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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.

EDITED BY

JOHN BRIDGE ASPINALL,

BARRISTER-AT-LAW.

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RELATING TO

MARITIME LAW.

House of Lords.

Feb. 9, 12, *and March* 19, 1917.

(Before Lords BUCKMASTER, DUNEDIN, PARKER OF WADDINGTON, SUMNER, and WRENBURY.)

EBBW VALE STEEL, IRON, AND COAL COMPANY LIMITED *v.* MACLEOD AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Contract—War—Sale of ore—Stoppage at mine—Sellers' right to cease to supply—Exception suspending liability—"Affection" clause—Construction of.

By two contracts made respectively in March and Nov. 1914 *the respondents agreed to supply the appellants with a certain quantity of iron ore from a particular mine in Spain by monthly instalments. Each contract contained a suspensory clause, providing that in the event of war, restraint of princes or Government, or other occurrences beyond the personal control of the buyer or seller, affecting* (inter alia) *the mine at which the ore was intended to be worked, the contract should at the option of the party affected be suspended, wholly or partially, according to the extent of the cause or occurrence during the continuance. In consequence of the war the mineowners lost the German market, and as the mines could not be worked at a profit they were closed down, and notice of suspension was given by the respondents to the appellants under the suspensory clause.*

In an action by the appellants claiming a declaration that the respondents were not entitled to suspend the operation of the contracts,

Held, that the mine was affected by the war although there had been no physical interference with it by warlike operations, and the respondents were therefore entitled to give notice suspending the contracts until such time as the supplies might recommence.

Decision of the Court of Appeal affirmed.

APPEAL by the Colliery Company from a decision of the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Lush, J.) which affirmed a decision of Bailhache, J. in the Commercial Court.

The appellants carry on business at Ebbw Vale, in Monmouthshire. The respondents carry on business as iron ore merchants and importers in Glasgow, and they had a branch house at Bilbao. Before the outbreak of the present war the appellants entered into a contract with the respondents to purchase from them 15,000 tons of Axpe-Arrazola calcined spathic iron ore, to be delivered at the appellants' wharf at Newport, Mon., as ordered, in equal monthly quantities, from May 1914 to Sept. 1914, according to mutual arrangement. By the second contract, entered into after the commencement of the war, the appellants purchased from the respondents a further 10,000 to the same ore, deliveries to follow the first contract at the same rate.

Each of the contracts contained the following strikes clause:

In the event of war, restraint of princes or Governments, revolutions, civil commotion, imminent hostilities, blockade of shipping or delivery ports, accidents, strikes, lock-outs, political disturbances, riots, epidemics, quarantine, fire, frosts, floods, snow, the act of God, perils and dangers of the seas and of navigation, explosions, negligence of pilot, master or seaman, delays, interruptions, or stoppage of work through failure of usual coal supply, *force majeure*, breakdowns of machinery, or other occurrences beyond the personal control of the buyer or seller, affecting the mines, ships, railways, docks, wharves, furnaces, or works, from, by means of, or at which the ore is intended to be worked, conveyed, received, smelted or manufactured, this contract shall, at the option of the party affected, be suspended, wholly or partially, according to the extent of the cause or occurrence during the continuance thereof. Any doubt, difference, or dispute to be settled by arbitration.

In the summer of 1914, owing to a strike, the appellants' furnaces had to be damped down, and they were unable to take delivery under the first-mentioned contract. No question, however, arose in this appeal with regard to this delay in delivery, and the second contract was entered into in Nov. 1914 to follow on the first. During Oct. and Nov. 1914 and Jan. 1915 slightly less than 8000 tons of ore were in all delivered. In Jan. 1915 the respondents had in "bings" at Bilbao about 14,000 tons of this ore available for delivery, and they chartered a vessel—the steamship *Juan* of a carrying capacity of 2000 tons—to make nine consecutive voyages to fulfil the contract under which some 17,000 tons had to be delivered.

In Feb. 1915 the mine was closed down owing to the effect of the war upon its financial position by shutting out the German market, and there was also an extraordinary rise in freight owing

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

to the shortage of shipping consequent on the war. The respondent, on learning of the stoppage of the mine, gave notice to the appellants that in consequence of the European war and the abnormal position thereby created they suspended the contract. The appellants then commenced these proceedings, claiming a declaration that the respondents were not entitled to suspend the operation of the contracts. In justification of the suspension the respondents relied upon (*a*) the stoppage of the mine; and (*b*) the shortage of shipping and consequent rise in freights.

Bailhache, J. and the Court of Appeal held that the war was the effective cause of the stoppage of the mine, and on that ground the suspension was justified.

The plaintiffs appealed.

Sir *John Simon*, K.C. and *Leslie Scott*, K.C. (*Micklethwait* with them) for the appellants.—The courts below were wrong in dismissing the action. Whatever happened at the mine could not give the respondents a right to suspend under the contract, for the performance of the contract was not thereby affected within the meaning of the clause. The power to suspend only comes into operation if the deliveries were delayed by the war as the *causa causans* of the delay, and then only to the extent of such delay. Bailhache, J. and the Court of Appeal both held that the respondents could not succeed on the ground that it was advisable for financial reasons to close the output of the mine, or by reason of the shortage of shipping and consequent rise in freight. Lord Herschell in *The Xantho* (6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 12 A. C. 503, at p. 509), overruling *Woodley* v. *Michell* (5 Asp. Mar. Law Cas. 71; 48 L. T. Rep. 599; 11 Q. B. Div. 47), explains the principle of the doctrine of *causa proximo*, and that doctrine has no application here. Even assuming that the war was an approximate cause of the stoppage of the output of the mines, nevertheless the sellers had a large supply of this ore stored in bings awaiting shipment, and they should have allocated the stock in hand towards the contract.

Roche, K.C. (*R. A. Wright* with him) for the respondents.—The clause relied on by the respondents is an affection clause, and cannot be turned in a preventive clause. The war was an event affecting the mines. It was not necessary for them to show that they were totally prevented by such event from making further deliveries. It was enough to establish the fact that they were substantially affected in the performance of the contract by such event and stoppage. [He was stopped.]

The House, having taken time, dismissed the appeal.

Lord Buckmaster.—The appellants in this case are a coal, steel, and iron company, carrying on business at Ebbw Vale, in the county of Monmouth, and the respondents are a firm of iron ore merchants, having their chief place of business at Glasgow, and a branch house at Bilbao. The business of the respondents is to import ore into the United Kingdom, partly to satisfy contracts already made and partly to store and sell as opportunity offers. One special class of ore in which they deal comes from a mine in Spain, situate about thirty miles from Bilbao, called the Axpe Arrazola Mine, and it was with the ore from these mines that the present dispute is concerned.

On the 16th March 1914 the respondents contracted with the appellants for the sale to them of 15,000 tons of this ore to be delivered by monthly deliveries from May to September 1914, ex steamer, at one of the appellants' wharves at Newport. The contract contained special provisions as to the size of the steamer by which delivery was to be made, but in the view that I take of this matter, those provisions are immaterial. The last clause of the contract was a clause entitling either party in certain events wholly or partially to suspend the contract. It is in these words: [His Lordship read the clause set out above, and continued:]

In order to give full effect to the appellants' argument it will be necessary to examine the clause in detail, but a general consideration of its terms shows that the circumstances contemplated as giving rise to the option are not confined to matters which prevent the fulfilment of the contract. A strike at the buyers' works is one of the conditions enabling suspension, but this certainly does not prevent the contract being carried out, since the contract is completed when the ore is delivered at the appellants' wharves at Newport.

On the 2nd Nov. 1914 a second contract was made between the same parties and in the same terms for the sale of a further 10,000 tons of the ore. Delays took place in the deliveries under the first contract. It is not necessary to inquire into the cause of these delays. They were due to the action of the appellants, but it is no part of the respondents' case on this appeal that that action constituted any breach of the contract. In Feb. 1915, owing to these delays, only 7980 tons of the ore had been delivered, consequently 7020 remained for delivery under the first contract and the full 10,000 under the second, making, in round figures, 17,000 tons.

The respondents had no control over the mine from which the ore was obtained. This was worked by a company which had very large trade transactions with Germany. Owing to the war, these trade relations were severed, and in consequence, on the 10th Feb. 1915, the mine was close down and all further deliveries ceased. On the 23rd Feb. 1915 the respondents accordingly served upon the appellants notice of suspension under the clause to which reference had been made. The appellants deny that circumstances had arisen which justified such a notice and the determination of this question is the only matter in dispute on this appeal.

The grounds upon which the appellants support their case are these:

They say that at the time when the notice was served there remained at Bilbao in the respondents' depôt, or as it is described in the evidence "in bing," 14,000 tons of ore; that the respondents had been able to charter a ship known as the *Juan* which would satisfy the conditions of the contract as to size of the vessel and that they had control of this vessel for a time sufficiently long to enable them to tranship the whole 14,000 tons.

These 14,000 tons, therefore, they say, the respondents ought to have delivered under the

contract, and to this extent the war and stoppage of the mine did not affect them so as to justify suspension.

In support of this contention they urge that the suspension clause in the contract is to be read with the following interpretations:

First, that "the event of war affecting the mines" means that the mines are actually affected by the havoc and ravage of war, and that the way in which the mines were affected is in the present case too remote to be within the meaning of the clause.

Secondly, they contend that the whole clause only applies so far as the future ore to be won from the mine is concerned, and that the phrase "at which the ore is intended to be worked" is equivalent to "at which the ore necessary for satisfying future deliveries is intended to be worked." Finally, they say that the respondents were not affected to the extent of the 14,000 tons, since these were available for satisfying the contract, and that the phrase "to the extent of the cause or occurrence," which limits the right of suspension, means the extent to which one of the specified causes has in fact prevented the contract from being performed.

I am unable to agree with this interpretation in any single particular, but, before considering the clause in detail for the purpose of explaining the reasons which have led to this conclusion, it will be desirable to state the circumstances under which the 14,000 tons had been collected at Bilbao.

In the ordinary course of business, the ore is calcined as soon as it is recovered from the mine. By this means all the moisture, of which there is a considerable amount, is driven off. It is then brought down by railway near to Bilbao, put into barges on the river and, in the ordinary course, taken from the barges direct into the loading steamer. It is only when there are no steamers ready to load that it is put on land and is then deposited in a bing. It is obvious that for the purpose of satisfying such contracts as those that are in question in the present proceedings, it would be the height of folly for the respondents to store the ore in bing unless they were compelled to do so. When so stored it proceeds rapidly to reassimilate moisture. The price which the respondents pay for the ore is the price per ton as delivered in the United Kingdom, while the price which they receive for it under the present contract is on a certain percentage of iron in each ton. It follows, therefore, that to allow the ore to absorb, as it well may do, from 7 per cent. to 8 per cent. of moisture (a rate which, in special cases, has been known to go as high as 16 per cent.) would mean that the respondents would both be paying purchase price and freight for the conveyance of water across the sea, without receiving any money for the commodity.

There is no evidence that the 14,000 tons so deposited had ever been, in the intention of the respondents, assigned to the satisfaction of this contract. They were in the habit of shipping about 100,000 tons of this ore a year. That they would have been at perfect liberty, without breach of contract, to deal with this ore as they pleased is not really in dispute. There was no difference in the position of the ore at Bilbao from that of any other deposit of ore that they might have had under their control at Glasgow or elsewhere, and there is nothing to show that they ever had assigned, even in their own minds, this ore in bing to the satisfaction of the appellants' contract. Appropriation of the ore, in the sense of determining the legal right of the respondents to deal with the ore as they pleased, was only faintly argued, and is indeed incapable of being made the subject of serious argument.

In these circumstances, I am clearly of opinion in the first place that the mine was affected by the war. There is nothing in the contract to limit the war there mentioned to a war in which Spain or the United Kingdom shall be involved. There must, therefore, have been something in contemplation by the parties other than the physical interference with the mine due to war-like operations. There can, I think, be no doubt that if anyone had been asked why the mines had closed, he would have answered without hesitation that they had closed owing to the war, and the answer would have been perfectly accurate.

The phrase "at which the ore is intended to be worked" will not support the meaning for which the appellants contend. They say that the ore in the bing was "the ore intended to be conveyed," and that it was not affected by anything happening to the mines, for it had left the mine for good. How the case would have stood if the sellers had evinced any intention, by giving notice or in some similar way, to satisfy the contract with that stock of ore *pro tanto* and not otherwise, need not be decided, for such was not the fact. When the contract was made the "ore intended" was simply Axpe Arrazola ore, and nothing had happened to give the term a more limited meaning. The sellers were still free to supply ore wholly and directly from the mine or wholly or partly from the bing as they chose. The real question therefore is were the respondents affected by what occurred? They clearly were; for they were unable to obtain from the mine the deliveries on which they were entitled to rely for the satisfaction of the contract. It is no answer to this to assert that they could have satisfied the contract out of the material in stock. So, no doubt, to a large extent they could, but this would have prevented them from dealing with that store, as they were clearly entitled to do, by sale to other persons, it may be, at a better price and under more favourable terms; it is impossible, in these circumstances, to say that they were not affected parties.

There remains the consideration of the extent to which they were thus affected. The extent was measured by the cut-off of the whole of their future supplies. Had the mine only partially closed, it might be that they would only have been able to excuse delivery to the extent to which such partial cessation of output interfered with their receipts of ore, but as the whole source of their supply was stopped, I think they were affected to the whole extent of their contract until such time as the supplies might recommence.

I am, therefore, of opinion that the judgment of Bailhache, J. and that of the Court of Appeal is correct, and that this appeal should be dismissed with costs.

Lord Parker of Waddington desires me to say he has seen the judgment I have just read and concurs with it.

Lord Dunedin.—I agree. I need only say I entirely concur in the judgment that has been delivered.

Lord Sumner.—I have had an opportunity of considering the judgment in print, and agree with it.

Lord Wrenbury.—I also concur.

Solicitors for the appellants, *Herbert Smith, Goss, King*, and *Gregory*, for *Colborne, Coulman*, and *Laurence*, Newport, Mon.

Solicitors for the respondents, *Botterell* and *Roche*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 23, 24, 25, *and Feb.* 26, 1917.

(Before Swinfen Eady, Bankes, and Scrutton, L JJ.)

Leyland Shipping Company Limited *v.* Norwich Union Fire Insurance Society Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (marine)—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, Rowlatt, J. 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.

Held, that the torpedoing of the vessel was the proximate cause of the loss, the chain of causation never having been broken from the time she was hit until she sank. The loss was a consequence of hostilities, and the plaintiffs could not recover on the policy.

Reischer *v.* Borwick (7 *Asp. Mar. Law Cas.* 493; 71 *L. T. Rep.* 238; (1894) 2 *Q. B.* 550) *followed.*

Judgment of Rowlatt, J. affirmed.

Appeal by the plaintiffs from a decision of Rowlatt, J., reported 115 L. T. Rep. 219.

The facts and arguments appear sufficiently from the judgments.

Leslie Scott, K.C. and *W. N. Raeburn* for the plaintiffs.

R. A. Wright (*Adair Roche*, K.C. with him) for the defendants.

Cur. adv. vult.

Feb. 26.—Swinfen Eady, L.J. read the following judgment:—The plaintiffs' claim is for a loss under a time policy of marine insurance upon the steamship *Ikaria*. The case was tried without a jury before Rowlatt, J., who gave judgment for the defendants, and the plaintiffs appealed.

The plaintiffs allege that the steamship sank and was lost through perils of the seas, being perils covered by the policy. The defendants deny this, and contend that the ship sank after and directly in consequence of being torpedoed off Havre by a German submarine, being a matter excepted from the policy by a warranty in the following form: "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."

On the 30th Jan. 1915, during the currency of the policy, the ship was on a voyage from South America to Havre and London with a cargo of sugar, cocoa, coffee, bran, and hides. When about twenty-five miles north-west of Havre the vessel was stopped to await a pilot just before half-past twelve (noon). Suddenly the captain and chief officer saw approaching the ship the wake of a torpedo, about 30ft. away forward of the port beam, and almost immediately a great explosion occurred, the torpedo having struck the vessel on the port side abreast of No. 1 hatch. A large hole was made there in the side of the vessel, 3 15 metres wide and 2 6 metres high, 4ft. below the water-line in her then trim; a huge column of water was sent up, which fell on deck and burst out the bulwarks on the port side; numerous pieces of the metal of the torpedo fell on the deck. The vessel began immediately to settle down by the head; according to the chief officer, they sounded and found No. 1 hold filled with water, some water in No. 2, and the forepeak practically half full. The captain ordered the boats out, and, as the vessel appeared to be sinking, he and the crew left the ship and boarded a tug which was close by. The weather was fine and the sea smooth. About an hour later the vessel, although much down by the head, appeared to have stopped sinking, and the captain with part of the crew again boarded her, and, with her own steam and the assistance of a tug and a minesweeper, reached the outer harbour of Havre about 9 30 p.m., and was berthed at the extension quay (Quai d'Escale) shortly afterwards. At this time the vessel was some 17ft. down by the head. Previous to the injury her draught was 23ft. 6in. forward and 23ft. 9in. aft; after the injury and when entering the harbour she was drawing 32ft. forward and 15ft. aft. She was drawing too much water to be able to proceed to the inner harbour or to enter a dry dock.

In the meantime instructions had been given to the *Salamander*, a pumping steamer, to get up steam, and this vessel came alongside as soon as the *Ikaria* was berthed at the Quai d'Escale, about 10.30 p.m., and commenced pumping at once, and continued to do so all night. Arrangements were also made with a stevedore to bring a gang of men as soon as it was light on Sunday

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

morning to discharge cargo forward in order to lighten her. The stevedore's gang commenced on Sunday morning about 7.30, but, after discharging some sixty tons of cargo, they were ordered to cease work between 11.30 a.m. and noon. On Saturday night a gale had sprung up and increased on Sunday; there was a great swell, and the pumping steamer was quite unable to continue her pumping operations alongside the *Ikaria*; the ships were bumping together, and, the *Ikaria* bumping against the quay, the pumping connections were broken, and the weather was so bad that it was impossible to continue pumping. According to the master of the pumping steamer, their pumps gained on the water at first, but not afterwards, as rivets were coming out and the ship was opening where she had been torpedoed, and was strained by the swelling of the cargo.

It is manifest from the evidence that the injury from the torpedo not only involved the collision bulkhead, but also extended to the bulkhead aft of No. 1 hold. There was considerable discrepancy between the ship's log and the engine log as to the effect of the ship's pumps. The latter records that on the day of the injury No. 2 hold was making water, with the ballast pump keeping it down. On the next day (Sunday) the water in the hold was gaining on the pump; at 11 a.m. 3ft. of water in No. 2 hold, at 1 p.m. 5ft. and still rising. The deck log gives quite a different story. But in any case the water was rising in the ship, when about noon on Sunday she was required to leave the Quai d'Escale. Between 11 a.m. and noon a conference of the port engineers of Havre took place, and it was then and there decided that it would be most dangerous to leave a ship in a sinking condition at the Quai d'Escale, at the entrance to the inner harbour and docks, where if she sank she might obstruct the fairway and hinder the docking of the British naval transports and supply ships. The Quai d'Escale during the war is used entirely for military purposes, and is not a berth for ordinary merchant ships—the vessel was placed there temporarily, owing to her injured condition, with a view to saving her if possible. When it was seen that the salvage pumps had to leave her and that her head had not been raised appreciably by the cargo discharged, the risk of her sinking at that berth was too great to allow of her remaining there, and she was ordered to the Batardeau, where she was moored. The same Sunday afternoon the ship took the ground forward as the tide receded, but floated again with the rise of the tide about 8 p.m. On Monday, the 1st Feb., the ship grounded at each ebb, but floated again with the flood tide. Early on the morning of Tuesday, the 2nd Feb., the engine-room forward bulkhead gave way, the ship grounded, and did not float again, and became a total loss.

The plaintiffs contended that the vessel was lost by perils of the sea; that the bulkhead between No. 1 and No. 2 hold remained substantially intact until the vessel broke her back after the third grounding; that the bulkhead gave way owing to the grounding and not from the pressure of water upon it; and that she was finally wrecked by reason of taking the ground at her forefoot while her stern was water-borne. The plaintiffs' case was that the judgment of Rowlatt, J. was erroneous, as the vessel grounded at her anchorage in the outer harbour, near the breakwater, and in consequence became a total loss; that such grounding was an ordinary peril of the seas, for which the defendants were liable under the policy.

In cases of marine insurance it is well settled that it is only the proximate cause which is to be regarded, and that an underwriter is not liable for any loss not proximately caused by the perils insured against. This rule is based, as Lindley, L.J. stated in *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 550), on the intention of the parties as expressed in the contract into which they have entered; but the onus must be applied with good sense, so as to give effect to, and not to defeat, those intentions. The policy, with the warranty, effects an insurance against perils of the sea other than such perils of the sea as are the direct and immediate consequence of hostilities or warlike operations. Where, in the case of a vessel at sea, sea water flows into her through an opening in such quantities that the vessel sinks and is lost, that is a loss through a peril of the sea. If the opening were made by a hostile shell, and in consequence the vessel fills and sinks, the loss would still be by a peril of the sea, but, being the direct and immediate consequence of hostilities, such a loss would not be recoverable under a policy in the form of the present one.

In *Hamilton, Fraser,* and *Co.* v. *Pandorf and Co.* (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518) the loss was through a peril of the sea, and none the less so because it was a rat which made the hole through which the sea water entered and occasioned the damage. In *Dudgeon* v. *Pembroke* (3 Asp. Mar. Law Cas. 393; 31 L. T. Rep. 31; 36 L T. Rep. 382; L. Rep. 9 Q. B. 581; 2 App. Cas. 284) there was a loss by perils of the sea, and the unseaworthiness of the vessel did not prevent the assured from recovering, as there was not any implied warranty of seaworthiness. In *Reischer* v. *Borwick* (*sup.*), if the policy had been against perils of the sea, with an exception of or warranty against damage received in collision with any object and the consequences thereof, the assured would not, in my opinion, have been entitled to recover.

As the policy against sea perils in the present case contained a warranty against all consequences of hostilities or warlike operations, the question arises, Was the loss, assuming it to be by a peril of the sea, the proximate consequence and effect of hostilities? The facts show that the vessel was severely damaged by a torpedo, and that, although every effort was made to save her, she sank and was lost early on the third day afterwards. If to prevent her sinking she had been run ashore immediately after the accident and had become a total loss, the loss would certainly have been the direct consequence of hostilities. Does it make any difference that between two and three days were spent in abortive and unavailing efforts to save her? She was in imminent risk of sinking from the moment of being injured; she was removed from the Quai d'Escale because of the evident risk of her sinking there; she was unable to remain at that quay, and never was able to reach and remain in any place of safety; the fact that she was so much down by the head prevented her removal to the inner

harbour; she had the choice of going outside the breakwater with a view to being beached, or of remaining within the outer harbour; the latter was chosen, but, having regard to her draught, she was bound to ground at every tide at the place where she was moored, unless she could be considerably lightened and her draught lessened, which proved to be impracticable. The risk of her grounding there was deliberately incurred as part of the salvage operations. The train of causation from the act of hostility to the loss was unbroken. She was never out of immediate danger from the time she was first injured to her final loss, and the efforts to save her were acts done by way of salvage. There was not any new intervening cause of loss after the injury by torpedo, no new casualty causing the damage. In my opinion the judgment appealed from was right and should be affirmed, and the appeal dismissed.

Bankes, L.J. read the following judgment:—

In this case the main ground upon which the appellants base their appeal is that the learned judge drew a wrong inference from the facts. They contend that he ought to have come to the conclusion that the proximate cause of the loss of the vessel was her taking the ground after she had been removed from the Quai d'Escale. They further contend that the learned judge ought to have come to the conclusion upon the evidence that the injury to the vessel caused by the torpedo had ceased to be an actively operating source of danger from the moment the vessel was moored at the Quai d'Escale, and that what happened to her afterwards must be considered as a fresh cause of injury quite independent of what had happened previously. They further contend that the taking of the ground by the vessel under the circumstances described in the evidence was quite sufficient to break her back even if she had not met with any previous injury from being torpedoed. These contentions raise questions of mixed fact and law. So far as the questions of fact are concerned, I entirely agree with the conclusions arrived at by the learned judge. The appellants' case on the facts depends very largely upon their being able to establish that the bulkhead separating Nos. 1 and 2 holds was left after the explosion of the torpedo in such a sound condition that the vessel would certainly have remained afloat after her removal from the Quai d'Escale had it not been for her taking the ground in the way she did. It is not necessary to go through all the evidence. It is sufficient to say that I cannot come to that conclusion. I think that the presence of water in No. 2 hold directly after the explosion, the character of the explosion itself, the action of the harbour authorities, who evidently regarded the vessel as doomed, all tend to render the chief engineer's account of the condition of things as contained in his log more probable than that of the captain and chief officer. As a result of a careful consideration of all the evidence, I have come to the conclusion that the view of the learned judge was right when he says that the loss of the vessel was due to two combined causes operating simultaneously—namely, the weakness of the bulkheads, the result of the explosion, and the taking of the ground by the vessel. In other words, the learned judge finds that the injury caused by the torpedo was an actively continuing source of danger to the vessel, which actually contributed in part to her loss. In this conclusion of fact I agree.

I cannot agree with the appellants' contention that, because the vessel had arrived at a place—namely, the Quai d'Escale—which would have been a place of safety had she been allowed to remain there, the case is therefore to be treated as though the vessel had arrived at a place of safety, or with the contention that in any decision upon the facts of this case her removal from the quay must be treated as a point of fresh departure, and that any injury to the vessel before that time must be excluded from consideration. The learned judge appears to me to supply a sufficient answer to these contentions when he says that you do not reach a place of safety unless you are allowed to remain there a sufficient time to ensure safety. Another answer might be supplied by treating the operations at the quay as salvage operations, which, owing to no neglect or default of the shipowner or his servants, could not be continued for a sufficiently long period to secure the safety of the vessel.

It was not disputed that in the view of the facts taken by Rowlatt, J. this case is covered by the authority of *Reischer* v. *Borwick* (*sup.*). It was contended that the decision in that case could not be reconciled with *Pink* v. *Fleming* (6 Asp. Mar. Law. Cas. 554; 63 L. T. Rep. 413; 25 Q. B. Div. 396) and with other cases in which on claims on policies or on bills of lading the question of the proximate cause of a loss has been considered. It may be that the Court of Appeal in *Reischer* v. *Borwick* (*sup.*) took a certain view of the facts of that case which had not previously been discussed in other cases; but the authorities to which we were referred do not seem to me to be irreconcilable. They may, I think, be divided into classes. There is first of all the class where the loss complained of was the result of a cause not covered by the policy, though that cause was clearly consequent upon a cause which was covered by the policy. *Pink* v. *Fleming* (*sup.*) is a good illustration of this class. The injury to the goods was the result of their being handled. This was the sole cause, and the proximate cause also, of the loss, though the necessity for handling the goods was consequent upon an injury to the vessel causen by perils of the sea. Another class of cases consists of those in which the policy contains no warranty or exception material to be considered, and where, therefore, the only question is whether upon the facts it can be said that the loss was covered by the contract. To this class of case the language of Willes, J. in *Grill* v. *General Iron Screw Collier Company* (2 Mar. Law. Cas. O. S. 362; 14 L. T. Rep. 711; L. Rep. 1 C. P. 600, 611) directly applies. He says: "A policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract." Lord Herschell cites this passage with approval in *The Xantho* (6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 12 App. Cas. 510). A good illustration of this class of case is afforded by *Dudgeon* v. *Pembroke* (*sup.*). In that case the vessel was unseaworthy, and was lost by perils of the sea because she was unsea-

worthy; but, inasmuch as the policy was a time policy which contained no warranty of seaworthiness, the assured were held entitled to recover. *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*), though an action on a bill of lading, may, I think, be considered as being in the same class. Had the bill of lading in that case contained an exception of injury by rats, the same considerations would have applied as, in my opinion, apply to a third class of cases—namely, those where the policy contains some warranty of exception. The present case falls within this class. The warranty is in these words: "Free from all consequences of hostilities or warlike operations." The presence of this clause renders it necessary to inquire not only whether but for the exception the loss would be covered by the contract, but also whether the loss has in whole or in part been caused by an excepted peril. If the result of the latter inquiry is that it has been so caused, it seems to me that the loss is not covered by the policy.

In this connection it becomes necessary to consider a passage in the speech of Lord Bramwell in *The Xantho* (*sup.*). In speaking of the collision in that case he speaks of it as a *causa sine qua non*, but not the *causa causans*. It was, he says, the *causa remota*, but not the *causa proxima*; the *causa proxima* of the loss was foundering. If that dictum is applicable to the facts of this case it would be a weighty authority. In the case of a collision where a vessel is injured to such an extent that the inrush of water is sufficient to sink her in a few minutes, it seems to me impossible to sever the causes of loss so as to to be able to say that the inrush of water was the cause of the loss to the exclusion of the collision injury. Such a case appears to me to be necessarily one where the loss must be treated as due to the two causes operating simultaneously, neither of which can separately be considered as the cause, much less as the proximate cause, though the two combined may be treated as the proximate cause. In the case of *Re Etherington and Lancashire and Yorkshire Accident Insurance Company* (100 L. T. Rep. 568; (1909) 1 K. B. 591, 599) Vaughan Williams, L.J. says this: "In my opinion it is impossible to limit that which may be regarded as the proximate cause to one part of the accident. The truth is that the accident itself is ordinarily followed by certain results according to its nature, and if the first step in the consequences so produced is death, it seems to me that the whole previous train of events must be regarded as the proximate cause of the death which results."

This view of the law is probably too widely expressed to be capable of general application, but the language of the Lord Justice, in my opinion, applies to the present case if the facts are interpreted as I interpret them and as the learned judge in the court below interpreted them. The same reasoning appears to me to have been applied to the facts in the case of *Reischer* v. *Borwick* (*sup.*), and I see no ground why I should not be content to follow that decision, which does not appear to me to be inconsistent with previous decisions. I agree that the appeal fails.

SCRUTTON, L.J. read the following judgment:

At midday on Saturday, the 30th Jan. 1915, the steamer *Ikaria* was torpedoed by a German submarine in the English Channel. She kept afloat and managed to reach Havre, her port of destination, that evening, but about 9 a.m. on Tuesday, the 2nd Feb, she sank at her moorings in the outer harbour. Her owners, the Leyland Shipping Company Limited, were insured against ordinary sea perils in the Norwich Union Fire Insurance Society Limited, with a warranty "free of all consequences of hostilities," and also on another policy for a smaller amount against war risks. They sued the Norwich Company, alleging a loss by perils of the sea; the defendants reply that the loss was a consequence of hostilities. Rowlatt, J. decided in favour of the defendants, and the shipowners appeal to this court. The case gives rise to those difficult questions which have always to be considered when it is necessary to apply the well-known maxim that in matters of insurance *causa proxima non remota spectatur*.

The shipowners allege that the loss was caused by the entry of water into the No. 2 hold and engine-room in large quantities; that this entry was due to the giving way of two bulkheads, due in turn to three groundings on three tides at the second berth of the ship at Havre and a heavy swell at the first berth, and to the orders of the Havre authorities to the ship to move from her first berth, which orders were not in fact justified by the necessities of the case. This entry of water into hold No. 2 they say was the proximate cause; the torpedo damage which let water into hold No. 1 was only a remote cause of the loss. The defendants reply that from the time of the explosion, due to the torpedo, the ship was a stricken or dying ship, and her subsequent history was merely unsuccessful attempts to save her. She sank because of and from the immediate and direct results of the hostile attack.

It is first necessary to consider the facts of the case, most of which are derived from printed or written evidence. The explosion at noon on Saturday, the 30th Jan., tore two large rents in the side of No. 1 hold, which at once filled with water. The forepeak leaked badly and became half full of water. A small quantity of water came into the bilges of No. 2 hold, but not above the tank tops. It came either from started rivets or a strained bulkhead between holds Nos. 1 and 2. The vessel settled by the head and the crew left her, but, finding she did not sink, returned to her. Under her own engines, working slow, and with the assistance of a tug and mine-sweeper she proceeded towards Havre, which she reached that night between nine and ten o'clock. She was taken to a berth, the Quai d'Escale, in the harbour, outside the dock gates, and therefore exposed to any swell which might come from the sea outside. A salvage steamer began at once pumping at her forepeak, and her ballast pump was working at No. 2 hold. To pump No. 1 hold was to pump the Channel. At daylight a large number of men began discharging cargo from the forepeak and hold No. 1, and about sixty tons were got out. But the swell into the harbour rendered it difficult for the salvage steamer to work, and bumped the vessel against the quay. It was doubtful whether the vessel was doing more than hold her own as regards her draft forward. The berth where she was lying was the Red Cross berth of the British army; Havre was their principal base, and a vessel sinking in that berth would seriously

obstruct the navigable channel. The harbour authorities, in view of the national interests involved, were very prudently taking no risks; and at 11 a.m. they stopped discharging, and gave the ship the option of going outside the harbour to beach herself or do what she liked, or of mooring at a place they indicated inside the Batardeau, the outside breakwater, as sheltered as possible from the swell. The *Ikaria* anchored in this place at 1 p.m. on Sunday, the 31st Jan. I do not think the ship's representatives thought she was going to take the ground, unless she sank. The captain wires on the Sunday, "Ordered her anchorage within outer harbour," and writes: "The authorities have ordered us to anchor in the outer harbour on account of the vessel being liable to sink and therefore blocking the harbour." The ship's agent writes on the Monday: "The authorities, fearing the vessel might sink at this berth . . . ordered her away to the western extremity of the outer harbour, where she is at anchor . . . in an exposed position; should a gale from the north-west arise, the captain fears she may be blown on to the breakwater. . . . As soon as circumstances permit she will be taken to the dry dock." This was obviously not an intentional beaching for safety; but in fact the vessel took the ground forward, being some 17ft. down by the head, at each low tide for four or five hours a tide. This position must have strained any sound ship, still more a ship badly weakened forward by the explosion. It is difficult to believe it was not known this would happen at the first tide; it was certainly foreseen and submitted to at the second and third tides, and was therefore at those tides an intentional, as distinguished from an accidental, grounding. After the third grounding the bulkheads between holds Nos. 1 and 2 and bold No. 2 and the engine-room gave way, and the vessel filled and sank. There was considerable controversy as to the state of the bulkhead aft of hold No. 1, and the consequent amount of water in No. 2 hold, before the groundings. The mate's log and the oral evidence represent the pumps as keeping down this water till on the morning of Monday, the 1st Feb., there were only 7in. in the port bilge and 1ft. 7in. in the starboard, and that the rise of water in No. 2 hold only began after the grounding that afternoon. But the engineer's log tells a very different story. It represents the water in No. 2 as beginning to gain on the pumps from Sunday midday, still rising all night, 6ft. on Monday morning, and 12ft. on Tuesday morning, as against the 13in. mean draught of the mate's log at that time. Unfortunately these figures were not put to the other ship's witnesses by the defendants, who only put in the engineer's log at the trial. The explanation may be error in dates, as the engineer's log states he left the ship on the afternoon of the 3rd Feb., while the experts' report states they kept the tug by the ship on the night of the 3rd Feb. to take off, if necessary, the chief engineer, "who had remained on board." Rowlatt, J. found that the bulkhead between Nos. 1 and 2 holds was seriously weakened by the explosion; and, in view of the engineer's log I see no ground to dissent from this finding. He found that in good weather, and if allowed to stay at her first berth, the *Ikaria* might have been saved. He found that in fact she sank from her bulkheads, weakened by the explosion, giving way, and from the strain of the grounding; or, in other words, from grounding in her damaged condition. He is not satisfied that if a sound ship had grounded in this way in this trim she would have suffered these injuries. I agree with these findings, but I think it also follows, whatever the legal effect may be, that the sinking did not necessarily follow from the explosion; that is to say, that with fine weather and a stay in the first berth the ship would have been saved; with the weather she in fact met, and in the berth to which in consequence of that weather she was ordered, she was lost.

What is the legal effect of these facts under the policy? The claim is one for loss under a policy of insurance, and, in deciding whether a loss is occasioned by a peril insured against it is the long-established rule that the proximate and not the remote cause is to be looked at. Lord Lindley said in *Reischer* v. *Borwick* (*sup.*): "This rule is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not defeat, those intentions." With great respect to that learned judge, I doubt whether anyone unfamiliar with the rule of *causa proxima* and reading the words of a Lloyd's policy or bill of lading would discover it was "the intention of the parties" to apply it. It is in my view a judge-made rule of construction, which came into existence because it was found that, among the infinite variety of causes which contribute to produce any given result not even "good sense" could select with any certainty the real cause of the loss. The underwriters, familiar with the law of their business, know of it; to most assured it comes as a surprise when they inquire as to the legal effect of their policy.

The group of cases decided by the House of Lords in 1887 on the meaning of the words "perils of the sea" contains authoritative statements of this rule. In *The Xantho* (6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 11 Prob. Div. 170), where a ship had been sunk by collision, and the Court of Appeal had previously held in *Woodley* v. *Michell* (5 Asp. Mar. Law Cas. 71; 48 L. T. Rep. 599; 11 Q. B. Div. 47) that collision caused by negligence of the other ship was not a peril of the sea, the Court of Appeal had held that mere proof of collision did not protect the shipowner under a bill of lading. Lord Esher had said (11 Prob. Div. 172) that in a policy only the *causa proxima* of the loss was to be looked to; under a bill of lading "the real and moving cause of the loss" had to be sought for; and that where the collision was caused by negligence, that, though not the *causa proxima*, was the real moving cause of the loss. In *Pandorf and Co.* v. *Hamilton, Fraser, and Co.* (6 Asp. Mar. Law Cas. 212; 54 L T. Rep. 536; 17 Q. B. Div. 670), where a rat ate a bath pipe, whereby salt water entered the hold and damaged goods, the Court of Appeal had held the shipowner was not protected by an exception of perils of the sea in the bill of lading. Lord Esher repeated his statement of *The Xantho* (11 Prob. Div. 172) as to the different rules of construction applicable to policies and bills of lading, holding that in the latter the *causa causans*, the "real effective cause," was looked

for, and held that the rats were the cause, the real effective cause, of the damage, and the sea was not. The House of Lords (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 503, 518) reversed both these decisions, pointing out that the rule of *causa proxima* applied equally to policies and bills of lading, with this difference, that there was in the latter, unless excluded by a negligence clause, an implied term against the negligence of the shipowner and his servants. They held that the proximate cause of each loss was the entry of sea water, a peril of the sea, and the fact that the sea water entered through rats or the negligence of others was immaterial, for only the proximate cause was considered. "In the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel": (Lord Herschell in *The Xantho*, *sup.*). "The ordinary rule of insurance law is that . . . you are not to trouble yourself with distant causes, or to go into a metaphysical distinction between causes efficient and material and causes final; but you are to look exclusively to the proximate and immediate cause of the loss—the proximate and absolute certain cause of the loss": (Willes, J. in *Ionides* v. *Universal Marine Insurance Company*, 1 Mar. Law Cas. O. S. 353; 8 L. T. Rep. 705; 14 C. B. N. S. 289). In *The Xantho* (*sup.*) Lord Herschell says: "I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler* (5 M. & S. 461), where a ship having been sunk by another ship firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea" (they held it was a loss within the general words). "I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases." It was suggested in argument that this passage laid stress on the word "accidentally"; but I think this means, as was held by the Court of Appeal in *The Torbryan* (9 Asp. Mar. Law Cas. 450; 89 L. T. Rep. 265; (1903) P. 194, 201), where reckless use of hooks damaging bags was held "an accident," "a fortuitous and unexpected occurrence" to the injured ship, just as murder has been held an "accident" to the victim under the Workmen's Compensation Act. The expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or untoward event which is not expected or designed: (per Lord Macnaghten in *Fenton* v. *Thorley and Co.* (89 L. T. Rep. 314; (1903) A. C. 443, 448). Murder was held an accident to the victim by the House of Lords in *Trim Joint District School Board* v. *Kelly* (111 L. T. Rep. 305; (1914) A. C. 667). In *The Xantho* (*sup.*) Lord Bramwell said: "Was it by a peril of the sea that the defendants' ship foundered? The facts are that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. . . . The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering." This strict rule has been applied in all classes of insurance case. In *Winspear* v. *Accident Insurance Company* (43 L. T. Rep. 459; 6 Q. B. Div. 42), on a policy against personal injury causing death, with a proviso that it should not extend to injury caused by or arising from natural disease, the Court of Appeal held that the death of a man, who was drowned in a stream into which he fell while in an epileptic fit, could be successfully sued for under the policy. This was followed in *Lawrence* v. *Accidental Insurance Company* (45 L. T. Rep. 29; 7 Q. B. Div. 216), where a man was killed on the railway, on which he had fallen in a fit, by a passing train. The judgment in this case of Watkin Williams, J., a judge very experienced in insurance law, is worthy of attention where he points out that the fit was not the "proximate and immediate cause of the death." He also takes the view that, once you get a succeeding accident or cause, it is immaterial how closely in point of time it follows the first accident or cause; there is a break in the chain of causes. See also the discussion of the question by the Court of Appeal in *Re Etherington and Lancashire and Yorkshire Accident Insurance Company* (*sup.*). In *Taylor* v. *Dunbar* (L. Rep. 4 C. P. 206), where storms delayed a ship so that her cargo of meat went bad, it was held that it was not a loss by perils of the seas, as they were not the proximate cause of the loss. In *Davidson* v. *Burnand* (3 Asp. Mar. Law Cas. 207; 19 L. T. Rep. 782; L. Rep. 4 C. P. 117), where an engineer negligently left a valve open so that sea water flowed in and damaged cargo, it was held a loss by perils of the seas, or the general words as the vessel was in harbour, and the negligence was not the proximate cause of the loss. In *Dudgeon* v. *Pembroke* (*sup.*), where the vessel was unseaworthy at starting, though, it being a time policy, there was no warranty of seaworthiness, and was then driven ashore by storms, the loss was held by the House of Lords a loss by the perils of the sea, Lord Penzance saying (*Ibid.* 297): "A long course of decisions in the courts of this country has established that *causa proxima et non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action or some other cause which is not within it." In that case, therefore, the shipowner succeeded because the proximate cause of the loss was perils of the sea. He would have failed under a voyage policy with a warranty of seaworthiness, even though the unseaworthiness had nothing to do with the loss, not because perils of the sea were not the proximate cause, but because, owing to the breach of the warranty, the policy never attached. Other cases and illustrations may be multiplied indefinitely.

It seems, therefore, that, had this been a policy against perils of the sea only, there would, on the facts of this case, have been a loss by perils of the sea, the entry of sea water into the vessel, and the

underwriters could not have successfully pleaded: "This is not a loss by perils of the sea, but by enemies."

The next step seems to me much more difficult. It is said that this is not a policy against perils of the sea only, but includes a warranty, "warranted free from all consequence of hostilities or warlike operations," and it is said, even if this loss be within the policy as proximately caused by perils of the sea or men-of-war, it is taken out again by the exceptive warranty, because it was the consequence of hostilities. The operation of such a warranty is to take out of the policy a loss which would otherwise be within it. "The warranty is intended to withdraw from the protection of the policy certain of the risks which are *primâ facie* covered by it": (per Mathew, L.J. in *Robinson Gold Mining Company* v. *Alliance Insurance Company*, 86 L. T. Rep. 858; (1902) 2 K. B. 489, 502). The inartistic character of the warranty, in that it uses different language from that of the enumeration of risks, has been frequently commented upon, and it has been pointed out that the words "capture, seizure, detention, and the consequences thereof, &c.," in the warranty are really equivalent to "men-of-war . . . enemies . . . arrests, restrainments and detainments of all kings, &c.," in the risks in the policy. It has not hitherto usually been considered that the operation of the f.c.s. clause was to take out of the policy other perils than those of war and the kindred risks; it has not been supposed to affect losses proximately caused by perils of the sea. It has been further pointed out that the warranty should be construed as if it were a reinsurance against the perils named in it; so that to be protected by the warranty a person so reinsured must be able to prove that the perils excepted were the proximate cause of the loss: (per Erle, C.J. in *Ionides* v. *Universal Marine Insurance Company*, *sup.*). And the words of this very warranty, "consequences of hostilities," were construed in the same case by Willes, J. to mean the proximate consequences or effects of hostilities only. "If you cannot presume the exception of loss from a consequence of hostilities to involve all consequences, however remote, you are necessarily driven to say that the word 'consequences' is to be dealt with, according to the ordinary rule, as meaning proximate consequences only": (14 C. B. N. S. 290). The bearing of this on the construction of the present policy would seem to be that, as the policy insured against the proximate consequences of the perils of the sea, the assured would recover for these, unless they could also be said to be proximate consequences of hostilities. It was was therefore contended by the shipowners that the hostilities were the torpedoing of the ship; that the proximate consequences were a hole in No. 1 hold through which water came, but that this did not sink the ship, for she remained afloat for three days, and that what sunk her was another hole in the ship, namely, the giving way of the bulkhead and the consequent entry of water, and that before this happened other causes came into play, the grounding and the swell in the harbour, so that the second entry of water was not a proximate but a remote consequence of hostilities. To illustrate, it could not be a proximate effect or consequence of hostilities that a man injured by the bursting of a shell was then killed by a passing motor-car, because owing to his crippled condition he could not get out of the way fast enough; or, to take the case actually put in the authorities, that a ship crippled in a fight was then, owing to her slow progress, caught by a storm which she would have escaped had she been sound: (see Erle, C.J. in *Ionides'* case, *sup.*; and Lord Ellenborough in *Livie* v. *Jansen* (12 East, 648). Erle, C.J. in *Ionides'* case (*sup.*), however, gives further illustrations which render the application difficult to follow. He says: "Suppose there was a hostile attempt to seize the ship, and the master, in seeking to escape capture, ran ashore and the ship was lost; there the loss would be a loss by the consequences of hostilities within the terms of this exception." He does not say whether the assumed running ashore is intentional, *i.e.*, a general average sacrifice, which would also be a loss by perils insured against (*Dickinson* v. *Jardine*, 3 Mar. Law Cas. O. S. 126; 18 L. T. Rep. 717; L. Rep. 3 C. P. 639), or accidental: (see also *Gordon* v. *Rimmington*, 1 Camp. 123). But in *Green* v. *Elmslie* (Peake, N. P. 278) a vessel was driven by a gale "on an enemy's coast" and was there captured, and this was held a loss by capture not by perils of the sea, not being a proximate consequence of perils of the sea. It is not quite clear, therefore, why in Erle, C.J.'s illustration the stranding would be a proximate consequence of hostilities; it might or might not have happened. His second illustration is: "Suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay where there is neither harbour nor anchorage, and, in consequence of her inability to get out, she is driven on shore by the wind and lost; that again would be a loss resulting from an attempt at capture, and would be within the exception." This surely would depend on how long the adverse wind which kept her in the bay held. If it changed, the vessel would get out unharmed, and the suggestion seems contrary to the decision in *Green* v. *Elmslie* (*sup.*). Where loss by perils of the sea follows loss by capture, the first owner recovers for loss by capture: (*Andersen* v. *Marten*, 11 Asp. Mar. Law Cas. 85; 99 L. T. Rep. 254; (1908) A. C. 334). As was said by Channell, J. in that case (11 Asp. Mar. Law Cas. 494; 97 L. T. Rep. 375; (1907) 2 K. B. 248): "The first owner lost his ship by capture. The Japanese captors lost their prize by perils of the sea." Where loss by capture is alleged to follow loss by perils of the sea, the question would appear to depend on whether the goods were already lost by perils of the sea. They were treated as already so lost in *Hahn* v. *Corbett* (2 Bing. 205), and in the case of the bulk of the cargo in *Ionides' case* (*sup.*); possibly also in *Bondrett* v. *Hentigg* (Holt, N. P. 149). I notice that in *Powell* v. *Hyde* (5 E. & B. 607), where a vessel was sunk by cannon shot in the Danube under the mistake that she was an enemy, it was not argued that the loss was by perils of the sea, or the general words, but the loss was treated as one by capture and seizure within the warranty.

Great reliance was placed by either side on the cases of *Pink* v. *Fleming* (*sup.*) and *Reischer* v. *Borwick* (*sup.*), each decisions of the Court of Appeal. In *Pink* v. *Fleming* the goods were warranted "free from particular average . . . unless damage be consequent on collision with

any other ship." To repair damage done to the ship by collision, perishable goods had to be discharged, and damage to them was caused partly by handling, partly by delay. Mathew, J. and the Court of Appeal treated the damage as too far removed from the collision to be consequent on it. All the members of the Court of Appeal treat the matter as an application of the well-known rule of *cause proxima*, though, as Lord Esher says, the cause of the damage was the repairs, and the cause of the repairs was the collision. The judgments appear to proceed exactly on the lines of *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*). In *Reischer* v. *Borwick* (*sup.*) the insurance was against "damage received in collision." A collision broke a hole in the condenser; the captain anchored and plugged the hole. The vessel was then being towed to dock for repairs when the plug came out, the vessel filled with water, and was run ashore to prevent sinking. This was held "damage received in collision"—words which were apparently treated as equivalent to "damage caused by collision"—and Lord Lindley, in giving judgment, expresses himself thus: "It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—*i.e.*, under circumstances which, but for that injury, would not have affected her safety. . . . It" (this view) "is consistent with the judgment in *Pink* v. *Fleming* (*sup.*), which is more favourable to the appellants than any other authority cited or known to me." I have read this judgment several times, and, while I quite understand it, it seems to me, with great respect to the learned members of that court, that, if its principles are applied to the facts of *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*), that case would have been decided differently. The goods there were damaged because of the continuing existence of a hole made by a rat through which the water came. If the cause of the hole, and not the water that came through the hole, was the proximate cause, the rat was the proximate cause of the damage; but the House of Lords held that it was not. It is said that this loss may be caused both by perils of the sea and by rats, and that in an insurance against perils of the sea warranted free from rats the assured would fail. This seems to me to depart from the rule of insurance law that you only look at the proximate cause. I refer again to the opinion of Watkin Williams, J. in *Lawrence* v. *Accidental Insurance Company* (*sup*), where the policy was against personal injury caused by accidental violence, but did not insure in case of death arising from fits. The assured fell on the railway line in a fit, and a train then ran over him. Watkin Williams, J. said: "It is essential that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation."

It seems to me, apart from authority, there may well be cases where a cause at once produces a state of things the natural result of which is subsequent loss. The Supreme Court of the United States in *The G. R. Booth* (171 U. S. Rep. 450), cited in Carver on Carriage by Sea, s. 88, note, a case where an explosion occurred in a ship which blew out the ship's side so that water came in and damaged cargo, seem to have treated the entry of water as an inevitable and absolutely necessary result of the explosion, and to have held that the action of such inevitable results does not prevent their cause from being the proximate cause. This would seem to apply to sinking through the entry of water through leaks made by gunfire or collision; but it would also seem to apply to the damage done through the rat hole. The Supreme Court either did not approve of *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*) or treated the entry of the water not as an inevitable consequence, but one that depended on the weather that the ship met with. The latter view would not be sufficient according to Lord Lindley's illustration in *Reischer* v. *Borwick* (*sup.*), where he puts the case of a damaged ship, which can float in calm weather, but sinks in her injured condition in a subsequent storm.

The learned judge below decided this case on the authority of *Reischer* v. *Borwick* (*sup.*), but he also added some reasoning of his own. He thought it was not necessary that the sinking should inevitably follow from the explosion. "She was not saved after being injured by the torpedo, and when you have said that you have said the whole, in my judgment." I do not understand this. It looks at first sight like the fallacy *post hoc ergo propter hoc*, which I am sure Rowlatt, J. does not mean. To say that if after injury she is not saved it must be the injury that sank her overlooks the case of the intervention of some new and overwhelming disaster, as a hurricane or fire. One must add the qualification "and was sunk as the immediate consequence of that injury." For such a proposition there is ample authority in the principles stated in *Reischer* v. *Borwick* (*sup.*). But for that case I should have felt bound by the authorities to hold that there was here a loss by the proximate cause, perils of the sea, and that, as the warranty must also be limited to proximate consequences of hostilities, hostilities here were only a cause, and not the proximate cause, of the loss. And, on the best consideration I can give to it, I do not think the principles in the judgment in *Reischer* v. *Borwick* (*sup.*) are consistent with the previous authorities I have cited, and particularly with the decision of the House of Lords in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*), Lord Lindley saying: "The fact that some fresh cause arises without which the injury would not have led to further loss is . . . in such a case far from conclusive." I respectfully think that on the earlier authorities it would have been conclusively treated as the only proximate cause. But *Reischer* v. *Borwick* (*sup.*) professed to consider *Pink* v. *Fleming* (*sup.*), and Lopes, L.J., one of the members of the court, was the trial judge in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*), and I have come to the conclusion that it is my duty, as a member of the Court of Appeal, to endeavour to follow such a decision of the court, which its members thought was consistent with previous decisions, and to leave to the House of Lords, if it is thought right to bring the matter before their consideration, the task of explaining, correcting, or approving the decisions of the Court of Appeal.

I appreciate that most plain men and many lawyers not conversant with insurance decisions would say at once that the loss here was a consequence of hostilities, but I am sure they would also say that the immediate cause of the damage to cargo in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*) was rats, in which case their judgment, like the Court of Appeal's, has been reversed by the House of Lords. I think they would also say that the cause of death in *Lawrence's* case (*sup.*) was fits, contrary to the decision of the Divisional Court.

For these reasons, after much hesitation, I have come to the conclusion that I am bound by the principles enunciated in *Reischer* v. *Borwick* (*sup.*) to affirm the judgment of Rowlatt, J. in this case.

Appeal dismissed.

Solicitors for the plaintiffs, *Alfred Bright* and *Sons*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the defendants, *William A. Crump* and *Son*.

Jan. 19, 22, *and* 23, 1917.

(Before Swinfen Eady, Bankes, and Scrutton, L.JJ.)

Hood v. West End Motor Car Packing Company. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (marine) — "Held covered" clause — Motor-car carried on deck—Error in description of interest—Notice to underwriters of error within reasonable time—Institute Cargo Clauses, No. 4.

By a policy of marine insurance, in the ordinary form, a motor-car was insured against the usual perils by sea from London to Messina. The Institute Cargo Clauses were attached, of which clause 4 is as follows: "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." The car was carried on deck in accordance with the terms of the bill of lading, under which it was shipped, and being carried on deck was not covered by the policy. When the ship arrived at Messina the car was found to be valueless, owing to damage by sea water. No notice that the car was being carried on deck was given to the underwriters before the loss. Evidence was given that many underwriters would not insure at any premium a car carried on deck against all risks, and that in any case an exceptionally high premium would be required.

Held, that clause 4 of the Institute Cargo Clauses did not enable the assured to recover the loss from the underwriters, as it was an implied term of the contract that notice that the car was being carried on deck should be given to the underwriters within a reasonable time after the assured became aware of the fact; that no such notice had been given; and the assured were not therefore protected by the policy.

Thames and Mersey Marine Insurance Company v. Van Laun (infra) *applied.*

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

Judgment of Rowlatt, J. (13 *Asp. Mar. Law Cas.* 441; 115 *L. T. Rep.* 220; (1916) 2 *K. B.* 395) *affirmed.*

Appeal by the defendants from a judgment of Rowlatt, J. without a jury.

The facts appear sufficiently from the judgments.

Newbolt, K.C. and *Graham Mould* (for *Arthur Lawton*, serving with His Majesty's forces), for the defendants, referred to

Moore v. *Mourgue*, 2 Cowp. 479;
Comber v. *Anderson*, 1 Camp. 523;
Commonwealth Portland Cement Company v. *Weber, Lohmann, and Co.*, 10 Asp. Mar. Law Cas. 27; 91 L. T. Rep. 613; (1905) A. C. 66;
Hewitt Brothers v. *Wilson*, 13 Asp. Mar. Law Cas. 111; 113 L. T. Rep. 304; (1915) 2 K. B. 739;
Greenock Steamship Company v. *Maritime Insurance Company*, 9 Asp. Mar. Law Cas. 364, 463; 89 L. T. Rep. 200; (1903) 1 K. B. 367;
Maritime Insurance Company v. *Stearns*, (1901) 2 K. B. 912;
Mentz, Decker, and Co. v. *Maritime Insurance Company*, 11 Asp. Mar. Law Cas. 339; 101 L. T. Rep. 808; (1910) 1 K. B. 132.

MacKinnon, K.C. and *E. F. Spence*, for the plaintiff, referred, in addition, to

Reliance Mutual Insurance Company v. *Duder*, 12 Asp. Mar. Law Cas. 223; 106 L. T. Rep. 936; (1913) 1 K. B. 265;
Thames and Mersey Marine Insurance Company v. *Van Laun* (*infra*).

Swinfen Eady, L.J.—This is an appeal by the defendants against a judgment of Rowlatt, J., who gave judgment for the plaintiff for 500*l.* The plaintiff, the owner of a motor-car, applied to the defendants for an estimate of the cost of packing the car, dispatching it to Messina, and insuring it against all risks and breakage, including war risks. On the 29th Oct. 1914 the defendants gave an estimate for "packing and freighting same to Messina, 31*l.* 10*s.* Insurance extra. All risks and breakage 12*s.* 6*d.* per cent. War risk 20*s.* per cent." The estimate was accepted by the plaintiff, and the defendants were requested to collect the car and pack and freight it to Messina and insure it against all risks and breakage, including war risk. There was thus a contract by the defendants to do the work for a fixed sum. Shortly afterwards by consent the contract was varied by the omission of the insurance against war risk, the plaintiff taking that risk upon himself. The defendants did not wish to carry out the whole contract themselves, but employed Messrs. G. W. Sheldon and Co., shipping agents, to effect the shipping and insurance. On the 30th Nov. the General Steam Navigation Company gave a quotation in writing for carrying the car from London to Messina, "with liberty to carry on deck at shipper's risk." Messrs. Sheldon instructed Mr. Murray, who was an outside broker, to effect the insurance. That was unfortunate, because in his evidence Murray said that he had no knowledge of such business. Not being a member of Lloyd's he could not effect an insurance there, and accordingly he employed Messrs. Byas, Moseley and Co., a firm of brokers at Lloyd's, who procured the insurance. That was the chain of persons through whose hands the matter passed. On the 8th Dec. Messrs. Sheldon prepared a bill of lading, in which the goods were described as "one case

motor-car on deck at shipper's risk." The words "on deck at shipper's risk" were not there when the bill of lading was prepared, but were stamped in afterwards before the bill of lading was signed. The bill of lading contained a clause in print: "Goods shipped as one parcel to be delivered the same way, and if shipped on deck (as the shipowners and (or) charterers are hereby authorised to do) they are so shipped at merchant's risk." Messrs. Sheldon were therefore aware that the car was being shipped on deck. Upon the 5th Jan. they wrote to Murray informing him that the car was being shipped on deck, and asked him if it would make any difference in the premium, and Murray said it would not. Before giving that answer Murray said that he communicated by telephone with Messrs. Byas, Moseley, and Co., and that they replied that it would not. Messrs. Byas, Moseley, and Co. denied this statement, and being experienced brokers they could not have given that answer. On arrival at Messina the car was found to be practically destroyed. The policy did not specifically insure the car as carried on deck, and it is conceded that there is no "usage to the contrary" within the meaning of rule 17 of the Rules for Construction of Policy in sched. 1 to the Marine Insurance Act 1906. It is clear that the policy as effected did not cover the car on deck.

The first question is, What was the contract between the plaintiff and the defendants? Was it a contract by which the defendants only agreed to take all reasonable steps to procure an effective insurance on the car, or was it a contract by which they undertook to procure an effective insurance on the car? In my opinion the defendants in consideration of certain payments entered into a definite contract to pack the car, ship it, and pay freight to Messina, and to procure an effective insurance against all risks and breakage except war risk. That was the contract. The next question is, Have they performed it? It is conceded that the policy does not cover the car so far as the body of the policy is concerned. The underwriters were not informed that the car was to be carried on deck. It is not disputed that after it was known that the car was being shipped on deck no notice was given to the underwriters that the car was to be carried in that way. The defendants rely upon clause 4 of the Institute Cargo Clauses to establish that the policy covered the risk. In the court below clause 7 was also relied upon, but in this court no question was raised upon that clause. Clause 4 provides as follows: "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." With regard to a similar clause the House of Lords have held in *Thames and Mersey Marine Insurance Company* v. *Van Laun* (*infra*) that it is an implied term of the contract, in the absence of any express term as to notice, that notice must be given to the underwriters within a reasonable time after the facts have come to the knowledge of the assured, if he wishes to rely upon the clause. In the present case no such notice was given to the underwriters, and the defendants therefore cannot rely upon the clause. There is this further point: According to the terms of the contract the insurance was to be effected for the plaintiff upon his making certain payments, and upon those payments being made he was to have an insurance against all risks and breakage except war risk. The defendants say that on payment of an extra premium such risks would be covered by the policy. In the first place, they failed to prove it. Upon the evidence I am not satisfied that any such insurance could have been obtained at all, that is to say, an insurance covering the motor car on deck. [His Lordship here referred to the evidence.] The defendants failed to prove that the policy effected was one which by payment of an extra premium would cover the risks agreed to be insured against. But, even if they had proved it, it would not help them, because they had agreed for a fixed premium to procure a policy against all risks except war risk. They failed to do so. The appeal must be dismissed.

