* were cited in argument. Of course, this may have been due to carelessness in examining the authorities, but it is quite possible that counsel did not consider that they had any bearing on a question of public policy.

The case of *Gimson* v. *Woodfall* (2 C. & P. 41) strikes the first discordant note. This was in 1825, and in 1827 the matter was discussed in the case of *Stone* v. *Marsh* (6 B. & C. 551), Lord Tenterden using language which might be construed to favour the view taken in *Gimson* v. *Woodfall*. The point was left open in *White* v. *Spettigue* (13 M. & W. 603), though that case overruled *Gimson* v. *Woodfall* on other grounds.

In *Wellock* v. *Constantine*, decided in 1863 (7 L.T. Rep. 751; 2 H. & C. 146), the plaintiff sought to recover damages for rape. Of course, if she had consented to the act alleged, there could be no civil remedy. If, on the other hand, she had not consented, she was in fact complaining of a felony, for which an action in trespass, at any rate, would not lie. Willes, J., being of opinion that no civil action would lie for a felony, intimated that he would direct a verdict for the defendant, and the plaintiff thereupon consented to a non-suit. The case, therefore, appears to resemble *Huggins* v. *Butcher*, and has no necessary reference to public policy, though Pollock, B., in discharging a rule for a new trial, seems to suggest that public policy was the real ground of decision. This also appears to have been the view of Blackburn, J. in *Wells* v. *Abrahams* (26 L. T. Rep. 326; L. Rep. 7 Q. B. 554), for he disapproves *Wellock* v. *Constantine* on the ground that public policy demands only the suspension and not the destruction of the civil remedy, thus approving the earlier authorities to which I have referred. He obviously disagreed with the ruling of Willes, J. that no civil action would lie for a felony, for though he expressly approves the case of *Huggins* v. *Butcher*, he says it is a mistake to suppose it was decided on that ground. Unfortunately, he does not suggest on what grounds he thought the decision could be supported.

That the rule of public policy only suspends or does not destroy the civil remedy is also shown by the subsequent cases of *Ex parte Ball* (10 Ch. Div. 667) and *Midland Insurance Company* v. *Smith* (45 L. T. Rep. 411; 6 Q. B Div. 561).

It should be noticed that Baggallay, L.J., in laying down in *Ex parte Ball* the propositions resulting from the authorities, says that a felonious act may (not that it must) give rise to a civil action. Before any question of public policy can arise it has first to be ascertained whether civil proceedings will lie at all. Most felonies involve a wrong less than a felony, and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings.

It was in this state of the law as to public policy that *Baker* v. *Bolton* came up for consideration before the Court of Appeal in *Clark* v. *London General Omnibus Company* (95 L. T. Rep. 435; (1906) 2 K. B. 648), and, if that case be referred to, it is quite apparent that neither the counsel who argued it nor the judges who were party to the decision considered that public policy had anything to do with the matter. Not one of the cases on the latter subject to which I have referred was so much as mentioned. Under these circumstances it seems impossible to suppose that the decision in either *Huggins* v. *Butcher* or *Baker* v. *Bolton* depended on a misconception of the rule of public policy. I think it more probable that this misconception which at one time no doubt prevailed but which has been now dispelled was itself due to a mistake as to the meaning of what was said in *Huggins* v. *Butcher*, that case itself merely deciding that felony could not be made a ground of complaint in trespass, a decision which in *Baker* v. *Bolton* was extended to cover all civil proceedings.

Perhaps I ought to add one word on the case of *Smith* v. *Selwyn* (111 L. T. Rep. 195; (1914) 3 K. B. 98). That case resembled *Wellock* v. *Constantine*. The statement of claim alleged and complained of a felony. There was an application to stay further proceedings or dismiss the action on the ground that it was based on a felony for which there had been no prosecution. Liberty was given to amend the claim by alleging only a wrong less than felony; otherwise the action was ordered to be stayed pending criminal proceedings. The question whether felony could itself be made a ground of complaint in a civil action, quite apart from any rule of public policy, does not appear to have been considered, and supposing the statement of claim had been amended in the way suggested, it would still seem that, under the authorities I have cited, public policy would, if there had been an actual felony, demand a stay until the plaintiff had done her duty by prosecuting the felon.

Under these circumstances I do not think the appellants can be said to have advanced any sound reasons why your Lordships' House should disturb a rule of law which has been so long recognised in our courts and which, however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds.

I agree that the appeal fails.

Lord SUMNER.—This appeal has been brought principally to test the rule in *Baker* v. *Bolton* (1 Camp. 493), that "in a civil court the death of a human being cannot be complained of as an injury," a rule which has long been treated as universally applicable at common law. Some attempt was made to contest it only in its application to the case of master and servant. I will discuss both the narrower and the wider proposition, but it is clear that the action was not brought for the loss to a master of the services of his employee, but for the respondents' bad navigation, which sank the Crown's submarine, and the item of damage now in dispute, namely, pensions and allowances to dependants of seamen who were drowned, was claimed merely as one of the natural consequences of the tort, which consisted in sinking the ship. No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned, and

so different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment that it may be questioned whether in any case an action *per quod servitium amisit* could have been brought at all.

Never during the many centuries that have passed since reports of the decisions of English courts first began has the recovery of damages for the death of a human being as a civil injury been recorded. Since Lord Ellenborough's time the contrary has been uniformly decided by the Court of Exchequer and by the Court of Appeal. In addition to the weight of Lord Ellenborough's name (no mean authority even when sitting at Nisi Prius in spite of Lord Campbell's sneer), the rule has been definitely asserted by Lord Selborne (*Clarke* v. *Carfin Coal Company* (1891) A. C., at p. 414), Lord Bowen (*The Vera Cruz*, L. Rep. 9 P. Div., at p 96), and Lord Alverstone and Lord Gorell (*Clark* v. *London General Omnibus Company* (95 L. T. Rep. 435; (1906) 2 K. B. 648). It has been accepted as the rule of the common law by the Supreme Court of the Dominion of Canada (*Monaghan* v. *Horn*, 7 Can. S. C. R. 409), and the Supreme Court of the United States of America (*The Corsair*, 145 U. S. Rep. 335).

That the rule has also received statutory recognition appears to me to be abundantly plain. I agree that the preamble to the first section of Lord Campbell's Act should be read as applying to the particular defect in the existing law, which it was passed to remedy, namely, the disadvantageous position of widows and children, and not to the limited rights of masters and employers, though only Bramwell, B.'s intrepid individualism could dismiss it as a "loose recital in an incorrectly drawn section of a statute, on which the courts had to put a meaning from what it did not rather than what it did say": (*Osborn* v. *Gillett*, L. Rep. 8 Ex., at p. 95). Still I think that the view taken by the Legislature in 1846 is clear. Sect. 6 of Lord Campbell's Act provides that "nothing therein contained shall apply to that part of the United Kingdom called Scotland." Why? Because Scottish law differed from English law in the very point in question, and in this respect is for once illogical. The rule, says Lord Watson, in *Clarke* v. *Carfin Coal Company* (1891) A. C., at p. 419), and again in *Wood* v. *Gray* (67 L. T. Rep. 628; (1892) A. C., at p. 581), which allows "actions of *solatium* and damages at the instance of husband, wife, or legitimate child in respect of the death of a spouse, child, or parent . . . does not rest upon any definite principle, but constitutes an arbitrary exception from the general law, which excludes all such actions, founded in inveterate custom and having no other *ratio* to support it." "Lord Campbell's Act," says Turner, L.J., with the concurrence of Knight-Bruce, L.J., in *Glaholm* v. *Barker* (13 L. T. Rep. 653; L. Rep. 1 Ch., at p. 227), "first introduced into this country a remedy in case of injuries attended with loss of life, the law up to the time of the passing of this Act having stood thus—that in case of death resulting from injury the remedy for the injury died with the person." It provided a new cause of action and did not merely regulate or enlarge an old one. It excluded Scotland from its operation because a sufficient remedy already existed there, when in England none existed at all. So much seems to me to be indubitable. It did not deal with the case of master and servant as such, presumably because the Legislature found nothing in the common law rule in this regard which called for reconsideration. I think the observation of Pigott, B. in *Osborn* v. *Gillett* (L. Rep. 8 Ex., at p. 93) was perfectly just. "We are not at liberty to disregard the law thus established so long ago and expressly recognised by the Legislature, nor in effect to add by the decision of this court another clause to Lord Campbell's Act." It is worthy of observation that the passing of Lord Campbell's Act was followed shortly afterwards by similar legislation in the States of New York in 1847 and 1849 and of Maryland in 1852, and statutes similar in effect have since been passed in most of the older States of the Union, where the common law prevails. Massachusetts had already dealt with the matter, though only tentatively, by direct enactment (c. 81 of 1786), which made the township as the highway authority liable in certain cases, when death was caused on highways, and by an Act of 1840, which provided that a railway company, whose negligence had caused a fatal accident, should be liable on indictment to payment of a fine to the use of the personal representative of the deceased for the benefit of his family. Plainly it was, and long had been, the general opinion among students of the common law that the rule was as stated by Lord Ellenborough. "The authorities are so numerous and so uniform," said the Supreme Court of the United States in 1877 (*Mobile Railway* v. *Brame*, 95 U. S. Rep. 758), "that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question." Since the early part of the last century the subject has been learnedly discussed on many occasions in the United States, both in connection with claims for the death of a servant and claims for the death of a relative. The reargument in *Hubgh* v. *New Orleans and Cincinnati Railway* (6 Louisiana Annual, 495) is particularly valuable for its contrast of the common law with the old French law and with the effect of art. 1382 and art. 2294 of the Code Napoléon, as repeatedly interpreted in the Cour de Cassation. So much for this rule as a proposition of general application.

I think that, as the appellants have argued this case as if the action had been brought by a master for the loss of a servant's service, it is better to deal also with this aspect of it. The point was concluded against the appellants in the courts below by *Osborn* v. *Gillett* and *Clark* v. *London General Omnibus Company*. The question is whether there is any ground of principle on which your Lordships ought to overrule decisions of such authority and long standing. The case is put thus: "It is admitted that a master has an interest in his servant's life, such as to support an action if the servant is maimed; how can it be right that the tortfeasor should escape if instead of maiming the servant he kills him? Is the general rule of liability for tortious injury to the servant's health subject to an exception in relief of the tortfeasor if death ensue?" Some most learned writers have expressed dissatisfaction with the rule. It has been even suggested that Lord Ellenborough was "the victim of a

confusion of ideas" and that the rule arose from a misunderstanding of the principle that a right of action for a tort, where the act done was felonious, is suspended till the tortfeasor has been prosecuted. The hope—perhaps a faint one—was long ago expressed that some day your Lordships might overrule *Baker* v. *Bolton*.

I think it is clear that the relation of master and servant presents in this matter some peculiar features. What is the right in the master which the tortfeasor infringes, or the duty towards him which he disregards? Ordinarily an action of tort is given to defend rights of property or rights of personal safety, personal freedom, and personal reputation. The latter must be confined to the person of the master, and in the person of the servant he has no property. Here is the beginning of anomaly.

I do not know, and doubt if it can now be ascertained, when or pursuant to what theory this special right of the master in relation to his servant was first established. The inquiry belongs to history rather than to positive law. Tindall, C.J. in *Grinnell* v. *Wells* (7 M. & G., at p. 1041) observes of the most highly artificial aspect of this cause of action: "The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter has been uniformly placed from the earliest times hitherto not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. . . . It is the invasion of the legal right of the master to the services of his servant that gives him the right of action for beating his servant, and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter." So nearly did the wrong, which is the subject of this cause of action, approximate to wrongs to his property that a count for debauching the plaintiff's daughter could be joined with a count for breaking and entering his house (*Woodward* v. *Walker*, 2 B. & P. New Reports, 476), and a man could join with a count for an assault on himself another for an assault on his wife "*per quod consortium uxoris* for three days *amisit*": (*Guy* v. *Livesey*, Cro. Jac. 501). Thus it is that the tortfeasor is liable to another's servant if he beats him, for the act is actionable *per se*; but he is only liable to the master of the servant if the beating interferes with the service, for at the master's suit it is only actionable *per quod* (*Robert Marys'* case, Coke's Rep. Pt. 9, 113A). They are two separate causes of action in two different persons in respect of the same act. Again, where there is no capacity for service, as in the case of an infant of tender years, the father's action *per quod servitium amisit* will not lie: (*Hall* v. *Hollander*, 4 B. & C. 660). If the contract of service had already determined before the wrongful act had any disabling effect upon the capacity to serve, as might be the case when a wrongful act is done to a servant under notice, I take it likewise that the action would not lie. It is the loss of service, which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant. The contract of service being purely personal determines with the servant's death. As he dies, *eo instanti* the master's right is extinguished. A cause of action, which essentially depends on the present existence of a right to services, cannot be asserted in respect of a state of things which is inconsistent with the existence of such a right. It cannot be changed from an action for injury to the right (for in tort the wrongful act of the defendant and an invasion of the right of the plaintiff must concur) into an action for damage arising upon an event, otherwise an action would lie for causing the death of one's *cestui que vie*. A similar explanation is applicable to the case of a husband's action for injury to his wife *per quod consortium amisit*. The right is not in the life but in the service or *consortium* during life. "Death following instantly upon the act complained of," says the Supreme Court of the United States in *Lucas* v. *New York Central Railway* (21 Barber, 245), "there was no time during her life when it could be said that the husband had lost the services of his wife in consequence of the injury complained of." Such an explanation was offered by the court in *Monaghan* v. *Horn* (7 Can. S..C. R. 409), and it has the approval of Sir Gorell Barnes, P. in *Clark's* case. For my own part I think it is sound in this sense that whether or not it be the theory on which those who introduced these causes of action would have justified them, as indeed we may be sure it is not, it, at any rate, provides, though somewhat imperfectly, an intelligible basis for the existing rule, sufficient to prevent your Lordships from interfering with long-standing decisions on the plea that they are insensible or arbitrary.

Mr. Solicitor urged that such a principle is highly technical and that, if a minor hurt to a servant gives a course of action to a master, *à fortiori* must the major hurt, which results fatally, and he reminded your Lordships that this House in the case of *The Bernina* (6 Asp. Mar. Law. Cas. 257; 58 L. T. Rep. 423; 13 App. Cas. 1) overruled *Thorogood* v. *Bryan* (8 C. B. 115), a case of long standing, and exhorted your Lordships to take heart and do likewise. This is hardly the right view to take of your Lordships' judicial functions nowadays, nor does it follow, in the case of a legal system such as ours, that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which, however imperfect, are well established and well defined. Again, an established rule does not become questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful. The explanations given of the rule in question are singularly varied. Hale (Pleas of the Crown, i. 476) says that a man shall forfeit his goods, though the verdict be *quod interfecit per infortunium et non per felonium*, "because the King has lost his subject and that men should be more careful." Certainly the idea of liability for breach of a duty to use care towards one's fellow-subjects was of slow growth. Again, Parke, B. says in *Armsworth* v. *South-Eastern Railway* (11 Jurist O. Ser. p. 758) that the rule had two reasons, "first, because the law provides remedies for such mischiefs only as affect legal rights and a man has no such legal right in the life of his parent as he has in his own, while, secondly, it was considered impossible to

form an estimate of the value of human life either to a man himself or to others connected with him."

Whether as some have thought the Roman law affected the matter in the distinction which it drew in various connections between the value of a slave's life and that of a free man it is probably impossible now to tell. The true explanation and the basis may be, and in our law often are, purely historical. As is well known it was long part of English law when civil injuries and criminal offences had not been clearly distinguished, that among emendable offences there was included homicide, for which payment of wite to the King, or in some cases to the lord, and of bot to the kinsfolk constituted satisfaction. The elaboration of this tariff and the heavy burden of the payments for which it provided in the case of various injuries seem to have been the cause of the disappearance of this system. It passed away very rapidly, partly through the rise of criminal jurisdiction over offences against the King's peace and partly through the attraction of the new action of trespass. The change had taken place before records of decisions begin. Thereafter, while damages were recoverable by the injured man in his lifetime for trespass to his person, homicide became punishable upon indictment, and in Bracton's day was regarded as felonious. Those homicides, which were due to negligence, could be and were dealt with by the exercise of the King's mercy. On the one hand homicide, which deserved punishment, ceased to be emendable; on the other personal torts, actionable in trespass, were compensated in damages; the intermediate case of an act, tortious but not heinous, causing death was dealt with by the Royal mitigation of the punishment naturally attaching to homicide. There was I imagine in early times no actual decision in which it was held that in a civil court the death of a human being could not be complained of, still less was any legal theory advanced in justification of such a rule. Following the development of law through the modification and development of procedure, the system of making satisfaction for homicide by payment of wer and wite died out after the twelfth century; it was dealt with as a punishable felony, with or without mitigation of punishment, in proceedings on the King's behalf. Relatives, who in the time of Henry I. would have been paid by the manslayer in accordance with the rank of his victim, in the time of Edward I. had lost that right and yet could not bring trespass, and this by a process of procedural change and not, so far at least as is known, on any analysis of the nature of the cause of action. Doubtless lawyers as familiar with fatal accidents due to mere negligence as we are would have analysed the injury and have distinguished fully between killing with intent to kill, killing by an intended act without intent to kill but in breach of a duty towards the victim, and killing without either intent or breach of duty by mere misadventure, but in days when negligence causing death was probably rare as compared with our day, and the guilty party more often than not had nothing with which to pay damages, men acquiesced without discussion in a procedure by which the Royal justice dealt with homicide of all kinds, and actions of trespass did not deal with homicide t all. No doubt it is the tradition of this change that was preserved in the language of Tanfield, J. in *Huggins* v. *Butcher* (Yelverton, 89), "the servant dying of the extremity of the battery it is now become an offence to the Crown, being converted into felony," to which the report in Noy, p. 18, adds "for the King only is to pursue felony except the party brings an appeal." Though no longer in accordance with the formal law as stated by Cockburn, C.J. in *Wells* v. *Abrahams* (26 L. T. Rep. 326; L. Rep. 7 Q. B. 554) and by Baggallay, L.J. in *Ex parte Ball* (10 Ch. Div., at p. 674), this was historically not far from the truth.

Pari passu with the respective proceedings in trespass and on the case and on indictment there remained the right of appeal. For many years an appeal was more common than an indictment in cases of homicide, and the judges were careful to preserve the relatives' private right to the appeal and to secure that they should not be prejudiced by the course taken by or in the name of the Crown. The liability of the manslayer to punishment might be discharged by the King's pardon, or by the appellant's release, but in case of the former the appellant's right was saved, so that the King's pardon could not be pleaded to defeat the appeal. Out of this there arose the practice of using the appeal as an engine of compulsion, by which the slayer was driven to make compensation in order to obtain the appellant's release. In the appeal there were risks on both sides, for if the appeal failed the appellee had his action on the case for a false and malicious appeal. Down to the end of the fifteenth century appeals were nevertheless common, but the statute 3 Hen. 7, c. 1, after reciting that "in appeals the party is oftentimes slow and also agreed with . . . also he that will sue any appeal must sue in proper person, which suit is long and costly, that it maketh the party appellant weary to sue," enacts that indictments should no longer be held back "so that the suit of the party may be saved," but are to be proceeded with at once. Eventually appeals fell much into disuse; but they are mentioned from time to time and a reported instance occurs, which is instructive, in Croke's Eliz., pp. 632 and 682, *Phillida Shackborough* v. *Biggins* or *Biggen*, Here in a widow's appeal for murder, in which the act was held to have only been manslaughter, the Queen's pardon was relied on. It was decided, with some difference of opinion, that the pardon did not get rid of the appellee's liability to be burnt in the hand, it being the suit of the party and not an information in the Star Chamber, which is the suit of the Queen. On this the appellee promptly paid the appellant forty marks, and the suit was discontinued. There is little subsequent record of similar cases. In 1770 in *Bigby* v. *Kennedy* (5 Burr. 2643) it is stated that there had been no such case for nearly half a century, and, as eventually the appellant did not appear and a non-suit was entered, no doubt the appellee had satisfied her demands. In *Ashford* v. *Thornton* in 1818 (1 B. & Ald. 405), the case which led to the abolition of appeals by 59 Geo. 3, c. 46, s. 1, Bayley, B. observes: "This mode of proceeding by appeal is unusual in our law, being brought not for the benefit of the public, but for that of the party, and being a private suit wholly under his control it ought therefore to be watched very narrowly

by the court, for it may take place after trial and acquitment on an indictment at the suit of the King, and the execution under it is entirely at the option of the party suing, whose sole object may be to obtain pecuniary satisfaction." In this sense down to 1819 the death of a human being could be complained of in a civil court, for the appeal, though "a vindictive action," was on the civil side of the court, but it could not be complained of "as an injury," and the rule as stated by Lord Ellenborough stands untouched.

I think the history of the disappearance of wergild and the persistence of the appeal for homicide, which is to be found in full in the works of Hawkins, Fitzjames Stephen, and Pollock and Maitland, proves, if proof were needed, that Lord Ellenborough's canon correctly states the law, and is one which is not now susceptible of expansion by judicial interpretation. There never was an action in the sense now contended for to recover damages for the death of a human being, and the remedy by appeal, which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated, had any such action at law been possible, for it was long a form of legalised blackmail.

The historical explanation of the absence of such an action at the suit of relatives applies equally to the case of a master's claim for the death of a member of his *familia*, for example, a servant. It is equally incapable of judicial creation. Indeed, what is anomalous about the action *per quod servitium amisit* is not that it does not extend to the loss of service, in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.

The canon in question has often been classified under the maxim *actio personalis moritur cum personâ*, and ill-advised arguments have sometimes suggested that, even as applied to the case of master and servant, it has something to do with the abatement of actions. The maxim itself has many critics; it has been coldly disparaged as post-classical, meaning thereby that it is bad Latin (*Finlay* v. *Chirney*, 58 L. T. Rep. 664; 20 Q. B. Div., at p. 502); it has been suggested to be a mistake for *actio poenalis* (Poste Gaius 493), whence it is sometimes insinuated that it is bad law; and it has been peevishly described as "a wretched saw" and as "a purely identical proposition" (Austin II. 1013). Of course, reliance on the maxim in this connection leads to the effective retort that the person who has the action is the master and he is alive and sues just because someone else, his servant to wit, is dead. If, however, this maxim is put aside, since in the present case it is irrelevant, I think that the argument, that your Lordships should discover under this ancient form of action some principle hitherto undetected, is really an appeal to this House in its legislative and not in its judicial capacity.

Apart from the question of civil liability for the death of a human being, there is another aspect of this case. Injury is the gist of any action of negligence—if the negligence does no damage no action lies. In the present case the sums claimed were paid to widows and other dependants of the drowned men under Admiralty Regulations (pars. 1974 A 1 and 2011 A), which expressly declare that these are compassionate payments, and granted of grace and not of right both in kind and in degree. True that in such cases they are always made, and most properly made, but none the less the money claimed was lost to the Exchequer directly because the Crown through its officers was pleased to pay it. The collision was the *causa sine qua non*; the consequent drowning of the men was the occasion of the bounty; but the *causa causans* of the payment was the voluntary act of the Crown. Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of a contractual obligation. In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy (*Bradburn* v. *Great Western Railway*, 31 L. T. Rep. 464; L. Rep. 10 Ex. 1), and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's service sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead. The appeal is enterprising and has been of considerable interest, but, I think, it fails.

Appeal dismissed.

Solicitors for the appellants, *Treasury Solicitor.*
Solicitors for the respondents, *Pritchard* and *Co.*

Judicial Committee of the Privy Council.

Nov. 3 *and* 15, 1916.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, and WRENBURY.)

THE CANTON. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Requisition of goods by Crown—Order of Prize Court—Refusal of special leave to appeal—Reasons for withholding leave.

On the hearing of a petition presented by the claimant for special leave to appeal from an order of the President of the Prize Court in chambers refusing an adjournment and giving leave to requisition for the use of the Crown certain copper:

Held, that, as the goods were urgently required for the prosecution of the war and it was impossible to say that there was no reasonable cause for suspicion or that the goods ought

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

to be released without further investigation, special leave would be refused, but, while so deciding, their Lordships desired to express no opinion as to whether the applicant could in the circumstances have appealed as of right.

Rule as explained in The Zamora (13 Asp. Mar. Law Cas. 330; 114 *L. T. Rep.* 626; (1916) 2 *A. C.* 77) *applied.*

A PETITION was presented by Mr. Hugo Tillquist, a Swede by birth and a merchant of Stockholm, for special leave to appeal from orders made by the President of the Prize Court (Sir Samuel Evans) in chambers on the 2nd Nov. 1916, refusing an adjournment and giving leave to requisition about 150 tons of electrolytic copper on board the steamship *Canton* for the use of His Majesty. The copper was shipped at New York in the *Canton* for delivery at Stockholm to the petitioner, the claimant in the Prize Court, who had bought it from an American company in New York. The vessel left New York on the 16th Nov. 1914, and was brought into Kirkwall for search on the 2nd Dec. A writ in the Prize Court was issued on the 1st Jan. 1915 claiming condemnation of the copper as contraband of war or otherwise. The claimant lodged a formal claim to the copper, and in his affidavit in support deposed that the copper was for use in Sweden. No further steps had been taken on behalf of the Procurator-General to obtain an adjudication in the Prize Court. On the 1st Nov. the claimant's solicitors received a telephone message from the Procurator-General's office that a summons would be served asking for liberty to requisition the copper forthwith. The next morning the summons came before the President in chambers, and an application was made on behalf of the claimant for an adjournment in order that certain statements contained in an affidavit made by Mr. Greenwood of the Treasury Solicitor's department might be answered.

The President refused to adjourn the case.

Thereupon it was submitted on behalf of the claimant that on the evidence there was no real cause for investigation and trial, and that the circumstances were such as would justify an order directing the immediate release of the goods.

The President made the order as prayed, and refused leave to appeal and a stay of execution pending an appeal.

It was intimated that possession of the copper would be taken immediately on behalf of the Minister of Munitions.

The claimant now petitioned for special leave to appeal from the order of the President, and asked that if the goods had been removed from the custody of the Admiralty marshal an order for their immediate return to his custody. It appeared from an affidavit made by the petitioner that he had for more than twenty years carried on business at Stockholm as an agent for English, French, and German export firms in engines and materials for electrical installation, and had in that way been associated with many important Swedish firms. Before the copper was shipped he had made a declaration at the Swedish Foreign Office that the goods would be used for manufacturing in Sweden, and, on the express understanding that the copper should be so used in Sweden, it was insured. On the 11th March he sold two parcels which were on board the *Canton* and another ship to the Royal Telegraph Department of the State of Sweden, who required the copper for their own purposes in Sweden.

Leslie Scott, K.C. and *Balloch* in support of the petition.

Sir *Frederick Smith* (A.-G.) and *D. Stephens* for the Crown.

At the close of the arguments:

Lord PARKER OF WADDINGTON said that their Lordships would humbly advise His Majesty that the application for special leave under the prerogative to grant leave to appeal should be refused. The board would express no opinion whether the right of appeal lay or not. The reasons for their decision they proposed to put into writing. There would, of course, meantime be no stay.

The reasons for the report of the Lords of the Judicial Committee upon the petition were delivered by

Lord PARKER OF WADDINGTON.—This was an application by the owner of a parcel of copper ex the steamship *Canton* for special leave under the prerogative to appeal against an order of the President, whereby the Crown obtained leave to requisition it. The form of the application admitted that there was no appeal of right. Their Lordships refused to advise His Majesty to grant the application for the following reasons: The limits of the Crown's right to requisition goods the subject of proceedings for condemnation in prize were recently laid down by this board in the case of *The Zamora* (13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77). It was there decided that, in order to justify an exercise of the Crown's right, two conditions must be fulfilled. First, the goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. It was not disputed in the present case that the first condition was satisfied, but it was contended that there was no real case for investigation or trial, the facts being such that the goods ought to be immediately released. Their Lordships were of opinion that the question whether there be any case for investigation or trial is one which can be better determined by the judge before whom the proceedings are pending than by this board. They did not think they could advise an exercise of the prerogative unless they were of opinion that the judge had proceeded on wrong principles, or had come to a conclusion which was obviously erroneous. It appeared that the applicant was before the war an export agent for Swedish, English, French, and German firms engaged in the manufacture of engines and materials for electrical installations. He had at times sold copper to his Swedish principals, but had not theretofore been an importer of copper on his own account. He found that the business of the several firms for whom he acted as agent was adversely affected by the war, and he gives this as his reason (in their Lordships' opinion a somewhat doubtful reason) for himself commencing to import copper on a large scale. Copper was declared to be

conditional contraband on the 21st Sept., and absolute contraband on the 29th Oct. 1914. The appellant purchased the copper in question in America in Oct. 1914. He insured it with German underwriters, among others, and procured it to be shipped on board the steamship *Canton* under bills of lading, by which it was made deliverable to the order of himself and his assigns at Stockholm, or as near thereto as the vessel might safely get, the vessel being at liberty to call at any other port. He thus retained a complete power of disposition over the goods. The copper was seized on behalf of His Majesty, and proceedings for condemnation were commenced on the 1st Jan. 1915. In March 1915 the applicant sold the copper to the telegraph department of the Swedish Government, delivery to be effected before the 1st July 1915. Nevertheless, he took no steps (as he might have done under Order V.) to accelerate the trial of the action or to obtain a release on the ground of failure to prosecute it, so as to enable him to perform his contract. On the contrary, their Lordships were informed by the Attorney-General, without contradiction, that he failed to comply with requests on the part of the Crown for disclosure of documents, and he still remains in close business communication with German firms. Under these circumstances, their Lordships found it impossible to say that there was no reasonable cause for suspicion, or that the goods ought to be released without further investigation.