BANKES, L.J.—I agree. The case seems to me to have been fought before Rowlatt, J. upon a false issue. The plaintiff was partly in fault for that, because in the statement of claim he alleged that the defendants "negligently and in breach of the contract" failed to require the car to be carried under deck and permitted it to be carried on deck, and "negligently and in breach as aforesaid" failed to cause it to be insured against on-deck risks; and at the beginning of the argument for the plaintiff as reported in the court below (1916, 2 K. B. 397) the contention is stated to be that "the defendants having undertaken to ship and insure the car were bound to take all reasonable precautions to provide that it should not be injured on the voyage, and to cause it to be insured against all risks other than war risk." Upon the true construction of the contract that question does not arise. The contract was that on payment of 31*l.* 10*s.* the defendants undertook to pack and freight the car to Messina and to procure an insurance on it against all risks, except war risks, at a premium of 12*s.* 6*d.* per cent. If that is the true construction of the contract, the question of negligence raised in the court below does not arise. It is not disputed that the policy in the form in which it was taken out did not cover the risk agreed to be covered at the stated premium of 12*s.* 6*d.* per cent. The action is really an undefended one. The defendants did not do what they contracted to do—namely, take out a policy covering all risks except war risk at the stated premium. In order to escape from that difficulty the defendants say that upon payment of an increased premium the policy is in such a form that the plaintiff can recover on it. In my opinion the defendants can only introduce that matter on the question of the damages which they have to pay for the breach, upon the principle that the plaintiff was bound to do what he reasonably could to mitigate the damages. If the defendants could have proved that on payment of an increased premium they could have insured against the risk that would go in mitigation of damages. Upon the evidence the defendants have failed to show that they could by payment of any premium have insured against the risk of carrying the car on deck. Further, even if they had proved that they could have insured against that extra risk, upon the authority of *Thames and Mersey Marine Insurance Company* v. *Van Laun* (*infra*), they failed to take such steps as wouldgive them the advantage of clause 4 of the Institute Cargo Clauses. As that case shows, upon the

facts coming to the knowledge of the assured he is bound to give notice to the underwriters within a reasonable time. For these reasons the appeal fails.

SCRUTTON, L.J.—I agree. The first question is, What is the liability of the defendants under their contract with the plaintiff? When a person is instructed to procure an insurance for another he is bound to use reasonable care and skill. If he is unable to procure the policy he must at once inform his principal. There is a very large class of business where a person does more than merely undertake to effect a policy. He sells a policy and incurs all the liability of a vendor, as, for instance, in the case of a c.i.f. contract. The question, therefore, is whether this is a case in which the defendants contracted to use reasonable care and skill to procure a policy against all marine risks at the named figure or contracted to procure an effective policy against those risks at that figure. Upon the true construction of the documents I think that the defendants undertook to procure a policy against all risks except war risks. The next question is, Have they performed that obligation? They shipped the car on deck. In the body of the policy it is stated that the insurance was "on motor-car," not stating that the car was to be carried on deck. By the old law before the Marine Insurance Act 1906, and now by rule 17 of the Rules of Construction of Policy in sched. 1 to the Act, in the absence of any usage to the contrary, cargo carried on deck must be insured specifically. The defendants therefore did not procure a policy in terms covering a motor-car carried on deck against all marine risks. It is contended, however, that the policy gives the plaintiff the right to get such an insurance by reason of clause 4 of the Institute Cargo Clauses; that there was an "omission or error in the description of the interest," and that upon payment of an increased premium to be arranged the plaintiff was in a position to get his car covered by the policy. There is a fatal objection to that contention. In *Thames and Mersey Marine Insurance Company* v. *Van Laun* (*infra*) the House of Lords, affirming the judgment of Kennedy, J., held that the assured could not avail himself of the clause unless within a reasonable time after he became aware of the omission or error he gave notice thereof to the underwriters. It is an implied term of such a contract. I regret that the case is not reported on this point. The decision is plainly right, because the natural tendency of a person assured is to wait and see if the matter goes through satisfactorily, and only in the case of a loss happening to give notice to the underwriters. In order to meet that tendency the condition as to notice is implied. In the present case when the defendants became aware that the car was being shipped on deck no notice thereof was given to the underwriters until after the loss of the car. That is not within a reasonable time within the decision of the House of Lords. That is sufficient to decide this case, and is the only point which I decide. I agree that the defendants would have found themselves in a difficulty because probably they could not have proved that they could have effected an insurance on a car carried on deck. I think also that the construction of clause 4 of the Institute Cargo Clauses is very difficult. It may have to be considered fully at some future date, and I will not speculate upon its meaning. I may, however, express a hope that the committee of underwriters will consider the clause and make up their minds as to the meaning they wish to attach to it, and express that meaning in language which an ordinary assured will understand.

Appeal dismissed.

Solicitors for the plaintiff, *Capel Cure* and *Ball.*

Solicitor for the defendants, *Richard Brooks.*

HOUSE OF LORDS.

July 24, 1905.

THAMES AND MERSEY MARINE INSURANCE COMPANY LIMITED *v.* H. T. VAN LAUN.

THE plaintiffs (H. T. Van Laun and Co.) brought an action against the defendants to recover moneys alleged to be due under two policies of marine insurance. In 1900 the German Government resolved to import cattle and sheep into Northern China to provision its military forces there, and entered into a written contract with Meyerink and Co., of Hamburg, for the shipment by steamer from Queensland to Tsingtau or other appointed ice-free port of loading of two successive consignments of livestock, one shipment to be made in September and one in Oct. 1900 at a c.i.f. price. By a sub-contract of the 11th Aug. 1900 Frederick Beyer, of London, undertook towards Meyerink and Co. substantially the same obligations as those by which the latter had bound themselves to the German Government. By an agreement dated the 13th Aug. 1900 the plaintiffs contracted with Beyer to provide the cattle and sheep for the October shipment and steamer for carriage from Queensland to Tsingtau or other port in Northern China as declared before sailing. The plaintiffs were to be paid 31*l.* 1*s.* per head of cattle and 2*l.* 2*s.* per head of sheep. The price included the cost of conveyance and insurance, fodder, attendants, and all other requisites for the carriage of the cattle. The loading was to be completed in October. In September the respondents secured a steamer by a time charter, and in November shipped on board in Queensland 705 bullocks and 611 sheep. The bills of lading stated the port of destination to be Taku. The two policies on which the plaintiffs sued were effected, one in London dated the 3rd Dec. 1909 for 700*l.*, and the other in Liverpool, dated the 4th Dec. 1900, for 1000*l.* Each was expressed to be a policy on 705 bullocks and 611 sheep, valued respectively apiece at 34*l.* 16*s.* and 2*l.* 13*s.* Each was expressed to cover the risk of mortality from any cause during transit, and contained a free of capture, seizure, and detention warranty. The voyage was described in the London policy as "at and from Sydney and (or) port or ports in New South Wales and (or) Queensland to the vessel's port or ports of discharge in China"; and in the Liverpool policy as "at and from Sydney and (or) New South Wales and (or) Queensland ports to China ports." The London policy gave the vessel liberty "to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all necessary purposes." The Liverpool policy gave liberty in addition "to proceed to and call at any ports or places on this side and beyond the port of destination backwards and forwards for all purposes." In the London policy there was a clause "that in the event of any deviation from the terms and conditions of this policy (p/a clause excepted) it is understood and agreed that notwithstanding such deviation the interest hereby insured shall be held covered at a premium to be arranged." In the Liverpool policy the corresponding clause was: "Held covered in case of deviation or change of voyage

provided notice be given and any additional premium required be agreed immediately after receipt of advices." The steamer sailed from Queensland in November and reached Wei-hai-wei on the 16th Dec., where the master, hearing that Taku was ice-bound, communicated at once with his owners, who directed him to await orders. The owners did not through their agents inform the underwriters of the deviation until the 31st Dec., when they gave notice of the suggested deviation, and also notice of abandonment, and claimed for a total loss. The vessel went to Chefoo on the 25th Dec., and on the 3rd Jan. to Woosung, and on the 16th Jan. to Shanghai. In the meanwhile many of the cattle had died owing to the accumulation of manure, which the China authorities did not allow to be thrown overboard, and rinderpest also broke out, and most of the cattle had to be taken out to sea and slaughtered. The respondents claimed for a total, and, alternatively, for a partial, loss. At the trial before Kennedy, J. the jury found that the plaintiffs were ready and willing to pay extra premiums for deviation. Kennedy, J. held that there was no sufficient proof of the abandonment of the insured voyage, but that there was in any case a deviation, and that the plaintiffs were not protected by the "held covered" clauses, as notice had not been given in a reasonable time. He gave judgment for the defendants. The Court of Appeal (Collins, M.R. Mathew and Cozens Hardy, L.JJ.) ordered a new trial. The defendants appealed.

Scrutton, K.C. and *Maurice Hill* for the appellants.

J. A. Hamilton, K.C. and *J. R. Atkin* for the respondents.

Lord HALSBURY, L.C.—For my own part I should be prepared to find as a fact that the voyage was abandoned, and that the real object of keeping the master waiting for orders was to see whether the cattle could not be disposed of to greater advantage than by attempting to deliver them in pursuance of the bills of lading. But in any event there was a clear deviation, and as in this respect there is a difference between the two policies to which I referred before, the case of each policy requires to be treated separately.

In the Liverpool policy it is provided that in case of deviation or change of voyage the assured are to be held covered, provided notice be given and any additional premium required be agreed immediately after receipt of advices. On the 17th Dec. the plaintiffs knew that the port of discharge, Taku, was closed, and that the ship was waiting at Wei-hai-wei, and it was not until the last day of the year that the plaintiffs' agents gave any notice at all. I certainly find as a fact that that condition was not complied with so as to secure the deviation.

In respect of the London policy the language is not the same, but I agree with Kennedy, J., and so find, that the notice was not given within a reasonable time, and that it is an implied term of the provision that reasonable notice should be given, that it is not competent to the assured to wait so long as he pleases before he gives notice and settles with the underwriter what extra premium can be agreed upon. I take Kennedy, J.'s view. I adopt his language where he says: "Reasonableness in such a matter as to the time of giving a notice depends, of course, upon the particular circumstances of the case. Here the subject-matter of the insurance was cattle on shipboard, in the winter season off a coast where, except at a few places, neither water nor fodder could easily be obtained, and then obtained only at serious risk, as the events have proved, of infection from disease. Every day of delay diminished the supply of both food and water, and helped to fill the cattle-pens with manure, creating a state of things which both weakened the health of the cattle and disabled with sickness the cattle-men whose duty it was to attend upon the animals. Interpreting the clause in question, as I do, to imply an obligation, in order to obtain the advantage which it confers upon the assured, that the assured should communicate as to the arranging of the premium within a reasonable time after obtaining advices, I have come to the conclusion that no tribunal could hold upon these facts that the plaintiffs fulfilled the obligation, seeing that, having the information which they had as to the position of the cargo on the 17th Dec., at any rate on the 18th Dec., they nevertheless made no communication to the defendants as to the deviation, although they had earlier communicated with their agents, until, through the agents, they communicated on the 31st Dec. 1900. 'Reasonable time' in such circumstances surely must be comprised within much narrower limits than those of any such protracted period."

We are not in the difficulty felt by the Master of the Rolls that this was a question of fact, and I answer it without any doubt or difficulty that no notice was given within a reasonable time. . . . I think what has been said is enough to release the underwriters from any liability after the arrival of the ship at Wei-hai-wei, and I move your Lordships that the judgment of Kennedy, J. be restored with the usual consequences as to costs.

Lord MACNAGHTEN.—I have had the advantage of reading in print and considering the judgment which has just been delivered by my noble and learned friend on the Woolsack, and I entirely agree with it. I should have agreed with it if it had been merely to the effect that the voyage had been abandoned. It appears to me that the risk which is sought to be imposed upon the underwriters is a totally different risk from that which they undertook.

Lord DAVEY.—The counsel for the respondents argued that it is a question for business men what time a master of a ship is to take to find out what was a safe port to go to. Mathew, L.J. says that the duty of the master, being to complete his voyage in the ordinary way, was that he should behave reasonably, having regard to the interests of all parties concerned. And the learned judge holds that there was evidence for the jury that the master had behaved reasonably and used proper discretion in the matter. On this point it is pertinent to inquire what was the cause of detention, and whether that cause was anything connected with the navigation of the ship or safety of the cargo, such as might be presumed to operate on the master's mind. The evidence shows that the cause of the delay was something quite different. The respondents were, no doubt, in a difficulty. There was a triangular dispute going on between them and Meyerink and Co. and the German Government, who repudiated their liability to accept delivery of the cargo. The respondents were endeavouring to compel either the Government or Meyerink and Co. to do so, or looking about to find some means of otherwise disposing of the cargo for their own advantage. But how did these disputes affect the liability of the insurers? The master might as well have taken his ship to Shanghai at once from Wei-hai-wei as a month later, and landed his cargo there. The appellants say, and I think it is apparent, that the master exercised no discretion in the matter, but under the orders of the respondents allowed his vessel to be used as a warehouse for the cattle until the disputes between the parties concerned should be arranged, or the respondents should find some other means of disposing of the cargo, and did not proceed to any port of discharge until the state of things had become so intolerable that he was compelled to do so. It is immaterial to consider whether there was a question for the jury, because the parties have agreed to leave all questions of fact arising on the evidence to your Lordships instead of asking for a new trial.

Kennedy, J. held that there was a deviation (if not as to the course of navigation on the voyage insured) as to the time in which the voyage ought to have been completed. It was, he says, for no purpose of the voyage

insured that the ship was detained at Wei-hai-wei or sent to Chefoo and detained there. But the learned judge held that there was no abandonment or change of the voyage insured. It is often a nice question on the facts whether an interruption of the voyage amounts to a deviation only or is a change of voyage. The usual test is whether the ultimate terminus *ad quem* remains the same. In the present case it may be doubted whether the detention of the ship at Wei-hai-wei and Chefoo, not for any purpose connected with or for the purposes of the voyage insured, but for the reason and under the circumstances disclosed by the evidence, did not amount to an abandonment of that voyage. It may be that Shanghai was a port to which the master might have taken the ship when he found that the port of Taku was ice-bound, but he went there, and was in fact ordered to go there, for a purpose different from that contemplated in the original voyage. But however this may be, I agree with Kennedy, J. that it was certainly a deviation from the terms and conditions of the policies, within the meaning of those instruments, and I also agree with him that no notice was given to the underwriters of the deviation or change of voyage (if there was one) either immediately or within a reasonable time after receipt by the respondents of advices as to the ship's movements so as to enable an additional premium to be agreed upon. The respondents knew of the ship's arrival on the 17th or 18th Dec., and on the 21st the master received orders to remain at Wei-hai-wei until further order, but no notice reached the underwriters until the 31st Dec., and, having regard to the nature of the risk insured and the increase of risk to a cargo of this character occasioned by such orders, I am of opinion that the notice was not given in a reasonable time. I have therefore come to the conclusion that the appellants were discharged from all liability under their policies from the date of the arrival of the ship at Wei-hai-wei. . . . I have been asked by my noble and learned friend Lord Robertson, who is unable to be here to-day, to say that he concurs in the judgment which has been proposed from the Woolsack.

Lord James of Hereford. — For the reasons which have been given by my noble and learned friend on the Woolsack and my noble and learned friend Lord Davey, I think this appeal should be allowed and the judgment of Kennedy, J. restored. I also agree with the view which my noble and learned friend Lord Macnaghten has expressed that there was here really an abandonment of the voyage, and not a mere deviation within the meaning of the policies.

Appeal allowed. Judgment of Kennedy, J. restored.

Solicitors for the appellants, *Waltons, Johnson, Bubb, and Whatton.*

Solicitor for respondents, *H. W. Chatterton.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Jan. 16, 17, *and Feb.* 1, 1917.

(Before Sankey, J.)

Société Nouvelle d'Armement *v.* Spillers and Bakers Limited. (*a*)

Charter-party — General average contribution — Towage—Absence of extraordinary and abnormal peril—Extraordinary sacrifice or expenditure—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 66 (2).

By sect. 66, *sub-sect.* 2, *of the Marine Insurance Act* 1906 *it is enacted that: "There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure."*

All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested.

But, in order to come within the expression "general average expenditure," there must be expenditure abnormal in kind or degree, and it must have been incurred on an abnormal occasion for the preservation of the property. It must be incurred to avoid extraordinary and abnormal peril as distinguished from the ordinary and normal perils of the sea.

The plaintiffs were the owners of the French barque E. L. *The vessel left San Francisco, arrived at Queenstown, and was there ordered to proceed to Sharpness. The usual practice for a sailing vessel going from Queenstown to Sharpness was for her to be towed a short distance out of Queenstown and a short distance into Sharpness. In this case the master hired a Dutch tug to tow him the whole way, he being of opinion that that course was necessary on account of the presence of submarines.*

Held, on a claim for a general average contribution in respect of the hiring of the tug from Queenstown to Sharpness, that the hiring of the tug was not a "general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure" within the meaning of the Marine Insurance Act 1906.

Action tried before Sankey, J. in the Commercial Court.

The plaintiffs were the owners of the sailing vessel *Ernest Legouve*, and they brought this action claiming a sum of 110*l.* 4*s.* 3*d.* from the defendants, who were the charterers of the said vessel under a charter-party dated London, the 9th Nov. 1914. In pursuance of the charter-party this vessel was in May 1915 on a voyage from San Francisco to Sharpness with a cargo of barley for delivery to the defendants. At that time the German submarine campaign was in active operation, and the master of the ship hired a tug to tow him from Queenstown to Sharpness. It was alleged by the plaintiffs that this course was necessary owing

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

to the presence of submarines. The plaintiffs claimed the above-named sum as general average expenditure in respect of the hiring of the tug.

A. A. Roche, K.C., *R. A. Wright*, and *C. T. Le Quesne* for the plaintiffs.

D. C. Leck, K.C. and *A. Neilson* for the defendants.

Cur. adv. vult.

Sankey, J.—This is a claim for a general average contribution. The plaintiffs are the owners of the French barque *Ernest Legouve*, chartered by the defendants to load a cargo of 3000 tons of barley at San Francisco on the 9th Nov. 1914 for carriage to the United Kingdom. In pursuance of the charter-party the vessel left San Francisco, proceeded to Queenstown, and was there ordered to Sharpness in the Bristol Channel. She arrived at Queenstown about the 20th May 1915, and while there the crew saw the dead bodies of the torpedoed *Lusitania* being brought ashore. The usual practice for a sailing vessel proceeding from Queenstown to Sharpness is for her to be towed a short distance out of Queenstown and a short distance into Sharpness, making the intermediate part of the voyage under her own sails.

The master hired a Dutch tug to tow him the whole way. He was of opinion that it was a necessary thing to do, having regard to the presence of enemy submarines in the neighbourhood. He says that for a week before his departure the weather had been calm, with wind from the south-east, and that proceeding under his own sails he would have been a better mark for submarines, not only on account of visibility, but because his progress would have been slower and he would have been unable to alter his course rapidly from time to time to avoid torpedoes; and, further than that, he could go closer into the shore with the assistance of a tug. He also says that on the 26th May there was a meeting of the crew, which is recorded in his log, when they definitely refused to proceed unless he engaged a tug. The defendants ask me to say that this meeting of the crew was inspired by a letter which the owners sent to the captain on the 19th May, and that the decision to take a tug was that of the owner and not of the master. I am unable to accept either of these suggestions, and I find that in hiring the tug the master acted on his own judgment and his own responsibility.

The plaintiffs contend that the expenses of the tug for the intermediate part of the voyage are general average expenses—that is to say, that they were properly incurred for the preservation and the safety of the adventure—and that therefore the defendants, the cargo owners, are liable to contribute their share, which is the sum sued for in this action.

It is first to be observed that both parties admitted that this question has to be decided by English law, and, as the plaintiffs are French owners, I may be allowed to say that the English law differs considerably from that of foreign countries. Before such expenditure can be recovered, our law demands proof that it has been properly incurred to preserve the property which has been in peril, while the jurisprudence of other countries is satisfied with proof that it has been incurred to benefit the adventure. A definition of general average has been given by many English judges, but the most famous one is that of Lawrence, J. in *Birkley* v. *Presgrave* (1801, 1 East, 220), which has always been regarded as authoritative. It is: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested."

The Marine Insurance Act 1906, by sect. 66, sub-sect. 2, has now enacted what is a general average act in the following words: "There is a general average act where an extraordinary expenditure is incurred in time of peril for the purpose of preserving the property imperilled in the common adventure."

I think, therefore, the questions I have to decide are: (1) Was the hiring of the tug extraordinary expenditure? (2) Was the expenditure voluntarily and reasonably incurred at a time of peril? As to (1), Was the hiring of the tug extraordinary expenditure? the law appears to stand as follows: Extraordinary expenditure must to some extent be connected with an extraordinary occasion. For example, an abnormal user of the engines and an abnormal consumption of coal in endeavouring to refloat a steamship stranded in a position of peril is an extraordinary sacrifice and an extraordinary expenditure: (see *The Bona*, 7 Asp. Mar. Law Cas. 557; 71 L. T. Rep. 870; (1895) P. 125). A mere extra user of coal, however, in order to accelerate the speed of a vessel would not be a general average act. Suppose, for example, a vessel, whose ordinary speed was seven knots, were under a forced draught and an extra coal consumption to proceed at nine knots merely for the purpose of accelerating the voyage, or a sailing vessel with auxiliary steam were to use the auxiliary steam for the purpose of reaching port sooner, in neither case would the expenditure on extra coal be a general average act, though in both cases some of the risks of the voyage might have been minimised by the vessel being exposed to perils for a shorter period. Again, suppose the master, instead of hiring a tug, had purchased guns and hired a crew of gunners at Queenstown on the chance that he might be attacked by a submarine, I doubt if the expenses of the guns and gunners could have been recovered as a general average expenditure: (see *Taylor* v. *Curtis*, 1816, 6 Taunt. 608). In that case, after elaborate and learned argument, it was held: "The expenditure of ammunition, in resisting capture by a privateer, the damage done to the ship in the combat, and the expense of curing the wounded sailors, are not the subject of general average by the law of England."

It is not sufficient to say that the expenditure was incurred to benefit the property; it must be proved that it was abnormal in kind or degree, and incurred to preserve the property. As to (2), Was the expenditure voluntarily and reasonably incurred at a time of peril? The law appears to stand as follows: The word "peril" is used in the statutory definition without any qualification, although in many of the definitions given of general average it is stated that the peril must be imminent, which means that it must be substantial and threatening and something more than the ordinary peril of the seas: (see *Covington* v. *Roberts* (1806, 2 Bos. & P. N. Rep. 378). It is not desirable, even if it were possible, to define the

degree of danger or the amount of peril necessary. That is a question of fact, depending alike on time and circumstance, upon which each judge must form his own conclusion. In some cases, as, for example, where a ship is stranded or sinking, the question approaches a certainty, and the decision presents no difficulties. It is far otherwise where, as here, the question depends to some extent on a contingency and quits the realms of certainty for those of conjecture.

To sum up, there must be expenditure abnormal in kind or degree, and it must have been incurred on an abnormal occasion for the preservation of the property. In this particular case I am left in an uncertain position. It is true that I have the evidence of Captain Symes, who gave it as his opinion that if he had been master of the vessel under the circumstances he would have taken the tug, but I must look more closely into the facts. The vessel left Queenstown on the 1st June and arrived at the Flat Holm of Cardiff on the 3rd June. Although she passed through waters in which she anticipated submarines, she in fact never saw one. A list was shown to me of vessels alleged to have been sunk or damaged in these waters between the 20th May and the 12th June. I do not propose to refer to the names of these vessels or the places where they were torpedoed. It is sufficient to say that three quarters of them were steamships and not sailing ships. Further than that, during the period up to the 4th June only one sailing vessel was torpedoed. I have nothing to compare this list with. I do not know how many sailing vessels were in these waters at the time, and whether any of them took tugs to assist them on their voyage. I should rather gather from the log that the master passed sailing vessels which were proceeding under their own sails. Under these circumstances it is very difficult to say that the *Ernest Legouve* was or would have been in such peril as to justify the expenditure on the tug being treated as a general average act.

It must further be remembered that the plaintiffs always used a tug when leaving or entering port, and are only claiming in respect of a user for the purposes of accelerating the intermediate voyage, a position not unlike that of a ship with auxiliary steam above referred to. General average expenditure must be incurred to avoid extraordinary and abnormal peril as distinguished from the ordinary and normal perils of the sea, and in my view in the present case the risk of being attacked or destroyed by the King's enemies was not an extraordinary and abnormal peril: (see *Taylor* v. *Curtis*, above referred to, where Gibbs, C.J. says: "The measure of resisting the privateer was for the general benefit, but it was part of the adventure. No particular part of the property was voluntarily sacrified for the protection of the rest. The losses fell where the fortune of war cast them, and there it seems to me they ought to rest." It therefore follows that these losses were not in the nature of general average and that the plaintiffs cannot recover. It is the duty of the master to carry the cargo safely if he can, and I do not think he did anything here in excess of his duty, or that he was exposed to any danger other than that usual and anticipated on such a voyage at such a time. I am satisfied that the act of the master may have minimised the risk, and that was undoubtedly a benefit to the property, but it is impossible to say that it preserved it in a time of peril. While it is true that proof of minimisation of risk may in some cases be equivalent to proof of preservation of the property, I cannot find that it reaches that standard in the present case.

In my opinion the claim fails, and my judgment must be for the defendants.

Judgment accordingly.

Solicitors for the plaintiffs, *Ballantyne, Clifford,* and *Hett.*

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

March 19, 20, *and* 30, 1917.

(Before Bailhache, J.)

Anglo-Northern Trading Company Limited v. Emlyn, Jones, and Williams. (a)

Time charter-party—Hire—Requisition of ship by Admiralty—Restraint of princes—Frustration of commercial adventure.

The doctrine of commercial frustration is applicable to a time charter-party.

It does not apply where the time charterer has the use of the vessel for some purpose for which he is, under the charter-party, entitled to use her, even though that purpose is not the particular purpose for which he desires to use her.

Whether the doctrine is to be applied to a particular time charter-party depends upon the circumstances, the main consideration being the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charter-party.

The parties have the right to claim that a time charter-party is determined by frustration as soon as the event happens on which the claim is based.

Where a party desires to rely on the doctrine, the question is what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel, having regard to the information before him, and it will be immaterial whether his anticipation is justified or not by the event.

By a charter-party, dated the 2nd Oct. 1915, *a ship was let on hire at a monthly rate until the 19th Nov.* 1916. *In certain events preventing the working of the steamer, hire was to cease until she was again in an efficient state to resume her service. There was an exception clause which included restraint of princes, but there was no provision for cessation of hire in respect of interruption of service due to that exception. On the 22nd July* 1916 *the ship was requisitioned by the Admiralty, and the requisition continued until after the 19th Nov.* 1916, *the rate of hire payable by the Admiralty being less than that payable under the charter-party. No information was given by the Admiralty at the time of the requisition of the probable duration of the requisition. The charterers claimed that the requisition determined the charter-party.*

Held, that the requisition had frustrated the adventure, and the charterers were not liable for the hire after the date of the requisition.

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

Award by an arbitrator in the form of a special case.

By a charter-party in the Baltic and White Sea Conference form, dated the 2nd Oct. 1915, the plaintiffs, the Anglo-Northern Trading Company Limited (hereinafter called the owners), agreed to let, and the defendants, Emlyn Jones and Williams (hereinafter called the charterers) agreed to hire, the steamer *Lowdale* for a term of about eleven or twelve calendar months (say from date of delivery till about the 30th Sept. or the 30th Oct. 1916), at 3631*l.* 5*s.* per calendar month, commencing from the time the steamer was delivered and placed at the charterers' disposal. The payment of hire was to be made in London monthly, in advance. In default of payment the owners were to have the faculty of withdrawing the vessel from the service of the charterers without prejudice to any claim that they might have against the charterers under the charter.

The charter-party provided by clause 12 that in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer for more than twenty-four consecutive hours, hire should cease until she was again in an efficient state to resume her service, and it contained an exception clause which included, *inter alia*, restraint of princes, but there was no provision for cessation of hire in respect of any interruption of the services of the steamer due to that exception. The steamer (unless lost) was to be redelivered on the expiration of the charter-party. By a supplemental clause it was provided that any time occupied during the currency of the charter-party in the survey of the steamer was to be added to or deducted from the above periods at the charterers' option.

The steamer was delivered to the charterers on the 28th Oct. 1915, when hire commenced, but it ceased to be payable for two periods, amounting in all to one month and nineteen and one-twelfth days, while the steamer was undergoing survey in Nov.-Dec. 1915, and in May 1916. In respect of those periods the charter-party was admittedly extended by the charterers exercising the option given them to do so.

On the 26th July 1916 the steamer was requisitioned by the Admiralty, and she continued under that requisition until after the expiration of the period covered by the charter-party, the rate of hire payable by the Admiralty being 1529*l.* 10*s.* per month. At the time of requisitioning the vessel no information was given by the Admiralty of the probable duration of the requisition. At that time hire had been paid in advance by the charterers for the period expiring on the 28th July 1916, but no subsequent payment of hire was made under the charter-party. If the extended period of one month and nineteen and one twelfth days (the time occupied in the survey of the steamer) was added to the 30th Sept. 1916, the charter-party would terminate on the 19th Nov. 1916. No formal redelivery of the vessel was ever made by the charterers, and on the 19th Nov. 1916 she was still under requisition to the Admiralty. No payment had been made by the Admiralty to the charterers, and presumably it would be paid to the owners. The owners claimed against the charterers hire from the 28th July 1916 to the 19th Nov. 1916, amounting, after giving credit for the hire, if and when received from the Admiralty, to 7782*l.* 6*s.* 4*d.*

It was contended for the owners that they were entitled to hire for the whole period of the charter-party as extended, that it was the charterers' duty to collect from the Admiralty the hire payable under the requisition, and that the act of requisition did not put an end to the charter or affect the rights of either party under the charter-party.

It was contended for the charterers that the Admiralty requisition put an end to the charter-party, and that, even if it did not do so, the owners were not entitled to payment of hire by the charterers until the sum due under the requisition from the Admiralty had been paid or credited to the charterers.

The arbitrator decided, subject to the opinion of the court, that the Admiralty requisition did not put an end to the charter-party, and that the owners were entitled to be paid hire until 2 a.m. on the 19th Nov. 1916, giving credit for the hire payable by the Admiralty. He therefore awarded that the charterers should pay to the owners 7782*l.* 6*s.* 4*d.* If his award was correct in point of law, it was to stand; if, however, the court should be of opinion that the charter-party was determined by the Admiralty requisition, he awarded that the owners should repay to the charterers 302*l.* 12*s.* 1*d.*, being the hire paid in advance for the period from the 26th July 1916, when the steamer was requisitioned, until noon on the 28th July 1916.

Leck, K.C. and *C. T. Le Quesne* for the charterers.

Inskip, K.C. and *W. N. Raeburn* for the owners.

The following cases were referred to during the course of the arguments:

Tamplin Steamship Company v. *Anglo-Mexican Petroleum Products Company*, 13 Asp. Mar. Law Cas. 284; 115 L. T Rep. 315; (1916) 2 A. C. 397;
Modern Transport Company v. *Duneric Steamship Company*, 13 Asp. Mar. Law Cas. 490; 115 L. T. Rep. 535; (1917) 1 K. B. 370;
Scottish Navigation Company v. *Souter and Co.*, 13 Asp. Mar. Law Cas. 539; 115 L. T. Rep. 812 (1917) 1 K. B. 222;
Jackson v. *Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;
Embericos v. *Reid and Co.*, 12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45;
Admiral Shipping Company v. *Weidner, Hopkins, and Co.*, 13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171; (1916) 1 K. B. 429; 115 L. T. Rep. 812; (1917) 1 K. B. 222;
Watts, Watts, and Co. v. *Mitsui and Co.*, 13 Asp. Mar Law Cas. 580; 116 L. T. Rep. 353; (1917) W. N. 108;
Geipel v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T Rep. 361; L. Rep. 7 Q. B. 404;
Metropolitan Water Board v. *Dick Kerr, and Co*, 116 L. T. Rep. 201; (1917) W. N 98;
Andrew Millar and Co. v. *Taylor and Co.*, 114 L. T. Rep. 216; (1916) 1 K. B. 402.

Cur. adv. vult.

March 30.—Bailhache, J. read the following judgment:—This case comes before me on a case stated by an arbitrator for the opinion of the

court. It raises once again the much-litigated question of the effect of an Admiralty requisition of a ship the subject of a time charter-party.

The facts are that the *Lowdale*, under time charter-party dated the 2nd Oct. 1915 to Messrs. Emlyn Jones and Williams, was requisitioned by the Admiralty on the 26th July 1916. The time charter-party expired on the 19th Nov. 1916, while the ship was still under requisition, and the charterers contend that the Admiralty requisition so frustrated the commercial object of the adventure as to put an end to the charter-party as from the date of the requisition. This contention was, I gather, raised as soon as the *Lowdale* was requisitioned. There is no finding to that effect, but the charterers paid no hire to the owners after the 26th July. The time charter-party is in the Baltic and White Sea Conference form, giving the charterers a wide choice of purposes for which the ship may be used by them. It provides, in clause 12, for cessation of hire during time lost by deficiency of men, owners' stores, or accident preventing the working of the ship, and it contains an exception clause, clause 14, which includes restraint of princes, but there is no provision for cessation of hire during any interruption of the services of the ship due to that exception. The arbitrator has held, contrary to the charterers' contention, that the requisition by the Admiralty did not put an end to the time charter-party, and the question for my decision is whether he is right in so holding.

The requisition by the Admiralty was a restraint of princes, and it took the *Lowdale* entirely away from the control of both owners and charterers, and from its date the charterers had none of her services for any purpose whatever.

The authorities upon the point are difficult to reconcile, and there is such conflict of opinion on the subject among lawyers and commercial men that I reserved my judgment in the hope that I might be able to extract from the decided cases some definite rules which might serve as a guide to shipowners and time charterers, who are much perplexed to know what their respective rights are in such a case as the present, a case now of constant occurrence. I have found the task a difficult one, but with the diffidence which befits a judge of first instance, especially one whose opinion has been overruled, I venture to suggest that the law at present stands thus:

(1) The doctrine of commercial frustration is applicable to a time charter-party: (see per Lords Loreburn, Haldane, and Atkinson in *Tamplin's* case, *sup.*) and the subsequent decision of the Court of Appeal in *Souter's* case (115 L. T. Rep. 812; (1917) 1 K. B. 222) and *Weidner, Hopkins'* case (*sup.*). I think it impossible to hold, as is sometimes contended, that the last-mentioned decision turned solely upon the conclusion of the Court of Appeal that the charter-parties in those cases were voyage and not time charter-parties: (see especially the judgment of A. T. Lawrence, J., at p. 249).

(2) The doctrine does not apply when the time charterer has the use of the vessel for some purpose for which he is under the terms of the time charter-party entitled to use her, even though that purpose is not the particular purpose for which he desires to use her: (*Brown* v. *Turner, Brightman, and Co.* (105 L. T. Rep. 562; (1912) A. C. 12). I think that, in so far as the decision in *Weidner, Hopkins'* case (*sup.*) seems contrary to this view, that part of the decision is founded upon the fact that Swinfen Eady and Bankes, L.JJ. considered that the charter-party in that case was a voyage and not a time charter-party. I am aware that the judgment of A. T. Lawrence, J. in that case cannot be explained on this ground, but, with every respect for any judgment of his, I think the law is as I have stated it.

(3) It follows that the doctrine does not apply unless the owner is unable to give the time charterer the use of the vessel for any purpose whatever within the scope of the charter-party.

(4) Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charter-party depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charter-party.

(5) This raises another question, namely, when is the party desirous of relying upon the doctrine of frustration in a position to claim his right so to do? If he does so as soon as the event happens which in his view gives him the right, its duration must be a matter of estimate, depending chiefly upon the nature of the event. The particular event with which I am concerned in this case is a requisition of the vessel by the Admiralty for an undefined period. Now there is nothing more repugnant to business men who have to look ahead and make their arrangements in advance than uncertainty as to their engagements already made. Doubt as to their contractual obligations paralyses business, and I think that in time charter-parties where hire is periodically payable and failure to pay may entail the withdrawal of the vessel, and payment and acceptance of the hire, if not a waiver of the right to rely upon frustration, at any rate extend the period of suspense, the parties must have the right to claim that the charter-party is determined by frustration as soon as the event upon which the claim is based happens. The question will then be what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials as are before him, including, of course, the cause of the withdrawal, and it will be immaterial whether his anticipation is justified or falsified by the event. This view is I think supported by such cases as *Geipel* v. *Smith* (*sup.*), *Notara* v. *Henderson* (26 L. T. Rep. 442; L. Rep. 7 Q. B. 225, 237), *The Savona* (1900) P. 252, 259), and *Embiricos* v. *Reid and Co.* (*sup.*). I should entertain no doubt of its accuracy but for the decision of the Court of Appeal in *Andrew Millar and Co* v. *Taylor and Co.* (*sup.*), which seems to point the other way and to indicate that the proper attitude to adopt is "wait and see." That is not, however, a charter-party case, and for the reasons given does not, in my opinion, apply to time charter-parties.

(6) The decision of the Court of Appeal in *The Duneric* case (*sup.*) does not appear to have any material bearing upon the matter in hand. Mr. Roche, in support of the appeal, expressly disclaimed any reliance upon the doctrine of frustration of the adventure: (1917) 1 K. B. 373). A good deal of confusion has been caused by misapprehension of this case and treating it as an authority on frustration of adventure.

These conclusions, if sound, are, I think, sufficient for practical guidance. If the principles I have stated are correct, commercial men will not care to inquire how they are arrived at, but lawyers may feel some surprise that I quote as my authority for the proposition that the doctrine of frustration of adventure applies to a time charter-party the opinions of Lords Haldane and Atkinson, who formed the dissentient minority in *Tamplin's* case (*sup.*), and not those of Lords Buckmaster and Parker, who with Lord Loreburn formed the majority in that case. The reason is that, as I understand it, the judgment of the Court of Appeal in *Admiral Shipping Company* v. *Weidner, Hopkins, and Co.* (*sup.*) has not followed the line of reasoning taken by Lords Buckmaster and Parker, nor, as I read his speech, did Lord Loreburn.

The question at issue is the implication into a time charter-party of a clause providing for the determination of the contract by frustration of the adventure, which will not conflict with the express provisions of the contract. The general rule of law is, of course, that no term can be incorporated by implication into a contract which conflicts with some term expressed in the contract. Lord Parker, speaking for himself and Lord Buckmaster, points this out in *Tamplin's* case (*sup.*), where, after referring to the terms of the charter-party in that case, terms which are the usual terms in most time charter-parties, and were the same as in *Weidner, Hopkins'* case (*sup.*), he says: "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 those provisions." I had pointed out the same difficulty in *Weidner, Hopkins'* case (114 L. T. Rep. 171; (1916) 1 K. B. 429) in a passage to which Lord Parker referred and of which he approved. The Court of Appeal in *Weidner, Hopkins'* case (115 L. T. Rep. 812; (1917) 1 K. B. 222) expressly say that my view was mistaken in that case. True it is that the majority of the Court of Appeal held that the charter-party there was a voyage and not a time charter-party, but that does not dispose of the difficulty now under consideration. The express terms of that contract being the same in this respect as in the contract in *Tamplin's case* (*sup.*), the introduction by implication into both contracts of the same term must necessarily cause the same conflict between the express terms and the terms so implied, if conflict there be.

It is not my purpose here to argue the matter further, still less to endeavour to set up again any opinion of my own against a judgment of the Court of Appeal. I should not, indeed, have referred to my own view of the matter at all, but that its reversal in the Court of Appeal after its approval by Lord Parker seems to be the clearest indication I can get that I am right in saying that, notwithstanding the difficulty felt and expressed by Lord Parker in the passage I have cited, the doctrine of frustration of adventure does apply to a time charter-party.

It remains to apply the law as I understand it to the present case, and so doing it seems clear that this adventure was frustrated, and that too whether one considers the position as at the date of the requisition or holds the matter in suspense until the termination of the charter-party, and I so answer the question submitted to me. The result of it is the charterers get the costs of this hearing.

Alternative award upheld.

Solicitors for the charterers, *W. A. Crump* and *Son.*

Solicitors for the chartered owners, *Winn-Jones* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 17, 18, *and* 31, 1916.

(Before Sir S. T. EVANS, President.)

THE MONTROSA. (*a*)

Proceeds of sale of ship in High Court — Action for breach of charter brought in County Court against proceeds of sale in the High Court—Summons in County Court action served on the Admiralty registrar—County Court action transferred to High Court—Jurisdiction of High Court to hear and determine the transferred action—County Court Admiralty Jurisdiction Amendment Act 1869 (32 *&* 33 *Vict. c.* 51), *ss.* 2, 3.

Salvors brought an abandoned steamship into Hull. The salvors instituted a suit for salvage in the High Court of Admiralty, and, an order for the sale of the vessel having been made, the proceeds (2350*l.*) *were paid into court. The salved steamship when abandoned was under a charter to load a wood cargo for England. On the day she was sold the Russian owner wrote to the charterers repudiating the charter. The charterers then took out a summons in the City of London Court against "the owners of the proceeds of sale of the sailing vessel* Montrosa, *now in the High Court of Justice, Admiralty Division, within the jurisdiction of this honourable court," claiming* 300*l. as damages for breach of charter-party. The summons was served on the Admiralty registrar. The charterers took out a summons in the High Court to transfer the action from the City of London Court to the High Court. An order to transfer was made. After the action was transferred the Russian owner entered an unconditional appearance in the High Court.*

Held, that the City of London Court had jurisdiction to entertain the action, as the proceeds of sale lying in the High Court represented the res; *that service on the Admiralty registrar was good service; and that the High Court of Admiralty had jurisdiction to hear and determine the transferred action although the charterers could not have instituted the action in the High Court originally.*

ACTION to recover damages for breach of charter.

By charter, dated the 16th March 1915, Mr. M. Eriksson, the owner of the Russian sailing ship *Montrosa*, agreed with John E. Moore Limited, of St. John's, New Brunswick, that the *Montrosa* should proceed in ballast to Halifax, Pictou, or Pugwash, as ordered before leaving England, and should there load a cargo of timber and deliver it at a port in the United Kingdom, which port was

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

to be stated on the signing of the bills of lading and on payment of freight at so much a standard.

The *Montrosa* before sailing from England was told to proceed to Pugwash, and she left Goole in May 1915. After leaving Goole she sprang a leak and was abandoned by her crew, who reported that she had been mined. On the 1st June she was picked up by salvors and taken to Hull. The salvors brought an action against her in the Admiralty Division to recover salvage for the services rendered in bringing her into port. On the 12th Aug. 1915 the Russian shipowners wrote to the plaintiffs, John E. Moore and Co. Limited, refusing to carry out their contract under the charter, and on the same day the vessel was sold by order of the Admiralty Court, and the proceeds of sale (2350*l.*) were paid into court.

On the 21st Oct. 1915 John E. Moore and Co. Limited took out a summons in Admiralty in the City of London Court claiming 300*l.* damages against the owners of the proceeds of sale of the *Montrosa* for breach of charter-party, dated the 16th March 1915, made between the plaintiffs and the owners of the *Montrosa* for the use or hire of the said vessel. The summons was directed against "the owners of the proceeds of sale of the *Montrosa* now in the High Court of Justice, Admiralty Division, within the jurisdiction of this honourable court," and was served on the Admiralty registrar as custodian of the fund in court. On the 27th Oct. 1915 the assistant registrar of the Admiralty Court made an order transferring the action, which had been started by Moore and Co. Limited in the City of London Court, to the Admiralty Division of the High Court. It was a term of the order that "all rights reserved to defendants, costs reserved."

The action having been transferred to the High Court, the plaintiffs delivered a statement of claim in which they alleged that, when the vessel was picked up by salvors eighteen miles N.E. by N. of the Spurn Lightship, she had been improperly abandoned by her crew. They alleged that when she was picked up she was leaking through two rivet holes and gradually filling with water, and that the pumps could not be worked owing to the handles being missing; that otherwise she was undamaged; that the leaky rivet holes were easily plugged by the salvors, and that then the ship did not make any more water. They further alleged that after arrival at Hull she was surveyed and it was found that she had not been damaged by a mine, and that the leaks had been caused by cutting off two rivet heads from the inside; that with very slight repairs she was fit to proceed on her voyage under the charter, but that the defendants or their agents improperly abandoned the voyage and repudiated the charter. The plaintiffs further alleged that, by reason of the matters stated above, the defendants had committed a breach of the charter in abandoning the voyage, or in repudiating the charter, or in sending the *Montrosa* to sea not tight and staunch, and with a master and crew and pumps which were not fit for the voyage, or in scuttling her. They also alleged that they had suffered damage, and claimed judgment against the proceeds in court for 300*l.*, or a reference to the registrar to assess the amount of the damage.

The defendants alleged that after leaving Goole the *Montrosa* made water through two rivet holes, the rivets having been wilfully and improperly, and without the consent and against the interests of the owners of the vessel, destroyed by the master and crew, or some or one of them, in order to allow water to enter the ship, and she was then improperly abandoned by the crew.

They further alleged that the performance of the charter-party was prevented by matters excepted therein—namely: "Perils of the sea, barratry of the master and crew, arrest . . . accidents of navigation even when occasioned by the negligence and default . . . of the master or mariners." The defendants then alleged that at the time the action was instituted Mr. M. Eriksson, who had been the owner of the vessel, with whom the plaintiffs had made the charter-party, had ceased to be her owner, the vessel having been sold, and the City of London Court had no jurisdiction to entertain the action, and that the High Court had no jurisdiction to entertain an action *in rem*, for damages for breach of contract.

The material sections of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 54) are as follows:

2. Any County Court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto to try and determine the following causes: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship . . . provided the amount claimed does not exceed three hundred pounds.

3. The jurisdiction conferred by this Act . . . may be exercised either by proceedings *in rem* or by proceedings *in personam*.

Sect. 6 of the Admiralty Court Act 1861 (24 Vict. c. 10), referred to in the argument, is as follows:

The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty, or breach of contract on the part of, the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.

Laing, K.C. and *Balloch* for the defendants.—The High Court of Admiralty has no jurisdiction to try an action *in rem* for damages for breach of charter, for such an action is not within the provisions of sect. 6 of the Admiralty Court Act 1861: (see Carver's Carriage by Sea, sect. 688). The City of London Court has jurisdiction to try such an action if the ship against which proceedings *in rem* are taken is the property of the shipowner against whom the plaintiffs have a claim. When proceedings were started Eriksson had ceased to be the owner. If the plaintiffs had proceeded with the action in the City of London Court they could not have enforced their judgment. Proceeds realised by the sale of property in the hands of a third party cannot be proceeded against:

The Optima, 10 Asp. Mar. Law Cas. 147; 93 L. T. Rep. 638.

The action could not be brought at all, and there was, therefore, no action which could be transferred, though it is admitted that, if such an

action could be brought, it might be transferred and tried in the Admiralty Court. Further, the exception in the charter as to barratry protects the shipowner:

Finlay v. *Liverpool and Great Western Steamship Company*, 3 Mar. Law Cas. O. S. 487; 23 L. T. Rep. 251.

Bateson, K.C. and *Dunlop* for the plaintiffs.—The proceeds of sale represent the *res;* the proceeds are owned by the late owner of the ship. They are in the custody of the High Court, which is in the geographical area over which the City of London Court has jurisdiction; the action therefore is properly instituted. The transfer of the action was rightly made under sect. 6 of the County Courts Admiralty Jurisdiction Act 1868, which provides that the High Court, on motion by any party to an Admiralty cause pending in a County Court, may, if it think fit, after notice to the other party, transfer the cause to the High Court. The High Court holds the proceeds for those entitled to them, and, subject to questions as to priorities, the plaintiffs are entitled to judgment:

The Africano, 7 Asp. Mar. Law Cas. 427; 70 L. T. Rep. 250; (1894) P. 141.

Oct. 31.—THE PRESIDENT.—This action was originally brought in the City of London Court under the provisions of the County Courts Admiralty Jurisdiction Amendment Act 1869. The claim was by the charterers for 300*l.* damages for breach of charter-party. By an order of this court the action was transferred to this division. Appearance was entered for the defendants in the High Court after the transfer. The appearance was unconditional.

The chief contest between the parties at the hearing was whether there was jurisdiction to entertain the action. Apart from this, the substance of the case can be dealt with briefly. The defendants pleaded that the completion of the voyage and the further performance of the charter-party were prevented by barratry of the master and crew, which was one of the exceptions in the charter-party. The damages were also in issue. As to the barratry plea, it is enough to say, first, that the defendants failed to prove it; and secondly, that whenever and however the rivets were removed, they could easily and promptly have been replaced, and the voyage could have been resumed. This could have been done even before the arrest in the salvage action.

Moreover, after the arrest the correspondence between the plaintiffs' and the defendants' respective agents shows that it was expected that the vessel would have proceeded on her voyage in accordance with the charter-party. On the 10th July the owners instructed their agents to settle the salvors' claim for 800*l.*—the sum demanded "if better impossible"—and to instruct the master to fulfil the charter if charterers insisted. The reply to this was a letter of the 12th July.

It was not until the 12th Aug. that the owners' agents repudiated the charter-party. On that day the vessel had been sold by this court for 2350*l.* The proceeds were paid into court. The salvors would have released the vessel if bail for 1000*l.* had been given. Subsequently the salvage action was settled for 600*l.* and costs.

As to the damages, the plaintiffs produced evidence which proved their loss to be considerably over 300*l.* The defendants did not attempt to controvert the evidence. Accordingly, if the court has jurisdiction, the plaintiffs have established their right to judgment for 300*l.* If it has not, the action of course fails.

This court could not have entertained the action if it had been originally brought in this court, because it has not been intrusted with powers like those conferred on County Courts by the Act of 1869 already referred to. Why that is so I do not know. Those interested in shipping have urged the extension of the powers of this court to enable it to decide causes arising out of agreements made in relation to the use or hire of a ship, and also in relation to the sale and purchase of ships. It seems to me to be fitting that this should be done; but that is a matter for the Legislature. But if the City of London Court had jurisdiction to entertain the action, this court by transferring the action to itself obtained jurisdiction to hear and determine it, notwithstanding that it could not have been instituted here originally: (*The Swan*, 23 L. T. Rep. 633; L. Rep. 3 A. & E. 314).

The defendants contended that there was no jurisdiction in the City of London Court because the ship had been sold, and the *res* had therefore disappeared; and also that the service of the plaint was not properly effected. It is a fact that the vessel had been sold; but the proceeds were in this court. The service of the summons was made on the Admiralty registrar of this court.

Where the proceeds are in court they represent the *res*, the ship itself, and the action can be brought against the proceeds: (see Coote's Admiralty Practice, 2nd edit., p. 144; Williams & Bruce's Admiralty Practice, 3rd edit., p. 269; *The Dowthorpe*, 2 Notes of Cases, 267; *The Elephanta*, 15 Jur. 1185; the proceeds of *Dora Tully*, unreported, Dec. 1885; and *The Optima*, *ubi sup.*). It makes no difference, in my view, that the proceeds were in the custody of the High Court when the action was entered in the City of London Court. The essential circumstance is that they should be in court, to be held and distributed among all persons legally interested.

It has been held that a County Court can arrest a vessel already under arrest in the High Court (see *The Rio Lama*, 2 Asp. Mar. Law Cas. 143; 28 L. T. Rep. 517; L. Rep. 4 A. & E. 157), although the usual practice is for the process in the County Court action to be served on the ship if she is already under arrest in the High Court. I think service on the proceeds was also good service and in accordance with Admiralty practice. Moreover, if there had been an irregularity in the service in the County Court action, that would have been waived by the unconditional appearance in this court after the transfer.

As the proceeds of a sale by the court are held by the court for all persons having rights against them, or the *res* which they represent, it is just that the plaintiffs should be able to rank in their proper place among the various claimants to the proceeds. The priorities of the claims will be decided in proper course hereafter.

Judgment must be entered for the plaintiffs, with costs.

Solicitors: for the plaintiffs, *Trinder, Capron, and Co.*; for the defendants, *Thomas Cooper and Co.*

Dec. 3, 1915, *and March* 27, 1916.

(Before Sir S. T. EVANS, President, and Elder Brethren of the Trinity House.)

THE BENUE. (*a*)

Collision — Damage action — Plea of compulsory pilotage—Negligence of master and crew—Onus of proof—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 633.

In a damage action the faulty navigation of the defendants' steamship was held to have caused the collision. The defendants had pleaded that if there was any negligence on their ship which caused the collision, the negligence was solely that of the pilot who was compulsorily in charge of their ship.

Held, that to make out that defence, the defendants must prove that the pilot was a compulsory pilot, and was in fact in charge; that the negligent act which caused the collision was the act of the pilot himself, or was an act done by the master or crew in obedience to the order of the pilot; and that, if on the evidence it appeared that there was some negligent act or omission on the part of the master or crew which might have contributed to the collision, the defence of compulsory pilotage would fail unless the defendants further proved that such act or omission did not contribute to the collision.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Ravenstone*. The defendants were the owners of the steamship *Benue*.

The plaintiffs' case was that shortly before 6.12 p.m. on the 1st March 1915 the *Ravenstone*, a steel screw steamship, 330ft. long, 3049 tons gross, 1946 tons net register, manned by a crew of twenty-five hands, was in the river Mersey, about off Seacombe, in the course of a voyage from Galveston to Liverpool with a cargo of cotton. The weather was clear but squally, the wind north-north-west, a moderate gale, and the tide was low water slack. The *Ravenstone*, in charge of a duly licensed Liverpool pilot, was proceeding straight up the river on the west side of mid-channel with engines working at slow speed. She carried the regulation masthead, side, and stern lights, which were duly exhibited and were burning brightly, and a good look-out was being kept on boa d of her.

In these circumstances the *Benue*, which steamship had been seen for some time previously coming up astern and had gradually overtaken the *Ravenstone*, while passing on the starboard side began to sheer to port as if acting under starboard helm, thereby causing danger of collision. The engines of the *Ravenstone* were at once stopped, and, as soon as her port bow was passed and clear of a vessel lying at anchor with her head to the westward, the helm of the *Ravenstone* was put hard-a-starboard and her engines were put full speed astern. Almost immediately afterwards the *Benue* with her port side about amidships struck the starboard bow of the *Ravenstone*, causing her considerable damage.

The plaintiffs charged the defendants with bad look-out, with neglecting to keep out of the way of the *Ravenstone*, with improperly starboarding, and with not stopping, easing, or reversing their engines.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The case of the defendants was that shortly before 6 p.m. on the 1st March 1915 the *Benue*, a steamship of 3123 tons gross and 1912 tons net register, manned by a crew of forty-six hands all told, was proceeding up the river Mersey, well to the west of mid-river, at a speed of about ten knots, in the course of a voyage from West African ports to Liverpool. The weather was clear, the wind north-north-west, a moderate gale, and the tide was about low water. The *Benue* was exhibiting the regulation lights, which were burning brightly, and a good look-out was being kept on board of her.

In these circumstances the *Benue*, which had been for some time previously overtaking the *Ravenstone* as she was proceeding up the river, began to pass her on the port side of the *Benue* at a distance of about 400ft. Both vessels continued on their respective courses until shortly after they had passed Seacombe landing stage, when the *Ravenstone* was seen to be sheering towards the *Benue* as if under port helm, and her stem approached close to the port quarter of the *Benue*. A collision then appeared inevitable, and the helm of the *Benue* was put hard-a-starboard and the engines, which had been at full speed, were stopped, but the *Ravenstone* came on and with the bluff of her starboard bow struck the port quarter of the *Benue* a heavy blow causing damage to the *Benue*.

The defendants charged the plaintiffs with bad look-out, with improperly porting, with allowing the head of the *Ravenstone* to come to starboard, with failing to keep their course and speed, and with failing to indicate their course by whistle signal.

The defendants also alleged that if the collision was caused or contributed to by any negligence on the *Benue*, which was denied, it was solely caused by the fault or neglect of the compulsory pilot who was in charge of the *Benue*.

Dec. 3, 1915.—The President found that the plaintiffs' vessel, which was being overtaken by the defendants' vessel, kept her course and speed in accordance with the collision regulations, and was not to blame for the collision. He further held that the defendants' vessel was to blame as she failed to keep out of the way and ran into the vessel she was overtaking.

The consideration of the further defence of compulsory pilotage raised by the defendants was reserved.

Laing, K.C. and *D. Stephens* for the plaintiffs.

Bateson, K.C. and *A. Hyslop Maxwell* for the defendants.

THE PRESIDENT.—At the conclusion of the trial I stated my decision on the facts, and I have now to deal with the defence of compulsory pilotage which was raised by the defendants. For this part of the judgment it is not necessary, fortunately, to recapitulate many facts. It is sufficient to state the main contests and conclusions.

The substance of the plaintiffs' case was (1) that the *Benue* neglected to keep out of the way of their vessel, the *Ravenstone*, and (2) that the helm of the *Benue* was improperly starboarded, and (or) her head was improperly allowed to go to port, so as to cause the collision.

The substance of the defendants' case was (1) that the *Ravenstone* was improperly ported

and (or) her head was improperly allowed to go to starboard, and (2) that the *Ravenstone* failed to keep her course and speed.

The cause of the collision was the faulty navigation of the *Benue*. She was the overtaking vessel, and she failed to keep out of the way of the *Ravenstone*. Her head was improperly driven to port and into the *Ravenstone* by improper starboarding. On the other side the *Ravenstone* was not ported, and her head was not allowed to go to starboard. Her course and speed were properly kept. The *Benue* had a compulsory pilot on board. General evidence was given that he gave the navigation orders, and that his orders were obeyed.

The important general question is what kind of evidence and proof must the owners of a vessel give in order to entitle them to the immunity afforded by the Merchant Shipping Act in cases of faulty navigation where pilotage is compulsory. In many, if not most, of the cases of this class which come before the court the disputes relating to the immunity involve personal reputations and responsibilities, as well as large sums of money. The reported authorities have dealt with the question in the main as one of onus of proof. I will not discuss the older cases. It will suffice for the purpose of this judgment to examine those which have been decided during the last half-century, since the passing of the Merchant Shipping Act of 1854.

The first of this series of cases is *The Schwalbe* (1 Mar. Law Cas. O. S. 42; 4 L. T. Rep. 160; 14 Moore, P. C. Cases, 241). The cause to which the collision was attributed was an improper starboarding of the helm. The owners failed to prove expressly that the order to starboard was given by the pilot. For that reason they were deprived of the immunity, and were held liable. Lord Chelmsford delivered the judgment of the Judicial Committee, and in dealing with this matter said: "The *Schwalbe*, therefore, being found to be in the wrong, it only remains to be considered whether the owners have succeeded in exonerating themselves from their *primâ facie* responsibility by showing that the pilot was the sole author of the injury. For this purpose it is not sufficient for them to prove the vessel to have been in charge of a licensed pilot, under whose orders the crew were acting, and then to call upon the court to presume that the particular order which occasioned the collision was given by him. By the express words of sect. 388 of the Merchant Shipping Act, which protects the owners from loss or damage where it is occasioned by the fault of the pilot, the *onus probandi* lies upon them, as their Lordships decided in the case of *The Christiania* (7 Moore, P. C. Cases, p. 160), upon corresponding words in the former Pilot Act, 6 Geo. 4, c. 125. It has been shown, in the consideration of the circumstances of the collision, that it must have been occasioned by the *Schwalbe* having starboarded her helm a short time before it occurred. The owners, to relieve themselves from their liability, are bound to prove that an order to starboard the helm at this time was given by the pilot. But no such proof is anywhere to be found, except in the hasty expression (corrected, as the witness says, almost before the words were out of his mouth, and not acted upon) just at the moment of the collision. The owners therefore fail entirely in the evidence necessary to transfer the responsibility from themselves." The members of the committee present at the hearing were Lord Chelmsford, Lord Kingsdown, and Sir Edward Ryan.

This decision was cited with approval in the judgments of the Privy Council in the two cases next to be referred to, viz., *The Iona* and *The Velasquez* (*ubi infra*). It is not mentioned in the opinions of the Law Lords in the *Clyde Navigation* case (*ubi infra*). The arguments are not reported, but I cannot doubt that *The Schwalbe* was there cited; moreover, Lord Chelmsford, who had delivered the judgment in it, presided in the House of Lords in the *Clyde Navigation* case.

The next decision to be examined is *The Iona* (2 Mar. Law Cas. O. S. 479; 16 L. T. Rep. 158; L. Rep. 1 P. C. 426), on appeal to the Privy Council from Dr. Lushington as Judge of the High Court of Admiralty. Upon the question of what the owners had to prove in order to make good the defence of compulsory pilotage, Sir Richard Kindersley (formerly Vice-Chancellor), who delivered the judgment, defined the position as follows: "It has been established as a principle that, in order to entitle the owners to the benefit of exemption from liability . . . they must prove that the damage for which it is sought to make them liable was occasioned exclusively by the default of the pilot. It is not enough for them to prove that there was fault or negligence in the pilot; *they must prove* to the satisfaction of the court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage."

This passage was criticised in the *Clyde Navigation* case, not with regard to the statement as to the necessity for proof by the owners of the fault of the pilot, but only to the implication in the three words I have italicised above as to the subsequent proof of fault on the part of the officers and crew which would exclude the conclusion that the damage was attributable solely to the pilot's negligence. Upon this Lord Chelmsford said (after citing the passage from "It is not enough," &c., to the end): "The learned Vice-Chancellor imposes upon the owners a species of negative proof which it is impossible for them to give. If instead of saying "they must prove," &c., he had said, "it must be proved that there was no fault on the part of the officers and crew," he would then have been perfectly correct: (*Clyde Navigation Company* v. *Barclay*, 36 L. T. Rep. 379; 3 Asp. Mar. Law Cas. 390; 1 App. Cas. 790, at p. 792)."

Subject to this criticism, therefore, the passage above quoted was approved of by the Law Lords. The members of the committee who sat with Sir Richard Kindersley were Lord Romilly (Master of the Rolls) and Sir James Colville.

A few months afterwards the decision in *The Velasquez* (2 Mar. Law Cas. O. S. 544; 16 L. T. Rep. 777; L. Rep. 1 P. C. 494) was given. It was delivered by Sir James Colville. In it the principle under discussion is stated thus: "It has been established by a long course of decisions, both in the High Court of Admiralty and at this board, that, to entitle the owners of a ship which is under the charge of a licensed pilot to the benefit of the provision which

exempts them from liability where the collision has been occasioned by the fault of the pilot, it lies upon them to prove that it was caused solely by his fault."

He afterwards pointed out that the authorities further showed that if it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them. Then follows a passage as to the burthen of the further proof where there is evidence of negligence on the part of the master and crew, which appears to be free from the criticism made by the Law Lords upon part of the *Iona* judgment—and to be in line with the subsequent opinions expressed by the House of Lords. The passage reads thus: "If, however, the evidence shows that there were acts of negligence on the part of the master and crew which may have contributed to the accident, as well as fault on the part of the pilot, the duty of showing that the former did not contribute in part to the accident seems to be involved in the obligation of the owners to prove that the *causa causans* of the collision was exclusively the fault of the pilot."

In this judgment there is one other passage which I deem it useful to quote: "If the crew and the pilot have combined consciously to put forward a false case, all that can be said is that the owners have failed to show, by trustworthy evidence, that the fault was exclusively the fault of the pilot. But if it be assumed, as their Lordships would willingly assume, that the witnesses honestly mistook the position of the barque, the natural inference from that is, that if there had been a proper look-out, not only would the barque have been descried at a greater distance, but her true position would have been known."

This is the part of the judgment apparently which was mainly in the mind of Sir Gorell Barnes when he stated the principle in *The Benmohr* (*ubi infra*).

In *The Velasquez* the faulty act of the pilot—viz., starboarding the helm—was proved by the owners, and was held to be a dangerous and improper manœuvre, and the immediate cause of the collision; but it was held that blame attached also to the crew, so that the defence of compulsory pilotage failed.

It is a little curious that this decision, following after *The Iona* (*ubi sup.*), was not adverted to in the *Clyde Navigation* case. The members who constituted the committee were Sir William Erle (Chief Justice), Sir James Colville, Sir Edward Vaughan Williams, and Sir Richard Kindersley.

The case of the *Clyde Navigation Company* (*ubi sup.*) comes next. Lord Chelmsford (having stated that there had been some little confusion in the cases as to the *onus probandi*, and having made the criticism already mentioned upon what Kindersley, V.C. said in *The Iona*), stated the law in these terms: "The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory fault. It may be that, in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions of part of the crew may come out; and it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the accident."

Lord Hatherley stated the rule thus: "I apprehend that the true rule is that the mode of proof will be this: In order to exempt yourself, by virtue of the provisions of the statute, 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 of proving 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."

It appears to me, speaking with all deference, that the ex-Lord Chancellor in the last sentence failed to distinguish between the separate burdens of proof to be borne again at this stage of the proceedings by the plaintiffs and the owners of a piloted vessel. His words seem to suggest that the former have the burden of establishing acts or omissions of the crew. But for this last sentence of Lord Hatherley's, I should not cite from the judgment of Lord Selborne, as he appears to me to express at much greater length what the judgment of Lord Chelmsford had succinctly stated. But in view of Lord Hatherley's language, it might be useful to make the following quotation from Lord Selborne's speech: "I see no reason for inferring the existence of any special or peculiar principle applicable to the burden of proof in this class of cases. 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 that charge was compulsory; and, thirdly, that it was his fault or incapacity which occasioned the damage." I apprehend that if a defender proves all these three propositions, and proves nothing more, then the burden is upon the pursuer, not upon the defender, to lay some foundation, at all events, for alleging that, notwithstanding the proof given that there was a qualified pilot in charge, and that compulsorily, and that he committed some fault or showed some incapacity, by which loss or damage were occasioned, yet there were also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and the question is upon whom it lies to show that. I apprehend it is clear on general principle that the burden of laying that foundation rests upon the pursuer, not upon the defender. The defender, if he has simply proved what he was obliged to prove to exonerate himself, and proved nothing more, is not obliged to travel into the indefinite region of negatives, or to anticipate by denial that for which no foundation is laid to call upon him to deal with it. No doubt the pursuer may discharge the onus lying

upon him in that respect either by direct proof tendered by himself, or by showing that in the proofs brought forward on the part of the defender there are matters appearing from which fault or negligence which may have contributed to the mischief is legitimately and reasonably to be inferred. Unless he does that he does nothing. When that is done no doubt a further *onus probandi* is thrown upon the defender to rebut the *primâ facie* evidence which has been given of contributory negligence on his part. Whatever may be the precise expressions to be found in any of the judgments, I see no reason whatever, referring them, as they ought to be referred, to the facts of the particular cases in which those expressions were used, for supposing that an arbitrary rule was meant to be laid down, inverting the general principles of *onus probandi* as applied to this particular class of cases."

This case was considered by the Court of Appeal in *The Indus* (56 L. T. Rep. 376; 6 Asp. Mar. Law Cas. 105; 12 P. Div. 46). In my humble view the summary explanation of the case given by the Master of the Rolls is not complete or satisfactory. In this, and in his own judgment, Lord Esher introduces the element of *primâ facie* proof when considering what the owners of the piloted ship have to establish to entitle them to exemption from liability. "If," he said, "the defendants prove that the pilot gave orders and that they were obeyed, they make out a *primâ facie* case of negligence on his part." The description he had just previously given as to the extent of the control of the pilot would seem also to be too restricted if it was intended to apply generally. The sentence above cited is so general that it is not unlikely to cause misconception. Evidence is always given formally in cases of this kind that the pilot gave all the orders and that they were all obeyed. I think that Lord Esher must have meant to refer, not to general evidence of that kind, but to proof of particular, specific orders given by the pilot, the obedience to which brought about the accident. I have examined this case, as it has been said that the decision in the *Clyde Navigation* case was explained in it.

I refer, in passing, to the case of *The Schwan* (69 L. T. Rep. 34; 7 Asp. Mar. Law Cas. 347; (1892) P. 419) only for a short passage from the judgment of Bowen, L.J., at p. 441. After stating that the owners of the ship have to show that the collision was due wholly to the pilot and not to their own crew or master, he adds: "It will not do to show that the pilot was in fault unless they can show that the pilot only was in fault, and that some act of negligence on his part, apart from the master and crew, caused the accident."

The last decision I propose to refer to is that of Barnes, J. in *The Benmohr* (52 W. Rep. 688). It has already been mentioned in connection with a passage cited above from *The Velasquez* (*ubi sup.*). Barnes, J. deals with the matter thus: "Then comes the principle applied in the case of *The Velasquez* (*ubi sup.*). A short statement of that principle may be thus put: That the persons—in this case the defendants—who rely on the plea of compulsory pilotage must prove by trustworthy evidence that the fault was the fault of the pilot alone, otherwise the court cannot act in finding that the fault was that of the pilot. It appears to me here that the defendants have failed to satisfy me, by trustworthy evidence, as to what occurred in fact on board the ship, that the fault was that of the pilot alone."

From these authorities I think it follows that the position in an action of collision as between plaintiffs on the one hand, and defendants pleading the defence of compulsory pilotage on the other hand, may be set out in plain and practical language in this way.

The plaintiffs must first establish a case of negligent navigation on the defendants' ship. The defendants must then prove that a pilot was in charge compulsorily and in fact; that the negligent navigation was due solely to the fault of the pilot; that is to say, that the particular negligent acts or defaults found by the court to have caused the collision were committed by the pilot himself, or by the master or crew in obedience to the pilot's orders. If the case rested in that state, the defence of compulsory pilotage would prevail. But if, in addition, evidence is given, either adduced by the plaintiffs or obtained from the defendants' own witnesses, or is in any other way forthcoming in the course of the case, that there were also acts or defaults on the part of the master or crew which might have contributed to the collision, the defence would fail, unless the defendants satisfied the court that such acts or defaults did not in any degree contribute to the collision. If the defendants did satisfy the court of that, their defence would hold good; if they did not, their defence would fail.

The issues which according to these rules arise are sometimes confused by contentions that the defendants have put forward a case either false, or ill-founded, and that therefore their defence of compulsory pilotage ought not to succeed.

Parties who put forward such cases suffer by the weakening or discrediting of their evidence, which may materially affect the findings upon the issues involved. But the legal issues remain the same.

If in every case where the defendants put forward a case to account for a collision which does not commend itself to the court they must fail in their compulsory pilotage defence, the defence would indeed have a scanty record of success.

The duty of the court is to try to ascertain the real facts in each case, and apply to them the legal rules. The application of the rules to the present case upon the facts found is simple.

I have found that the collision was due to the improper starboarding of the *Benue*.

The defendants, so far from proving that this starboarding was the sole fault of the pilot, denied in their pleadings and by their evidence that such starboarding ever took place.

They accordingly did not prove, or even set out to prove, that the act which is found to have caused the collision was the act of the pilot.

This puts an end to their defence of compulsory pilotage.

In order to further illustrate the rules applicable to such cases, I may add that if the defendants had admitted or proved the starboarding of their ship by the order of the pilot, but had also tried to prove, as they had alleged, that the *Ravenstone* had improperly ported and had so brought about the collision, or had changed her

course and speed, they would not necessarily have lost the benefit of their defence.

But again, supposing they admitted or proved the starboarding by the order of the pilot, if it transpired in the course of the evidence that the starboarding exceeded the pilot's orders or was continued contrary to such orders, by the fault of the man at the wheel, the defendants would have failed in their defence unless they satisfied the court that such excess or continuance of the starboarding did not in any degree contribute to the collision. If they had so satisfied the court they would succeed.

For the reasons before stated, I decided that the defence of compulsory pilotage failed, and ordered judgment to be entered for the plaintiffs.

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

Solicitors for the defendants, *Lawrence Jones* and *Co.*, for *Forwood* and *Williams*, Liverpool.

PRIZE COURT.

Feb. 21 *and March* 5, 1917.

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

THE BALTO. (*a*)

International law—Prize—Continuous voyage—Raw material imported into neutral country—Common stock of neutral country—Goods to be manufactured from raw material—Enemy country the ultimate destination of manufactured goods—Right of seizure—Evidence—Discovery.

A quantity of leather, which was contraband, was consigned from a neutral country, on a neutral ship, to a firm of boot manufacturers in another neutral country. It was contended on behalf of the Crown that it was the intention of the consignees either to forward the leather as raw material to the enemy, or to manufacture boots from the leather and then to send them to the enemy. The leather was therefore seized as prize, and a claim for its release was made by the consignees. Upon a summons being taken out by the Crown for an order for discovery of the claimants' books and documents relating to the sales of leather and boots from the year prior to the outbreak of the war down to the time of the seizure, it was contended that, as the leather had to go through the process of manufacture in the neutral country, the doctrine of continuous voyage did not apply, no matter what might be the ultimate destination of the boots when made, and that no order for discovery should be made, as the leather in its raw state was not liable to seizure.

Held, that the order asked for by the Crown must be made, as the rule of international law that goods which are liable to be seized when they are on a continuous voyage to a final enemy destination applies not only to the case of manfuactured articles on their way to the enemy, but also to the case of raw material which is being consigned to a neutral country, there to be manufactured into articles which are afterwards to be forwarded to the enemy.

THIS was a summons adjourned into court for argument, and raised the question as to the extent of discovery.

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

The *Balto* was a Norwegian vessel which left New York for Gothenburg on the 14th Oct. 1915. Included in her cargo was a parcel of seventy-four bales of sole leather, consigned from Boston, U.S.A., to Mr. Ernst Aqvist, the managing director of the Skofabriks Aktiebolaget Oscaria, a firm which carried on business at Orebro, Sweden, as manufacturers of boots and shoes. The vessel was diverted by the British naval authorities to Kirkwall for examination, and the leather was seized on the 22nd Nov 1915. It was the contention of the Crown that the leather—which was contraband—was being imported into the neutral country, Sweden, for the purpose of being turned into military boots ultimately destined for the German army, and that under the doctrine of "continuous voyage" the leather should be condemned as contraband.

In his affidavit Mr. Ernst Aqvist stated (*inter alia*):

I bought the said seventy-four bales of sole leather on or about the 2nd Sept. 1915, from the Howes Brothers Company, of Boston, through their agents, Messrs. C. Hemson, of Christiania, and opened on or about the 3rd Sept. 1915, through the Skandinaviska Kredit Aktiebolaget, Orebro, in the National City Bank of New York, a credit to be paid to the sellers against documents. I paid for the said goods on or about the 5th Nov., by paying the amount of the purchase price—namely, 38,565·26 Swedish crowns—in the Skandinaviska Kredit Aktiebolaget, Orebro, against documents. The said goods were purchased by me for, and are and were at the time of seizure intended exclusively for, consumption in my factory in Sweden, and none of them were for exportation or for enemy destination. The said goods are, and were at the time of seizure, and when restored will be my property, and no enemy of Great Britain had at the time of the seizure thereof, or now has, directly or indirectly, any right, title, or interest in the said goods.

On the 8th Feb. 1917 a summons was taken out at the instance of the Procurator-General, by which an order was asked for that

The claimants do within fourteen days make discovery on oath of all books of account, letter books, and usual commercial documents relating to the matter in question, and in particular of ordinary business books from the 1st Jan. 1913 up to the present time, showing all purchases of leather and of sales and proposed sales of leather and goods from the 1st Jan. 1913, together with all contemporaneous cables and correspondence relating to such sales or proposed sales.

The Procurator-General filed an affidavit in which he presented a *primâ facie* case that the boots which would be manufactured from the leather would be sent on to the enemy.

The *Attorney-General* (Sir F. E. Smith, K.C.), *MacKinnon*, K.C., and *Theobald Mathew* for the Procurator-General.—The question which arose in this case was whether there was the right on the part of a belligerent to stop contraband of this character which was ultimately intended for the benefit of the enemy. The leather was undoubtedly contraband, and it was being sent from the United States to the town of Orebro, which was the centre of the leather industry in Sweden. It was the contention of the Crown, and there was *primâ facie* evidence to that effect, that the leather was intended for the manufacture of boots which would afterwards be sent on to the German and the Austrian armies. If that contention was correct, there was the right

of seizure, and the goods would be liable to condemnation. The right was based upon the principles asserted in the case of *The Kim* (13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215), where it was stated in the course of the judgment: "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 on to it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. . . . I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage 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 consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled and bound to take a more extended out look in order to ascertain whether this neutral destination was merely ostensible, and, if so, what the real destination was." And, again, in the course of that judgment the following was quoted with approval from the judgment in the case of *The Bermuda* (3 Wall. 514): "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." The case which the claimants seek to establish would be that the leather was intended for use in Sweden only—that it was, in fact, to be absorbed into the common stock of the country. If that was so, the court was entitled to be supplied with the fullest information. It was not sufficient to say that the goods were going to the neutral country for manufacture into other goods, and that therefore they became absorbed into the common stock of the country. Absorption into the common stock meant absorption for the purpose of consumption and not merely for the purpose of manufacture. If goods were to be released merely because they were to be used for manufacture in a neutral country, and no notice was to be taken of the intended destination of the manufactured articles, the entire British blockade would be paralysed. There was hardly a commodity which we were preventing from entering Germany to-day which could not obtain franchise if the condition was that such commodity could not be seized because it was to go through a process of manufacture in a neutral country. It was quite unnecessary to point out how essential it was for a claimant to make out a clear case if he was to succeed in his contention that contraband goods which were being imported into a neutral country were not to be utilised for the benefit of the enemy; and the Crown was therefore entitled to such information from a claimant as he alone could possess, and which would show whether the goods were to be sent to the enemy or not. The Prize Court had always insisted upon the fullest candour on the part of those who appeared to make claims in such cases as the present. The ambit of discovery had never been defined in the Prize Court as in the municipal courts, and from the very nature of the matter it was essential that there should be the fullest disclosures in the present instance. The order asked for by the summons was not unduly wide, and it did not go beyond what would have been allowed under the old practice of interrogatories.

Le Quesne for the claimant.—At the time when the leather was seized—namely, the 22nd Nov. 1915—the Declaration of London was still in force, so far as the doctrine of continuous voyage in relation to contraband was concerned. In considering, therefore, the law relating to these goods, the important point for consideration was not what was the law apart from the Declaration of London, but what was the law as it was found in the Declaration of London. The important and relevant article of the Declaration, so far as this case was concerned, was art. 30, which was as follows: "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." If anything more than that was entailed, the doctrine of continuous voyage could not be successfully invoked. There was much more involved here than transhipment and subsequent transport—there was the whole process of manufacture, to say nothing of the making of a contract of sale by the consignee and manufacturer with some person in the enemy country. The right of a belligerent did not go to the length of the stoppage of contraband goods when they were on their way, as raw material, to be turned into other goods in a neutral country. The right only existed when the goods actually existed in their contraband state and were on their way to the enemy country. The goods must, in fact, be taken *in delicto*, otherwise the doctrine of continuous voyage had no application. That doctrine was only possible where there was a deliberate intention of getting goods into an enemy country in accordance with a preconceived scheme, and that intention must exist at the time of the seizure. Even if there existed such an intention of sending manufactured boots ultimately from Sweden to Germany, the right of seizure on the part of the Crown could only extend to the manufactured boots, if they could be intercepted, and not to the leather in its raw condition when on its way to the factory. The Crown was not, therefore, entitled to any order for discovery of books and documents relating to the sale of boots from the factory, as no boots had been seized. Moreover, in any event the order for discovery as to the leather was too wide, and no order should be made with respect to it.

MacKinnon, K.C. in reply.—The true spirit of the doctrine of continuous voyage was altogether opposed to the contention put forward on behalf of the claimant. The real object of the doctrine was to prevent a neutral supplying goods of a certain character, either directly or indirectly, to an enemy which might be of utility to him in the conduct of the war. It was immaterial that a process of manufacture had to intervene between the arrival of the leather in Sweden and the dis-

patch of boots to Germany and Austria. To accede to the arguments of the claimant would be to reduce the doctrine of continuous voyage to an absurdity.

Cur. adv. vult.

March 5.—The PRESIDENT.—The short question for decision upon this summons is whether the order for discovery should include documents relating to boots as well as to leather.

The claim made by the Crown in the proceedings is for the condemnation of a cargo of sole leather consigned to the claimants, the Skofabriks Aktiebolaget Oscaria, of Orebro, in Sweden. The objection of the claimants is that the leather cannot in any circumstances be seized as prize, if it is intended to be manufactured into boots in Sweden, although the boots were to be sent afterwards to the forces of the enemy. In general terms the contention is that no contraband goods can be seized by a belligerent, if upon a continuous voyage to the enemy, or to the enemy's armed forces, unless they are intended to be carried to an enemy destination in the condition in which they exist at the time of the seizure.

The case which the Crown proposes to put forward at the hearing is that the leather seized was either to be sent on to Germany or to Austria, or that it was all to be used in Sweden in the manufacture of boots for the German or the Austrian army. Evidence has been filed in support of the application which, *primâ facie*, serves as a foundation for such a case. It deals with the shortage of leather in Germany and Austria, and with the imports of boots from Sweden into those countries, contrasting such imports before the war with those after the war broke out; it states that non-commissioned officers of the German and the Austrian armies have been stationed at Orebro—the centre of the boot trade in Sweden—for the purpose of examining and passing such boots before export into the enemy countries; and it further states that the claimant company made a profit of 600 per cent. on their capital in the year 1915.

If the leather could not be seized in any possible set of circumstances on the ground that it was going to be converted into boots in Sweden, I should not order discovery of the claimants' books relating to the sale and export of boots. But is the claimants' contention that contraband goods cannot be seized on a continuous voyage unless they are on their way to a final enemy destination in the same condition as they were at the time of seizure sound? As at present advised, I think that it is quite unsound. I shall give my reasons more in detail if the question arises for actual decision at the trial. At present I have only to deal with it as an interlocutory application.

The principles of general importance relating to continuous voyages were considered and discussed with some fullness in the cases of *The Kim* and other vessels (*ubi sup.*). One of the tests applied was whether the goods imported were intended to become part of the common stock of the neutral country into which they were first brought. In my view the notion that leather imported into a neutral country for the express purpose of being at once turned into boots for the enemy forces becomes incorporated in the common stock of the neutral country is illusory. Instances can be given and multiplied which appear to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage.

It may be well to give a few instances, by way of illustration, relating both to conditional and to absolute contraband. Suppose coffee beans and cocoa beans are imported into a neutral country with the object of their being converted into coffee or cocoa to be sent on to the enemy, would the fact that the coffee beans are ground into coffee or that the cocoa beans are ground and mixed with sugar to make cocoa in the neutral country be enough to render those goods immune from capture if they would be capturable as coffee or cocoa foodstuffs when afloat? Again, assume that cloth of an appropriate hue, but intended for the enemy forces, is imported into a neutral country, and there dyed the desired colour for the enemy forces; or that steel helmets are so imported, and there painted with the German colour, or fitted with the regulation German army or regimental marks, would a belligerent lose the right to seize them at sea when and because they are not so dyed, painted, or fitted? To take a couple more instances. It is quite possible that the metal parts of rifles for the enemy army might be imported into a Scandinavian country in a complete state; and that the butt ends, or timber parts, were intended to be affixed in such country because timber is plentiful there, or for some other reason, good or ostensible. Would the metal rifles be free from capture by a belligerent because they were to be so completed in the neutral country before being sent on to the enemy? If a field gun was imported, would it be protected from seizure because it would, in fact, be mounted upon its appropriate carriage before being exported from a neutral country to the enemy's front? The court could not give affirmative answers to such questions as these unless it cut itself adrift from the safe anchor of common sense.

I have said enough to show that, having regard to the case which the Crown will seek to establish at the trial, I think the order for discovery should extend to the documents relating to the boots as well as to the leather.

Accordingly I make the order as prayed in the summons, with the substitution of "Aug. 1, 1913," for "Jan. 1, 1913."

Leave to appeal.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche.*

March 2, 8, 9, 14, *and* 19, 1917.

(Before Sir S. T. EVANS, President)

THE KRONPRINSESSAN MARGARETA.
THE THAI. (*a*)

Prize Court—International law—Prize—Contraband goods—"Innocent" goods—Cargoes partly contraband and partly "innocent"—Infection—Shipments by enemy from neutral State—Neutral destination—Contracts made since outbreak of war—Transfer of property in transitu *—Payment for goods — Principles of international law applicable.*

It is established by prize law that during hostilities, or when there is imminent and impending danger of hostilities, the property in cargoes of belligerent parties cannot change its national character during the voyage, and that if neutrals purchase goods whilst on a voyage during a state of war existing, or during imminent and impending danger of war, the contract of purchase is invalid and the property is deemed to continue as it was at the time of shipment until actual delivery.

It is further established by prize law that, if the person who is the owner of confiscable contraband goods laden on board a vessel has also goods belonging to him which are not contraband on the same vessel, the latter, although "innocent" goods, are subject to capture and condemnation as well as the contraband goods.

An enemy firm carrying on business at Hamburg had established various branches in the Republic of San Salvador in Central America. From this State quantities of coffee were shipped by various of these branches on two neutral vessels, the place of destination being the country to which the ships belonged, and the consignee named in the bills of lading being a neutral trading there. Portions of the coffee were intended for Hamburg, and as such were confiscable as contraband. The remainder of the coffee was intended for neutral purchasers in the neutral country, some of whom had entered into contracts of purchase before the date of shipment, and some after the date of shipment, whilst others had paid for their consignments before the seizure of the cargoes as prize.

Held, applying the principles of international law set out above, that the property in the coffee still remained in the German firm, the shippers, at the date of the seizure of the cargoes, and that as the shippers had goods on board which were admittedly contraband, the doctrine of infection affected the other "innocent" goods so as to render them confiscable as good and lawful prize.

THESE were two suits in which the Crown claimed the condemnation of the cargoes of the vessels as prize.

The two vessels concerned, the *Kronprinsessan Margareta* and the *Thai*, were Swedish ships which sailed from the Republic of San Salvador, in Central America, with large consignments of coffee. The destination of the vessels was Stockholm. In the course of their voyages the ships were diverted by the British Navy to Kirkwall, and the coffee on board the two was seized there as prize in May 1915 and Aug. 1915 respectively. The coffee had been shipped by one or more of the branches of the firm of Goldtree, Liebes, and Co., which had its headquarters in Hamburg, and in each case it was consigned to one Theodor Sack, the trade name of one Christian Pyk, of Stockholm, and he was the person named as consignee in the bills of lading. Part of the coffee was intended for Hamburg.

With respect to the coffee on board the *Kronprinsessan Margareta*, claims were put forward by five Swedish firms, and the ground of their claims was that they had entered into contracts of purchase with the vendors, Goldtree, Liebes, and Co., of Hamburg, and that, therefore, the property in the coffee had passed to them before the date of seizure.

With respect to the coffee on board the *Thai*, claims were put forward by two Swedish firms, and the ground of their claims was that the coffee had been bought and paid for by them before the date of seizure.

On behalf of the Crown it was contended that whatever contracts had been entered into between the neutral purchasers and the enemy vendors, the property in the coffee, being *post bellum* shipments, at the date of the seizure was still in the vendors; and that as a part of the cargo of each vessel was confiscable as being contraband destined for the enemy, the remainder, since it was the property of the owner of the confiscable cargo, was subject to the doctrine of infection and likewise confiscable as prize.

On behalf of the claimants it was contended that the doctrine of infection had no application in the case of contracts of sale which had been entered into prior to the date of shipment.

The *Attorney-General* (Sir F. E. Smith, K.C.), *Stuart Bevan*, and *Hull* for the Procurator-General.

Sir *Erle Richards*, K.C., and *Balloch* for the claimants, the Import Aktiebolaget Vict. Th. Engwall and Co., Berg and Halgren, and Levin Levander.

Balloch for the Aktiebolaget Kaffee Import Rostereit "Orienten."

Darby for Rudolf Olverstrom.

Noad for the Import Aktiebolaget Engwall, Hellberg, and Co., and the Aktiebolaget C. O. Wessen, in respect of consignments of coffee on the *Thai*.

The following cases were cited during the argument:

The Staadt Embden, Roscoe's English Prize Cases, vol. 1, 37; 1 Ch. Rob. 26;
The Vrow Margaretha, Roscoe, vol. 1, 149; 1 Ch. Rob. 336;
The Springbok, 5 Wall. 1;
The Peterhoff, 5 Wall. 28;
The Hsiping, 2 Russ. and Jap. P. C. 140;
The Pehping, 2 Russ. and Jap. P. C. 164;
The Bawtry, 2 Russ. and Jap. P. C. 270;
The Lydia, 2 Russ. and Jap. P. C. 367;
The Alwina, 13 Asp. Mar. Law Cas. 311; 114 L. T. Rep. 707; (1916) P. 131;
The United States, 13 Asp. Mar. Law Cas. 568; 116 L. T. Rep. 19; (1917) P. 30.

Cur. adv. vult.

THE KRONPRINSESSAN MARGARETA.

March 14.—THE PRESIDENT.—Quantities of coffee were shipped on this Swedish vessel from

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

Acajutla and La Libertad, in the Republic of San Salvador, to Stockholm, at the beginning of July 1915. They were consigned in the name of Gonzales and Co. to Theodor Sack as consignee in each case. In all 4250 bags (weighing 255 tons) were shipped under several bills of lading. One thousand eight hundred bags have already been condemned as prize as conditional contraband belonging to enemies and destined for Hamburg. The remaining 2450 bags remain to be dealt with. They are the subject of various claims.

The list of claimants is as follows:

Claim.	Claimants.	Quantity.	Weight.
A.	Import A/B Vict. Th. Engwall and Co.....	750 bags ...	45 tons
B.	Berg and Halgren	250 „ ...	15 „
C.	Levin Levander	250 „ ...	15 „
D.	Rudolf Ofverstrom.....	150 „ ...	9 „
E.	A/B Kaffee Import.....	500 „ ...	30 „
	Rostereit "Orienten"	550 „ ...	33 „

All the above quantities were laden at Acajutla, except the last, which was laden at La Libertad. The vessel sailed from Acajutla on the 4th July 1915, and from La Libertad on the 9th July 1915. The seizure was on the 15th August 1915. After investigation, when the real facts were ascertained, it was found that at the time of shipment the owners of the goods were Goldtree, Liebes, and Co., of Hamburg.

The letters and cablegrams contained in the exhibits to the affidavit of Mr. Greenwood, filed on behalf of the Procurator-General, show clearly that the name of Gonzales and Co. was merely used for the purpose of concealing the name of Goldtree, Liebes, and Co., who had several agencies in San Salvador acting under the same name as the head office at Hamburg; and that Theodor Sack (the name in which one Christopher Pyk, of Stockholm, carried on business) acted in these and in other matters as the agent or intermediary for Goldtree, Liebes, and Co., of Hamburg.

Apart from these exhibits, it was shown in one of the cases—that of Berg and Halgren—that after a formal contract was signed by Goldtree, Liebes, and Co. at Hamburg on the 10th July for 250 bags of coffee "shipped by Goldtree, Liebes y Cia., or by Gonzales and Co., or by Francisco Mojica" (the latter being another name similarly used), Theodor Sack, after he knew of the seizure, attempted to substitute another contract of Gonzales and Co. for the Hamburg one of the 10th July. It is not necessary to elaborate this point, because finally it was not disputed by counsel for any of the claimants that Goldtree, Liebes, and Co., of Hamburg, were the owners at the time of shipment, and were the vendors under the contracts for sale to the respective purchasers, upon which the latter found their claims.

The matters in contest between the Crown and the claimants are two: first, as to who were the owners of the goods according to the law of prize at the time of seizure; and secondly, whether the goods which the claimants had *bonâ fide* contracted to buy should be condemned as contraband by the application of the doctrine of infection or contagion, by reason of there being contraband goods belonging to the same owners on board the same vessel. Before dealing with the particular facts of the different cases, it will be convenient to determine and state the legal principles which have to be applied.

It must be remembered that the court is dealing in these cases with *post bellum* shipments. I have on other occasions during this war pointed out the difference between the principles to be applied to transactions taking place before war and after war (see *The Miramichi*, 13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; (1915) P. 71; and *The Southfield*, 13 Asp. Mar. Law Cas. 150; 113 L. T. Rep. 655).

It is well established as a principle of prize law that during hostilities, or imminent and impending danger of hostilities, the property in cargoes of belligerent parties cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*; and that if neutrals purchase goods *in transitu* during a state of war existing, or imminent and impending danger of war, the contract of purchase is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery: (see Pratt's Story, at p. 64). As Lord Kingsdown said, in the judgment delivered in the Privy Council in *The Baltica* (Roscoe, vol. 2, 628; 11 Moo. P. C. 141), the general rule is open to no doubt. He there stated it in precise and unambiguous terms as follows: "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 the case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such a 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*."

He discusses two alternative grounds for the rule, one being that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery; and the other that the ship and the goods having incurred the risk of capture by putting to sea shall not be permitted to defeat the inchoate right of capture by belligerents until the voyage ends. He gives the preference to the former ground, and amplifies it in the following passage: "Such transactions during war, or in contemplation of war, are so 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."

As to the other matter in contest, Sir Erle Richards (whose able argument was adopted by the other counsel) did not question the doctrine of infection or contagion; but only canvassed its application to the facts of the present case. The doctrine is too well settled to be disturbed. I see no reason for weakening it, and the apprehension of the learned counsel that its application in the present cases would be an unreasonable extension of the principle does not appear

to me to have any foundation. In my view to apply it to these cases involves no extension; certainly not an unreasonable or unwarrantable one.

The rule is simple and broad. If the person who is the owner of confiscable contraband goods laden on board a vessel has also goods belonging to him which are not contraband on the same vessel, the latter—sometimes called "innocent" goods—are subject to capture and condemnation as well as the contraband goods. The rule has come from ancient times right down to the days of the Declaration of London, and has been applied in all maritime wars for, at any rate, a century and a half.

It has been stated in the Supreme Court of America in these terms: "It is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent thus: 'Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the innocence of any particular article is not usually admitted to exempt it from general confiscation'": (per Chase, C.J. in *The Peterhoff* (*ubi sup.*).

It was incorporated in the Prize Regulations of Japan in 1904, in art. 43, as follows: "Articles which are contraband of war, and that portion of the cargo which belongs to the owners of the contraband, shall be condemned." Effect was given to it by the Japanese Prize Courts in many cases which were cited at the Bar.

It was urged that the doctrine had been adopted in order to impose an additional punishment upon persons carrying on trade in contraband, and that *bonâ fide* neutral purchasers at whose risk the goods might be should not come within the reach of such a punishment. By this I think was meant that neutrals who had honestly entered into contracts to purchase, even if they had not become the owners, should somehow be protected from the possible results of the exercise of a belligirent's rights of capture. How is a Court of Prize to investigate where the particular loss or "punishment" would fall? It may be that the intending purchaser loses nothing, that the loss would fall *in toto* upon the underwriters, or re-insurers, in one or more countries.

Inquiries such as these will not be embarked upon by a Prize Court, any more than inquiries as to liens, mortgages, or charges. It deals with the tangible goods as they are found in the vessels. It has direct means of deciding who are the owners of goods afloat in time of war and it will not leave the high road to wander in a maze of by-ways. If it decides that A. is the owner of contraband goods and also of goods not contraband on board the same vessel, if the former are condemned the latter will also come under the same sentence.

Having considered thus far the principles relating to the matters in dispute, I now come to apply them to the facts in these cases.

By the bills of lading in each case the goods were consigned to Stockholm, to Theodor Sack, the agent of Goldtree, Liebes, and Co., and in each of the bills of lading which were produced was the note, "Insured under open policy of consignees," and in one of them was added, "Against all risks, war included."

At the time of seizure the bills of lading were held by Theodor Sack, or his or Goldtree, Liebes, and Co.'s bankers in all the cases.

In claim A the contract with the claimants was made on the 2nd or the 9th July. It may have been made on the 2nd July and confirmed on the 9th July. It does not seem to me to matter. The contract was f.o.b. at Acajutla, and the price was to be paid 90 per cent. in cash against documents and 10 per cent. on arrival. The documents had not been taken up before seizure. It was stated that the 90 per cent. was paid after seizure.

In claim B the contract was made after the ship sailed and while the goods were afloat. The terms and the circumstances were the same as in the last claim.

In claim C the contract was made on the 2nd July. The terms and circumstances were the same as in claim A.

In claim D the facts were similar to those in claim C.

In claim E the contracts were made after shipment, and when the goods were afloat. They were c.i.f. contracts for Gothenburg. Payment was to be net cash against documents. No documents were taken up and no payments were made. On the 16th Aug.—after seizure—the shipowners gave a delivery order for the 550 bags to Theodor Sack.

As to all the consignments, notwithstanding the statement as to insurance by consignees on the bills of lading, insurances were also effected by the intending purchasers. Although the goods were consigned to Stockholm, they were apparently by the contracts and invoices all for delivery in Gothenburg. As to all the cases, it is obvious that such transfer of property as there was (if any) was merely by documents, and not by actual delivery. The intending purchasers had at best only "paper transfers" and no "possession."

Accordingly, applying the principles before stated, two results follow. One is, that all the contracts of purchase are held to be invalid; and thus, all the claims under such contracts necessarily fall to the ground, and must be disallowed. The other is that the property in all the goods is deemed to have continued as it was at the time of shipment up to the time of seizure—namely, in the enemy shippers. In other words, the enemy shippers were at the date of seizure the owners of the goods according to the doctrines of the Prize Court.

Apart, therefore, from all questions as to the destination of the goods they are subject to condemnation because their owners also had goods on board the same vessel belonging to them which were contraband and subject to condemnation as such.

Upon the question of infection the claimants have not, in strictness, any right to be heard; or, at any rate, any right to complain, because the decision of the court is that they have not established any ownership in the goods, and infection only affects the real owners.

I may add that even if the doctrines of the common law as to the passing of property in times of peace were to be applied in the circumstances of these cases, I should hold that the property in the goods had not vested in any of the claimants at the time of seizure.

The judgment of the court is that all the goods claimed are condemned as good and lawful prize.

THE THAI.

March 19.—THE PRESIDENT.—These claims have reference to two quantities of coffee shipped on board the steamship *Thai* at Acajutla for carriage to Stockholm, the consignor being Francisco Mojica, and the consignee Theodor Sack. I have already decided in the cases of other cargoes, that Francisco Mojica was a mere name for Messrs. Goldtree, Liebes, and Co., a firm carrying on business at Hamburg, and which had a branch at Acajutla. I have already condemned twenty cases of balsam carried by the same ship, and consigned, as I have stated, by Francisco Mojica to Theodor Sack, and also 200 sacks of washed Salvador coffee and 250 sacks of unwashed coffee, parts of the cargo which were unclaimed.

There remains to be dealt with two claims, namely, that of the Import Aktiebolaget Engwall, Hellberg, and Co. to 350 sacks of unwashed coffee, weighing twenty-one tons, and that of the Aktiebolaget C. O. Wessen to a similar quantity of unwashed coffee. The ship sailed from Acajutla on the 7th April 1915, and the goods were seized on the 15th May 1915.

I will deal first of all, shortly, with the case of Import Aktiebolaget Engwall, Hellberg, and Co. The contract for the sale of these goods to the Import Aktiebolaget Engwall, Hellberg, and Co. was made with Messrs. Goldtree, Liebes, and Co. It was made before the sailing of the vessel. It was a c.i.f. contract, cash to be paid against bill of lading, less a discount of 1 per cent. The bill of lading was dated the 29th March 1915, and the invoice the 30th March. A certificate given by some Swedish office shows that payment was made on the 7th May 1915. That means that payment was made before seizure. In many of these cases the evidence as to payment consists of a certificate of the kind which was given in the particular case with which I am now dealing. I am not very satisfied with that kind of evidence, and the affidavit in this case, and in other cases, merely refers to the certificate in proof of payment. However, the Crown do not contest the *bona fides* of Mr. Hellberg, and I must assume that payment was made some time about the 7th May—that is to say, before the actual seizure of the goods.

There are some peculiar circumstances with reference to the appearances. An appearance was first entered on behalf of the Import Aktiebolaget Engwall, Hellberg, and Co. towards the end of 1915, but an order was afterwards made amending the appearance by substituting the name of Theodor Sack. He was the agent both in this case and in the case of the *Kronprinsessan Margareta*, in Stockholm, for Goldtree, Liebes, and Co., of Hamburg. Subsequently an order was made for security for costs, and that order was made against Theodor Sack. A little later the claim was put forward by the Import Aktiebolaget Engwall, Hellberg, and Co. The short facts, therefore, fall within the case of the *Kronprinsessan Margareta*, in which I delivered judgment a few days ago, and the same principles have to be applied. Inasmuch as the goods were enemy goods at the date of shipment and they were shipped and were consigned to the agent of the enemy firm at the time of seizure, although a paper transfer, as it has been called, has been established in this case to an intending purchaser, the goods nevertheless are subject to capture and confiscation as prize exactly in the same way as I held in the case of the *Kronprinsessan Margareta*.

The next claim is that of the Aktiebolaget C. O. Wessen. That is in many respects similar. The claim is made by the company, who say that they entered into a contract on the 25th Nov. 1914, before the vessel sailed, and before the seizure of the goods. There are some peculiar circumstances in this case because there was an attempt after capture to show that Francisco Mojica was the person who entered into the contract, whereas the contract is clearly made in express terms between Goldtree, Liebes, and Co. and the Aktiebolaget C. O. Wessen, who know nothing about Francisco Mojica. After seizure. Theodor Sack tried to substitute for Messrs. Goldtree, Liebes, and Co. the name of Francisco Mojica, and a substituted contract was sent. The Aktiebolaget C. O. Wessen knew nothing about that. They only knew Goldtree, Liebes, and Co. in the transaction. The final invoice for the goods was long after the date of seizure. It is said that these goods were also paid for before the actual date of seizure. As I have said, in my view that makes no difference. The circumstances of this case bring it within the principles set out in my judgment in the *Kronprinsessan Margareta*. The result is that the goods belonged to the enemy firm of Goldtree, Liebes, and Co., and were on a ship which was carrying contraband; and even if these goods were innocent goods they would be tainted with the doctrine of infection, and would be confiscable on that ground.

I therefore make an order condemning the 350 sacks of coffee claimed by the Import Aktiebolaget Engwall, Hellberg, and Co., and the 350 bags claimed by the Aktiebolaget C. O. Wessen as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor*.

Solicitors for the Import Aktiebolaget Engwall, Hellberg, and Co., Berg and Halgren, and Levin Levander, *Botterell* and *Roche*.

Solicitors for the Aktiebolaget Koffee Import Rostereit "Orienten," *Travers, Smith, Braithwaite*, and *Co.*

Solicitors for Rudolf Ofverstrom, *Thomas Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

April 19, 20, *and May* 8, 1917.

(Before SWINFEN EADY and SCRUTTON, L.JJ. and BRAY, J.)

SUTRO AND CO. *v.* HEILBUT, SYMONS, AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Written contract to send goods by sea—Goods sent partly by land—Temporary usage to send partly by land—Evidence varying written contract—Admissibility of evidence.

By a contract of March 1916, *in a printed form with necessary additions written in, the appellants*

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

agreed to sell to the respondents certain tons of plantation rubber, c.i.f., "to be shipped during March/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"; any question regarding quality to be settled by arbitration, to be demanded and held within a certain time "after the arrival of the vessel"; payment to be "by cash against documents in London or before arrival of vessel or vessels at port of discharge."*

The sellers made a declaration under the contract of fifteen tons as having been shipped via Seattle (a port on the western coast of the United States) under a through bill of lading, which stated that the goods would be sent by rail from Seattle to New York. The buyers objected to the declaration as irregular, contending that the rubber ought to be conveyed to New York all the way by sea.

Arbitrators found that after the outbreak of war great difficulty was experienced in obtaining space for shipments from the East, and in consequence, in Oct. 1915, *shipments to the eastern States of the United States, which had before gone the whole distance to New York by water, began to be made by steamer to a port on the western seaboard of the United States, whence they were transmitted by rail to destination; that at the date of the contract 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 on contracts in the form of the one in question; and 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 rubber might come by this route, and that goods forwarded by such a route would be a good tender under the contract. They therefore awarded that the tender was good, and that the buyers were bound to accept the same.*

Held (Scrutton, L.J. dissenting), that the contract was to send the rubber by sea all the way from the East to New York; that the usage found by the arbitrators (assuming that they had found a usage) was inconsistent with the contract and could not be applied to it; and that therefore the tender was a bad tender, and the buyers were entitled to reject the rubber.

Decision of Lush, J. (13 *Asp. Mar. Law Cas.* 576; 116 *L. T. Rep.* 126) *affirmed.*

APPEAL by the sellers from a decision of Lush, J. The material parts of the special case are set out 13 Asp. Mar. Law Cas. 576.

The contract was in the printed "Form of Contract for Cost, Freight, and Insurance (or Cost and Freight) issued by the Rubber Trade Association of London. April 1913."

The words which were written into the printed form are set out here in italics:

Insurance.—To be insured *by sellers against marine and war risk insurance* with particular average at the price of this contract *plus* 10 *per cent.*

Shipment.—To be shipped during the months of *March/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; but if to France no transhipment west of Port Said, except at a French port or by force majeure.

Guarantee of quality.—*Quality equal to type H* 114 *in selling brokers' possession.* 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.

Lush, J. 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 convey 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 rubber.

The sellers appealed.

Adair Roche, K.C. and *A. Neilson*, for the sellers, referred to

Wigglesworth v. *Dallison*, 1 Doug. 201; 1 Smith L. C., 12th edit., 613;
Hutton v. *Warren*, 1 M. & W. 466;
Brown v. *Byrne*, 3 E. & B. 703, 715;
Humfrey v. *Dale*, 28 L. T. Rep. 284; 7 E. & B. 266, 274;
Myers v. *Sarl*, 3 E. & E. 306;
Produce Brokers Company v. *Olympia Oil Cake Company*, 116 L. T. Rep. 1; (1917) 1 K. B. 320;
Re Walkers and Shaw, Son, and Co., 90 L. T. Rep. 454; (1904) 2 K. B. 152;
Glynn v. *Margetson*, 7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351;
Stephens v. *Winteringham*, 3 Com. Cas. 169.

Leslie Scott, K.C. and *Barrington-Ward*, for the buyers, referred, in addition, to

Bowes v. *Shand*, 36 L. T. Rep. 857; 2 App. Cas. 455;
The Alhambra, 4 Asp. Mar. Law. Cas. 410; 43 L. T. Rep. 31; 6 P. Div. 68;
North-Western Rubber Company v. *Hultenbach and Co.*, 99 L. T. Rep. 688; (1908) 2 K. B. 907;
Dickenson v. *Jardine*, 18 L. T. Rep. 717; L. Rep. 3 C. P. 639.

Cur. adv vult.

May 8.—The following judgments were read:—

SWINFEN EADY, L.J.—Messrs. L. Sutro and Co. were the buyers of a quantity of rubber under a c.i.f. contract dated the 27th March 1916. On the 5th June 1916 the sellers made a formal declaration under the contract of fifteen tons, as having been shipped per the steamship *Lycaon/Teucer via* Seattle, under a bill of lading dated the 30th April 1916. The buyers objected to the declaration as irregular, and demanded arbitration to settle the dispute. An award was made in favour of the sellers; and the buyers appealed, in accordance with the rules of the Rubber Trade Association, to the committee of the association, and the committee made their award in the form of a special case. Lush, J. held that the tender to the buyers was not a good tender under the contract; and in that event the award that the buyers were not liable to accept the same took effect. From the decision of Lush, J. the sellers now appeal.

There is a contract in writing between the parties. The buyers contend that the written terms provide for rubber being shipped from the East and carried to New York in one or more ships, and that the date of the arrival of the vessel or vessels at the port of discharge (New York) governs the date at which the buyers must pay cash against documents. The sellers contend that under the contract they are entitled to ship from the East *viâ* Hong Kong, where transhipment takes place, to Seattle, and thence by

railway across America, some 3000 miles, to New York; that at the date of the contract a practice had arisen, beginning some six months previously, to send rubber by that route instead of the whole way by sea, as had previously been the case; that such route had become one of the usual routes for rubber from the East; and that it was within the contemplation of the parties to the contract that the goods in question might come by that route—that is, partly by sea and partly by railway. The buyers reply that evidence of such a practice is not admissible, in order to annex it as incident to the contract, as it would contradict the express terms of the contract. They further urge that from a business point of view it would work a variation of the contract most prejudicial to them; that with sea-borne goods they can calculate approximately when the vessel may be expected to arrive, and can make their business and financial arrangements accordingly, but that with goods coming by railway for so great a distance there would be no way of ascertaining the probable date of arrival, even within a month or two, or to ascertain where the goods were at any date, or even whether they would all arrive in waggons forming part of the same train, or, if not, what interval of time there would be between the arrival of the different parcels, or for what date they would have to make their arrangements for payment or delivery on resale. Their objection to the long land transit is the uncertainty of the date of arrival and the impossibility of ascertaining the probable date beforehand, and not any question of delay. It is not, however, necessary for them to justify in a court of law the mercantile reasons for inserting any particular stipulation in a contract. The observations on this point of Lord Cairns in *Bowes* v. *Shand* (36 L. T. Rep. 857; 2 App. Cas. 463) are very relevant. After construing the contract in question in that case he proceeded to say: "My Lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships or for any court to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer. But, if necessary, a further answer is obtained from two other considerations." Then he refers to the two other considerations in detail. The court assumes that a merchant, in entering into a mercantile transaction, has regard to his arrangements for paying for goods purchased and his intention about reselling them in the ordinary course of his trade.

The contract in question here is dated the 27th March 1916, and is made in the form of a contract for cost, freight, and insurance business issued by the Rubber Trade Association of London in April 1913. At this date rubber was carried from the East to New York by sea, either round Cape Horn or *viâ* the Panama Canal. The contract provides for the sale of the following plantation rubber, about twenty-five tons, sellers to obtain all necessary permits, at 3*s.* 5*d.* per pound, cost, freight, and insurance, shipping weights. Then it provides for the insurance; for the shipment: "To be shipped during the months of March/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." Then it provides for the guarantee of the quality, for the weight, for declaration of the shipment; "the name of the vessel or vessels . . . to be declared to the buyers in writing with due dispatch," for sampling, with regard to the vessels being lost, and for payment, "Cash against documents in London on or (at buyers' option) before arrival of vessel or vessels at port of discharge"; and then a provision for arbitration. Thus not only does the contract provide in express terms that the rubber is "to be shipped . . . by vessel or vessels (steam or motor) from the East to New York," but the whole context of the instrument shows that it was intended that the rubber was to be carried in and by a vessel or vessels to its ultimate destination, which is referred to as the "port of discharge." Throughout the contract times are fixed by reference to the arrival of the vessel or vessels. Thus any question regarding quality is 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." Sellers are to name their representatives, to attest the drawing and sealing of samples, "on or before arrival of vessel." Again, things are agreed to be done at or by reference to "ports," or "the port of discharge." The sellers cannot demand cash against documents "before arrival of vessel or vessels at port of discharge." The goods are to be weighed at buyers' expense at the port of discharge named in the contract; and buyers are to furnish, when sold on delivered weights, a properly certified copy of "landing weights." Again, the name of the vessel or vessels is to be declared to the buyers in writing with due dispatch. Again, provision is made for the consequences of the vessel or vessels applying to the contract being lost, either before or after declaration; and, in the case of the vessel or vessels being lost, but the goods or some portion thereof being transhipped to some other vessel or vessels, and arriving on account of the original importer.

I am satisfied, from a consideration of all the terms of the contract, that it only contemplates and provides for a sea carriage from the loading port to the ultimate port of discharge; and that the express terms of the contract are quite inconsistent with a long railway carriage. The printed form was obviously settled in April 1913 with reference to the only route then used for the carriage of rubber, namely, a sea route all the way; and its terms are inapplicable to and inconsistent with land carriage. The contract is to send by a specified method of conveyance—by ship. This is a usual method, and the route by sea is a usual route. Where a method of conveyance and route, namely, a sea route, are specified, it is immaterial that there may co-exist some other usual mode of conveyance and route. The terms of the contract must be observed. The arbitrators have not found that any trade usage in fact existed to send rubber to New York *viâ* Seattle and across the continent of America. They say that in or 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 on the western seaboard of the United States, whence they were transmitted by rail to destination. This was after the outbreak of war, and owing to the great difficulty experienced in obtaining space for shipments to the eastern States. This is very far from a finding of any established trade usage or custom. Any such usage, if found, would be inconsistent with the terms of the written contract, and repugnant to them, and therefore inadmissible to annex a new term or condition to the contract. It is not like a case where words or phrases employed in commerce are alleged to have been used in some special technical sense other than their ordinary sense. Moreover, the whole context of the contract shows that the parties were employing the words used in their ordinary sense. Again, if there were any words used of ambiguous meaning, it must be remembered that greater regard is paid to the intention of the parties, as appearing from the instrument when construed as a whole, than to any particular words they may have used to express their intention: (see *Ford* v. *Beech*, 11 Q. B. 842, 866).

With regard to pars. 10, 11, and 12 of the special case [these paragraphs are set out in the judgment of Scrutton, L.J. (*infra*)], I may say that it is not open to arbitrators by such findings to vary the express contract between parties, or to decide otherwise than in accordance with the legal rights of the parties. Their finding does not indicate that the words used have any other than their ordinary and popular meaning, or that the mode of conveyance by vessel or vessels to a port of discharge does not extend to mean water carriage all the way. Their finding only amounts to this, that there are other usual routes for rubber than an all-sea route, and that where rubber is forwarded by a mode of conveyance other than that specified in the contract buyers sometimes accept delivery.

Sometimes a question of ambiguity arises by reason of a printed form being used, the terms of which, or some of them, are manifestly inapplicable to the contract into which the parties are entering; and it has been said that "a business sense will be given to business documents": (see *Glynn* v. *Margetson*, 7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 359). No such question or ambiguity arises in the present case. The language throughout the form is entirely appropriate to carriage by water, and only appropriate to such carriage, and is obviously only intended for sea carriage. It is irrelevant to urge that there may be contracts entered into which involve some land carriage, and, if this form were used, to ask, How would the printed parts of it then be construed?—*e.g.*, reference to "a vessel or vessels" and to "the port of discharge." The answer is that, if land carriage wholly or partly is intended, an appropriate form or language should be adopted; but that the form in question is not appropriate, or indeed intended for such a purpose. Again, where a particular method of conveyance is stipulated for, it is not permissible to inquire whether there is not some other usual method; and a finding that there is another usual method is irrelevant.

The careful judgment of Lush, J. is, in my opinion, correct, and for the reasons given by him, and this appeal should be dismissed.

SCRUTTON, L.J.—This is an appeal from a decision of Lush, J. on a special case stated by the committee of the Rubber Trade Association to raise the question whether a tender of certain documents pursuant to a c.i.f. sale of fifteen tons of rubber is a good tender.

The contract in question was dated the 27th March 1916, and its terms were filled in on a printed form called "Form of Contract for Cost, Freight, and Insurance (or Cost and Freight) issued by the Rubber Trade Association of London. April 1913." The subject-matter was twenty-five tons plantation rubber Hevea Crepe. The printed form ran: "To be shipped during the months of by vessel or vessels (steam or motor) from to direct, or indirect, with liberty to call and/or tranship at other ports." The blanks were filled in in writing so that the contract read: "To be shipped during the months of March/April 1916 by vessel or vessels (steam or motor) from the East to New York, &c." When the printed form of contract was settled we were told that the usual route from the East to New York was entirely by sea round Cape Horn. Then or later a sea route through the Panama Canal became an alternative usual route. After the outbreak of war the scarcity of ships led to another alternative route becoming usual, and the arbitrators find as facts: "(9) After the outbreak of war great difficulty was experienced in obtaining space for shipments from the East, and in consequence of this difficulty in or about October 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 on 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 engaged 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 the parties to this contract that the goods in question might come by this route." The vendors accordingly shipped in the East within the contract time twenty-five tons of rubber answering the description in the contract under a bill of lading to "New York *viâ* Seattle," a railway terminus on the west coast of North America, with power to the shipowners "to forward by rail . . . to be subject to the conditions and exceptions of the forwarding conveyance." They also effected a policy of insurance "from Singapore *viâ* Hong Kong and Seattle to New York," "against all loss or damage of whatsoever nature and howsoever caused," from warehouse to warehouse "at destination, and for fifteen days after arrival at such destination."

The sellers declared this shipment under the contract, and the buyers objected to this declaration as irregular on the ground that the transit from Seattle to New York was by land, and claimed arbitration on the regularity of the

declaration. It does not appear whether the shipping documents were in fact tendered. The arbitrators find that no objection was taken to the form of the policy, but it is not quite clear whether this means at the time of tender, or at the arbitration; probably the latter.

The arbitrators find in par. 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." As to this it may be remarked that the tender would not be of goods, but of documents relating to goods. Par. 13 runs as follows: "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." Par. 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." The latter paragraphs and par. 16, which says, "In the event of the court being of the opinion . . . that the tender was not a good tender," look as if the arbitrators were dealing with the validity of the tender, not with the validity of the declaration; but the question appears to be the same—whether a shipment in the contract time of goods of the contract description to be forwarded by sea to Seattle, and thence by rail to New York with a contract of carriage for such journey, and a policy covering all risks on such journey, was a compliance with the terms of the contract of sale.

The purchasers appear to have argued before Lush, J. that the arbitrators were really trying to incorporate a custom or usage inconsistent with the contract, for they pointed out that the printed form appeared to assume throughout a sea transit. The arbitration as to quality was to be six weeks "after the arrival of the vessel." Sellers were to name their representatives "on or before arrival of vessel." Payment was "Cash against documents in London on . . . arrival of vessel . . . at port of discharge."

Lush, J. was of opinion that the contract was clearly for sea transit throughout; that if there was a usage or custom of trade at all it was contradictory of the written contract, and could not therefore be applied to the contract, and that therefore the decision of the commercial arbitrators was erroneous. The vendors appeal.

The first thing that strikes me is that the particular adventure of the contract is written into a printed form applicable to all sorts of transits, particulars of which are to be filled in and a form parts of which may be inapplicable to the particular adventure written in. For instance, many c.f.i. contracts must involve some land transit. I put the case of a sale of "rubber c.f.i. Birmingham" for the large motor works there, written into this form, where the rubber would almost certainly be forwarded by rail from the discharging port of the vessel. Similar cases can easily be suggested in connection with sales carried out by through bills of lading from or to the interior of the United States or Canada. How would the printed form about vessels and "ports" of discharge be applied to such written particulars? The answer has been given by the House of Lords in *Glynn* v. *Margetson* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351), where an adventure of carrying perishable fruit from Spain to England was written into a printed form which gave very wide powers of deviation. Lord Herschell expressed himself thus (at p. 355): "Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used having in view that object and intent." Lord Halsbury's words are (at p. 357): "Looking at the whole of the instrument, and seeing what one must regard . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract"; and he speaks of "the difference between the ordinary and formal parts of the document which are to be found in print and the written parts." Lord Penzance in *Dudgeon* v. *Pembroke* (3 Asp. Mar. Law Cas. 393; 36 L. T. Rep. 382; 2 App. Cas. 293) had said: "The practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known and has been too constantly recognised in courts of law." Indeed these learned Lords were only applying the language of Lord Ellenborough in *Robertson* v. *French* (4 East, 130, 136): "The words superadded in writing (subject, indeed, always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

What, then, was the real adventure of the parties in this case. The purchaser wanted rubber of a particular description in New York, shipped at a given time in the East, at a price which was to include the cost of carriage under a usual contract of carriage and the cost of insuring all risks under a usual form of policy. Where there is a contract to carry from A to B, if the exact route or method of carriage is not specified in the contract, the carriage must be by one of the usual routes and methods of carriage at the option of the carrier. If the other party wishes to exclude some usual route or method of carriage, he can do so by inserting such a term into the contract, but in the absence of such a term the option of selecting a usual method of performance is with the person who has to perform. What is a usual route or method is a question of fact to be found by the arbitrators, and they have found as a fact that when the contract was entered into the 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 on contracts in this form, and that there was such a course of business established as would make it within the contemplation of the

parties to this contract that the goods might come by this route. This is a finding of fact by the appropriate tribunal to find facts, and we have no power to review it.

It was attacked, as I understood, in two ways: first, it was said that a usage or custom could not spring up in so short a time, and there could only be an occasional acquiescence which did not make the route a usual route. Customary procedure, as Lord Blackburn said in *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 App. Cas. 599, 616): "Did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port," which was again defined by the Court of Appeal in *Newall* v. *Royal Exchange Shipping, Company* (33 W. R. 868) as "A practice so general and universal in the trade . . . that everyone shipping goods there must be taken to know that other people's goods, if not his goods might probably be stowed on deck." A usual route need not be the invariable route. In *Evans* v. *Cunard Steamship Company* (18 Times L. Rep. 374) a route followed in half the recorded cases was held by Wills, J. a usual or customary route. I do not feel myself at liberty to speculate whether the arbitrators ought or ought not to have made this finding. They are the judges of fact, and they know much more about the trade than I do; and I do appreciate that in wartime methods of business alter and crystallise very rapidly.