It may be desirable to add that their Lordships expressed no opinion as to whether the applicant could, under the circumstances, have appealed as of right.

Solicitors: for the petitioner, *Botterell* and *Roche*; for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Oct. 23, 26, *and Nov.* 6, 1916.

(Before Sir S. T. EVANS, President)

THE JEANNE, THE VERA, THE FORSVIK, THE ALBANIA. (*a*)

Prize Court—International law—Neutral vessels — Contraband goods — Freight — Claim by neutral shipowners.

By international law the owners of neutral ships are not entitled to any freight in respect of the carriage of contraband goods, except as a matter of grace or as a matter of discretion.

THIS was a case in which claims were put forward by the owners and charterers of the four vessels above named in respect of freight, expenses, and damages.

A German steamer, *Neuenfels*, sailed from Moulmein, in Burmah, laden with a cargo of rice for consignees in Germany and Austria, before the outbreak of hostilities in Aug. 1914. Upon hearing of the existence of a state of war, the master of the *Neuenfels* took refuge in the port of Vigo, in Spain, where the vessel remained. In Feb. 1915 the four vessels above named were chartered by Mr. Tycho Roberg, of Gothenburg, in Sweden. The first two vessels, the *Jeanne* and the *Vera*, were owned by the Dampskibsselskab Heimdal, of Copenhagen, in Denmark; the *Albania* was owned by the Förnyade Angfartyge Aktiebolaget Svenska Lloyd, of Gothenburg, in Sweden; and the last-named company were also the charterers of the *Forsvik*. The rice was then transferred from the *Neuenfels* to these four vessels, and the bills of lading made the rice deliverable at Gothenburg to Mr. Tycho Roberg or his assigns, the shipper being stated to be a merchant of Vigo. In the course of their voyage from Vigo the four vessels were captured and their cargoes were seized as prize, the same being afterwards sold and the proceeds condemned, but the ships were allowed to continue their voyages.

On behalf of the shipowners and charterers it was argued that freight, &c., was payable unless it was proved that they were aware of the ultimate destination of the contraband cargo which they were carrying, whilst on behalf of the Crown it was contended that no freight is ever due, whether owners or charterers do or do not know of the destination.

Aspinall, K.C. and *Dunlop* for the *Forsvik* and *Albania*.

R. A. Wright and *Le Quesne* for the *Jeanne* and *Vera*.

Sir *Maurice Hill*, KC., *Pilcher*, and *T. H. T. Case* for the Procurator-General.

The following cases and authorities were referred to:

The Concordia Affinitatis, Hay & Marriott, 169;
The Vryheid, Hay & Marriott, 188;
The Jonge Gertruyda, Hay & Marriott, 246;
The Ringende Jacob, Roscoe's English Prize Cases, vol. 1, 60; 1 Ch. Rob. 89;
The Jonge Tobias, Roscoe, vol. 1, 146; 1 Ch. Rob. 529;
The Haabet, Roscoe, vol. 1, 212; 2 Ch. Rob. 174;
The America, Roscoe, vol. 1, 127; 3 Ch. Rob. 36;
The Neptunus, Roscoe, vol. 1, 264; 3 Ch. Rob. 108;
The Neutralitet, Roscoe, vol. 1, 309; 3 Ch. Rob. 295;
The Oster Risoer, Roscoe, vol. 1, 382; 4 Ch. Rob. 199;
The Ebenezer, 6 Ch. Rob. 250;
The Rapid, Roscoe, vol. 2, 45; Edw. 228;
The Commercen, 1 Wheat. 382;
The Bermuda, 3 Wall 514;
The Springbok, 5 Wall. 1;
The Peterhoff, 5 Wall. 28;
The Mashona, 17 Cape S. C. 135;
The Hakan, 13 Asp. Mar. Law Cas. 479; 115 L. T. Rep. 389; (1916) P. 266;
The Maracaibo, 13 Asp. Mar. Law Cas. 522; 115 L. T. Rep. 639; (1916) P. 284;
Story's Notes on the Principles and Practice of Prize Courts, pp. 92-94;

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

[1] Pyke's Law of Contraband of War, p. 225; Declaration of London, arts. 14, 41, and 46.

Cur. adv. vult.

Nov. 6, 1916. — The PRESIDENT.—In these cases the shipowners put forward claims for freight in respect of contraband goods carried on the respective neutral vessels. The facts have been very fully laid before the court, and counsel on both sides have dealt most exhaustively with the law affecting the subject. The whole point which I have to decide is whether freight ought to be paid under the circumstances, and the argument on behalf of the neutral shipowners is that it is payable unless it is shown that the shipowners had knowledge of the contraband nature of the goods.

In my opinion it is quite clear from all the authorities and from the text-books that freight is never paid to neutrals in respect of the carriage of contraband goods, except as a matter of grace or as a matter of discretion. In the American case of *The Commercen* (*ubi sup*) Mr. Wheaton, in his headnote of that case, says, "Freight is never due to the neutral carrier of contraband"; and in his note at p. 394 he says, "Freight and expenses are almost always refused by the British Prize Courts to a carrier of contraband. There is but one case in the books of an exception to this rule, which was of sailcloth carried to Amsterdam, the contraband being in a small quantity amongst a variety of other articles." That was the case of *The Neptunus* (*ubi sup.*).

Later on, in America, the point was definitely and specifically decided in the case of *The Peterhoff* (*ubi sup.*), where freight was refused although knowledge was negatived. It is clear also, from the deliberations of the representatives of the various Powers at the International Naval Conference held in London, that it was assumed that freight was never payable in respect of contraband. This being the rule, and I have not been able to find that it has ever been doubted, it is unnecessary for me to waste any time in stating the facts of this case. It must not be assumed, however, in the present instance that I find that the shipowners were unaware of the property in and the destination of the contraband cargo which they were carrying.

The claims are disallowed with costs.

Solicitors for the claimants in the *Jeanne* and the *Vera*, *Botterell* and *Roche*.

Solicitors for the claimants in the *Forsvik* and the *Albania*, *Thomas Cooper* and *Co.*

Solicitor for the Procurator-General, *Treasury Solicitor.*

Dec. 1 *and* 18, 1916.

(Before Sir S. T. EVANS, President.)

THE UNITED STATES. (*a*)

Prize Court — International law — Reprisals — Goods of enemy origin — Ownership — Transfer to neutrals—Passing of property in goods during continuance of war—Goods dispatched by parcel post — Seizure on neutral vessel — Detention — Order in Council of the 11*th March* 1915 *— Reprisals Order, art.* 4.

Where goods are sent from a belligerent country to a neutral country during the progress of the war, or vice versâ, *they are to be regarded, as far as the rights of a belligerent captor are concerned, as enemy property so long as they are in transit. It is immaterial what are the terms of the contract between the vendor and the purchaser as to the passing of the property in the goods, and it makes no difference in the general principle of international law that there is a transit by land through a neutral country at one end or other of the journey.*

A number of firms in America ordered goods from various firms in Austria and Germany. Some of the goods were ordered before the outbreak of war, and some after hostilities had commenced. A certain portion of the goods had also been paid for before the war. Towards the end of 1915 *a number of packages was sent from Germany and Austria to America* via *Copenhagen, the same being forwarded by parcel post on board a Danish vessel. By virtue of the provisions of the Reprisals Order in Council of the* 11*th March* 1915, *the vessel was diverted on its journey to a British port, where the parcel packets were seized and the goods detained as being of enemy origin and enemy character.*

Held, that the goods were of enemy origin and enemy character, and that an order for their detention—or the proceeds of the goods if sold—until the conclusion of peace must be made.

THIS was a case in which the Procurator-General, on behalf of the Crown, claimed the detention and (or) sale of 1724 parcels of various kinds of goods seized from the parcels mail of the Danish steamship *United States*, whilst on a voyage from Copenhagen to New York. The *United States* left Copenhagen on the 30th Dec. 1915 and was diverted to Kirkwall, where the packages in question were seized on the 20th Jan. 1916. The claim of the Crown was made under art. 4 of the Reprisals Order in Council dated the 11th March 1915.

There were numerous claimants to the goods, but the nature of the claim put forward was practically the same in each case, and therefore that of the American Bead Company, Inc, was taken as typical of the whole. The grounds of the claim of the American Bead Company were as follows: (1) The goods were ordered and purchased from various manufacturers in Germany and Austria by the claimant corporation, which was organised and carried on business in New York, under and by virtue of the laws of the State of New York, in the United States of America, or by and through their commission agents, Carl Pollak, of Gablonz, Austria, and Leonard Kaiser, of Lauscha, Germany, and were at all material times the property of the said corporation.

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law

(2) The goods were ordered by the claimants on various dates between the 4th April and the 18th Dec. 1914. (3) By the terms of purchase and by the course of business between the parties the said goods were at the risk of the claimant corporation, and became its property on dispatch from the several factories in Germany and Austria. (4) Postal correspondence of neutrals and belligerents is not, or was not, at any time material to these proceedings within the provisions of the Order in Council of the 11th March 1915, and is and was inviolable. Alternatively no effective intimation had been given by the British Government that postal correspondence would be treated as coming within the provisions of the Order in Council.

There was no question raised as to the enemy origin of the goods, and the whole matter at issue turned upon the point as to whether they were, considering the various facts of the case, of enemy character, seeing that they had been ordered in some instances before the outbreak of war, that some of them had been paid for, and that by the terms of the contract the property passed to the claimants when they left Germany. On behalf of the Crown it was contended that the property in the goods in cases of this kind only passed to the consignee when the goods actually reached him, and that the sending of them from the port of a neutral country was an attempt to evade the provisions of the Order in Council.

By the Order in Council framing reprisals for restricting further the commerce of Germany, dated the 11th March 1916, it is enacted (*inter alia*) :—

Whereas the German Government has issued certain orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare; and whereas in a memorandum accompanying the said orders neutrals are warned against intrusting crews, passengers, or goods to British or allied ships; and whereas such attempts on the part of the enemy give to His Majesty an unquestionable right of retaliation; and whereas His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will be enforced without risk to neutral ships or to neutral or noncombatant life, and in strict observance of the dictates of humanity ; and whereas the allies of His Majesty are associated with him in the steps now to be announced for restricting the commerce of Germany ; His Majesty is therefore pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, as follows : . . .

IV. Every merchant vessel which sailed from a port other than a German port after the 1st March 1915, having on board goods which are of enemy origin or are enemy property, may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the marshal of the Prize Court, and if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into court and dealt with in such manner as the court may in the circumstances deem to be just. Provided that no proceeds of the sale of such goods shall be paid out of court until the conclusion of peace except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this order. Provided also that nothing herein shall prevent the release of neutral property of enemy origin on the application of the proper officer of the Crown.

The *Attorney-General* (Sir F. E. Smith, K.C.), the *Solicitor-General* (Sir George Cave, K.C.), and *R. A. Wright* for the Procurator-General.

Bateson, K.C. and *L. C. Thomas* for the claimant, the American Bead Company.

L. C. Thomas for the other claimants.

The arguments in the case are sufficiently indicated in the judgment. *Cur. adv. vult.*

Dec. 18, 1916.—The PRESIDENT.—The Crown claims an order for the detention or sale of certain goods seized on a voyage from Copenhagen to the United States on the double ground (*a*) that the goods were of enemy origin, and (*b*) that they were enemy property. The application is made under art. 4 of the Reprisals Order in Council of the 11th March 1915.

It is not disputed that the goods were of enemy origin. But the claimants contended that they were neutral property, on the ground that before seizure the property had passed from the respective vendors in Germany to the respective purchasers in America.

The goods were dispatched by the parcel mail on the *United States*, a Danish vessel. They were goods of multifarious kinds, and not such as would be sent by mail in times of peace. It is well known in this court that since the war the mails have been used for the clandestine transmission of contraband and other goods and merchandise from foreign countries to Germany and of goods and merchandise of various kinds from Germany to foreign countries.

The goods in the present case comprised such things as metal chains and bags, glass beads, cotton goods, skins, gloves, and musical instruments. The descriptions appear in the manifest. Short particulars of the goods claimed are as follows:—

Claimants.	No. of separate parcels.	Invoice value in marks.
American Bead Company, Inc.	129	15,622
C. Bruno and Co., Inc.	106	5,201
R. C. E. Chambers.....	183	5,978
Dieckerhoff, Raffloer, and Co...	1136	35,288
Carl Fischer	15	2,108
W. C. Van Sant and Co.....	130	20,620
H. Wolff and Co.....	21	4,063
Tiffany and Co.....	4	1,480

The goods had been ordered before the date of the Reprisals Order in Council, and in some cases payment had been made before that date. The goods had to be manufactured.

The contentions of the claimants were that the goods became their properties when they left the various factories in Germany. They left the factories in every case after the Reprisals Order in Council was made.

The question for decision is whether they were "enemy property" for the purpose of that order. Putting it in another form, had the goods in the circumstances lost their enemy character and acquired a neutral character before the seizure?

The Reprisals Order in Council deals with maritime commerce between belligerents (and of necessary consequence with that commerce in relation to neutrals also) in a state of war.

As I have pointed out before, it does not add to the articles which are confiscable and subject to condemnation as maritime prize of war. In that respect it deals more tenderly and generously with neutral commerce than was done under the old and existing law of strict blockade. Under the latter ships and cargoes were condemned out and out as prize on breach or attempted breach of blockade. Under the Reprisals Order in Council the ships are released and the cargoes or their proceeds, if a sale is ordered, are only detained until the conclusion of peace.

But, although there is this important distinction between the results of the working of the reprisals order and of the strict application of the law of blockade, it is obvious that the order deals with maritime commerce during war upon the analogy of the law of prize. Indeed, it is under the international law of prize that the order, as one of reprisal, derives its validity.

It is essential, therefore, to see how the question of the passing of property was regarded by the international law of prize.

The passing of property shipped on the seas during war is regarded by international law from a wholly different standpoint from that adopted by that law or by the municipal law in time of peace. In the case of *The Southfield* (13 Asp. Mar. Law Cas. 150; 113 L. T. Rep. 655) this subject has already been dealt with in this court. I there cited passages from Story, J.'s work and from the judgment of Lord Stowell in *The Vrow Margaretha* (Roscoe's English Prize Cases, vol. 1, 149; 1 Ch. Rob. 336) and of Lord Kingsdown in *The Baltica* (Roscoe, vol. 2, 628; 11 Moo. P. C. 141), so that their repetition is not necessary.

Stating the rule quite shortly, it is this: Where goods are sent by sea, captors' rights cannot be defeated by a mere transfer of legal ownership, by documents, without actual delivery of the goods themselves; such rights cannot be defeated unless and until the actual possession of the goods, as well as the property in them, has been changed before the seizure.

Such transfers have been described as transfers *in transitu*. This does not mean transfers made only while the goods are on the seas, between the shipment and the delivery. I take some concrete cases. If goods of a contraband nature had been bought by the enemy in America before shipment at New York, in circumstances where the legal ownership would remain in a neutral vendor according to the law in times of peace, they could still be captured on the voyage to Germany to the enemy purchaser, on the ground that they would be his on delivery, on whatever vessel, neutral or otherwise, they might be carried. So if goods of any kind so bought were shipped on an enemy vessel, or on a British or allied ship, they would be capturable. It would be no answer to say that the matter had been so arranged that by municipal law the property would not pass until the goods had safely reached the hands of the enemy. The goods would be regarded in such cases as enemy property.

So in regard to goods shipped from the enemy country; if purchased by neutrals during a state of war the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery: (see Story's Notes on the Principles and Practice of Prize Courts, p. 64.)

Having regard to the doctrine of continuous voyage, it makes no material difference that at the one end or the other there is a transit by land. And just as goods from New York to Germany intended to be delivered to the enemy are regarded as "enemy property," so goods from Germany to New York are also regarded as "enemy property," *quâ* the rights of the captors. The same principles must be applied whether the goods are being carried from east to west, or from west to east. To hold otherwise would be to encourage colourable transactions set up for the purpose of misleading and defrauding captors: (see *The Baltica, ubi sup.*).

Upon this analogy I hold that "enemy property" in the Reprisals Order in Council was intended to mean, and does mean, property which is to be regarded as of "enemy character" in time of war. This view seems to me to be in accordance with the proviso to art. 4 of the order, which refers to goods which had become neutral property before the order was promulgated. To hold otherwise would make all the provisions of the order as to "enemy property" nugatory; because in order to defeat them all that would be necessary would be that an enemy and his sympathetic neutral should take such steps as would make all goods shipped to and from Germany in theory and on paper the property of the neutral in the strictly legal sense during the whole of the transit.

For the reasons given I decide that the goods were enemy property as well as of enemy origin; and I order their detention until the conclusion of peace, with liberty to the Crown to apply for an order for their sale and detention of the proceeds.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitor for the claimants, *Hewitt, Woollacott,* and *Chown.*

Dec. 12 *and* 18, 1916.

(Before Sir S. T. EVANS, President.)

THE FREDERIK VIII. (*a*)

Prize Court — International law — Reprisals — German Government bonds — Seizure in mails on board neutral ship — "Goods" or "commodities" — Meaning of terms — Order in Council of the 11*th March* 1915 *— Reprisals Order, art.* 4.

Certain German Government bonds sent by a banking company in Berlin to a firm in Copenhagen were forwarded by registered post by the Copenhagen firm to a bank in Chicago on a Danish ship bound from that port to the United States. The vessel was, during its voyage, ordered to proceed to a British port, where the mail was overhauled and the bonds seized under the Reprisals Order in Council of the 11*th March* 1915.

Held, that the bonds were "goods" or "commodities" and liable to detention under the order, as being of enemy origin, until the

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

conclusion of peace, when they would be dealt with as the court might direct.

THIS was a case in which the Procurator-General, on behalf of the Crown, claimed the detention and (or) sale of thirty German Government bonds under the Reprisals Order in Council dated the 11th March 1915.

The writ in the case was issued on the 15th June 1916, and asked for "an order for the detention and for the sale of the goods and commodities as being of enemy origin and (or) enemy property or otherwise."

From an affidavit of Mr. Hans Mittelhauser, the Vice-President of the State Commercial and Savings Bank, Chicago, it appeared that on the 25th Feb. 1916 the bank remitted 30,000 marks by cable through Messrs. Goldman, Sachs, and Co., of New York, to the Direktion der Disconto Gesellschaft, Berlin, for the purchase of Deutsche Reichsanleiha (German Government bonds), and that on the 14th March 1916 the Disconto Gesellschaft sent the securities in question to the firm of Messrs. Beckmann and Jorgensen, Copenhagen, to be forwarded by them to the State Commercial and Savings Bank, Chicago. The securities in question consisted of ten German Government 1908 4 per cent. bonds of 1000 marks each and twenty German Government 1914 5 per cent. bonds of 1000 marks each. They were forwarded by registered letter by Messrs. Beckmann and Jorgensen to the State Commercial and Savings Bank, Chicago. The bonds were contained in a letter which was on board the *Frederik VIII.*, a Danish steamship which sailed from Copenhagen for the United States about the end of March 1916. A few days later the vessel was ordered to put in at Kirkwall, and the mail letters were ordered to be discharged under the Reprisals Order of the 11th March 1915. The mail letter containing the bonds was examined, and on the 11th May 1916 the bonds were seized as prize to the use of His Majesty.

There was no appearance or claim entered with respect to the bonds.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *R. A. Wright* for the Procurator-General.—There is no appearance before the court on the part of any claimant, and it is difficult to see how there could be any claim. The point raised was whether the bonds seized were "goods" or "commodities" within the meaning of the Order in Council of the 11th March 1915. Although the point was of a novel character, it created no difficulty. The nature of the documents, such as those which were now in question, had been the subject of discussion in the Court of Appeal in the case of *Embiricos* v. *Anglo-Australian Bank* (92 L. T. Rep. 305; (1905) 1 K. B. 677), and the judgments then delivered were in favour of the contention of the Crown. They referred to

Story's Notes on the Principles and Practice of Prize Courts (Pratt's Ed.), p. 28;
Fourth Hague Conference 1907, art. 53;
Order in Council, 14th April 1916.

Cur. adv. vult.

Dec. 18, 1916.—The PRESIDENT.—The question of law that is raised in this case is whether bonds of the German Government are comprised in the words "goods" or "commodities" within the meaning and operation of the Reprisals Order in Council of the 11th March 1915.

German Government bonds of the nominal value of 30,000 marks were sent by the Direktion der Disconto Gesellschaft, of Berlin, to the firm of Messrs. Beckmann and Jorgensen, of Copenhagen, for transmission to the State Commercial and Savings Bank, of Chicago. They were shipped on the steamship *Frederik VIII.* on the 30th March 1916. A few days afterwards they were required to be discharged under the said Reprisals Order in Council. The present application by the Crown is for an order for their detention as goods of enemy origin and (or) enemy property. No claimant has appeared. But an affidavit was made on behalf of the American bank and submitted to the Procurator-General. No order for their detention can be made unless the bonds come within the description "commodities" or "goods." The Order in Council deals with matters analogous to maritime prize, though it refrains from subjecting the goods to confiscation.

In prize the bonds and their accompanying coupons would be goods subject to seizure and confiscation as realisable securities, negotiable instruments, or *choses in action*, if they were enemy property on an enemy, British, or allied vessel. Story says that the ordinary prize jurisdiction of the Admiralty extends to all captures made on the sea, "whether the property so captured be goods, ships, or mere *choses in action*": (see Story's Notes on the Principles and Practice of Prize Courts, p. 28). It may be observed that for the purposes of the Naval Prize Act 1864 the term "goods" includes "all such things as are by the course of Admiralty and law of nations the subject of adjudication as prize" (sect. 2).

Primâ facie, if bonds were "goods" capturable as prize, one would expect them also to be included within an Order in Council for reprisal. Various interpretations have been given to the word in cases relating to wills, contracts, and legal documents of many kinds, and to Acts of Parliament dealing with various subjects. But it would serve no good purpose to cite or to discuss such cases. The question is whether the securities are "goods" or "commodities" under the Order in Council referred to.

The reasons for the Order in Council, which was due to the enemy's method of maritime warfare, and its recitals are well known. The object is stated to be the further restriction of the commerce of Germany, and it is stated in a recital as follows: "And whereas His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will be enforced without risk to neutral ships, or to neutral or non-combatant life, and in strict observance of the dictates of humanity." The word "commodity" is one of extensive meaning, denoting anything that is useful, convenient, or serviceable. And it would not be easy to conceive a wider or more comprehensive phrase than "commodities of any kind." It is a phrase more used in common speech than in legal terminology; so it is not surprising that in the operative part of the Order in Council the legal words "goods" and "property" are used simply, without the colloca-

tion of any such words as "chattels, wares, or merchandise."

I think that it is abundantly clear that the bonds in question come within those words. If money, notes, or cheques were shipped from America to Germany for the purchase of these bonds they would clearly be goods or property with an enemy destination, and equally so are the bonds sent in return goods or property of enemy origin.

It may also be mentioned that in the proclamation of the 14th April 1916 "gold, silver, paper money, and all negotiable instruments and realisable securities" are treated as articles of absolute contraband capturable and confiscable as prize.

There being no claimant before the court, I give no decision upon the question as to whether the bonds were enemy property. But as being goods of enemy origin I order their detention until the conclusion of peace, to be then dealt with as the court may order.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Dec. 18 *and* 21, 1916.

(Before Sir S. T. EVANS, President.)

Re BATTLE OF THE FALKLAND ISLANDS; *Ex parte* H.M.S. CANOPUS. (*a*)

Prize Court — Prize bounty — Distribution — Destruction of enemy warships—Action—Presence of applicants in action—Principles to be applied—Naval Prize Act 1864 (27 *&* 28 *Vict. c.* 25), *s.* 42—*Order in Council of the* 2*nd March* 1915.

By the combined effect of sect. 42 *of the Naval Prize Act* 1864 (27 *&* 28 *Vict. c.* 25) *and the Order in Council dated the* 2*nd March* 1915, *a prize bounty is payable amongst such of the officers and men of His Majesty's warships as are actually present at the taking or destroying of any of the armed vessels of the enemy, calculated at the rate of* 5*l. for each person on board the enemy's ships at the beginning of the engagement.*

It is a question of fact to be decided by the court whether a warship was or was not "actually present" at the taking or destroying of an armed ship, or of armed ships, of the enemy. Upon a finding by the court that H.M.S. Canopus *did not in any sense take part in the chase of the enemy or in the subsequent naval engagement of the Falkland Islands, that she was detached for other duties outside the engagement, and that she was not present in any sense when the enemy ships were destroyed:*

Held, that her commander, officers, and crew were not entitled to any share in the prize bounty awarded under the Naval Prize Act 1864 *and the Order in Council of March* 1915.

THIS was a motion on behalf of the commander, officers, and crew of H.M.S. *Canopus*, who claimed that they were entitled to a share in the sum of 12,160*l.* awarded as prize bounty to the officers and crews of the squadron of Vice-Admiral Sturdee —the said squadron consisting of H.M. Ships *Invincible, Inflexible, Cornwall, Carnarvon, Kent,* and *Glasgow*—for the destruction of the four German warships, *Scharnhorst, Gneisenau, Leipzig,* and *Nürnberg,* in the battle of the Falkland Islands, on the 8th Dec. 1914.

Dunlop in support of the motion.

Commander *Maxwell Anderson,* R.N., for the officers and crews of Vice-Admiral Sturdee's squadron.

Clive Lawrence for the Procurator-General.

The facts of the case are sufficiently set out in the judgment. In addition to the cases there cited the following were referred to in the course of the argument:—

The Vryheid, Roscoe's English Prize Cases, vol. 1, 179; 2 Ch. Rob. 16;
The Nordstern, Roscoe, vol. 2, 109; 1 Acton, 128;
The Ville de Varsovie, Roscoe, vol. 2, 220; 2 Dods. 301.

Cur. adv. vult.

Dec. 21, 1916.—The PRESIDENT.—This is an application by the commander, officers, and ship's company of His Majesty's ship *Canopus* claiming to share the prize bounty of 12,160*l.*, which I awarded in August last to the squadron of Vice-Admiral Sir Frederick Sturdee in respect of the destruction of the German warships *Scharnhorst, Gneisenau, Leipzig,* and *Nürnberg* in the naval battle off the Falkland Islands in December 1914.

The enactment now in force regulating the grant of prize bounty is sect. 42 of the Naval Prize Act 1864. The section is as follows:

> If in relation to any war Her Majesty is pleased to declare by Proclamation or Order in Council Her intention to grant prize bounty to the officers and crews of Her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship or of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement.

The test to be applied to the present claim is, accordingly, whether the commander, officers, and crew of His Majesty's ship *Canopus* were actually present at the destruction of the aforesaid four German warships.

It is well to advert to the nature of prize bounty, or head-money as it was called in former times. It had no necessary connection with the capture or joint capture of prize of war. It is "the peculiar and appropriate reward of immediate personal exertion," and was originally "to be paid only to the actual captor": (see *La Gloire*, Edw. 280). It was established "expressly for the purpose of exciting personal enterprise, and of counterbalancing present danger, by peculiar and appropriate rewards": (see note to case of *L'Alerte*, 6 Ch. Rob., 238).