If, then, this was a usual route for rubber from the East to New York, has it been excluded by the terms of this contract from the means of performance open to the vendor? So far as the writing is concerned, the only excluding term that can be suggested is that the insurance is "marine." But, first, "marine" in the clause in question is contrasted with war risks, risks of transit with risks of war; and, secondly, a policy does not cease to be "marine" because it includes land insurance: (see *Harding* v. *Bussell*. 92 L. T. Rep. 531; (1905) 2 K. B. 83). But it was said that the usual route which went partly by land was excluded by the reference to "vessels" in the printed part of the contract, which showed that the contract related only to usual sea routes. I am clear that if the only route had been partly by land these references to vessels being in a printed form would have been construed as applying either to the auxiliary conveyance, rail or lighter, which replaced the vessel, or to the goods which after all were the main object of the contract; and I have come, after careful consideration, to the clear conclusion that where one of the usual routes is a land route the fact that the printed form used refers only to "vessels" and is not altered is not enough to cut that usual route out of the contract. The purchasers' counsel suggested that there was a good business reason for excluding a land route, in that there would be greater uncertainty and delay on the railway than by sea. On this, which is a question of fact, the arbitrators have made no finding, and I have no materials for forming an opinion, though I should have doubted whether, in view of the fact that the consignment might come by several ships, direct or indirect, with liberty to tranship, and of the well-known difficulties of labour in discharging, there were not considerable, if not equal, uncertainty and delays in sea transit. The fact that the land route has become one of the usual routes does not suggest any marked advantage in favour of sea transit; and I am impressed by the finding of the arbitrators not only that this was a usual route, but also a usual route under this contract, the printed terms of which are supposed to exclude it. I strongly suspect that the real cause of the buyers' action is the undoubted fall in market price, but it is not material whether my suspicion is or is not justified.

I have come, therefore, to the same conclusion as the independent commercial men in the trade, but I should like to add this: Business men frequently complain of what they consider the technical and unbusinesslike methods of lawyers in approaching commercial contracts. I think such business men should consider how much of the difficulty is due to the fact that many business men (even if they have clearly thought out what they mean, which does not always happen) frequently do not take the trouble to see whether the form in which they have expressed their meaning really expresses it. If in this case, a usual method of transit being partly by land, the contracting parties had thought what do we intend this form in such a case to mean, they would certainly have made some alterations in the printed form of contract, and thus have moulded the printed language to their real intention, instead of leaving it to the courts to do this, with less knowledge and more possibilities of error.

I am of opinion that the appeal should be allowed with costs here and in the court below, and the decision of the arbitrators restored.

BRAY, J.—In this case the question arose under an award made by the appeal committee of the Rubber Trade Association in the form of a special case. Heilbut, Symons, and Co. bought of L. Sutro and Co. twenty-five tons Hevea Crepe plantation rubber under a contract note dated the 27th March 1916. The contract note was headed thus: "Form of Contract for Cost, Freight, and Insurance (or Cost and Freight) issued by the Rubber Trade Association of London. April 1913." It was in print, and the blanks had been filled in in writing. The important clause was the one described in the margin as "shipment": "To be shipped during the months of *March/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; but if to France, no transhipment west of Port Said, except at a French port, or by force majeure." The words in italics were in ink, the rest was the printed form. The sellers declared a parcel of fifteen tons, part of the goods, by a vessel to Seattle and thence by railway to New York under a through bill of lading. The buyers refused to accept the declaration and to take up the documents when tendered as not being in accordance with the contract, which they said provided for the goods coming entirely by sea and that they should have arrived in New York by a vessel. The sellers contended that they were entitled to send the goods *viâ* Seattle under an established course of business existing at the time of the contract. The dispute was referred to arbitrators pursuant to a clause in the contract. The arbitrators found in favour of the sellers. The buyers appealed to the appeal committee, who made their award in the form of a special case, affirming the

decision of the arbitrators, subject to the points of law raised by the case. The material facts as to the established course of business are stated in pars. 9 to 14 of the case. The special case came before Lush, J., who held that the course of business could not be applied to the contract, being inconsistent with the terms of that contract, and held that the buyers were entitled to reject the goods. The sellers appealed.

The points argued before us were two: first, whether the appeal committee had really found a custom, and, secondly, whether the custom, if found, could be read into the contract. The latter is the main and more important question, and I will deal with that first, of course on the assumption that a custom was found that the goods might be sent by vessel to a Pacific port such as Seattle, and thence forwarded to New York by rail. The law on this point is now well settled. Evidence of a custom can be given in two cases: (1) to interpret a business term or expression in a contract; and (2) to annex an incident to the contract. It was contended here that the first case applied. That contention clearly fails. No one said or could say that vessel included rail. The main contention was that it was an incident or term annexed to the contract. In *Myers* v. *Sarl* (3 E. & E. 319, 320) Blackburn, J. stated the law to be as follows. After referring to the judgment of Lord Campbell, C.J. in the case of *Humfrey* v. *Dale* (*sup.*), he continued: "The rule is still more correctly laid down in Smith's Leading Cases, vol. 1, p. 529 (5th edit.), in the notes to *Wigglesworth* v. *Dallison* (1 Doug. 201), where, after setting out Parke, B.'s judgment in *Hutton* v. *Warren* (1 M. & W. 474), the author thus proceeds: 'From the above luminous judgment it may be collected that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent. But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced, first, by the express terms of the written instrument; secondly, by implication therefrom. That I take to be the true rule of law upon the subject.'" The test, therefore, is whether this custom was consistent with the terms of the contract. Were the route or routes by which the goods were to be sent expressly or by necessary implications defined by the contract, and, if so, could they include the route by ship to Seattle and thence by rail to New York?

I have read the material clause which contains the words "by vessel or vessels from the East to New York," and these words are followed up by the words "with liberty to call and/or tranship at other ports." Giving to these words their natural meaning, the goods are to go to a port, the port of New York. There are other clauses which convey the same meaning. "The arbitration is to be held within six weeks after the arrival of the vessel." "To be insured by sellers against marine and war risk insurance." There is no mention of that. "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 next clause is not applicable to this contract because it specially provided with reference to the shipping weights, but nevertheless it is material for construing the rest of the contract. "The goods to be weighed at buyers' 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." Then as to the declaration of shipment: "The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing with due dispatch." No mention of any declaration as to their coming by rail. "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, so far as regards such lost vessel or vessels on the production of the bill or bills of lading, or other satisfactory proof of shipment by sellers, so soon as fairly practicable after the loss is ascertained." "Should the vessel or vessels, after declaration, and the goods or any portion thereof be lost, this contract to be cancelled." And then last, and it is most important: "Cash against documents in London on or (at buyers' option) before arrival of vessel or vessels at port of discharge." All these words point, in my opinion, quite clearly to the goods arriving by vessel and at a port of discharge. The destination is to be the port of New York. The custom is that they should go to Seattle and arrive by rail at New York. In my opinion the custom is quite inconsistent with the express terms of the written instrument. It was argued that after the words "New York" there should be added the words "by one of the usual routes." That may be, but the usual route must be that of a vessel from the East to New York, and the place of arrival must be a port of discharge. Nothing can be implied which is contrary to the intention of the parties as shown by the written instrument. To imply that the goods could be sent by a route partly by land would be contrary to the terms of the contract. Reference was made to the case of *Glynn* v. *Margetson* (*sup.*), and especially to the words used by Lord Herschell: "These words are printed words in a document evidently intended to be used in relation to a variety of contracts of affreightment"; and it was said that the printed words here were intended to be used where the destination was an inland place. The case does not so state, and I decline to infer that this contract was intended to be so used without alteration. No business man could, in my opinion, read this contract without seeing that unaltered it was intended to be used only where the destination was a seaport, and that if the destination was to be an inland place it would have to be altered. There would be no difficulty in making the required alteration. All that was really decided in *Glynn* v. *Margetson* (*sup.*) was that the written words should prevail over the

printed words, and to that I agree; but there is no inconsistency here between the written words and the printed words. In my opinion this custom or practice, or whatever it be, cannot be read into this contract. This makes it unnecessary for me to decide whether the findings of the committee really show an established custom or practice, but I certainly do not differ from the criticism made by Swinfen Eady, L.J. on this point.

In my opinion the judgment of Lush, J. was right, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Tamplin, Tayler and Joseph.*

Solicitors for the respondents, *Herbert Smith Goss, King,* and *Gregory.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

July 19 *and* 24, 1916.

(Before ROWLATT, J.)

JENNESON, TAYLOR, AND CO. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. (*a*)

Charter-party — Cesser clause — Lien on cargo — Rate of discharge of cargo specified in charter-party—Captain to sign bill of lading in prescribed form—Without prejudice to charter-party —No provision in bill of lading as to rate of discharge or lien—Delay at port of discharge—Liability of charterer.

A charter-party provided that the cargo was to be discharged at a specified rate per day; that the captain should have a lien on the cargo for freight, demurrage, and any other lawful claim against the charterer; and that the charterer's liability should cease on completion of shipment, provided the cargo was worth the freight and demurrage. It also provided that the captain should sign bills of lading in a particular form without prejudice to the charter-party. The captain signed bills of lading in the prescribed form, which did not contain any provisions regulating the rate of discharge of the cargo, or give any lien to the shipowners for demurrage or other claims against the charterer. The cargo was not discharged within the time prescribed by the charter-party.

Held, that the charterers were liable for the delay at the port of discharge, notwithstanding the cesser clause.

TRIAL of action in the Commercial list by Rowlatt, J. without a jury.

The plaintiffs, who were the owners of the steamship *Palestrina,* claimed from the charterer demurrage, or alternatively damages, for the detention of the steamship *Palestrina* at Avonmouth in discharging a cargo of corn.

By a charter-party dated the 26th April 1915, made between the plaintiffs as owners and the defendant as charterer, it was agreed that the *Palestrina* was to proceed to Karachi and there load a full cargo of wheat in bags and deliver the same at one of certain named ports in the United Kingdom (including Avonmouth) as ordered, on being paid freight at the rate of 50*s.* per ton. The charter-party contained clauses to the effect that the captain was to sign clean shippers' usual Eastern trade form bills of lading at any rate of freight required by the charterer without prejudice to the charter-party. On arrival at the port of destination, the cargo to be discharged without delay and according to the custom of the port for steamers, but not less than twenty-four hours to be allowed from time of reporting at the custom-house before unloading shall commence. The captain to have a lien on the cargo for all freight, dead freight, and demurrage, and for any other lawful claim against the freighter. The charterer's liability to cease on completion of shipment, provided the cargo is worth the freight and demurrage.

There was a clause in the margin of the charter-party which provided that the discharge was to be effected at Avonmouth, Portishead, and Sharpness at the rate of 600 tons a day. Minimum, six days' whole cargoes, but if over 6000 tons, 650 tons a day, and if 7000 tons or over, 750 tons per day. All based on bill of lading quantities. Reporting day not to count. Running day (holidays, &c., excepted) as per 1890 charter.

The *Palestrina's* load was under 6000 tons, and therefore the rate of discharge of 600 tons per day applied.

The defendant presented for signature and the master signed bills of lading, which were the usual Eastern trade form bills of lading as specified in the charter-party. These forms did not incorporate the terms of the charter-party with regard to demurrage nor gave the captain any lien on the cargo for demurrage or other lawful claim.

The *Palestrina* was ordered to discharge at Avonmouth, and she arrived off that port on the 10th July 1915. She was docked and ready to discharge her cargo on the 13th July, and her lay days commenced on the 14th July. Her discharge was completed on the 27th July, being thirteen days excluding Sunday. Her cargo being 5056 tons the discharge should have been completed, at 600 tons a day, in nine days, and the plaintiffs claimed demurrage or damages for detention for four days at the rate of 90*l.* per day.

The defendant relied on the cesser clause in the charter-party as a defence to the action, alleging that the cargo provided for by the charter-party was duly shipped and was worth the freight and demurrage. He further alleged that the bills of lading presented to the captain for signature were in the form stipulated for in the charter-party, and that therefore the plaintiffs were not entitled to complain of the terms of such bills of lading. The defendant called evidence to show that the delay in the discharge was solely due to the default of the plaintiffs because the steamer's winches were in a defective condition and consequently could not work as fast as the receivers were ready and willing to take delivery, and, further, that the plaintiffs had no labour available on the first lay day, and that the discharging gear was not rigged until noon on the 14th July, and that the 14th July ought not to count against the charterers as a lay day.

A. A. Roche, K.C. and *R. A. Wright* for the plaintiffs, the shipowners.

D. C. Leck, K.C. and *W. N. Raeburn* for the defendant, the charterer.

Cur. adv. vult.

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

ROWLATT, J.—In this case the plaintiffs, the shipowners, claim damages in respect of four days' detention of the ship by the defendant, the charterer, at Avonmouth, the port of discharge. The defendant's first answer is to set up the cesser clause in the charter-party as relieving him from liability. The plaintiffs contend that the clause does not apply to the charterer's obligation at the place in question. By the terms of the charter-party the cargo was to be discharged at Avonmouth at the rate of 600 tons per day. The captain was to sign bills of lading in a particular form, without prejudice to the charter-party; and he did in fact sign bills of lading in a particular form which did not provide for any rate of discharge at Avonmouth. The result was that, although under the charter-party the charterer undertook that the ship should be discharged at the rate of 600 tons per day, there was no corresponding obligation on the holder of the bill of lading.

If, as the defendant contends, the cesser clause applies, the plaintiffs have absolutely lost their right to have the cargo discharged at Avonmouth at the rate of 600 tons a day. Such a result is contrary to the intention which is presumably imputable to the parties in such a case as this. I need only refer to one sentence in the judgment of Esher, M.R. in *Clink* v. *Radford* (7 Asp. Mar. Law Cas. 10; 64 L. T. Rep. 491; (1891) 1 Q. B. 627), which was repeated by him in *Hansen* v. *Harrold Brothers* (7 Asp. Mar. Law Cas. 464; 70 L. T. Rep. 475; (1894) 1 Q. B. 612, at p. 617), where he says: "It cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he stipulated for in another part of the contract." That one sentence states the whole principle which is applicable to questions arising in connection with a cesser clause. That is presumably the intention of the parties. But it is contended on behalf of the defendant that in this case the cesser clause is absolute in its terms. I do not think it is, because the charterer's liability is only to cease provided the cargo is worth freight and demurrage, which points to a connection between the cesser and the obtaining of a lien. But I wish to add that, even if there had not been those words at the end of the cesser clause, I still should have held the cesser clause limited in the same way as a matter of construction, by reason of the general principle to which I have already alluded.

Then it is said that the provision for the bill of lading being signed in this particular form shows that it was intended to give up the right to a discharge at the rate of 600 tons per day. In my judgment the effect of that stipulation is exactly the contrary, because it shows that the only way to give to the 600 tons a day clause any effect at all is to keep it alive against the charterer by restriction of the cesser clause. In other words, it being perfectly plain to both parties that the shipowner would have no right against the cargo, or the bill of lading holder for that matter, for the observance of the rate of discharge for which he stipulated, and the stipulation not being liable to be prejudiced by the bill of lading, the case becomes an unusually clear one, much clearer than *Hansen* v. *Harrold Brothers* (7 Asp. Mar. Law Cas. 464; 70 L. T. Rep. 475; (1894) 1 Q. B. 612). I think, therefore, that the cesser clause does not relieve the charterer in this case.

The next point made was that the delay was caused by the default of the ship. This charter-party is a charter-party to which the rule in *Budgett and Co.* v. *Binnington and Co.* (6 Asp. Mar. Law Cas. 592; (1891) 1 Q. B. 35) applies. That rule goes back to earlier times than those to which that case (*Budgett and Co.* v. *Binnington and Co.*, *sup.*) was decided. It goes back, at least, to the time of Lord Ellenborough, in whose time shipping affairs were conducted in a rather different and more primitive way than they are at present. As I understand it, the principle is that the charterer is regarded as saying to the shipowner, "If you will let your ship sail upon my adventure I will tell you in how many days she will get free at any port of discharge."

Therefore he takes the risk of the ship being in difficulties with regard to doing her part in the port of discharge by reason of circumstances at the port of discharge. The ship must not, however, prevent the discharge. It is said here that the ship did prevent the discharge by not having proper winches. I am satisfied that the winches were amply capable of doing the work with the necessary speed.

Finally, it is said that in any case the first day did not count, because the stevedore's gear was not ready till about the middle of that day. My brother Bray has decided in another case that time does not count under this particular charter-party and at this port until the stevedore's gear is rigged. That does not mean, I think, that the rigging of the gear can never be part of the first day's work; so that even if it is done with all dispatch the first thing in the morning, the day, nevertheless, does not count. In this case they did begin substantially the first thing in the morning. They knew that the consignees were not going to take the cargo that day; consequently they did not begin very punctually, and they worked at their leisure. Under these circumstances it would be most unjust to make the ship lose the whole of the day.

If it is desirable to state the position in legal language, I should say that in my judgment quite clearly the consignees waived any greater dispatch. Therefore I treat this case as being upon the footing of the stevedores having set to work to rig their gear on the very first day it is sought to make count, and of their having used all dispatch. Under those circumstances, I think, the rigging of the gear being merely part of the first day's work, that first day does count.

In the result there must be judgment for the plaintiffs for four days' detention at the agreed rate of 90*l.* per day, making a total of 360*l.* with costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Botterell* and *Roche.*

Solicitors for the defendant, *William A. Crump* and *Son.*

Thursday, Feb. 22, 1917.

(Before BAILHACHE, J.)

PANOUTSOS v. RAYMOND HADLEY CORPORATION OF NEW YORK. (a)

Sale of goods—Sale and delivery by instalments—Condition as to payment—Payment to be "by confirmed bankers' credit"—Breach of condition—Waiver of condition by seller—Cancellation of contract—Notice by seller of intention to cancel.

By a contract made in Sept. 1915 for the sale of 4000 tons of flour to be shipped from the United States to Greece by the 7th Nov. 1915, it was provided that each shipment should be deemed a separate contract, and that payment should be "by confirmed bankers' credit." The buyer opened a bankers' credit in favour of the sellers, but this credit was not a "confirmed" credit. After the sellers had become aware of the fact that the credit was not a confirmed credit, they made certain shipments under the contract, and also asked for and obtained an extension of time for the shipment of the balance of the flour. Subsequently the sellers purported to cancel the balance of the contract without giving any notice to the buyer, on the ground that the credit was not in accordance with the terms of the contract. Held, that (1) the sellers could not cancel the balance of the contract without giving to the buyer reasonable notice of their intention to cancel it; and (2) the fact that the sellers had waived for a time the condition as to the confirmed credit did not bind them to continue to waive it until the end of the whole contract.

By an agreement dated the 27th Sept. 1915 the defendants sold to the plaintiff 4000 tons of flour, to be dispatched from Atlantic ports to Greece per steamer or steamers as per bill or bills of lading dated or to be dated not later than the 7th Nov. 1915. Each shipment was to be deemed a separate contract.

The contract contained also the following stipulations:

Cash against documents in New York. Payment by confirmed bankers' credit. Buyers to guarantee arrangement for shipment with British envoy at Athens. War risk insurance to be effected by buyers.

On the 16th Oct. 1915 the National Bank of Commerce of New York by letter informed the sellers that a credit had been opened in their favour for about 270,000 dollars in respect of the shipment of 4000 tons shipped up to the 7th Nov. 1915. The letter contained no guarantee as to the period for which the credit was to remain in force.

On or about the 21st to the 30th Oct. the sellers made shipments of flour in accordance with the contract, for which they were duly paid by the New York bank in exchange for shipping documents.

On the 27th Oct. the sellers took exception to the credit on the ground that it was not irrevocable. About the 15th Nov. the sellers requested the buyer to extend the time for the shipment of the balance of the flour to the 30th Nov., and to this the buyer agreed.

On the 25th Nov. the Bank of Commerce informed the sellers that they did not assume any responsibility for the continuance of the credit and it could not therefore be construed as a confirmed credit, and on the 13th Dec. the bank advised the sellers that the credit of the 15th Oct. had been cancelled. The defendants then cancelled the balance of the contract. The credit opened at New York was not in accordance with the contract. The plaintiff refused to accept the cancellation of the balance of the contract, and the dispute was referred to arbitration.

Before the arbitrators the sellers contended (*inter alia*) that the buyer had failed to comply with the conditions of the contract as he had failed to open a credit at New York which was to be irrevocable until the 15th Nov. 1915 under which the sellers would be assured that they would receive cash in New York against presentation at any time up to that date of the shipping documents. That the fact that the sellers had made one shipment without insisting upon this condition did not release the buyer with regard to subsequent shipments, especially having regard to the term that "each shipment shall be deemed a separate contract."

The buyer contended (*a*) that the contract was clear and the sellers must justify their failure to fulfil it; (*b*) that the statement that the credit opened by the buyer was not a confirmed credit was not established, but that the credit was fully satisfactory; and (*c*) that in any case the sellers had accepted it as satisfactory, and, having made a shipment under it, had waived any possible objection to it, and were not in a position to repudiate their obligation to ship the balance of the flour, or could not do so without giving due notice to the buyer so as to enable him to remove any valid objection and furnish such a credit as would satisfy them.

The arbitrators awarded that the sellers were in default in not shipping the balance of the flour, and should pay certain damages for their default, and they stated a special case for the opinion of the court.

The question for the opinion of the court was whether upon the above facts there was evidence upon which the arbitrators could properly find that the sellers had waived the term in the contract that payment should be by confirmed bankers' credit, and whether their award was correct.

Roche, K.C. and *R. A. Wright* for the plaintiff.

Stuart Bevan for the defendants.

The following cases were referred to during the arguments:

Bentsen v. *Taylor, Sons, and Co.* (*No.* 2), 7 Asp. Mar. Law Cas. 385; 69 L. T. Rep. 487; (1893) 2 Q. B. 274;

Ebbw Vale Company v. *Blaina Iron Company*, 6 Com. Cas. 53.

BAILHACHE, J.—This is an award in the form of a special case upon questions that arose with reference to the proper construction of a contract for the sale of 4000 tons of flour. The deliveries were to be completed not later than the 7th Nov. 1915. Each shipment was to be deemed a separate contract. Payment was to be made by cash against documents in New York, and there was to be a confirmed bankers' credit.

The whole point of the case turns upon the clause about payment by confirmed bankers' credit. Credit was in fact opened in New York against this contract, but the continuance of the credit was not guaranteed by the National Bank of Commerce. They did not hold themselves personally responsible for the continuance of the

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

credit down to the expiration of the shipments under the contract, and the arbitrators' finding is that the credit was not a confirmed bankers' credit. The sellers made several deliveries, and did not purport to cancel on the ground of the credit not being in conformity with the contract until the 25th Nov. 1915. Meanwhile the period of delivery had been extended to the 30th Nov. The arbitrators have found that, inasmuch as the sellers knew that the credit opened with the bank was not a confirmed credit, and yet went on making deliveries under the contract and receiving payments from the bank, they must be taken to have waived the original and continuing informality as to the opening of the credit.

The real question is whether the sellers had, by acting upon that credit opened in a way not in accordance with the contract, which they might have refused to accept if so minded, with knowledge of the fact that the credit was not in accordance with the contract, waived their right to cancel the contract upon the ground that it was not the contractual credit. I think that the matter stands in this way: When the sellers know that the credit is not in form, and yet proceed to act upon it as if it is in form, they must be taken to have waived the informality so long as they elect to act upon that credit; but I do not think that they are bound to act upon it right up to the end of the contract, merely because they began to act upon it at first and waived the informality up to a point. I think that the sellers can at any time insist upon the credit being put in order, but that, if they have acted upon it up to a certain time without it being in order, they cannot then suddenly turn round and without warning claim to cancel the contract because the credit upon which they have acted as being in order is not in fact in order. If they desire to cancel the contract in circumstances such as these, I think that they must give some reasonable notice to the other party of their intention so to do. The sellers have not given any such reasonable notice. I think, therefore, that the sellers struck too soon, and a cancellation of the contract on the ground that the credit was not in order ought to have been preceded, in the circumstances of the case, by a reasonable notice to the buyer that they would cancel the contract on that ground.

The arbitrators, therefore, have come to a right conclusion in the case, and I so answer the question put to me.

Award confirmed.

Solicitors for the plaintiff, *Stibbard, Gibson,* and *Co.*

Solicitors for the defendants, *Coward* and *Hawksley, Sons,* and *Chance.*

March 19, 20, *and* 29, 1917.

(Before Sankey, J.)

Rio Tinto Company Limited *v.* Ertel Bieber and Co. (*a*)

Contract—War—Alien enemy—Illegality—Avoidance—Legal Proceedings against the Enemy Act 1915 (5 *Geo.* 5, *c.* 36).

The plaintiffs entered into two several agreements in writing, dated respectively the 27*th Jan.* 1910 *and the* 9*th Oct.* 1913, *for the supply of cupreous sulphur ore by them to the defendants, who were a German firm. The agreements provided that the ore was to be shipped from Huelva in Spain, and delivered ex ship in Rotterdam, Hamburg, Stettin, and other European ports. Both agreements contained a clause in substantially similar words as follows: "If, owing to strikes, war, or any other cause over which the sellers have no control, they should be prevented from shipping the ore from Huelva or delivering same to the buyers, the obligation to ship and (or) deliver shall be suspended during the continuance of such impediment and for a reasonable time afterwards." There was also a provision for suspending or reducing the buyers' obligation to receive under the contract during the continuance of such impediment and for a reasonable time afterwards.*

Held, that the contracts were not merely suspended, but were illegal and dissolved on the ground of public policy as involving intercourse with the enemy, and the plaintiffs as from the date of the declaration of war between Great Britain and Germany on the 4*th Aug.* 1914 *were and are released and absolved from any obligation thereunder.*

Action tried by Sankey, J. in the Commercial Court.

The plaintiffs claimed (1) a declaration that an agreement in writing dated the 27th Jan. 1910 and made between the plaintiffs of the one part and the defendants of the other part, together with the indorsements thereon dated respectively the 15th March 1912 and the 8th Oct. 1912, for the supply of cupreous sulphue ore was abrogated and avoided by the existence of a state of war between Great Britain and Germany on the 4th Aug. 1914, and that the plaintiffs were thereby released and absolved from any duty or obligation to observe or perform the said agreement, without prejudice, however, to liabilities already incurred; and (2) a declaration that an agreement in writing dated the 9th Oct. 1913 and made between the plaintiffs of the one part and the defendants of the other part for the supply of cupreous sulphur ore was abrogated and avoided by the existence of a state of a war between Great Britain and Germany on the 4th Aug. 1914, and that the plaintiffs were thereby released and absolved from any duty or obligation to observe or perform the said agreement, without prejudice, however, to liabilities then already incurred.

By an agreement dated the 27th Jan. 1910, made between the plaintiffs of the one part and the defendants of the other part, the plaintiffs agreed to sell to the defendants a quantity of cupreous sulphur ore to be shipped from the port of Huelva, Spain, between the 1st Feb. 1911 and the 30th Nov. 1914 and to be delivered ex

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

ship in Rotterdam, Hamburg, Stettin, and (or) other European ports except as there mentioned. The said ore was to be delivered upon the terms and subject to the conditions and provisions in the said agreement contained or indorsed thereon.

By an agreement dated the 15th May 1912 and a further agreement in writing dated the 8th Oct. 1912, both of which agreements were indorsed on the said agreement of the 27th Jan. 1910, the plaintiffs agreed to sell to the defendants further quantities of ore upon the terms there mentioned. By a further agreement dated the 9th Oct. 1913 the plaintiffs agreed to sell to the defendants a further quantity of ore, to be shipped from Spain between the 1st Feb. 1915 and the 30th Nov. 1919, to be delivered ex ship in certain ports therein specified. The said ore was to be delivered upon the terms and subject to the conditions and provisions in the said agreement contained or indorsed thereon. During the currency of the agreements above mentioned—namely, on the 4th Aug. 1914—a state of war was declared between Great Britain and Germany, and the defendants became alien enemies with whom it is illegal for the plaintiffs to trade or to have any commercial intercourse.

The plaintiffs contended that by reason of the said declaration and existence of a state of war the said agreements were and are abrogated and avoided, and that they (the plaintiffs) were thereby released and absolved from any duty or obligation to perform the same, without prejudice, however, to liabilities already incurred.

The agreements contained a clause which provided as follows:

> If, owing to strikes, war, or any other cause over which the sellers have no control, they should be prevented from shipping or exporting the ore from Spain or delivering the same to the buyers, 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, and if one or more works of buyers' clients should be destroyed or materially damaged by fire, or should war or any other cause over which the buyers or their clients have no control prevent their receiving such ore, the obligation to receive under this contract shall be reduced in proportion or suspended during the continuance of such impediment and for a reasonable time afterwards to allow the buyers time to recommence receipts.

The defendants contended that upon the true construction of the said agreements the operation thereof is only suspended during the existence of war between Great Britain and Germany, and the agreements are not abrogated or avoided by reason of the war. They further contended that the agreements were made in London and Hamburg, and were to be performed in Germany and are subject to the laws of Germany.

Grant, K.C. and *Micklethwait* for the plaintiffs.—They referred to

Zinc Corporation v. *Hirsch*, 114 L. T. Rep. 222; (1916) 1 K. B. 541.

J. A. Compston, K.C. and *A. Cohn* for the defendants.—They referred to

Daimler Company v. *Continental Tyre Company*, 114 L. T. Rep. 1049; (1916) 2 App. Cas. 308, 347.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

March 29.—Sankey, J. delivered the following written judgment:—

In this case the Rio Tinto Company ask for a declaration that two several agreements in writing, dated respectively the 27th Jan. 1910 and the 9th Oct. 1913, for the supply of cupreous sulphur ore by them to the defendants were abrogated and avoided by the existence of a state of war between Great Britain and Germany, and that they are thereby released and absolved from any duty or obligation to observe or perform the said agreements, without prejudice, however, to liabilities already incurred.

The defendants contend that upon the true construction of the agreements the operation thereof was merely suspended during the existence of a state of war, and the said agreements are not avoided or abrogated by reason thereof.

The clause relied on in the first agreement is No. 12; that in the second agreement is No. 15. They are both in substantially the same words, and I will read the last one: "If, owing to strikes, war, or any other cause over which the sellers have no control, they should be prevented from shipping the ore from Huelva or delivering same to the buyers, the obligation to ship and (or) deliver shall be suspended during the continuance of such impediment and for a reasonable time afterwards to allow the sellers time to resume shipments and (or) deliveries, and if one or more works of buyers' clients should be destroyed or materially damaged by fire, or should war or any other cause over which the buyers or their clients have no control prevent their receiving such ore, the obligation to receive under this contract shall be reduced in proportion or suspended during the continuance of such impediment and for a reasonable time afterwards to allow the buyers time to recommence receipts."

The contention of the plaintiffs was two-fold. They said (1) that the contract involved constant commercial intercourse and communication between the parties, and therefore, on the authority of *Zinc Corporation* v. *Hirsch* (114 L. T. Rep. 222; (1916) 1 K. B. 541), the agreement had become illegal and was dissolved; and (2) that the effect of supending the deliveries would be to protect the defendants' trade during the war and to enable the defendants upon the conclusion of peace to resume their trade as speedily and in as great a volume as possible and so as to diminish the effect of war on the commercial prosperity of the enemy country, which it is the object of this country during the war to destroy (per Swinfen Eady, L.J. 114 L. T. Rep., at p. 227), and that consequently the agreement is void.

To this the defendants reply (1) that the first contract did not involve commercial intercourse with the enemy because the second contract provided that all former contracts were to be considered as expired on the 1st March 1915, and the writ in this case was issued on the 4th Aug. 1916; (2) that deliveries under the second contract were not to begin till the 1st Feb. 1915, and that in fact no deliveries had been made, or, putting the two points shortly, it was said that no commercial intercourse was involved because the first contract had expired and the second had not begun; and (3) that neither under the special juris-

diction under which the court is trying this case —viz., the Legal Proceedings against the Enemy Act 1915—nor at common law could the court take into consideration the effect which would be caused by holding that the deliveries were suspended till after the war.

It was urged that at the conclusion of the war trading would be legal between the plaintiffs and defendants, and that the words of Swinfen Eady, L.J. above cited have been disapproved in the speech of Lord Parker in the case of *Daimler Company* v. *Continental Tyre Company* (114 L. T. Rep. 1049; (1916) 2 App. Cas. 308, at p. 347).

I now turn to the first point—viz., that the contract involved commercial intercourse and is therefore illegal and is dissolved. It is convenient to deal first with the second of the two contracts, that dated the 9th Oct. 1913.

Mr. Fielding, the chairman of the plaintiff company, who was called and whose evidence I accept, said that the contract would involve daily communication between plaintiffs and defendants by letter and telegram; that under clause 12 the defendants had to declare in writing not later than the 1st Jan. of each year the total quantity of fines and lumps—that is to say, of crushed and uncrushed ore—which they desired delivered during the year, and what quantity of each size was to be delivered at particular ports; that upon that declaration in writing by the defendants depended the whole of the plaintiffs' programme at the mine for the coming year. He further said that the plaintiffs had to charter ships long in advance of the time at which they were required, and he pointed to numerous other clauses of a similar character with a view of showing that they postulated constant commercial intercourse between the parties.

I am satisfied that the contract would involve such intercourse, and proceed to consider the defendants' point that as deliveries were not to begin till February of 1915, and that as, according to their contention, the effect of the *force majeure* clause was only to suspend deliveries, no commercial intercourse was in fact possible after an outbreak of war.

In my view this is not correct. It seems to me that clause 12 is one which precedes delivery, and, while agreeing that the effect of clause 15 is to suspend deliveries, the question of delivery does not arise till clause 12 has operated. I think, therefore, that clause 12 is not suspended during the war. I equally think that clause 19, which which deals in part with the *personnel* of the defendant firm, is not suspended. Still further I think that clause 18, referring to arbitration, is not suspended, as is evidenced by the fact that the defendants themselves took out a summons to stay the present action under that very clause. In respect of this contract I desire to quote the words of Swinfen Eady, L.J., when discussing the *Zinc* case contract. At p. 226 he says: "There are other clauses, including the arbitration clause 21 of the agreement of 1908, all pointing to the necessity of intercourse, although deliveries may be suspended under clause 17, thus rendering the performance of the contract illegal." In my view this agreement stands on the same footing, and I am of opinion that it does involve commercial intercourse with the enemy, and has therefore become illegal and is dissolved.

I now turn to the second point—viz, that deliveries after the war would assist the enemy by enabling the defendants to resume their trade, and consequently the agreement is void. I have already cited the words of Swinfen Eady, L.J. on the effect of suspending deliveries and allowing them to be completed after the war. It is said that his reasoning has been disapproved by Lord Parker. I doubt if that is so, but it is not necessary, after my first finding, for me to decide the point, but I think it right to ascertain the facts in case they become important before a higher tribunal.

Mr. Fielding gave evidence, but it was objected to by Mr. Compston, although I took it *de bene esse*. The facts are as follows: The ore which is shipped by the plaintiffs to the defendants is of the greatest possible commercial use. After passing through various chemical and mechanical processes it can be used for explosives, for fertilisers, and for dyes; it is important for nearly every industry in Germany, and, further, Mr. Fielding said that the effect of suspending deliveries would be to stop the plaintiffs' business during the war, and to tie it up after. I accept that as correct, and am satisfied that the result of such a suspension would be to assist German trade, and to hinder the plaintiffs' business. If the learned counsel for the defendants is wrong in saying that the remarks of Swinfen Eady, L.J. must be taken to be disapproved by Lord Parker, this is an additional reason for holding the agreement void.

I will now deal with the first contract, but, after my findings in respect of the second one, the matter is not important. If the contract is still in existence, I think it illegal and dissolved for similar reasons to those already stated in respect of the second contract. If it has become merged into or put an end to by the second contract the discussion is academic, because either it has ceased to exist or is merged into a contract which is illegal and void.

In the result I am of opinion that the plaintiffs are entitled to the declaration asked for.

Judgment for plaintiffs.

Solicitors: *Slaughter* and *May*; *William A. Crump* and *Son*.

March 19, 20, *and* 29, 1917.

(Before Sankey, J.)

Rio Tinto Company Limited *v.* Vereimingte Konigs and Laurahutte Actien-Gesellschaft Fur Bergbau and Huttenbetrieb and Rio Tinto Company Limited *v.* Dynamit Actien-Gesellschaft. (*a*)

Contract—War—Alien enemy—Suspension clause—Effect of declaration of war—Legal proceedings against the Enemy Act 1915 (5 *Geo.* 5, *c.* 36).

Contracts made before the war with German firms are illegal and dissolved as from the declaration of a state of war between Great Britain and Germany, upon the ground of public policy as involving intercourse with the enemy.

Action in the Commercial list tried by Sankey, J. The plaintiffs claimed declarations that certain

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

contracts for the supply of sulphur ore were abrogated and avoided by the existence of a state of war between Great Britain and Germany, and that the plaintiffs were released and absolved from any duty or obligation to observe or perform the said agreements, without prejudice, however, to liabilities then already incurred.

The said agreements contained a clause providing (*inter alia*) that in all cases of *force majeure*, including war, strike, quarantine, &c., which should prevent the plaintiffs from shipping the ore or delivering same or delaying the delivery, their obligation under the said agreements should be postponed for the duration of such impediments and their consequences, and the obligations of the defendants to receive under the said agreements should be postponed if and as long as similar reasons should prevent their receiving such ore.

The defendants contended that upon the true construction of the said agreements the operation thereof is suspended during the existence of a state of war between Great Britain and Germany, and were not abrogated nor avoided by reason of the war. They further said that the agreements were made in Germany, and were to be performed in Germany and are subject to the laws of Germany.

A. Grant, K.C. and *Micklethwait* for the plaintiffs.

J. A. Compston, K.C. and *A. Cohn* for the defendants.

Cur. adv. vult.

March 29.—Sankey, J. delivered the following written judgment:—With regard to the actions by the Rio Tinto Company against the Company, which for shortness I will call the Konigs Company, and against the company which for shortness I will call the Dynamit Company, the plaintiffs in these cases claim similar declarations to those asked for in the *Ertel Bieber* case (*ante*, p. 44); in respect, so far as the *Konigs* case is concerned, of two agreements dated respectively the 7th Feb. 1911 and the 17th March 1913, and in respect, as far as the *Dynamit* case is concerned, of two dated the 19th Jan. 1910 and the 28th Jan. 1913.

To a very large extent the considerations which apply in that case apply to the present ones, and it was agreed that the evidence called should be deemed to apply, *mutatis mutandis*, to all the cases, but those now under consideration were said to have three points of difference: (1) The defendants contended that these were German contracts, to be construed by German law, and there was no evidence that they were illegal by such law; (2) the plaintiffs contended that the word "war" in the *force majeure* clause did not include war between Germany and England; and (3) that there was a restrictive clause in the contracts, at any rate in the *Konigs* case, under which they bound themselves to offer the sulphur ores bought under the agreements to no other than certain specified customers, most of whom were alien enemies (that is, German), and some of whom were allies (that is, Russian), and as a consequence the agreements were void.

In addition to the evidence given in the first case, there was that of a Mr. Cliffe, that deliveries have been made under each of the four contracts in question.

The only other dispute of fact was the correct translation of the *force majeure* clause, as to which there was a controversy whether certain German words were correctly rendered into English by the word "suspended," or whether they meant "postponed."

I accept the evidence given by the plaintiffs' translator, and hold that the proper rendering is "suspended," and that the clause as it appears in the plaintiffs' translation is correct. I am of opinion that the contention of the defendants is right, that these are German contracts, to be construed by German law, for the reasons given by them.

I am satisfied, however, for reasons similar to those in the first case, that these contracts also involve constant commercial intercourse with the enemy. I do not think any useful purpose would be served by my going through the points again at length.

Although there is no clause in any of them similar to clause 12 in the Ertel Bieber contract, because the stipulations as to quantity and quality of deliveries are such as to give an option to, and not to impose an obligation on, the defendants, there are other clauses, notably those providing for times of delivery and for arbitration, which necessitate commercial intercourse between the parties. Over and above that, there is the evidence of Mr. Fielding as to the necessity of providing for tonnage beforehand, and as to the effect on German trade and the plaintiffs' business of a suspension of the deliveries. Further than that, there is no question here of the agreement having either terminated or not having commenced, as there is the evidence of Mr. Cliffe that some deliveries have been made under each of the four contracts. Holding as I do that according to English law these contracts are illegal and dissolved upon the ground of public policy as involving intercourse with the enemy, the question of their validity under German law is immaterial, for they are contracts which it is illegal for a British subject to remain bound by, as was said by Turner, L.J. in *Hope* v. *Hope* (1857, 8 De G. M. & G. 731, at p. 743): "When the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it." When a contract is illegal and against public policy in England, I do not think it can be enforceable merely because it was made in Germany: see *Rousillon* v. *Rousillon* (42 L. T. Rep. 679; 14 Ch. Div. 351), by Fry, J., at p. 369, where he says: "It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else"; and see, further, Professor Dicey's book on Conflict of Laws, 2nd edit., p. 549, where he says: "A contract (whether lawful by its proper law or not) is invalid if it or the enforcement thereof is

opposed to English interests of State or to the policy of English law, or to the moral rules upheld by English law."

It is true that in one sense the court is not being asked to directly enforce a contract, but I think the object of the Legal Proceedings against the Enemy Act 1915 is to enable a British subject to obtain against an enemy defendant a declaration as to the effect of the present war, not only on his rights, but on his liabilities under an agreement entered into before the outbreak of the war.

A plaintiff entitled to claim a declaration that he has a right to enforce a contract must equally, in my view, be entitled to claim a declaration that he has a right to disavow one.

The object of the plaintiffs here is to override the contract, not to enforce it, and contracts which involve intercourse with alien enemies, as this one does, are contracts which are illegal and dissolved, and, in my opinion, the plaintiffs are entitled to the relief asked. Under these circumstances it is not necessary for me to give a decision on the two additional points taken by the plaintiffs—namely, that the *force majeure* clause does not include the event of a war between Great Britain and Germany, and upon the question of the restrictive clause which they allege makes the contract void.

In the result the plaintiffs are entitled to the declaration which they ask for.

Judgment for plaintiffs.

Solicitors: *Slaughter* and *May*; *William A. Crump* and *Son*.

March 28, 29, *and April* 26, 1917.

(Before ATKIN, J.)

ASSOCIATED OIL CARRIERS LIMITED *v.* UNION INSURANCE SOCIETY OF CANTON LIMITED. (*a*)

Marine insurance—Chartered freight—Anticipated profit—German charterers—Non-disclosure—War—Illegality of contract of affreightment—Loss by restraint of princes—No notice of abandonment—Total loss—Constructive total loss—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 18, 61, 62.

By a charter-party dated the 20th Jan. 1913 *the plaintiffs chartered the steamer* B. *to a German company for consecutive voyages for three years, from the commencement of loading the first cargo thereunder. On the 31st July* 1914 *the plaintiffs instructed their brokers to take out a policy of insurance against war risks, on freight and (or) anticipated profit on a voyage of the steamer from Portland to Roumania and back to certain specified ports. The policy was underwritten by the defendants, but the plaintiffs did not disclose the fact that the charterers were German. On the 4th Aug.* 1914 *war broke out between England and Germany, and the plaintiffs cabled instructions to the master of the steamer at Gibraltar to abandon the insured voyage and proceed to Norfolk, Virginia, for orders. No notice of abandonment was given to the defendants until the 27th Aug.* 1914.

Held, that the plaintiffs had established that there was a total loss by a peril insured against, because on the outbreak of war the contract of affreightment became illegal, and the freight was lost to the owners through restraint of princes. The loss was an actual loss and not a constructive total loss, and no notice of abandonment was necessary.

Held, also, that non-disclosure of the fact that the charterers were German did not avoid the policy, because on the date of taking out the policy that fact would not have influenced the underwriters' judgment.

ACTION in the Commercial list tried before Atkin, J. without a jury.

The plaintiffs were the owners of the oil tank steamer *Baku Standard*, and they claimed total loss on a policy of insurance upon freight and (or) anticipated profit on a voyage of that steamer from Portland to Kustendji, in Roumania, and back to certain specified Continental or English ports. The policy in question was underwritten by the defendants, and was against war risks only. It was dated the 7th Aug. 1914, and was for an amount of 2000*l.*

By a charter-parter dated the 20th Jan. 1913 the plaintiffs chartered the *Baku Standard* to a German company of Berlin. The charter-party was expressed to remain in force for consecutive voyeges over three years from the commencement of loading the first cargo thereunder. On the 14th July 1914 the steamer was at Vlaardingen, and the plaintiffs' agents were in correspondence with the German charterers to obtain information as to the steamer's next loading port. Before obtaining the information they obtained an insurance on "chartered freight" per the steamer at and from Vlaardingen to a port or ports in the Black Sea, and thence to ports in the United Kingdom or Continent between Bordeaux and Hamburg, both inclusive. This policy did not cover war risks. The owners continued to experience difficulty in getting the charterers to name a loading port. On the 27th July the charterers cabled that they declared the charter terminated in consequence of the war between Austria and Serbia rendering shipping to Roumania impossible. The owners firmly declined to accept this view of the rights of the parties, and eventually on the 31st July the charterers withdrew their former cable and cabled instructions for the steamer to proceed to Kustendji immediately. By this time the steamer had arrived at Portland and was awaiting orders. Upon receipt of those instructions the plaintiffs' agents, Messrs. Jacobs, gave telephone instructions to Messrs. Willis, Faber, and Co., insurance brokers, to take out the policy in question against war risks. The policy is expressed to be not, as in the former ordinary risk policy, on "chartered freight," but in "freight and (or) anticipated profit" per the *Baku Standard* at and from Portland to Kustendji and back to ports in the United Kingdom and (or) the Continent, excluding Germany or Russia, but including any French port in the Mediterranean. On the same day Messrs. Jacobs wrote to Messrs. Willis, Faber, and Co. purporting to confirm "having instructed you and also your having placed on our account insurance on 'chartered freight.'" But on the same day Messrs. Willis, Faber, and Co. reported having insured "on freight and (or) anticipated profit," and the cover note was received without demur. On the 4th Aug. Messrs. Jacobs cabled instructions to

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

Lloyd's at Gibraltar to instruct the steamer to await orders on arrival there. On the 6th Aug. the steamer arrived at Gibraltar and awaited orders. War had on the 4th Aug. broken out between England and Germany. On the 11th Aug. the owners instructed the captain to proceed to Norfolk, Virginia, for orders; and on the 13th Aug. directed him to proceed first to Las Palmas to coal and then to Norfolk. The captain sailed according to instructions, and on the 19th Aug., while on the voyage to Norfolk, was requisitioned by the Admiralty.

A. Adair Roche, K.C. and *R. I. Simey* for the plaintiffs.—Inasmuch as after the 4th Aug. it became illegal for the owner to fulfil the charter made with an alien enemy, there has been a total loss of freight by restraint of princes. See

British and Foreign Marine Insurance Company v. *Sanday and Co.*, 13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 App. Cas. 650.

There is, therefore, a total loss by a peril insured against.

MacKinnon, K.C. and *R. A. Wright* for the defendants.—This case is distinguishable from *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (*ubi sup.*). In *Sanday's* case the insurance was on cargo, and the whole adventure was frustrated. In the present case the insurance is on freight generally. It is true that the particular chartered freight was lost; but there was nothing to prevent the steamer from proceeding on the insured voyage. There is in this case not a total loss at all. If the vessel had earned any freight after proceeding on the voyage, there would have been no loss. See

Everth v. *Smith*, 1814, 2 M. & S. 278.

In any case the underwriters do not take upon themselves the risk of the freight market falling in consequence of the war. If there is a loss, it is a constructive total loss, and the plaintiffs have failed to give notice of abandonment within the proper time. Moreover, it was a material fact for the underwriter to know that the charterers were German. Would a prudent underwriter have insured the risk if he had been told that fact? That is the test on the question of concealment. The policy is void for non-disclosure of the fact that the charterers were Germans.

Cur. adv. vult.

April 26.—The following judgment was read by

ATKIN, J.—This is a claim by the plaintiffs, the owners of the oil tank steamer *Baku Standard*, against the defendants on a policy of insurance upon freight on a voyage from Portland to Kustendji, in Roumania, and back to Continental or English ports as therein mentioned. The policy is against war risks only. The defendants say that there was no loss, or, if there was, it was a constructive total loss, and that notice of abandonment was not given, or, if given, not given in time; and they further plead that the policy is void for non-disclosure of a material fact —viz., that the freight risk was freight which would be due under a charter to a German company resident in Germany.

The facts appear to be that by a charter-party dated the 20th Jan. 1913 the plaintiffs chartered the *Baku Standard* to a German company of Berlin. The charter-party was expressed to remain in force for consecutive voyages over three years from the commencement of loading the first cargo thereunder. On the 14th July the steamer was at Vlaardingen, and the plaintiffs' agents, Messrs. Jacobs and Co., were in correspondence with the German charterers to obtain information as to her next loading port. Before obtaining it they obtained an insurance on "chartered freight" per the steamer at and from Vlaardingen to a port or ports in the Black Sea, and thence to ports in the United Kingdom or Continent between Bordeaux and Hamburg, both inclusive. This policy did not cover war risks. The owners continued to experience difficulty in getting the charterers to name a loading port. On the 27th July the charterers cabled that they declared the charter terminated in consequence of the war between Austria and Serbia rendering shipping to Roumania impossible. The owners firmly declined to accept this view of the rights of the parties, and eventually on the 31st July the charterers withdrew their former cable and cabled instructions for the steamer to proceed to Kustendji immediately. The steamer had now arrived at Portland and was awaiting orders. Upon receipt of those instructions Messrs. Jacobs gave telephone instructions to Messrs. Willis, Faber, and Co., insurance brokers, to take out the policy in question against war risks. The policy is expressed to be not, as in the former ordinary risk policy, on "chartered freight," but on "freight and (or) anticipated profit" per the *Baku Standard* at and from Portland to Kustendji and back to ports in the United Kingdom and (or) the Continent, excluding Germany or Russia, but including any French port in the Mediterranean. On the same day Messrs. Jacobs wrote to Messrs. Willis, Faber, and Co. purporting to confirm "having instructed you, and also your having placed on our account insurance on 'chartered freight.'" But on the same day Messrs. Willis, Faber, and Co. reported having insured "on freight and (or) anticipated profit," and the cover note was received without demur. I have no doubt that the change of language from the former policy was intentional, and probably due to the charterers' threat on the 27th July to terminate the charter. The *Baku Standard* proceeded forthwith upon her voyage. On the 4th Aug. Messrs. Jacobs cabled instructions to Lloyd's at Gibraltar to instruct the steamer to await orders on arrival there. On the 6th Aug. the steamer arrived at Gibraltar and awaited orders. War had on the 4th Aug. broken out between England and Germany. On the 11th Aug. the owners instructed the captain to proceed to Norfolk, Virginia, for orders; and on the 13th Aug. directed him to proceed first to Las Palmas to coal, and then to Norfolk. On the 15th Aug. the captain sailed in accordance with these instructions. The steamer arrived at Norfolk, and on the 19th Aug., while on a voyage there, was requisitioned by the Admiralty.

I am satisfied that in taking the course they did after the outbreak of the war, the owners acted prudently and reasonably. Their charter was dissolved by the war, and I think it was established that at this time there was no reasonable prospect of obtaining either a charter or any freight engagement at Kustendji for the steamer. I do not think any prudent uninsured

owner under the circumstances would have proceeded on the insured voyage.

Upon these facts the plaintiffs contend that there has been a total loss of freight by restraint of princes, inasmuch as after the 4th Aug. it became illegal by English law for the owner to fulfil the charter made with an enemy, and they rely on the decision in *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 App. Cas. 650). On the other hand, the defendants contend that the two cases differ. In *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (*sup.*) it was said that the insurance was on cargo, and the whole adventure was frustrated. Here the insurance is on freight generally. It is true that the particular chartered freight at risk was lost; but there was nothing to prevent the steamer from proceeding on the insured voyage. If she had earned any freight after proceeding on the voyage, there would have been no loss (*Everth* v. *Smith*, 1814, 2 M. & S. 278), and in any case the underwriters do not take upon themselves the risk of the freight market falling in consequence of war.

In my opinion the plaintiffs establish that there was a total loss by a peril insured against. I think it is true this was not intended to cover merely the chartered freight. I do not pause to consider whether any meaning can be attached to the words "and (or) anticipated profit," although I cannot think of any insurable interest described by such words which would not be covered by the word "freight." But I think that the insurance would have covered a loss of freight, though the steamer had started on the insured voyage freed from the charter altogether. Nevertheless, the insurance clearly covers chartered freight; the risk in respect of such freight attached as soon as the vessel began the insured voyage, and the owners had an insurable interest in the chartered freight at the outbreak of the war. That freight they have lost, and lost because on the outbreak of the war British law forbade them to fulfil the contract of affreightment; in other words, forbade them to proceed to Kustendji for the purpose of loading a cargo from the charterers. It is to be noticed that they were proceeding to Kustendji solely because they were so directed by the charterers, a direction which before the war they were bound to obey, and after the war they were bound to disobey. Apart from the charter, as I have already said, on the 6th Aug. no reasonable person would have thought of making the insured voyage. Under these circumstances it appears to me that the freight was lost to the owners by restraint of princes.

It was further contended that in any case the loss was a constructive total loss, so that notice of abandonment was necessary. Now, it appears to me that if a vessel insured on freight generally loses entirely from perils insured against, the only freight in respect of which it has a contractual interest, and no other freight can be obtained on the insured voyage, the loss is an actual and not a constructive loss. If other freight can be obtained on the insured voyage, the question might arise whether it could be earned without an expenditure which would exceed its value when earned, and the loss might then be a constructive total loss or no loss at all. Here, as I have said, no freight could be obtained, and I think the loss an actual loss.

The question whether this was an actual or constructive total loss may be considered from another point of view. If this were a constructive total loss, what follows? By sect. 61 of the Marine Insurance Act 1906 the assured may either treat the loss as a partial loss or abandon the subject-matter insured to the insurer, and treat the loss as it were an actual total loss. The question of abandonment only arises where there has been in fact a loss of the subject-matter insured, and the issue is whether that loss shall be partial or actual. It involves the loss of something in which the assured has an insurable interest at the time of the loss. If a vessel is sailing with cargo on board, the owners have a right to earn freight by carrying the cargo to its destination by that vessel or a substituted vessel. That right is the subject of insurance, and, if vessel or cargo be injured, it may well be that the owner can abandon to the underwriters his rights so to carry the cargo as to enable them to earn freight. But when a vessel is sailing on an outward voyage to a loading port, intending to carry home cargo in respect of which a contractual obligation exists, and in the course of the outward voyage all the rights in respect of such cargo disappear by a peril insured against, what is there to abandon? The subject-matter in respect of which the loss is made has disappeared, and there is nothing left analogous to ship or cargo, or right to carry forward cargo, still in existence which can be made over to the underwriters. I cannot conceive that the ship has to be handed over to the underwriters to become a sinking ship. In such a case I do not think there can be either a constructive total loss or an abandonment. The only question that can arise is, Was there an actual loss at all, either total or partial?

But even were there a constructive total loss in this particular case, I think that notice of abandonment would be unnecessary, for the Marine Insurance Act 1906, by sect. 62, subsect. 7, declares it to be "unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him."

I am satisfied that the underwriters here could have derived no benefit if notice had been given to them at once. Notice of abandonment was not given till the 27th Aug. If it had to be given, I think that it was given too late. The voyage had then been abandoned and the ship was at Norfolk, Virginia, and the underwriters had not been consulted as to her movements. But for the reasons I have given I think this immaterial.

The further point that remains to be dealt with is the question of non-disclosure. It is said that the fact that the charterer was a German was a material circumstance that ought to have been disclosed. The test is, would it influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk? (Marine Insurance Act 1906, s. 18, sub s. 2).

In view of the law as laid down in *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (13 Asp. Mar. Law Cas. 289; 114

L. T. Rep. 521; (1916) 1 App. Cas. 650), I think there can be no doubt that such fact was actually material. But I am satisfied from the evidence called before me that on the 31st July 1914 no underwriter would have been influenced by this circumstance, for the simple reason that it would never have occurred to him that the inability to deliver which arose in the circumstances of this case could constitute a loss by perils insured against. I have had gentlemen of great experience in the underwriting world called before me on both sides, and the witnesses for the defence were as emphatic as those for the plaintiffs in asserting that the risk in *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (*ubi sup.*) did not enter into the matter. Counsel for the defendants, however, bravely threw over his witnesses on this point. He said that a prudent insurer within the meaning of the section must be taken to know the law, and to know that the law was as laid down in the case of *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (*sup.*). Knowing so much, he would clearly have been influenced. I think that this standard of prudence indicates an insurer much too bright and good for human nature's daily food. There seems no reason to impute to the insurer a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intelligent insurers carrying on business in that market at the time. The evidence satisfies me that, if the standard of prudence is the ideal one contended for by Mr. MacKinnon, there were in July 1914 no prudent insurers in London, or, if there were, they were not to be found in the usual places where one would seek for them. I am satisfied that in this respect the defendants' judgment would not have been influenced had the fact that the charterers were German been disclosed. It was sought, however, to say that the circumstances would have affected the underwriters' judgment as to the risk of seizure, and witnesses for the defence were called who gave evidence to that effect. Mr. Saunders, the defendants' underwriter, however, quite properly admitted that up to the date of the insurance he had never known an underwriter ask an assured to tell who the charterer was; and this evidence only confirms that given by the witnesses for the plaintiffs. I think that this was not a circumstance which would have any real influence upon an underwriter's judgment on the 31st July 1914, and that it need not have been disclosed. I am led by the correspondence to suspect that this defence of non-disclosure was an afterthought. But, however this may be, I do not think the defence valid. Under these circumstances, I think that the plaintiffs are entitled to succeed, and that there must be judgment for them for the amount claimed with costs.

Judgment for plaintiffs.

Solicitors: *W. A. Crump* and *Son*; *Waltons* and *Co.*

Wednesday, May 2, 1917.

(Before HORRIDGE, J.)

ANTHONY HORDERN AND SONS LIMITED *v.* COMMONWEALTH AND DOMINION LINE LIMITED. (*a*)

Carriage by sea—Bill of lading—Incorporation of Harter Act—Clause limiting liability—Conflict—Clause null and void.

A bill of lading contained a clause which in effect incorporated the Harter Act. The Act prohibits the insertion in a bill of lading of any clause limiting the shipowners' liability with regard to the non-delivery of goods committed to their charge. The plaintiffs delivered to the defendants for shipment from New York to Sydney a number of packages of merchandise. The bill of lading contained a clause limiting the shipowners' liability with regard to the non-delivery of the goods. The defendants failed to deliver one of the packages of the merchandise.

Held, that, inasmuch as the bill of lading was expressed to be subject to the Harter Act, the clause limiting the shipowners' liability was null and void. The defendants were therefore liable.

ACTION in the Commercial list tried before Horridge, J.

The plaintiffs claimed damages for breach of duty in relation to goods received by the defendants for shipment per the steamship *Caldy* from New York to Sydney. As the shipment was made at New York, the contract of carriage embodied the provisions of the Harter Act, sect. 1 of which prohibits the insertion in a bill of lading of any clause whereby the owner shall be relieved from liability in respect of the proper delivery of goods carried from American ports. The bill of lading in this case contained a clause which limited the liability of the shipowners in respect of delivery of the goods intrusted to their care, and the question for decision was whether the insertion of such a clause contravened the Harter Act, or whether the effect of the incorporation of the said Harter Act was to render the clause null and void.

There was an agreed statement of facts as follows:

1. The plaintiffs are owners and consignees of 336 packages of general merchandise shipped on board the steamship *Caldy* at New York. By bills of lading dated the 5th Oct. 1915 the defendants acknowledged the receipt of the said goods in apparent good order and condition upon the said vessel, and contracted to carry the same to Sydney and there deliver them in the like good order and condition to the plaintiffs, subject to the exceptions and conditions of the said bills of lading. The defendants failed to deliver one package of the said 336 packages. Such package contained hosiery, and measured 22ft. 11in. cubic measurement, and was worth 240*l.* 12*s.* 7*d.* It was marked A. H. & S. H. 19.

2. By clause 3 of the said bills of lading the same are expressed to be subject to all the terms and exceptions of the Harter Act.

3. By clause 6 of the said bills of lading it is expressly provided as follows—viz.: "The shipowners will not be accountable for any of the articles enumerated in No. 4281 of United States Revised Statutes, nor for goods of which the value is more than 5*l.* per cubic foot, nor for any one package which is of a value of

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

more than 100*l.*, unless the value thereof shall have been stated in writing both on the broker's order, which must be obtained before shipment, and also on the shipping note presented on shipment, and extra freight agreed upon and paid and the bills of lading signed with a declaration of the nature and value of the goods appearing thereon, nor for damage to other goods of a brittle or fragile nature of any description from whatsoever cause arising.

4. No declaration of the value of the said goods was made in writing either upon a broker's order or upon a shipping note. No extra freight was either agreed upon or paid in respect thereof, and the said bills of lading contained no declaration of the value thereof.