In order to determine whether the officers and crew of the *Canopus* can be considered to have been actually present at the destruction of the German ships, it is necessary to examine the facts closely,

The naval battle of the Falkland Islands took place on the afternoon of the 8th Dec. 1914. The facts are set out in Vice-Admiral Sturdee's dispatch of the 19th Dec. 1914. He does not include the *Canopus* among his squadron, which

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

arrived at Port Stanley (Falkland Islands) on the morning of the 7th Dec. 1914, ready to resume a search for the enemy's squadron on the next day The *Canopus* had been at the port since the 12th Nov. 1914, She had been ordered there by the Admiralty to arrange the defence of the port against attack by the enemy. The work of defending the harbour and possible landing places in the vicinity was at once commenced under the direction of the commander, Captain (now Rear-Admiral) Heathcote Grant. It comprised the landing of the ten 12-pounder guns from the *Canopus*, the construction of shore batteries and of mines at the entrance, the erection of look-out stations, the establishment of an examination service of vessels entering or leaving the harbour, and the censoring of correspondence.

Ultimately the *Canopus* was grounded in a position to obtain an all-round fire to seaward, and to protect the harbour and the town of Stanley from bombardment from seaward. Her double bottoms were flooded to keep her steady, and she was secured with anchors out ahead and astern. For some time before the squadron arrived she was firmly embedded in the bottom. Rear-Admiral Grant had no information as to the concentration of Vice-Admiral Sturdee's squadron before its arrival on the morning of the 7th Dec. 1914. After his arrival Vice-Admiral Sturdee expressed himself satisfied with the arrangements which had been made for the defence of the port, and appointed Rear-Admiral Grant as senior officer of the Falklands, in charge of the defences, berthing of auxiliaries, and provisioning of the squadron.

During the afternoon of the 7th Dec., a meeting of the commanding officers of the vessels of the squadron was held aboard the flagship, at which the commander of the *Canopus* was present. In the words of the latter: "The decision arrived at included the *Canopus* remaining at Port Stanley in order to defend the same during the absence of the fleet."

On the next morning some enemy ships were sighted and duly reported from the signal station to the flagship of the squadron. At 9.20 a.m. the armoured cruisers *Gneisenau* and *Nürnberg* came within range of the *Canopus*, with guns trained on the wireless station inland. The *Canopus* opened fire at them across the lowland at a range of 11,000 yards. Two salvoes were fired. The two cruisers at once hoisted their colours and steamed away. A ricochet from the second salvo was thought to have hit, and probably did hit, the *Gneisenau*. At 9.45 a.m. the squadron, which had been lying in harbour, weighed and proceeded out to sea. At 10.20 the signal for a general chase was made. At 12.47 the signal to "open fire and engage the enemy" was given. The range was from 15,000 to 16,500 yards.

Details of the action are described in Vice-Admiral Sturdee's dispatch. It is enough here to say that in the main action the *Scharnhorst* was sunk at 4.17 p.m., the *Gneisenau* turned on her beam ends and sank at six o'clock, and in the action with the light cruisers the *Nürnberg* sank at 7.27 and the *Leipzig* turned over and disappeared at nine o'clock that night. Vice-Admiral Sturdee returned to Port Stanley on the 11th Dec. It is gratifying to mention that he expressed his thanks to Rear-Admiral Grant for the work done by the *Canopus*, and also expressed his appreciation to the ship's company later.

The *Canopus* did not, and could not, join in the chase. Her speed was much less than the slowest of the squadron. If she had been ordered to do so, she could not have put out to sea from the position where she was fixed till about four o'clock in the afternoon. Meanwhile the naval action was at its height over 100 miles away, and the first armoured cruiser was being destroyed about that time, while the *Canopus* remained at her post of duty near the harbour.

Upon these facts Rear-Admiral Grant, on behalf of his ship's officers and crew, claimed to participate in the prize bounty on the grounds: (*a*) That His Majesty's ship *Canopus* had made Port Stanley a defended port, and held it until the arrival of the squadron. (*b*) That by her gunfire she drove off the *Gneisenau* and *Nürnberg*, and prevented them from making a reconnaissance of the superior strength of the British squadron in the port. (*c*) That the defence of the port allowed of the safe coaling and revictualling of the squadron on the 7th and 8th Dec. (*d*) That the look-out stations and communications established by the *Canopus* were the means of giving the squadron sufficient warning to raise steam, cast off colliers, and leave in pursuit to catch the enemy. (*e*) That probably the ricochet shot from the *Canopus* struck the base of the after funnel of the *Gneisenau* and killed five of her men.

I believe that Rear-Admiral Grant was actuated by motives of the best kind towards his officers and men in making this application to the court that his ship should share in the prize bounty. It is only right also that this court should testify, and testify gratefully, to the good work done by the Rear-Admiral and his ship from the 12th Nov. up to and including the 8th Dec. They know that they have the gratitude of their country, and must feel the satisfaction themselves which comes from the sense of a good and faithful performance of serious duties.

But upon an application of this kind this court has also its duty to carry out in accordance with the law which prescribes it. I am not left without the guidance of precedents well established long ago. There is no real difference as to prize bounty between the provisions of the Naval Prize Act of 1864 and the former Act of 1805, which enacted that it should be paid to persons "who shall have been actually on board any of His Majesty's ships at the actual taking, sinking, burning, or otherwise destroying any enemy ship of war." Such cases as *l'Hercule*, decided by the Lords of Appeal in Prize in 1799, and cited in the case of *l'Alerte* (*ubi sup.*), decided by Lord Stowell in 1806; *La Gloire* (*ubi sup.*), in 1810; and *La Melanie* (Roscoe, vol. 2, 217; 2 Dods. 122) state the principles upon which this court should act and illustrate their application.

In my opinion the *Canopus* did not form a part of the squadron; did not in any sense join in the chase or take part in the naval engagement; was detached for other duties outside the engagement; and her commander, officers, and crew were not actually present at the destruction of the four enemy ships, in any sense within the meaning or intent of the enactment referred to.

Accordingly my decision must be that they are not entitled to share in the distribution of the

prize bounty allotted, and the application is dismissed.

As the motion has been, in my opinion, properly brought, and has raised an important and new point as far as the present case is concerned, there will be no order as to costs.

Solicitors for the applicants, *Daniell* and *Glover*, for *Banton*, *Mackrell*, and *Co.*, navy agents.

Solicitors for the respondents, *Arthur Tyler*, for Stilwell and Sons, Navy Agents (for H.M. Ships *Invincible*, *Inflexible*, *Cornwall*, and *Carnarvon*); *Wild*, *Moore*, *Wigston*, and *Sapte*, for National Provincial Bank of England, Navy Agents (for H.M.S. *Kent*); *Charles Stevens* and *Drayton*, for Martin's Bank Limited, Navy Agents (for H.M.S. *Glasgow*).

Solicitor for the Procurator-General, *Treasury Solicitor*.

Dec. 4, 11, *and* 21, 1916.

(Before Sir S. T. EVANS, President.)

THE HYPATIA. (*a*)

Prize Court—International law—Domicil—Commercial domicil—Partnership firm in neutral country—Members of partnership enemy subjects—No partner resident in neutral country—Property in goods shipped by firm in neutral country—Passing of property—Seizure—Condemnation as enemy property.

In order that a person may acquire a commercial domicil in any country, residence in that country is an essential condition of the acquisition of such domicil. Even a subject of a belligerent country may acquire a commercial domicil so as to protect his property at sea during a state of war if he fulfils the above necessary condition. If, however, he is not resident in the neutral country, though he carries on business there through agents, any goods which are his property and are being carried in a British ship during the progress of hostilities are liable to condemnation.

A partnership firm which carried on business in A., a neutral country, was composed exclusively of persons of German nationality. None of the members resided in A., and the business was carried on by agents. The firm consigned certain goods to a German house before the outbreak of war on a British ship. During the voyage, and after the declaration of war, the vessel was diverted to an English port and the goods were seized as enemy property. On an application being made by the Crown for their condemnation as prize, the consignors put in a claim on the ground that the goods were the property of a firm which had a commercial domicil in a neutral country, and were therefore not liable to be confiscated.

Held, that, as all the partners of the firm were enemy subjects, and as none of the partners resided in the neutral country so as to possess a commercial domicil, the goods were enemy property and must be condemned as such.

THIS was a case in which the Procurator-General, on behalf of the Crown, claimed the condemnation of certain bales of wool which were seized on board the British ship *Hypatia*, which sailed for Buenos Ayres in July 1914, about a month before the declaration of war between Great Britain and Germany.

The wool was shipped by a firm named H. Fuhrmann and Co., who carried on business in Buenos Ayres, and was consigned to a company carrying on business in Germany. The firm of Fuhrmann was composed of four persons, all of whom were German subjects. None of them resided in Argentina, and the only active member who had ever resided in Buenos Ayres had left that city for Europe in 1910. The South American business was transacted entirely by agents and clerks. After the outbreak of war the *Hypatia* was diverted to Liverpool whilst on her voyage, and the wool was seized as prize. The consignors then put in a claim, on the ground that as the wool was the property of a firm which had a commercial domicil in a neutral country, it had a neutral character and was not liable to condemnation.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Stranger* for the Procurator-General.

Dawson Miller, K.C. and *Dumas* for the claimants.

The whole of the facts and the arguments are sufficiently set out in the judgment.

Cur. adv. vult.

Dec. 21, 1916.—The PRESIDENT.—The subject-matter of this claim is a consignment of 100 bales of wool shipped from Buenos Ayres to Hamburg upon a British vessel before the outbreak of war. The wool was shipped under a bill of lading to the order of the shippers, for delivery at Hamburg. The shippers were a partnership of Messrs. H. Fuhrmann and Co., of Buenos Ayres. They had contracted to sell the wool to a German company, the Spinnerei Cossmannsdorf G.m.b.H. Payment was to be made by drafts on the Dresden Bank, of Dresden, on account of the purchasers. The transaction was to be carried through on behalf of the shippers by a firm of Messrs Fuhrmann and Co., of Antwerp.

The goods were seized at Liverpool on the 14th Aug. 1914. The writ was issued on the 5th Sept. 1914. Appearances were entered at first by Messrs. Fuhrmann and Co., afterwards by Messrs. H. Fuhrmann and Co., and lastly by the liquidators of Messrs. H. Fuhrmann and Co. The claimants were Messrs. H. Fuhrmann and Co., of Buenos Ayres, the vendors and shippers. They claimed the goods as neutrals on the ground that the property had not passed from them to the German buyers.

After an investigation of the facts, I find, upon the principles adopted in *The Miramichi* (13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; (1915) P. 71) that at the time of the capture the property in the goods was in Messrs. H. Fuhrmann and Co., of Buenos Ayres.

The remaining question is whether, according to the principles of international law, that firm is entitled to the release of the goods. The *dramatis personæ* are four persons, all German subjects. Between them they constituted at all material times three firms—one in Antwerp, another in Buenos Ayres, and the third in Berlin. The four persons are Mr. Peter Fuhrmann, Mrs. Laura Fuhrmann (widow of Mr. Johann Daniel Fuhrmann, deceased), Mr. Heinrich Fuhrmann, and Mr. Richard Fuhrmann. The Antwerp firm was

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

simply called Messrs. Fuhrmann and Co. It consisted of Peter, Heinrich, and Richard (the active partners), and Laura (a sleeping partner). The Buenos Ayres firm was called Messrs. H. Fuhrmann and Co. It consisted of Heinrich (the active partner), and Peter and Laura (sleeping partners). The Berlin firm was called Messrs. Richard Fuhrmann and Co. It consisted of Richard (the active partner), and Peter and Laura (sleeping partners).

The claimants (the Buenos Ayres firm) contended that they had a neutral domicil, either Argentine or Belgian. As members of the firm at Buenos Ayres they claimed a commercial domicil; and as residents in or about Antwerp they claimed an acquired domicil in Belgium. As to the latter claim, I find that it is clear from the evidence that they never acquired a Belgian domicil, and never abandoned their German nationality. It is possible that they would be entitled to be regarded as having a commercial domicil in Belgium *quâ* their Antwerp house of trade, while they resided there; but the transaction in question was not the business of that house, and the Antwerp firm made no claim to the goods.

Not one of the partners of the firm of Messrs. H. Fuhrmann and Co. resided at Buenos Ayres, or in any part of the Argentine Republic. At the beginning of the war they were all expelled from Belgium as subjects of Germany, and as enemies of Belgium. It was admitted by counsel for the claimants that probably Heinrich and Laura were expelled before the seizure of the goods. Peter may have been arrested and expelled later. I do not think, however, that that matters.

Heinrich shortly after his expulsion was in Dusseldorf. He was in bad health, and died in Germany in July 1915. He never ceased to be a German subject. Mrs. Laura Fuhrmann was the mother of Heinrich. She accompanied him to Germany. She was also a sleeping partner in the firm of Messrs. Richard Fuhrmann and Co., of Berlin. She swore her affidavit in support of the claim in Germany. She has never ceased to be a German subject. Peter served with the Prussian Army in the Franco-Prussian War. While he was in Antwerp he was one of the heads of the German colony there, and he has contributed to the German war loan. He was also arrested, imprisoned, and afterwards expelled by the Belgian authorities; and he subsequently returned to Antwerp after the occupation by the Germans. He is also a sleeping partner in the firm of Messrs. Richard Fuhrmann & Co., of Berlin, and he has never ceased to be a German subject.

The three partners in the claimants' firm being Germans, the question arises whether they in fact or in law acquired a commercial domicil in the Argentine Republic. It is well known that according to the English and American views of international law (although not according to the French or German or general European view) a subject of a belligerent State can have a commercial domicil in a neutral State, which would protect his property from capture at sea. But I think that residence in a neutral State is an essential condition of such a domicil. I know of no case where, merely by reason of carrying on business through agents or clerks in a neutral State, subjects of an enemy can acquire a commercial domicil without residence in that State.

In his celebrated judgment in *The Indian Chief* (Roscoe's English Prize Cases, vol. 1, 251; 3 Ch. Rob. 12) Lord Stowell said of Mr. Johnson, the American Consul: "He came to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an English trader, for no position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country."

In the case of *The Venus* (8 Cranch, 253), where the Supreme Court of the United States discussed questions of commercial domicil so fully, it will be seen that throughout the judgments residence was regarded as an essential ingredient. On this question Chancellor Kent says: "If a person resides in a belligerent country his property is liable to capture as enemy's property; and if he resides in a neutral country he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade": (see Kent's Commentaries, vol. 1, 103).

Mr. Dicey also, in his Conflict of Laws, at p. 742, deals with the matter thus:—"A commercial domicil, on the other hand, is such a residence in a country for the purpose of trading there as makes the person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country so as to make it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there."

It is sometimes said that Lord Stowell in *The Jonge Klassina* (Roscoe, vol. 1, 485; 5 Ch. Rob. 297) expressed the opinion that a man may acquire a commercial domicil in more countries than one. The passage referred to is as follows: "A man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating respectively in those countries. That he has no fixed compting house in the enemy's country will not be decisive. How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea that a counting-house or fixed establishment is necessary to make a man a merchant of any place. If he is there himself and acts as a merchant of that place, it is sufficient; and the mere want of a fixed compting-house there will make no breach in the mercantile character, which may well exist without it."

That case was one involving the question of carrying on a trade outside and beyond that authorised by a particular licence to trade. It is no decision that the existence of a fixed compting house or house of trade in a neutral country without residence by a trader or partner in that country will endow him with a neutral com-

mercial domicil which will give him, though an enemy subject, protection for his goods from maritime seizure. Indeed, the passage itself seems to assume the presence of the trader in the neutral country.

I note that in dealing with this case, the late Mr. Westlake said (International Law, Part 2, p. 164): "Without having or being a partner in a house of business established in a given country, a man may in that country make contracts or do other acts of a trader, not linked together otherwise than through his person. Then we have the state of facts with regard to which Lord Stowell said that 'a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries.'"

It must not be taken that I am expressing any opinion as to whether a man can have a commercial domicil in two neutral countries which would entitle him to be regarded as a neutral trader in both. I can conceive that it is possible that he might establish a sufficient residence in both for the purpose. Nor am I considering the case of a corporation or an incorporated company which might theoretically have a residence in the country where it was registered. Dealing with the case now before the court, in my view a commercial domicil such as is here claimed cannot be established without proof of a sufficient residence of the partners or some of them in the country where the business is carried on, or where the house of trade is situate.

A further argument remains to be dealt with. It was contended that the partners in the firm were Belgians, and resident in Belgium. I have already expressed the opinion that they had not become Belgians, and that they remained German subjects. But the argument was that residence in one neutral country was enough to constitute a commercial domicil in another country in respect of transactions originated in the latter. I cannot think that can be so. But in any event, the facts in this case show that there was no residence by any of the Buenos Ayres partners in Antwerp at the time of the capture. It is clearly established in the law of nations that claimants must prove their non-hostile character at the time of capture. I have also decided in other cases that they must prove this at the time of the claim, and of the adjudication.

What then was the character of the claimant partners when the goods were captured? Two of them, if not the three, had before then been expelled from Antwerp and Belgium and sent back to Germany. Their residence in Belgium had therefore been terminated. Indeed, as they were German subjects it came to an end when Germany made war on Belgium. The position of such persons is aptly described by Marshall, C.J. in *The Venus* (*ubi sup.*), at p. 290, in the following passage: "The right of the citizens or subjects of one country to remain in another depends on the will of the Sovereign of that other; and if that will be not expressed otherwise than by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there."

Moreover, the proper inference to draw from the facts, in my view, is that the claimants adhered at once to their country—the enemy—upon the outbreak of war. If the three Fuhrmanns had no right to remain in Antwerp after their country made war on Belgium, whether they were expelled before the capture or not, it is not possible that they could set up a residence, to which they had no right, as a ground for protection against capture at sea of any goods the subject-matter of transactions of their Belgian or Argentine or any other of their businesses.

The claim of Messrs. H. Fuhrmann and Co. is disallowed. I find that the wool at the time of capture was enemy property on a British vessel, and accordingly I adjudge its condemnation as prize to the Crown as droits of Admiralty.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Pritchard* and *Sons.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Dec. 6, 1916.

(Before LUSH, J.)

SUTRO AND CO. *v.* HEILBUT, SYMONS, AND CO. (*a*)

Contract—Written contract to send rubber entirely by sea route—Goods sent partly by land—Temporary usage—Evidence—Varying written contract—Admissibility of evidence.

By a contract in writing dated March 1916 *certain sellers sold to the buyers* 25 *tons of rubber, to be shipped during March and April* 1916 *by a vessel or vessels from the East to New York direct and* (*or*) *indirect, with liberty to call and* (*or*) *tranship at other ports, any question regarding quality to be settled by arbitration, such arbitration to be . . . held within six weeks after the arrival of the vessel. The rubber was sent by the sellers from Singapore by sea to Seattle, and was to be forwarded thence by rail to New York on through bills of lading. The buyers objected to this method of sending the rubber. Arbitrators found that there was at the date of the contract such a course of business established as would make it within the contemplation of the parties that the goods might be sent by the route adopted, and they awarded that the sellers' tender was a good tender.*

Held, that by the written contract, which was clear and unambiguous in its terms, the rubber was to be carried by sea throughout, and that evidence of a temporary usage in a particular trade to forward the goods partly by sea and partly by land was not admissible to vary the written contract. The tender, therefore, was bad, and the buyers were not bound to accept the goods.

(*a*) Reported by W. V. BALL, Esq., Barrister-at-Law.

AWARD stated by arbitrators in the form of a special case.

By a contract in writing dated the 27th March 1916 Messrs. Heilbut, Symons, and Co. (sellers) through Messrs. Lewis and Peat sold to Messrs. Sutro and Co. (buyers) 25 tons of Hevea Crepe Plantation Rubber at the price of 3*s.* 5*d.* per pound, cost, freight, and insurance, shipping weights to be shipped during March-April 1916 by a vessel or vessels from the East to New York direct and (or) indirect with liberty to call and (or) tranship at other ports, but if to France no transhipment west of Port Said except at a French port, or by *force majeure*.

The contract further provided: "To be insured by sellers against marine war risk insurance with particular average at the price of this contract plus 10 per cent. Any question regarding quality to be settled by arbitration, such arbitration to be demanded within twenty-eight days and held within six weeks after the arrival of the vessel. The goods to be weighed at buyer's expense at the port of discharge named in the contract or duly declared by the buyers according to the contract, and buyers shall furnish, where sold on delivered weights, as soon as possible a properly certified copy of landing weights. Each shipment, if by more than one vessel, and each mark or countermark to be treated separately. The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing with due dispatch. If to ports other than London, samples to be drawn and sealed in the presence of representatives of buyers and sellers, or if in London, by the Port of London Authority or wharfingers and forwarded to selling brokers in London. Failing sellers naming their representatives on or before arrival of vessel, the buyers' accredited sealed samples to be accepted. Should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled for the whole of such portion (as the case may be) unless the goods shall have been previously paid for, but should the vessel or vessels be lost and the goods or any portion thereof be transhipped to any other vessel or vessels and arrive on account of the original importer, this contract to stand good for such portion. Cash against documents in London on or (at buyers' option) before arrival of vessel or vessels at port of discharge. Any dispute arising out of this contract to be settled by arbitration in London in the usual manner, according to the constitution and rules of the Rubber Trade Association of London. Brokerage per cent., ship lost or not lost."

A dispute having arisen out of the contract it was duly referred to arbitration, and an award was made in favour of the sellers, and the buyers, in accordance with the rules of the Rubber Trade Association, appealed to the committee of the said association. The appeal duly came before the committee of the association, and upon the hearing of the appeal the buyers applied to the committee to state a special case for the opinion of the court on certain questions of law.

The committee, having duly heard and considered the evidence and documents put before them, found the facts to be as follows:—

(1) On the 4th April 1916 sellers declared to the buyers provisionally on cable advice and subject to correction 10 tons (part of the said 25 tons) per the steamships *Teucer*/*Ixion*, *viâ* Seattle.

(2) On the 9th May 1916 sellers' brokers wrote to the buyers with reference to the said contract for 25 tons of rubber, as follows: "Sellers write: We believe the balance of this contract is on board the steamships *Lycaon*/*Teucer*, *viâ* Seattle.

(3) Buyers objected to this as an irregular shipment upon the ground that they understood thatthe rubber was shipped to the Pacific port and thence by rail to New York.

(4) On the 5th June 1916 a formal delaration was made of the remaining 15 tons under the contract in question as having been shipped per the steamships *Lycaon*/*Teucer*, *viâ* Seattle, under a bill of lading dated the 30th April 1916.

(5) This declaration the buyers objected to as irregular, and demanded arbitration to settle the dispute.

(6) The said 15 tons of rubber, together with the 10 tons, were shipped at Singapore in due time in accordance with the contract, and through bills of lading per steamship *Lycaon*, dated the 30th April 1916, were issued by the shipowner's agents to New York, *viâ* Seattle.

(7) As to the 10 tons, the buyers having resold this quantity to others who accepted the buyers' tender to them, the buyers (Sutro and Co.) raised no objection, and no question arises with regard to rejection of this portion of contract, the dispute being as to the remaining 15 tons only. As regards the remaining 15 tons, the buyers insisted upon their rejection thereof.

(8) The shipping documents included a policy which covered the goods against all risks to New York and to the form of which no objection was taken. These documents have been initialed for the purpose of identification, and may be referred to as part of this award in case of need.

(9) After the outbreak of war great difficulty was experienced in obtaining space for shipment for the East, and in consequence of this difficulty in about Oct. 1915 shipments to the Eastern States of the United States which had hitherto gone directly or indirectly the whole distance to New York by water, began to be made by steamer to a port of the western seaboard of the United States, whence they were transmitted by rail to destination.

(10) At the date when the said contract was entered into this route from the East by sea and rail from the Pacific seaboard was well known to those in the trade as one of the usual routes for rubber sold on contracts in the form of the one now in question.

(11) If, and so far as it be material, we find that there was at the date of the contract such a course of business established as would make it within the contemplation of parties to the contract that the goods in question might come by this route.

(12) We further find, if and so far as it may be a question of fact, that goods forwarded by such a route would be a good tender under such a contract.

(13) We further find, if and so far as it be a question of fact, that the shipment was duly made in accordance with the terms of the contract.

(14) Subject to the opinion of the court on the above findings of fact, we find and award that the tender was a good tender, and the buyers were bound to accept same.

(15) We direct that the sellers' costs of this appeal and the fees and expenses of the arbitrators and the expenses and fees of committee, including the statement of this case, shall be borne and paid by the buyers.

(16) In the event of the court being of opinion on the above findings of fact that the tender was not a good tender, then we award and direct that the buyers were not liable to accept same, and that their costs of appeal and the fees and expenses of the arbitrators and of the committee and the expenses of the stating of this case shall be borne and paid by the sellers.

Leslie Scott, K.C., *D. M. Hogg*, and *Barrington Ward* for the buyers.—This written contract is plain and cannot be varied by evidence of custom:

Bowes v. *Shand*, 36 L. T. Rep. 857; 2 App. Cas. 455;

Alexander v. *Vanderzee*, L. Rep. 7 C. P. 530.

The buyers had good business reasons for insisting on all-sea route. If the sellers wanted to

send the goods partly by land, they should have made it an express condition of the contract.

A. A. Roche, K.C. and *Neilson* for the sellers.—Evidence of a trade custom was admissible, not for the purpose of varying a written contract, but in order to show that the parties had in contemplation the sending of the goods partly by sea and partly by land, and that they contracted on that basis, having regard to commercial usage.

LUSH, J.—This case raises a question of some difficulty, but I have come to the conclusion, after the very clear arguments that have been addressed to me, that the contention of the buyers is the right one. The first question, I think, that I have to consider is whether this contract is clear, unambiguous, and definite in its terms—in other words, whether the contract construed in its entirety provides for a shipment of this cargo, or, rather, the balance of 15 tons, so that it may be conveyed by sea from the East to New York.

I will consider, after discussing the terms of the contract, what the effect is of the finding of the arbitrators with regard to this so-called usage.

The contract is a contract by which the sellers purport to sell to the buyers this 25 tons at the price stated; it provides how the goods are to be conveyed and delivered to the buyers, and it says this: "To be shipped during the months of March and April 1916, by vessel or vessels (steam or motor) from the East to New York direct and (or) indirect, with liberty to call and (or) tranship at other ports. The words "March-April 1916" are added in writing to the print, and so are the words "the East" and "New York"; otherwise the contract is in stereotyped form, and provides that the goods are to be shipped by vessel or vessels from place A. to place B., which have to be filled in when the contract is concluded. The contract goes on: "Any question regarding quality to be settled by arbitration, such arbitration to be demanded within twenty-eight days, and held within six weeks after the arrival of the vessel." Then there is this in the sampling clause: "If to ports other than London, samples to be drawn and sealed," and so on. Then the next clause is this: "Loss or transhipment.—Should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled," and so on. Then the payment clause: "Cash against documents in London on or (at buyers' option) before arrival of vessel or vessels at port of discharge." Can that contract when construed in its entirety mean anything else than this, that by the contract the goods were to be conveyed by sea from the port of loading in the East to the port of discharge at New York? It seems to me that it is quite impossible to say that the contract has any ambiguity in it or that it has not provided for the method of conveyance of the goods. There is no ambiguity. The parties have agreed that the goods shall be conveyed by vessel or vessels from point A to point B. They have agreed that the time within which the dispute, if any, that may arise with regard to the quality of the goods is to be made the subject of arbitration is to date from the arrival of the vessel, in other words, the point of time at which you calculate the period within which the question is to be raised is from the arrival of the vessel at New York, and the payment clause equally, which provides for the date of payment, regulates the periods by reference to the arrival of the vessel at New York. How can it be said, when one looks at the contract and considers it as one entire contract, that the parties have either not bargained with regard to the method of conveyance or that they have used terms of an ambiguous character with reference to that method of conveyance. I cannot for myself think that the contract is open to any question with regard to its interpretation, and therefore I start by considering the question that Mr. Roche has raised on this basis, that here there is a clear definite and unequivocal agreement between the parties with regard to the mode of conveyance.