5. The question to be determined is, whether the defendants in the premises are exempted by clause 6 aforesaid from liability for the said non-delivery of the package. The plaintiffs claim in respect thereof 240*l.* 12*s.* 7*d.*, but the defendants, relying on clause 6 of the bill of lading, deny all liability.

R. A. Wright for the plaintiffs.—The short point in the case is as to whether clause 6 of the bills of lading is binding or not. The shipowners cannot rely on this clause because it conflicts with the provisions of the Harter Act, which are incorporated by clause 3 of the bill of lading. Clause 1 of the Harter Act provides that it shall not be lawful for the manager, agent, or owner of any vessel transporting merchandise or property from any United States port to foreign ports to insert in any bill of lading any clause whereby he or they shall be relieved from liability for loss or non-delivery of any goods committed to their charge. Any and all words and clauses inserted shall be null and void and of no effect. Clause 6 of the bill of lading is clearly inconsistent with this provision of the Harter Act. As the clause purports to relieve the shipowner from liability in respect of loss or non-delivery which is prohibited by the Harter Act, it ought to be treated as null and void. He cited

Morris and Morris v. *Oceanic Steam Navigation Company Limited*, 16 Times L. Rep. 533;
McFadden v. *Blue Star Line*, 10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 701;
Tuck v. *Levant Line*, unreported.

Sect. 4281 of the United States Revised Statutes provides that:

If any shipper of platina, gold, gold dust, silver, bullion, coins, jewellery, bills, &c. . . . shall lade the same as freight or baggage on any vessel without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master or owner of such vessel shall not be liable as carrier thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

Clause 6 of the bill of lading goes far beyond this provision, and, in so far as it does so, it is invalid.

C. R. Dunlop for the defendants.—It is laid down in Scrutton's Charter-parties and Bills of Lading, at p. 409, that the Harter Act is of great importance and must be construed according as the action is brought in the English courts or in the courts of the United States. He referred to

Morris and Morris v. *Oceanic Steam Navigation Company* (*ubi sup.*);
Baxter's Leather Company v. *Royal Mail Steam Packet Company*, 11 Asp. Mar. Law Cas. 98; 99 L. T. Rep. 286; (1908) 1 K. B. 796; affirmed (1908) 2 K. B. 626.

The objects of clause 6 of the bill of lading were (1) to enable shipowners to charge extra freight, and (2) to give them notice before shipment is offered or accepted that the goods tendered are of high value, in order to enable them to decide whether they will accept them, and, if accepted, where they should be stowed. As to the effect of the clause, see per Lord Gorell 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., at p. 632). The Harter Act, which is introduced into the bill of lading, must not be construed as an Act, but simply as words occurring in the bill of lading (see per Lord Esher in *Dobell* v. *Steamship Rossmore Company*, 8 Asp. Mar. Law Cas. 33; 73 L. T. Rep. 74; (1895) 2 Q. B. 412, at p. 413), as if the words of the Act were set out at length in it: (see per Kay, L J.). Clause 6 does not conflict with the Harter Act. It does not deal with nor affect the question of care in loading, storing, &c, nor does it lessen the obligation to exercise due diligence to make the vessel seaworthy. There is no limitation of duty to use reasonable care. He referred to

Marsh v. *Horne*, 5 B. & C. 322;
Harris v. *Packwood*, 3 Taunt. 264;
Caulderon v. *Atlas Steamship Company*, 170 U. S. A. Reports, 271.

The shipowner is entitled to the protection which the clause was intended to give him.

HORRIDGE, J.—This case raises a question of considerable importance, as to which I have formed a definite opinion, and it is not likely that I shall change my opinion if I were to reserve my judgment.

The case comes before me on an agreed statement of facts. The plaintiffs' claim is in respect of one package of merchandise shipped on board the steamship *Caldy* at New York for delivery to the consignees at Sydney. It was shipped under a bill of lading which contained a clause (clause 6) which is set out in par. 3 of the agreed statement of facts. The defendants rely on this clause as relieving them from liability. The defendants failed to deliver the package in question; and it is admitted that conditions laid down in the said clause were not complied with.

In the argument in answer it is said, in par. 2 of the statement of facts, that by clause 3 of the said bills of lading "the same are expressed to be subject to all the terms and exceptions of the Harter Act." In other words, the bill of lading incorporates the Harter Act. The effect of this is dealt with in the case of *Dobell* v. *Steamship Rossmore Company* (8 Asp. Mar. Law Cas. 33; 73 L. T. Rep. 74; (1895) 2 Q. B. Div. 412), where Lord Esher, M.R. says: "That document has brought in by reference the provisions of an American Act of Congress, and what we have to do is to construe the bill of lading, reading into it as if they were written into it the words of the Act of Congress. If this is done it will have this effect: that some provisions will appear twice over, because they have put words extremely like those of the Act into the bill of lading and then introduced the whole Act. That would, of course, do no harm, but it is clumsy to the last degree."

Therefore I have to take the bill of lading in this case, and I have to read into the contract

the Harter Act, and it becomes necessary for me to consider the provisions of that Act. Now, the clause applicable to this case is clause 1 of the Harter Act, which provides that it shall not be lawful for the manager, agent, or owner of any vessel transporting merchandise or property from any United States port to foreign ports to insert in any bill of lading any clause whereby he or they shall be relieved from liability for loss or non-delivery of any goods committed to their charge. Any and all words and clauses inserted shall be null and void and of no effect.

Clause 6 of the bill of lading, which is set out in par. 3 of the agreed statement of facts, expressly provides that the shipowner will not be accountable for "any of the articles enumerated in No. 4281 of the United States Revised Statutes, nor for goods of which the value is more than 5*l.* per cubic foot, nor for any one package which is of a value of more than 100*l.*, unless the value thereof shall have been stated in writing both on the broker's order, which must be obtained before shipment, and also on the shipping note presented on shipment and extra freight agreed upon and paid and the bills of lading signed with a declaration of the nature and value of the goods appearing thereon, nor for damage to other goods of a brittle or fragile nature, of any description from whatsoever cause arising." This clause covers the case of non-delivery. Therefore I must treat the bill of lading as providing that there shall be no such clause as that prohibited by clause 1 of the Harter Act, and, if there is such put in, it is to be null and void and of no effect. Therefore clause 6 of the bill of lading is null and void and of no effect.

Channell, J. in *McFadden* v. *Blue Star Line* (10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B., at p. 707) says that: "The effect of the incorporation of sect. 2, which provides that it shall not be lawful to insert a clause in a bill of lading whereby the obligation of the owner to exercise due diligence to make the vessel seaworthy shall be lessened, is as though the parties had said: 'If we have in the exception inadvertently inserted a clause cutting down the obligation of seaworthiness below the obligation to exercise care, that clause shall be null and void.'" To apply that to this case, it seems to me that, if in this bill of lading we have inserted anything which limits the obligation to deliver, that clause shall be null and void and of no effect. It was said that this clause only applies to negligent non-delivery. I do not think that is right. But if it did depend on negligence, there is the non-delivery of the goods, and their non-delivery is in no way explained. In the course of Mr. Dunlop's argument he referred to *Baxter's Leather Company* v. *Royal Mail Steam Packet Company* (11 Asp. Mar. Law Cas. 98; 99 L. T. Rep. 286; (1908) 1 K. B. 796). In that case Bigham, J. expressly deals with the question of non-delivery. He says: "Non-delivery raises a *primâ facie* presumption of negligence on the part of the shipowner, and therefore, in the absence of evidence to rebut that presumption, I must find as a fact that the loss of the plaintiffs' goods was due to the negligence of defendants." In this case the goods are shown to have been not delivered through negligence. The only other authorities to which I need refer are *Caulderon* v. *Atlas Steamship Company* (170 U. S. A. 271), the judgment of Matthew, J. in the case of *Morris and Morris* v. *Oceanic Steam Navigation Company Limited* (16 Times L. Rep. 533), and the unreported decision of Bailhache, J. in the case of *Tuck* v. *American Levant Line Limited*. The same principle applies to these cases and to the present case.

In my view, when you have once read the Harter Act into this bill of lading, the Harter Act provides that if the clause in the bill of lading with regard to the limitation of the shipowner's liability in case of non-delivery of goods intrusted to his charge, conflicts with clause 1 of the Harter Act, it is to be null and void and of no effect. In this case it does conflict. The only way to read the two clauses together is to give effect to the Harter Act and to say that it is null and void and of no effect.

For these reasons there must be judgment for the plaintiffs for the agreed value of the package —viz., 240*l.* 12*s.* 7*d.*, with costs.

Judgment for plaintiffs.

Solicitors: *Thain Davidson* and *Co.*; *Holman, Fenwick*, and *Willan*.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, May 3, 1917.

(Before Lord READING, C.J., BANKES and WARRINGTON, L.JJ.)

SMITH AND CO. *v.* THE KING. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriage of goods—Bill of lading—Exception of King's enemies — Deviation from voyage — Destruction by enemy vessel—Main object and intent of the contract—User of vessel for military purpose.

Under a bill of lading dated the 14th July 1915 at Melbourne, and signed by His Majesty the King under the style of the Commonwealth Government of Australia, certain goods were shipped on board a steamship bound from Australia for London via ports, subject to Government requirements, the ship having been requisitioned for the Government service. The bill of lading contained an exception that the Crown was not to be liable if the cargo was lost owing to the act of the King's enemies.

After having left Melbourne with troops, horses, and guns for the Australian Expeditionary Force which was then operating in the Gallipoli peninsula, and with other goods, including those above referred to, the steamship was used for about three months as a store or warehouse at Imbros and Mudros for supplies of meat required for the troops, the same being doled out to them as rations when needed.

When the ship was ultimately on her way from Mudros to London she was torpedoed by a German submarine in the Mediterranean and the whole of her remaining cargo perished.

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

A petition of right was accordingly presented by the owners of the goods in question claiming damages in respect of the loss of their goods.

Held, that the suppliants were entitled to recover damages, the bill of lading, having regard to the main object and intent of the contract, not giving the Government the right to detain the ship for use as a store or warehouse, a purpose foreign to her employment as a means for the carriage of goods; and that therefore the exception clause did not apply.

Glynn *v.* Margetson (7 *Asp. Mar. Law Cas.* 366; 69 *L. T. Rep.* 1; (1893) *A. C.* 351) *and* James Morrison and Co. Limited *v.* Shaw, Savill, and Albion Company Limited (13 *Asp. Mar. Law Cas.* 504; 115 *L. T. Rep.* 508; (1916) 2 *K. B.* 783) *considered and applied.*

Decision of Sankey, J. reversed.

APPEAL by the suppliants, Benjamin Smith and Co., from the decision of Sankey, J. on a petition of right which had been presented by them.

The facts of the case as found by Sankey, J. were fully stated in the written judgment of the learned judge, which was delivered by his Lordship on the 15th Jan. 1917, and were as follows:

The suppliants claimed to recover against the Crown the sum of 1628*l.* 11s. 7*d.* under a bill of lading dated Melbourne, the 14th July 1915, and signed by His Majesty under the style of the Commonwealth Government of Australia.

The bill of lading covered a shipment of fifty bales of sheepskins which were shipped on board the steamship *Marere*, bound for London *viâ* ports subject to Government requirements.

The *Marere* was torpedoed by a German submarine in the Mediterranean in Jan. 1916, and the whole of her cargo perished.

The bill of lading contained an exception that the Crown was not to be liable if the cargo was lost owing to the act of the King's enemies. But the suppliant's contention was that the Crown was not entitled to rely upon that excuse, because the vessel deviated from her voyage, and that in the result the exceptions did not apply.

What had to be ascertained, therefore, was whether there was such a deviation, and, if there was, whether such deviation was permissible under the terms of the bill of lading, because, if the vessel did deviate from her course without any right to do so, the exception clauses would not apply, and the suppliants would be entitled to judgment.

It appeared that early in 1915, by an Order in Council, the Crown requisitioned the refrigerated spaces in certain steamships trading between Australia and Europe and also certain vessels for the purpose of the transport of troops, and a document was published giving the summary of terms and conditions governing the letting and hiring of steamers for such transport purposes.

It was further determined to allow traders' goods to be shipped on such vessels when there was cargo space to spare. The goods in question in this action were so shipped on board the steamship *Marere* under the bill of lading above referred to, which contained the following clauses:

Shipped in good order and condition on board the steamship *Marere viâ* ports subject to Government requirements. . . . With liberty to proceed to and stay at any port or ports, place or places, in any order or rotation backwards and (or) forwards and notwithstanding that such ports or places are out or away from the customary or geographical route to the port of discharge hereinbefore mentioned for the purpose of receiving and (or) discharging goods, coals, supplies, or passengers or for any other purpose whatsoever, whether *ejusdem generis* or not, and to return once or oftener to any port or ports, place or places, without any liability whatsoever resting on the shipowners on the ground of deviation by reason of any route taken as above, and with liberty on the way to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies and to sail with or without pilots and to tow and assist vessels in all situations. . . . The insulated space on the ship having been taken by His Majesty's Government, the ship, in addition to any liberties expressed or implied in this bill of lading, shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, or otherwise howsoever given by His Majesty's Government or any department thereof or any person acting or purporting to act with the authority of His Majesty or of His Majesty's Government or of any department thereof, and anything done or not done by reason of any such orders or directions shall not be deemed a deviation; ship free to carry contraband war and like risks.

The following were the material clauses of the terms and conditions:—

3. In this connection owners should promptly notify the British Government War Risk Insurance Department in London as soon as the steamer is taken over by the Commonwealth Government.

5. If the steamer is not at present fitted for the purpose, the Commonwealth Government will carry out the provision and erection of such new fittings as may in the opinion of the Commonwealth Government be required for the safe carriage of troops and horses.

6. Victualling and canteen stores arrangements will be provided for by agreement. In calculating supplies of rations for troops the basis of sixty days' voyage is to be taken, with a reserve to meet contingencies of ten days' additional provisions in single-screw steamers, and seven days' in twin-screw steamers.

13. The Commonwealth Government proposes that if space is available cargo shall be carried, and desires that owner's agents will use their best endeavours to procure such cargo as may be necessary for stability purposes and the profitable utilisation of such space as may not be required to accommodate troops, horses, stores, fodder, reserve bunker coal, &c.

On the 20th Aug. the vessel sailed from Melbourne with troops, horses, and guns for the Australian contingent then engaged in the Gallipoli Expedition and with certain other goods, including those of the suppliants, for London. She landed the troops, horses, and guns in Egypt at the end of September, and was ordered by the authorities to Mudros, where she discharged certain mails and meat.

On the 6th Oct. she was ordered to Imbros and remained there till the 4th Dec., during which period under the directions of the authorities she discharged meat daily for the use of the troops.

Upon the 4th Dec. she was ordered back to Mudros and remained there discharging meat daily till the 16th Jan. During all this time the suppliants' goods had been on board, and upon the latter date the vessel left for London. While on her way between Mudros and Malta she was torpedoed, as before stated, with the result above indicated.

The loss of the vessel and her cargo was undoubtedly caused by the act of the King's enemies, but the suppliants alleged that the manner in which the vessel was used showed that the original voyage had been abandoned and the ship used as a store, and that when she started on the 16th Jan. it was upon a new voyage to London, and consequently the defendants were not entitled to rely upon the exceptions in the bill of lading. They further pointed to the fact that the vessel herself was changed from being a transport vessel, under which she was known as "A.21," to being a supply ship, under which she was known as "S.50."

With regard to the legal position, from the various cases which were cited during the argument Sankey, J. was of opinion that the law stood as follows, a statement which was approved by the learned judges of the Court of Appeal:

In deciding the question whether a vessel has so deviated from her voyage as to disentitle her from relying on the exceptions contained in the bill of lading, it is necessary to determine: (1) What is the main intent and object of the contract between the parties. (2) What is the usual course taken by a vessel of the character in question when proceeding upon the specified voyage from the port of loading to the port of discharge. If the vessel embarks upon an enterprise which is foreign to the main intent and object of the contract, or if she proceeds to a port outside the limit of the usual course on the specified voyage, she has committed a deviation which will prevent her relying on the exceptions.

The general printed words in the contract were to be construed and limited by reference to particular words inserted to define the specified voyage: (*Glynn* v. *Margetson*, 7 Asp. Mar. Law Cas. 367; 69 L. T. Rep. 1; (1893) A. C. 351, per Lord Herschell, at p. 355; *James Morrison and Co. Limited* v. *Shaw, Savill, and Albion Company Limited*, 13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 508; (1916) 2 K. B. 783, per Swinfen Eady, L.J., at p. 793).

It seemed to his Lordship, therefore, that the main intent and object of the contract was a military one—namely, the conveyance of troops, horses, and guns, the ship having to be at the disposal of the authorities after leaving Melbourne, although her ultimate destination was London; that the carriage of goods of private persons to London was subsidiary to and subservient upon such military purpose; that, this being the construction of the contract, the actual user of the vessel was foreign to that main intent and object; that under these circumstances there was no departure from the main intent and object of the contract; that the calling and staying at Mudros and Imbros was not a deviation from the specified voyage; and that the loss of the suppliants' goods was caused by the act of the King's enemies, and judgment must therefore be for the defendants.

From that decision the suppliants now appealed.

Roche, K.C. and *R. A. Wright* for the appellants.

Sir *F. E. Smith* (A.-G.) and *G. W. Ricketts* for the Crown.

No reply was called for.

The following authorities were referred to in the course of the arguments:

Glynn v. *Margetson*, 7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351;

James Morrison and Co. Limited v. *Shaw, Savill, and Albion Company Limited*, 13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 508; (1916) 2 K. B. 783;

Carriage of Goods Act 1904, s. 4.

Lord Reading, C.J.—The suppliants are the holders of a bill of lading for the carriage of fifty bales of sheepskin in the steamship *Marere*. The bill of lading is signed by the Commonwealth Government of Australia; and, consequently, the claim which is made by the suppliants takes the form of a petition of right to His Majesty the King. But the case must be decided as if it were a case between the bill of lading holders and the shipowner, who has granted the bill of lading. The incident that it is the King who is the respondent, against whom the petition of right is presented, has only this bearing upon the case: that it makes it necessary to consider various emergencies of a national character, in determining what is the true extent and purpose of this contract.

The claim arises out of the shipment of those fifty bales of shipskin in this steamship, which left Melbourne on the 20th Aug. 1915. She went, apparently, to Mudros on the 30th Sept. 1915, having meanwhile discharged stores which she was carrying, and it appears also troops, horses, and guns, part of the Australian Expeditionary Force, which was then operating in the Gallipoli Peninsula.

Having discharged those troops, horses, and guns, the vessel was ordered to Mudros; and she remained at Mudros till the 6th Oct., when she went to Imbros. She remained there till the 4th Dec. She was then ordered back to Mudros, where she remained till the 15th Jan., when she was ordered to sail for London; but she did not in fact set out on her voyage till the 16th, on account of the weather.

On the 18th Jan., when a little south of Malta, the vessel was attacked by a German submarine and she was sunk, with all her cargo, by gunfire from the submarine. Consequently the suppliants, the owners of the fifty bales of sheepskin, lost their cargo, and the petition is now to recover the value.

The answer made by the Government is that the cargo was destroyed by the King's enemies. Of that there is no doubt; and no question arises for decision in this case upon that. But the suppliants say that the vessel and cargo were destroyed by the King's enemies after the shipowners had deviated from the voyage which had been contracted to be made with them, the cargo owners; and that, consequently, the exception in the bill of lading concerning the King's enemies does not apply. There is no doubt about the law; and it does not require any further discussion, if the facts warrant that answer by the cargo owner.

Then the Government replies to that by asserting that this was not a deviation, because the Government had a right to order the vessel where they liked, and, apparently, to stay where the Government ordered her for whatever purpose, provided the Government really required it. The question for our consideration is whether in

those circumstances the suppliant has made out his case.

An important fact to bear in mind is that this vessel was fitted up with refrigerating plant and space. She carried 4000 tons of meat for London, and was a ship which was engaged in trading between the Commonwealth of Australia and the United Kingdom carrying cargo. The Government had requisitioned the vessel for Government service in Aug. 1914. After the 13th April 1915 the Government requisitioned her by virtue of the Order in Council of that date being a British steamship with insulated space in her, and usually engaged in trading between the Commonwealth of Australia and the United Kingdom for the carriage of refrigerating produce. Thereafter the bill of lading dated the 14th July was given, which had the insulated space clause stamped upon it.

The whole question in the case depends upon the true view to be taken of the contract between the parties. Before dealing with it I will state facts which to my mind are vital to the decision of this case. When at Mudros the vessel started, by order of the Government authorities, discharging the meat which had been intended for carriage to London. She proceeded to discharge it for some days; and then, when sent to Imbros, discharged meat again there for a number of days. At Imbros the rate of discharge was a little swifter than at Mudros, because, no doubt, there were more soldiers at Imbros, as appears from the evidence. In any event the rate of discharge was from fifty to ninety tons per day.

Eventually, when the ship was ordered back to Mudros, which was on the 4th Dec., she then had 150 tons left of the 4000 tons of meat which had been shipped from Melbourne for carriage to London. From another ship she received on board 150 tons or 200 tons of meat, which were kept on board the vessel in her insulated space. Later on again, by Government directions, she received 300 tons from a second vessel, which were in the same way put into the insulated space of this vessel and kept there and discharged, apparently, as and when it was required by the Government for the purpose of rationing the troops.

Therefore we have this important fact, that, over and above the 150 tons that she had left in her, she received from the two vessels 450 to 500 tons of meat which were never intended for carriage to London; which were received, apparently, according to the evidence, in the view I take of the fact, merely for the purpose of being kept there in the vessel as a convenient storehouse in her insulated space for the purpose of supplying the troops with meat which would be required as part of their rations at Mudros.

It is clear that she was consequently detained a longer period than would otherwise have been the case, because, in the way in which this vessel was being discharged for feeding the troops, it would obviously take her longer to discharge 650 tons than to discharge the 150 tons, which was all that was left of the original cargo.

The question, and to my mind the real question, that arises in this case is whether the Government, acting as the shipowner, was entitled to detain the ship and use her as a storehouse or warehouse for the keeping and preserving and issuing of supplies as required by the Government. In order to determine whether there was the power one must have regard to the language in the bill of lading, and, in my judgment, to no other document.

The language itself of the bill of lading, which I do not propose to read again, is wide enough, either in the deviation clause, which is clause 4, or in the stamped clause, which is the insulated space clause—or it might be in the red ink clause as to insurance, but certainly in the first—to cover any use which the Government might choose to make of this vessel at any place, if you give the ordinary meaning to the language used in this document.

But it is quite plain and well-settled law that that is not the way in which such a document must be construed. The decision of the House of Lords in *Glynn* v. *Margetson* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351) and in *James Morrison and Co. Limited* v. *Shaw, Savill, and Albion Company Limited* (13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 508; (1916) 2 K. B. 783), in the Court of Appeal, make this abundantly plain—indeed. so clear that if, in my judgment, there is no new principle of law involved in this case, there is what is often more difficult, the question as to the right application of existing principles.

In construing the document one must have regard to the main object and intent of the contract; and the general words used must be limited in their interpretation by a regard to the main object and intent of the contract. Sankey, J., in deciding the case, stated very clearly the principles applicable in a way which, in my judgment, is unexceptionable. I adopt his statement of the law as advanced by him in his judgment, and I do not think that I could better it. I should merely be repeating the principles of law enunciated by him.

I have come to the conclusion, however, that I must differ from him in the application of those principles of law. I need scarcely say that I do so very reluctantly, having regard to the learned judge's knowledge and experience of commercial matters of this nature. I take this view—or, at least, I am prepared to take it—for the purposes of the present case. The language of this contract, as interpreted by the light of the surrounding circumstances—that is to say, the war, the national emergencies, the requisitioning of ships, the presence of Australian troops in the Gallipoli Peninsula, the necessity of feeding those troops by means of sea transport, and the carriage of troops and stores in this ship under requisition by the Government—all points, in my judgment, to the reasonableness of the view that the Government had the right to direct the ship to proceed to Mudros and Imbros, notwithstanding that, in the strictest sense of the word and I think under ordinary circumstances, that would be held to be a deviation.

For the purposes of this case, however, I assume that that was not a deviation, and that under the contract by which these goods were shipped in a vessel bound for London *viâ* ports subject to Government requirements, with the two clauses in the bill of lading to which I have already adverted, I should conclude that the main object and intent of the contract was to serve a military purpose. The learned judge has come to that conclusion, and I agree with him.

But it is in assuming that, because he has decided it, the Government has the right to use the vessel as a store or warehouse that I am bound to differ from him. I think the Government could use this vessel for any military purpose, provided always that it was consistent with the main object and intent of the contract, which is to carry the goods from the Commonwealth of Australia to London or a port in the United Kingdom.

I should be prepared also to go very far in these times, and, bearing in mind the considerations which must affect the views of all who contract at the present day with the Government, in giving the widest possible latitude to the Government as to the ports at which they may call, or the rights which they might exercise in the carriage of the goods. But when the Government does an act which, in my judgment, is not consistent with the main object and intent of the contract—that is to say, the carriage of the goods to London—by keeping the ship at Mudros as a convenient depot from which meat may be served to the troops out there and not carried to London, the Government cannot justify that action by a reference to the terms of the contract.

The only question with which we are concerned here is as to the effect of the contract. That the Government may be entitled to use the ship as it pleases, no one will dispute: We are only dealing here with what the contractual rights are. I base my judgment upon the wording of the contract itself, which nowhere, by any extended meaning which may be given to it, gives the right to use the ship as a store or warehouse. I think all the language of the contract must be read subject to the main object and intent of the contract, which is to carry the goods from Australia to the United Kingdom. And the only words to which reference has been made which are said to give the Government this wide power, as I have followed the argument both of the Attorney-General and of Mr. Ricketts, are to be found in the insulated space clause.

For that reason I will just say one word about that clause. Reliance is placed, or seems to be placed, upon the right of the Government to give any orders or directions as to the departure, arrival, ports of call, stoppages, or otherwise howsoever. Those may be given by His Majesty's Government. All those words must be read subject to the main purpose of the contract. I see no difficulty in giving full effect to them in that way. I see the greatest difficulty in extending them to mean that the Government can keep the ship where they like, or as long as they like, without regard to the voyage which she had undertaken to perform.

It has been said many times in this class of cases that in order to justify such a deviation there must be found language which clearly and unequivocally states the right to deviate in the contract. No such language is to be found in the present case. Neither can I, by any reasonable interpretation of this mercantile document, construe it, or any part of it, as giving the right to use the ship as a warehouse.

For these reasons I have come to the conclusion that the learned judge's judgment is wrong. I only desire to add that, having studied the judgment of Sankey, J. with care, I am impressed with this view, that in the court below the argument seems to have centred round the question whether or not the Government could give directions to use the vessel for a military purpose without regard to the further difficulty which arose—assuming that to be decided in the Government's favour—whether that military purpose must always be read subject to the main object and intent of the contract—that is, the voyage. It is only with regard to the latter that I am differing from Sankey, J.

In my view this appeal must be allowed. The damages are agreed, I understand, and judgment will therefore be entered for the suppliants for the agreed amount—namely, 1543*l.* 14*s.* 10*d.*—and they will have the costs here and below.

BANKES, L.J.—I agree.

The question for our decision is as to the construction of a bill of lading. In order to decide that question there are certain rules of construction which we must follow, and which I think have been well established. I think that the rules of construction may be stated thus. In order to ascertain what the contract between the parties was, full effect must be given to any conditions which were specially inserted in the document for the particular occasion; but general conditions, whether in print or otherwise, must be read with such necessary qualifications as will prevent them from defeating the object and intention of the parties as made manifest by the document when considered as a whole. I think that that is the effect of the decisions, two of which have been referred to.

It seems to me, as I indicated during the argument, that the respective constructions which are put forward here, or must be put forward here, may be shortly stated thus: On the one hand, there is the construction the effect of which would be that the parties agree that the suppliants' goods should be shipped on board a steamship which was to proceed on a voyage from Australia to London, but which voyage was to be subject to certain defined, and, it may be, very important, interruptions at the instance of the Government. That is one construction. The other construction must be that the parties agreed that the goods should be shipped on board a steamship which was not bound on a voyage to London in any ordinary sense of the term, using that word in a mercantile sense, but on a steamship whose ultimate destination was London, but which, on her way there, was to be at the absolute disposal of the Government, and liable to be used for any purpose they thought proper.

Reading the document as a whole, and giving full effect to the exception, I come to the conclusion that the first of those two constructions is the one that ought to be adopted. We are dealing with a document which states that the goods are shipped on a steamship bound for London. We are dealing with a document which purports to be a contract in reference to "Steam between Australia and Europe"; and we are dealing with a document which refers in terms, in the exceptions which are relied on, to deviation, which seems to me to be deviation from a voyage in the ordinary commercial sense, and something quite different from the entire abandonment of that particular voyage, and the commencement at some future time of a new voyage.

Therefore I come to the conclusion that, speaking broadly, this is a contract which has reference to a voyage, using that word in the ordinary mercantile sense, from Australia to London by steamer; but a voyage, nevertheless, which is liable to very serious and grave interruptions, it may be, at the instance of the Government, which are forced upon them by the necessities of the time.

That being so, the only remaining question is to consider whether what happened to this particular vessel came within one of the interruptions to the voyage which was sanctioned by the language used in the bill of lading, and to be construed by reference to that document as a whole, and interpreting it as I interpret it. The vessel proceeded on her voyage, and she landed her warlike stores and troops, I think, at Suez, and she was then ordered to these two ports which have been mentioned.

I do not think that it is necessary to decide either one way or the other whether ordering her in that way to those ports was within or without the exception. But if it is material, I myself should say that certainly ordering her to those particular places was within the exception of the bill of lading. She was kept at those two ports for a considerable time, and she was kept there while her meat cargo was, I may call it, being doled out. That is to say, the meat was not delivered in the ordinary sense of delivery of a cargo alongside, but was doled out to the troops as required.

It is not necessary to decide whether that is or was permissible within the meaning of the bill of lading. Speaking for myself, I am inclined to think that it was. But there came a time when an entirely different operation took place, and that was transferring from other meat-carrying ships on to this ship a quantity of meat not for the purpose of its being carried on by this ship to the ultimate destination, or to some further port, but placed there for the mere purpose of being stored, and doled out when needed from time to time came as rations for the troops.

I quite agree that the quantity of meat so doled out was not large as compared with the entire cargo. It may be said that it was very small. It amounted to something between 300 and 400 tons. We are not dealing here with quantity. Nor are we dealing with the time occupied in taking the meat on board or doling it out. We are dealing here with a question of principle and a question of construction, because if the Government were entitled to do this particular act at all they would be entitled to do it to any extent. And it seems to me you cannot find any principle upon which you can limit the extent to which they could make use of the vessel, if it is permissible to make use of it in this way at all.

In my opinion it was not permissible to use the vessel for that purpose. In order to ascertain whether that is so or not, of course it is necessary to look closely at the terms of the bill of lading. There are only two clauses in the bill of lading in which you can find any language that touches this particular question at all. One is clause 4 in the print, and the other is the stamped clause, with reference to the insulated space.

Clause 4 in the print has been referred to. It is in the widest possible terms, and it includes authority to proceed and stay at any port, "notwithstanding that such ports or places are out of or away from the customary or geographical route to the port of discharge hereinbefore mentioned, for the purpose of receiving and (or) discharging goods, coals, supplies, or passengers, or for any other purpose whatsoever."

Taking those general words literally, the vessel was, of course, merely receiving goods when the meat was being put on board. But in my opinion those general words must receive the limitation, and the necessary limitation, which will prevent them from defeating the object and intention of the parties as indicated by the document as a whole. It is impossible to read those words as an authority except to take goods on board in the course of the voyage—it may be at some port *en route*, or within the limits of deviation—and taking goods on board there for the purpose of conveying them to some further destination. In my opinion the words of clause do not assist the Crown at all.

Then we come to the words in the insulated space clause, and those are words which it is not quite so easy to deal with, it seems to me. They shall have the liberty—that is, the ship shall have the liberty—"to comply with any orders or directions as to departure"—that does not apply; "arrival"—that does not apply; "routes"—that does not apply; "ports of call"—that does not apply; "stoppages"—that does not apply. But then we come to the words "or otherwise howsoever given by His Majesty's Government," and so on.

Here, again, you may say that the order to take the meat on board, and to keep it until required as rations, and then to dole it out to the troops, was an order which came within this extremely wide language "or otherwise howsoever." It is necessary to consider whether, in the stamped clause, even treating it as equivalent to writing, this comes within the principle of being a general condition which must receive some qualification in order to carry out the object and intent of the parties.

For two reasons I say it does. First, because I have come to the conclusion that this is a voyage contract, using that expression "voyage" in the ordinary sense; and, secondly, because I find in the clause itself indications that the language cannot be employed in the way contended for by the Crown. That is so because that those orders if complied with shall not be deemed a deviation the clause says, and I think those words are used in the proper sense as a deviation from the contemplated voyage, and cannot be read as authorising a complete abandonment of the voyage, and, which is really what is contended for, a right to commence a fresh one.

In my opinion, therefore, the judgment of the learned judge in the court below was wrong. I think that, in giving effect to the view that he entertained, he did not attach sufficient importance to this particular point—which to my mind is the one and only point upon which the suppliants are entitled to succeed—namely, the point that has reference to the placing of the cargo of those other ships upon this vessel for the particular purpose for which they were placed there.

WARRINGTON, L.J.—I am of the same opinion. The particular contract which we have to

construe is a mercantile document, being a contract of affreightments for the carriage of certain goods by ship from Melbourne to London. The only question that it is necessary to determine is whether, according to the construction of this particular contract, the shipowners—in the present case the Government—were at liberty to use the ship for a purpose foreign to her employment as a means for the carriage of goods.

It is quite unnecessary for me to read again the bill of lading, or to repeat the facts in detail. I should be prepared to hold, and I will assume for the purposes of this judgment, that, under the very wide terms of this particular contract, the direction of the ship to Mudros and Imbros—although those places are far away from any ordinary geographical route from Melbourne to London—was not a deviation such as to amount to a breach of the contract on the part of the shipowner. And, so far as I am personally concerned, I am prepared to hold, and I will assume, that the mode in which the cargo of meat was discharged—that is to say, by doling it out as required by the troops at those two places—was also within the terms of the contract.

But then the Government, who were the owners of the ship for the time being, did this further: They used the ship at Mudros for the purpose of placing upon her a quantity of meat taken from other meat-carrying ships; and they did so not for the purpose of conveying that meat by sea from one place to another, but for the purpose of supplying the troops at Mudros. In other words, they used her not as a carrying ship, but as a store ship or warehouse. That is a purpose which I have described above as being foreign to her employment for the purpose of the carriage of goods.

Is her use for that purpose within this particular contract? I need not read the words again. There are only two clauses which are relied upon as having that effect. The first is the fourth clause, which in general terms gives liberty to proceed and stay at ports in any order and rotation, and so forth, "for the purposes of receiving and (or) discharging goods," "or for any other purpose whatsoever."

In my judgment that is entirely consistent with the idea that the purpose for which the ship is to stay at a port or place shall be connected with the voyage; not for some other purpose outside the voyage altogether. So also with regard to the insulated space clause, which is also in general terms, conferring upon the ship liberty to comply with any orders as to, amongst other things, stoppages, "or otherwise howsoever," given by one of His Majesty's officers.

That, again, is in general terms; and I think that both these clauses have to be considered with such limitations as are necessary in order not to render them inconsistent with the main object of the contract which has to be construed. In my opinion, if we were to give those clauses the effect which the Crown asks us to give them, we should be giving them an effect which would be inconsistent with what seems to me to be the main object of this adventure, namely, a voyage subject, no doubt, in this particular case, to very special powers of deviation, and even to interruption, but still a voyage from one port to another.

For these reasons, I think that the judgment of the learned judge in the court below was wrong, and ought to be reversed.

Appeal allowed.

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

Solicitor for the Crown, *Solicitor to the Treasury.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Feb. 28, 1917.

(Before BAILHACHE, J.)

THOMAS SMAILES AND SON *v.* EVANS AND REID LIMITED. (*a*)

Shipping — Charter-party — Hire — Cessation of hire while vessel damaged—Payment of hire to be resumed when vessel in "an efficient state to resume her service."

A charter-party provided that "In the event of loss of time from . . . damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

The chartered vessel, having loaded some of her cargo, was proceeding to another loading place, when she went aground. She discharged part of the cargo on board and was got off seriously damaged. After discharging more of her cargo at another place, she proceeded to a port of refuge, where the necessary repairs were effected. She left dock on the 18th Oct., and proceeded to reload the cargo at the places where it had been discharged, and completed the reloading on the 30th Oct.

Held, that the vessel was "in an efficient state to resume her service" when the repairs were completed, and that the hire became payable again from the time when the repairs were completed, and not from the time when the discharged cargo was reloaded.

AWARD stated by arbitrators in the form of a special case.

By a charter-party dated the 30th July 1915 made between Thomas Smailes and Son, Whitby (hereinafter called "the owners"), and Evans and Reid Limited, Cardiff (hereinafter called "the charterers"), the owners chartered the steamship *Carisbrook* to the charterers on time charter for two round voyages from the United Kingdom to Newfoundland, Northern States of America or Gulf of Mexico, and back to the United Kingdom. The charter-party contained (*inter alia*) the following clauses: "That the charterers shall provide and pay for all the coals, fuel, port charges . . ."; "that the charterers shall pay for the use and hire of the said vessel at the rate of 4000*l.* per calendar month, commencing on and from the time of her delivery in the Mersey, and at and after the same rate for any part of a month, hire to continue from the time specified for commencing the charter until her redelivery to owners . . . at a coal port on the west

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

coast of United Kingdom"; "that 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, the payment of hire shall cease until she be again in an efficient state to resume her service; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense." The charter-party also contained an arbitration clause.

The *Carisbrook* was duly delivered to the charterers and proceeded on her first voyage to load a cargo of timber at ports in Newfoundland. After she had loaded a considerable portion of her cargo, and while proceeding from one loading place to another, she went aground in Little Bay at 3.55 p.m. on the 13th Sept. 1915, and although, after discharge of a portion of the cargo, she was eventually got off, it was found that she was seriously damaged in the bottom, and the master therefore decided to discharge a further portion of the cargo so as to bring the vessel on an even keel in order that he might proceed to St. John's, Newfoundland, which was the nearest port of refuge where the necessary repairs could be effected. The steamship accordingly proceeded to North West Arm, about twenty miles distant, where a further portion of the cargo was discharged, and she then proceeded to St. John's, where she was dry docked and the necessary temporary repairs effected. Those repairs were completed at 11 a.m. on the 18th Oct., and she then proceeded from the dry dock to a coaling berth to take in bunker coal. She finished taking in bunker coals at 10.30 p.m. on the 19th Oct., and on the 20th Oct., at 6.30 a.m., she left St. John's and proceeded back to North West Arm, where she arrived at 9.45 p.m. on the 20th Oct. The reloading of the cargo which had been discharged there was commenced at 7 a.m. on the 23rd Oct. and completed at 4.45 p.m. on the 26th Oct. At 6.45 a.m. on the 27th Oct. she proceeded to Little Bay to load the other portion of the discharged cargo. She arrived there and commenced to reload that cargo at 11.15 a.m. on the same day. The reloading of the whole of the discharged cargo was completed at 8.30 a.m. on the 30th Oct.

Disputes having arisen between the parties as to the time during which the vessel was off hire, the matter was referred to arbitration.

The owners contended that the vessel was efficient for all purposes at 11 a.m. on the 18th Oct., when the temporary repairs were finished and the vessel came out of dry dock; that the reloading of the cargo was not part of the work of making the ship efficient, and that therefore the hire was payable during the time the reloading was taking place; and that the payment of hire only ceased from 3.55 p.m. on the 13th Sept. (when the vessel went aground) until 11 a.m. on the 18th Oct.

The charterers contended that after the stranding hire ceased to be payable until the discharged cargo was reloaded, as upon the true construction of the charter-party the vessel was not in an efficient state to resume her service until the discharged cargo had been so loaded.

The arbitrators held and decided (subject to the opinion of the court) that hire ceased to be payable respectively from 3.55 p.m. on the 13th Sept. 1915, when the accident took place, until 11 a.m. on the 18th Oct., when the temporary repairs were completed, from 9·45 p.m. on the 21st Oct., when the vessel arrived at North West Arm, until 4.45 p.m. on the 26th Oct., when the cargo discharged there had been re-loaded, and from 11.15 a.m. on the 27th Oct., when she arrived at Little Bay, where the other portion of the cargo had been discharged, until 8.30 a.m. on the 30th Oct., when the reloading of that cargo was completed, and they awarded accordingly.

The question for the opinion of the Court was whether the arbitrators' decision was correct.

T. W. H. Inskip, K.C. and *W. N. Raeburn* for the shipowners.

D. C. Leck, K.C. and *R. A. Wright* for the charterers.

Reference was made to

Hogarth v. *Miller*, 7 Asp. Mar. Law. Cas. 1; 64 L. T. Rep. 205; (1891) A. C. 48;
Vogemann v. *Zanzibar Steamship Company*, 7 Com. Cas. 254.

BAILHACHE, J. [after stating the facts, continued:]—I have been referred to two authorities as assisting me somewhat in the construction of this clause of the charter-party — *Hogarth* v. *Miller* (7 Asp. Mar. Law Cas. 1; 64 L. T. Rep. 205; (1891) A. C. 48) and *Vogemann* v. *Zanzibar Steamship Company* (7 Com. Cas. 254). In *Hogarth* v. *Miller*, where the clause in the charter-party was practically identical with this clause, the facts were that during the vessel's voyage her high-pressure engine broke down, and she had to be towed, although she assisted the towage to some extent by means of her low-pressure engine. On arrival at the port of discharge her cargo was discharged, the vessel's steam winches and machinery being efficient for that purpose. The question was whether she was on hire during these periods. The House of Lords held that she was not in an efficient state to resume her service while it was necessary for her to go from one place to another and she was unable to do so by her own unaided power; but they also held that when she reached port where all that had to be done was to discharge her cargo hire again became payable as the discharge could be effected as efficiently from her as from the most seaworthy vessel. It is clear from that decision that in deciding whether a ship is "efficient" within the meaning of a clause one has to consider the particular service like the one in this charter-party which she has to render at the given time. If she is capable of rendering the service which she is required to render then and there, she is "efficient" for that purpose. *Hogarth* v. *Miller* (*sup.*), however, has no particular bearing upon the point which I have to decide.

Vogemann v. *Zanzibar Steamship Company* (*sup.*) has a much closer bearing upon it. There the question, as stated by Collins, M.R, was "whether the charterer is relieved from paying for the hire of the ship during the time which elapsed between her sailing from Queenstown after repairing and her arrival at the place where the accident, which necessitated the repairs, took place." The vessel had met with an accident and was compelled to put back for repairs which took some time to effect. During that period she was off hire. After the repairs were

completed it took the vessel some time to get back to the place where the accident had happened, and the question was whether she was off hire till she reached that place. The Court of Appeal held that she was not off hire. The words of the clause were not quite the same as those I have now to construe; they were as follows: "That in the event of loss of time from deficiency of men or stores, breakdown, or damage of machinery or damage to rudder or propeller, grounding, but not in river, detention by average accidents to ship or cargo, or by other cause preventing full working of the vessel (loading and (or) discharging cargo), the payment of hire shall cease for the time exceeding twenty-four hours thereby lost." In this case the clause does not excuse the payment of hire during time lost by damage "preventing the full working of the vessel"; it says that hire is not payable "until she be again in an efficient state to resume her service." *Vogemann* v. *Zanzibar Steamship Company* (*sup.*) is not so strong against the contention of the present charterers as at first I thought it to be, for, as Mr. Leck has pointed out. it is one thing to say that a vessel is "in full working order" and another thing to say that she is "in an efficient state to resume her service." In this case the vessel was, as a vessel, undoubtedly in an efficient state at 11 a.m. on the 18th Oct., that is to say, she had had her temporary repairs completed, and was ready to sail the seas as a seaworthy ship. But was she in an efficient state "to resume her service"? Mr. Leck contended that until the cargo was reloaded she was not. I do not agree. I think she resumed her service from the moment she was in an efficient state so to do. It is quite true that there was time lost by the accident until 8.30 a.m. on the 30th Oct., and if the clause had said that hire should not be payable during "all time lost in consequence of an accident" Mr. Leck's contention would, I think, have been correct. But that is not the language employed. The clause which I am construing does not give the charterers a complete indemnity in respect of time lost under circumstances that occurred in this case. The contention of the owners is, in my opinion, right, and the award must be varied in accordance with the view I have expressed.

Award varied.

Solicitors for the owners, *Botterell* and *Roche*.

Solicitors for the charterers, *Winn-Jones* and Co., for *F. Vaughan*, Cardiff.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Jan. 29 *and Feb.* 21, 1917.

(Before Sir S. T. EVANS, President.)

THE E14. (a)

Prize Court—Prize bounty—"Armed ship"—Troopship—Calculation of bounty—Principles to be applied—Naval Prize Act 1864 (27 *&* 28 *Vict. c.* 15), *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 "armed ship" 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.*

A submarine belonging to the British navy sank (inter alia) *an enemy troopship which carried troops, field guns for use after the landing of the troops, a few light guns, and a quantity of rifles, and a claim was made on behalf of the officers and crew of the submarine that they were entitled to an award of a prize bounty calculated at the rate of* 5*l. per head according to the number of the troops on board and the number of the crew of the troopship, on the ground that the troopship was an "armed ship" within the meaning of sect.* 42 *of the Naval Prize Act* 1864.

Held, that the expression "armed ship" meant a fighting unit of the fleet of the enemy—that is, a ship commissioned and armed for offensive action in a naval engagement—and that the fact that a troopship carried a few light guns and field guns in addition to troops armed with rifles did not make her an "armed ship" within the meaning of the section so as to entitle the officers and crew to the benefit of prize bounty under the Act of 1864.

THIS was a motion on behalf of Commander Edward Courtney Boyle, V.C., and the officers and ship's company of His Majesty's submarine *E*14, for a declaration that they were entitled to prize bounty in respect of the destruction of two Turkish vessels, a gunboat and a transport, in the Sea of Marmora in May 1915.

According to the official report, dated the 23rd May 1915, if appeared that the *E*14, amongst other exploits, sank a Turkish gunboat—name unknown—the complement of which was believed to be not fewer than seventy-five persons, and a large Turkish transport, the *Gul Djemal*, which carried a large number of troops. In addition to the troops there were six field guns on board and several thousand rifles. It was also stated that the Turkish troopships were usually armed with a certain number of light six-pounder guns. Whilst there was no dispute as to the prize bounty in respect of the gunboat, it was contended on behalf of the Crown, against the contention of Commander Boyle, V.C., that the Turkish troopship was not an "armed ship" within the meaning of sect. 42 of the Naval Prize Act 1864 and the Order in Council made thereunder.

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 action.

An Order in Council was made under the above section dated the 2nd March 1915.

Roche, K.C. and Commander *Maxwell Anderson*, R.N., in support of the motion.

J. G. Pease for the Procurator-General.

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

The following cases were cited in the course of the argument :

Several Dutch Schuyts, 6 Ch. Rob. 48 ;
The San Joseph, 6 Ch. Rob. 331 ;
La Lune, 1 Hagg. Adm. 210.

Cur. adv. vult.

Feb. 21.—The PRESIDENT.—This motion for prize bounty is made on behalf of Commander Edward Courtney Boyle, V.C., and the officers and ship's company of His Majesty's submarine *E*14. It concerns two enemy vessels sunk by the submarine in the Sea of Marmora, in May 1915. One was a Turkish gunboat and the other a large Turkish transport vessel. As to the former, I find that she had seventy-five men on board at the time of her destruction, and that the submarine was the only vessel present at the destruction. I therefore declare that the sum of 375*l.* is payable as prize bounty to the commander, officers, and crew of the submarine *E*14.

As to the other vessel, different and important questions arise. The first is whether she was an enemy armed ship in respect of which any prize bounty at all is payable. The other is whether, if bounty is payable, it is to be calculated according to the number of the crew of the ship or according to the total number of persons on board. The crew consisted of 200. If that were the determining factor, the prize bounty would be 1000*l.* In addition to the crew the transport carried 6000 Turkish troops. If the total number of persons on board were the determining factor, the prize bounty would amount to 31,000*l.*

But the first question to consider is the character of the destroyed ship, and whether it answers the description of "an armed ship" of the enemy within the meaning of sect. 42 of the Naval Prize Act of 1864, which is the enactment now governing the grant of prize money. Counsel for the Crown contended that she was not.

It is interesting and not uninstructive to trace shortly the history and the development of the granting of prize bounty, or "head money" as it was called in olden times. By two ordinances in the time of the Commonwealth (the 22nd Feb. and the 17th April 1649) it was ordained that a bounty should be given for sinking, firing, or destroying any of the revolted ships or of any other fleet that should fight against the Commonwealth. If the ship destroyed was an admiral's ship, the bounty was to be 20*l.* for each piece of ordnance on the ship ; if a vice-admiral's 16*l.* ; if a rear-admiral's 12*l.* ; and if it was any other ship of war 10*l.* was to be allowed for each gun on the ship.

By an Act passed in the fourth year of William and Mary a bounty of 10*l.* for every piece of ordnance upon a taken, sunken, fired, or destroyed ship of war was given.

By sect. 8 of the statute 6 Anne, c. 13, which dealt with prize, it was enacted that where a ship of war or a privateer of the enemy was taken in action by any of Her Majesty's ships of war a sum should be paid to the officers and men who should have been actually on board the ship taking the enemy ship of 5*l.* for every man living on board the enemy ship so taken at the beginning of the engagement. There followed two Acts of the reign of George III. (43 Geo. 3, c. 165, and 45 Geo. 3, c. 72) by which it was enacted that a bounty of 5*l.* for every man who was living on board should be paid for the taking, sinking, burning, or otherwise destroying an armed ship of the enemy.

In the time of the Crimean War, by the statute 17 & 18 Vict. c. 18, it was provided that a bounty of 5*l.* should be given for every person who was living on board any enemy ship of war at the beginning of the engagement.

Then came the provisions in sect. 42 of the Naval Prize Act 1864, already referred to, which is the Act now in force dealing with the matter, which gives bounty for the destruction of armed ships of the enemy.

It will be observed that in former times the amount of prize bounty or head money was calculated on the basis of the number of guns the enemy vessel carried, and, later, on the basis of the number of men on board. In olden days, of course, the number of guns carried was large in proportion to the number of men. In modern times the number of guns is very small in comparison with and in proportion to the men required for the equipment of the fighting vessels.

The character and the description of the *Gul Djemal*, the destroyed vessel in the present case, were given in an affidavit of Commander Boyle, exhibiting a report of Lieutenant Slade, and by Lieutenant-Commander Bagot of the Intelligence Division of the Admiralty War Staff, who was called as a witness. It was afterwards supplemented by an affidavit of Vice-Admiral Sir Arthur Limpus. She appears to have been a fleet-auxiliary, designated as a troop transport, manned by naval ratings, and commanded by officers of the Turkish Navy. There was no evidence of whether or how she was armed. But it was said that such auxiliaries were usually armed with about four light six-pounder guns. Reliance was also placed on the fact that when the vessel was destroyed she carried 6000 enemy troops with rifles and six field guns (75 m.m. Krupps). No evidence was given as to whether these were placed in the holds or on deck.

Now, was she an armed ship within the meaning of the enactment referred to? That she was a fleet-auxiliary does not constitute her an armed ship. Besides troopships, there are other such auxiliaries, *e.g.*, colliers or oil ships and hospital ships, which clearly do not answer that description. In my opinion, if it were proved that she carried a few light guns that would not constitute her an armed ship, any more than a merchant vessel armed for self-defence; nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops.

Sect. 42 of the Prize Act refers to the number of men on board the enemy ship "at the beginning of the engagement." So, indeed, did sect. 8 of the Act of Queen Anne. This does not mean that there must be an actual fight, for the enemy ship may be made to surrender by the presence of a superior force. But the words throw some light on the meaning which ought to be given to the expression "armed ship." It was decided in the *Several Dutch Schuyts* (*ubi sup.*) that the enemy vessel must be armed and commissioned to act offensively.

In my view, an "armed ship" within the meaning of the section to be construed is a fighting unit of the fleet, a ship commissioned and armed

for the purpose of offensive action in a naval engagement. It has not been shown that the transport in question was such a ship.

The dazzling, daring, and intrepid courage of Commander Boyle and his comrades in their entrance and operations in the Sea of Marmora excited general wonder and admiration, and were recognised by His Majesty the King and by the heads of other allied States. But in dealing with the application for prize money, I must proceed in accordance with what I conceive to be the law which has to be administered; and for the reasons stated my decision is that this application for prize bounty fails, and must be disallowed. It is just possible, however, that at some future time further evidence may be procured as to the alleged armament of the vessel. I do not anticipate that it will. But in order to safeguard any possible rights of these brave officers and sailors in disallowing the present application, I do so without prejudice to any further application they may be advised to make upon any further evidence that may be forthcoming.

Solicitors for the applicants, *Botterell* and *Roche*, for *Holt* and *Co.*, Navy Agents.

Solicitor for the Crown, *Treasury Solicitor.*

April 23 *and* 30, 1917.

(Before Sir S. T. EVANS, President.)

Re THE SURRENDER OF TSINGTAU—CLAIMS OF H.M.S. TRIUMPH AND H.M.S. USK. (*a*)

Prize Court — Prize bounty — Operations against enemy fort — Joint operations — Land and sea forces—Destruction of enemy ships—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 of 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 armed ship 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.*

During the months of September, October, and November 1914 *the German fort of Tsingtau was besieged by the British and the Japanese, and in the operations the land forces as well as the sea forces of the Allies took part. In the harbour of Tsingtau there were several German men-of-war and one Austrian cruiser. The whole of these were destroyed by the Allies during the siege or by their own crews prior to the surrender of the fortress on the 7th of Nov.* 1914. *It was computed that there were* 1200 *persons on board the enemy vessels, and a claim was made by the officers and crew of the two British men-of-war which took part in the siege for a sum of* 6000*l. as prize bounty under the terms of the Naval Prize Act* 1864 *and the Order in Council of* 1915.

Held, that as the destruction of the enemy vessels was not brought about by naval action alone, but was the result of the joint operations of land and sea forces, no prize bounty was payable.

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

THIS was a motion on behalf of the commanders, officers, and ships' companies of H.M.S. *Triumph* and H.M.S. *Usk* for a declaration that they were entitled to a prize bounty amounting to 6000*l.* for having been present at the destruction of the Austrian cruiser *Kaiserin Elizabeth*, and the German gunboats *Iltis*, *Jaguar*, *Tiger*, *Luchs*, and *Cormoran*, and the German torpedo-boat destroyer *Taku*, during the siege of and the surrender of the German fortress of Tsingtau.

From the affidavit of Commodore Maurice Swynfen Fitzmaurice, C.M.G., it appeared that on the 14th Sept. 1914 the *Triumph*, which was then under his command and stationed at Wei-hai-wei, received instructions to join the Japanese Navy forthwith, and the *Triumph* and the *Usk* (Commander W. G. Maxwell), which was also at Wei-hai-wei, at once proceeded to Tsingtau and joined the Japanese naval forces there, which were under the command of Vice-Admiral Kato. The *Triumph* and the *Usk* were the only British warships operating before Tsingtau, and throughout the operations which culminated in the fall of that fortress these warships conformed to the movements of the Japanese fleet and took part in all the naval services. The operations were carried out by the naval and military forces of Great Britain and Japan during the months of September, October, and November 1914, until the fortress surrendered on the 7th Nov. 1914.

The naval operations consisted in the enforcement of a rigorous blockade and in the bombardment of the forts and the naval forces of the enemy. Upon several occasions the enemy ships were directing an enfilading fire on the land forces, and in consequence various attempts were made to destroy these vessels, which, if not then destroyed, were hit. The enemy ships which were lying in the harbour at Tsingtau, and which are enumerated above, were not visible from seaward, and consequently it was not possible to observe the fall of the shells from the bombarding vessels; but upon several occasions during the course of the operations the allied shore observation station reported that a ship in the harbour had been blown up and sunk. On the 3rd Nov. 1914, the *Kaiserin Elizabeth* was blown up and sunk off Chi Po San, and on the 7th Nov. 1914, the day upon which the fortress surrendered, it was ascertained that the remaining six enemy ships had also been sunk.

There was no definite information as to whether the enemy ships were sunk by the gunfire of the attacking naval forces, but it was assumed that if the ships were not so sunk they were destroyed by their own crews when it was realised that they had no longer any chance of escape. All the papers and notes concerning the operations at Tsingtau were lost when the *Triumph* foundered in the Dardanelles on the 25th May 1915.

From the German official casualty list it appeared that the crews of the five gunboats consisted of 140 men each—that is, 700 in all. The crew of the *Taku* was estimated at sixty persons, whilst that of the Austrian cruiser was 440. This made a total of 1200 persons for the purpose of calculation of the prize bounty at the rate of 5*l.* per head.

It was agreed that the grant of prize bounty was peculiar to this country, and that therefore the co-operation of the Japanese forces at Tsingtau did not in any way affect the question at issue—

namely, whether the officers and crews of the *Triumph* and the *Usk* were entitled to prize bounty under the special circumstances of the case, the operations against Tsingtau not having been exclusively of a naval character.

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 action.

An Order in Council was made under the above section dated the 2nd March 1915.

Commander *Maxwell Anderson*, R.N., in support of the motion.—There were two points raised in the present case. The first was what constituted conjoint operations, and the second was whether the joint operation of military and naval forces destroyed the claim to prize bounty, as it was admitted that prize bounty was a purely naval award. This matter had been discussed in 1818 in the case of *La Bellone* (Roscoe's English Prize Cases, vol. 2, 227; 2 Dods. 343). That case was decided under a section of the statute then in force as to prize bounty or "head money"—namely, 45 Geo. 3, c. 72, sect. 5. Then Sir William Scott held that prize bounty was not distributable to officers and crews of His Majesty's navy after conjoint naval and military operations. But, however correct such a conclusion might be under the circumstances prevailing a century ago, different considerations obtained at the present time. *La Bellone* was one of several ships captured at the taking of the island of Mauritius. The Government paid prize bounty in respect of some of the ships taken, but as some doubt arose as to the legality of the payment, the case of *La Bellone* was specially referred to the court for an authoritative decision. In those days there was ample reason why the naval claim should be destroyed when soldiers were on the scene, because when a conjoint expedition set out and arrived at its objective and troops had been landed, it was the common practice for the naval contingent to join up with the military forces under the leadership of the military officer in command. There was then a common enterprise under one officer. It was to be recollected that a century ago there were only sailing ships in the navy. Sailing ships could not come and go at will, and when a fortress surrendered it was quite possible for soldiers to pull off in boats and capture enemy ships. There was a case or record in which a man-of-war had been captured by cavalry who had ridden across the ice. But the application of steam to vessels had completely altered matters. In the present instance the enemy vessels were prevented from going to sea by the naval contingent alone. The military forces were quite incapable of doing anything in this respect. The court should hold, therefore, that the enemy ships were destroyed by the naval forces alone, and that the claim to the prize bounty was made out. It was immaterial whether the enemy vessels were actually destroyed by gunfire or were blown up by their own crews when it was recognised that there was no chance of escape. There was no conjoint expedition in the present case, and as that was the sole ground upon which the claim could be defeated, the applicants were entitled to the amount claimed. He cited

Banda and Kirwee Booty Case, 14 L. T. Rep. 293; L. Rep. 1 A. & E. 109.

Pearce Higgins for the Procurator-General.—The sole question was one of law, whether in the circumstances prize bounty was payable under the statute in force—namely, the Naval Prize Act 1864. It had been held in the case of *La Bellone* (*ubi sup.*) that where there was a conjoint operation no prize bounty was distributable. That decision was under an Act of 1805 (45 Geo. 3, c. 72), but the wording of sect. 5 of that Act was very similar to the wording of sect. 42 of the Naval Prize Act 1864, and the decision should be followed. There was no other case in this country which dealt with the point, but the decision had been followed in the United States in the case of *Dewey* v. *United States* (178 U. S. Rep. 510). That the operations against Tsingtau were both military and naval could not be doubted after a perusal of the official account issued by the Japanese Admiralty. It was for the court to say whether under the circumstances prize bounty should be paid. The Crown simply desired a decision upon the question.

Commander *Maxwell Anderson* in reply.

Cur. adv. vult.

April 30.—The PRESIDENT.—In the early period of the war the German fortress of Tsingtau was besieged, bombarded, and reduced by joint operations on land and by sea of Japanese and British military and naval forces.

The land forces of Japan were under the command of Lieutenant-General Kamio as Commander-in-Chief. Those of Great Britain consisted of the 2nd Batt. South Wales Borderers and the 36th Sikhs, of the Indian Army, under the command of Brigadier-General Barnardiston. The Japanese naval forces were the first and second Japanese fleets commanded by Vice-Admiral Tomasobaroh Kato and Admiral Kato respectively. The British ships of war which assisted in the operations were H.M. battleship *Triumph* and H.M. destroyer *Usk*, of which Commodore FitzMaurice and Lieutenant-Commander Maxwell were respectively in command.