That being so, am I or am I not at liberty to put upon that contract some other interpretation by reason of the findings of the arbitrators set out in clauses 10, 11, 12, and 13? Mr. Roche says that I am, and that I should defeat the contract upon its true interpretation, taking into consideration the facts found by the arbitrators, if I give to it the meaning which I have already said appears to me as a question of construction to be free from any ambiguity. What the arbitrators have found is this, that, at the date when the contract was entered into, this route from the East by sea and rail from the Pacific seaboard was well known to those engaged in the trade as one of the usual routes for rubber sold in the form of the contract now in question. They next go on to find: "If and so far as it be material we find that there was at the date of the contract such a course of business established as would make it within the contemplation of the parties to the contract that the goods in question might come by this route." Then, again, they find: "If, and so far as it may be a question of fact that goods forwarded by such a route would be a good tender under such a contract," and, lastly, they find: "If and so far as it be a question of fact that the shipment was duly made in accordance with the terms of the contract." In other words they say this, not that there was an old and well-established usage by which in contracts in these terms the seller had an option either to send the goods by sea from the East to New York or to send them from the East to the Pacific coast and thence by rail to New York. They do not suggest that. What they do find is that at the time the contract was entered into, owing to recent events, it had been so usual for that route to be adopted as to make it within the contemplation of the parties to the contract that the goods might come by that route, and that goods forwarded by that route would be a good tender under such a contract. As I have said, I very much doubt whether that can be called a usage, or, as Lord Cairns called it in *Bowes* v. *Shand* (26 L. T. Rep. 857; 2 App. Cas. 455), a custom of the trade at all. But assuming that it is, is it legitimate when a contract is clear and unambiguous in its terms to seek to alter the terms by importing evidence of a usage, not a general and universal custom, but evidence of a usage in that particular trade which would alter the terms of the written agreement?

As I understand the law, it stands thus: If you find that the parties to the written agree-

ment have not provided for or bargained with regard to a certain subject-matter, then you are not contradicting or you are not altering the terms of the contract by admitting evidence with regard to the subject-matter as to which the contract is silent. That is clear enough, and I find there is this second rule, which was the one I think that was referred to in the case of *Bowes* v. *Shand* (*sup*), that where you have in a mercantile contract a term used which may be susceptible of one meaning and may be susceptible of another, although its ordinary meaning would be one of those two, yet you may allow evidence of usage to be given, provided it is perfectly clear and well established in order to show that when the parties used that term they were not using it in its ordinary meaning, but were using it in the other meaning of which that term was susceptible, and I think one arrives at that conclusion by tracing the history of the dispute which arose in *Bowes* v. *Shand* (*sup.*), and seeing how the question in *Bowes* v. *Shand* (*sup.*) came to arise. In *Alexander* v. *Vanderzee* (L. Rep. 7 C. P. 530), there was a contract for the sale of a large quantity of Danubian maize "fair average quality of the season and port of shipment when shipped. To be shipped from Danube . . . by three or more first-class vessels. . . . For shipment in June and (or) July 1869, seller's option." There was a question whether the particular date of shipment in the circumstances of that case did or did not comply with the contract, and there was a question left to the jury at the trial with regard to it. The question was whether the meaning that the jury put upon the term was or was not so different from the ordinary and necessary meaning which the term itself bore as to contradict the written document, and I think it is clear that both Blackburn, J. and Lush, J. considered the expression "the shipment of grain in June and (or) July" was in itself an expression which was susceptible of one of two meanings, and the court there took the view that the question as to the meaning of the term was a question for the jury.

In *Bowes* v. *Shand* (*sup.*) a similar question arose with regard to practically the same term. The case went to the House of Lords. There the contract or contracts, because there were two, provided for the sale of 300 tons of rice to be shipped at Madras or coast for this period "during the months of March and (or) April 1874." A ship arrived at Madras in February, and most of the cargo was put on board in February, not one of the specified months. There was a small proportion put on board on the 3rd March. The buyers refused to accept the rice on the ground that it had not been shipped during the months of March or April, and there it is important to observe that no evidence was given of the usage with a view to altering the meaning of the words "shipment in March and (or) April"; but, on the contrary, evidence was given to show that the words meant in that trade what they meant ordinarily and plainly on the face of the contract. Lord Cairns undoubtedly does say this at p. 468: "It was of course competent for those who were resisting the application of this natural construction of the contract to have said: "We will prove by evidence that according to the custom of the trade" —which I take to mean usage in the trade— "these words, which have this natural signification, are used in a wider or in a different sense. The natural meaning of the words is, no doubt, that the rice shall be shipped during those two particular months; but we will show that by the custom of the trade a latitude is allowed, and that provided the shipment has been conducted in such a way as that the ship will be able to sail during those two months, that means by the custom of the trade the shipping of rice on board during the months in question. That, of course, would, according to the well known rule of law, which admits parole evidence not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used." Then Lord Blackburn uses similar language to that which was used by Lord Cairns. If there was any term the mercantile meaning of which one had to ascertain, then here, no doubt, evidence having been given of that which I assume for this purpose is a usage, unquestionably one would not only be able to refer to it, but one would be bound to refer to it in order to give the mercantile meaning to the words that the parties have used. But there is no such term. There is no reason, in my opinion, for the application of the principle referred to by Lord Cairns and Lord Blackburn. All that the arbitrators say is this, that if it is material there was when the contract was made such a course of business established as would make it within the contemplation of the parties to the contract that the goods might come by that route. What does that amount to? At the most it seems to me to amount to this, that the course of business was such that the parties did not mean what the contract in writing said they meant. To my mind that is utterly inadmissible. That is contradicting the contract. It is importing evidence of usage with a view to altering it. I think the facts found are immaterial, because the parties have in clear terms provided otherwise, provided, in fact, for a method of shipment contrary to that which the arbitrators say might be taken to be the contract.

I think, therefore, that the question must be answered in favour of the buyers, and therefore that the contention of the sellers fails.

Solicitors: *Herbert Smith, Goss, King*, and *Gregory; Tamplin, Tayler*, and *Joseph*.

House of Lords.

Feb. 12, 13, 15, *and March* 16, 1917.

(Before the LORD CHANCELLOR (Lord Finlay), Earl LOREBURN, Lords DUNEDIN, PARKER OF WADDINGTON, and SUMNER.)

WATTS, WATTS, AND CO. LIMITED *v.* MITSUI AND CO. LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Exception of "restraint of princes"—Reasonable anticipation of restraint —Actual restraint in existence—Breach by shipowner—Measure of damages—Penalty clause—Limitation of liability.

The plaintiffs chartered a vessel from the defendants, who were shipowners, to proceed to M. and to load and carry to Japan a cargo of sulphate of ammonia which the plaintiffs had bought. The charter-party excepted "arrests and restraints of princes." The defendants refused to provide a ship which by the charter-party they agreed to provide, on the ground that there was reasonable apprehension that if they fulfilled the charter the ship would be seized by the King's enemies. In these circumstances the plaintiffs were compelled to repudiate their contract with their sellers, and paid them, as the result of arbitration proceedings, 4500l. for so doing.

In an action by the plaintiffs against the defendants for damages for breach of charter, Bailhache, J. held that the shipowners were guilty of a breach of the charter-party, and that the plaintiffs could not recover from them 4500l., such damage being too remote, but that they were entitled to recover 3800l., the amount of profit they would have insured. This amount was the difference between the price at which they had purchased the goods and the market price of the goods in Japan on the date at which the goods might have been expected to arrive. The Court of Appeal were agreed that the defendants were guilty of a breach of charter-party in not sending a vessel to load, but that as regards the amount of damage the proper amount to fix was the difference between the price which would have been realised by the sale of the goods in Japan at or about the time the vessel should, under ordinary circumstances, have arrived, and the cost price of the goods at the port of loading at the time of the shipment, together with the cost of freight and insurance.

Held, that the mere apprehension of seizure was insufficient to justify the defendant's failure to supply a steamer, as to make the exception operative there must be such a declaration of war as to cause an actual restraint of princes.

But on the main point, the measure of damages, their Lordships were of opinion that Bailhache, J. had proceeded on a right basis, and his order would be restored, subject to correcting the omission to deduct the amount of insurance premium, which, taking the premium to be 6 per cent., would reduce the amount of damages to 800l.

Decision of the Court of Appeal (13 *Asp. Mar. Law Cas.* 427; 115 *L. T. Rep.* 248; (1916) 2 *K. B.* 826) *set aside and judgment of Bailhache, J.* (13 *Asp. Mar. Law Cas.* 300; 114 *L. T. Rep.* 326) *restored with a modification.*

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

APPEAL by the defendants from an order of the Court of Appeal, reported 115 L. T. Rep. 248; (1916) 2 K. B. 826).

Leck, K.C. and *Raeburn* for the appellants.

Greer, K.C. and *R. A. Wright* for the respondents.

The facts and cases cited sufficiently appear from the considered judgment of their Lordships.

The Lord CHANCELLOR (Lord Finlay).—The appellants in this case are shipowners who had entered into a charter-party dated the 5th June 1914 with the respondents, the charterers, by which it was provided that a steamer, the name of which was to be declared, should proceed to Mariopol on the Sea of Azov, and having there taken on board a cargo of sulphate of ammonia should carry it to Japan for delivery there. By the seventh clause the charterers had the option of cancelling the charter if the vessel was not ready to load by the 20th Sept. 1914. By the twelfth clause there was an exception for the arrests and restraints of princes. The thirteenth clause was as follows: "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight."

The respondents had, in April 1914, purchased from the Coppee Company in Russia 3500 tons of sulphate of ammonia, and if the steamship had arrived the goods so purchased would have been shipped by it for Japan.

At the beginning of August war broke out between Germany and Great Britain, Russia, and France. Turkey did not enter into the war until Nov. 1914. On the 1st Sept. the respondents through their brokers requested that the name of the steamer should be declared. On the same day the appellants replied that the charter-party must be considered cancelled. The reason given was that the British Government had prohibited steamers from going into the Black Sea to load, but in fact there had been no such prohibition.

The Dardanelles were closed to navigation after sunset on the 26th Sept.

The action was brought by the charterers for not providing a steamer according to the charter-party. The defence was that on the reasonable apprehension of Turkey becoming involved in the European War, and of the Dardanelles being thereupon closed, the shipowners were justified by reason of the exception of arrests and restraints of princes in not sending a vessel to load.

The action was tried by Bailhache, J. in the Commercial Court. He decided: (1) That there was no justification for the breach. (2) That even if the steamship had arrived by the cancelling date (the 20th Sept.) she could not have loaded and got to the Dardanelles before they were closed. (3) That if the steamship had been provided at Mariopol the charterers could have insured the goods for Japan, and that they had lost the chance of doing so owing to the shipowners' default. (4) That no other charter-party being procurable the charterers were entitled to 3800l., being the amount of profit which they would have insured on the voyage to Japan. The learned judge arrived at this amount by taking the difference between the price at which the

charterers had purchased the goods under the contract of April 1914 and the market price in Japan in Nov. 1914, the date at which the goods might have been expected to arrive, but by a lapse no allowance was made for the premium which the respondents would have had to pay on the insurance.

A claim for 4500*l.* which the charterers had paid to their sellers (the Coppee Company) to have their contract of purchase cancelled was disallowed as being too remote.

Both sides appealed to the Court of Appeal; the shipowners on the ground that they ought to have been held not liable, and the charterers on the ground that they ought have been allowed the sum of 4500*l.* which they had paid to their sellers. The Court of Appeal disallowed the claim for 4500*l.*, agreeing in this with Bailhache, J.; and while holding the shipowners liable in damages, varied the order of Bailhache, J. by directing a reference to ascertain the amount of the damages, and declaring that the measure of damages was the difference between the price which the goods would have realised if they had been sold in Japan at the end of Nov. 1914, and the cost price of the goods at the port of loading at the current price at the nearest available date to the 10th Sept. 1914, in addition to freight, insurance premiums for war risks, and brokerage.

The effect of the decision of the Court of Appeal was that while the damages would be reduced by the allowance for the amount of the premium, they might have been largely increased if it proved to be the case that the cost price at Mariopol at the time of the breach was less than the price under the contract of April 1914.

The shipowners appealed to this House; there was no cross appeal in respect of the 4500*l.* disallowed by both courts below.

In my opinion the contention of the appellants that they could justify the failure to provide a steamship on the ground of the exception for restraint of princes was not made good. There was not, in fact, any restraint of princes to prevent the passage of the steamship through the Dardanelles and to Mariopol until the closing of the Dardanelles on the evening of the 26th Sept. There was a reasonable apprehension that the Dardanelles might be closed, but such an apprehension does not constitute a restraint of princes. To bring the case within the exception there must be an actual restraint in existence, and in the present case there was nothing to prevent the steamship from passing the Dardanelles and arriving at the port of loading by the cancelling date (20th Sept.).

It is quite true that her going there, so far as the actual voyage to Japan was concerned, would have been useless, as the Dardanelles were closed before she could have got out, but if the vessel had arrived at Mariopol the charterers might have insured against war risks. I confess I have some doubt whether the respondents might not have abandoned the adventure instead of having to insure at a heavy premium, but having regard to what passed at the trial, as stated to us by counsel on both sides, I think we must deal with the case on the footing that the insurance against war risks would have been effected. The only controversy between the parties on this point appears to have been as to whether such an insurance was practicable. It was proved by the one witness called that the insurance could have been effected. There was no contradiction, and I think that the courts below were right in holding that the loss of insurance may be recovered. I do not think that the opportunity of effecting an insurance can be regarded as too remote to constitute an element of damage.

As regards the amount of the damages, the basis adopted by Bailhache, J.—correcting of course the mistake as to the non-allowance of the premium—was in my opinion correct. It was strenuously argued for the respondents that as the 4500*l.* paid by the respondents to their sellers had been disallowed as too remote, the contract of April must be disregarded for all purposes, and the loss ascertained on the difference between the market price at the port of loading at the date of the breach, and what would have been the market price in Japan on arrival. It would follow, on the assumption that the cost price at Mariopol had fallen by the time of the breach to a point below the price under the contract of April, that the damages recoverable would be correspondingly increased. In my opinion the respondents' contention on this point fails. It is quite clear and indeed was not disputed that if the steamship had arrived at Mariopol the sulphate of ammonia which the respondents had contracted to purchase under the contract of April would have been the goods shipped, and this of course involved taking delivery of these goods, and paying for them to the seller. If the respondents having so shipped the goods had started the steamship upon a voyage to Japan insuring against war risks the adventure would have been frustrated by the closing of the Dardanelles, and this should have constituted a constructive total loss. The respondents would have recovered on the insurance the value of the goods as at the time of their expected arrival in Japan, but they would *ex hypothesi* have had to pay the price for the goods under the contract of April, and the difference between these two amounts would have represented their profit after deduction of premium, &c. This seems to me to exclude any inquiry as to a possible lower market value at Mariopol at the time of the breach.

The case of *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67) has in my opinion no application. That was a case in which the goods had been lost on the voyage by the fault of the ship, and it was held that the damages could not be reduced by reference to a contract for sale at a price below the market price at the date when they ought to have been delivered.

The claim of the respondents to enhance the damages by reference to a supposed fall in the market at Mariopol at the time of the breach appears to me also to fall upon another ground. There was no evidence that there was any market at Mariopol for such goods, or that they could be obtained from any person other than the Coppee Company (the respondents' vendors), and there is no evidence of any fall in the cost price of such goods at the time of the breach. It is indeed probable that the price may have fallen after exit from the Black Sea had been barred by the closing of the Dardanelles on the 26th Sept. The Court of Appeal ought not in my opinion to have directed an inquiry as to damages on a basis

for which no foundation had been laid by the evidence at the trial.

I agree with the construction put in the courts below on clause 13—the penalty clause. If this clause had appeared for the first time, I think it might have been construed as imposing a limitation on the damages to be recovered, but the penalty clause is an old one with a settled meaning, and the intention, if it existed, to make so fundamental a change in its effect as is suggested ought to have been much more clearly shown in order to bind the other party to the contract.

In my opinion the judgments of Bailhache, J. in the present and in the earlier case before him on this point were right.

In my opinion the respondents are entitled to 3800*l.*, less the cost of insurance, &c.

Bailhache, J. took the premium to be 6 per cent., and on this basis the amount will be 800*l.*

I think that the respondents should have costs in the Commercial Court and in the Court of Appeal, but that there should be no costs of the appeal to this House.

I am authorised to say that Lord Parker of Waddington concurs in the opinion I have just read.

Earl LOREBURN.—I need not recapitulate the facts of this case. In my opinion there was no restraint of princes on the 1st Sept. when the shipowners declared their intention of not carrying out their contract. There was an available force at hand in the Dardanelles, and if the situation had been so menacing that a man of sound judgment would think it foolhardiness to proceed with the voyage I should have regarded that as in fact a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised. I agree, however, with Lord Dunedin's expression that "it would be useless to try and fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear." No form of words is likely to cover automatically all contingencies. In the present case the lists of ships that went through the Dardanelles to and fro during the material days, which were furnished to us during the argument, though not printed in the book, show that there was no restraint of princes when the voyage was abandoned. I cannot agree with the learned counsel for the appellants that we are to judge merely by the event. The decision must be made at the time by those concerned.

If this be so, the sole remaining question relates to the measure of damages. What the plaintiffs claim was the sum they had to pay as compensation to the sellers of the cargo which they had bought in order to load it on the ship, but were disabled from loading because the defendants failed to provide the ship. Now this would not be the measure of damage in the absence of any notice to the shipowner. It is unnecessary to quote authority for this familiar rule. After the case had been heard on this footing the learned judge allowed an adjournment to hear evidence on another footing altogether. The plaintiffs then argued that if this ship had entered the Black Sea and reached the port of loading on the 20th Sept. (the last day allowable under the contract and the earliest day on which she could have arrived) they could have loaded her with the cargo intended. They also said that they could and would have insured the cargo against war risks, and that, though she would have been captured by the Turks on her way down through the Dardanelles, they would have recovered from the underwriters. The evidence on this case was very meagre, and indeed unsatisfactory, but it was uncontradicted. We are therefore bound to take it that this cargo could and would have been insured against war risks at a premium of 6 per cent. They would have done so, we must assume, because a sensible man of business would so act, and they were deprived of their opportunity of so doing.

In these circumstances I think it is legitimate to recognise this as an element in damages. A man of business in such a position would naturally load the cargo and insure against war risks if he could, even if the premium swallowed up nearly all the profits of his voyage, because he would thereby be free from any liability which might fall upon him for not himself taking delivery from his sellers, or if he himself had already taken delivery he would not be left with the goods on his hands in a port to which access might soon be made impossible by war. In short, I think the plaintiffs are entitled to say to the defendants, "You broke your contract in not sending your ship to the port of loading. If you had sent her we could have loaded her with a cargo which we had ready. True, it would never have reached its destination by reason of the war, but we should have insured against war risks, as any practical man would do, and we could have done so at 6 per cent. premium. Pay us what we have lost by your default. It is the avowed value at port of destination, less the actual price we paid at port of loading and the expenses, and less also the premium we had to pay for insuring against war risks." That sum leaves 800*l.* as the damages.

Lord DUNEDIN.—In terms of the contract contained in the charter-party of the 5th June 1914 the appellants were bound to send a steamer to Mariopol, on the Sea of Azov, not to arrive before the 1st and the contract cancellable if it arrived after the 20th Sept. 1914, to receive a cargo of 3500 tons of sulphate of ammonia to be carried to Japan *viâ* the Suez Canal. On the 1st Sept. 1914 the appellants informed the respondents that they considered the contract as cancelled. On the 2nd the respondents in a letter to the appellants refused to accept that proposition and called on them to proceed with the contract and give the name of the steamer which they proposed to send to Mariopol. The appellants persisted in their attitude, and no steamer was sent. The present action is to recover damages for this alleged breach of contract.

The first question that arises is whether there was a breach of contract. The non-fulfilment is admitted, but the appellants say that under the circumstances that is excused under one of the exceptions in the charter-party—namely, restraint of princes. On the 1st Aug. 1914 Germany had declared war against Russia and had begun hostile action against France, and on the night of the 4th Great Britain declared war against Germany. There was, however, at this time no activity on Germany's part in the Black

Sea or in the passage from the Black Sea to the Mediterranean, or in the Levant. Turkey was a neutral. Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension. This was held long ago by Lord Ellenborough in *Atkinson* v. *Ritchie* (10 East, 530). The more recent cases cited by the appellants, such as *Geipel and another* v. *Smith and another* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404) and *Nobel's Explosives Company* v. *Jenkins* (8 Asp. Mar. Law Cas. 181; 75 L. T. Rep. 163; (1896) 2 Q.B.326), do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered. In the present case, while there was natural and great apprehension on the 1st. Aug., and while the decision of the British Government immediately after to exclude Black Sea voyages from the benefits of the Government Insurance Scheme might well deter British subjects from sending their ships to the Black Sea, yet it is clearly proved by the production of lists of ships which after that date, and up to the 26th Sept., passed inwards and outwards through the Dardanelles that there was no such restraint as would have actually prevented the appellants presenting a ship at Mariopol before or by the appointed date of the 20th Sept. I agree on this matter with the conclusion arrived at by the courts below.

Breach of contract being ascertained damages are due. What happened subsequently, so far as material, was as follows: The respondents attempted, but without success, to secure another ship at Mariopol. On the 26th Sept. the Dardanelles were finally closed and have never been open since. On the 5th Nov. Great Britain declared war against Turkey. The respondents had by a contract of date the 23rd April 1914 secured a cargo of sulphate of ammonia from a company, Coppee Company Limited, registered in England but trading in Russia at Mariopol. Under the contract the sulphate was to be accepted by the buyers not later than the end of October, but the respondents asked and obtained a prolongation of the period to the end of November. In November the respondents, who had been sounding the Coppee Company as to terms for cancelling the contract, finally intimated that they did not propose to accept delivery. A lengthened correspondence ensued as to what damages were to be paid, and the matter was finally settled in July 1915, upon the respondents paying the Coppee Company 4500*l.* with certain costs of an inchoate arbitration.

The respondents in the case as raised set forth the breach of contract by the appellants and their own consequent inability to accept delivery of the sulphate, and claimed as damages the said sum of 4500*l.* together with such a sum as would represent their loss of profit on the venture, said loss to be arrived at by taking the difference between what the sulphate would have fetched if sold in Japan in November, and the sum they would have had to pay for it at Mariopol under the contract. They went to trial, and the respondents contented themselves with proving the charter-party, the failure of the appellants to send a ship, and their own inability to procure another ship, the facts as to the contract and the payment they had made to the Coppee Company, and the facts as to the position at the Dardanelles and the Black Sea in August and September. The evidence of the appellants was directed to the sole point of showing that there was such danger as at the 1st Sept. as justified them in refusing to send a ship.

The evidence being closed and counsel having addressed the court, the learned judge seems to have expressed an opinion that the restraint of princes was not, in his view, made out in fact, and that in law the liability of the respondents to the seller under the contract was as regards the appellants *res inter alios acta* and too remote to be taken as the measure of damages as against them. He also seems to have indicated that in his view, the Dardanelles having been finally shut on the 26th Sept., the voyage could not have been made at all, as the ship, even if sent by the due date, could not after loading have repassed the Dardanelles. At the same time he indicated that it might have been possible for the respondents, if the ship had been at Mariopol, to have insured the cargo for safe arrival, and in so doing to have valued the goods at arrival value in Japan. He accordingly, without amendment of the pleadings, allowed a continuation of the cause to a future day for further evidence on that point. This evidence was subsequently led, and thereafter the learned judge gave his judgment. He found first, as already stated, as to the restraint of princes; second, as a fact that the Dardanelles having been finally closed on the 26th Sept., the ship, even if sent, could not have made out the voyage; and third, as a mixed question of fact and law, that the respondents, had the ship been duly sent to Mariopol, could and would as reasonable men have effected an insurance against loss, including war risks, on the arrived value of the goods in Japan. On this third finding he repeated his view as to the payment under the contract between the respondents and the Russian sellers not being the measure of damages as against the appellants; but he found due as damages the sum of 3800*l.*, being the difference between the proved value of the cargo as it would have sold in Japan, which he assumed covered by insurance, and the sum payable for the sulphate of ammonia if the respondents had shipped the intended cargo, which would have given them an insurable subject.

Both parties appealed to the Court of Appeal. The learned judges there affirmed all the findings of the trial judge in fact and law, but on the third finding they came to a different conclusion. While affirming the view that the damages paid under the contract could not be taken as the measure between the respondents and appellants, they decided that the proper way of arriving at the damage was to take the arrived value of the goods, which, like the trial judge, they held could be covered by insurance, and then to find the loss which the respondents suffered by comparing that sum with the cost of buying a cargo at Mariopol on or about the 10th Sept. 1914, plus freight, insurance premium for war risk, and brokerage;

and they referred it to the official referee to determine this sum.

The general rules for assessment of damages for breach of contract have been often stated, but nowhere more succinctly than by Parke, B. in *Robinson* v. *Harman* (1 Ex. 850): "Where a party sustains a loss by reason of a breach of contract he is so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." The matter was further elucidated in the case of *Hadley* v. *Baxendale* (9 Ex. 341).

Now, what would have been the position of the respondents if the ship had been duly sent to Mariopol? They would have been able to ship their cargo. But what then? Once it is found as a fact that the final closing of the Dardanelles on the 26th would have prevented the ship after loading from reaching the Mediterranean it is obvious that the intended voyage could not have been performed. The appellants argued that that being so damages should be merely nominal, the true cause of the failure of the adventure being, not their breach of contract, but the facts of war. I agree with the learned judges in the courts below that that does not conclude the matter, but that one must next inquire what would a reasonable man have done in the supposed position. As a matter of ordinary common sense he would have insured his cargo against sea and war risks, and the possibility of so doing was, I think, rightly affirmed by the trial judge upon the evidence led. The result arrived at by him after this seems to me right, subject to correction of what is an obvious inadvertence—though it must be admitted an inadvertence which makes a great difference in the pecuniary result. I refer to the omission to deduct from the sum receivable under the insurance the amount of the insurance premium. This premium has been proved—not very satisfactorily, but I think sufficiently—to be calculable at 6 per cent.

This method of assessing the damage was, as already stated, altered by the Court of Appeal.

I am not satisfied that the view taken by the learned judges of the Court of Appeal is correct. The respondents' counsel sought to support it by citing the case of *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67), a case which, although not binding on your Lordships, was, I apprehend, rightly decided, and is indeed in consonance with the case in this House of *Ströms Bruks Aktie Bolag* v. *Hutchison* (10 Asp. Mar. Law Cas. 138; 93 L. T. Rep. 562; (1905) A.C. 515). In that case the plaintiffs chartered a ship to bring cotton from Alexandria to the United Kingdom. The goods were lost by the fault of the shipowner. It was held that the damages due to the plaintiffs were the value of the goods at market price in the United Kingdom at the date at which the goods ought to have arrived, and that it made no difference that the plaintiffs had sold the goods "to arrive" at a figure less than that market price. It does not appear to me that the present case is in the same position. In that case the plaintiff, owing to the breach of contract, was actually left without his goods, and he was therefore entitled to be presented with the sum which it would have cost him to get other goods of the same quality and quantity. Whether, having the goods, he sold them to someone else at a profit or a loss was a matter with which the shipowner had no concern, and the fact of the sale being antecedent to the possession made no difference.

In this case the respondents were not without goods; they had no ship to put them in owing to the breach of contract. But the failure of the venture was due not to the breach of the contract but to the war. In order to estimate the damage an ideal situation has to be created—namely, the idea that the respondents having got the ship would have insured the arrival of the goods in Japan against all risks, and the respondents are given credit for the arrived value of the cargo intended to be shipped. But then I think we must take the ideal situation as it would have existed in fact; that they would have shipped the cargo they intended to ship—that is to say, the sulphate of ammonia acquired under the contract; and that, therefore, their only real loss is the difference between the price they would actually have had to pay for the cargo and the arrived value of the cargo under deduction of the insurance premiums. Taking it the other way, and assuming there had been a fall in the market, then, inasmuch as the venture was, in truth, frustrated not by the breach of contract but by the war, you really come to throw on the back of the shipowner the loss in value of the goods which was truly due to the war.

Besides this there is, in my view, something else which ought to prevent judgment passing in terms of the order of the Court of Appeal. The respondents here entered court with a claim based entirely on their own payment to the Russian seller, and they made no other case. After the case was really concluded the learned judge intimated that he could not accept their view, and indicating the point as to insurance he allowed an adjournment for further evidence. The respondents had then the opportunity of making out any case they could as to insurance. They did so by proving the possibility of insuring against war risks at a premium of 6 per cent. up to at least the middle of September, and by proving what would have been the selling value of sulphate of ammonia in Japan in November. They proved nothing as to the state of the market at Mariopol in mid-September, nor indicated in any way that the price would have been less than the price they had agreed to pay under the contract.

It is true that there are some references to the market for sulphate of ammonia having fallen, but they are of the most vague description. They are not the subject of direct testimony, but are all, such as they are, contained in the negotiations in correspondence between the respondents and the Coppee Company as to the amount of damages to be charged against the respondents for having broken the contract of sale, correspondence which, strictly speaking, is not evidence at all in regard to statements made in it as against the appellants.