The siege ended in the surrender *en bloc* of the fortress, which the German Emperor described as "the review ground of German Kultur created by many years' work." During the siege the Austrian cruiser *Kaiserin Elizabeth* and the German gunboats *Iltis*, *Jaguar*, *Tiger*, *Luchs*, and *Cormoran*, and the German torpedo-boat destroyer *Taku* sheltered in the harbour of Tsingtau. There they were completely blockaded. Before the surrender they were all destroyed and sunk. They were fired upon from land and sea; but there is no adequate evidence to show whether they were ultimately sunk by Japanese or by British forces, or by the action of their own officers preceding the surrender. The legal position of the present claim, however, is not affected by that circumstance.

The number of persons on board these enemy ships in all was 1200. The claim now before the court is made on behalf of the commanders, officers, and crews of the *Triumph* and *Usk* for 6000*l.* as prize bounty at the rate of 5*l.* per head of the men on the enemy ships. The question arising for decision is whether in the circumstances any prize bounty is payable. This depends upon the proper application of the enactment now in force dealing with this subject, which is sect. 42 of the Naval Prize Act 1864.

I stated generally the history of the grant of prize bounty (or "head money," as it was formerly called) in the case of *The E14* (14 Asp. Mar. Law Cas. 61; 116 L. T. Rep. 192; (1917) P. 85). It is necessary to distinguish clearly between prize ships or cargoes and prize bounty. "Prize" is property captured or seized by commissioned or authorised captors at sea or in ports, and is now condemned in favour of the Crown, either in its own right or in its right to droits of Admiralty. "Prize bounty," on the other hand, is a grant made out of public moneys under the authority of the Parliament of this realm as a reward for bravery resulting in success in naval engagements. It may be observed in passing that no such grant is made in these days by any other country in the world. Its amount, and the conditions of its grant, are defined by the Act of our Legislature, and the jurisdiction of this court to allow it is limited strictly by the Act of Parliament.

As Sir William Scott said in the case of *La Bellone* (*ubi sup.*): "The whole of this subject is the creature of mere positive law. Head money is not property acquired in any manner by the captors, or to be demanded on the ground of any antecedent title. It is a mere voluntary grant of public money; and the grantees must be content to take what is actually given, and no more. The court cannot amplify the grant by constructive analogy, and by so doing take upon itself the double impropriety of imputing blame to the Legislature for a supposed omission, and arrogating to itself the further disposal of public money. By every rule of interpretation that can apply to such a matter, the court is bound to confine its exposition within the very letter of the statute, if that letter speaks an intelligible language."

Sir William Scott pronounced the decision in *La Bellone* (*ubi sup.*) in 1818. The statute then in force dealing with prize bounty, or "head money," was 45 Geo. 3, c. 72, s. 5. The case arose in relation to an enemy ship captured in Port Louis upon the capitulation of the Isle of France after a blockade by the land and sea forces of Great Britain. The question whether prize bounty was payable was raised in friendly proceedings in order to obtain the formal decision of the Prize Court, so that the Treasury, as the custodian of the public funds, might know what it was authorised to do. It was decided by the court that head money could only be paid where the capture or destruction of enemy ships of war was effected by naval forces only; and that where the capture or destruction was the result of joint action of the armed forces on land and of ships at sea, it could not be paid. Sir William Scott said: "The grant, in the whole of its extent, relates to naval capture only. Where it is not purely naval the statute has thought fit to be silent, and it is not for this court to introduce a different description of service into a grant where it is not."

There is no essential or material difference touching this question between the enactment now in force and that which was applied in the authority quoted. The provisions as to prize bounty contained in the Naval Prize Act of 1864 were enacted when the decision in *La Bellone* (*ubi sup.*) stood as the last word of the English Prize Court upon the subject. They must be read with reference to the law as then pronounced. The Legislature could, of course, have altered it, but it did not think fit to do so.

In the special circumstances of the present case, I think that it is right to mention that the court is not called upon to consider whether the fact that Japanese forces—military and naval—took part, and a leading part, in the operations affects the legal question which arises. I decide the case quite apart from that special circumstance.

Even if British forces alone had carried out the engagement or operations which resulted in the destruction of the enemy's ships of war, I pronounce that, as their destruction was not brought about by naval action alone, but was the result of the joint operations of land and naval forces, prize bounty is not payable.

I regret that the law, accordingly, leaves me no alternative but to disallow the claim, and to dismiss the application for the bounty.

Solicitor for the claimants, *A. Tyler*, for *Stilwell* and *Sons*, Navy Agents.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Judicial Committee of the Privy Council.

Tuesday, May 22, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE KIM (PART EX CARGO). (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION, ENGLAND (IN PRIZE).

Prize Court—Continuous voyage—Absolute contraband—Evidence—Condemnation.

A neutral vessel sailed from New York in Nov. 1914. *Part of her cargo consisted of rubber, which was consigned by the claimant, an American citizen, to a Swede at Landscrona. The vessel was captured by a British cruiser. At the hearing in the Prize Court evidence was offered by the Crown to the effect that the final destination of the rubber was Germany. The President held that as the doctrine of continuous voyage and transportation, both as regards carriage by sea and land, was part of international law at the time of the commencement of the war in Aug.* 1914, *all goods which were intended for the use of the German Government, although nominally having a neutral port as their port of destination, must be condemned as lawful prize.*

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

From the order of condemnation the claimant appealed.

Held, that the appellant's title had not been made out, and the probabilities of the case pointed to the version given at the original hearing being the true one.

Appeal dismissed.

Decision of the President (13 *Asp. Mar. Law Cas.* 178; 113 *L. T. Rep.* 1064; (1915) *P.* 215) *affirmed.*

APPEAL from a decree of the President (reported 13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215) condemning thirty-nine cases (29,771lb.) of rubber shipped on the steamship *Kim* by the claimant, William Torrey Baird, on the 11th Nov. 1914, from New York to Copenhagen, to be forwarded to Landscrona, Sweden, consigned to W. Fritsch of that town. The rubber had been shipped as "gum," a term often applied to it commercially in America. It had, it was said, been so described to avoid search and inconvenience—not capture.

A. A. Roche, K.C. and *Douglas Hogg* for the appellant.—The rubber was sold upon terms that it was not to be paid for until arrival. It therefore was the property of the shipper at the date of seizure. Goods, the property of a citizen of a neutral state in a neutral ship while on the way to a neutral port, are not confiscable as prize, and the doctrine of continuous voyage has no application. The evidence offered by the Crown is rebutted by the fact that there was a large demand for rubber in Scandinavian countries at that time, and although the goods were described as "gum," assuming that was a misdescription, that would not of itself justify condemnation.

Sir *Frederick Smith* (A.-G.) and *R. A. Wright*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

Lord PARKER OF WADDINGTON. — In the present case the President came to the conclusion that the claimant had not made out his title. The board do not see their way to differ from the President in this respect. It appears that the case originally stated in the court below on behalf of the claimant, Mr. Baird, was that he had sold the thirty-nine cases of rubber in question to a Mr. Frankfurter, who was also a rubber broker in New York, and that he, in his turn, sold them to a Mr. Fritsch. The case is quite inconsistent with Mr. Baird having any title to support the claim, and is not only fully borne out by a letter of the 24th March 1915, from Mr. Baird to the Rubber Club of America, but is also consistent with what Mr. Baird himself says in his affidavit. Under these circumstances the board are of opinion that the appellant's title is not made out, and that the probabilities of the case point to the version given by counsel at the original hearing being the true one.

Accordingly the appeal must necessarily fail on this ground, and the other points which were decided by the President do not arise. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellant, *Crosley* and *Burn*.

Solicitor for the respondent, *Treasury Solicitor*.

May 21, 22, *and June* 21, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and SIR ARTHUR CHANNELL.)

THE CONSUL CORFITZON (CARGO EX). (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION, ENGLAND (IN PRIZE).

Prize—Neutral claimant—Discovery—Character and extent of order—Prize Court Rules, Order IX., r. 1.

Documents are material to matters in question in the litigation if it is reasonable to suppose that they may contain information directly or indirectly enabling the party seeking discovery to advance his own cause or to damage the case of his adversary.

Goods having been seized as prize, an order was made for discovery by the claimant of his books of accounts, letter books, and usual commercial documents under Order IX., r. 1, *of the Prize Court Rules. The order went on to particularise the documents as to which discovery was to be made. Against the latter part of the order the claimant appealed.*

Held, there was jurisdiction to particularise the documents as to which discovery was to be made.

Principle laid down by Brett, L.J. in Compagnie Financière du Pacifique *v.* Peruvian Guano Company (48 *L. T. Rep.* 22; 11 *Q. B. Div.* 55) *applied.*

THIS was an interlocutory appeal, in which Per Palen of Nettraby, Sweden, trading as Nettraby Läderfabrik, was the appellant, and His Majesty's Procurator-General respondent, in a suit instituted by the respondent for the condemnation as prize of the steamship *Consul Corfitzon* (a Swedish vessel) and her cargo, or alternatively for an order as to the disposal of the cargo under the Reprisals Order of the 11th March 1915.

The question involved was the character and extent of discovery which might be ordered as against a neutral claimant in prize proceedings.

The appellant claimed 13,287 pieces of quebracho wood, 3,846 bags of quebracho extract, and 2,843 salted hides which were shipped on the *Consul Corfitzon* in July, 1915, at Santa Fe and Buenos Ayres to be carried to Karlskrona and Malmo for delivery to him. The vessel in the course of her voyage to those ports put into Swansea for bunker coal in Sept. 1915, where the collector of His Majesty's Customs and Excise took possession of her cargo.

Roche, K.C. and *R. A. Wright* for the appellant.

Sir *Frederick Smith* (A.-G.) and *T. Mathew* for the respondent.

The considered opinion of their Lordships was delivered by

Lord PARKER OF WADDINGTON.—This is an appeal from an order made by the President on the 24th Oct. 1916, requiring the appellant to make discovery on oath of all books of account, letter books, and usual commercial documents relating to the matters in question in the litigation, including the books, contracts, policies of insurance, cables and correspondence in the order particularly referred to. The appellant contends that this order ought to be discharged or varied, (1) because there was no jurisdiction to make it, (2) because it was wrong in law, and (3) because it was in the

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

circumstances of the case oppressive, and as a matter of discretion ought not to have been made.

There can be no doubt that under Order IX., r. 1, of the Prize Court Rules, the President sitting in Prize has power to make an order for the discovery of documents relating to the matters in question, either generally or limited to certain classes of documents to be specified in the order. In the present case the discovery is limited to books of account, letter books, and usual commercial documents, and so far the order is not complained of. It is contended, however, that the order ought to have stopped at this point, and that in further particularising the documents of which discovery was to be made the President exceeded his powers under Order IX, r. 1. He ought, it was said, to have left it to the judgment or conscience of the person against whom the order was made to decide what documents ought to be and what need not be included.

In their Lordships' opinion this contention cannot be upheld. It is by no means easy for a litigant, however sound his judgment and however scrupulous his conscience, to come to a correct conclusion as to what documents do or do not relate to the matters in question within the meaning of the rule. The principle applicable was laid down in *Compagnie Financière du Pacifique* v. *Peruvian Guano Company* (48 L. T. Rep. 22; 11 Q. B. Div., at p. 63): "Every document," said Lord Justice Brett, "relates to the matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences."

But even if this principle be borne in mind, there is such ample room for error in its application that it is, in their Lordships' opinion, not only permissible, but in many cases highly convenient, that the judge who makes the order should indicate as far as may be the kind of document of which he contemplates that discovery shall be made. The objection to jurisdiction therefore fails.

The second objection to the President's order is that he has specified among the documents of which discovery is to be made documents which cannot by any possibility relate to the matters in question in the litigation. Before considering this objection it is necessary to see what these matters are.

The proceedings in which the appeal arises are proceedings on behalf of the Crown for condemnation as contraband of war of about 2843 tons of salted hides, 3551 tons of quebracho logs, and 201 tons of quebracho extract shipped on board the Swedish steamship *Consul Corfitzon*, from South American ports to Karlskrona, and consigned to the appellant. There is an alternative claim under the Order in Council of the 11th March 1915 which is immaterial for the purposes of this appeal.

The goods having been shipped on a neutral vessel, and ostensibly destined for a neutral port, can only be contraband of war if, on the principle of continuous voyage and according to the real intention of the parties concerned in the transaction, they had a further or ultimate destination in an enemy country. Intention is rarely the subject of direct evidence. As a rule it has to be inferred from surrounding circumstances, and every circumstance which could, either alone or in connection with other circumstances, give rise to an inference as to the intention of the parties concerned in a transaction, both relates and is relevant to the question what that intention really was.

In the present case one of the matters in question is how the appellant intended to dispose of the goods to which these proceedings relate after their delivery at Karlskrona. Were they intended by him for consumption in Sweden, or had they a further destination, and if so in what country? It appears to their Lordships to be beyond dispute that inferences on this question might properly be drawn from the course and nature of the appellant's business in goods of a similar nature both before and after the outbreak of the present war, and in particular from the volume of his trade with Germany before and since such outbreak. All documents which throw light on these matters must therefore fall within the principle laid down in the case above referred to. The order for discovery being limited to documents which may throw light on the nature and course of the appellant's business and the volume of his trade with Germany for some months before the war and since the outbreak of the war, it is in their Lordships' opinion impossible to hold that the order was wrong in law.

The objection that the order appealed from is oppressive is, in their Lordships' opinion, equally untenable. No doubt in interlocutory matters, such as discovery of documents, the Judge in Prize has a wide discretion which ought, of course, to be exercised so as not to impose upon neutrals any unnecessary difficulty in the speedy establishment of their claims. But, on the other hand, it would be wrong to subordinate the interests of the Crown to the mere convenience of adverse claimants. Considering the nature of the matters in issue in these proceedings, a refusal of the discovery ordered might deprive the Crown of all means of proving that the goods in question were contraband of war. On the other hand the discovery ordered is so limited that it cannot involve the appellant in any great trouble or expense. It must be remembered that full and complete discovery by the claimant may be the best and readiest mode of establishing his own case if it be a good one. At any rate their Lordships do not see their way to interfere with the President's discretion, which appears to have been exercised after full discussion, and in view of his wide experience in cases of this nature.

Considerable stress was laid in argument on the provisions of the Swedish War Trade Law of the 17th April, 1916, a translation of which is contained in the supplemental record. It was said that the appellant if he complied with the order appealed from would, or might, render

himself liable to penalties under art. 3 of this law. Their Lordships can hardly suppose that art. 3 was intended to hamper Swedish subjects in asserting their rights in British Prize Courts. Indeed, the concluding clause of the article seems to authorise everything necessary for the assertion of such rights, and further it would appear to be possible for the appellant, if he feels any difficulty in this respect, to obtain the consent of his Government to complying with the order appealed from. But however this may be, their Lordships are clearly of opinion that a Court of Prize cannot properly be deterred from making what it conceives to be the appropriate order because a neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law. The substantive law administered by the Court is international law, which cannot be affected by the municipal legislation of any one State, and its practice and procedure is governed by the municipal law of the State from which it derives its jurisdiction, and cannot be modified by the municipal legislation of any other State.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs, including the costs of the petition for the admission of the supplemental record.

Solicitors for the appellant, *Botterell* and *Roche*.
Solicitor for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

March 5 and 6, 1917.

(Before SWINFEN EADY and BANKES, L.JJ. and A. T. LAWRENCE, J.)

THE PHILADELPHIA. (*a*)

Collision—Loss of ship—Measure of damage—Rule for assessing the amount of damage.

A sailing ship while on a voyage to Australia was sunk by another vessel. The owners of the other vessel admitted liability for the collision, subject to the damage being assessed by the registrar. On the hearing before the registrar the owners of the sailing ship admitted that the value of their vessel on the date she was sunk was 22,500l., but alleged that, as she would have been requisitioned by the Australian Government on her arrival at Sydney to carry a cargo of wheat to Great Britain, she was in the position of a vessel sunk while proceeding to perform a valuable charter, and that they were entitled to the value of the ship at the time of her arrival at Sydney, which was 29,370l. The registrar assessed the value of the vessel at 29,370l. The defendants appealed to the President, who reduced the amount to 22,500l. The owners appealed to the Court of Appeal.

Held, affirming the decision of the President, that the right rule for arriving at the damages in the case of a total loss of a vessel under charter is to value the ship at the time of her destruction or loss, and to add to this the proper sum for freight or profits at the end of the voyages fixed by her existing charters, subject to proper deductions for contingencies and wear and tear, and that 22,500l. was the sum which should be awarded.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

APPEAL from the decision of Sir Samuel Evans, President, varying a report by the district registrar at Liverpool, made in a collision case.

The facts were that the steamship *Philadelphia* collided with and sank the sailing ship *Ben Lee* in Carnarvon Bay in Jan. 1916. The owners of the *Philadelphia* admitted liability for the damage caused by the collision subject to the amount being assessed by the district registrar assisted by merchants. The owners of the *Ben Lee* filed a claim in the district registry which contained two items—(1) the value of the *Ben Lee*, 22,500l.; (2) the cost of outfit and stores on board at the time of the collision and other outlay, 4323l. 1s. 7d.

The claim came before the district registrar first on the 3rd March 1916, when the owners of the *Philadelphia* alleged that the *Ben Lee* had been prematurely abandoned, but, after evidence had been given by the master and crew of the *Ben Lee*, the owners of the *Philadelphia* abandoned this contention. The claim next came before the district registrar on the 27th May in order that the value of the ship and stores might be determined.

The owners of the *Ben Lee* then put forward a supplemental claim by which they sought to recover: (1) The value of the *Ben Lee*, 22,500l.; (2) stores, equipment, and outlay subsequent to her coming out of dry dock in Dec. 1916, 3939l. 6s. 2d.; (3) loss of voyage, 22,899l.; (4) alternatively to No. 3, if requisitioned by the Australian Government for the carriage of wheat, 7611l., or the market value of the *Ben Lee* on arrival at Sydney, 29,370l.; (5) Lloyd's account at Holyhead, 193l. 5s. 9d.; (6) Salvage Association account, 18l. 14s. 6d.

The amended claim came before the district registrar on the 31st July, when the owners of the *Ben Lee* abandoned their claim for items 3 and 4 above, and finally sought to recover:

	£.	s.	d.
(1) The value of the *Ben Lee* at the market price on the assumed date of her arrival at Sydney...	29,370	0	0
(2) Stores, equipment, and outlay subsequent to her coming out of dry dock in Dec. 1915.....	3,939	6	2
(3) Lloyd's agents at Holyhead	193	5	9
(4) Salvage Association's account ...	18	14	6
Total	£33,521	6	5

The registrar assessed the value of the *Ben Lee* at 29,370l., allowed the owners of the *Ben Lee* the sum of 1139l. 12s. 7d. in respect of item 2, and also allowed 193l. 5s. 9d., the amount claimed in respect of Lloyd's agent at Holyhead, and 18l. 14s. 6d., the amount of the Salvage Association's account, making a total of 30,721l. 12s. 10d.

From that sum the registrar deducted three and a half months' wages at 120l. per month—420l.—which would have been spent while the vessel was proceeding to Sydney, and a further 500l. which would have been spent in discharging cargo at ports in Australia, and thus the final sum due to the owners of the *Ben Lee* was 29,801l. 12s. 10d.

The registrar gave the following reasons for his report:—

The claim in this reference arises out of a collision between the plaintiffs' sailing vessel the *Ben Lee* and the defendants' steamship *Philadelphia* in Carnarvon Bay in Jan. 1916, which resulted in the total loss of the *Ben Lee* with the cargo and all stores and effects on board at the time.

At the date of the collision both vessels were outward bound, the *Ben Lee* being under charter with a general cargo for Sydney and Melbourne, and the steamship *Philadelphia* for New York.

The defendants, the owners of the *Philadelphia*, admitted liability for the collision, but contended that they were not liable for a total loss of the *Ben Lee* on the ground that the vessel had been prematurely abandoned, but, after evidence by the captain and other members of the crew had been given, the defendants abandoned their contention.

The claim originally filed by the plaintiffs in respect of the loss of the ship was amended on three separate occasions, the claim as finally adjudicated on being for the items numbered 1 to 4, amounting in all to 33,521*l.* 6*s.* 5*d.*

Separate claims were filed in respect of the loss of the crew's effects and cargo.

The claim in respect of loss of ship as originally filed consisted of two items only: Item 1, value of *Ben Lee*, 22,500*l.*; item 2, cost of outfit and stores, 4323*l.* 1*s.* 7*d.*

The freight for the outward voyage had been prepaid; there was therefore no claim for loss of profits.

The plaintiffs subsequently added further alternative claims for loss of prospective profits based on a voyage (*a*) from Melbourne to South America with a cargo of coal, and thence home with a cargo of nitrate, or, alternatively, (*b*) from Melbourne home with a cargo of wheat on requisition by the Australian Government.

Under the former 22,899*l.* was claimed, and under the latter 7611*l.* These alternative claims were subsequently abandoned by the plaintiffs.

On the reference it appeared that the value of the *Ben Lee* had been assessed by a nautical valuer at 22,500*l.* as at a date shortly prior to the loss, and this value was agreed by the defendants' solicitors; the value should, however, under the decision of the Court of Appeal in *The Racine* (95 L. T. Rep. 597; 10 Asp. Mar. Law Cas. 300; (1906) P. 273), have been ascertained as at the end of the voyage.

It was agreed that this voyage would have occupied 105 days, and I gave the plaintiffs leave to produce evidence showing the presumptive value of the *Ben Lee* had she arrived at Sydney, and adjourned the reference for that purpose.

The nautical surveyor who had previously valued the *Ben Lee* at 22,500*l.* as at the date of loss was instructed to revalue the vessel on the basis of her assumed arrival at Sydney on the 1st May (105 days after leaving Liverpool), and he assessed the value on this basis at the sum of 29,375*l.*

With the consent of the defendants' solicitors an amended claim was filed in which the latter amount—viz., 29,375*l.*—was substituted in an alternative form for 22,500*l.* as the value of the vessel, and some further amendments were made, including a reduction of item 2 from 4323*l.* 1*s.* 7*d.* to 3939*l.* 6*s.* 2*d.*, which is later referred to, and the addition of two items for salvage expenses.

On the adjourned reference counsel for the defendants did not raise any objection to the increase in the amount of the valuation of the vessel, but contended that the plaintiffs had agreed the figure of 22,500*l.*, and that they were not entitled to go outside that agreement as it was admitted that both sides had agreed that 22,500*l.* represented the value of the vessel at the date of the loss. I was of opinion that the plaintiffs were not precluded from claiming the enhanced value of the vessel as on the completion of her voyage, which, under the authority of the *Racine*, was the date when the value should be ascertained, and I have allowed the claim for the amended value.

Item 2: Stores, Equipment, and Outlay, 3939*l.* 6*s.* 2*d.*—This claim was subdivided under six heads, and the total of these subdivisions amounts to 4149*l.* 19*s.* 4*d.*, and the amount claimed—viz., 3939*l.* 6*s.* 2*d.*—is therefore understated.

Of these six subdivisions four have been disallowed, and reductions have been made in the remaining two, with the result that this item has been reduced to 1139*l.* 12*s.* 7*d.*

The claims for loss of profit on alternative voyages, as explained above, were abandoned by the plaintiffs.

No deductions were made by the plaintiffs for the amount of (1) the crew's wages on the voyage to Sydney, which, at 120*l.* a month for three and a half months, would have amounted to 420*l.*, or (2) for inward expenses at ports of discharge, which expenses would, in the opinion of the merchants, based on their experience, have amounted to at least 500*l.*

To enable the plaintiffs to earn this freight, the above expenditure, amounting in all to 920*l.*, would have been necessarily incurred, and the said sum of 920*l.* has been deducted from the total amount of the ship's claim.

On the 7th Dec. 1916 the owners of the steamship *Philadelphia* gave notice to the plaintiffs that they intended to object to the report of the district registrar.

On the 20th Dec. 1916 the defendants, the owners of the steamship *Philadelphia*, served the plaintiffs with a notice of motion asking that the report of the registrar assessing the amount of the damage due to the plaintiffs should be rejected and not confirmed so far as it related to item 1 of the plaintiffs' claim, and that the sum, 29,370*l.*, allowed by the registrar in respect of such item should be reduced to such an amount as the court should deem just, or, alternatively, to the sum of 22,500*l.*, on the grounds that the registrar (*a*) was wrong in law in not having regard only to the figure of 22,500*l.* which had been agreed between the plaintiffs and the defendants as the value of the *Ben Lee*; (*b*) was wrong in law in allowing the plaintiffs to alter or amend their claim after the value of the *Ben Lee* had been agreed; (*c*) was wrong in law in holding that the decision in the *Racine* was applicable to the circumstances of the present case, and in assessing the value of the *Ben Lee* at a figure which represented her presumptive value on arrival in Sydney instead of her value at or immediately prior to the date of loss; (*d*) having regard to the agreed value, the fact that no freight was outstanding, and that a sum was to be allowed for unused stores on board, he ought to have held that the damages recoverable by the plaintiffs were the agreed value of the *Ben Lee*—22,500*l.*—or, alternatively, the value of the *Ben Lee* at the time of the loss; (*e*) that the value of the *Ben Lee* should have been assessed at her market value at the time of her loss, less an allowance for wear and tear and possible marine and war risks, or at the agreed figure of 22,500*l.*; (*f*) that in any case some deduction from the sum of 29,370*l.* should have been allowed for wear and tear and possible marine and war risks.

The motion came on for argument before Sir Samuel Evans, President, in the Admiralty Court on the 16th and 17th Jan.

Butler Aspinall, K.C. and *Stewart Brown* for the owners of the *Philadelphia*.

Laing, K.C. and *Hyslop Maxwell* for the owners of the *Ben Lee*.

After argument, judgment was reserved and delivered on the 2nd Feb.

Feb. 2.—The PRESIDENT.—An important question is raised upon this motion—viz.: What is the proper time at which to assess the value of a ship, which has become a total loss in a collision, in order to arrive at the damages payable by the owners of the vessel in fault?

The collision took place in Jan. 1916 in Carnarvon Bay between the sailing vessel *Ben Lee* and the steamship *Philadelphia*. The *Ben Lee* was sunk. The owners of the *Philadelphia* admitted liability. The *Ben Lee* was under charter with a general cargo for Melbourne and Sydney. The freight had been prepaid. It was assumed that she would have arrived at Sydney on the 1st May 1916. The value of the vessel at the time of the loss had been agreed between the parties at 22,500*l*. At the reference the district registrar raised the point that the value of the vessel should be taken as at the time of her assumed arrival at the end of her voyage at Sydney—viz., the 1st May 1916. Amendments were made in the claim accordingly. The value as on the 1st May was fixed at 29,375*l*. That is to say, that in the three months between the collision and the 1st May the value of the sailing vessel had increased by 6875*l*., or more than 30 per cent.

The district registrar allowed the increased value. He based this upon *The Racine* (95 L. T. Rep. 597; 10 Asp. Mar. Law Cas. 300; (1906) P. 273), which he thought decided that the value of the vessel must be ascertained as at the end of the voyage.

The application on the motion is that the sum of 29,375*l*. be reduced to 22,500*l*.

It is necessary shortly to examine what the Admiralty rule in such a case has been, and to ascertain what the exact decision in *The Racine* (*ubi sup.*) was. The Court of Appeal in the *Racine* approved of the earlier decision of Sir F. Jeune, President, in *The Kate* (80 L. T. Rep. 423; 8 Asp. Mar. Law Cas. 539; (1899) P. 165). The authorities are carefully collected in the latter case. It was pointed out that Dr. Lushington had decided in *The Columbus* (3 W. Rob. 158) and in *The Clyde* (Swab. 23) that the value of the vessel was to be taken at the time of the loss. That learned judge stated the same rule in *The Ironmaster* (Swab. 441).

Side by side with the decisions of Dr. Lushington the opinions of Sir Robert Phillimore were also considered in *The Kate* (*ubi sup.*) with reference especially to his judgment in *The Northumbria* (21 L. T. Rep. 681; L. Rep. 3 A. & E. 6). Collating the views which had been expressed by those two learned judges, Sir F. Jeune deals with them thus: "The difference between the views of the practice of the Court of Admiralty taken by Dr. Lushington and Sir Robert Phillimore, both, of course, very high authorities on such a matter, is perhaps more apparent than real. Dr. Lushington indicates that the value of the vessel is to be taken at the time of the collision, which does not, as I have above suggested, exclude a fact such as the existence of a profitable charter from being allowed to enhance the value of the vessel at that time. Sir Robert Phillimore states that the value should be taken as at the end of the voyage, and therefore lets in freight or interest as an additional compensation. The result of the two calculations in figures should be practically identical."

The general principle to which the court strives to give effect is *restitutio in integrum* subject to the limitation that the damages must not be too remote in law.

Upon this Sir F. Jeune adds for himself: "It may be nothing more than a question of statement of figures whether the owner of a vessel, lost when under a profitable charter-party, is recouped this loss by receiving her value at the conclusion of her voyage plus the profits of her charter-party, or by receiving her value at the time of collision, such value being enhanced by the fact that the ship at the time was under a profitable charter-party. But unless in one or other of these ways the owner gets the benefit of the profitable engagement of his ship, he obviously fails to realise *restitutio in integrum*."

The question which arose for decision in *The Kate* (*ubi sup.*) was simply whether the value of the lost vessel was to be fixed at the time of the collision, as if she were a free vessel, without reference to the benefit which might accrue under her then existing contractual obligations; or whether the profits, which might be the result of the performance of her existing charter, were to be taken into account as an element in her value.

The decision was that the latter was the correct rule of assessment.

The learned President also expressed the view that nothing appeared to have been decided by Dr. Lushington in the cases referred to which would exclude a claim for enhanced value of a vessel at the time of her loss by reason of a profitable engagement which had been secured for her.

In order "to remove the claim as far as possible from the region of speculation" the calculation would be made as at the end of the voyage. This does not mean that the value of the vessel *per se* at a date removed by a substantial period from the time of the collision, due to the rise of the commercial market in ships, should determine the amount of the damages; but that the profits of the voyage which would have been completed (after making proper deductions for wear and tear and contingencies) should be added to the value of the vessel itself as at the date of the loss.

The case of the *Racine* does not differ in principle. It only extended the application of the rule to a succession of existing charter-parties. Moulton, L.J. explains the reason and method of the calculation of the damages. He says: "By adopting this plan there is no change in what you are calculating—you are calculating the pecuniary difference made to the plaintiff by the collision—but you calculate it by considering the position of the plaintiff at a date at which you can get the requisite data more easily, and you allow interest from that date only. The date taken is the conclusion of the voyage. Setting aside other risks,

the plaintiff, but for the collision, would at the end of the voyage have been in possession of his ship (diminished in value by the wear and tear of that voyage) and would have been in possession of the freight. Neither of these things, however, were certainties. There was the risk of loss during the subsequent part of the voyage, and these two sums must be discounted according to that risk. This is an easy task inasmuch as such risks are the ordinary subject of insurance, and having allowed for these other risks, you get a sum of money the possession of which would be the equivalent of the plaintiff's position had the collision not taken place."

There is nothing in the judgments of the Lords Justices to justify the taking of the increased or inflated value of a vessel itself at a date subsequent to the collision as the basis of the damages. I have examined the Record in the case of the *Racine*.

The valuation of the vessel was given as at the date of collision by all the witnesses for the plaintiffs and the defendants; and was fixed by the registrar and merchants at a sum between the maximum and minimum valuations. No evidence was given of the value of the lost vessel as at the end of the charter voyages. Other sums were added for freights after deductions for contingencies, &c.

Before concluding, I may mention that the rule adopted in the American courts is correctly stated by Mr. Sedgwick in his work The Measure of Damages as follows: "If the injured vessel is a total loss her market value at the time will be the criterion of damages."

In support of this, reference may be made to *The New Jersey* (Olcott's Admiralty Reports, p. 446), *The Baltimore* (8 Wall, p. 386), and *The Umbria* (166 U. S. Rep., pp. 421-422).

In my opinion, the right rule for arriving at the damages in a case of total loss of a vessel under charter is to value the ship at the time of its destruction or loss, and to add to this the proper sum for freight or profits at the end of the voyages fixed by her existing charters, subject to proper deductions for contingencies and wear and tear.

I reject the allowance of the increased value between Jan. and the 1st May as part of the damages; and the item of 29,375*l.* must be reduced to 22,500*l.* The district registrar's report will be varied accordingly.

The plaintiffs must pay the costs of the appeal.

On the 9th Feb. 1917 the plaintiffs gave notice of appeal against the judgment of the learned President, by which he held that the defendants' objections to the report of the registrar were to be allowed, and by which he varied the report by reducing the sum allowed to the plaintiffs as the value of the *Ben Lee* from 29,375*l.* to 22,500*l.*

The case came before the Court of Appeal on the 5th and 6th March.

Laing, K.C. and *A. H. Maxwell* for the appellants.—The question raised in this case is what amount are the appellants entitled to recover for the loss of their ship. The respondents admitted liability for the collision, and on a reference before the district registrar, who was to assess the amount of the damage, the appellants recovered the sum of 29,370*l.* as being the value of the vessel on the assumed date of her arrival at Sydney. The respondents, being dissatisfied with the decision of the registrar, appealed to the President, with the result that the sum awarded to the appellants was reduced, the President holding that the appellants were only entitled to the value of the ship on the day of her loss, which had been agreed at 22,500*l.* The appellants contend that the value of the ship ought to be taken as at the end of the voyage on which she was sunk. [SWINFEN EADY, L.J.—What is the legal proposition for which you contend?] The proposition is that the owner of the vessel is entitled to be put in the same financial position as he would have been in if no collision had happened. The time to assess the value is at the end of the voyage. It was decided in *The Kate* (*ubi sup.*) that the profit to be made out of the voyage that the vessel was engaged on could be taken into account in assessing her value, and this principle was adopted in *The Racine* (*ubi sup.*). In one case when the vessel had an unprofitable charter the result of taking it into account in assessing her value was that her owners got less than the market value of the vessel would have been if she had not been under charter:

The Helvetia, 1913, 29 Times L. Rep. 423.

The value of a free ship at Sydney is what the appellants are entitled to recover—that is the rule laid down by the authorities:

The Amalia, 34 L. J. 21, P.

It is true that in the cases of *The Kate* (*ubi sup.*) and *The Racine* (*ubi sup.*) the shipowner had entered into binding charters, and that in this case he had not done so. But in this case the shipowner is in exactly the same position, for the Australian Government were requisitioning all ships to carry wheat to this country, and, if this vessel had been requisitioned, her owners must have made a profit of 7000*l.* [SWINFEN EADY, L.J.—The mere fact that a vessel ought to make a profit has been held too speculative a matter to be taken into account.] That may be so, and in ordinary times it may be admitted that unless a shipowner has a binding charter loss of possible profit is too speculative a matter to be taken into account. At present, however, instead of vessels seeking freights, freights are waiting for them, and it is certain that if this vessel had arrived at Sydney she would either have been requisitioned, or, if not requisitioned, she must have earned a better freight than she would have done as a requisitioned ship. It is submitted that the decision of the learned President is wrong, and that the value of the vessel should be fixed at 29,370*l.*, as was done by the registrar.

Butler Aspinall, K.C. and *Stewart Brown* for the respondents.—The rule contended for by the appellants is not supported by the cases. *The Racine* (*ubi sup.*) and the other cases cited by the appellants are authorities for the proposition that the shipowner was entitled to recover the value of the ship and the profit incidental to the voyages which he had undertaken to perform. But before the profit incidental to the voyages could be taken into consideration the shipowner had to prove that he had a binding contract, and the only profit that he was entitled to was the amount of freight to be paid to him under the contract, less the cost of earning it. [SWINFEN EADY, L.J.—The President reduced the amount allowed by the registrar from 29,370*l.* to 22,500*l.*

Are you content with the substitution made by the President?] Yes, that is the amount that the respondents say should be paid as damages. As the appellants were not seeking to recover any profit in respect of the voyage the *Ben Lee* was engaged on when she was lost, the respondents admitted that the sum of 920*l.* deducted by the district registrar could not be deducted from the value of the ship at the time of her loss.

Swinfen Eady, L.J.—This is the appeal of the owners of the sailing ship *Ben Lee* from an order of the President varying a report made by the district registrar at Liverpool of the Admiralty Court. The *Ben Lee* was a sailing ship which in Jan. 1916 was totally lost in Carnarvon Bay by a collision with the steamship *Philadelphia*. The *Philadelphia* admitted her liability for the collision, and the only question was a question of the amount—what sum were the owners of the *Ben Lee* entitled to recover against the owners of the *Philadelphia* for damages for the collision. The amount of the assessment was left to the district registrar at Liverpool assisted by merchants, and the district registrar reported to the court various sums with a total which is mentioned in the report, and the only item about which any question arose was the value of the *Ben Lee*. The owners of the ship claimed and there was allowed in the report a sum taken to be the value of the ship, not at the time of the collision, but the market value of the ship, or the probable value at which she would have arrived at the time she arrived at her port of destination; she was bound for Sydney with a general cargo. The ship was valued on the assumed date of her arrival at Sydney at 29,370*l.* or thereabouts, and that with other items was included in the report. The defendants applied to the President to vary the report with regard to that amount and they succeeded before the President, the judgment of the President being that the ship ought to be valued, not as at the date of its arrival or probable arrival in Sydney, nor as to its probable value on that date; the learned President held that the true date as at which the loss was to be estimated and the value ascertained was the date of the destruction or loss of the ship; and consequently the report of the district registrar was varied by reducing the figure of 29,375*l.* to the figure of 22,500*l.* From the judgment of the President the owners of the *Ben Lee* appealed; and it has been contended before us that there is an established rule of the Admiralty Court that, in the case of the total loss of a vessel under charter, the ship is to be valued as on the probable date on which she would arrive at her port of destination, and you are there to take the market or probable market value of the ship at that date.

Of course there is no authority whatever for the contention put forward by the appellants, and it would be contrary to all principle so to decide. In the judgment of the learned President he refers to the measure of damages given in Mr. Sedgwick's book: "If the injured vessel is a total loss, her market value at the time"—that is, at the time of her loss—"will be the criterion of value." Now, cases have been cited which establish that where a ship the subject of a charter is a total loss by reason of a collision, the owner of the ship is entitled to recover the value of the ship plus the value of the charter. It is laid down that the owner of the ship is entitled, so far as money can effect it, to have restitution; that he is entitled to be placed in the same position, so far as money can place him, as if the collision had not taken place; and that rule, so laid down in general terms, has resulted in this: that where the ship is under an engagement, charter or other engagement, under a contract, the owner of the ship is entitled to say, "What I have lost is the value of my ship with her engagements." If the engagement is a profitable engagement, it would enhance the value of the ship; if, on the other hand, the engagement is an unprofitable engagement, it is possible it might diminish the value. In either case that is what the owner of the ship has lost; he has lost the ship with her engagements.

Distinction is drawn between a ship with a definite engagement and a ship without any engagement, but with a chance, with a probability, of earning profit, as in several instances that have arisen of fishermen; and in the case of the fishing smacks to which our attention has been drawn it has been held that the owner of a ship is not entitled to recover, besides the value of the ship, for the loss of probable profit that he would have made if the vessel had been able to continue fishing.

The true rule was considered first by the Court of Appeal, the members of which differed between themselves, and the case proceeded to the House of Lords in the case of *The Argentino* (61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433; 14 A. C. 519), and Bowen, L.J. there stated the rule that was approved and adopted in the House of Lords, which was contrary to the view that Lord Esher had expressed. Bowen, L.J. said in *The Argentino* (59 L. T. Rep. 914; 6 Asp. Mar. Law Cas. 348; 13 P. Div. 191): "A ship is a thing by the use of which money may be ordinarily earned, and the only question in the case of a collision seems to me to be what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand, the direct consequences of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repairs, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone."

It will be observed that Bowen, L.J. there in terms expresses that there is to be excluded the element of uncertain and speculative and special profit. That case went to the House of Lords, and Lord Herschell in his speech said: "It is admitted that there is no special rule of the Admiralty Court governing the question, and that the law there administered in relation to such

a matter is the same as prevails at common law." Then he added this: "It does not appear to me to be out of the ordinary course of things that a steamship, while prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision." It is therefore established that the owner of the ship is entitled to recover what may be put shortly as the value of the charter.

How is the value of the charter to be arrived at? It was urged first that it was unnecessary that there should be any charter or definite contract. In my opinion that contention is wrong. In order to bring a case within this rule there must be an employment contracted for; and it was by reason of the absence of any contract for employment that cases like *The Columbus* (*ubi sup.*) and *The City of Rome* (8 Asp. Mar. Law Cas. 542n.) and other similar cases were decided. In the *City of Rome* (*ubi sup.*) Lord Hannen refused to allow a claim for the value of the fish which, it was alleged, would have been taken. An attempt was made there to introduce the uncertain and speculative profit. Where, on the other hand, there is a definite contract for the employment of the vessel, the charter is to be taken into account; and that, whether there is one or more consecutive charters.

It is then said that in working out that value in order to give effect to that rule and to include the value of the charter you must take the value of the ship at its port of arrival; and, in a sense, that is true, and that phrase has been used in various cases; but, in my opinion, what is meant by that is that you are to take the value of the ship at the end of the voyage in this sense and meaning; that if you are to give the shipowner the profit that would have been earned by the current charter, you must take into account, on the other hand, the elements that would have to be considered before the profit was arrived at. The first thing which you would have to take into account would be the diminished value of the ship by reason of the wear and tear which arises when the value of the ship at the end of the voyage is ascertained; it does not mean the speculative value of what the ship would probably then fetch in the market if she were then sold and having regard perhaps to the demand for ships and their greatly increased price; it does not mean that at all, but it means that you have to take into account the diminished value of the ship by reason of the wear and tear of the voyage. In the judgment of Moulton, L.J. in *The Racine* (*ubi sup.*), which was quoted, he puts the matter in that way: "The date taken is the conclusion of the voyage. Setting aside other risks, the plaintiff, but for the collision, would at the end of the voyage have been in possession of the ship (diminished in value by the wear and tear of that voyage) and would have been in possession of the freight." In other words, in order to find the value of the charter you must see what the shipowner would have had to lose or provide in order to gain his freight. There would be the wages of the crew in the outward voyage; there would be in a steamship the bunker coal stores, and in every ship, whether a steamship or sailing ship, there would be an allowance for the wear and tear caused by the voyage. In my opinion, in the case of *The Kate* (*ubi sup*) and in the case of *The Racine* (*ubi sup.*) it is the amount of the deduction that has to be made for the wear and tear of the voyage that is in the mind of the court when the expression was used to take the value at the end of the voyage; in every case it means to take the diminished value by reason of having to make the proper allowance for wear and tear of the voyage.

Under these circumstances I am of opinion that the judgment of the learned President below was right when he said that "the right rule for arriving at the damages in the case of a total loss of a vessel under charter is to value the ship at the time of its destruction or loss, and to add to this the proper sum for freight or profits at the end of the voyage fixed by her existing charters, subject to proper deductions for contingencies and wear and tear." It is in that way that the value of the thing lost to the shipowner is arrived at; it is the value of the ship with her engagement which has to be valued; and that I think is really the view of the various judges before whom the matter has previously come. It was that view which Lord St. Helier, when Sir Francis Jeune, as President expressed in the case, where he said that the difference between the views of Dr. Lushington and Sir Robert Phillimore was more apparent than real. When Dr. Lushington indicated that the value of the vessel is to be taken at the time of the collision it does not drive out and exclude a cause such as the existence of a valuable charter from being allowed to increase the value of the vessel at that time; Sir Robert Phillimore said that the value should be taken as at the end of the voyage, and therefore lets in any profit or interest at additional compensation, and the result of the true calculation in figures should be practically identical. Figures can only be practically identical if they are worked out on the footing that I have suggested. If you have taken into account a speculative increase or decrease in the market value of the vessel at some place long after the collision, practically in almost every case the figures would be very different.

For these reasons I am of opinion that the judgment of the President is right, and the appeal should be dismissed.

Bankes, L.J.—I agree. I think that the view taken by the President of the authorities was quite right, and that this appeal fails. I think when the authorities are looked into it will be found that there is no authority for the proposition put forward by the appellants. It is quite true that in a number of cases, when dealing with the question of the damages to which the owner of a vessel which had been sunk in a collision was entitled, the learned judges have spoken of the rule of the Admiralty Court that the damages were the value of the ship at the end of the voyage, but when those authorities are looked into and the facts are ascertained, it seems plain to me that those learned judges have not used that expression in the sense contended for by counsel for the appellants—in the sense, that is to say, of the market value of the vessel if put up for sale at the end of her voyage. When the authorities

are looked into I think it will be found quite plainly that the expression has never been used to include anything more than the value of the vessel at the time of the collision plus any profit which she was in the act of earning at that time and plus any profit which under a contract or contracts existing at that time she was entitled to earn, after discounting, of course, those profits by an amount commensurate with the risk incurred in earning them.

Not only, in my opinion, is there no authority for the proposition, but it seems to me opposed to the first principles upon which the measure of damages in the case of collision should be ascertained, and I think that Moulton, L.J. in the case of *The Racine* (*ubi sup.*) put the matter on its right footing when he said that the rule of the Admiralty Court, of which so much has been said, was really a rule of convenience for accurately arriving at the amount of damage which the owner of a vessel has really sustained, rather than as a rule of principle by which those damages should in fact be arrived at.

On these grounds I think that the appeal fails.

A. T. LAWRENCE, J.—I am of the same opinion.

I think the proposition stated by the learned President which has been quoted by my Lord correctly states the rule of law in this case, and I do not think it is necessary for me to say anything—it has been read once and it accurately puts the proper rule. The very able argument of counsel for the appellants used, I think, the word "value"—of course it was his sheet anchor—as the value at the end of the voyage, but it was really using the word "value" in a different sense to that in which the judges used it who were delivering those judgments. The reason that the word "value" was taken as at the end of the voyage where the ship was under charter was that it had to be considered in order to get at the true amount that had to be credited for freight. The freight had to be taken into consideration as a credit, but that was not a gross credit because it was the total amount of freight, but it had to have a number of deductions made for the wages of crew, wear and tear, and other things unnecessary to enumerate, and, in order to bring those into view, the value at the end of the voyage was spoken of, and it was put as a debit against the ship, whereas really it probably ought to have been put as a debit against freight, and the net amount is credited to the ship under charter. I do not agree at all that any such allowance can be made if the ship is not under charter or engagement of some kind. The charter or engagement is just like a growing crop, it is like the destruction of a growing crop, and you have to take into consideration the value of the crop when it yields and after the expenses of getting it; in that way you would get the true amount of damages. But in this particular case it would result in an entire refusal of justice, because here the freight has already been paid, and if you look at the freight, the shipowner had got the freight in his pocket, and in assessing the damages due to him you have not got to look at the end of the voyage at all; it would be making the defendants pay, or probably creating the first step towards making them pay, twice over, because when he has got to settle with the cargo owner the cargo owner will be coming along and bringing that freight into account as a credit; so that you would completely destroy the proper assessment of the damage he would sustain. I am sure the case could not have been better put than it was by counsel for the appellant, and I do not think anyone can say that the rule is otherwise than it has been expressed by my Lord.

Solicitors for the appellants, the owners of the *Ben Lee*, *Weightman*, *Pedder*, and *Co.*, Liverpool.

Solicitors for the respondents, the owners of the *Philadelphia*, *Hill*, *Dickinson*, and *Co.*, Liverpool.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, March 9, 1917.

(Before Sir S. T. EVANS, President, and Elder Brethren.)

THE SAN ONOFRE. (*a*)

Salvage—Value of salved vessel—Vessel under charter—Affidavit of value—Appraisement of vessel.

A steamship rendered salvage services to another vessel. The salved vessel in the year that she was built had been chartered to time-charterers for a period of twenty-six years at a rate which gave a fair return on the original cost of the salved vessel. The market value of the salved vessel at the time she was salved was in excess of her original cost and of the value put upon her in the books of her owners. In the affidavit of value in a salvage suit her owners swore her value at her original cost less a sum for depreciation. The salvors objected to her value as sworn and, after getting an order for appraisement, she was appraised by the marshal at her market value.

Held, that the value which should be taken for the purpose of assessing the amount due to the plaintiffs for the services rendered was her market value; and that the contractual relationship between owners and charterers was not a matter which should be taken into consideration in ascertaining the value of the vessel for the purpose of ascertaining the amount due to the salvors.

Held, also, that, though an appraisement is conclusive, there may be instances where it may be varied on the ground of obvious mistake or some other ground.

SALVAGE SUIT.

The plaintiffs were the owners, master, and crew of the steamship *Ashtabula*; the defendants were the owners of the steamship *San Onofre*.

The action was brought to recover salvage for services rendered to the defendants' vessel between 29th Feb. and 18th March 1916, in the North Atlantic and in the harbour at Halifax.

The *Ashtabula* was a steel screw tank steamship fitted for the carriage of oil in bulk; she was of

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

7025 tons gross and 4526 tons nett register, and when she rendered the services was bound from Sabine, Texas, to London with a cargo of gas and fuel oil and was manned by a crew of forty hands. The value of the *Ashtabula* was 300,000*l.*, of her cargo 18,577*l.*, and the freight at risk was 52,962*l.*, making in all a value of 371,539*l.*

The *San Onofre* was a steel screw tank steamship of 9717 tons gross and 5968 tons nett register, and when the services were rendered to her she was bound from Rosyth to Tampico in water ballast. The *San Onofre* was a steamship which used oil fuel, and something having gone wrong with her machinery so that the fuel coagulated, she was unable to use it, and had lost all motive power. All the wood on board her had been burnt, and she was unable to send wireless messages or steer, as she could not be steered by hand, and it was impossible to raise steam for the purpose of steering her.

The services rendered consisted in the *Ashtabula* standing by, towing, and steering the *San Onofre* until another steamship, the *San Gregorio*, came up, when the *San Gregorio* towed the *San Onofre* while the *Ashtabula* steered her.

The defendants swore an affidavit of value in which they stated that the value of their vessel was 160,000*l.* The plaintiffs being dissatisfied with that valuation got an order for appraisement, and her value as appraised was 369,841*l.*

Laing, K.C. and *H. C. Dumas* for the plaintiffs.—They stated the values and pointed out that in the affidavit of value the defendants had alleged that the value of their vessel was 160,000*l.*

Dawson Miller, K.C. and *Lewis Noad* for the defendants.—The *San Onofre* was built in 1914. The contract price was 156,000*l.*, and there were certain extras which cost 6891*l.*, so that her total value to her owners when she was delivered to them was 162,891*l.* Her owners at once chartered her to the Eagle Oil Transport Company, Limited, and she was running under this charter when the services were rendered to her. The charter was to continue in force until Dec. 1930, and the rate of hire which was to be paid by the charterers to the owners was fixed at a sum which was a fair return upon the capital invested in the ship. The value of the vessel which originally cost 162,891*l.* now stood at 152,268*l.* in the books of the defendant company, 10,623*l.* having been written off her original cost for depreciation. Further, when the services ended on 18th March, all the available woodwork on the vessel had been burnt, and the owners had to spend 8000*l.* to repair her; she was thus worth to her owners less than 160,000*l.* The basis of valuation should be the value of the vessel in her damaged condition:

The Harmonides, 87 L. T. Rep. 448; 9 Asp. Mar. Law Cas. 354; (1903) P. 1;
The Hohenzollern, 95 L. T. Rep. 585; 10 Asp. Mar. Law Cas. 296; (1906) P. 339.

[THE PRESIDENT.—Are you entitled to go behind the appraisement?] The appraisement is not conclusive:

The Oscar, 2 Hagg. 257;
The Hohenzollern (*ubi sup.*).

The appraisement was made by Kellock and Co. on behalf of the marshal, but they had apparently appraised her upon the assumption that she was a free vessel, but as under the charter under which she was running until 1930 she could only earn 24,000*l.* per annum, she could not take advantage of the existing rates of freight, and was only worth to her owners the sum that had been sworn to in the affidavit. A letter had been written to the marshal stating that, though the appraisement was not questioned, if the ship was regarded as a free ship, yet, as she was under contract to run at a fixed rate of freight until 1930, there should be a further appraisement. The marshal, however, had refused to make a further appraisement.

Laing, K.C. in reply.—The value which should be taken into consideration is the value at the termination of the services. The appraisement is conclusive. Except in cases of fraud or misconduct the appraisement should not be reopened. Reference was made to

The Georg, 71 L. T. Rep. 22; 7 Asp. Mar. Law Cas. 476; (1894) P. 330;
Cargo ex Venus, L. Rep. 1 A. & E. 50;
R. M. Mills, 3 L.T. Rep. 513.

The value of the ship *qua* the salvors is not affected by the contractual obligations of the owners. The property salved is the *res* and not the bare interest of the legal owner of the ship. The salvors are entitled to be paid on the real value of the vessel, that is her market value. The fact that her owners had entered into an unremunerative charter should not be allowed to affect the amount of the award to be paid to the salvors.

THE PRESIDENT.—In this case the salved ship was valued by the owners at the sum of 160,000*l.* The salvors were not satisfied with that valuation, and obtained an appraisement by the marshal of the Court. The result of the appraisement is that the value of the ship is stated to be more than double the figure given by the owners of the vessel themselves.

I allowed counsel for the defendants to make an application in this case as if he were making a motion to the court on proper materials to vary or set aside the appraisement of the marshal. It is only in very exceptional cases that can be done, because, ordinarily speaking, where there has been an appraisement by the marshal of the court, the appraisement is conclusive on the point. I will not say, having referred to the cases, that there may not be instances where there may be an obvious mistake or some other ground for varying the appraisement.

In this case the ground upon which the motion is founded is this: counsel for the defendants says that this vessel cannot be looked at as an ordinary vessel at all, but must be looked at, having regard to the contractual obligations which have been entered into by some extraordinary arrangement between the shipowners and the charterers. In no case, so far as I am informed, has the value of the charter been taken into account in assessing the value of the salved ship in salvage proceedings, and I think it would be a great pity from all points of view if there should be introduced into valuations any element of that kind, which would make a reference to the registrar and merchants necessary in order to ascertain the value.

The ship is salved and is arrested, as the salvors are entitled to arrest the *res*. If bail is not given the ship may be sold. She would not be sold subject to the charter-party, but sold as she is to anyone who wants to buy a ship of her description.

In this case there was an undertaking given to give bail in ordinary form, and the writ as issued is directed to the owners of the *San Onofre*, her cargo and freight, and all persons interested in that vessel. I have nothing to do with the relationship between the shipowners and the charterers, nor in my opinion have the salvors anything to do with any such question. In my judgment the valuation of the gentleman in structed by the marshal to make the valuation on his behalf was a valuation properly arrived at and based on the right principle. The value of the ship for the purposes of these proceedings, therefore, must be taken to be 369,841*l.* 18*s.* 3*d.*

The salvage case was then heard, and the President made the following award: To the owners of the *Ashtabula* 32,000*l* ; to her master 1000*l.* ; and to her crew 3550*l.*, making a total award of 36,550*l.*

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

Solicitors for the defendants, *W. A. Crump* and *Son.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Feb. 21, 1917.

(Before BAILHACHE and ATKIN, JJ.)

HARRISON *v.* MICKS, LAMBERT, AND CO. (*a*)

Sale of goods—Contract—Construction—Sale of "remainder of cargo"—Estimate of quantity by seller—"More or less about" specified quantity—Miscalculation of seller—Excess—Liability of purchaser to take excess.

H. was an importer of wheat. He imported a certain quantity of wheat from Canada in a specified vessel, and stored the same in a warehouse in England. After selling a part of the cargo to various buyers, including M., he entered into a contract with M. to sell to him the whole of the remainder of the cargo. The contract was made verbally in the first instance, but it was afterwards reduced to writing, and by the terms of the contract H. agreed to sell to M. "the remainder (more or less about) 5400 quarters Manitoba wheat at Hull ex," naming the vessel. H. had made a miscalculation as to the quantity of wheat which remained, and, in fact, there was an excess of 574 quarters over the 5400 quarters made. The contract was subject to the rules and regulations of the H. Corn Trade Association, and one of these terms was that "the word 'about' when used in reference to quantity shall mean within 5 per cent. over or under the quantity stated." H. contended that M. was compelled to take the whole of the remainder of the cargo, even though it exceeded the 5400 quarters named; whilst M. maintained that in any case, if he was compelled to take more than the 5400 quarters, the excess over 5400 quarters for which he was liable did not exceed 270 quarters—that is, 5 per cent. on the 5400 quarters. The case having gone to arbitration under the rules and regulations of the H. Corn Trade Association, a special case was stated for the opinion of the High Court as to the true meaning of the contract.

Held, that the words "(more or less about) 5400 quarters" were merely words of estimate and did not place any limitation upon the quantity of wheat to be delivered; that the governing word of the contract was "remainder," which referred to the remainder of the cargo; and that the buyers were bound to take the whole of the remainder of the cargo from the seller, even though the amount was greatly in excess of the estimated quantity.

SPECIAL case, stated by the appeal committee of the Hull Corn Trade Association, under sect. 19 of the Arbitration Act 1889.

The facts of the case, as set out by Bailhache, J. in his judgment, were shortly as follows: Thomas Harrison was a corn merchant carrying on business at Liverpool, and in the course of his trading he imported a cargo of wheat into Hull in a vessel called the *Clodmore*. The bulk of the wheat was stored in a warehouse at the Hull docks belonging to the North-Eastern Railway Company. Part of the cargo of wheat was sold on different occasions to various persons, and included amongst the buyers were Messrs. Micks, Lambert, and Co., who were corn merchants carrying on their business at Hull. A portion of the wheat still remained in the Hull warehouse on the 27th April 1916, and on that date Messrs. Micks, Lambert, and Co. verbally agreed with Mr. Thomas Harrison to purchase from him the remainder of the cargo, which the seller estimated at 5400 quarters. It was expressly stipulated by the buyers that they should have the "remainder" of the cargo, and this was confirmed by a letter of the seller to the buyers, dated the 27th April 1916, in which the seller stated that he sold "the remainder of the cargo (more or less about) 5400 quarters Manitoba wheat . . . at Hull ex *Clodmore*." The buyers accepted delivery of 5400 quarters. Subsequently the seller, Mr. Harrison, discovered that he had made a mistake in calculating the amount of the wheat, and that he had, in fact, 5974 quarters left—that is, 574 quarters over and above the 5400 quarters which he had imagined. He thereupon called upon the buyers to take and to pay for these additional 574 quarters, his contention being that, as the buyers had contracted to take the "remainder" of the cargo, they were compelled to purchase the additional amount, as this was a part of the remainder, and were not limited to 5400 quarters, the amount named in the contract. The buyers, on the other hand, contended that the word "remainder" was governed by the words "about 5400 quarters"; that they could not be compelled to take anything beyond "about 5400 quarters," and that the excess over 5400 quarters must be held by the seller on his own account. The seller admitted that the mistake

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

was entirely owing to a miscalculation on his own part. The contract was in the ordinary printed form of the Hull Corn Trade Association, clause 3 of which provided: "The word 'about' when used in reference to quantity shall mean within 5 per cent. over or under the quantity stated." In view of that clause the buyers contended that if they were compelled to take anything over and above the 5400 quarters, the utmost they could be called upon to accept would be 270 quarters—that is, 5 per cent. on 5400 quarters. The dispute was referred to arbitration, in accordance with the rules of the Hull Corn Trade Association, and the arbitrators submitted the following questions for the opinion of the High Court:

(1) Whether on the true construction of the contract the buyers were liable to take delivery of the whole of the remainder of the wheat, even though the amount exceeded the estimate of 5400 quarters; and

(2) Whether the buyers were bound to take any of the excess over 5400 quarters.

Greer, K.C. and *Keogh* for the seller.—The buyers were liable to take the whole of the cargo of wheat which remained on the hands of the seller, and the seller was entitled to damages for the non-acceptance of the extra 574 quarters of wheat. The contract was for the "remainder" of the wheat. This was a specific quantity, a quantity capable of being ascertained. Even though the excess had been much greater than 574 quarters, still the buyers would have been bound to take the same. The word "remainder" was the controlling word in the contract, whilst the words "(more or less about) 5400 quarters" were words of estimate, and not of limitation. If the buyers had wished to limit their purchase to 5400 quarters, or something closely approximating thereto, what was the object of using the words "remainder of the cargo" at all? The buyers purchased the whole of the cargo less that part which had been disposed of by previous sales. They cited

Borrowman v. *Drayton*, 35 L. T. Rep. 727; 2 Ex. Div. 15;
McLay and Co. v. *Perry and Co.*, 44 L. T. Rep. 152;
Levi v. *Berk*, 2 Times L. Rep. 898;
Tancred, Arrol, and Co. v. *Steel Company of Scotland*, 62 L. T. Rep. 738; 15 App. Cas. 125.