The earliest and, indeed, the only reference which is at all direct is in a letter of the 17th Sept. from the Coppee Company to the respondents, in which, with reference to a verbal communication made by the respondents that they were not ready to accept delivery of the sulphate, and would like to know what would be the terms for cancellation, the Coppee Company point out that the sulphate is all lying ready to be delivered, and that

if it is not taken at the stipulated time they will have to arrange either to build or to hire a store in order to prevent deterioration of the sulphate during the cold weather. They add: "In addition the market price has diminished, and we should have to take into consideration the probability whether the price would further diminish during the period the sulphate is in store." That means, of course, till the spring. On the 6th Nov. they write again: "We went into the question of the fall of price in sulphate, and so far as we are able to estimate any future loss in this respect and for the storage," &c. Actual figures are not approached till Jan. 1915, when the fall in price is quoted at 2*l.* 3*s.* 9*d.* per ton. But by this time the war with Turkey was well established and the Black Sea was absolutely sealed for exit to the Mediterranean. It is obvious that the price at that time reflects no light on the price in mid-Sept. 1914, at a time when both in fact and *ex hypothesi* of the present calculation the sea was still open and a voyage from Mariopol to Japan was insurable. This exhausts the references to be found in their correspondence. There is one piece of direct testimony given by the respondents' own manager which, so far as it goes, tends the other way. He says that in July 1915 it was rumoured that the price of sulphate in Russia was very high. He also says that there is no market price for sulphate of ammonia in Russia, except the prices advertised by Coppee and Co. There is not a shred of evidence that Coppee and Co. would have supplied sulphate in mid-September at a reduced price. This being so it seems to me that there is no justification for allowing a new and fresh inquiry to make a new case. I am aware that the Commercial Court is not bound by the stricter rules of pleading which obtain in the ordinary courts. But I cannot think it would be right at this time to start a new case as has been done by the Court of Appeal in the order complained of. The respondents have already had two cases adjudicated. It is not right, in my opinion, that they should now be allowed to embark on a third without having proved the fact which forms the foundation of it, basing the hope on the strength of casual references in a correspondence with other parties that something may turn up which will allow of a larger computation of the damages due.

I am, therefore, of opinion that the appeal should be allowed and that the respondent should be found entitled to the sum of 800*l.*, being the sum allowed by Bailhache, J., minus the premium calculated at 6 per cent. This view makes the discussion as to the limitation of liability under the penalty clause of no practical importance. But I wish to say that, had it been necessary to decide the point, I should have only wished to express my approval of the admirable judgment of Bailhache, J. in the case of *Wall* v. *Rederiaktiebolaget Luggude* (13 Asp. Mar. Law Cas. 271; 114 L. T. Rep. 286; (1915) 3 K. B. 66).

Lord SUMNER. — Restraint of princes is, I think, no excuse for the appellants' breach of charter-party in not sending a steamer to load at Mariopol. No such restraint even existed, still less operated to restrain them, when they intimated their intention of not sending any steamer, or at any time thereafter till the Dardanelles were closed on the 26th Sept. 1914. They do not so contend, nor that the ambiguous and arbitrary conduct of the Porte before that date amounted to restraint.

The words "restraint of princes" do not, in my opinion, extend to the apprehension of restraint. Such is neither the meaning of the words nor the sense of the clause. No decided case has gone so far, and the language of Lord Ellenborough in *Atkinson* v. *Ritchie* (10 East, 530) is authority to the contrary, though, as the ship there could have loaded a full cargo before any embargo was imposed, the case on the facts is distinguishable. The exceptions clause contemplates matters which cause a breach or prevent performance of the charter. The reasonable apprehension of a prudent man and the inutility of doing something, which cannot lead to any good result, are considerations material in deciding at what distance of time or over what area an existing restraint of princes may be deemed to be operative so as to restrain; but restraints in themselves they are not. The appellants admit that apprehension alone will not suffice, and say that the shipowner must take the risk of his fears being justified by the event. This argument converts a provision stipulating the effects of the operation of certain causes into a speculation upon the chances of their coming into operation. To some of the excepted matters, for example, fire, explosions, or collisions, such a contention is obviously unfitted. In any case its application would lead to the interpolation of a period of suspense during which neither party could be certain of his rights until the course of events determined the speculation in one way or the other. As Scrutton, L.J. (then Scrutton, J.) well observes in *Embiricos* v. *Sidney Reid and Co.* (12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B., at p. 54): "Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not." Such a construction would unsettle the foundation of the contract as a matter of business, which is that the ship shall proceed upon a named voyage, unless prevented by named causes. Here, as the facts stood, the shipowners, by refusing to send a ship to Mariopol, evinced such an intention not to perform their bargain as justified the charterers in treating it as an offer of repudiation and in accepting it as such.

I have no doubt that clause 13 is a penalty clause and immaterial in the present case. To read it otherwise is to ignore the first word "penalty." True the use of that word is not decisive; but it is not impossible to read the residue of the clause as defining a mode of calculating a mere penal sum, and to read it as a limitation of the right to recover proved damages seems to me to produce an absurd result in business. Whatever the value of the cargo or the extent of the injury to it, the shipowner's liability in respect of it would be limited to the estimated amount of the freight, however that estimate is to be made. If the cargo owner is uninsured, he stands to lose large sums for the ship's default. If he is insured he upsets the ordinary course of insurance business by depriving his underwriter of a valuable right of recourse and must suffer for this in one way or another. Nothing could be less like a "genuine covenanted pre-estimate of

damage": (*Dunlop Pneumatic Tyre Company* v. *New Garage and Motor Company*, 108 L. T. Rep. 679; (1914) A. C., per Lord Dunedin, at p. 86). The whole matter has been fully and, if I may say so, admirably discussed by Bailhache, J. in the recent case of *Wall* v. *Rederiaktiebolaget Luggude* (13 Asp. Mar. Law Cas. 271; 114 L. T. Rep. 286; (1915) 3 K. B. 66). Your Lordships decided the point in *Ströms Bruks Aktie Bolag* v. *Hutchison* (10 Asp. Mar. Law Cas. 138; 93 L. T. Rep. 562; (1905) A. C. 515) upon a somewhat similar clause, and I think that the present case cannot really be distinguished. My only difficulty is to understand why such a provision should be inserted at all.

I should be loth to hold that, if insurance of the war risk was feasible, proof that the charterers would have insured it was really needed. As is admitted, to insure the cargo against marine risks would be the ordinary thing to do, and it would have been obviously imprudent in a merchant to stand his own insurer of the war risk of such an adventure. I should have thought it would be within the legitimate inferences of fact to be drawn from the known circumstances of this case to find that a war-risk policy would be effected, but, as it is, the point need not be decided. What passed between the solicitors to the parties before the adjourned hearing in effect dispensed the plaintiffs from calling any witness on the point, almost formal as that witness would have been. The evidence called was very brief, but it sufficiently supports a finding that the whole line would have been covered. If so, no further inquiry on the point is needed. In effect, the breach of charter-party caused the plaintiffs to lose the chance of shipping and dispatching an insured cargo and of recovering on the policy when the cargo was lost, as it would have been actually and constructively, in consequence of the outbreak of war with Turkey. The legal presumption must be that the amount to be insured would be such as would indemnify the plaintiffs for their actual loss and pecuniary damage. This will accordingly eliminate the factor of war and bring the case within the ordinary rules as to damages for breach of contracts of carriage by sea.

On the measure of damages a point of considerable nicety was discussed, but in my opinion it is not really raised by the evidence. The principle of measuring damages for breach of a contract for the sale of merchandise by a ruling market price at a given date is not always equally applicable to contracts of charter-party. Nor do I think that the canon expressed by Lord Davey in *Ströms Bruks Aktie Bolag* v. *Hutchison* (*sup.*) is in point in the present case. There the charterers were themselves producers of the intended cargo, and could have loaded the ship from their own factory if she had arrived to load. Their claim arose because the shipowner's breach of contract prevented them from delivering the cargo at the port of discharge as they had contracted to do. Naturally, in measuring their loss, the cost of replacing it there was a factor to be compared with the value of an equivalent quantity never shipped at all. In the present case there is no evidence that there was any market or even any market price for sulphate of ammonia at Mariopol about the 10th Sept. 1914. There is no evidence that the charterers could have bought a cargo of it there or then, so as to load it on the arrival of the defendants' ship. Such evidence as there is shows that, if there was any sulphate of ammonia except the cargo in question, it all belonged to the firm from whom the charterers had contracted to buy it. If so, the charterers would have held to their bargain if the price had risen, and the vendors if it had not. A good deal can be said for the argument that, if this bargain is to be disregarded as too remote (which is admitted) so far as the plaintiffs claimed to recover the damages paid for its non-fulfilment, then, too, it should be disregarded for all purposes connected with the present case, and that the position is truly an inversion of that in *Rodocanachi* v. *Milburn* (*sup.*), "The value is to be taken independently of any circumstances peculiar to the plaintiff." This argument, however, is based on a supposition of fact as to the existence of a market price at Mariopol, which on the evidence fails.

I think that in the main the appeal succeeds, and I concur in the motion proposed by my noble and learned friend on the Woolsack.

Solicitors for the appellants, *Holman, Fenwick, and Willan.*

Solicitors for the respondents, *Waltons and Co.*

Judicial Committee of the Privy Council.

Feb. 22 *and March* 3, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, Sir WALTER PHILLIMORE, Bart., and Sir ARTHUR CHANNELL.)

THE STANTON (CARGO EX). (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Claim to goods—Security for costs—Prize Court Rules 1914, *Order XVIII., r.* 2.

Order XVIII., r. 2, *of the Prize Court Rules* 1914 *provides that: "Any person instituting a proceeding, other than a cause for condemnation, and making a claim, and being ordinarily resident outside the jurisdiction of the court, may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction of the court, and the proceedings may be stayed until the order is complied with.*

Rule 3 *of the same order provides that: "In any cause in which security for costs is required, the security shall be of such amount and be given at such times and in such manner or form, as by bond, payment into court, or otherwise, as the judge shall direct.*

Held, that the discretion of a judge in prize matters conferred by the above rules was a judicial discretion, and that in the case before the board there was no evidence that it had been exercised otherwise. The appeal therefore failed.

Principles that should guide the judge's discretion when deciding the question of security for costs considered and explained.

APPEAL by special leave from an interlocutory order made by the President of the Admiralty

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

Division (in Prize), dated the 16th Oct. 1916, relating to security for costs in prize cases.

The appellant, Charles M. Lindvall, was a Swedish subject carrying on business at Gottenburg as a wholesale dealer in colonial produce. On the 27th Jan. 1916 a writ was issued by the Procurator-General claiming the condemnation of about 800*l.* worth of pork, seized at the port of Bristol, consigned to the appellant by Swift and Co., of Chicago, in the Swedish steamship *Stanton*. The writ claimed that the goods had an enemy destination or were enemy property. The appellant entered an appearance. A summons was then taken out asking that the appellant might be ordered to give security under Order XVIII., r. 2, of the Prize Court Rules. The summons was adjourned, and the appellant ordered to file his claim and evidence.

On the 16th Oct. 1916, no evidence having been filed on behalf of the Crown, the President ordered the appellant to give security in the sum of 100*l.*, and stayed the claim pending the order being complied with.

Le Quesne for the appellant.

Sir *Frederick Smith* (A. G.) and *R. A. Wright* for the Procurator-General.

The considered opinion of the board was delivered by

Lord PARKER OF WADDINGTON.—This appeal turns entirely on the true meaning and effect of rules 2 and 3 of Order XVIII. of the Prize Court Rules 1914. These rules govern the practice of the court with regard to security for costs, and no question is raised as to their validity. It should be noticed that by Order XLV., in cases not provided for by the rules, the old practice in prize proceedings is to be followed, and in considering the question at issue on this appeal it is both legitimate and useful to refer to the former practice.

The practice of the High Court of Admiralty in prize proceedings, with reference to security for costs, was from time to time prescribed or sanctioned by statute. The last statute dealing with the matter was the Naval Prize Act 1864. By sect. 23 of that Act all claimants in proceedings for condemnation were required to give security for costs in a sum of 60*l.* This is remarkable for two reasons. First, a claimant in condemnation proceedings was not as a general rule ordered to pay costs unless he had put forward a fraudulent or unjustifiable claim. Secondly, a claimant was at any rate, up to the preliminary hearing, in the position of a defendant rather than a plaintiff, the *onus probandi* till then at any rate resting with the captors. Nevertheless, he was required to give security.

The twenty-third section of the Naval Prize Act 1864 was repealed by the first section of the Prize Courts (Procedure) Act 1914 as from the day on which the Prize Court Rules 1914 came into operation. Under these circumstances rules 2 and 3 of Order XVIII. must be looked upon as relaxing in favour of claimants the rights with regard to security for costs which the Crown, or the captors who represented the Crown, possessed under the earlier practice. Claimants ordinarily resident within the jurisdiction of the court need no longer give security. Claimants ordinarily resident out of the jurisdiction of the court may, even though temporarily resident within such jurisdiction, be ordered to give security in such manner and amount as the judge may direct. Whatever be the precise meaning of the expression "within the jurisdiction of the court" the present claimant certainly does not ordinarily reside within such jurisdiction, and therefore the President had power to make the order appealed from.

It is, however, contended that the discretion vested in the judge under the rules in question is a judicial discretion, and that the President, if he can be said to have exercised any discretion at all, did not exercise it judicially, but in complete disregard of all considerations by which a judge in exercising such a discretion ought to be influenced. In particular, he is said to have entirely disregarded the fact that on the evidence before him the Crown had entirely failed to make out any case for condemnation of the goods the subject of the claim, and that the claimant on the other hand had fully made out a case for their release. The *onus probandi*, it was said, still rested with the Crown, and the appellant being in the position of a defendant and not of a plaintiff should not have been ordered to give security at all.

Their Lordships entertain no doubt that the discretion conferred on the Prize Court judge by the rules in question is a judicial discretion, but except to this extent they do not think the appellant's argument is sound. The rules to be interpreted are not rules to be followed by a court which had not, according to its usual practice, ordered security against litigants who were not in the position of plaintiffs. On the contrary, they are rules to be followed by a court in which, according to its former practice extending back for over a century, all claimants wherever they resided, and whether in the position of plaintiffs or otherwise, had been compelled to give security. If, according to the former practice of the High Court of Admiralty, claimants in prize proceedings had only been ordered to give security if they asked for and were granted further proof after the preliminary hearing, the case might have been different; but this was not the practice. Moreover, the second rule of Order XVIII. expressly places claimants in condemnation proceedings on the same footing as persons instituting proceedings other than proceedings for condemnation. In other words, it treats all claimants as it treats plaintiffs. Their Lordships therefore are of opinion that neither the merits of the claim as they appear from the evidence already filed nor the *onus probandi*, having regard to such evidence, are the determining factors in considering whether the discretion has been properly exercised.

The object of the rules appears to be this. Persons ordinarily resident within the jurisdiction usually have property within the jurisdiction against which process of execution will lie should they be ordered to pay costs. These, therefore, need not be required to give security. Persons ordinarily resident out of the jurisdiction have, as a rule, no property within the jurisdiction against which process will lie in a similar event. These, therefore, may be ordered to give security. The fact that they are ordinarily resident outside the jurisdiction, if nothing more be proved, will in an ordinary case justify the judge in

ordering security. But if something more be proved—for example, if it be established that the claimant has property within the jurisdiction against which process will lie—the judge, in exercising his discretion, must take this into account. It would be in the highest degree inconvenient if the judge were in every case bound to consider the *onus probandi* as it appears on the evidence already filed or the merits of the claim if it fell to be determined upon this evidence. He is, no doubt, entitled to look into both matters if he thinks fit—at any rate, on the question of the amount to which security should be ordered; but neither point affords the criterion as to whether security ought or ought not to be directed. The judge is entitled, on the one hand, to bear in mind that when the claim is *bonâ fide* made costs are not as a rule ordered against an unsuccessful claimant. He is, on the other hand, entitled to be guided by his own experience as to the type or kind of claim which usually turns out to be fraudulent. While bearing in mind that the object of the rule is to safeguard the Crown in the event of unsuccessful claimants being ordered to pay costs, he should not, either in ordering security or fixing its amount, ignore the effect of the order he proposes to make in increasing the difficulty of enforcing *bonâ fide* rights.

Their Lordships are not satisfied that in making the order appealed from the President either ignored any matter which he ought to have considered, or took into account any matter which he ought to have ignored. In other words, they are not satisfied that he did not exercise the discretion conferred on him by the rules in a judicial manner and on proper grounds, both as to amount and otherwise. It follows that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant, *Botterell* and *Roche*.

Solicitor for the respondent, *Treasury Solicitor*.

Feb. 23, 27, *and March* 20, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE GERMANIA. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Enemy ship—Private yacht of alien enemy—Outbreak of war—Seizure in port—Days of grace Navire de commerce—*Sixth Hague Convention* 1907, *art.* 1.

Held, that a racing yacht, the private property of a German subject, which was in a British port at the time of the outbreak of the war between Great Britain and Germany, was not un navire de commerce, *and therefore was not entitled to protection in respect of days of grace, &c., conferred on a merchant ship by the Sixth Hague Convention* 1907, *art.* 1.

Decision of the President, reported 13 *Asp. Mar. Law Cas.* 230; 113 *L. T. Rep.* 1167; (1916) *P.* 5, *affirmed.*

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

APPEAL on behalf of the owner, Herr Gustav Krupp von Bohlen, of the sailing schooner racing yacht *Germania* from a decree of the President of the Admiralty Division (in Prize) directing that the yacht should be condemned as lawful prize and declaring her as such to have been lawfully seized by the Customs authorities at Southampton as a droit of Admiralty, and ordering that she should be sold by the marshal.

Bateson, K.C. and *Dunlop* for the appellant.

Sir *Frederick Smith* (A.-G.) and *Gavin T. Simonds* for the Crown.

The considered opinion of their Lordships was delivered by

Lord PARMOOR.—The *Germania* is a sailing schooner racing yacht of 366 tons Y.M., 191 tons gross and 123 tons net register, built and registered at the port of Kiel. She was built in 1908 and belonged to Gustav Krupp von Bohlen. In the claim of Baron Friedrich von Bülow, on behalf of the owner, she is described as a racing sailing yacht of no value or utility for any commercial, naval, or military purpose, nor adaptable for any such purpose, and as being no part of the commercial, naval, or military resources of the enemy.

On the 27th July 1914 the *Germania* arrived at Southampton to take part in the Cowes Regatta, and was dry-docked for the purpose of repairs, cleaning, and painting. On the outbreak of war she was in the yard of Messrs. Summers and Payne, at Southampton, and was seized and detained by the officer of Customs. A decree of detention, until further order of the court, was made on the 24th Sept. 1914. Subsequently, on the 23rd Sept. 1915, notice was sent to the appellant's solicitors that an application would be made to the Prize Court to condemn the *Germania*. The application was made on the 28th Oct. 1915, and on the same day a decree was made condemning the *Germania* as lawful prize. It is against this decree that the appeal, on behalf of the owner of the *Germania*, is brought.

Two contentions were raised before their Lordships at the hearing of the appeal. In the first place, it was said that a racing yacht, such as the *Germania*, should not be regarded as property liable to confiscation and condemnation, as droits of Admiralty. No authority was adduced in support of this contention. In the opinion of their Lordships, there is no principle in Prize Law which would place a racing yacht in a special category, or exempt it, from the ordinary rule, that enemy property seized in port, after the outbreak of war, is liable to confiscation and condemnation as droits of Admiralty.

It was contended, secondly, and to this point the argument of the counsel for the appellant was mainly directed, that the *Germania* was *un navire de commerce* within the meaning of art. 1 of the Sixth Hague Convention, and as such was not liable to confiscation. If the *Germania* is not *un navire de commerce*, it is not within the protection of art. 1, and it is unnecessary to consider the further conditions specified in the article. In order to make good his contention that the *Germania* was *un navire de commerce*, Mr. Bateson argued that any private vessel should be regarded as *un navire de commerce*, and that every vessel is included within that designation which is not *un navire d'État*.

There is nothing in the context of art. 1 which would suggest that the expression *un navire de commerce* includes every class of private vessel; but reference was made to the proceedings of the International Naval Conference held in London on the 25th Feb. 1909, and to an extract from a Prize Court order published in Berlin on the 15th April 1911. The object of these references was apparently to suggest that there was some ambiguity in the language of art. 1, but their Lordships do not find that the language is ambiguous, and quotations from documents published subsequently to the Sixth Hague Convention, and dealing with a different subject in another context, cannot affect the question of construction which comes before their Lordships for decision in this appeal.

The preamble of the Sixth Hague Convention states that the signatory Powers "anxious to ensure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as fas as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a convention to this effect."

These words clearly indicate that the purpose of the convention is the security of international commerce, and that the operations undertaken in good faith and in process of being carried out are operations of a commercial character. It is in accordance with this purpose that art. 1 protects under the specified conditions *le navire de commerce*, or, to use the English translation, "a merchant ship." A vessel which is described in the claim as a vessel of no value or utility for any commercial purpose, nor adaptable for such purpose, and not any part of the commercial resources of the enemy, is not in any sense a merchant ship or entitled to the protection of art. 1 of the Sixth Hague Convention.

The appellant further asked that an order should be made in the same form as in the case of *The Gutenfels* (13 Asp. Mar. Law Cas. 346; 114 L. T. Rep. 953; (1916) 2 A. C. 112), but their Lordships are of opinion that that form of order is not applicable to the case of a vessel which is clearly not comprehended within the class of vessels to which alone the Sixth Hague Convention affords protection.

In the result the appeal fails and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant, *Kenneth Brown, Baker, Baker*, and *Co.*

Solicitor for the Crown, *Treasury Solicitor.*

Feb. 20 *and March* 15, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE ELEFTHERIOS K. VENIZELOS (PART CARGO EX). (a)

ON APPEAL FROM THE COMMERCIAL COURT FOR MALTA (IN PRIZE).

Prize Court—Cargo—Whether destined for enemy—Onus of proof.

The Commercial Court for Malta (in Prize) found that a cargo of wheat seized as prize was on its way to an enemy destination and made an order that it should be condemned. At the hearing, the captors adduced no evidence in contradiction of the claimants' case, but subjected the whole of the transactions to the closest scrutiny, and suggested that in truth the wheat was on its way to an enemy destination.

Held, that, as the documents produced by the claimants were genuine and regular in form, in the absence of evidence to refute them they were deserving of credit. The decision below was based on assumptions that were mere conjectures and were therefore inadmissible, whereas the claimants' evidence discharged such burthen as rested on them and sufficed to establish their claim on the facts so proved.

Decision appealed from reversed.

APPEAL from a judgment of His Majesty's Commercial Court for Malta (in Prize), dated the 15th July 1915, relating to 1,000,000 kilos of wheat, forming part of the cargo on board the Greek steamship *Eleftherios K. Venizelos*, which was captured by H.M.S. *York*.

The claimants were the Società Anonima Alfredo Kun, of Genoa, and the respondent His Majesty's Crown Advocate (acting as Procurator-General) in Malta.

Roche, K.C. and *R. A. Wright* for the appellants.

Sir *Gordon Hewart* (S.-G.) and *A. R. Kennedy* for the respondent.

The considered opinion of the board was delivered by

Lord SUMNER.—This appeal relates to a part cargo of wheat, 1,000,000 kilos in weight, which was captured on the 27th Feb. 1915 by H.M.S. *York*, on board the Greek steamer *Eleftherios K. Venizelos*, V. Velivanakis master, and condemned as prize by a judgment of His Majesty's Commercial Court for the Island of Malta and its Dependencies (in Prize), dated the 15th July 1915, upon the ground of enemy destination on a continuous voyage.

The appellants, who were claimants below, are an Italian company, the Società Anonima Alfredo Kun, of Genoa, of which the shares are, as appears from the evidence, largely owned by a firm of Bunge and Born, grain merchants, of Buenos Ayres. The partners in this firm are two subjects of the Argentine Republic, named Ernesto Bunge and Alfredo Hirsch, and one J. Born, a Belgian subject. The whole cargo, consisting of various cereals, was shipped by Bunge and Born at Bahia Blanca, and the parcel in question was represented by a single bill of lading, which made the wheat deliverable at

(a) Reported by W. E. REID, Esq., Barrister-at-Law.

Genoa, the vessel's port of discharge, to the Untermühle Zug Actiengesellschaft, Zug, Switzerland, or their assigns.

The appellants' case was as follows. The parcel in question was shipped in performance of a prior contract of sale between Bunge and Born, represented by the appellants as their agents, and the Untermühle Zug Actiengesellschaft. The residue of the cargo was consigned to various other named Swiss consignees. To the other parcels the captors made no claim; but, as at any rate a large portion of them had been acquired by the Italian Government, in favour of whom His Majesty's Government were willing, for the sake of amity, to waive any claim they might have, no inference ought to be drawn from this circumstance. On the very day on which the *Eleftherios K. Venizelos* finished loading at Bahia Blanca, the Società Anonima Alfredo Kun, without the receipt of any communication on the subject from Bunge and Born, so far as appears, began a negotiation by telegram for the purpose of purchasing the wheat from the Untermühle Company of Zug. They did this, as they say, because, as the market stood, the parcel was cheap, and accordingly they began by offering a premium or allowance for it of 30,000fr. The Swiss company at once stood out for 50,000fr. Four days later, bargaining going on meantime, the appellants learnt by cable from Bunge and Born that the wheat, actually shipped under the Swiss company's bill of lading in question, weighed 3 kilos per hectolitre more than the buyers were entitled to under the purchase contract.

Fortified by this private information, the appellants continued the haggling for the rest of the day, and eventually agreed to pay the 50,000fr. originally demanded, while protesting that the price was "enormous." They stipulated, naturally, that the bill of lading, which was then in course of transit by post, should be indorsed to them by the consignees, when it arrived, and this was done. The fourteen telegrams by means of which this negotiation was carried out were produced. They record in ordinary terms the interchanges that might be expected between two hard bargainers, acting at arm's length and each determined to get the better of the other. The subsequent course of the market, according to the appellants' evidence, showed that they had the best of it.

Subsequently the Società Anonima Alfredo Kun disposed of their purchase by sales to the Molino Carlo Molinari, fu Carlo, of Genoa, and Arturo Baranzini, of Milan, and by delivery under a prior sale to the Molino Bossi, of Lugano. Baranzini, in his turn, sold over to Fioruzzi and Co., of Piacenza, and the Molino Bossi to La Banca Russa per il Commercio Estero, at Genoa, who sold again to the Molino Sismondi, of Pinerolo. When the last of these sales was made by the appellants, the *Eleftherios K. Venizelos* was still on passage in the Atlantic, and they gave directions accordingly to the firm of cargo superintendents, who were to act in the discharge at Genoa, and sent bills of lading or delivery orders to the buyers to enable them to get delivery.

With few and immaterial exceptions, all the relevant mercantile documents, which would be brought into existence in the course of, and would constitute the best evidence of, the transactions above detailed, were placed by the claimants before the court below. Nor did counsel for the captors, at their Lordships' bar at least, contest their genuineness or suggest that any of them were fabricated. The learned judge at the trial appears to have been satisfied that, as documents, they were in the fullest sense what they purported to be.

The captors adduced no evidence in contradiction of the claimants' case, but subjected the whole of the transactions to the closest scrutiny, and suggested that in truth the wheat was on its way to an enemy destination. After full and careful examination, but by reasoning which their Lordships are not able to accept or indeed entirely to appreciate, the learned judge at the trial arrived at that conclusion.

Two assumptions appear to underlie this view: The first is that the Società Anonima Alfredo Kun desired to recover control of the bill of lading because it would enable them to effect the transmission of the wheat through Switzerland to Germany, without interference on the part either of the Italian or of the Swiss authorities; the second is that some and probably all of the above transactions were entered into merely to cloak the truth—namely, the enemy destination of the wheat.

Their Lordships are of opinion that all the evidence is to the contrary, and that, being regular in form, genuine in themselves, and contemporary in date, the documents, in the absence of evidence to refute them, are deserving of credit. It follows that the above assumptions are, in their opinion, mere conjectures and therefore inadmissible.

To deal with the latter first. It implies that, in pursuit of a scheme too tortuous to be intelligible, the appellants paid 50,000fr. to their Swiss partners in the operation, in order to obtain their consent to a change which was necessary to give effect to their common desires, and entangled themselves in serious claims for damages by various purchasers for no object except to give verisimilitude to a sham transaction in case they should be called on to support it in a Court of Prize. Of the former assumption it is sufficient to say that the matter was one for proof, and the evidence given tended to establish the contrary. Their Lordships fully appreciate that the learned judge may have been possessed of and influenced by information as to the course of transportation as it existed at the time in question over the Gothard Railway, whether obtained from other cases in prize tried before him or otherwise, which might well have seemed to him to support the view which he took upon this point; but as the evidence given in the case failed to support it, they are unable to agree with his conclusion.