Wallace, K.C. and *Dunlop* for the buyers.—The contract on the part of the buyers was for the purchase of a quantity of wheat which was to be about 5400 quarters. The seller purported to sell the remainder of the cargo, and he himself had estimated the amount. It was unreasonable to imagine by the use of a particular term a seller could be compelled to purchase something so much in excess of what had been named as the probable amount. The seller must be taken to know how much he had to sell, whilst the buyer was entirely in the seller's hands. The word "remainder" was limited by the words "(more or less about) 5400 quarters," and what the buyers could be called upon to take was about 5400 quarters, the word "about" limiting the amount over or under to 5 per cent. of the estimated amount in accordance with clause 3 of the contract. They cited

Cross v. *Eglin*, 2 B. & Ad. 106;
Morris v. *Levison*, 34 L. T. Rep. 576; 1 C. P. Div. 155;
Bowes v. *Shand*, 36 L. T. Rep. 857; 2 App. Cas. 455;
Reuter and Co. v. *Sala and Co.*, 40 L. T. Rep. 476; 4 C. P. Div. 239;
Varley v. *Whipp* (1900) 1 Q. B. 513;
Miller v. *Borner and Co.*, 82 L. T. Rep. 258; (1900) 1 Q. B. 691;
Heilbut, Symons, and Co. v. *Buckleton*, 107 L. T. Rep. 769; (1913) A. C. 513;
Sale of Goods Act 1893 (56 & 57 Vict. c. 71), ss. 13, 30;
Benjamin on Sale, 5th edit., p. 709.

BAILHACHE, J. stated the facts and proceeded.—The question that is raised in the case is simply this: What is the true construction to be placed upon the words of the contract entered into between the seller and the buyers on the 27th April 1916? Or to put it more shortly, is this a contract under which the buyers are bound to take delivery of the remaining 574 quarters of wheat, the rest of the cargo, that is, of the quantity over and above the estimated amount of 5400 quarters? Now the words used are "the remainder (more or less about) 5400 quarters Manitoba wheat . . . at Hull ex *Clodmore*." In my view the words "(more or less about) 5400 quarters" are words of estimate only, and do not mean that the buyers are to be limited to that amount, with a possible 5 per cent. margin either way. What the buyers purchased and what the seller sold was the "remainder" of a certain cargo, and that means that the buyers were liable to take the quantity of wheat, whatever it was, which was still in the hands of the seller from the cargo of the *Clodmore*. I do not see how it would be possible for us to hold otherwise without departing from the reasoning in the cases of *Levi* v. *Berk* (*ubi sup.*) and *Borrowman* v. *Drayton* (*ubi sup.*). In the case of *Levi* v. *Berk* (*ubi sup.*) it was held that where a buyer contracted for a "cargo" and mentioned the quantity (unless there was a clear intention shown of something to the contrary) the governing word was "cargo," and the buyer was bound to take the cargo, whatever its quantity might be. There the difference between the estimated quantity of the cargo and the real amount was proportionately much greater than in the present case—the estimated cargo being 450 tons and the real cargo 341 tons. In giving judgment Lord Esher, M.R. said: "No doubt the difference in quantity was serious and considerable, but it did not appear that there was any fault or default in not obtaining a full cargo, or that the party did not obtain all that he could, and in the ordinary view of such documents there was not a total failure in the performance of the contract. Effect must be given to the word 'cargo,' without requiring the quantity specified, and where the buyer contracted for a 'cargo' and mentioned the quantity (unless something plainly showed the contrary to be intended), the governing word was 'cargo,' and the buyer was bound to take the cargo whatever its quantity might be." Following the reasoning and applying the decision of *Levi* v. *Berk* (*ubi sup.*) to the present case, I am of opinion that the proper construction to be placed upon the contract of the 27th April 1916 is that the whole of the remaining part of the cargo of the *Clodmore* was being dealt with by the parties, and not merely a portion of it, even though there were the words "(more or less about) 5400 quarters" used in

estimating what the remainder of the cargo might amount to.

The case of *Borrowman* v. *Drayton* (*ubi sup.*) is the opposite of that of *Levi* v. *Berk* (*ubi sup.*), in that the supply was greater than the estimated amount. But the line of reasoning is the same. In the case of *Borrowman* v. *Drayton* (*ubi sup.*) the contract was for a cargo of from 2500 to 3000 barrels. The total number of barrels in the cargo turned out to be 3300 barrels—300 in excess of the estimated quantity. It was held, nevertheless, that the buyer was entitled to the whole of the cargo which was in fact carried. In delivering the judgment of the court Mellish, L.J. said: "Generally speaking, the term 'cargo,' unless there is something in the context to give it a different signification, means the entire load of the ship which carries it, and it may fairly be assumed that when one man undertakes to sell and another to buy a cargo, the subject-matter of the contract is to be the entire load of the ship. And that such must have been the sense in which the term 'cargo' is used in this contract is materially strengthened by the agreement that the vessel shall proceed to a port of discharge to be determined, within certain limits, by the buyer, showing plainly that what was contemplated was that the vessel and its entire cargo were to be at his disposal. There are various reasons why a purchaser may wish to buy the whole quantity of goods loaded on board a particular vessel. Such a contract gives him the complete control of the vessel. It enables him to select the port of discharge, to appoint the place in the port at which the discharge is to take place, to be free from the inconvenience of other persons' goods being unloaded at the same time with his own, and from the competition arising from other persons' goods being ready for sale at the same place and at the same time with his." It will be noticed that various reasons are given for arriving at the decision in that particular case, but all through the judgment it is clear that the words "the cargo" were taken as those which ruled the contract. I think that the rule which was applied in *Borrowman* v. *Drayton* (*ubi sup.*) is applicable in the present case, and therefore I hold that the governing and ruling words are "the remainder of the cargo."

The conclusion at which I have arrived is strongly borne out by the decision in the case of *McLay and Co.* v. *Perry and Co.* (*ubi sup.*), where the parties were dealing with a heap of scrap iron. The estimate of the heap turned out to be quite wrong, the quantity of scrap iron being much less than it was thought to be. It was held, however, that the parties were really dealing with the heap and that the fact that the estimate of the quantity in the heap was incorrect was quite immaterial.

The result is that we must answer the questions put to us in accordance with what I have already stated to be my opinion—namely, that since the contract entered into between the parties was for the remaining portion of the cargo of the *Clodmore*, whatever it might amount to, and even though it had been estimated at about 5400 quarters of wheat, the buyers are bound to take the extra 574 quarters.

ATKIN, J.—I agree. It is difficult to lay down a general and universal rule, and I think that in all cases of this character one has to examine the wording of the particular contract and then construe it. But in construing it one must apply the ordinary rules of construction and try and give to the words used their reasonable and ordinary meaning. In a commercial contract for the sale of goods it is quite usual to define the subject-matter, after the description of quality, in terms of quantity. On the other hand, however, it is not at all uncommon to define the subject-matter of the sale by reference to attributes other than mere quantity, for example, by relation to its locality, ownership, manufacture, or other respect. And if all these matters are brought into the terms of the contract effect must be given to them. Now let us see what are the matters imported into the present contract. The contract begins by saying that the seller has sold the "remainder" of something, and, omitting for a moment the words as to quantity, that would mean the remainder of the Manitoba wheat which had formed the cargo of the *Clodmore*. That seems to be a description of the subject-matter so far as the amount is concerned. It is not expressed in the ordinary terms of quantity by reference to weight or number. But after the word "remainder" there come these words "(more or less about) 5400 quarters." Now, as it seems to me, the clear intention of the parties was that the sale should be of the whole of the remaining portion of the cargo of wheat carried in the *Clodmore*, and that the additional words introduced into the contract are by way of estimate only. In my view nothing could more clearly point to something in the nature of an estimate than the use of such words as "more or less" or "about," and when once it has been defined what the contract is to be, as here—namely, the sale of the remainder of a cargo of wheat—I do not see, in the light of the authorities which have been cited, how it can be held that the words in question limit the amount at all.

It is true that an objection may be made on the score that a person who purchases upon such terms as the present may not know exactly what he is buying, that on the purchase of a "remainder" he may have no very definite idea how much that remainder may amount to. But there is always a remedy which the purchaser may adopt so as to prevent his being compelled to buy within large limits. It is quite possible for words to be inserted in the contract such as "not exceeding" or "not less than," and then, if the quantity is named, the subject-matter is absolutely defined. But that has not been done in this case. Seeing that there is not the slightest allegation of misrepresentation or of any other circumstance which might entitle a purchaser to repudiate the contract, and that the purchasers have taken delivery of the greater part of the remainder of the cargo, I think that the buyers must take the 574 quarters—or whatever the quantity over the 5400 quarters may amount to—and that our answer to the questions put to us by the arbitrators must be to that effect.

Case remitted, with questions answered in favour of seller.

Solicitors for the seller, *Rawle, Johnstone,* and *Co.*, for *Laces, Wilson,* and *Co.*, Liverpool.

Solicitors for the buyers, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

March 5, 6, and April 4, 1917.

(Before SANKEY, J.)

NEWSUM *v.* BRADLEY. (*a*)

Bill of lading — Contract of affreightment — Abandonment by crew—Resumption of possession by cargo-owner—Effect on contract of affreightment.

The abandonment of a vessel by its crew during a voyage, without any intention to retake possession, gives the cargo-owner the right to treat the contract of affreightment as at an end.

The plaintiffs were the indorsees of bills of lading signed on behalf of the defendants, the owners of the ship J., for the carriage of a cargo of wood goods therein specified to be delivered in good order and condition at Hull on payment of freight as per charter-party. The J. duly proceeded on her voyage, but while off the coast of Scotland she was attacked by a German submarine and the crew were compelled to take to their boats under threats from loaded revolvers. The enemy placed bombs on board the vessel and exploded them, and the last the crew saw of the vessel led them to believe that she was sinking. Subsequently, however, the vessel was found a waterlogged derelict and towed into port, where she was taken possession of by the Receiver of Wreck. On the same day the cargo-owners claimed to elect to take possession of their property where the steamer then was.

Held, that the defendants had abandoned the further performance of their contract during the voyage, and, the cargo-owners having exercised their rights before the shipowners had resumed possession of the vessel, the contract of affreightment was at an end. The plaintiffs were therefore entitled to take their cargo free of freight.

TRIAL of action in the Commercial list before Sankey, J.

In this action the plaintiffs claimed a declaration that they were entitled to take delivery of the cargo in the steamship *Jupiter* at Leith, of which vessel the defendants were the owners, free of freight, and an order that the defendants do permit the said cargo to be taken by the plaintiffs free of any liens or charges thereon.

The plaintiffs were indorsees of bills of lading dated Archangel, Sept. 1916, signed on behalf of the defendants, the owners of the steamship *Jupiter*, for the carriage of the cargo of wood goods therein specified from Archangel, such cargo to be delivered in like good order and condition at Hull on payment of freight as per charter-party dated the 18th July 1916. The *Jupiter*, while proceeding on the voyage, was attacked by enemy submarines on the 7th Oct. 1916, and the master and crew took to their boats and abandoned the vessel, and were landed on the 8th Oct. 1916. The enemy exploded a bomb on the starboard quarter of the *Jupiter*, making a large hole, and also removed the door of the condenser and opened all the sea-cocks and left her in a waterlogged and derelict condition. In that condition she was picked up by vessels of His Majesty's patrol flotilla, which eventually towed her with great difficulty into port, as salvors, where she arrived on the 10th Oct. 1916, was beached on the 11th Oct., and placed in the hands of the Receiver of Wreck.

The plaintiffs thereupon, by wire, claimed delivery of the cargo to them. They claimed that in the circumstances the defendants entirely abandoned the prosecution of the said voyage and put an end to the bill of lading contract and abandoned all lien over the cargo.

The defendants denied that they had abandoned the *Jupiter* or the prosecution of the voyage as alleged, and they denied that they put an end to the bill of lading contract and abandoned all lien over the said cargo, or that they were guilty of any breach of contract or duty. They alleged that while the *Jupiter* was in the course of her voyage to Hull she was attacked by an enemy submarine, her crew were compelled under peril of their lives to leave her and take to their boats, and thereafter were towed away from their vessel by the said submarine after the crew of the said submarine had taken means to cause the *Jupiter* to sink. They also alleged that immediately the defendants became aware that the *Jupiter* had not sunk, but was salved and beached, they attempted to take possession of the vessel and her cargo in order to complete the voyage to Hull, and, as soon as the plaintiffs withdrew their notice to the Receiver of Wreck, the defendants carried the goods to Hull and delivered them there in accordance with their contract. The defendants relied on the conditions and exceptions in their bills of lading and particularly on the following: "The King's enemies, restraints of princes and rulers, pirates . . . always excepted."

The defendants counter-claimed 18,236*l.* 9*s.* 7*d.* for freight.

The plaintiffs joined issue and claimed that the voyage had been finally abandoned by the defendants, and the latter were therefore not entitled to claim to retake possession of the cargo or to claim freight. They denied that the defendants carried the goods to Hull or delivered them there in accordance with the contract. In so far as the defendants did carry the cargo and deliver it at Hull, it was done in accordance with an agreement dated the 26th Oct. 1916, and was without prejudice to the plaintiffs' rights or to the matter in issue in the action. In any event the defendants did not deliver at Hull the quantity alleged in the counter-claim.

A. A. Roche, K.C. and *R. A. Wright*, for the plaintiffs, cited

The Kathleen, 4 Ad. & E. 269;
The Cito, 4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 Prob. Div. 5;
The Arno, 72 L. T. Rep. 621.

MacKinnon, K.C. and *Lewis Noad* for the defendants.

Cur. adv. vult.

April 4.—SANKEY, J. read the following written judgment:—In this case the plaintiffs claim that they are entitled to take delivery of a cargo in the steamship *Jupiter* free of freight. The defendants deny that the plaintiffs are so entitled, and counter-claim for the freight, a sum of about 18,000*l.*

The facts are as follows: The plaintiffs are the indorsees of bills of lading dated Archangel,

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

Sept. 1916, and signed on behalf of the defendants, the owners of the *Jupiter*, for the carriage of a cargo of wood goods therein specified to be delivered in good order and condition at Hull on payment of freight as per charter-party dated the 18th July 1916. The *Jupiter* duly proceeded on her voyage, but while off the coast of Scotland she was attacked by a German submarine upon the 7th Oct. The enemy compelled the crew to take to their boats under threats from loaded revolvers. They then placed bombs on board the vessel, exploded them, and proceeded to tow the crew towards land, but cast them off after going a certain distance. The last the crew saw of the vessel led them to believe that she was sinking. They were picked up by a trawler and taken into Aberdeen, where the captain telegraphed to the owner on the 8th Oct., "Ship sunk yesterday; submarine; arrived all well; sailors' home."

Owing to the fact, however, that the cargo was of wood, the efforts to sink the ship were unavailing. She was found a waterlogged derelict and towed by patrols of His Majesty's navy with great difficulty into port, but her condition was such that it was found necessary to beach her, and she was taken possession of on the 11th Oct. by the Receiver of Wreck, to whom the salvors handed her over. At 3.30 of the same afternoon the plaintiffs' solicitors telegraphed to the receiver to the following effect: "Receiver of Wreck, Leith.—Steamer *Jupiter*.—We represent owners cargo. Understand she is now lying at Newhaven. Please note our clients claim elect take possession their property where steamer now is. Please do not allow cargo to be dealt with except with our sanction. Please do anything necessary protect property for our clients." The owner of the vessel at Hull heard the same day that she had been salved, and he received a telegram from the plaintiffs' solicitors, about 2.45 in the afternoon, saying: "*Jupiter*. We represent owners cargo of this steamer recently brought into Leith derelict. Our clients elect take possession their property where now lying. Please note." The owner left for Leith that evening, went down to the beach at Newhaven as soon as he reached that place, but could not get aboard. The following morning he saw the senior naval officer, told him he had come for the ship, and said: "I am glad to have her back." The officer replied: "You have not got her back; she belongs to the Receiver of Wreck." The owner was sent on board in a torpedo boat and left behind an engineer to represent him. By arrangement between the parties the vessel eventually proceeded to Hull and delivered her cargo, but this was done without prejudice to their rights on the 12th Oct., and it falls to me to decide what those rights were.

A number of cases were cited to me, including *The Cito* (4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 Prob. Div. 5) and *The Arno* (72 L. T. Rep. 621).

The law as laid down in those cases is that the abandonment of a vessel by its crew during a voyage, without any intention to retake possession, gives the owner of the cargo on board the right to treat the contract of affreightment as at an end. It may happen that after abandonment of a vessel its owner resumes possession before the cargo-owner exercises his right to treat the contract as at an end, and the legal effect of such a resumption has never yet been decided. The point, however, does not arise in this case, for I find as a fact that, if the circumstances here show an abandonment of the vessel, the cargo-owners exercised their right to put an end to the contract before the owner resumed his possession. The point for decision is whether there was an abandonment under the circumstances. In my view that is a question of fact. The learned counsel who appeared on behalf of the defendants contended that an abandonment of the vessel was not necessarily a repudiation of the contract of affreightment, and that the defendants must have been guilty of conduct from which it might be inferred that they intended to repudiate the contract.

In the present case the master and crew abandoned the vessel under stress of enemy violence, but I do not think that this is different from a master and crew abandoning the vessel under stress of the violence of the weather, as was the case in *The Cito* (*ubi sup.*). The vessel was left as a derelict upon the face of the waters. She was waterlogged and, when the crew last saw her, was believed to be sinking; in fact, the first act of the master on landing was to telegraph that she had sunk. There is no suggestion that the abandonment was wrongful, an event which might not put an end to the contract of affreightment as suggested by Lord Esher in the *Cito*. In my view there was in fact an abandonment of the vessel, and there was, on the part of the servants of the owner, an act done clearly indicating their intention not to carry out the contract; in other words, that there was the predicament mentioned by Smith, L.J. in *The Arno* (*ubi sup*) of a ship left derelict in mid-ocean and abandoned by its master and crew.

In the result I find that the defendants did not complete their contract, but abandoned the further performance of it before the vessel reached Newhaven. A similar case came before Bargrave Deane, J. in 1915 in respect of a vessel which had been torpedoed off the south-west coast of England, *The W. S. Caine* v. *Bellglade*, reported in Lloyd's List on the 3rd Aug. 1915, where the Court of Appeal upheld Bargrave Deane, J. in the conclusion he came to that the vessel had been abandoned.

My judgment therefore is for the plaintiffs for the relief claimed. Should this case be taken to the Court of Appeal and my judgment be reversed, I find that the amount due to the defendants on their counter-claim is 14,050*l.* 2*s.* 9d.

Solicitors: *William A. Crump* and *Son*; *Downing, Handcock, Middleton*, and *Lewis*.

Judicial Committee of the Privy Council.

May 21 *and July* 3, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

STEAMSHIP PRINZ ADALBERT (PART CARGO EX). (*a*).

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize—Cargo—Claim by neutrals—Passing of property—Bills of lading—Onus on claimants.

The claimants, an American firm, shipped lubricating oil by a German steamer to a German firm at Hamburg in July 1914. *On the* 5*th Aug.* 1914 *the vessel was seized at Falmouth. The oil was alleged to have been shipped to the German firm for sale as claimants' agents. The bills of lading made delivery to the shippers' order at Hamburg and were indorsed in blank, and were attached to drafts drawn by the claimants on the Hamburg firm and discounted in the United States. The discounting bank forwarded the documents to Germany. Ultimately the Hamburg firm returned the bills of lading to the claimants, and debited them with the amount of the drafts.*

Held, that as by the general mercantile practice, which had the force of law, the delivery of an indorsed bill of lading was, in the absence of evidence of a contrary intention, effectual to transfer of ownership, the property in the goods passed at the date of the acceptance of the drafts. The claimants had failed to discharge the onus upon them of showing that they were the owners of the oil either at or after the date of its seizure, and the oil had rightly been condemned as good and lawful prize.

Decision of Sir Samuel Evans, P. affirmed.

APPEAL from a decree of Sir Samuel Evans, P., dated the 6th April 1916, condemning as good and lawful prize a quantity of lubricating oil claimed by the appellants, the Crew Levick Company of Philadelphia, and consigned by them to a German firm in Hamburg.

Greer, K.C. and *C. R. Dunlop* for the appellants.

Sir *Frederick Smith* (A.-G.) and *Rayner Goddard* for the respondent.

The considered decision of their Lordships was delivered by

Lord SUMNER.—When the German steamship *Prinz Adalbert*, bound from Philadelphia to Hamburg, was seized as prize at Falmouth on the 5th Aug. 1914, she had on board the two parcels of lubricating oil, respectively 290 and eighty-six barrels, which are now in question. The writ was issued on the 18th Aug. 1914.

The appellants, the Crew Levick Company of Philadelphia, neutral shippers, filed a claim, dated the 1st April 1916, alleging the oil to be their own and saying that they had shipped and consigned it to the Maschinen Oel Import Gesellschaft of Hamburg, as their agents for sale on the Continent of Europe, and that, as it had never passed to any purchaser, it had always continued to belong to them. The learned President decided that the oil had ceased to belong to the appellants on shipment. Neither the actual shipping documents nor the dates of the acceptances to the accompanying drafts appear to have been brought to his attention. At their Lordships' bar the appellants' arguments made these dates crucial. The learned President was strongly and justly impressed by the absence of proper evidence of the prior course of dealing between the shippers and the consignees. The appellants petitioned their Lordships for leave to remedy this defect, but their Lordships refused to grant it for reasons of principle already given.

Both parcels were covered by bills of lading, which made the oil deliverable to the shippers' order at Hamburg and were indorsed in blank by an officer of the claimant company. The bills of lading and certificates of insurance were attached to drafts, drawn by the claimants on the Maschinen Oel Import Gesellschaft and discounted in the United States, namely, a sixty days' draft for 75 per cent. of the invoice value of the 290 barrels, and a draft at three days' sight for the full value of the eighty-six barrels. The discounting bank forwarded the documents to Germany. The draft drawn against the eighty-six barrels reached Hamburg on or before the 1st Aug. 1914, on which date it was accepted by the Maschinen Oel Import Gesellschaft against surrender of the bill of lading. The other draft was accompanied by a bill of lading of the same date, namely, the 20th July, and the evidence does not show any sufficient reason to suppose that it was not forwarded by the same mail. The appellants contended that it was not accepted till the 10th Aug., though no reason for this difference could be given. This bill of lading also was handed over to the Maschinen Oel Import Gesellschaft against acceptance of the corresponding draft, and ultimately that company returned both bills of lading to the claimants at Philadelphia. Presumably they also met both bills of exchange when they fell due, for the amounts are debited against the appellants in a quarterly account current, brought down to the 30th Sept., which they rendered to the claimants on the 28th Nov. It does not appear that the claimants have either paid or otherwise settled the debit balance shown on this account, and, as the evidence leaves the matter, they have received the proceeds of the two bills of exchange, less discount, in Philadelphia, have neither paid nor agreed to pay to the acceptors the amounts of those bills, and have got back the bills of lading from the acceptors, without conditions or explanation, and so, presumably, for the acceptors' account.

By general mercantile understanding, which has the force of law, where transactions originate like the present in time of peace, without prospect of war, the delivery of an indorsed bill of lading, made out to the shipper's order, while the goods are afloat, is equivalent to delivery of the goods themselves, and is effectual to transfer ownership if made with that intention. The bill of lading is the symbol of the goods. Apart from specific formalities or similar prescriptions of municipal law, which are not now material, such intention is a question of fact. The usual course of dealing in the export of merchandise, and the interest of the parties concerned in it, suffice for the necessary inference in the absence of evidence to the contrary. When a shipper takes his draft, not as yet

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

accepted, but accompanied by a bill of lading indorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods which the bill of lading represents security for its payment. If, in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorises and directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done. Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction, the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted.

Their Lordships are unable to agree with the learned President's view that the property in the oil in question passed on shipment. In their opinion the claimants were owners until the Maschinen Oel Import Gesellschaft accepted the drafts drawn against the two parcels respectively, but no longer. Such is the true inference from the mercantile transactions themselves.

Sundry communications were produced, either requesting that the shipment should be made or advising that it had been made, but they are neutral in their effect; nor is it material to consider how the transaction might be worked out after the drafts had been accepted. This depends on arrangements between the parties, which are not properly proved, and the transfer of the ownership in the oil on the acceptance of the drafts is consistent either with a sale to the German company and a resale by them to German customers, or with some agency arrangement, under which they might debit the amount of the drafts paid and credit the proceeds of their sales to the claimants, and obtain their own remuneration by charging an agreed commission.

It follows that the eighty-six barrels had ceased to belong to the claimants, and had become the property of the Maschinen Oel Import Gesellschaft on the 1st Aug. How stands the other parcel? The date when the draft drawn against it was accepted depends upon an entry in the quarterly account above mentioned. That account was prepared for the purpose of showing a general balance on the 30th Sept. 1914. The acceptance transactions are only incidents in it. The dates of the acceptances are immaterial to the account, which, of course, reckons interest from the dates of payment, and are of small value even for the purpose of identifying the acceptances, which are sufficiently described by their amounts. The document is not proved, nor is it sufficient to discharge the onus, which is on the claimants. Even if the larger parcel of oil differs in its circumstances from the smaller one, at any rate it ceased to belong to the claimants before they came into court to prove a claim as owners, and so their title fails. The probability is that there is no difference between the two parcels, and that the date of acceptance to the larger draft ought to be the 1st Aug. and not the 10th Aug. That both drafts should have been accepted together is natural, but that one, and that the larger of the two, should have been refused acceptance for over a week, and then have received it, is a very difficult supposition. If nothing else was known of the *Prinz Adalbert*, on the 10th Aug., at least, it was known that she was considerably overdue. Capture was, at any rate, a reasonable explanation of her non-arrival. It may well have been that, having, as the appellants' case says, "called at Falmouth after her master heard of the outbreak of war between France and Germany," she was already known in Hamburg before the 10th Aug. "to have been seized as prize by the officer of customs at Falmouth." If so, acceptance of the draft on the 10th Aug. is most improbable. Their Lordships, however, cannot act upon conjecture, and as the original exhibit bears the date of the 10th Aug. they have accepted it, and are content to say that as the claimants failed to prove their right to the goods when they came before the court as owners, their appeal must also fail.

Accordingly their Lordships, being of opinion that the claimants were not owners of either parcel at or at any time after the commencement of the proceedings in prize in this case, will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants, *Pritchard* and *Sons*.

Solicitors for the respondent, *Treasury Solicitor*.

July 19 *and Aug.* 3, 1917.

(Present: The Right Hons. Lord PARKER OF WADDINGTON, Lord WRENBURY, Sir SAMUEL EVANS, and Sir ARTHUR CHANNELL.)

THE SUDMARK. (*a*)

ON APPEAL FROM THE SUPREME COURT (IN PRIZE), EGYPT.

Egypt—Prize Court—Prize permitted to remain in neutral port—Breach of international agreement—Condemnation—Suez Canal Convention 1888, *arts.* 1, 4, 6, 9.

Where a neutral Power has permitted a prize to remain in one of its ports longer than is warranted by international law or international agreement, a Prize Court on that account has no power or duty to release the prize.

APPEAL by the Hamburg-Amerika Linie of Hamburg from a decree of the Supreme Court for Egypt in Prize, dated the 5th Feb. 1915, whereby their steamer the *Sudmark* was condemned as lawful prize upon an application by the present respondent, His Majesty's Procurator

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

in Egypt, asking that the vessel should be delivered up to the Crown.

Sir *Erle Richards*, K.C. and *Dunlop* for the appellants.

Sir *Frederick Smith* (A.-G.) and *W. M. Geldart* for the respondent.

The considered opinion of the board was delivered by

Lord PARKER OF WADDINGTON.—A German vessel being on a voyage from Colombo to Antwerp *viâ* the Suez Canal was on the 15th Aug. 1914 stopped by H.M.S. *Black Prince* in the Red Sea and ordered to proceed to Suez. It is not disputed that this amounted to a seizure as prize. The vessel arrived in the roadstead at Suez at 1 a.m. on the 17th Aug., and at 9 a.m. on the 18th left for Alexandria in charge of a prize crew. She arrived at Alexandria on the 20th Aug. The writ in the present proceedings was issued on the 23rd Oct. 1914 on behalf of His Majesty's Procurator in Egypt asking for condemnation of the vessel as lawful prize.

It was not disputed before their Lordships' board that the seizure of the vessel on the 15th Aug. in the Red Sea was a lawful seizure as prize, such as in ordinary course would justify an order for condemnation. The appellants, however, relied on what happened after the seizure, coupled with the provisions of the Suez Canal Convention 1888, as entitling the vessel to be released.

The first article of the Suez Canal Convention 1888 provides that the Suez Maritime Canal shall be free and open in time of war as in time of peace to every vessel of commerce or of war without distinction of flag. The fourth article provides that vessels of war of belligerents shall not revictual or take in stores in the canal or its ports of access except in so far as may be strictly necessary, and that their stay at Port Said or in the roadstead at Suez shall not exceed twenty-four hours except in case of distress. The sixth article provides that prizes shall be subjected in all respects to the same rules as the vessels of war of belligerents. It is said that the *Sudmark* stayed in the roadstead at Suez for more than twenty-four hours, and thereby committed a breach of these provisions, in consequence of which she ought to be released.

That the vessel did remain in the roadstead at Suez for more than twenty-four hours is certain; but their Lordships entertain some doubt whether in so doing she committed a breach of the convention. The captain, in his affidavit of the 18th Oct. 1914, says that on reaching Suez he went to the British Consulate and requested leave to take in provisions and water, which leave was given. He also says that he was ordered by the captain of H.M.S. *Chatham*, then at Suez, to leave for Alexandria the next morning, but refused unless he were allowed to proceed with his own officers and crew. It is at least arguable that under these circumstances there was such a case of necessity or distress as would render the twenty-four hours rule inapplicable. Their Lordships will, however, assume that the rule was broken, and will proceed to consider the consequences of such breach.

The convention, which is an international agreement, imposes on the contracting Powers a number of obligations which, except in the case of the Egyptian Government and the Imperial Ottoman Government, are purely negative. On the Egyptian Government and the Imperial Ottoman Government alone is any positive obligation imposed. By art. 9 the Egyptian Government is within the limits of its powers resulting from the firmans to take the necessary measures for insuring the execution of the convention, and in case it has not the necessary means at its disposal, is to call on the Imperial Ottoman Government, and the latter Government is then to take the necessary measures, giving notice thereof to and concerting with the Powers therein referred to. But for the fact that the Egyptian Government was *de facto* controlled by the Government responsible for the breach in question, the fact that neither the Egyptian Government nor the Imperial Ottoman Government intervened would have been sufficient proof that the breach (if any) was purely technical, and did not call for any action on their part.

But even if this inference does not under the circumstances arise, the question remains as to whether a Court of Prize can properly constitute itself the guardian of the convention and invent and exact penalties for its non-observance, although no such penalties are imposed by the convention itself. In their Lordships' opinion this question can only be answered in the negative. The jurisdiction of a Court of Prize does not embrace the whole region covered by international law. It is confined to taking cognisance of and adjudicating upon certain matters (including capture at sea), which in former times were enumerated in the Royal Commissions under which the court was constituted and are now defined both by statute and by the Royal Commission issued at the beginning of the war: (see Naval Prize Act 1864, s. 55 (5); Judicature Act 1891, s. 4 (1); and Royal Commission of the 6th Aug. 1914). It is true that the court must adjudicate on these matters in accordance with international law, including international agreements. But the international law which the court is to enforce is that branch of international law (including international agreements) which relates to matters of which the court is to take cognisance and upon which it is to adjudicate. It has no such roving jurisdiction as suggested by the appellants' counsel.

Considerable stress was laid in argument upon the recent decision of the Supreme Court of the United States in the case of the steamship *Appam*. In their Lordships' opinion that decision has no application to the present case. According to the rules of international law a prize may, under certain circumstances, be taken into a neutral port, but its right to remain there is limited by the continued existence of these circumstances. When these circumstances cease to exist it is the duty of the neutral to order it to leave forthwith, and if it fail to leave to cause its release.

If the neutral allow the prize to remain longer than is warranted by the circumstances it is no doubt guilty of an unneutral act, which may well be made the subject of diplomatic complaint. But their Lordships cannot think that the captor's Prize Court has any jurisdiction to entertain the question, or is bound, if it consider that there has been an unneutral act, to release the prize on that account.

Assuming that in the present case the Egyptian Government or the Imperial Ottoman Govern-

ment may be looked upon as a neutral Power which has allowed a prize to remain in one of its ports longer than is warranted by international law or international agreement, their Lordships cannot hold that the Prize Court has on that account any power or duty to release the prize.

Their Lordships will therefore humbly advise His Majesty that the appeal fails and should be dismissed with costs.

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

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 9 *and* 26, 1917.

(Before Swinfen Eady, Bankes, and Scrutton L.JJ.)

Armement Adolf Deppe *v.* John Robinson and Co. Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Discharge of cargo — Lay days — Demurrage — Arrival at place of discharge — Readiness to discharge.

Where a charter-party or berth contract does not contain any express provision to name a berth, and does not provide for delivery at a berth "as ordered," and the ship arrives at the end of the specified voyage and is anchored or moored waiting for orders, and is ready to discharge in the sense that there is nothing to prevent her being made ready at once, if desired, the lay days commence to run.

Appeal by the plaintiffs, the shipowners, from a decision of Bray J. at the trial of the action without a jury.

The following statement of facts is taken from the written judgment of Swinfen Eady L.J.:—

"The plaintiffs, as owners of the steamship *Elizabeth van Belgie*, claimed against the defendants, as indorsees of bills of lading and receivers of cargo, eight days' demurrage for the detention of the ship at Avonmouth. The case was tried before Bray J. and the plaintiffs recovered for three days only. The plaintiffs appealed and claimed for the remaining five days. During the argument it was conceded that for one of the days the plaintiffs could not maintain their claim, and the case proceeded with regard to four days only.

"The bills of lading incorporated the terms and conditions of a berth contract, dated the 13th Sept. 1915. The cargo consisted of grain in bulk, and linseed and pollards in bags; the ship was to proceed to 'Avonmouth and Sharpness (two ports) or as near thereunto as she can safely get, always afloat, and deliver the cargo in accordance with the custom of the port for steamers, unless otherwise provided for as per clause 25, on being paid freight,' &c.

"Clause 25 dealt with the time for discharging, and provided that for grain cargoes, without fixed lay days, the rate of discharge at Avonmouth should be 600 tons a day based on bill of lading quantities, reporting day not to count. Demurrage 3*d.* per gross register ton per running day for steamers of over 4000 tons dead weight cargo capacity. The bill of lading quantities for Avonmouth were 2059, and at the before-mentioned rate of discharge this quantity should have been discharged in six lay days.

"The ship arrived at Walton Bay from Buenos Aires on the 24th Oct. 1915, was entered at the custom house on the 26th Oct., and on the 28th Oct. at 11 a.m. was permitted to pass into the docks at Avonmouth, where she was made fast to some mooring buoys, as there was not then any discharging berth at the quay available for her—of this she was informed before entering the docks. On the 2nd Nov. she was berthed at the quay and discharge began, and it was finished on the 11th Nov. at 7 p.m. The judge held that the six lay days expired on the 8th Nov. and allowed demurrage for the three days to the 11th Nov.

"At the trial various points were raised by the defendants and decided against them by the judge, and there is not any cross-appeal by the defendants. The judge, however, did not allow the plaintiffs' claim in respect of the four days between the 28th Oct. and the 2nd Nov. which are the subject of this appeal, on the ground that the ship, although an 'arrived ship' on the 28th Oct., was not 'ready to discharge' her cargo until the 2nd Nov."

Leck, K.C. and *W. N. Raeburn* for the plaintiffs.

MacKinnon, K.C. and *R. A. Wright* for the defendants.

The following cases were referred to during the arguments:

Budgett v. *Bennington*, 6 Asp. Mar. Law Cas. 549, 592; 63 L. T. Rep. 742; 25 Q. B. Div. 320, 327; (1891) 1 Q. B. 35;

Leonis Steamship Company v. *Rank*, 11 Asp. Mar. Law Cas. 142; 99 L. T. Rep. 513; (1908) 1 K. B. 499;

Vaughan v. *Campbell, Heatley, and Co.*, 2 Times L. Rep. 33;

Grampian Steamship Company v. *Carver and Co.*, 9 Times L. Rep. 310.

Cur. adv. vult.

Feb. 26.—The following judgments were read:—

Swinfen Eady, L.J. [after stating the facts as above set out, continued:]—Having regard to the decision in *Leonis Steamship Company* v. *Rank* (*sup.*), it is not open to dispute that on the 28th Oct. the ship was an "arrived ship." Her destination was Avonmouth, and she had reached that place and entered the dock there and was safely moored at the buoys. The charterers were entitled, in accordance with the decision in *The Felix* (18 L. T. Rep. 587; L. Rep. 2 A. & E. 273) to indicate the discharging berth; but as the charter-party did not contain any express words empowering the charterer to name the berth, and the cargo was not for delivery "at a berth as ordered," the lay days would commence if "ready to discharge" although the vessel was not in her discharging berth.

Discharge could have been effected at the buoys, although not usual, and the consignees of the cargo did not desire it. Bray J. states in his judgment that nobody really thought that there was going to be a discharge at the buoys,

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

but he held that the defendants were at liberty to take advantage of what he said was a technical point, but a technical defect in the plaintiffs' case, that the plaintiffs had not proved that the ship was "ready to discharge" until the 2nd Nov.

The question raised by this appeal is whether upon the facts not in dispute the ship was ready to discharge cargo when moored at the buoys. The hatches had not been taken off while the vessel was at the buoys, nor did the owners' stevedores bring all their discharging gear on board then. On the other hand, the receivers' stevedores did not bring any of their gear on board until the vessel arrived at the quay; they had to provide cables and weighing machines and planks, and also to provide the gear for lowering into barges any cargo so taken, and the evidence of the owners' stevedores was that as a rule they were able to get the gear which the ship had to provide on board quicker than the merchants' stevedores could get theirs.

The plaintiffs' contention is that the ship was ready to discharge when at the buoys—if the merchants had been willing to take delivery there, the owners would have rigged up their tackle, and opened the hatches and been ready to commence actual delivery, as soon as or sooner than the merchants would have been ready to accept delivery; and that the only reason why these preparations were not made was that the merchants did not desire delivery at the buoys, but preferred to wait until the vessel was alongside the quay.

It is the duty of the merchants to co-operate with the owners in the receipt of cargo, and upon the facts I am satisfied that the only reason why the ship did not take on board the gang and rig the gear to fulfil the owners' duty in discharging was that the receivers were not desirous of receiving the cargo at the buoys, and so were not willing to co-operate in her discharge there and made no preparations for doing so.

The ship was lying at a waiting berth, her voyage being ended; it would have been an idle form to take on board men and open hatches and make other preparations at the buoys when there was no desire or intention of the merchants to receive cargo until the ship was berthed at the quay.

The ship was ready to discharge in a business and mercantile sense, and the idle formality of incurring useless expense was not necessary as a condition precedent to the commencement of the lay days.

Where a charter-party does not contain any express provisions to name a berth, and does not provide for delivery at a berth "as ordered," and the ship arrives at the end of the voyage specified in the charter-party, and is anchored or moored waiting for orders, and is ready to discharge in the sense that there is nothing to prevent her being made ready at once, if desired, the lay days commence to run.

In my opinion this appeal should be allowed, and the plaintiffs should have judgment for the four additional days' demurrage.

BANKES, L.J.—This is an appeal from a decision of Bray, J., refusing to allow the plaintiffs' claim for demurrage in respect of any of the days during which the plaintiffs' vessel was moored to the buoys in Avonmouth Dock before she reached a berth at the quay.

The vessel was in fact admitted into the dock and moored to the buoys at 11 a.m. on 28th Oct. There was at that time no berth vacant for her, and she was not in fact berthed until 2nd Nov. The vessel had passed the customs before she entered the dock, and while lying at the buoys there was nothing to prevent the discharge of the cargo into lighters had the consignees and the shipowners co-operated to discharge the vessel in that manner.

The point in dispute between the parties was whether the vessel was ready to discharge when she was moored to the buoys and while she remained there. For the owners it was contended that she was; for the consignees that she was not. Questions both of fact and of law were raised in the court below and in this court. For the consignees it was contended that the vessel must be actually ready to discharge in order to entitle the owners to claim demurrage, and that this vessel was not ready at any time while she lay at the buoys. For the owners it was contended that, as the obligation upon consignees was to discharge in a fixed number of days, it was not necessary for them to prove a readiness and willingness on the part of the master to discharge, but the consignees must show that they were prevented from taking delivery by some act of the master or of those for whom he was responsible. For the latter contention the appellants relied upon *Budgett* v. *Binnington* (6 Asp. Mar. Law Cas. 549, 592; 63 L. T. Rep. 742; 25 Q. B. Div. 320; (1891) 1 Q. B. 35), and particularly upon the judgment of Vaughan Williams L.J. at p. 326 in the report of the case in the court of first instance. The respondents, on the other hand, relied upon the decision in the case of *Leonis Steamship Company* v. *Rank* (*sup.*), and particularly upon a passage in the judgment of Kennedy L.J. Bray J. accepted the contentions of the respondents both upon the facts and the law.

It is not necessary to express any opinion upon the question of law, as I do not agree with the learned judge's conclusion upon the facts, with regard to which it appears to me that there was really no dispute upon the particular point which for the present purpose is the only material one. From the evidence it appears that the practice at the port of Avonmouth is for the shipowner and the consignee each to engage their own men to perform that particular part of the operation of discharging which falls to their share, that each set of men provide their own gear, and that the discharge cannot commence until each set of men has provided their share of the necessary gear. There was some conflict of evidence as to how long it would take the shipowners' stevedores to rig up their gear. The learned judge accepts the view that the necesary time was about three hours, and he holds that because the ship had not that gear rigged and in position to commence delivery while she was lying at the buoys she was not ready to deliver so as to entitle her owners to claim demurrage for that period. I am unable to come to this conclusion upon the evidence which was before the learned judge. It appears to me quite clear upon the evidence that all parties concerned—namely, the dock officials, the consignees, and the representatives of the ship—were all of

one mind, and that no one either desired or required the discharge to commence until the vessel arrived at her berth. Under these circumstances the rigging of the gear while the vessel lay at the buoys was a needless and a useless thing to do. Upon the evidence I consider it impossible to say that the master was not ready and willing to discharge. The witnesses on both sides appear to me to be all agreed on this point.

The chief officer of the vessel speaks to everything being ready to discharge when the ship entered the dock, ready to give delivery when the vessel was at the buoys. This was not disputed so far as the ship herself was concerned; the only thing that required to be done was the rigging by the stevedores of the necessary gear. The superintendent of the stevedores employed by the shipowners said that the ship's stevedores did not employ labour on board until the receivers asked them to do so. This statement was not contradicted. This witness went further and spoke to the defendants' (Messrs. Robinson's) agent, telling him that they could not take delivery till the ship was in dock, by which I understand he meant in berth. A representative of the ship's brokers said that none of the receivers spoke to him about taking delivery at the buoys, and he also said that he gathered that it was the intention of the receivers not to begin the unloading until the vessel got to the berth. The principal witness for the defendants on this point was the outside supply foreman for the defendants, Messrs. Robinson. He seems to have made several conflicting statements, but in cross-examination he admitted that the consignees' men do not take their things on board until they have arranged with the stevedores when they are going to work, and he added: "We see one another: if he does not come to us we go to him." He further said that "the stevedore, Mr. Cox, met us when the ship was at the buoys, and we arranged we could not work there; neither of us could." He gave further answers to the same effect. This man's evidence seems to me so entirely in accordance with the evidence given for the plaintiffs that I cannot come to any other conclusion but that it was a matter of mutual arrangement, or understanding, that the discharge should not commence at the buoys.

Under these circumstances, whatever the exact legal obligation of the shipowner may be with regard to the readiness of his vessel, in the present case I think that it does not lie in the defendants' mouth to say that the ship was not ready, and on these grounds I think that the appeal succeeds.

Scrutton, L.J.—The owners of the steamship *Elizabeth van Belgie*, whom I call the shipowners, brought an action against three bill of lading holders, receivers of grain and linseed, for eight days' demurrage of the ship at Avonmouth. Bray, J. at the trial allowed them three days' demurrage only. They appeal.

The bills of lading incorporated the terms of a berth note as to discharge. By that berth note, in the events that happened, the ship was to discharge at Avonmouth, having six days for discharge. She entered the Avonmouth Dock and lay at the buoys, then a usual place for ships waiting for a berth, on Thursday, the 28th Oct. The shipowners alleged that time for discharge began that day; the receivers alleged that by a custom of the port time did not begin till the ship reached her loading berth alongside the quay, which was Tuesday, the 2nd Nov.

They failed to prove their custom, and time would therefore begin on the 28th Oct. if the ship had fulfilled the obligations on her. But it was proved that on the 28th Oct. she had not gear rigged for her part of the discharge or men on board to do that part. Accordingly Bray, J., saying that this was a technical point, but one that he could not disregard as *de minimis*, as it would, on the evidence, take half a day to erect the gear, held that as the ship was not on the 28th Oct. "ready to discharge" the time for discharge could not begin till she was so ready. He therefore fixed the commencement of the time on the 2nd Nov., when she began to discharge in fact. The six days expired on the 8th Nov.; and as the ship finished at Avonmouth on the 11th Nov. he gave the shipowners three days' demurrage.

The phrase that the ship must be "ready to load" or "ready to discharge" before her time for loading or discharge can begin has been frequently used by the Court and text-writers. In *Sailing Ship Lyderhorn* v. *Duncan* (11 Asp. Mar. Law Cas. 237, 291; 100 L. T. Rep. 736; (1909) 2 K. B. 929), the Court of Appeal adopted as to "readiness to load" the language of Mr. Carver's work at s. 221, that a vessel is not ready to load unless she is discharged and ready in all her holds so as to give the charterers complete control of every portion of the ship available for cargo. But this does not give much assistance as to "readiness to discharge." In particular I cannot find that the meaning of that phrase has ever been considered in those cases where the place where time begins is a place where ships wait to go to a berth, and not a place where ships usually discharge. Up to 1908 this position would arise in cases where the ship was charted to discharge in a dock, such as *Tapscott v. Balfour* (27 L. T. Rep. 710; L. Rep. 8 C.P. 46) and where time began when she got into the dock, although owing to the crowded state of the dock she could not get to her discharging berth.

I should be surprised to find that in practice it was ever thought necessary for the ship as soon as she entered the dock to rig her discharging gear, and get men to do her part of the discharging on board, before her time could begin to run, though it was well known that, at the place where she was, discharging would not take place. Such a requirement would be quite unbusinesslike. The question assumed a much wider aspect when in 1907 the decision of the Court of Appeal in *Leonis Steamship Company v. Rank* (*sup.*) introduced some certainty into a law at that time confused by a number of very contradictory decisions.

The practical question of business was on whom should the risk of losing time, in waiting till a berth was ready, fall, on the goods owner or the shipowner. When the charter was to a dock, time began when the ship got into the dock though she had to wait for a berth, and the risk of of loss of time was placed on the goods owner. When the charter was to a "berth as ordered," time did not begin till the vessel reached the berth though the goods owner ordered a berth which the shipowner could not reach at once, and the risk of loss of time was placed on the shipowner. On whom did the risk fall when the

ship was chartered to a port and the goods owner had the right to name the berth in the port to which the ship should go? The Court of Appeal in *Leonis Steamship Company v. Rank* (*sup.*) held that the time began when the ship had reached the port in the commercial sense, where she was at the disposal of the charterer "as a ship ready as far as she is concerned to discharge," though not at the discharging berth: per Buckley L.J. This decision at once added largely to the number of cases where time would begin before the ship was at her discharging berth. And I cannot bring myself to hold that it was necessary for such a ship before her time would begin—that is, when the risk of loss of time is transferred to the goods owner—to make preparations for discharging at a place where on the hypothesis discharging will not take place. In *Leonis Steamship Company v. Rank* (*sup.*) time began while the vessel was lying in the river Parana, where ships were usually loaded when they got alongside quays and piers. I do not think any court containing judges so conversant with commercial matters as Lord Alverstone and Kennedy L.J. would have held the ship, when her time began in the river, was required to have her derricks rigged and men on board to do work, which work could not be required till she got alongside the pier. Where time begins at a usual discharging place I think it may well be that the ship must then be ready for a state of things which may at once happen. But when the ship's time begins at a place which is not a usual discharging berth (and she cannot be required to discharge at any other place) I think her obligation to be ready to discharge is fulfilled if she is free from customs or quarantine restrictions and ready to proceed to her actual discharging berth and to be ready to discharge when she reaches it.

If this is so, unless the buoys in Avonmouth dock were a usual discharging place, the ship was not bound to rig her stevedore's gear and have her stevedores on board for her work while lying there in order that her time should begin. The risk of loss of time while waiting there for a discharging berth would under the decision in *Leonis Steamship Company v. Rank* (*sup.*) be on the goods owners.

As to the receivers of grain, I am clear that they did not intend to take delivery at the buoys, or treat the buoys as a discharging berth, however ready the ship was. They had placed their share of the discharge in the hands of the dock authorities, and those authorities, who were trying to set up a custom that time did not begin till the vessel reached the quay, wrote on the 3rd Nov.: "We cannot depart from the principle that the steamer's time, so far as the dock committee is concerned, commences from the time that the steamer is in berth and ready to deliver. This was not till the morning of the 3rd Nov."

The case of the linseed is more difficult, as the linseed was going into lighters; and the receiver of the linseed gave very contradictory evidence. "The stevedores had not put in their gear. If they had we should have taken delivery at the buoys." "We arranged we could not work at the buoys; neither of us could." "I did not mean we were ready to have taken delivery at the buoys." It is clear, however, that the linseed receivers never asked for delivery at the buoys, or sent to take delivery; and I am not satisfied on the evidence that the buoys were a usual place of discharge for linseed. I think, therefore, time began to run when the ship reached the buoys, and the ship was ready to discharge, in the sense explained, but as it would take half a day to rig the stevedore's gear I think the amount recovered should only be seven days' demurrage, or 371*l.* 1*s.* 9*d.*, for which sum judgment should be entered for the plaintiffs with the costs here and below.

It was argued that the principle of *Budgett* v. *Binnington* (*sup.*) that in a fixed time charter the goods owner is not excused by the inability of the shipowner to perform his work when the time has begun to run, unless such inability arises from the default of the shipowner or his servants and prevents the goods owner from fulfilling his part of the work, applies also when the shipowner's inability is in existence at the commencement of the lay days. It is not necessary to decide this point now, though it and the effect of the decision in *Budgett* v. *Binnington* (*sup.*) may require consideration on some future occasion.

The appeal must be allowed with the result stated above.

Appeal allowed.

Solicitors for the plaintiffs, *Holman, Fenwick,* and *Willan.*

Solicitors for the defendants, *Downing, Handcock,* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, March 19, 1917.

(Before ATKIN, J.)

THOMAS *v.* TYNE AND WEAR STEAMSHIP FREIGHT INSURANCE ASSOCIATION. (*a*)

Insurance—Time policy—Ship unseaworthy in two particulars—Assured privy as to one only—Loss caused by unseaworthiness to which assured not privy—Liability of insurer—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 39, *sub-s.* 5.

Sect. 39, *sub-sect.* 5, *of the Marine Insurance Act* 1906 *provides that in a time policy* ". . . *where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.*"

A ship insured by a time policy was sent to sea in an unseaworthy state in two particulars (1) *insufficiency of crew,* (2) *unfitness of hull. The assured was privy to* (1), *but was not privy to* (2). *The loss of the ship was caused by the unfitness of the hull, to which the assured was not privy.*

Held, that the insurer was not protected by the sub-section, and the assured was entitled to recover on the policy.

SPECIAL case stated by an umpire.

The claimant, H. S. Thomas, was the manager of the steamship *Dunsley.* By a policy of marine insurance dated the 20th Feb. 1911 he was insured by the respondents from the 20th Feb.

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

1911 to the 20th Feb. 1912 in respect of the *Dunsley* "on brokerage, profits, advances, contributions to and premiums of insurance and disbursements in the sum of 500*l.* payable in the event only of actual or constructive total loss." The policy provided for the settlement of disputes by arbitration. A dispute arose between the parties, and was referred to arbitration. The arbitrators not agreeing, the dispute was referred to an umpire, who made his award in the form of a special case.

The Marine Insurance Act 1906 provides:

Sect. 39, sub-sect. 5. In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

The umpire found the following facts: The *Dunsley*, while on a voyage from Port Talbot with a cargo of coal to Nantes, grounded in the river Loire on the 3rd July 1911, and remained aground till the 8th July. After being refloated she proceeded on her voyage to Nantes, where she discharged her cargo and loaded a cargo of iron for Rotterdam. She was examined by a Lloyd's surveyor, who reported that she was in a fit condition to make the voyage from Nantes to Rotterdam. On her way down the Loire she on the 22nd July took the ground, but was able to proceed to Rotterdam, where she discharged her cargo. She then returned to the Bristol Channel, and was sent to Appledore to be docked. As, however, there was no dock available at Appledore the claimant on the 29th Aug. sent her to Birkenhead with a crew made up of the captain and seven runners. During the voyage she sprung a leak and was lost from a peril covered by the policy.

The umpire found that the cause of the leak and of the consequent loss of the ship was the damage and straining which she had undergone through grounding in the Loire in the previous month, and that by reason of such damage she was at the time she left Appledore unfit for the voyage to Birkenhead, but that the claimant was not aware of such damage and was not privy to sending the ship to sea in an unseaworthy condition so far as that damage was concerned. The umpire also found that the *Dunsley* left Appledore with an insufficient crew, and that the claimant was privy to sending the ship to sea with an insufficient crew, but that the insufficiency of the crew did not cause or contribute to the loss of the *Dunsley*. He awarded that the claimant was entitled to recover for a total loss under the policy.

Stuart Bevan for the respondents.

F. D. MacKinnon, K.C. and *W. N. Raeburn*, for the claimant, were not called upon to argue.

ATKIN, J.—The claimant was insured by the respondent company "on brokerage, profits, advances, contributions to and premiums of insurance and disbursements payable in the event only of actual or constructive total loss" in respect of the ship *Dunsley* which was totally lost on a voyage from Appledore to Birkenhead. Disputes having arisen between the parties, the matter was referred to arbitration. The umpire in that arbitration found that the *Dunsley* when she left Appledore was unseaworthy in two respects—(1) she was unfit for the voyage in consequence of damage which she had sustained in consequence of having twice taken the ground during voyages in the preceding month, and (2) her crew was insufficient. He further found that the claimant was not privy to the unseaworthiness of the ship with regard to her hull, but was privy to the insufficiency of the crew on the voyage from Appledore. He also found that the loss was wholly attributable to the unfitness of her hull in consequence of the damage she had sustained when she grounded on the previous voyages, and that the insufficiency of the crew did not in any way cause or contribute to her loss.

The claimant having made a claim under the policy, the respondents rely upon sect. 39, sub-sect. 5, of the Marine Insurance Act 1906 and say that it relieves them from liability. The section provides that: "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." The respondents contended that they were not liable, inasmuch as the ship was sent on her voyage in an unseaworthy condition with the privity of the assured, namely, with an insufficient crew, and that she was lost owing to her unseaworthiness, though the unseaworthiness was in another respect, namely, in respect of the unfitness of her hull. In my view, however, that is not the proper construction of the sub-section. I think it means that the insurer is not to be liable for a loss attributable to unseaworthiness to which the assured was privy. In the case of insurance under a time policy the intention of the Legislature was that the assured should be unable to recover in respect of a loss occasioned by his own fault. That was the rule previous to the Act. In order to prevent the assured recovering under a time policy it was always necessary to show that the loss was the result of some misconduct on the part of assured. The statute has now defined the degree of misconduct necessary to prevent the assured recovering as being the sending of the ship to sea in an unseaworthy state with the privity of the assured. When a ship is sent to sea in a state of unseaworthiness in two particulars, and the assured is privy to the one and not to the other, the insurer is not protected unless the loss is caused by the particular unseaworthiness to which the insurer was privy. The contrary construction of the section is unreasonable. For example, if a ship were sent on a voyage with a defective equipment and subsequently during the course of the voyage became unseaworthy in some wholly different aspect which caused her loss, according to the respondents' contention the assured could not recover. In my opinion, the construction which the umpire has put upon the sub-section is correct. There must therefore be judgment for the claimant.

Judgment for claimant.

Solicitors for the claimant, *Rawle, Johnstone, and Co.*, for *J. Harvard Davis*, Cardiff.

Solicitors for the respondents, *Waltons* and *Co.*

Tuesday, May 8, 1917.

(Before Lord READING, C.J., RIDLEY and AVORY, JJ.)

ADMIRALTY COMMISSIONERS *v.* ROPNER AND CO. (*a*)

Requisitioning by Admiralty—Contract—Admiralty charter-party—Terms—Loss of ship—Claim by shipowners—Claim for interest on unpaid balance of value of ship—Whether charter-party is policy of marine insurance—Civil Procedure Act 1833 (3 *& 4 Will.* 4, *c.* 42), *ss.* 28, 29—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 1, 22, 23.

In the month of Jan. 1915 *the Admiralty requisitioned a certain steamship. There was no charter-party signed, but it was agreed between the Admiralty Commissioners and the steamship owners that the terms of the requisitioning should be those which were contained in the ordinary Admiralty charter-party known as T* 99. *The steamship was captured and destroyed by an enemy cruiser in Jan.* 1916. *The Admiralty paid a certain sum on account in respect of the loss in March* 1916, *and a further sum in Aug.* 1916. *These two sums were alleged by the shipowners to be inadequate, and, in accordance with the terms of the charter-party T* 99, *the dispute was referred to arbitration. In the course of the arbitration it was found that the value of the steamship was in excess of the amount paid by the Admiralty. The shipowners claimed this difference, and in addition they claimed interest upon the unpaid part of the value of the steamship from the date of the loss until the date of the payment. The claim to interest was based upon three grounds: (*1*) Under the general law; (*2*) under an implied promise to pay in the ordinary course of business between the parties; and (*3*) under the provisions of the Civil Procedure Act* 1833 (3 *& 4 Will.* 4, *c.* 42), *whereby interest is recoverable in all actions on policies of insurance made after the passing of the Act. It was contended on this third point that the Admiralty occupied a position analogous to that of underwriters, and that the charter-party was* (inter alia) *a policy of marine insurance.*

Held, that there were no grounds upon which interest was payable under the circumstances of the case. The parties were bound entirely by the terms of the charter-party T 99, *which was a charter-party simply for the hire of the steamship, and that document did not comply, by its provisions, with any of the essential sections of the Marine Insurance Act* 1906, *so as to make it a policy of marine insurance. The Civil Procedure Act* 1833 *had therefore no application to the case. The alleged agreement to pay interest in the course of business was of no substance, and was not supported by the facts.*

SPECIAL case stated by an umpire for the opinion of the High Court.

On or about the 26th Jan. 1915 the *Dromonby*, a steamship belonging to Sir R. Ropner and Co. Limited, was requisitioned for the use of His Majesty by the commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland. No charter-party or other form of agreement was signed regulating the terms upon which the *Dromonby* was requisitioned, but it was agreed between the parties that the requisition and the employment of the vessel thereunder were upon the terms of the form of Admiralty charter known as T 99, a print of which was annexed to and formed part of the case.

The relevant articles of the Admiralty charter were as follows:

Art. 19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause—Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost at the time of such loss, or if she be injured on the ascertained value of such injury. Should a dispute arise as to the value of the steamer the same shall be settled as laid down in clause 31.

Art. 31. Any dispute arising under this charter shall be referred under the provisions of the Arbitration Act 1889 or any amendment thereof to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law.

On or about the 13th Jan. 1916 the *Dromonby*, whilst employed by the Admiralty under the requisition, was totally lost by a risk of war—namely, by being captured and sunk by a German auxiliary cruiser. Disputes then arose between the parties as to the value of the steamer and as to the right of the owners to receive payment to the amount of the value with interest from the date of the loss to the date of settlement. Two arbitrators were appointed in accordance with the terms of the Admiralty charter and an umpire elected by them, and by request of the parties the umpire sat with the arbitrators to hear the evidence and the arguments of the parties notwithstanding that the arbitrators had not then been unable to agree. At the hearing, the Admiralty by their counsel requested that a special case should be stated for the opinion of the court by the arbitrators, or, in the event of their disagreement, by the umpire as to the right of the owners in law to claim interest as aforesaid, and the present case was stated pursuant to such request. The arbitrators were unable to agree as to the value of the *Dromonby* at the time of her loss, and accordingly the umpire took upon himself the burden of the reference and stated the case. The umpire found, in addition to the facts already set out, (*a*) that the value of the *Dromonby* at the time of her loss was 72,300*l.*, and (*b*) that on the 18th March 1916 a sum of 50,000*l.* was paid by the Admiralty to the owners on account, and on the 21st Aug. 1916 a further sum of 12,500*l.*

The owners relied in support of their claim for interest both on the general law and the provisions of the Civil Procedure Act 1833 (3 & 4 Will. 4, c. 42), and also on a course of business between the parties whereby, as they alleged, interest had been allowed and paid in similar cases between the same parties.