In the result their Lordships are of opinion that the claimants' evidence discharged such burthen as rested on them and sufficed to establish their claim. They will accordingly humbly advise His Majesty that the appeal ought to be allowed, with costs, and the order appealed against ought to be reversed so far as it condemns the cargo in question; and that the sum in court, being the proceeds of the wheat which, on requisition by His Majesty's proper officer, was sold, less any sum paid by the Crown to the master for freight or

otherwise under the order of the court below, ought to be paid out to the appellants.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitor for the Crown, *Treasury Solicitor.*

Feb. 20, 22, *and March* 22, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE DAKSA (CARGO EX). (*a*)

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR, ADMIRALTY JURISDICTION (IN PRIZE).

Prize Court—Goods afloat—Shipment prior to outbreak of war—Apprehension of war—Transfer in fraud of belligerent—Capture by allied belligerent—Rights of captor.

Where upon the facts of the case it appears that the transfer of goods at sea was induced by apprehension on the part of the transferor of war being declared between the State to which he owed allegiance and another State, such transfer is deemed to be in fraud of the belligerent rights of the latter State if war is subsequently declared. But there is no such presumption in the case of an allied belligerent State, which State neither the vendor nor purchaser at the time of the transfer contemplated would declare war with the vendor's country.

Principles upon which a transfer of goods consigned to an enemy subject at an enemy port, made in apprehension of hostilities, is deemed to be made in fraud of captors considered.

Decision in The Southfield (13 *Asp. Mar. Law Cas.* 150; 113 *L. T. Rep.* 655) *approved and followed.*

APPEAL by the Attorney-General and King's Proctor of Gibraltar from a decree of the Chief Justice of the island (the Hon. B. H. T. Freer), who directed that the proceeds of certain barley *ex Daksa* should be released to the respondents.

The respondents, Messrs. Louis Dreyfus and Co., were a French firm of grain merchants who had until the outbreak of the war a branch office at Hamburg. By their affidavits they stated that their Hamburg house had purchased the barley from the German firm of Messrs. Ehlers and Loewenthal, of Hamburg, by a c.i.f. contract made on the 13th June 1914; that on the 31st July 1914 the German firm had handed to their Hamburg manager an invoice for the barley and had tendered the shipping documents; and that on the following day their manager had paid to the sellers the amount of the invoice in exchange for the shipping documents.

The Chief Justice of Gibraltar found that, although the transfer of the barley was made by the German firm in fraud of possible French or Russian captors, it was not made in fraud of British captors, and, following *The Southfield* (13 Asp. Mar. Cas. 150; 113 L. T. Rep. 655) he directed that the proceeds of the barley should be released to the respondents.

(*a*) Reported by W. E. REID, Esq., Barrister-at-Law.

Sir *Gordon Hewart* (S.-G.) and *T. Mathew* for the appellant.

Leck, K.C. and *Raeburn* for the respondents.

The considered judgment of the board was delivered by

Lord PARKER OF WADDINGTON.—Their Lordships are of opinion that in view of the course taken both here and below the parties to this appeal must be deemed to have made all such admissions of fact as were necessary to reduce the issue to one single question—namely, Was the transfer of the 1st Aug. 1914 to the respondents by the German sellers made under such circumstances as to entitle the captors to treat the barley transferred as retaining, notwithstanding the transfer, the character of enemy property at the date of its seizure as prize?

The principles of prize law upon which the answer to this question depends may, so far as material, be summarised as follows: (1) Where a transfer of goods at sea is induced by apprehension on the part of the transferor of the outbreak of hostilities between the State to which he owes allegiance and another State, such transfer is deemed to be in fraud of the belligerent rights of the latter State, and should such hostilities subsequently arise and the goods be seized as prize, the transferee cannot (at any rate if he were aware of the apprehension which induced the transfer) set up his own title in order to show that the goods had at the date of seizure lost their enemy character. (2) If at the date of the transfer the circumstances were such as to give rise to a general apprehension of war the onus is on the transferee to prove the complete innocence of the transaction. It will not be enough to prove his own innocence. He must prove also that the contract was not induced by apprehension of war on the part of the transferor. (3) The transferee may discharge this onus by showing that the transfer was pursuant to a contract made at a time when no such hostilities were apprehended.

In the present case the respondents set up that the transfer of the 1st Aug. 1914 was made pursuant to a contract dated the 13th July 1914. This may very probably have been the case, but it can hardly be said to have been proved; for the contract of the 13th July 1914 was not produced, nor is there any satisfactory evidence as to its terms. Their Lordships prefer to base their advice to His Majesty upon another ground.

The learned judge in the court below held that there was at the date of the transfer no such general apprehension of hostilities between this country and Germany as to throw upon the transferee the onus of proving that the transfer was not in fraud of our belligerent rights. This was in accordance with the view expressed by the President in the case of *The Southfield* (*ubi sup.*), and their Lordships are not prepared to differ from the learned judge upon what is in reality a finding of fact. The only question, therefore, is whether the British captors are, because war between France and Germany was at the date of transfer undoubtedly generally apprehended and subsequently broke out, in a better position than they could otherwise have been. In their Lordships' opinion they are not. A transfer induced by apprehension of hostilities is not void. It merely cannot be set up against those in fraud of whose rights it is deemed to

have been made. Here there was no transfer which can be deemed to be in fraud of the rights of British captors because there is nothing to show and nothing to raise any presumption that the transferor was induced to make the transfer by apprehension of war between Germany and the United Kingdom. Their Lordships agree in this respect with the judgment of the court below and with the decision of the President in the case of *The Southfield* already referred to.

Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the respondents, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, July 12, 1916.

(Before Swinfen Eady, Phillimore, and Bankes, L.JJ.)

The Thorsa. (a)

APPEAL FROM THE ADMIRALTY DIVISION.

Damage to cargo — Seaworthiness — Fitness to carry cargo—Contract of carriage—Improper stowage—Excepted peril.

Chocolate was put on board a steamship for carriage from Genoa to London. The chocolate was shipped in good condition, but was delivered in a damaged state owing to the chocolate having been stowed in a hold in which cheeses were stowed. The consignees of the chocolate brought an action to recover the damage they had sustained. The shipowners pleaded as a defence an exception in the bill of lading relieving them from liability for negligent stowage. The consignees by their reply alleged that the shipowners could not rely on the exception, as the ship was unfit to carry the chocolate when the ship was loaded or when the voyage began.

Held, affirming the decision of Bargrave Deane, J., that the ship was not unseaworthy; that the damage was caused by improper stowage; and that the respondents were protected by the exception in the bill of lading and were entitled to rely on the exception.

Appeal from a decision of Bargrave Deane, J. by which he held that the appellants were not entitled to recover from the respondents the damage sustained by them by reason of certain chocolate, owned by the appellants, being stowed in the respondents' ship near certain cheese.

The appellants were the owners of cargo laden on the *Thorsa*; the respondents were the owners of the *Thorsa*.

The appellants shipped 1838 cases of chocolate in good order and condition on board the *Thorsa*, under a bill of lading dated the 8th Dec. 1914, for carriage from Genoa to London. The appellants alleged that it was the duty of the respondents to deliver the chocolate in like good order and condition, and that in breach of that duty they failed to deliver it in good order and condition, and in fact delivered it tainted and deteriorated by taint from cheese.

The respondents admitted that the chocolate was shipped on the *Thorsa* under the terms and on the conditions contained in the bill of lading, but denied that they had been guilty of any breach of duty, or that they had delivered the chocolate tainted or deteriorated by taint from cheese. The respondents relied upon the following clauses in the bill of lading:

1. Not responsible for "all loss and damage whatsoever from . . . perils of the sea . . . all loss and damage arising from any act, neglect, or default whatsoever . . . of the officers, engineers, crew, stevedores, or agents of the owners in the management, loading, or stowing . . . of the ship . . . or otherwise, and the owners being in no way liable for any consequences of the causes before mentioned."

2. ". . . Not answerable for . . . contact with other goods . . ."

3. ". . . Owners of the vessel shall not be liable for any claim whatever, unless the same or notice thereof be made or given in writing before the craft or the goods leave the ship's side, when in case of damage or dispute a survey . . . may be held."

The respondents alleged that reasonable means for the ventilation of the cargo were provided, but that the weather was such that all the ventilation covers had to be kept on and the hatches had to be closed during the voyage. They further alleged that the notice specified in clause 3 was not given to them.

The appellants in their reply alleged that the respondents were not entitled to rely on the clauses in the bill of lading because the *Thorsa* when the chocolate was loaded or when the voyage commenced was not seaworthy or fit to carry the chocolate in that it was carried where it was liable to become and did become tainted by cheese.

The action was heard by Bargrave Deane, J. on the 21st Dec. 1915. The appellants called certain evidence, and at the close of the appellants' ase the respondents submitted that the appellants had made out no case. The learned judge gave judgment for the respondents.

Bargrave Deane, J.—In my opinion this ship was seaworthy when she started on her voyage, and there was no reason why she should not carry both the cheese and the chocolate. They were not dangerous cargoes either of them—this case is not like the cases which have been quoted—and the whole matter resolves itself into a question of stowage. It is a case of bad stowage and nothing else, and that bad stowage did not render the ship unseaworthy. Therefore there must be judgment for the defendants.

On the 15th March 1916 the appellants gave notice of appeal against the judgment of Bargrave Deane, J., asking that the judgment should be set aside and that judgment should be entered for them.

MacKinnon, K.C. and *C. R. Dunlop* for the appellants.—If a vessel is unfit to carry the particular cargo her owners have contracted to carry she is unseaworthy:

Kopitoff v. *Wilson*, 3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377;

Tattersall v. *National Steamship Company*, 5

(a) Reported by L. C. F. Darby, Esq., Barrister-at-Law.

Asp. Mar. Law C. s. 206; 55 L. T. Rep. 299; 12 Q. B. Div. 297;
Ingram and Royle v. *Services Maritimes*, 12 Asp. Mar. Law Cas. 295; 108 L. T. Rep. 304; (1913) 1 K. B. 538.

Exceptions can only protect the shipowners if they have provided a ship which is seaworthy at the beginning of the voyage:

The Glenfruin, 5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. 769; 10 P. Div. 103.

[Phillimore, L.J.—That proposition is too wide: (*Cohn* v. *Davidson*, 3 Asp. Mar. Law Cas. 374; 36 L. T. Rep. 244; 2 Q. B. Div. 455).] The respondents have not discharged the burden of proof which was on them. To enable them to defeat the claim they should have proved that the negligence which caused the damage was the negligence of those mentioned in the exceptions. This they have not done.

Bateson, K.C. and *A. Neilson*, for the respondents, were only called on to deal with the point raised by the appellants as to the burden of proof.

Swinfen Eady, L.J.—In this case the owners of cargo on board the steamship *Thorsa* sued the shipowners for damage to cargo. Bargrave Deane, J. found that the damage had resulted from bad stowage and from nothing else, and that the defendants were protected by the exception in the bill of lading, and he gave judgment for the defendants. It is against that judgment that the plaintiffs now appeal.

The plaintiffs were the owners of 1838 cases of chocolate that were shipped on board the *Thorsa* at Genoa for carriage to London. The bill of lading is dated the 8th Dec. 1914. The case made by the plaintiffs was that on the arrival of the goods at the port of discharge and on the consignees receiving the goods they were so tainted and affected by the smell of cheese as to be damaged and almost, if not quite, unmerchantable. The extent of the damage is immaterial; there would have been a reference to the registrar to ascertain the amount of the damage if the plaintiffs had succeeded, so the amount of it is not in question here, and that damage was occasioned is not in dispute. The question is whether the defendants can rely on the provisions of the bill of lading and so be absolved from liability for the damage.

The ship carried in addition to the chocolate a quantity of Gorgonzola cheese and a number of turkeys. Apparently the ship met with exceptionally bad weather and the consequence was that the hatches were kept on during the voyage. There was no opportunity of obtaining further ventilation by removing the hatches, and when the cargo arrived in London there was an offensive smell given off from it. I think it is clear from the evidence of the lighterman in control of the barges discharging the ship that the smell was very offensive and that it was caused particularly by the turkeys, which were in a state of decomposition; but it was also established, or it must be taken, I think, on the evidence of the plaintiffs to be established, that the chocolate was affected by the cheese which was carried on the ship. It was suggested that it was the boxes in which the chocolate was contained and not the chocolate itself which was affected, but I think the fair result of the evidence given on behalf of the plaintiffs is that the chocolate was seriously tainted by reason of its proximity to the Gorgonzola cheese, and that it had become tainted by the cheese. That fact the plaintiffs established.

But the plaintiffs were not content with merely proving that the cargo arrived damaged; they produced evidence to show what had occasioned the damage, and, in my opinion, it is established by the plaintiffs' evidence that what caused the damage was the improper stowage. The exact details of the stowage are not proved. A stowage plan was produced to which both parties referred, and which, although not formally proved, was referred to in turn, first by one side and then by the other. It was referred to by Bargrave Deane, J. and it has been handed up to us, and for what it is worth, making the same use of it that was made by both sides and by Bargrave Deane, J. in the court below, it would appear that the chocolate was stowed at the bottom of the hold in question and the cheese in the upper part. In other words, it would appear that the chocolate was put on board first and the cheese was stowed on top of it. But, in any case, the plaintiffs established that cheese and chocolate were stowed in the same hold, and that, by reason of the hatches being kept on throughout the voyage, the ventilation was insufficient, and the chocolate was affected and deteriorated in quality by the proximity of the cheese. I should add this, that it does not appear that this was the first shipment of the kind in which cheese and chocolate had been placed in the same hold. Before the war the ordinary way in which chocolate was sent from Switzerland to this country was by a different route. By reason of that route being closed owing to the war this chocolate was sent from Switzerland to Genoa and was shipped from Genoa by sea to London. The voyages of the *Thorsa* began in Aug. 1914, when the war began. The date of this bill of lading was Dec. 1914, and both before and afterwards similar cargoes, chocolate and cheese, had travelled together in a similar manner in the same ship, in the same hold, without damage; but on this voyage the plaintiffs proved damage.

The defendants plead the exceptions in the bill of lading, and the only one which it is necessary to refer to is the exception relieving them from liability for "all loss and damage arising from any act, neglect, or default whatsoever . . . of the officers, engineers, crew, stevedores, servants, or agents of the owners in the management, loading, or stowage . . . of the ship . . . or otherwise, and the owners being in no way liable for any consequences of the causes before mentioned." Put shortly, that is improper stowage, and the defendants rely on that exception. The plaintiffs in their reply after joinder of issue meet that by saying, "The defendants are not entitled to rely on clauses 1, 2, or 3 of the bill of lading by reason of the fact that the *Thorsa*, when the chocolate was loaded and (or) the voyage commenced was not seaworthy or fit for carrying the chocolate in that the chocolate was carried where it was liable to become and did become tainted by cheese." That is to say, they reply that it was the improper stowage which occasioned the damage, and then they allege that that rendered the vessel unseaworthy.

It was contended for the plaintiffs that the defendants had failed to make out their defence, as they had not shown that the servants of the owners were responsible for the bad stowage, and that it might have been that the owners themselves had actually directed the ship to be stowed in the way she was. Having regard to the way it is pleaded and to the conduct of the case in the court below, I am of opinion that this point is not open to the appellants. If there were any facts upon which the plaintiffs intended to rely as showing some active intervention of the owners in directing the stowage, they should have specially pleaded them. They have not only failed to do this, but they point to the fact that improper stowage, and not the persons by whom it was done, is the ground of their complaint. That is their defence, and it was upon that defence that they went to trial.

In the present case it is not contended that the ship was in any way defective in design or in structure or in condition or equipment at the time she sailed. The sole point is the way in which the cargo was stowed. It is not contended that on the date when the ship was empty and ready to receive cargo that she was in any way defective, nor is it contended that the cargo or any part of it was stowed so as to be a danger to the ship herself. In other words, the case is not brought within the principle of cases like *Tattersall* v. *National Steamship Company* (*ubi sup.*), where the defendants had not proved the ship to be reasonably fit for the purpose of the carriage of cattle which they had contracted to take; nor is it governed by cases like *Kopitoff* v. *Wilson* (*ubi sup.*) or *Ingram and Royle Limited* v. *Services Maritimes de Tréport* (*ubi sup.*), where bad stowage endangered the safety of the vessel. The contention put forward amounts to this, that if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy. I am not prepared to accept that. It would be an extension of the meaning of unseaworthiness going far beyond any reported case.

In these circumstances I am of opinion that, having regard to the facts established by the plaintiffs' evidence, the ship was not unseaworthy; that the plaintiffs failed to prove unseaworthiness, and that there is nothing to prevent the defendants relying upon and being freed from liability by the exception in the bill of lading of "All loss and damage arising from any act . . . of the officers, engineers, crew, stevedores, servants, or agents of the owners in the management, loading, or stowing . . . of the ship."

I am of opinion, therefore, that the learned judge in the court below was right in the judgment that he gave dismissing the action, and that the appeal fails.

Phillimore, L.J.—In this case the steamship which carried the cargo in question is either owned or chartered by a limited company residing in London, and the home port is London. The damage to the chocolate was either proved or admitted. I think the nature of the damage was proved. I assume that this damage was caused by the chocolate being tainted by cheese. In that case the cause of the damage was the negligent stowage of the cheese and chocolate in the same hold. The bill of lading excepts the owners from liability for loss "from any act, neglect, or default whatsoever of the pilot, master, officers, crew . . . stevedores, servants, or agents of the owners in the management, loading, stowage, discharge, or navigation of the ship." This being a foreign port, one assumes that the ship was under the control of the master, and that the negligent stowage was due to his action or inaction, or that of the crew, or of the stevedores whom he would employ. No doubt it is possible that there might be express directions by the owners that the cargo should be stowed in a particular way, but in the absence of proof of that, and in the absence of any suggestion of that in the pleading or in letters written before action, I think the defendants were not called on to prove that this stowage was not done by the express direction of the owners, and I take it we must assume that it was done either by the master, the crew, the stevedores, or other servants or agents of the owners for whose negligence they have contracted not to be responsible.

The point taken in answer to that is that the stowage made the ship unseaworthy—not unseaworthy altogether, but unseaworthy *quo ad* this parcel of cargo, unfit to carry it in the way in which it was proposed to carry it. Taking it as not proved that the cheese was there first, taking it as most probable that the cheese came there afterwards, I do not think that it made the ship unseaworthy *quo ad* the chocolate. The point taken upon this by counsel for the appellants was that the moment when seaworthiness is to be tested is the moment when the ship leaves the harbour, and by that time there had been the wrong juxtaposition, and therefore the ship was unfit to continue to carry, in the way in which it was carried, this chocolate. I do not think that is the way to test this particular kind of unseaworthiness. I am aware of the case of *Cohn* v. *Davidson* (*ubi sup.*), but I do not think it is applicable to this case. When one is dealing with the structure of the ship, a ship may be and must be seaworthy according to stages. If the first stage is the less dangerous stage and it is intended and supposed, as in the ordinary course would be the case, that after the first stage the ship should be further fitted for the second stage, it will be enough that the ship is, as it is sometimes called, riverworthy for the first stage, and seaworthy for the second stage. If the first stage is the more dangerous stage, the ship must be worthy or fit for it from the beginning. In *Cohn* v. *Davidson* (*ubi sup.*) the ship was seaworthy when she was brought to the quay, but an injury to her hull made her unseaworthy before she left the harbour. She was sufficiently seaworthy to take in the cargo and to move about the harbour; she was not sufficiently seaworthy to go to sea and confront the perils of the seas; and, by reason of the principle that you must look at structural seaworthiness in stages, the ship was held not to be seaworthy. I see no reason to apply such a principle to the question of the stowage of two parcels of cargo which are placed in juxtaposition in the hold of a ship.

Having regard to all the circumstances of this case, and confining myself to this case, and the way in which I apprehend the stowage took place and the damage happened, I am not prepared to say that this ship was in any sense of the word unseaworthy.

I will only add that, if this did constitute unseaworthiness, it would be well worth inquiring whether it is not the very unseaworthiness whichthe owners of the ship contracted not to be responsible for in the clause that I have already cited of exception in the bill of lading.

Bankes, L.J.—I agree. The plaintiffs' complaint here was that the defendants had failed to deliver their chocolate in the like good order and condition in which they had shipped it, and they alleged that the mischief was caused because the chocolate had been placed in contact with and had become tainted by cheese. The defendants' answer was: "We are relieved from any liability in respect of that complaint because the stowage was done either by the master or the officers or the crew or the stevedores—either by the stevedores alone or by them in conjunction with the officers of the ship—and there is a provision in the bill of lading which relieves us from any liability for any such stowage." The plaintiffs' reply to that was that the placing of the cheese and the chocolate in immediate contact in the stowage rendered the ship unseaworthy, and the case therefore came within the principle of those cases which say that where a shipowner seeks to relieve himself from the obligation to provide a seaworthy ship he must do so in clear and unambiguous language, which he failed to do in this bill of lading.

Junior counsel for the plaintiffs has taken the point that the defendants failed to give the necessary evidence that the stowage was the act of the master, officers, crew, or stevedores, either singly or combined. If that had been made a part of the case from the beginning, it may be that he would have been entitled to rely on that contention; but, looking at the pleadings and at the way the case was conducted, and judging as far as one can from the evidence, the examination, and the cross-examination, I quite agree with what has already fallen from the other members of the court, that that point was really not the point in the case in the court below; it was only raised by counsel at the last moment at a time when it was not open to him to do so. That being so, one has to consider what the position is with regard to the rest of the case.

The case for the plaintiffs rests entirely on their establishing this alleged unseaworthiness. We have been referred to certain cases and it is admitted that there is no case which has gone as far as the appellants' contention, and, without expressing any opinion as to what constitutes unseaworthiness, it is sufficient to say that in this case, if it be unseaworthiness at all, it is unseaworthiness using that term in a particularly narrow sense. But even if the appellants could establish unseaworthiness, they have got to take the next step, which is to show that they bring themselves within the principle I have stated, and that the respondents have failed to indicate in sufficiently clear and unambiguous language that they seek to protect themselves by the clause in the bill of lading from the particular act or class of act of which the appellants are complaining. Upon that point it seems to me that the appellants fail.

The complaint here is negligent stowage, negligent stowage which is said to amount to unseaworthiness. I fail to see that there is anything wanting in the language used, that it can be said to be either ambiguous or wanting in clearness when the shipowner provides that with regard to stowage he will not be responsible for the act of the stevedore or the master or the officers.

In my opinion, in this case, this appeal fails, and fails upon the ground that the shipowner has clearly and in unambiguous language protected himself against the very class of act of which the appellants complain.

Solicitors for the appellants, *McKenna* and *Co.*
Solicitors for the respondents, *Botterell* and *Roche.*

July 4 *and* 5, 1916.

(Before Swinfen Eady, Phillimore, and Bankes, L.JJ.)

The Polzeath. (a)

APPEAL FROM THE ADMIRALTY DIVISION.

Right to register a ship as a British ship—Ship owned by a limited company registered in England — Principal place of business of the company — Control of company in Germany — Forfeiture of ship—Position of British shareholders in the company owning the forfeited ship—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 1, 9, 76—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 51.

A ship owned by a limited company was registered as a British ship. A doubt having arisen as to whether the ship was rightly registered as a British ship, inquiry was made by the Registrar of Shipping at the port of registry of the ship under sect. 51 *of the Merchant Shipping Act* 1906 *as to whether the ship was rightly registered. It appeared that the business of the company was controlled by a German, who was a naturalised British subject, and who had resided in Hamburg for some considerable time before and after the outbreak of war. Proceedings were then instituted, asking for the forfeiture of the ship. Bargrave Deane, J. declared the ship to be forfeited to the Crown, and subsequently allowed the British shareholders to intervene in the proceedings to protect their interests, but refused to order that when the ship was sold they should be granted an amount out of the sum realised by the sale proportionate to their interest in the company. The company and the British shareholders appealed.*

Held, by the Court of Appeal, affirming the decision of Bargrave Deane, J. that the ship was rightly forfeited to the Crown, as the general superintendence of the business was carried on in Hamburg and the company was controlled from Hamburg.

Held, further, that the British shareholders were not entitled to intervene in the proceedings, and that the court had no power to order any payment to be made to them when the ship was sold.

Appeal from a decision of Bargrave Deane, J. holding that the steamship *Polzeath* was subject to forfeiture to the Crown, and further holding that the court could not grant certain relief to

(a) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

the British shareholders in the company which owned the *Polzeath*.

The plaintiff in the action was W. C. Searley; the defendants were the owners of the steamship *Polzeath*.

The plaintiff was an officer of customs and excise. In Oct. 1914 the steamship *Polzeath*, which was then named the *Walter Dammeyer*, was registered as a British ship at the port of King's Lynn, in Norfolk, in the name of the Lynn and Hamburg Steamship Company. The Commissioners of Customs being doubtful whether the ship was entitled to be registered as a British ship, directed the plaintiff, who was acting as registrar of shipping at King's Lynn, to require evidence to be given to his satisfaction within thirty days that the said ship was entitled to be registered as a British ship. The plaintiff, on the 2nd Nov. 1914, wrote requiring the company to give evidence to his satisfaction within thirty days from that date that the ship was entitled to be registered as a British ship. The statement of claim alleged that no satisfactory evidence was given within that time, and the plaintiff claimed a declaration that the said ship, with her tackle, apparel, and furniture, became and was forfeited to His Majesty, or that the said ship should be forfeited to His Majesty and might be sold by the marshal of the court.

The defendants by their defence alleged that the ship was owned by the Lynn and Hamburg Steamship Company; that the company was duly formed under the Companies Acts in 1888, and had its registered office and principal place of business in England. They alleged that the steamship was duly registered as a British ship in 1911. They denied that no satifactory evidence had been given as to the title of the ship to be registered, and alleged that the plaintiff was not entitled to the declaration or judgment claimed.

The *Attorney-General* (Sir F. E. Smith, K.C.), *Leslie Scott*, K.C., and *J. Wylie*, for the plaintiff, contended that the principal place of business of the company was in Hamburg, and, in addition to the sections of the Act of Parliament set out in the judgment of Swinfen Eady, L J., referred to the following authorities:

De Beers v. *Howe*, 95 L. T. Rep. 221; (1906) A. C. 455;
San Paulo Railway Company v. *Carter*, 73 L. T. Rep. 538; (1896) A. C. 31;
American Thread Company v. *Joyce*, 108 L. T. Rep. 353; 29 Times L. Rep. 266;
Palmer v. *Caledonian Railway Company*, 66 L. T. Rep. 771; (1892) Q. B. 823;
Dicey's Conflict of Laws, rule 19, p. 160;
Lindley on Companies, 6th edit., p. 1223.

MacKinnon, K.C. and *Dunlop*, for the company, contended that the principal place of business of the company was at King's Lynn, and that the vessel was managed at King's Lynn.

Judgment was reserved and was delivered by Bargrave Deane, J. on the 28th March 1916.

BARGRAVE DEANE, J.—Before and on the 30th Oct. 1914 a vessel named the *Walter Dammeyer* was registered as a British ship at the port of King's Lynn, Norfolk, in the name of the Lynn and Hamburg Steamship Company Limited.

The Lynn and Hamburg Steamship Company Limited was duly formed under the Companies Acts in 1888, and has its registered office and principal place of business in England. So far as appears in the evidence, the *Walter Dammeyer* is the only steamship owned by this company. She was registered as a British ship in 1911, and her port of registry was and is King's Lynn, in Norfolk.

According to the declaration of Arthur Lyon Tassell, the manager of the said company, dated the 19th Nov. 1914, the shares in the said company are held by fourteen persons in all, four of whom are directors—namely: Hermann Dammeyer, of Hamburg; G. A. Meves, of London; Henry Ruffer, of London; and Carl Breithan, of Hamburg.

The fourteen shareholders are:—

	Shares.
(1) Hermann Dammeyer, Hamburg	845
(2) Gertrude Dammeyer, his wife	6
(3) Carl Breithan, Hamburg	50
(4) Henry Ruffer, London	160
(5) Walter Savage, Hamburg...	2
(6) G. A. Meves, London...	100
(7) Hallack and Bond, Cambridge...	10
(8) Helene Schrader, Brunswick	10
(9) Frederick Cleves, London...	10
(10) Charles Ford, St. Leonards-on-Sea	16
(11) Alfred Bone, Streatham Hill	1
(12) George Charles Vasmer, London	210
(13) Charles John Bailey, London	150
(14) Thomas G. Bilton, Wallington, Surrey ...	40
	1610

The four directors, according to Mr. Tassell, are:

Dammeyer: A naturalised British subject, living in London till six or seven years ago, when he went with Walter Savage, the secretary of the company, to Hamburg, where he has lived ever since. When war broke out the secretary was interned by the German authorities, but Dammeyer has remained at liberty in Hamburg.

Meves: A British subject, born and living in London.

Ruffer: A naturalised British subject, 1891, of Swiss origin, but born in France.

Breithan: A German subject, living in Hamburg.

I have no doubt, from the history of Dammeyer, and the fact that he is now living freely in Hamburg, though the secretary, who lived with him there, has been interned, that though naturalised here he is recognised as a German subject by the German authorities.

It was proved to my satisfaction that Dammeyer has been to all intents and purposes an autocrat in managing the affairs of this so-called English company from Hamburg before and since the war, and especially in the management of the only steamship belonging to this steamship company.

The correspondence and minute book of the company show this, but I do not propose to go through them in detail in my judgment. They were put in evidence before me.

I am satisfied that this company, though nominally composed of these fourteen shareholders, of whom four were directors (of whom two were Germans), was entirely managed and directed from Hamburg by Hermann Dammeyer. The declaration of Mr. Tassell shows that when the London directors wished to let the ship on

charter, Mr. Dammeyer, by his agent in Holland, peremptorily forbade it, with the result that the London directors at once submitted and abandoned the idea.

The name of the ship was subsequently changed from that of *Walter Dammeyer* to *Polzeath*, and she is now in the hands of the Admiralty.

On or about the 30th Oct. 1914, after war had been declared between this country and Germany, the plaintiff Walter Charles Searley, acting Registrar of Shipping at King's Lynn, pursuant to sect. 51 of 6 Edw. 7, c. 48, required from Mr. Tassell, the manager at King's Lynn, evidence to be given to his satisfaction that the ship was entitled to be registered as a British ship, and Mr. Tassell made the declaration and furnished the other information to which I have before referred.

Not being satisfied, Mr. Searley commenced this action under the provisions of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 1, 69, 71, and 76), to have the ship declared forfeit to His Majesty.

The question I have to ask myself is whether the *Polzeath* is entitled to her registry as a British ship, or whether she is in fact a German ship assuming a British character and using the British flag wrongfully, being, in fact, subject to the orders and direction of a company German in feeling and controlled by a German resident in Germany.

My attention has been called to several decisions as to what is to be looked to in order to ascertain the true character of this so-called English company and English ship. These cases are: *Palmer* v. *Caledonian Railway Company* (*ubi sup.*), *San Paulo Railway Company* v. *Carter* (*ubi sup*), and *De Beers Consolidated Mines Limited* v. *Howe* (*ubi sup.*).

The cases come to this, that to decide the true character and entity of a business or company you must ascertain where the motive or directing force of the business or company comes from; in other words, where the real life is, and not where the limbs move to give effect to that living motive power.

The whole of the documents in this case point to Mr. Hermann Dammeyer as the life and driving force of this so-called English company and director of the use to which this single ship of the company is to be put, and the English shareholders and directors as mere puppets pulled by his strings. In my opinion, the whole history of this gentleman, although he has been naturalised in this country, leads me to the belief that he still considers himself a German, and by residing at Hamburg during this war without molestation by the German authorities he is recognised by them as a German subject, and as such must be considered in this court, and the company and ship which he so controls are not entitled to registration as an English company or an English ship.

I therefore declare the *Polzeath* to be forfeited to His Majesty.

There will be judgment for the plaintiff with costs.

June 8, 1916.—*Raeburn* moved the court on behalf of the British shareholders in the company, asking that they might be made parties to the suit, and that the court should hear an application in support of their interest. If the British shareholders were made parties to the proceedings they would ask for an order that the forfeiture of the ship should not entail the forfeiture of their interest in her. The questions raised were whether the court had power to make any such order; whether, if the court had such power, the court would, under the circumstances, exercise it, and what the nature of the relief ought to be. It is submitted that the court has power to make an order to protect the British shareholders under sect. 76 (1) of the Merchant Shipping Act 1894, which provided that "where any ship has either wholly, or as to any share therein, become subject to forfeiture . . . the court may . . . make such order in the case as to the court seems just." The circumstances were such that, if the court had power to make the order, the court should make it for the British shareholders, who held 699 shares out of a total 1610 in the company, could have done nothing to prevent the managing director from adopting the course which resulted in the forfeiture. [BARGRAVE DEANE, J.—Could they not have got rid of the managing director?] It might have been possible, but the action of the British shareholders in not doing so was not a matter which should tell against them, as the circumstances were so novel. With regard to the nature of the relief that might be granted, the shareholders submitted that when the Crown sold the vessel the British shareholders should receive an amount out of the sum realised proportionate to their holding in the company.

Leslie Scott, K.C. and *James Wylie* for the Crown—The ship was owned by the defendant company. The shareholders in the company have no *locus standi* whatever, and ought not to be made parties to the proceedings. The words "make such order in the case" in sect. 76 (1) referred to the case before the court, and that case was not concerned with the rights of individual shareholders, it only dealt with the question whether a company owning the ship was a body corporate established under and subject to the laws of some part of His Majesty's dominions, and having its principal place of business in those dominions. As to whether the court should make an order in favour of the British shareholders. Even if the court had the power to make such an order, in this case it ought not to exercise its power in favour of the shareholders because they had allowed the principal place of business to be outside His Majesty's dominions, and were breaking the law in allowing that. The court should not make the order asked for by the applicants.

Raeburn in reply.

BARGRAVE DEANE, J.—I will give the British shareholders leave to become parties to the proceedings. The question which I have now to determine is whether I can discriminate between the British shareholders and the German shareholders in the company which owns this ship. I do not think I can discriminate. My view is that the British shareholders had the right if they had liked to exercise it as soon as they found that the principal place of business of the company was not in a place in His Majesty's dominions, to have had the administration of

the company taken out of the hands of the managing director.

They did nothing of this kind, but allowed things to go on as before, therefore I think I ought not to grant them any relief even if I have the power to do so.

The ship having been forfeited to the Crown it is, of course, open to the Crown to exercise that consideration towards the British shareholders which the Crown in its clemency may think they are entitled to.

I must reject this motion with costs.

The company and the British shareholders appealed from the decision of Bargrave Deane, J.

MacKinnon, K.C. and *Dunlop* for the appellants, the owners of the *Polzeath*.

The *Attorney-General* (Sir F. E. Smith, K.C), *Leslie Scott*, K.C., and *J. Wylie* for the respondent.

The arguments were the same as in the court below, and, in addition to the cases cited in the court below, the following was cited:

The Annandale, 37 L. T. Rep. 139; 3 Asp. Mar. Law Cas. 489; 2 Prob. Div. 218.

Swinfen Eady, L.J.—The question raised by this appeal is whether the ship that was formerly called the *Walter Dammeyer*, but since she has been chartered by the British Government, has been called the *Polzeath*, was rightly pronounced by the judgment now under appeal to have been forfeited.

The proceedings have been taken under the Merchant Shipping Acts to sustain a cause of forfeiture of the ship to the Crown. It is provided by the Merchant Shipping Act 1906, s. 51, sub-sect. 1, that:

Where it appears to the Commissioners of Customs that there is any doubt as to the title of any ship registered as a British ship to be so registered, they may direct the registrar of the port of registry of the ship to require evidence to be given to his satisfaction that the ship is entitled to be registered as a British ship.

And then by sub-sect. 2:

If within such time, not less than thirty days, as the commissioners fix, satisfactory evidence of the title of the ship to be registered is not so given, the ship shall be subject to forfeiture under part 1 of the principal Act.

Part 1 of the principal Act (Merchant Shipping Act 1894) provides, by sect. 76, that:

Where any ship has either wholly or as to any share therein become subject to forfeiture under this part of this Act, (*a*) any commissioned officer on full pay in the military or naval service of Her Majesty; (*b*) any officer of customs in Her Majesty's dominions; or (*c*) any British Consular officer, may seize and detain the ship and bring her for adjudication before the High Court in England or Ireland, or before the Court of Sessions in Scotland and elsewhere before any Colonial Court of Admiralty, or Vice-Admiralty Court in Her Majesty's dominions, and the court may thereupon adjudge the ship with her tackle, apparel and furniture to be forfeited to Her Majesty and make such order in the case as to the court seems just, and may award to the officer bringing in the ship for adjudication such portion of the proceeds of the sale of the ship or any share therein as the court think fit.

Now the qualification for owning British ships contained in sect. 1 of the Merchant Shipping Act 1894 provides that:

A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description in this Act referred to as persons qualified to be owners of British ships.

And then clause D of that section extends to

Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions.

And sect. 9, which provides for the declaration of ownership that has to be made on registry of a British ship, provides that:

A person shall not be entitled to be registered as owner of a ship or of a share therein until he, or in the case of a corporation the person authorised by this Act to make declarations on behalf of the corporation, has made and signed a declaration of ownership, referring to the ship as described in the certificate of the surveyor, and containing the following particulars.

And then sub-sect. 1:

A statement of his qualifications to own a British ship, or in the case of a corporation of such circumstances of the constitution and business thereof as prove it to be qualified to own a British ship.

I refer to sub-sect. 1 of sect. 9 as aiding the construction of clause D of sect. 1, which provides that the body corporate must have its principal place of business in Her Majesty's Dominions.

It is claimed that in the present case the company's ship was not properly registered in the name of the defendant company, which has not, as is alleged, its principal place of business in Her Majesty's dominions. The company is registered under the English Companies Acts, and at one time its principal place of business was in England. The case made against the company is that at all material times its principal place of business has been not in England, but in Hamburg. In considering what is the principal place of business of a company, assistance is derived from the case of *Palmer* v. *Caledonian Railway Company* (*ubi sup.*). There the words that were being considered were the principal office or one of the principal offices of a railway company. Lord Esher, then Master of the Rolls, said: "I should have thought without any authority that the principal office of the company must be the place at which the business of the company is controlled and managed. The only office that answers this description is the company's office at Glasgow. No part of the business of the company is controlled or managed, in the sense that it is independently controlled or managed, at Carlisle."

The point there was whether service upon the company at Carlisle was a good service upon the company at one of their principal offices, and Lopes, L.J. said: "What I understand by principal office is that office where the general superintendence and management of the business of the railway is carried on. . . ."

And so here, in considering what is the principal place of business of the company, one has to consider the centre from which instructions are given, and from which control is exercised on behalf of the company over the employees of and business of the company, and where control is exercised and the centre from which the company

is managed without any further control except such control as every company or the directors of the company are liable to by the larger body which they represent—the shareholders of the company in general meeting.

To apply these considerations to the facts of this case, it appears that the Lynn and Hamburg Steamship Company Limited, being an English limited company, has an issued capital of 1610 shares. Of those shares one person, Hermann Dammeyer, owns more than half, so that as the voting power is a vote per share, each share carrying a vote, he controls the company in the sense that in general meeting he could carry by a majority of votes any proposition, and no vote adverse to his view could be carried in general meeting. His wife holds six shares, and there is another gentleman, Carl Breithan, a German, also living in Hamburg, who holds fifty shares. Thus Dammeyer, his wife, and Breithan hold 901 shares out of the total of 1610. Those three persons are German subjects. They hold an absolute majority of the shares, and in that way hold the control of the company.

There are, or were, until the outbreak of war, four directors, Mr. Dammeyer, Mr. Breithan, the two German gentlemen, and Mr. Henry Ruffer and Mr. G. A. Meves, both of whom reside in England. The German director, Dammeyer, is chairman of the board, and as such, according to the constitution of the company, has a casting vote in case of equality of votes on the board. If therefore the two German directors were to take one view at a board meeting, and the two English directors another, then Mr. Dammeyer's view, by reason of his being chairman and having a casting vote, would prevail.

Until some six or seven years before the year 1914—the year in which the answers are given to certain questions—Mr. Dammeyer was in England, but at that time, which would make it either 1907 or 1908, Mr. Dammeyer removed to Germany, and took up his residence in Hamburg. The secretary of the company, Mr. Savage, also went with Mr. Dammeyer to Hamburg. He has remained ever since as the paid secretary of the company. Upon the outbreak of the war it appears that Mr. Savage, who is English, was interned in Germany at Ruhleben, and remains interned. Mr. Dammeyer apparently is treated in Germany as a German subject, notwithstanding his English naturalisation, and is at large in Hamburg.

In order to see the way in which and the centre from which the company has hitherto been managed, the first source of information to which one would turn in the ordinary course would be the minute-book, which contains the record of the meetings of the board and what was done at them. But the minute-book is not forthcoming. It would be kept by the secretary, and we are told that it is in Germany.

Questions having arisen—perhaps I will say suspicions having arisen—with regard to this vessel, at the end of Oct. 1914, the Commissioners of Customs and Excise directed the registrar of shipping at the port of King's Lynn to make inquiries with regard to her, pursuant to sect. 51 of the Merchant Shipping Act 1906, and on Nov. 2 the acting collector at King's Lynn (Mr. Searley), as an officer of Customs, wrote to the company as follows: "I have been directed by the Commissioners of Customs and Excise to hold an inquiry under the above Act"—the letter is headed, "Merchant Shipping Act 1906, s. 51"—"as to the title of the steamship *Walter Dammeyer* to be registered as a British ship. You are therefore requested to produce evidence in order to prove to the satisfaction of the commissioners that the above-named vessel is so entitled to be registered. The evidence in answer hereto, which should be in affidavit form, should embody in addition to any other statement you may desire to make." And then there are various matters which are set out in the affidavit—statements as to six matters that are mentioned in the affidavit.

It will be observed that this request refers to sect. 51 of the Act. It requests the company to produce evidence that the vessel is entitled to be registered as a British ship, and whatever evidence they produce is entirely open to them; they may produce as evidence what they please, but, in addition to assist them, specific questions are asked with regard to certain details of the evidence.

They are asked the names and addresses of the directors, and where they reside. Then they are asked: "(3) Has an attempt been made to charter the ship since the outbreak of war? If so, who gave instructions to do so?" Then: "(4) Where is the chairman of the company and the other German director? Have they communicated in any way with the other directors since the outbreak of war? (5) Where is the secretary of the company? Is he taking any part in the business? (6) Is the business of the company controlled and the management of the business conducted at meetings of directors held at the registered office of the company at King's Lynn? Who have attended the meetings since the outbreak of war?"

That letter is answered by Mr. Tassell, the manager of the company. He gives the information which I have referred to with regard to the directors. As to Mr. Hermann Dammeyer, he says: "This director was, to my knowledge, a naturalised British subject during the whole of my acquaintance with him, extending for twenty-four years. He resided in London until six or seven years ago"—it is in Nov. 1914 that this information is given—"when he went to live at Hamburg, and, so far as I am aware, is still a British subject." Then he says that Meves, a director, is a British subject, that Henry Ruffer is a naturalised British subject of Swiss origin born in France, and that the fourth director, Carl Breithan, is a German. Those are the particulars of the two German and the two English directors. Then Mr. Tassell says: "I am the manager of the company, and reside at King's Lynn, and I am a British subject. The secretary of the company, Walter Savage, is a British-born subject, and until Mr. Hermann Dammeyer left London, resided also in London, but left with Mr. Dammeyer, and now resides at Hamburg." He then goes on to say that the company is managed by him subject to the control of the directors. Then No. 3 is an important question: "Has an attempt been made to charter the ship since the outbreak of war?" He says: "Since the outbreak of war no attempt has been made to charter the steamship *Walter Dammeyer*, although it was originally the intention of the London directors and myself to engage the vessel in the home

trade, if profitable employment could be obtained, but Mr. Dammeyer, the director above referred to, communicated through a Mr. Sinnema, of Amsterdam, with me, and intimated that he did not approve of the chartering of the steamer for this purpose, but wished the steamer to remain in dock"; and then he exhibits the correspondence.

The Crown relies strongly upon this correspondence as showing what, without taking it at any fixed date, the real position of affairs is. Counsel for the appellants submitted that it should be taken roughly as since the war. Since the outbreak of war have the control of the company and the principal place of business of the company been in Hamburg? In my opinion we cannot look only to what has happened since the war. We must consider what the position was before the war. But for the moment, looking only to what has happened since the war, what is the position with regard to the chartering of this ship? The two directors being in Hamburg and the minute-book being in Hamburg, what took place on the outbreak of war was that in an informal manner, and in an irregular manner according to the constitution of the company, the two directors in England called to their aid two of the largest shareholders in England, and those four persons met from time to time, and with the assistance of Mr. Tassell, the manager, purported to exercise in England some of the powers of the company. The two shareholders had never been elected on the board, and it is not suggested that they were qualified to act as directors. It is not suggested that this irregular meeting purporting to assume to itself the functions of a board was a regular or legal method of carrying on the business of the company in accordance with its constitution, but it was an honest attempt to do the best they could under the circumstances. As I have said, the minute-book is not forthcoming; the minute-book is in Hamburg; but they started a memorandum-book in which they entered particulars of what this little committee did. One of the first things that they resolved upon was that this ship, which at the moment was idle, should be chartered or worked at a profit, and on the 17th Aug. they enter a memorandum of what they determined to do; they enter it as if it were a resolution of the board meeting: "It was further resolved that the marine and war risk insurance be covered over the period to be arranged if the steamer can be chartered or worked at a fair profit to the company." Then it appears that on the 26th Aug. Mr. Tassell wrote to Mr. Sinnema at Amsterdam — Mr. Sinnema being the medium of communication between London and Hamburg — and he passed the matter on to the chairman of the company in Hamburg. Mr. Tassell communicated in that way the decision at which this committee had arrived at the 17th Aug. He said: "If you are communicating with Mr. Dammeyer please inform him that everything is in good order;" and then the letter contains this statement: "If we can cover her marine insurance at Lloyd's later on, at a reasonable rate, also the war insurance, and can see a chance of running her in the coasting trade at a profit, we propose to do so." As soon as that was communicated to the chairman of the company the authority of the chairman was immediately put in force, and the next thing was a telegram of the 1st Sept. It was apparently a telegram sent from Hamburg to Amsterdam, and from Amsterdam to London. Sinnema on the 1st Sept. telegraphs: "Dammeyer telegraphs not to charter steamer. Expect letter.—Sinnema." The next day there is a letter. I suppose it is sent by the chairman, Dammeyer, to Mr. Tassell, but, obviously, through Amsterdam. On the 2nd Sept. the chairman says: "Referring to my yesterday's communication, kindly put forward to you by Mr. Sinnema, I wish to tell you once more that I will not run any risk with the steamer in the way of a charter or employing the vessel in any way during present hostilities. To cover all the risks seems to me simply impossible, and anyhow, if covered not safe enough for us." The chairman was manifestly exercising the control from Hamburg over the affairs of the company. On the 4th Sept. Sinnema wrote further: "Mr. Dammeyer is of opinion that the employment of the steamer during the war is subject to too much risk, and without mentioning that the insurers (Lloyd's), under circumstances, could not be safe enough for the insurance accounts, the high war premiums will make a remunerating business impossible. Mr. D. therefore does not agree previously the chartering of the steamer for coasting trade, and begs to let the steamer in dock"—that is to say, the steamer is to remain in dock—"awaiting the further development." On the 8th Sept. there is a letter from Mr. Tassell in answer to this: "I have this morning received your letter of 4th instant" from Sinnema. "Will you kindly inform Mr. Dammeyer that his instructions with reference to the steamer shall be carried out, and that we will keep her in dock during the present hostilities, unless requisitioned by the Government, which is not probable." Therefore, notwithstanding the resolution of the 17th Aug. of the informal committee in London, it is overridden by Mr. Dammeyer, and for the rest of that year nothing further is heard about chartering or working the vessel. Mr. Tassell was as good as his word, and the chairman's instructions with regard to the steamer were carried out.

The next question is with reference to the financial control. Having regard to the letter of the 8th Sept. 1914 and to Mr. Tassell's answers, it seems to me to be manifest that the company has three banking accounts, Nos. 1, 2, 3. Nos. 2 and 3 were apparently only fed from No. 1 account. They were operated upon by the manager of the company for local payments, and they were small matters, apparently, which were left in the control of the manager. The principal account of the company is the No. 1. Having regard to what is stated, I think it cannot be doubted that up to the outbreak of war the cheques were all signed by two directors in Hamburg; but whatever cheques were signed they were all countersigned by the secretary, who was resident in Hamburg, acting under the chairman's instructions. Therefore the financial control was in Hamburg. True it is that after the outbreak of war, as the banking account is here, an arrangement had to be made with the bank, and an arrangement was made under which cheques drawn on No. 1 account and signed by two directors, with Mr. Tassell countersigning, were honoured. But that was only in consequence of a special arrangement made after the

outbreak of war, and was not the case up to the commencement of the war; and I think upon the evidence it cannot be doubted that the real position was that all the financial control was exercised in Hamburg, where the secretary lived and where all the cheques were countersigned.

Then there was a question with regard to the insurance of the ship, and so late as the 14th Oct. 1914 instructions are being given through Mr. Sinnema by the chairman in Hamburg with regard to insurance. He is directing matters. On that date Sinnema writes: "To-day I have to write you at the request of Mr. Dammeyer"; and then, in inverted commas, is set out Dammeyer's instructions: "As regards the steamer, which as you know has to remain in dock until my further orders, I wish to see her covered against war risk. Seeing this risk being a harbour risk only, the rate is bound to be very moderate, and I should be glad to hear from you the rate for three and six months on, say, 13,000*l*. On receipt of your reply I will give you instructions."—I, the chairman of the company. It cannot be doubted when regard is had to the facts of the case, that both before and after the war, and at all the material dates, the control and management of this company were in Hamburg.

It was suggested that perhaps at one time the questions that were addressed by the officer of customs did not point to the case that is now raised; but that cannot be maintained, because the second request for information is in this form: "Is not Mr. Hermann Dammeyer the managing director of the company, and has not he had virtual control of the vessel both prior to the outbreak of war and subsequently?" and "How long has the secretary resided in Hamburg?" Those questions point directly to the virtual control and management, and ask whether both before and since the war they have not been in Hamburg. Mr. Tassell answered that, no doubt, to the best of his ability. He says: "Mr. Dammeyer is chairman of the directors of the company, not managing director. The company has never to my knowledge ever had a managing director. The manager at King's Lynn has always practically had a free hand as to chartering steamers, surveys, repairs, freights, arranging officers and crews, &c., advising Mr. Dammeyer as chairman of directors what has been done." That is to say, he acts under the direction of the chairman at Hamburg. To the question whether Dammeyer had not had virtual control both before and after the war, the further answer is: "Mr. Dammeyer has not had virtual control since outbreak of war"—since.

Then a further question was put in regard to the meeting of the directors; and reading carefully what Mr. Tassell says—I have no doubt that he did the best he could for his company—I think it is manifest that until the outbreak of war, except for one meeting of the board yearly in London, all the meetings of the board were held in Hamburg. He is asked where they are held, the question being: "Is the business of the company controlled and the management of the business conducted at meetings of the directors held at the registered office? Who have attended the meetings?" He answers it in this way: "The business of the company is controlled at meetings of the directors, one of which, until the outbreak of war, was held yearly in London." But where were all the other meetings held? The obvious inference is, at Hamburg. Then he says: "Since then all the directors meetings have been held in London"—that is, since the outbreak of war—"not at the registered offices of the company at King's Lynn. These meetings have been attended by the two English directors above referred to, by me as manager of the company, and by two of the largest English shareholders, Mr. Vasmer and Mr. Bilton."

Under those circumstances I think it is clear to demonstration that both before and since the war the principal place of business of this company has been Hamburg; and that being so, I am of opinion that the conclusion of fact at which the judge below arrived was right, and that the evidence which the court has to consider is not satisfactory of the title of the ship to be registered as a British ship. I think it is clear that the principal place of business of the defendant company is not within the British dominions, but in Hamburg. It is true that many of its operations are carried on in England. In addition to owning the ship, it appears to have carried on a considerable business as a trader both in coal and in sugar, and it may well be, as regards the purchase and shipment of coal, that the details were arranged in England; with regard to the purchase and export of sugar from Hamburg, probably all the arrangements were made in Hamburg. One has to consider upon the evidence where is the principal place of business. I am satisfied that the principal place of business is not within His Majesty's dominions. The ship, therefore, is not entitled to be registered as a British ship, and the judgment below condemning the ship to forfeiture was right and must stand.

PHILLIMORE, L.J.—I agree that this appeal must fail. On the 8th March 1911 the appellant company was registered with the collector of customs at King's Lynn as the owner of a ship intended to be a British ship. The appellant company, being a body corporate, in order to entitle itself to own a British ship, had to be one established under and subject to the laws of some part of His Majesty's dominions, and having its principal place of business in those dominions. And, having regard to sect. 9, which establishes the procedure by which a ship is to get upon the register or by which an owner is to get upon the register in respect of a ship, it appears that the corporation must at the time it seeks registration, and to enable it to get the registration, have the same conditions—I use the expression of the section—the same "circumstances of the constitution and business as prove it to be qualified to own a British ship"—that is under sect. 1 of the Act of 1894. At that time the constitution of the company was as stated by Swinfen Eady, L.J. The majority of the shares were held by Mr. Dammeyer. Other shares were held by other Germans. One of the three directors and shareholders was a German resident at Hamburg; Mr. Dammeyer had moved to Hamburg some years before, and had taken the secretary with him. From the time that Mr. Dammeyer had moved to Hamburg, which was before the time the English ship was purchased and registered, only one meeting of directors had been held in

England. The general meeting of the company held also been held in England, but it was evident that there were other meetings of directors, and that, as they were not held in England, they must have been held in Hamburg. On those facts and other facts it is, to my mind, plain that until the outbreak of war the principal place of business of this company was not in His Majesty's dominions, but was at Hamburg.

As regards the state of things since the war, there is, I think, more difficulty, and the appellants have fastened upon that point and have said that the duty of the court is not to inquire whether the ship at some previous stage was entitled to be registered, using the words of sect. 51 of the Merchant Shipping Act 1906, but whether she had a title to be registered at the time when the inquiry was made. I think it right to construe sect. 51 as meaning that the inquiry is as to the title of the ship to be on the register, not to have been put upon the register—that the word "register" is not to be considered as a verb of motion denoting the act of putting on the register, but a static verb, remaining or being upon the register, and that it is right to say that the inquiry is whether there is a title of the ship to be on the register. That expresses, I think, exactly what I mean.

That being so, I will, for the purposes of this case only, assume the argument of the appellants that the fact that at some previous stage the ship was not entitled to be upon the register is immaterial—that is, immaterial for this particular form of procedure, though it might be possible for the Crown, if they would establish a case under sect. 69 of the Merchant Shipping Act of 1894, to proceed for forfeiture under that section, upon the supposition that the ruling in the case of the *Annandale* (*ubi sup.*) applies to the latter Act of 1906—a point upon which I desire to express no opinion.

Assuming, however, all that in favour of the appellants, I cannot get over the difficulty that, to be upon the register, the ship must have been lawfully put there; and, in my view, one must not neglect the initial stage when she was put upon the register for the first time, and at that time the company was not qualified to own a British ship or to be put upon the register as owning a British ship, because the circumstances were the same as they were from that time forward until the outbreak of war, and those circumstances were such that the company had its principal place of business at Hamburg. That, in my judgment, is enough to decide this case, and I am personally rather glad to be able to put it upon that ground, but I do not dissent from the view of Swinfen Eady, L.J., that upon the whole, though the case is much more arguable since the war than it was before the war, the principal place of business, which was at Hamburg, has not been moved from Hamburg since the war, and, therefore, that the corporation still has *de facto*, if not *de jure*, its principal place of business at Hamburg.

I cannot part from this case, however, without dealing with one other matter. It was contended by the Crown in the court below that the only evidence admissible upon this inquiry was the information supplied to the registrar. It was so ruled by the judge, but it was ruled with the consent of counsel for the company, and no point has been made on this appeal by counsel for the company that evidence was improperly excluded which he desired to take. That being the case, this court is not in a position to decide whether or not that ruling of the learned judge was right, and I do not intend to express any opinion upon it, except that I think it is a matter which would on a proper occasion require very serious consideration.

Bankes, L.J.—I agree. The only question which arises in this appeal for decision is, as it appears to me, a question of fact. I think that the materials upon which the court is asked to decide, or rather was in the court below asked to decide, are very insufficient and unsatisfactory, and the amount of information which is given as to the way in which this company has carried on its business is very scanty. But neither party sought to adduce any other evidence in the court below, and both parties are content in this court that the decision should be given upon materials which were in the court below.

Under those circumstances, dealing with those materials, the inference that I draw is that before the war the principal place of business of this company was in Germany. Since the war the inference I draw is that under stress of circumstances the English directors and shareholders have made the best makeshift arrangements they can to do what they consider to be best in their interests, but without any transfer of the principal place of business to this country at all. Under those circumstances it appears to me that the proper conclusion upon these materials as a matter of fact is that the principal place of business of this company has been, and is, without His Majesty's dominions, and that is sufficient for the decision of this appeal.

But two very important questions have been touched upon, and upon those no decision is arrived at by this court. I only mention them in order to avoid the conclusion at any future time that these questions have been considered and decided. They are these: first, whether upon an inquiry under sect. 51 of the Merchant Shipping Act of 1906 it is sufficient to give evidence that at some period in the past history of the vessel the provisions of the statute have not been complied with; and, secondly, whether or not upon an inquiry after the matter has been referred to the court, the parties are limited to the evidence which was supplied to the commissioners. In my opinion both these matters are open for discussion at any future time, and the decision in this case should be treated as a decision upon the facts only.

Raeburn for the English shareholders.—This appeal is an appeal from a refusal of Bargrave Deane, J. to grant them relief in respect of their interest in the Lynn and Hamburg Steamship Company. They seek to have the ship appraised and ask for an order that the British shareholders should be paid a sum proportionate to their holding in the company.

Leslie Scott, K.C.—I object. The shareholders have no right to intervene.

Swinfen Eady, L.J.—What right have your clients to intervene? They have no interest in the ship.

Raeburn.—They have no direct interest in the ship, but they have an interest in the company owning the ship.

SWINFEN EADY, L.J. We are not administering the affairs of the company.

Raeburn.—That is so, but under sect. 76 (1) of the Merchant Shipping Act 1894 the court has power to make such an order as may seem just to the court. Bargrave Deane, J. in his judgment did not decide whether he had power to grant any relief; he assumed that he had such power; but he refused to exercise it in favour of the English shareholders under the circumstance which existed in this case. It is submitted that the court should make an order giving them relief.

SWINFEN EADY, L.J.—In my judgment the British shareholders are not entitled to intervene in this litigation. They are not owners of the ship, nor are they owners of any shares in the ship. They are shareholders in the company, and the company owns the ship. Counsel for these shareholders has suggested that the proper course to pursue would be to have the vessel appraised, and to ascertain in that way what its value is, and if it is sold, either out of the proceeds of the sale or out of the appraised value, there should be paid to the British shareholders such a proportion of the value of the vessel as the number of their shares bear to the entire issued capital of the company. That is to say, there being 1610 issued shares in the company, they should be paid so many 1610th parts of the appraised value or its proceeds if sold. Of course, the court has no power whatever to make any order of that kind. That would be administering the affairs of the company, and it may be that, if the vessel still belonged to the company and the ship were sold, the money might be required to go to the creditors of the company. The court cannot administer the affairs of the company in that way.

In my judgment the British shareholders are not entitled to intervene at all. Their true position is this, that, if by reason of the judgment of the court there is any case of hardship to innocent British shareholders, they can only appeal to the merciful consideration of the Crown. The order giving them leave to intervene will be discharged.

Solicitors for the appellants, *Holman, Birdwood, and Co.*

Solicitors for the interveners, *Burgess, Cosens, and Co.*

Solicitor for the respondents, *Solicitor for Customs and Excise.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 17 *and* 24, 1916.

(Before Sir S. T. EVANS, President, and Elder Brethren of the Trinity House.)

THE FANCY. (*a*)

Collision—Examination steamer proceeding to speak another steamship—Crossing rule—Regulations for Preventing Collisions at Sea 1897, *arts.* 19, 21, 29.

An examination steamer in the Bristol Channel, on a course of N.W., sighted a steamship four points on her port bow and proceeded towards her to speak her. The other steamship was on a course of about E. by N. It was in the ordinary course the duty of the vessel on the E. by N. course to port and pass under the stern of the examination vessel. Instead of doing so, she kept her course and speed as she expected the examination steamer to round to on her starboard side. The examination steamer hard-a-ported and increased her speed to get across the course of the steamship she was approaching.

Held, that both vessels were to blame, the steamship on the E. by N. course for not complying with the crossing rule as there was no special circumstance which excused her departure from it, and the examination steamer for altering her course and speed; but that, as the steamship on the E. by N. course was primarily to blame, the loss would be apportioned, the steamship on the E. by N. course to bear three-fourths and the examination steamer one-fourth of it.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Eirene.* The defendants and counter-claimants were the owners of the steamship *Fancy.*

The plaintiffs' case was that shortly before 7.30 p.m. on the 9th Oct. 1914 the *Eirene*, a steel screw steamship, belonging to the port of London, of 67 tons gross and 26 tons net register, 75ft. in length, manned by a crew of nine hands, was in the Bristol Channel, near the Welsh Hook Buoy, engaged on examination duty. After examining a sailing vessel the *Eirene* was headed north-west, making about four knots through the water with engines at half-speed. The weather at such time was fine and clear, the wind E.N.E., a light breeze, and the tide flood of two to three knots force. The regulation lights for a steamship under way, including a stern light and three vertical white lights (patrol duty lights), were being duly exhibited and burning brightly, and a good look-out was being kept on board of her.

In these circumstances the masthead and, shortly after, the green light of the *Fancy*, which had been previously observed, was particularly noticed about four miles distant about four points on the port bow. The *Eirene* kept her course and speed, carefully watching the lights of the approaching vessel, until she had come so close, without taking any step to keep clear, that collision could not be avoided by her action alone, when the engines of the *Eirene* were thereupon put full speed ahead and her helm hard-a-port as

(*a*) Reported by L. F C. DARBY, Esq., Barrister-at-Law.

the only possible means of avoiding collision, but the *Fancy* continued on at high speed and with her stem struck the port side of the *Eirene*, doing so much damage that the *Eirene* sank soon afterwards.

The plaintiffs charged the defendants with bad look-out, failing to keep clear, failing to ease stop, and reverse in due time, and failing to port.

The case of the defendants and counter-claimants was that shortly before 7.30 p.m. on the 9th Oct. 1914 the *Fancy*, an iron screw steamship, of the port of Tonsberg, in Norway, of 1612 tons gross and 995 tons net register, 260ft. in length, manned by a crew of nineteen hands all told, was proceeding up the Bristol Channel, between Clevedon and Portishead, in the course of a voyage from Hernosund, Sweden, to Sharpness with a cargo of timber. The weather was fine and clear, the wind about N.E., light, and the tide flood of the force of about three knots. The *Fancy*, in charge of a duly licensed pilot, was heading about E. ¾ N. magnetic, and was making about six knots. She carried the regulation masthead, additional masthead, side and stern lights duly exhibited and burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on the *Fancy* observed, distant about one and a half miles and bearing about two points on the starboard bow, the masthead and red lights of the *Eirene*, which also exhibited three white lights placed vertically, indicating that she was on patrol duty. The *Fancy* kept her course, and as the *Eirene* approached apparently for the purpose of speaking the *Fancy* the latter's whistle was sounded, the local pilot's signal of three long blasts to inform those on board the *Eirene* that the *Fancy* was bound to Sharpness. As the *Eirene* came nearer it was seen that the *Eirene*, instead of rounding up on the starboard side of the *Fancy*, as it was expected she would do, and as she could and ought to have done, was shaping to cross the bows of the *Fancy*, and appeared to be increasing her speed, whereupon the engines of the *Fancy* were put full speed astern and her helm hard-a-port, but the *Eirene* came on and with her port side about amidships struck the stem of the *Fancy*, causing her damage, for which her owners counter-claimed.

The defendants and counter-claimants charged those on the *Eirene* with bad look-out, with failing to keep clear when approaching to speak her, with improperly attempting to cross her bows, with failing to follow the usual and ordinary and seamanlike practice of rounding to on her side and failing to port, with improperly increasing her speed, and with neglecting to ease or stop or reverse.

The following collision regulations were referred to:

19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note.—When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

28. The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle or siren—viz.: One short blast to mean "I am directing my course to starboard." Two short blasts to mean "I am directing my course to port." Three short blasts to mean "My engines are going full speed astern."

29. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Bateson, K.C. and *Noad* for the plaintiffs, the owners of the *Eirene*.—The vessels were crossing vessels, and, art. 19 of the collision regulations applies. It was the duty of the *Fancy* to keep clear, and there being no special circumstance present which justified a departure from art. 19, she is to blame. The crossing rule applies when two vessels are making for the same pilot boat:

The Ada; The Sappho, 2 Asp. Mar. Law Cas. 4; 28 L. T. Rep. 825;
The Albano, 10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193.

The reasoning in those cases applies to the facts of this case. The *Eirene* is not to blame. It is admitted she did not keep her course and speed as she ought to have done under art. 21, but, when she saw the *Fancy* breaking art. 22 by crossing ahead of her, she did the right thing in porting and increasing her speed as it assisted the manœuvre adopted by the *Fancy*. The action of the *Eirene* was justified by the note to art. 21.

Laing, K.C. and *D. Stephens* for the defendants, the owners of the *Fancy*.—The *Eirene* was coming out to speak the *Fancy*; both vessels wanted to meet each other, so art. 19 does not apply. The only rule which applies is art. 29. *The Roanoke* (11 Asp. Mar. Law. Cas. 253; 99 L. T. Rep. 78; (1908) P. 231) governs this case. The sole cause of the collision was the *Eirene* crossing the bows of the *Fancy* instead of rounding-to on the starboard side.

Bateson, K.C. in reply.

Cur. adv. vult.

Nov. 23.—THE PRESIDENT.—The collision in this case happened in the Bristol Channel off Walton Bay.

The *Eirene* was a small steamship engaged in patrol duty. The *Fancy* was a Norwegian steamship of 1612 tons gross, laden with timber, and proceeding on her voyage up the Channel towards

Sharpness. The patrol vessel sank in a few minutes after the collision; but, fortunately, all her crew were saved.

The *Eirene* at the material times was in the sole charge of a second mate. He not only had to navigate her, but also steered at the wheel. The *Fancy* was navigated by a Sharpness pilot.

The collision happened in the early days of the war—about two months after its outbreak.

The *Eirene* had been ordered by the examination officer to "head off the steamer coming up channel"—viz, the *Fancy*. The second mate accordingly proceeded, with the engines at half-speed, towards the up-coming steamer. The latter's speed was not far from double that of the patrol vessel. The patrol vessel showed, in addition to the regulation navigating lights, three white lights placed vertically indicating that she was on patrol duty. The two vessels were on converging courses, and would in the ordinary way be crossing vessels. As such the *Fancy* would have the duty of keeping out of the way of the *Eirene*, which was on her starboard side; and the *Eirene* the correlative duty of keeping course and speed. But it was contended for the *Fancy* that in the special circumstances the International Rules as to crossing vessels did not apply.

At the time of the accident no special regulations, instructions, or notices as to signals or methods of approach, as between patrol vessels whose duty it was to make examinations and vessels who would be subject to examination, seem to have been made or given. And I have no information that any such exist now.

The case is therefore of importance to those engaged in the navigation of mercantile ships and of Government vessels.

It was assumed, and correctly assumed, by the pilot of the *Fancy* that the *Eirene* was proceeding on her way towards her to speak her. That was in fact the object of the *Eirene* at the time. But it might not have been. She might have been performing some other work in pursuance of her duties. She was no doubt engaged in special work, and in this sense some special circumstances existed. But in the interest of safety, some rules of navigation must apply; and what others should be substituted for the old and well-established International Sea Rules? Canons of good seamanship would be too general to govern the conduct of vessels in all cases. This does not mean that effect is not to be given in proper cases to the provisions of art. 29, which is generally referred to as the "good seamanship" article.

I deem it my duty to hold that the rules as to crossing ships applied to these two vessels, notwithstanding the special character of the work of the patrol vessel.

The *Fancy's* pilot and officers said they "expected" that the *Eirene* would round-to on the starboard side of the vessel under a port helm in order to speak her.

There was no obligation upon the *Eirene* to adopt that manœuvre; and the *Fancy* had no right to act in contravention of rules under the expectation or impression that she would do so; certainly not without some definite indication from the *Eirene* that her manœuvres would be other than those of a crossing vessel. It was admitted that the *Fancy* did not take steps to keep out of the way of the *Eirene*. It is strange that the pilot did not even take off any of her speed in order to enable the *Eirene* to do what he says he expected. She kept her full speed until the last, although if the orders "Full speed astern" and "hard-a-port" had been given only some few seconds earlier, the collision might have been avoided. In thus failing to take the proper steps to keep out of the way of the crossing vessel on her starboard side, the *Fancy* must be held to be in fault, and must bear blame for the collision.

Even if the prescribed rules did not apply, in my opinion, and in that of my nautical assessors, she must be blamed for acting as she did when those on her bridge admitted they saw the *Eirene* increase her speed an appreciable time before the accident, and at a considerable distance away.

Next, the navigation of the *Eirene* must be considered. Can she be exonerated? It has already been observed that the second mate, who also had to work at the wheel, was solely intrusted with the navigation of the ship. The only other person who seems to have been on deck was an A.B. on the forecastle head. I do not wish to say anything harsh about the second mate. He seemed a man of good character. He had served on coasting sailing ships for some years. But he had never served on a steamer till he joined the *Eirene* about two months before the accident. He had never before been left in sole charge. He held no certificate. He probably thought that the order to "head off" the steamer was tantamount to an order to cross her bows. His mind was not troubled by any crossing rule. It was exercised, seemingly, with one idea, viz., to get red to red to the other vessel. To try to get into this position he ordered his engines "Full speed ahead" from the half-speed at which his vessel had been travelling.

According to the evidence of the engineer this was done some three minutes or so before the vessels collided. This receives corroboration by evidence from the *Fancy*. As there was no record of the time, and estimates of it are uncertain, it is appropriate to note that the engineer said he had increased his revolutions from ninety up to the full-speed number of 147 before the actual collision. The *Eirene* was a small vessel, 75ft. in length, and she was struck amidships. Her course was also altered about the same time by a hard-a-port helm. The alteration of speed and course was not, in the circumstances, justified under the note to art. 21.

Under the articles which I have held to apply, this was wrong navigation for the stand-on vessel. Her case is not one of those (of which *The Roanoke* (1908) P. 231, affords an example) where in special circumstances the give-way ship is precluded from complaining of an alteration of speed and course by a stand-on vessel known to be pursuing her object in the ordinary course of good seamanship.

If in approaching the ship to be examined the patrol vessel had reduced her speed, or even altered her course in seamanlike fashion in order to effect her expected or known object, the position would be different.

The *Eirene* must also be held to blame under the rules.

I will add that, as in the case of the *Fancy* so in the case of the *Eirene*, too, if considerations of good seamanship are applied, apart from the sea

rules, I am of the opinion (in which my assessors also concur) that her navigation was faulty in making to cross the bows of the *Fancy* without clearly indicating that she was proceeding to the port side in order to speak her. But the primary and main fault was that of the *Fancy*.

The blame for the unfortunate collision must be distributed in the proportions of three-fourth parts to the *Fancy* and one-fourth part to the *Eirene*.

Judgment will be entered on the claim and counter-claim accordingly; and there will be an order for the usual reference to the registrar and merchants.

Solicitors for the plaintiffs, *William A. Crump and Son*, for *Gilbert Robertson*, Cardiff.

Solicitors for the defendants, *Thomas Cooper and Co.*

Feb. 3 and 4, 1916.

(Before BARGRAVE DEANE, J. and Elder Brethren of the Trinity House.)

THE NORD. (*a*)

Collision — Compulsory pilotage — Exempt ship —Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 603, 625—*Pilotage Act* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *ss.* 10, 14, 15—*Defence of the Realm Consolidation Act* 1914 (5 *Geo.* 5, *c.* 8)—*Defence of the Realm Regulations* 1914, *No.* 39—*Notice to mariners, 27th March* 1915—*Liability of owners of vessel for damage—Vessel being conducted.*

In a damage action the owners of a Swedish steamship pleaded that their vessel was in charge of a compulsory pilot, and that if there was any negligence in the navigation of the vessel it was solely that of the pilot, for whose negligence they were not responsible. The pilot was found alone to blame. Under the provisions of the Merchant Shipping Act 1894 *the Swedish vessel was an exempt ship, although she was navigating in a compulsory pilotage district. Under the Defence of the Realm Regulations all ships, other than certain British ships, while navigating from Gravesend to London Bridge have to be conducted by pilots licensed by the London Trinity House.*

Held, that, though the Swedish vessel was an exempt ship under the Merchant Shipping Act 1894, *yet the order issued under the Defence of the Realm Regulations* 1914 *made pilotage for the vessel compulsory; and that the owners were not responsible for the damage caused by the collision.*

DAMAGE ACTION.

The plaintiffs' ship, the *Levensau*, was a German steamship which had been ordered to be detained by the Prize Court, and which was registered in the name of the Lords Commissioners of the Admiralty, and employed by the Admiralty coasting trade office. The defendants were the owners of the Swedish steamship *Nord*.

The *Levensau*, a steamship of 2155 tons gross and 1358 tons net register, in charge of a duly licensed Trinity House pilot, was in Halfway Reach of the river Thames, proceeding from Dagenham Jetty to Erith to discharge her cargo. The *Levensau* was heading down river, angling to the south shore, with her helm a-port, and was making about one and a half knots over the ground, shaping over towards the south side of the river. She carried the regulation lights, and a good look-out was being kept on board of her.

In these circumstances those on the *Levensau* saw, three to four cables off and bearing about two points on the port bow, the masthead lights of the *Nord*. The whistle of the *Levensau* was sounded a short blast, her helm was put more a-port, and when the *Nord*, which as she came clear of a dredger below showed her red light, opened her green light, the whistle of the *Levensau* was again sounded a short blast, and her helm was put hard-a-port. Directly afterwards the *Nord* shut in her red light and sounded two short blasts on her whistle, and thereupon the engines of the *Levensau* were put full speed astern and her whistle was sounded three short blasts, but, notwithstanding these measures, the *Nord* came on at great speed under starboard helm, and with her starboard side about amidships struck the stem of the *Levensau*, causing her considerable damage. Shortly before the collision the starboard anchor of the *Levensau* was dropped.

Those on the *Levensau* charged those on the *Nord* with bad look-out, with improperly starboarding, with neglecting to pass port to port, with neglecting to navigate and keep on her proper side of the channel, with proceeding at an excessive speed, and with neglecting to ease, stop, or reverse.

The defendants' case was that the *Nord*, a steamship of 2204 tons gross and 1093 tons net register, bound from Umea to London with a cargo of timber, was proceeding up Halfway Reach, on the north side of mid-channel, in charge of a duly licensed pilot, and was making about five and a half knots. The regulation lights were being exhibited, and a good look-out was being kept.

In these circumstances the masthead and green lights of the *Levensau* were particularly noticed about three-quarters of a mile off, just on the starboard bow. She was angled partly across the river towards the north shore, and appeared to be going to Dagenham Jetty, and there was another steamer above her, also on the north side of the river, showing her masthead and green lights. Accordingly the helm of the *Nord* was starboarded and two short blasts were sounded. The steamer above the *Levensau* sounded two short blasts.

Afterwards the *Levensau* opened her red light and shut in her green, and the helm of the *Nord* was put hard-a-starboard, two short blasts were sounded on her whistle, and her engines were put full speed ahead. The *Levensau* then sounded a two-blast signal, the second blast being a short blast and the first blast being longer than the second, and the *Nord* again sounded two short blasts.

The *Levensau* then sounded one short blast, the *Nord* replied with two short blasts, and the *Levensau* afterwards sounded three short blasts, and, though the *Nord* reversed her engines and hard-a-ported when her bows had crossed the bows of the *Levensau*, the *Levensau* came on and with her stem struck the *Nord* on the starboard side at the after-part of the engine-room.

Those on the *Nord* charged the *Levensau* with bad look-out, with not keeping clear of the *Nord*,

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

with being on the wrong side of the river, with attempting to cross to the south side of the river, with porting, with not passing the *Nord* starboard to starboard, with not stopping or reversing their engines, with not letting go their anchor, and with not indicating their manœuvres by proper sound signals.

Alternatively the defendants alleged that if there was any negligence in the navigation of the *Nord*, which they denied, the same was solely that of the pilot who was in charge of her by compulsion of law.

BARGRAVE DEANE, J. held that the collision was caused by negligence on the *Nord*, and further, held that the negligence which caused the collision was solely that of the pilot.

The following are the material sections of the Merchant Shipping Act 1894:

603 (1). Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force. (2) If, within a district where pilotage is compulsory, the master of an unexempted ship, after a qualified pilot has offered to take charge of the ship or has made a signal for the purpose, pilots his ship himself without holding the necessary certificate, he shall be liable for each offence to a fine of double the amount of the pilotage dues that could be demanded for the conduct of the ship.

625. The following ships, when not carrying passengers, shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district and in the Trinity House outport districts; (that is to say) . . . (4) Ships trading from the port of Brest, or any port in Europe north and east of Brest . . . to any port in Great Britain within the said London or Trinity House outport district.

The following are the material sections of the Pilotage Act 1913:

Sect. 10 (1). Subject to the provisions of any Pilotage Order, pilotage shall continue to be compulsory in every pilotage district in which it was compulsory at the time of the passing of this Act, and shall continue not to be compulsory in every pilotage district in which it was not compulsory at the time of the passing of this Act, and subject to the provisions of this Act all exemptions from compulsory pilotage in force at the date of the passing of this Act shall cease to have effect. (2) Any reference in this Act to a pilotage district in which pilotage is compulsory shall, in the case of a district in which pilotage is compulsory only in part of the district, be construed, if the context so requires, as a reference to that part of the district only.

Sect. 14. Notwithstanding anything in any pilotage order made under this Act, any area in which pilotage was not compulsory at the date of the passing of this Act shall be deemed to be an area in which pilotage is not compulsory for the purpose of determining the liability of the owner or master of a ship being navigated in the area for any loss or damage occasioned by or arising out of the navigation of such ship.

Sect. 15 (1). Notwithstanding anything in any public or local Act the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory. (2) This section shall not take effect until the first day of January nineteen hundred and eighteen, or such earlier date as His Majesty may fix by order in Council, certifying that it is necessary to bring the section into operation in order to enable His Majesty to comply with an international convention. (3) As from the date of the coming into operation of this section, section six hundred and thirty-three of the Merchant Shipping Act 1894 shall cease to have effect.

The following is the material section of the Defence of the Realm Consolidation Act 1914:

1 (1). His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by courts of summary jurisdiction, and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed . . . (*d*) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty. . . .

The following is the regulation under which the order referred to in the judgment was issued:

39. The Admiralty or Army Council, or any pilotage authority acting under their instructions, may make orders as to the pilotage of vessels entering, leaving, or making use of any port, or navigating within any part of the territorial waters adjacent to the United Kingdom, and any such order may provide for pilotage being compulsory for all or any class of such vessels within such limits as may be specified in the order, for the granting of special pilotage licences and the suspension of existing pilotage licences and certificates, and for the supply, employment, and payment of pilots.

Any enactment, order, charter, custom, by-law, regulation, or provision in force for the time being in any area to which any such order relates shall have effect subject to the provisions of the order.

The notice to mariners issued under this regulation, which was in force at the time of the collision, is set out in the judgment of Bargrave Deane, J. The notice is No. 239 of 1915, and was published in the *London Gazette* of Tuesday, the 30th March 1915, No. 29,116, at p. 3122. The notice was issued by command of the Lords Commissioners of the Admiralty; it was dated the 27th March 1915, and came into force at 6 a.m. on the 31st March 1915.

Bateson, K.C. and *Stephens* for the plaintiffs — Even if the pilot of the *Nord* were compulsorily in charge and were solely to blame for the collision, the defendants would still be liable for the damage. Under sects. 603 and 625 of the Merchant Shipping Act 1894 the *Nord* was an exempt ship, and her owners would have been liable for damage caused by the negligence of a pilot on board her. The object of the Pilotage Act 1913 was to ultimately abolish the defence of compulsory pilotage, and the Act was not intended to give the owner of a vessel a right to set up that defence in cases in which he could not have set it up before the Act was passed. The Defence of the Realm Consolidation Act 1914 and the regulations made under that Act may enable the proper authority to make the owners of vessels take pilots on exempt ships, but that fact does not make pilotage compulsory. The Legislature did not intend when passing the Act to give owners the right to set up the defence of compulsory pilotage in cases in which they had no such right before.

Laing, K.C. and *Dunlop* for the defendants.—The owners of the defendants' ship have no power to refuse the services of the pilot. The pilot in this case does not act as the adviser of the master. The master does not retain the control of the vessel, and it is only in such cases that the owners escape responsibility for damage done through the negligence of the pilot:

The Guy Mannering, 6 Asp. Mar. Law Cas. 558; 46 L. T. Rep. 110; 7 P. Div. 132;
The Augusta, 6 Asp. Mar. Law Cas. 161; 57 L. T. Rep. 326.

The reason why owners are not liable for the negligence of a compulsory pilot is that they are compelled to take the pilot on board and have no control over him:

The Maria, 16 L. T. Rep. 717; L. Rep. 1 A. & E 358.

In this case the owners were compelled to take the pilot, who was in sole charge of the navigation, and they are not responsible for the damage done.

BARGRAVE DEANE, J.—The question of compulsory pilotage was quite simple up to 1913, but in 1913 there was a movement on foot to get rid of the defence of compulsory pilotage. There was a good deal of talk about it, and a great deal appeared in the public Press about it, and various opinions were expressed as to the advisability of getting rid of it. The result has been an Act of Parliament, called the Pilotage Act 1913, which has caused much confusion.

It was felt that it was very difficult to alter things without proper notice, and the Act provides for certain things which are not to take effect till a subsequent date, and meanwhile things are to remain the same, and meanwhile also the old Act is not altogether repealed. So that we have contradictory provisions, but I do not think that interferes with my judgment in this particular case.

In this case the question of pilotage arose in July 1915, and the question is, What was the law applicable at that date? The whole state of things was different then, because war had broken out. It was found necessary to pass special legislation with a view of providing for a different state of things from that which was in force at the time of the Act of 1913; and by the Defence of the Realm Act 1914 His Majesty the King was given power, by Order in Council, to issue any regulations he thought fit for the better carrying on of the defence of the realm; and it was enacted that His Majesty by Order in Council might direct any of his naval or military authorities, or any officer thereunder, to issue such regulations as were necessary, and if those regulations were not obeyed penalties would follow.

Among other regulations which were issued is this one to which I have had my attention called: "Notice to Mariners." The date of the "Notice to Mariners" is the 27th March 1915. That is before the date when this question with regard to the *Nord* and compulsory pilotage arose, and the *Nord* was subject to the regulation. The notice provides:

> The following orders as to compulsory pilotage between the Downs and Great Yarmouth made under the Defence of the Realm (Consolidation) Regulations 1914 will come into operation at 6 a.m. on the 31st March 1915, and will supersede those now in force.

Therefore here is a new regulation, having the effect of an Act of Parliament, which is made to come into force on the 31st March 1915, and supersedes everything before it. Therefore we start with an absolutely clean sheet. What does it say? I leave out the first two paragraphs, which do not apply: All ships—it does not say except ships subject to exemption—but (other than British ships of less than 3500 tons gross tonnage, when trading coastwise or to or from the Channel Islands, and when not carrying passengers) whilst navigating in the waters from Gravesend to London Bridge or *vice versâ*, must be conducted by pilots licensed by the London Trinity House.

That is compulsory pilotage in the old form, without any exemption of any sort or kind, and the regulation is passed for the express purposes of war time. Under that regulation it was compulsory, in my opinion, on the *Nord*, which is a Swedish and not a British ship, to take a pilot from Gravesend to London. She took her pilot on board at Gravesend for the purpose of being "conducted" by him to London. I think the word "conducted" means that the pilot is in charge under the old system—that is, in full charge—and entitled to all the assistance he can get from the master and crew. He is in command. Therefore I hold in this case that there was compulsory pilotage in the proper sense of the words, and there will be judgment for the defendants without costs.

Solicitors for the plaintiffs, *Waltons* and *Co.*
Solicitors for the defendants, *Stokes* and *Stokes*, for *Bramwell, Bell*, and *Clayton*, Newcastle-upon-Tyne.

END OF VOL. XIII.