The Admiralty contended that neither under the general law nor under the statute of 1833 were the owners entitled to interest nor could

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

any be awarded, and that the statute did not affect or apply to the Admiralty as representing the Crown. They further contended that there was no course of business material to the owners' claim in the present case.

As to the "course of business," there was a finding in the special case that interest at the rate of 4 per cent. had been allowed by the Admiralty in the case of four other ships belonging to the same owners whilst under requisition by the Crown, but these four had all been requisitioned subsequently to the *Dromonby*. There had been no loss by war risks of any vessel belonging to the owners whilst under requisition prior to the requisition of the *Dromonby*.

The questions for the opinion of the High Court were whether in the circumstances above set out the owners were in law entitled to interest, or whether under the circumstances interest could lawfully be allowed or damages in the nature of interest could lawfully be given.

By the Civil Procedure Act 1833 (3 & 4 Will. 4, c. 42), it is provided:

Sect. 28. Upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided that interest shall be payable in all cases in which it is now payable by law.

Sect. 29. The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions or policies of assurance made after the passing of this Act.

By the Marine Insurance Act 1906 (6 Edw. 7, c. 41), it is provided:

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 loss, that is to say, the losses incident to marine adventure.

Sect. 22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded or afterwards.

Sect. 23. A marine policy must specify—(1) The name of the assured, or of some person who effects the insurance on his behalf; (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; (4) the sum or sums insured; (5) the name or names of the insurers.

The *Solicitor-General* (Sir Gordon Hewart, K.C.) and *Dunlop* for the plaintiffs.—There was nothing at all under the circumstances to make the Admiralty liable to pay the interest claimed, either under the general law or under an implied promise. The contentions on the part of the defendants were not in any way supported by the facts. There remained, therefore, the third ground of complaint, which depended entirely upon sect. 28 of the Civil Procedure Act 1833. But any claim of that kind was disposed of by the judgments in the case of *London, Chatham, and Dover Railway Company* v. *South-Eastern Railway Company* (69 L. T. Rep. 637; (1893) A. C. 429).

Leck, K.C. and *Le Quesne* for the defendants.—The terms of the contract which had to be construed were contained in the form of charter-party known as T 99. The material clause was clause 19. That showed that the Admiralty in this contract were taking certain extra risks to which the ship would be exposed after being requisitioned. The Admiralty, therefore, were in the position of underwriters, and in the ordinary course of business the underwriters might be liable to pay interest. This charter-party was really a contract of marine insurance, as it satisfied the requirements of the definition given in the Marine Insurance Act 1906. There could be no doubt that the parties intended it to be such a contract. In any case, however, as the Admiralty had paid interest in respect of other vessels which had been requisitioned and lost, the shipowners were entitled to assume that it would be paid in the case of the *Dromonby*. The following case was referred to in the course of the argument:

Home Marine Insurance Company v. *Smith*, 78 L. T. Rep. 734; (1898) 2 Q. B. 351.

The *Solicitor-General* in reply. — However willing the Admiralty might have been at one time to pay interest, the position had changed, and there was no ground for inferring that interest would be paid in every case on the value of a ship which had been requisitioned and subsequently lost. The contract under which the Admiralty took the ship was extremely favourable to the shipowners, and the only claim that could really be put forward was one for the value of the ship at the time when it was lost. It was not to be lost sight of that under the special circumstances the value of the ship was continuously rising after the date of the requisition. By no stretch of construction of the charter-party could the contract between the parties be held to be one of insurance. The requisites of every policy of marine insurance were set out in sects. 22 and 23 of the Marine Insurance Act 1906, and in the present instance these requisites were entirely wanting.

Lord READING, C.J.—This case raises an interesting point which is apparently of considerable importance to shipowners, whose ships are requisitioned by the Government under the proclamation of the 3rd Aug. 1914. The point at issue is whether or not the shipowner, in the event of the loss of the vessel whilst under requisition by His Majesty's Government, can recover interest on the ascertained value of the ship at the time of loss from the time of loss until the date of payment.

The case has been very well argued, and the points raised are quite clear. The question turns entirely upon the language of the document between the parties. It is a charter-party entered into by the Admiralty with the shipowner, under which his vessel was requisitioned, and the material clause is clause 19. Now, broadly speaking, this charter-party — the clauses of

which have been read several times—makes it plain that the shipowner takes upon himself all marine risks as ordinarily understood in the shipping world and in the marine insurance world. No question arises with regard to that. The war risk, damage or loss of the ship, is taken in express terms by the Admiralty, and the Admiralty has undertaken that such risks—that is, the war risks—are taken by the Admiralty on the ascertained value of the steamer if she be a total loss at the time of such loss, or if she be injured on the ascertained value of such injury.

The shipowners say that the vessel here, the *Dromonby*, having been lost, and the value having been ascertained by the arbitrators at 72,500*l*., certain payments having been made on account since the loss, they are entitled to be indemnified for the loss to any extent of recovering not only the balance of the ascertained value of the ship, but interest calculated on the ascertained value of the ship from the time she was lost, and allowing for the payments made on account until the final payment. They base this claim on three grounds. First, they say this clause 19 amounts to a policy of insurance made by the Admiralty to the shipowners, and they are bound to say that in order to maintain their claim under sect. 29 of the Act 3 & 4 Will. 4, c. 42, because by that Act the Legislature says that over and above the money recoverable in actions on policies of assurance, the jury may give interest, and, if this is a policy of assurance, Mr. Leck, for the shipowners, will have established his right to payment of interest if the arbitrators think fit.

But I am of opinion that this contract is not a policy of assurance. It is a charter-party. It is a contract for the hire of a vessel by which one of the parties undertakes certain risks against which ordinarily the shipowner would take out a policy of insurance; and, to this extent, I agree with the arguments on behalf of the shipowners that it absolved them from the necessity of insuring against war risks, because the Crown undertook to pay if the vessel was lost or injured in consequence of war risks, or if it suffered damage. So far, I should agree with the view that it is as if the risks were set out such as you would find them enumerated in a policy of insurance against war risks. Now, a contract of insurance must be embodied in a policy. That appears by sect. 22 of the Marine Insurance Act 1906, and a contract of marine insurance is defined by sect. 1. It is a contract whereby the insurer undertakes to indemnify the assured against marine losses. That contract cannot be put in evidence unless it is embodied in a marine policy. In order to constitute a marine policy under sect. 23, there must be a coincidence in the instrument in writing of the five specific essentials set out in sect. 23. I have no doubt that this contract does not comply with the terms of sect. 23. It is enough to say that it does not state the sum or sums insured, which is one of the essentials under sub-sect. 4 of sect. 23 of the Act. Moreover, I should be prepared to hold that looking at this document it is not a document between an assured and an insurer, but that it is a document between two parties in respect to a particular subject-matter, which is the ship. The contract means no more than that one party to the contract, who is to have the use of the subject-matter of the contract, that is, the ship, undertakes to make good certain risks which might occur without the latter of the persons, who is the owner of the vessel, being under any necessity to protect himself by taking out a policy of insurance. I think therefore that the first point fails.

The second point at first sight appears to be the better view; but on consideration I have come to the conclusion that that is not sound either. The argument there is that, notwithstanding that this is not a policy of marine insurance, the obligation undertaken by the contract is that the Crown will make good loss as if it had been the insurer of the vessel—in my view a contract which could quite well be contained in a charter-party if the terms permitted of that construction—and the only question to my mind which gives rise to any difficulty on this is as to the language actually adopted, because it means that we must decide this upon the language of the contract, and therefrom determine the intention of the parties.

I come to the conclusion that although the Admiralty, as representing the Crown, did undertake to make good war risks as ordinarily understood without stating them *in extenso* in the contract, the charter-party itself measured this liability in the event of such a risk happening by the language which it adopted, and that language shows that the value of the steamer is not to be taken as a definite fixed value. It is not to be ascertained as the value at the time of the charter between the Government and the shipowner, but the parties agree that this value is to be ascertained at the time of the loss, so that if the value of the steamer increases, as we know that it has, the result will be that the shipowner, if the vessel is lost, will get the benefit of that excess in value as compared with the value at the time of the contract. That is the measure which, in terms, the parties have stated is to be the pecuniary liability upon the Admiralty if the vessel is lost. I think that that is the clear meaning of the language which is used, and therefore I decide the second point against the contention of the shipowners.

The third point merits but little discussion. It is said that there is a course of business between the parties because the Admiralty had on several occasions paid interest. To my mind, there is no substance in that point. It is sufficient to say that at the time of the contract the Admiralty had never paid interest. The first time that they ever paid interest was immediately after the contract was entered into, and what we have to ascertain is what was the intention of the parties at the time the contract was entered into. Moreover, I should be prepared to hold that even if they had paid interest before the date of the charter-party in one or two cases, that would not be sufficient to make such a course of business as would justify us in construing the contract entered into between the parties, by reference to two or three isolated instances such as are referred to.

On the whole, I come to the conclusion that the answer to the question which is put to us by the learned umpire—whether in the circumstances the owners are in law entitled to interest, or whether interest can lawfully be allowed or damages in the nature of interest can lawfully be given—should be in the negative.

RIDLEY, J.—I agree with my Lord's judgment and with the reasons which he has given, and I shall add nothing.

AVORY, J.—I agree upon both points.

Solicitor for the plaintiffs, *Treasury Solicitor.*
Solicitors for the defendants, *Botterell* and *Roche.*

June 13 *and* 14, 1917.

(Before BAILHACHE, J.)

FRANCE (WILLIAM), FENWICK, AND CO. LIMITED *v.* NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION. (*a*)

Marine insurance—"Consequences of hostilities"—Ship damaged by striking wreck of vessel sunk by enemy submarine—Proximate cause of damage—Perils of the sea.

Vessels navigating the sea must, in the matter of wrecks, take the sea as they find it, and if they run upon a wreck the reason why the wreck happened to be there is immaterial unless it was actually placed there as an act of hostility for the purpose of damaging passing vessels.

The S. *was insured by a policy expressed to cover "all consequences of hostilities," and all risks excluded from an ordinary policy by the f. c. and s. clause. During the currency of the policy the* S. *was damaged by striking the submerged wreck of the* F. *which had been sunk in shallow water a few hours earlier by an enemy submarine. Time had not permitted of the marking with a buoy the spot where the* F. *lay.*

Held, that the sinking of the F. *by the enemy submarine was not the proximate cause of the damage done to the* S., *which damage was not caused by a "consequence of hostilities" within the meaning of the policy.*

ACTION tried by Bailhache J. in the Commercial list.

The plaintiffs, the owners of the steamship *Sherwood*, were insured by a policy issued by the defendants which was expressed to cover only (*a*) the risks of capture, seizure, and detainment by the King's enemies and the consequences thereof, or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after declaration of war; and (*b*) all risks not covered by (*a*), which were excluded from recovery under the ordinary policy upon hull and machinery by reason of the presence in such policies of the f. c. and s. clause of the Institute Clauses. The policy was subject to the rules of the defendant association, which provided that the *Sherwood* was to be deemed to be at all times fully insured by an ordinary policy against all other risks.

About 9 a.m. on the 1st Aug. 1915 the steamship *Fulgens*, coming south, was sunk in shallow water by a German submarine off the coast of Norfolk. On the same day, about 6.40 p.m., and before there had been time to mark the spot where the *Fulgens* lay with a buoy, the *Sherwood*, going north, without negligence, ran upon the submerged wreck of the *Fulgens* and sustained damage to the amount of 5500*l.*, and in respect of this damage the plaintiffs brought the action.

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

The defendants said that the damage was not proximately caused by the perils insured against in the policy sued upon.

Roche, K.C. and *R. A. Wright* for the plaintiffs.—The proximate cause of the damage done to the *Sherwood* was the hostile act of the German submarine in sinking the *Fulgens*. If a submarine attacks ship A and causes her to sheer into ship B, the damage to B would be a consequence of hostilities; and equally so if the submarine sinks A and, before there is time to buoy the spot, B strikes the submerged wreck of A. The position is as if the *Sherwood* had struck a mine instead of the wreck. They referred to

Reischer v. *Borwick*, 71 L. T. Rep. 238; (1894) 2 Q. B. 548;
Leyland Shipping Company v. *Norwich Union Fire Insurance Society*, 13 Asp. Mar. Law Cas. 426; 116 L. T. Rep. 327; (1917) 1 K. B. 873;
Ionides v. *Universal Marine Insurance Company*, 8 L. T. Rep. 705; 14 C. B. N. S. 259.

Leslie Scott, K.C. and *C. R. Dunlop* for the defendants.—The damage to the *Sherwood* was not the proximate result of the sinking of the *Fulgens*. If it is alleged that event A is the proximate cause of result B, in a case where a substantial period of time has elapsed between A and B, the assured must show that B necessarily results from A. If B may have been caused by a variety of intervening events, it is not shown that it results from A. The area of navigation was wide, and it was by a mere accident that the *Sherwood* went over the wreck of the *Fulgens*. There is no analogy between this case and the striking of a hostile mine. This was an ordinary obstruction of navigation. There was a *novus casus interveniens* — the ignorance of the *Sherwood* of the obstruction to navigation. There was no continuing cause here as in the *Leyland* case (*sup.*), where the ship was a doomed and dying ship from the time she was torpedoed. Here there were two fortuitous circumstances; a few more feet of water, or a swell disclosing the presence of the wreck, would have saved the *Sherwood*. If a German submarine sank a ship in a narrow channel for the express purpose of obstructing the channel, then different considerations would arise. The judgment of Scrutton, L.J. in the *Leyland* case (*sup.*) would have been in our favour here, except for *Reischer* v. *Borwick* (*sup.*). The present case is of a sound ship inadvertently stumbling on the result of a past accident, and the character of the past accident is irrelevant.

Roche, K.C. in reply.—This is really an appeal against the *Leyland* decision (*sup.*). The defendants' argument is that which failed in the *Leyland* case. I agree that if a substantial period of time had elapsed the damage would have been the result of marine perils, but the distinction is that here there was no time to mark the wreck. The area of navigation was narrow, the *Sherwood* was within the three-mile limit following Admiralty instructions, and only a portion of that limit is navigable. The collision was the natural and probable result of the sinking of the *Fulgens*.

Cur. adv. vult.

June 14.—BAILHACHE, J. read the following judgment:—On Sunday, the 1st Aug. 1915, the steamship *Fulgens*, on her voyage from Hartlepool

to London, was sunk off Palling in Norfolk at about 9 a.m. in shallow water by a German submarine. On the same day at 6.40 p.m. the plaintiffs' steamship *Sherwood*, on her voyage from London to Methil in Scotland, before there had been time to buoy or otherwise mark the spot where the *Fulgens* lay, and without negligence, ran upon the *Fulgens*, made water fore and aft, and sustained particular average damage to the amount of 5500*l*.

For this sum the plaintiffs sue the defendants, the underwriters, upon a war risks time policy dated the 14th June 1915. The policy is expressed to cover risks, *inter alia*, (*a*) of all consequences of hostilities, and (*b*) all risks excluded from recovery under the ordinary policies upon hull and machinery by reason of the presence in such policies of the f. c. and s. clause of the Institute Clauses now in use.

The question I have to determine is whether the loss in this case is covered by this policy and is not covered by the ordinary marine policy containing the f. c. and s. clause. The authorities bearing upon the point have been so closely examined by the Court of Appeal in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society* (13 Asp. Mar. Law Cas. 426; 116 L. T. Rep. 327; (1917) 1 K. B. 873) that it would be mere pedantry on my part to discuss them again.

The question is the same whether one approaches it from the standpoint of whether this loss is excluded from an ordinary marine policy containing the usual f. c. and s. clause or from the standpoint of whether it is within this policy. The defendants' rules, however, which are incorporated into this policy, preclude the plaintiffs from recovering if the loss is covered by the ordinary form of marine policy with the f. c. and s. clause, and I propose to consider the matter from that point of view.

Now, the running of a ship upon a sunken wreck is an ordinary marine peril, and damage sustained in consequence of so doing is recoverable under a marine policy. I agree, however, with the plaintiffs that where a marine policy contains the usual f. c. and s. clause one must make further inquiry and ascertain whether that marine peril was brought into operation by an act of hostility. In making this further inquiry it must always be remembered that the act of hostility to be looked for must be the proximate cause. It is not sufficient that some act of hostility is one of the links in a chain of causes without which link the accident would not have happened. It must be the effective proximate link in the chain.

I do not think there is any difference of opinion as to the test to be applied, but there is always room for difference of opinion as to how the test works out in the circumstances of a particular case. In this case I think the act of hostility, the sinking of the *Fulgens*, was too remote. I can perhaps best explain my reason for coming to this decision by two illustrations. Let me suppose a torpedoed timber ship, deserted and derelict but not sunk, and a collision in the dark with such a ship. That would, in my opinion, be a marine peril and the loss would be recoverable under a marine policy containing the ordinary f. c. and s. clause. Again, let me suppose a case where there was a narrow and shallow entrance to a port and the enemy deliberately sank a ship in the entrance for the purpose of damaging any vessel trying to make the port, and succeeded. Such a case would, in my opinion, be covered by this policy and not by a marine policy with the f. c. and s. clause. This case seems to me to fall within my first illustration and not within my second. The truth obviously is that the act of hostility on which the German submarine was bent was the sinking of the *Fulgens*. Having sunk the *Fulgens* the submarine had attained her end. The object of the submarine was to sink the *Fulgens*, and not by sinking the *Fulgens* to destroy some other ship.

All that can be said in the plaintiffs' favour in this case is that but for hostilities this loss would not have been sustained; but the rule in insurance law, that one must seek the proximate cause, is so rigid that that statement does not carry the plaintiffs far enough. The casualty was due to the fact that by a singular chance the *Sherwood* happened to pass over the very spot where the *Fulgens* had been sunk. There was no particular reason why she should do so. I think vessels navigating the sea must, in the matter of wrecks, take the sea as they find it, and if they run upon a wreck the reason why the wreck happened to be there is immaterial unless it was actually placed there as an act of hostility for the purpose of damaging passing vessels.

My judgment must be for the defendants with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Lightbound, Owen, and Co.*, for *Ingledew* and *Fenwick*, Newcastle-upon-Tyne.

Tuesday, June 19, 1917.

(Before Bailhache, J.)

Owners of Steamship Plata *v.* H. Ford and Co. Limited. (*a*)

Charter-party—Demurrage—Lay days—"Arrival" of ship at destination—Ordered for safety to Cherbourg to await turn at Havre—Whether arrived in or off Havre.

Under a charter-party dated the 10th May 1916 *the steamship* P. *was to load a cargo at Buenos Ayres, Havre being subsequently nominated as her port of discharge. When at St. Vincent she was ordered by the French authorities to proceed to Cherbourg to await her turn for entering Havre, there being considerable danger of being torpedoed while awaiting her turn off Havre. The vessel consequently went to Cherbourg and awaited there for some days her turn to discharge at Havre. A clause of the charter-party provided: "Cargo to be discharged at the minimum average rate of* 300 *tons per running day . . . time to count twenty-four hours after arrival in or off port of destination whether berth available or not, any custom of the port to the contrary notwithstanding, and to be absolutely free of turn, should steamer be longer detained demurrage to be paid at the rate of* 100*l. per day." Cherbourg is about seventy-five miles from Havre.*

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

Held, that the lay days did not run while the ship was at Cherbourg waiting for her turn at Havre. It was the ship's duty to arrive at her destination, and any obstacle, whether physical or legal, which prevented the ship arriving was for the ship's account and not the charterers'. The arrival at Cherbourg was not an arrival on or off Havre. The shipowners were not protected by the words "to be absolutely free of turn," for the arrival at Havre was a condition to be fulfilled before time began to run against the charterers.

Case stated by an arbitrator in the form of a special case.

1. By a charter-party dated the 10th May 1916, made between the owners of the steamship *Plata* and Messrs. Ford and Co., charterers, it was agreed that the steamer having loaded a cargo at Buenos Ayres should proceed therewith to discharge at a safe port on the French Atlantic coast between Bordeaux and Havre (both included), Rouen excluded, or as near thereunto as the vessel could safely get, always afloat, and should there deliver the cargo in accordance with clause 41 on being paid freight as mentioned in the said charter-party. Clause 41 of the charter-party was as follows:

Cargo to be discharged at the minimum average rate of 300 tons per running day, Sundays and holidays excepted, time to count twenty-four hours after arrival in or off port of destination whether both available or not, any custom of the port to the contrary notwithstanding, and to be absolutely free of turn, should steamer be longer detained demurrage to be paid at the rate of 100*l.* per day.

2. The steamer duly loaded a cargo, and was ordered to discharge at Havre. The vessel on arriving at St. Vincent on her way to Havre was directed by the French naval authorities to proceed to Cherbourg and there wait her turn for a discharging berth at the port of Havre. These orders were given in pursuance of a notice issued by the French naval authorities, dated Paris, the 28th March 1916, under which vessels bound for Havre should be obliged to receive orders from their shipowners or consignees or from the maritime authorities at the last port reached to touch at Cherbourg for those coming from the west and from French ports, and at Spithead for those coming from the east and from the ports of Great Britain and Ireland. The notice stated that ships which had knowingly infringed the orders given, to try to get a turn to enter, should be immediately sent back to Cherbourg in order to wait.

3. In normal times deep-water vessels bound for Havre, if they cannot enter at once, anchor off the port in Havre Roads, and, if there is not a berth available, await there in their turn for a discharging berth. The expression "turn" means the sequence in which vessels awaiting a discharging berth are entitled to have a berth allotted to them.

4. The said order of the 28th March was made in consequence of the recrudescence of submarine action. A number of vessels which had been waiting in Havre Roads had been torpedoed whilst so lying there.

5. The *Plata*, in accordance with her instructions, proceeded from St. Vincent to Cherbourg and arrived there on the 1st July at 7 a.m. and remained there at anchor until 7 a.m. on the 12th July, when, a berth having become vacant for her in the port of Havre, she was allowed to proceed from Cherbourg to Havre, where she duly arrived and berthed on the 12th July at 8.45 p.m. The distance from Cherbourg to Havre Roads is about seventy-five miles.

6. The discharge of the cargo was duly proceeded with at Havre and finished on the 20th July at 10 a.m.

7. The owners contended that under clause 41 the arrival of the steamer at Cherbourg may be deemed to be an arrival off the port of Havre, and that she was waiting there a "turn" within the meaning of the clause, and that then the time for discharging would commence to count twenty-four hours after arrival at Cherbourg.

8. The charterers contended that an arrival at Cherbourg could not be construed as an arrival in or off the port of Havre, and therefore the lay days did not count until the steamer had actually arrived in the port of Havre, and that on that footing no demurrage was due.

The arbitrator, if and so far as it was a question of fact for him to decide, found that the vessel on arrival at Cherbourg had arrived off the port of Havre within the meaning of clause 41 and that her time began to run twenty-four hours after such arrival. He further found that she was detained there waiting a turn, and if time so occupied was not to be counted she would not be "absolutely free of turn" as provided in the charter-party. If the owners' contention was right in law, he held that they were entitled to seven days' demurrage, but if the charterers' contention was right, no demurrage was payable.

Adair Roche, K.C. and *C. T. Le Quesne* for the charterers.—Arrival at Cherbourg was not arrival in or off Havre. The ship was bound to arrive at her port of destination before the lay days began to run. Cherbourg is seventy-five miles from Havre and her arrival there could not be arrival in or off Havre. Arrival at Havre was a condition precedent to the commencement of the lay days.

Inskip, K.C. and *A. Neilson* for the shipowners.—It was as regards demurrage immaterial to the charterers whether the ship waited her turn at Cherbourg or Havre. The position is the same as if the ship had arrived at Havre, and then been sent back to Cherbourg to wait her turn at Havre. The master could have caused the lay days to run by going straight to Havre, but there was no need to go through that idle form. The ship's turn came just as quickly whether she waited at Cherbourg or Havre. What caused the loss of time was the necessity of waiting a turn, and by the clause the ship was to be absolutely free of turn, and the time lost by waiting ought to be on the charterers' account.

Bailhache, J.—This is an award stated in the form of a special case. The question which I have to decide is as to the construction to be put, having regard to the facts of the case, upon clause 41 of the charter-party made between the parties dated the 10th May 1916. Under that charter-party the steamer *Plata* was to load a cargo at Buenos Ayres and proceed to the French coast ports between Bordeaux and Havre, both ports included. The ship was loaded and Havre was ultimately nominated as her port of destination. In the course of her voyage she put in at

St. Vincent and there received orders from the French authorities to proceed to Cherbourg to await her turn for entering Havre. The ship arrived at Cherbourg and was detained there for some days awaiting her turn at Havre. The arbitrator has found that she was waiting her turn there on demurrage, and he found what was the amount due from the charterers to the shipowners.

The question on that view of the matter is whether the ship was in fact on demurrage or not while waiting at Cherbourg. That depends entirely on the construction to be placed on clause 41 of the charter-party, which says "Cargo to be discharged at the minimum average rate of 300 tons per running day . . . time to count twenty-four hours after arrival in or off port of destination." It is clear that on the face of the clause the owners were stipulating that when the vessel arrived at Havre her time was to count; and the question is whether the time is to be counted just the same although the vessel did not arrive in or off the port of Havre, but arrived at Cherbourg, and was detained there while a berth was being secured at Havre.

The general principle applicable to all these cases is well known, and is this: It is the duty of the vessel to arrive at the place of destination, whether that place is a port, a roadstead, a dock, or a berth. It is the duty of the charterer to be ready for the vessel when she arrives, and to proceed to discharge her if she is ready in accordance with the terms of the charter-party. But as a rule the vessel must first of all arrive. Any obstacle that prevents her arriving is for the vessel's and not for the charterer's account. The delay so occasioned must be borne by the shipowner and not by the charterer. That is equally true whether the obstacle is a physical obstacle, or a legal obstacle, or a restraint of princes. In this case the vessel properly obeyed the orders of the French Admiralty, arrived at Cherbourg, and waited there. Cherbourg is seventy-five miles from Havre. By the terms of clause 41 time was to count twenty-four hours after arrival in or off the port of destination. The ship being at Cherbourg had not arrived in or off her port of destination. Cherbourg is not Havre. The obligation of the charterers to discharge never attached at Cherbourg. The arbitrator has taken what is not at all an unreasonable business view. He said it does not matter whether the ship was in Havre or Cherbourg; she could not have been discharged in any case, as she was only detained awaiting her turn. But, in my view, it does matter, and the reason why it does so is that the contract says that she is to arrive at Havre, and, as I have already said, it is the obligation of the vessel to arrive. The charterer has nothing to do with her arrival except that he must do nothing to hinder or prevent it, and there is no suggestion that he has done so here. In my opinion time did not begin to run while the ship was at Cherbourg.

Then the arbitrator relied on the words "to be absolutely free of turn." I quite agree as to the meaning of the words, but they are conditional upon her arrival. After her arrival she is to be discharged at a certain rate, whether a berth is available or not, and to make the matter perfectly clear it says she is to be free of turn. These obligations of the charterers are conditional on the vessel arriving at or off the port of destination, which in this case was Havre. The truth of the matter is that the particular contingency which happened in this case had not been provided for, and as that particular contingency prevented the vessel from arriving, as it was her duty to do before her time counted, the loss occasioned by this unprovided for contingency must fall upon the shipowners and not upon the charterers.

Judgment for the charterers.

Solicitors for owners of steamship *Plata*, *Downing*, *Handcock*, and *Co.*

Solicitors for Ford and Co., *Botterell* and *Roche*.

June 19 *and* 20, 1917.

(Before Rowlatt, J.)

Chinese Engineering and Mining Company Limited *v.* Sale and Co. (*a*)

Shipping — Time charter-parties — Admiralty requisitions — Whether charter-parties terminated—Admiralty hire—Whether payable to charterers or shipowners—Divisibility of hire—Proportions.

The plaintiffs, by three charter-parties dated respectively July 1913, *Dec.* 1913, *and the* 11*th July* 1914, *chartered three steamers, the* A., *the* W., *and the* T., *from the defendants for periods of five years from delivery. The charter-parties would expire respectively in May* 1918, *May* 1919, *and March* 1920. *The owners were to pay for the insurance of the vessels and maintain them in efficiency. The Admiralty, during the course of the war and after the delivery to the charterers, requisitioned each of the steamers. The* T. *was sunk by a submarine, but the other vessels were still under requisition. The Admiralty form of charter-party provided* (inter alia) *that the owner should pay for insurance of the ship, and that the Admiralty should not be liable if the steamer should be lost or damaged by sea risk. The charterers claimed from the owners the sums paid by the Admiralty to the owners, and a declaration that they were entitled to the sums receivable by the owners from the Admiralty less the charter-party hire. The owners contended that the charter-parties were dissolved by the requisitions, and alternatively that the Admiralty hire was divisible.*

Held, that the charter-parties had not been terminated by the requisitions.

Held, also, that as the Admiralty charters took effect partly out of the interests of the charterers and partly out of the interests of the shipowners, the Admiralty hire must be divided between the two.

The principles to be followed in the division of Admiralty hire laid down.

Action in the Commercial List.

MacKinnon, K.C. and *Raeburn* for the plaintiffs.

Roche, K.C. and *R. A. Wright* (Sir *John Simon*, K.C. with them) for the defendants.

Cur. adv. vult.

Rowlatt, J.—In this case the plaintiffs were the time charterers of three steamers requisi-

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

tioned by the Admiralty during the currency of the charters, and the question I have to decide is whether they or the defendants, who are the owners, are entitled to a sum representing monthly hire for these steamers already paid by the Admiralty and still accruing. A third possibility is that both plaintiffs and defendants are interested in the fund in shares which have to be determined.

It is, in my judgment, essential to bear in mind the nature of the payment which the Admiralty has made—namely, that it is hire for the use of the vessels monthly. The charterers, though they had no possession of these ships under their charter-party, had a valuable contractual interest in their services, for the destruction of which the Crown might justly make compensation. But I have no fund of that kind to deal with, and if the result of the action of the Government has been to destroy the charter-parties, they have destroyed them without providing for compensation to the charterers. They have ignored them, and have put themselves in the position of compulsory charterers direct from the owners, to whom in that case the hire they pay would belong. If, however, the charters are not destroyed the charterers are bound to continue to pay the hire to the owners, and are entitled as between them and the owners to the use of the vessels, and, as pointed out by Lord Loreburn in *Tamplin (F. A.) Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (115 L. T. Rep. 315; (1916) A. C. 397), the owners must account for any hire received by them for such use.

It is for these reasons that to determine the ownership of the fund in dispute it is necessary to see whether the action of the Government has destroyed the charter-parties by virtue of what one may briefly refer to as the doctrine in *Paradine* v. *Jane* (Alleyn, 26), as developed by modern cases.

That doctrine, as a general rule of the law of contracts, must apply to time charters as to other contracts. This was pointed out by my brother Atkin in *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (33 Times L. Rep. 390). But there are many kinds of events and circumstances which in different connections have been held to call the rule into operation. The simplest case of all is where there has been destruction of specific subject-matter. There is, however, a very particular and special instance of its application, and that is where all that has happened is delay, but delay certain to be so prolonged as to destroy the possibility of performance of the contract at all as contemplated.

To that special form of event, destroying the contract, the special designation of "frustration of the adventure" has been applied in the current legal language of to-day, and the question which has arisen with reference to time charters is not, as it seems to me, whether the general doctrine of *Paradine* v. *Jane* (*sup.*) is applicable to this class of contract, but whether the special form of it in the case of inordinate delay is so applicable. It is obvious that where the contract is for the benefit of services over a period of time as opposed to the accomplishment of certain objects, the doubt may well occur whether the mere loss of time can put an end to the obligation. However, I think that doubt is now set at rest by authority, so far as delay amounting to an interruption of the kind now in question is concerned, an interruption which, as I shall point out later, obviously operates to the infraction of the rights of both parties.

Lord Loreburn in the *Tamplin* case (*sup.*) clearly held that if the interruption was bound to eat up the whole time that would destroy the contract. Furthermore, I think it is settled that this result follows notwithstanding that the event leading to the delay is one the occurrence of which is prevented by an exceptions clause from giving rise to a claim for breach of contract. Lords Loreburn, Haldane, and Atkinson were clearly of that opinion in the *Tamplin* case (*sup.*).

Under these circumstances it seems to me that the practical question which I have to consider is whether the requisition of these steamers, or any one of them, portended when made, or has at any time up to the date of trial come to portend—for I am authorised by the agreement of the parties so to extend my inquiry—that the Government user would continue for substantially the remainder of the charter period. I use the words of Lord Loreburn in the *Tamplin* case (*sup.*).

It was indeed argued by Mr. Wright for the owners that, independently of the question of time, the removal of the ship to a trade never agreed to by the owners in the charter-party entitled them to say the charter was at an end. But I do not think that point is open before me. If sound, it would have afforded a short way to a decision in the *Tamplin* case, where the interruption was as complete from both points of view as here.

Now, on the question of time there was evidence before me that the volume of requisitioning has been rapidly growing, and that to-day practically the whole of that class of British vessels with which this case is concerned are under requisition, so that there is very little chance of any of these ships being released during the war. Evidence was also given of statements made in Parliament on behalf of the Ministry confirming that view, and it was further suggested that requisitioning, or at least control, of shipping on the same scale would probably continue after the war. But the earliest of these charters to determine—namely, that of the *Albiana*—will not expire until Dec. 1918, and it seems to me I cannot assume that the war will last till then, nor can I assume that the Government will interfere with these ships after the return of peace.

At present I know of no power under which that could lawfully be done, and even if they had the general power conferred upon them I cannot assume that they will find it necessary to apply it to these particular ships.

It is true that the ships have been taken for an indefinite time, and that no one can say that this state of affairs will terminate before the charters would have expired even in the case of the latest of them, that of the *Tungsham*, which would have continued, had she not been sunk, till March 1920. But I do not think that I am at liberty to look at it in that way. I think I must approach it as Lord Loreburn did when he said that it must be "established" that the interference would last substantially to the end of the charter period. On this part of the case I come to the

conclusion that none of these charter-parties has come to an end.

The question remains whether the charterers are entitled to the whole of the Admiralty hire or whether they must share it with the owners. It is to be observed that in this case the use of the vessels by the Admiralty is not such as the charterers could have enjoyed themselves under their charter-parties or conferred on others by sub-charters. If that had been the case the Admiralty hire would have been paid for something which it lay exclusively in the hands of the charterers to enjoy or transfer without any right in the owners to object. The compulsory charter to the Admiralty would have been equivalent to a compulsory sub-charter taking effect entirely out of the charterers' interest, and the charterers would have had to be regarded as solely entitled to the position of owners for the purposes of the Admiralty charter-party, and as such solely entitled to the Admiralty hire. Here, however, the Admiralty hire is being paid partly in respect of a use of the vessels to which the charterers were not entitled to put them in return for the hire which they pay to the owners. Therefore, the Admiralty charter takes effect partly out of the interests of the charterers and partly out of that of the owners. In these circumstances the Admiralty hire must clearly be divided between the two, as was pointed out by Lord Parker in the *Tamplin* case.

It was agreed that the figures were to be referred, but I think that I ought to give some guidance as to the principle to be followed. The evidence before me showed that the conditions of the Admiralty charter were more onerous to the owner as involving him in higher payments for insurance and other disbursements than the conditions of the plaintiffs' charters, and this certainly is one element to be considered. I understood Mr. MacKinnon, for the charterers, to suggest that the owners should be compensated for any extra expense of this kind, and that the charterers should take the balance. I do not think that this is correct, nor, if the Admiralty hire were lower than it happens to be in this case, would it always be just to the charterers. I think a proportional division must be made in every case even where the Admiralty hire is less than the hire paid by the time charterers. However small it is, it forms the only fund out of which both parties must be paid for the invasion of their respective rights and interests, and paid *pari passu* in the proper proportions. This proportion must be found by ascertaining as fairly as possible—first, what the owners could properly demand monthly for altering the charter to the Admiralty form; and, secondly, what the charterers could properly demand monthly for the loss of the benefit of the charter.

The first sum should not only include what is necessary to indemnify the owners against extra expense, but also something to represent what they might reasonably have asked for consenting to alter the charter at all. If they had been free they could have bargained for that. The second sum must not include anything for special loss possibly inflicted upon the charterers by reason of dislocation of the trade for which they happened in fact to require the ships, but must be fixed on the basis of the value of the ships' services pursuant to the time charters in the tonnage market. The ratio between the two sums will be the ratio in which the Admiralty hire will be divided. As that hire must be treated as fixed on the day of the requisition the two sums forming the ratio must be calculated with reference to the values ruling on that same day. Further, they must be calculated on the footing that the requisition is to last for an indefinite time but to expire substantially before the expiry of the time charters. This is because the prospective length of the interruption may possibly have a bearing even on the rate per month which the respective parties may be regarded as justly demanding. There will be liberty to apply as to the form of the reference and of the declarations. The plaintiffs to have the costs of the claim and the defendants the costs of the counter-claim.

Solicitors: *Ashurst, Morris, Crisp*, and *Co.*; *Thomas Cooper* and *Co.*

Monday, July 2, 1917.

(Before Bray and Avory, JJ.)

Re Lobitos Oilfields and Admiralty Commissioners; *Re* Crown Steamship Company Limited and Same. (*a*)

Arbitration — Shipping — Ships requisitioned by Admiralty — Loss — Damage — Admiralty Transport Arbitration Board — Power of board to state a case — Admiralty Transport Arbitration Board Rules, r. 6.

The court has power to order arbitrators appointed by the Admiralty Transport Arbitration Board to state a case on a point of law for the opinion of the court.

Decisions of Sankey, J. and of Low, J. affirmed.

Appeals from chambers.

The question in the first case was whether the Admiralty was liable for the loss of the steamship *El Zorro*, as being due to risks of war undertaken by the Admiralty; and, in the second case, whether (*inter alia*) the Admiralty were responsible for the damage sustained by the steamship *Crown of Leon* on a voyage to Philadelphia owing to the carriage of a particular cargo.

The *El Zorro* was requisitioned by the Admiralty in Sept. 1914 and became a constructive total loss in Dec. 1915. The *Crown of Leon* was requisitioned in Jan. 1916 and was alleged to have been damaged by the carriage of a cargo of ore, for the carriage of which she was not adapted.

Sir *Gordon Hewart*, K.C. (S.-G.), *G. W. Ricketts*, and *C. R. Dunlop* for the Admiralty.

Roche, K.C. and *R. A. Wright* for the Lobitos Oilfields Company.

Le Quesne for the Crown Steamship Company Limited.

Rule 6 of the rules of the Admiralty Transport Arbitration Board provides:

The president may direct that any claim coming before the board may be heard and disposed of by a tribunal consisting of the president or vice-president sitting with two arbitrators selected by the president from the panel, and that the award of any two members of such tribunal shall be final and conclusive, and shall not be subject to appeal or review.

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

The following authorities were cited during the arguments:—

Re a Petition of Right of X., 113 L. T. Rep. 575; (1915) 3 K. B. 649;
Bexley Local Board v. *West Kent Main Sewerage Board*, 47 L. T. Rep. 192; 9 Q. B. Div. 518;
Montgomery v. *Liebenthal*, 78 L. T. Rep. 211;
Nuttall v. *Lynton and Barnstaple Railway*, 82 L. T. Rep. 17;
Leyland Shipping Company v. *Norwich Union Fire Insurance Company*, 13 Asp. Mar. Law Cas. 426; 116 L. T. Rep. 327; (1917) 1 K. B. 873;
Carpenter v. *Bristol Corporation*, 97 L. T. Rep. 461; (1907) 2 K. B. 617;
Tabernacle Permanent Building Society v. *Knight*, 67 L. T. Rep. 483; (1892) A. C. 298;
Kydd v. *Liverpool Watch Committee*, 99 L. T. Rep. 212; (1908) A. C. 327;
Baker v. *Yorkshire Fire and Life Insurance Company*, 66 L. T. Rep. 161; (1892) 1 Q. B. 144;
Hickman v. *Kent or Romney Marsh Sheepbreeders' Association*, (1915) 1 Ch. 881;
Arbitration Act 1889, ss. 2, 19, 21, 23, 25, 26, and 27.

Cur. adv. vult.

Bray, J.—This is an appeal by the Lords Commissioners of the Admiralty against an order made by Sankey, J. on the 1st May 1917. That order reversed the decision of the master and ordered that the arbitrators herein do state a case for the opinion of the court under sect. 19 of the Arbitration Act 1899 on the question of law alleged by the claimants to arise in the arbitration. I need not read the question of law, because the Solicitor-General did not contend that there was not a question of law.

His contention was threefold. He said there was no submission within the meaning of that Act; secondly, that if there was a submission it was upon the terms that it was to be final and binding and without review; and there is a third question that as a matter of discretion we ought not to make the order.

The facts which give rise to this dispute are these: There was a proclamation on the 3rd Aug. 1914 which authorised the appellants, the Lords Commissioners of the Admiralty, to requisition any British ship for such period or such time as should be necessary, on the 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 and compensation for loss or damage thereby occasioned according to terms to be arranged by mutual agreement, or, failing agreement, by the award of a board of arbitration. Then follow some rules and a panel of arbitrators. The rules we have to deal with here are what are called the amended rules.

The Admiralty under this power requisitioned a ship belonging to the plaintiff company called the *El Zorro*, and in Dec. 1915, or about that time, while she was so employed, she was torpedoed, and though an attempt was made by Government tugs to bring her into harbour, they ultimately failed owing to a storm, and the ship was lost. Thereupon the plaintiff company demanded compensation for the damage.

It appears that these rules and this proclamation when examined do not provide for a claim for compensation and damage being settled in any way, either by arbitration or in any other way, and in this case there was no charter-party signed and no terms arranged. So that two questions arose: first, as to what was to be paid for the hire of the ship; and, secondly, whether the plaintiff company were entitled to any compensation for this damage. Very properly the parties agreed after some time that both these questions, in fact all questions between them, should be referred to arbitration. A submission was agreed upon and signed by the parties. That is dated the 28th July 1916. It is an agreement between the Director of Transports, no doubt acting for the Lords Commissioners, and the solicitors for the plaintiff company. It recites: "Disputes have arisen between the company and the Lords Commissioners of the Admiralty: (1) As to the liability of the Admiralty in respect of the loss of the said vessel; (2) as to the amount of compensation, if any, to be paid in respect of the said vessel while she was in the service of the Admiralty. And whereas the company and the Lords Commissioners of the Admiralty have agreed to submit all the matters in dispute as aforesaid to the Admiralty Transport Arbitration Board constituted and appointed under the said proclamation, and the Right Hon. Lord Mersey, the president of the board, has expressed his willingness to appoint arbitrators to determine all the matters in dispute between the parties in accordance with the rules of the Arbitration Board if the company and the Lords Commissioners of the Admiralty should in writing request him so to do. Now the company and the Director of Transports on behalf of the Lords Commissioners of the Admiralty hereby request the Right Hon. Lord Mersey to appoint two arbitrators to sit with the president or vice-president of the board under rule 6 of the rules of the Arbitration Board to determine all matters in dispute between the company and the Lords Commissioners of the Admiralty with reference to the said vessel, and agree to be bound by the determination of the tribunal so constituted." Rule 6 of the rules is in these words: "The president may direct that any claim coming before the board may be heard and disposed of by a tribunal consisting of the president or vice-president sitting with two arbitrators selected by the president from the panel, and that the award of any two members of such tribunal shall be final and conclusive, and shall not be subject to appeal or review"; and pursuant to the request he on the 4th Aug. made an order in these terms: "In compliance with the request of"—so and so—"I hereby appoint Captain Sir Charles E. H. Chadwyck-Healy, K.C.B., K.C., and C. Sydney Jones, Esq., two arbitrators to sit with William Walton, Esq., the vice-president of this board, under rule 6 of the rules of the board to determine all matters in dispute between the said company and the Lords Commissioners of the Admiralty with reference to the said vessel." Thereupon that tribunal, consisting of Mr. William Walton and two other arbitrators nominated by Lord Mersey, sat, and during the course of the case, and before any award was made, they were asked to state a special case upon this point of law. As I understand, they said they were prepared to do it on being ordered to do so by the court. Then follows the application that was made which resulted in the order of Sankey, J.

As I have said, the first point raised is that there was no submission in writing within the meaning of the Act—that is, the Arbitration Act. The Arbitration Act provides by sect. 27: "In this Act, unless a contrary intention appears, 'submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." It is said that this is not a submission to arbitration. This is a written agreement undoubtedly to submit present or future differences to arbitration, and the arbitrators were appointed as such.

The first point taken was that this was a board. It is called, I think, the Transport Board of Arbitration, and the case cited was a case not under the Arbitration Act, but under the Common Law Procedure Act, viz, *Bexley Local Board* v. *West Kent Main Sewerage Board* (47 L. T. Rep. 192; 9 Q. B. Div. 518). The private Act obtained by the West Kent Sewerage Board and which incorporated them and gave them power to make a sewer provided by sect. 93 as follows. "Except as in this Act expressly otherwise provided, if at any time any difference arises between the board on the one hand and any constituent authority or authorities or person or persons on the other hand, or between any two or more constituent authorities, or between any constituent authority and any parish or part of a parish or persons or person, respecting any assessment of a main sewer rate, or any injunction, notice, or any determination of the board, or any controversy or other matter under this Act, the same shall by virtue of this Act stand referred for decision to the Local Government Board, whose decision thereon and respecting the costs of the reference shall be final and binding." The court before whom it came, consisting of Manisty, J. and Watkin Williams, J., decided that the Local Government Board were not arbitrators; it being held that "it was not competent to them to do so, the Local Government Board being by sect. 93 constituted the tribunal whose decision on the matter was to be final and binding, and this not being a submission to arbitration within sect. 5 of the Common Law Procedure Act 1854." Watkin Williams, J. in giving judgment says: "It appears to me that this is neither in words nor in substance or sense a reference by consent of parties, where the submission can be made a rule of court." It is quite clear that that does not apply to this case, because this arbitation was undoubtedly a reference by consent. There is submission in writing. Independently of that, everyone knows the way the Local Government Board, who often have to decide disputes between local authorities, decide the point. They do not hold the arbitration themselves, but they send down an inspector to make an inquiry, and the inspector reports. The way in which they decide is quite different from persons who are actually arbitrators; they are not arbitrators. It seems to me, therefore, this case is quite distinguishable. Therefore we have to decide this case, in my opinion, without reference to any real authorities on the point.

Looking at the rules, it is observable that the word "arbitrators" is mentioned again and again. The president is called "the president of the board of arbitration." He is to refer the claim to "two arbitrators." "The arbitrators so selected shall receive directions from the president." "The joint award of such arbitrators shall be final." I will deal with the question of this clause presently. "If they are unable to agree, the matter shall be referred to the president of the board of arbitration, who can call for papers," &c. And "the award of the president shall be final." It seems to me clearly what was contemplated was an arbitration and an award. There is no suggestion of any express or implied clause saying that the Arbitration Act 1889, with which every one is familiar, was not to apply.

Nothing could have been easier, if it had been so intended, than to have a clause saying that the Arbitration Act 1889 shall not apply to any proceedings before this board of arbitration. Therefore it seems to me that this was a submission to arbitration.

The next point that is raised is on the special provision that this shall be final and binding, and not be subject to appeal or review. When it is looked at, it appears that the president may direct that the claim shall be heard, and that the award of any two members of such tribunal—that is, two out of the three—shall be final and conclusive, and shall not be subject to appeal or review. Now, Lord Mersey did not so direct; therefore that part of rule 6 does not apply. But in my opinion it would make no difference if there had been a direction on that point. I am not quite certain that my learned brother agrees with me on this point, but in my opinion it would make no difference. When the Arbitration Act is looked at, there is attached to it a schedule, and by one of the sections to the Act it is made to apply. Now, that schedule, by par. *h*, says this: "The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively." Therefore the very Act which contains these provisions as to the powers of the court to order a special case to be stated contemplated an arbitration where the award was to be final and binding. The section I referred to was sect. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to this Act, so far as they are applicable to the reference under the submission." When one looks at the words "shall be final and conclusive and shall not be subject to appeal or review," they do not contain in my opinion any words inconsistent with the tribunal having the power to state a special case, or their award in the form of a special case, or to state a case for the opinion of the court. The award will be final and conclusive, and will not be subject to appeal or review. Sect. 19 contemplates that before any award is made at all, before possibly even any expression of opinion, the arbitrators may be ordered to state a special case. "Any referee, arbitrator, or umpire may at any stage of the proceeding under a reference"—and, of course, after the award it has been decided and it is quite clear there is no such power, it must be during the reference—"and shall, if so directed by the court or a judge, state in the form of a special case, for the opinion of the court any question of law arising in the course of the reference." Therefore, when they state a special case their award does not cease to be final and conclusive. Under sect. 19, of course, they make their award after the court have decided upon the special case, "the award

of any two members of such tribunal shall be final and conclusive, and shall not be subject to appeal or review."

Some cases have been cited, and among others a reference was made to the case of *Kydd* v. *Liverpool Watch Committee* (99 L. T. Rep. 212; (1908) A. C. 327). That was not a case of arbitrators, but a case of quarter sessions, and the question arose if the quarter sessions had power to state a special case, which, by the by, is not stated till after they have decided the case; but the words which were relied upon were these:— This is what the Act requires: that the court, after inquiry into the case, may make such order in the matter as appears to the court just, which order shall be final. There is not a word said about "arbitrators" or "arbitration" or anything of the kind. Lord Loreburn lays down this rule, which is clearly applicable: "I do not wish to express any opinion as to other Acts containing different words, and indeed the process of reasoning that, because one set of words means one thing in one context, other words or the same words in a different context must necessarily mean the same thing is often vexatious and fruitless. I confine myself to this particular clause." Therefore it seems to me that, the words being so entirely different, that case is no authority at all.

The conclusion, therefore, that I come to on the second point is that the words "final and conclusive, without appeal or review," even if they had been embraced in the order, would not prevent the court ordering a special case to be stated here.

The remaining point is that it is said that this court ought in its discretion not to do so, and the main reason put forward was the eminence of the members of this board. It is to be observed that there is here a very large sum in dispute. The ship is said to be worth by the plaintiff company 250,000*l.*, and by the Board of Admiralty 188,000*l.*; in other words, it is about some 200,000*l.*, and therefore it is a matter which undoubtedly ought to be very carefully considered and decided.

The court before whom this case will come always consists of three members, and, as a rule, is presided over by the Lord Chief Justice. However eminent this tribunal may be, and I do not wish to say they are not eminent at all in any way, I have no hesitation in saying that I prefer the decision of the court to the decision of these gentlemen. It is very important no doubt that they should be skilled arbitrators, because their duty is not confined to deciding questions of law; they have to decide questions of fact, and there may be very difficult questions of fact here. We are not taking away jurisdiction from them in any degree except to the extent of deciding this point of law for them. It was said, and I think it was put under the head of discretion rather than anything else, that this is referring the whole matter to us. It is not suggested that it does not come within the words "any question of law." That does not prevent it, because in these cases it often happens, and the arbitrators have still to decide all questions of fact. We are not taking away their jurisdiction at all.

Therefore, for these reasons, it seems to me the order was rightly made, and this appeal must be dismissed.

Now I will deal with the other case. The only difference really between the second case and the first which I have decided is that there is a question raised as to whether there was a submission in writing. Of course it is essential for the respondents in this case to establish that there was a submission in writing. Now, "submission" means a written agreement to submit present or future differences to arbitration. There was no formal agreement, but there was correspondence, and the correspondence is set out. I think it is exhibit "J. 3." There are a number of letters. I need not go through them because this point ultimately was not contested very strongly; but it seems to me that those letters, beginning with the 9th June and ending with the 7th Aug., do contain a written agreement to submit these matters to arbitration. Reference was made to a letter of the 30th March which was written by Mr. George, acting on behalf of the Admiralty, to Mr. Walton. There may be a question whether that is an agreement, inasmuch as it was written to Mr. Walton, and I do not think it is necessary, and I do not desire, to rest my decision on that letter of the 30th March; it seems to me the letters I have referred to from the 9th June to the 2nd Aug. are quite sufficient. But it is very clear; "with reference to your letter of the 2nd inst." the department are quite willing that the arbitration board should determine all mat ers in dispute with reference to the above vessel. I do not know whether the owners are acting in conjunction with the marine underwriters in this case, but, if not, it appears that the same sort of difficulty might arise as I understand arose in the *El Zorro* case. I am not quite sure whether the owners appreciate this, since they have framed their case rather on the lines of a claim in tort. That is really the only difference. The question of discretion is substantially the same. I am not sure if the arbitrators are the same, but as a matter of fact there was just the same direction by Lord Mersey, and no special direction that the award of any two of the members should be final and conclusive, and not be subject to appeal or review.

Therefore it seems to me our decision in the first case must be followed by our decision in the second case, and the appeal should be dismissed in that case also.

Avory, J. read the following judgment:—My judgment deals with both cases, because I can find no distinction for the purpose of to-day between them.

By the mutual consent of the Lords Commissioners of the Admiralty and the shipowners the questions in dispute in each of these cases were referred to the board of arbitration constituted under the proclamation of the 3rd Aug. 1914 and the rules made thereunder. In each case the dispute involves questions beyond the jurisdiction conferred on the board of arbitration by the proclamation, as appears by the correspondence and by admissions made in the argument before us, which questions, except by consent, could not have been referred to them. The president of the board of arbitration has in each case directed that the claim shall be heard and disposed of by the vice-president sitting with two arbitrators under rule 6 of the rules for the constitution of the board; but has not in terms directed that the award of any (w)

members of the tribunal shall be final and conclusive and not subject to appeal or review. There is, I think, no doubt that important questions of law have arisen in each case in the course of the reference, and orders have been made by the judge in chambers directing the arbitration tribunal to state a special case for the opinion of this court under sect. 19 of the Arbitration Act 1889. The contention of the Crown, on appeal from those orders, is that, having regard to the object and purpose of the proclamation and the rules made thereunder, and to the fact that the claimants are not seeking to enforce any legal right to compensation, in support of which latter contention *Re a Petition of Right of X.* (113 L. T. Rep. 575; (1915) 3 K. B. 649) is cited, the Arbitration Act does not apply, and that in any event this court, in the exercise of its discretion, ought not under the circumstances to order a special case to be stated. In my opinion there was in each of these cases a submission to arbitration within the meaning of the Arbitration Act, which by sect. 23 is expressly applied to arbitrations to which the Crown is a party, and a submission of disputes beyond the jurisdiction conferred on the board of arbitration by the proclamation. I do not think there is any inconsistency between sect. 19 of the Arbitration Act and the rules at present in force under the proclamation. Par. *h* of the first schedule to the Arbitration Act provides that the award shall be final and binding on the parties, and I doubt if rule 6 means more than this, even when the concluding words are specified in the direction of the president: (see sect. 24 of the Arbitration Act and the case of *Tabernacle Society* v. *Knight*, 67 L. T. Rep. 483; (1892) A. C. 298). The case of *Kydd* v. *Corporation of Liverpool* in (1908) A. C. was exceptional, and does not, I think, govern the present.

Therefore I come to the conclusion that, in the absence of any rule of this board of arbitration expressly excluding the provisions of the Arbitration Act, sect. 19 applies to the proceedings in question, and that the order for the statement of a special case should be confirmed and the appeals dismissed.

Appeals dismissed.

Solicitors: *Treasury Solicitor; Parker, Garrett,* and *Co.; Botterell* and *Roche.*

July 3 and 6, 1917.

(Before ROWLATT, J.)

LONDON-AMERICAN MARITIME TRADING CORPORATION COMPANY LIMITED *v.* RIO DE JANEIRO TRAMWAY, LIGHT, AND POWER COMPANY LIMITED. (*a*)

Charter-party—Hire to cease in case of loss—Option to shipowner to substitute another vessel in case of loss—Requisition by Admiralty—War risks assumed by Admiralty—Loss of steamer while under requisition—Compensation payable by Admiralty—To whom payable.

By a charter-party dated the 5th June 1914 *the plaintiffs chartered their steamer* R. C. *to the defendants for a term of eight years, two months, and eighteen days from that date on the conditions therein set out. It was provided by the charter-party that, should the vessel be lost, the hire was to cease and determine on the day of the loss, and any hire paid in advance and not earned should be returned to the defendants, but that the plaintiffs should have the right to substitute another steamer to continue the charter if they so desired. The plaintiffs were to insure, and could insure or not as they pleased and against such risks as they chose. On the 17th Jan.* 1917 *the steamer was requisitioned by the Admiralty on the terms of the time charter-party known as T.99, whereby the Government assumed war risks on her ascertained value. In March* 1917 *the steamer was lost by war risks, and the plaintiffs, who were the owners of the steamer, brought the action, claiming a declaration that all payments made by the Admiralty in respect of the ascertained value of the steamer by reason of her loss belonged to the plaintiffs, and that the defendants had no claim to receive or share in such or to be present at any arbitration.*

Held, that the plaintiffs, the shipowners, were entitled to the whole of the compensation payable by the Admiralty in respect of the ascertained value of the steamer by reason of such loss.

TRIAL of action in the Commercial list before Rowlatt, J., without a jury.

In this case the plaintiffs, who were the owners of a steamship known as the *Rio Colorado*, claimed a declaration that all payments made by the Director of Transports or the Commissioners for executing the office of Lord High Admiral of the United Kingdom in respect of the ascertained value of the said steamship, by reason of the loss of the said steamship on or about the 22nd March 1917, belong to the plaintiffs, and that the defendants had no claim to receive or share in such or to be present at any arbitration in respect thereof. They also claimed an injunction to restrain the defendants, their servants and agents from interfering with or attempting to prevent the receipt by the plaintiffs of the said moneys.

The plaintiffs, by their points of claim, alleged that by a charter-party dated the 5th June 1914 the plaintiffs agreed to let the said steamship to the defendants for a term of eight years, two months and eighteen days from that date on the conditions therein set out. By clause 18 of the said charter-party it was provided that, should the vessel be lost, the hire was to cease and determine on the day of her loss, and any hire paid in advance and not earned should be returned to the defendants, but that the plaintiffs should have the right to substitute another steamer to continue the charter if they so desired.

On the 17th Jan. 1917 the said steamship was requisitioned by the Admiralty on the terms of the Admiralty time charter-party known as T.99. By clause 19 of the said charter-party it was provided that the risks of war were taken by the Admiralty on the ascertained value of the steamer if totally lost at the time of such loss, and that if a dispute should arise as to the value of the steamer the same should be settled as laid down in clause 31, which provided that any dispute should be referred under the provisions of the Arbitration Act 1889 to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and in case of dis-

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

agreement to an umpire; and it was further provided that such arbitration should be a condition precedent to the commencement of any action.

On or about the 22nd March 1917 the steamer was totally lost by a war risk, and the Admiralty were prepared to negotiate with the plaintiffs the value of the steamer and to pay to the plaintiffs 80,000*l.* on account and the balance when the value of the ship had been ascertained. On the 30th March 1917 the defendants gave formal notice to the Admiralty that they claimed to be interested in any moneys payable in respect of the loss of the steamer, and that the Admiralty were not to agree the amount payable or to make any payments to the plaintiffs without the defendants' concurrence, and that the defendants claimed the right to attend and take part in any arbitration. In consequence of this notice the Admiralty have refused to make any payment to the plaintiffs or further to deal with their claim without a banker's guarantee to refund any moneys paid to the plaintiffs.

The defendants, in addition to carrying on various utility services in the City of Rio de Janeiro, control a Belgian company which has a concession for the supply of gas for lighting and heating in the city. For the purposes of their business the defendants require approximately 150,000 tons of coal per annum in Brazil, and some years before the war they time chartered from the plaintiffs and their predecessors a fleet of several steamers, including the *Rio Colorado*, which was a steel screw steamship of 3565 tons gross and 2237 tons net register which was built in the year 1903.

The steamer was finally chartered to the defendants by the said charter-party dated the 5th June 1914, and it was alleged by the defendants in their points of defence that under this charter-party of the 5th June 1914 the defendants were the time chartered owners of the said steamship from the said date until the 23rd Aug. 1922, and, subject to the prerogative power of the Crown to requisition her during the war, the defendants were the only persons entitled to the use of the ship during the remainder of her probable life. The plaintiffs were entitled to 1111*l.* 5*s.* per month for hire, out of which they had to pay for wages and provisions of the crew, stores, insurance, and other charges, and also the expense of maintaining the ship in an efficient state for the defendants' service.

The charter-party was the subject of litigation between the parties in an action which was tried by Atkin, J. in May 1916. The object of the action was to obtain a declaration with reference (*inter alia*) to the effect of requisitioning by the Admiralty of ships chartered by the present plaintiffs to the present defendants under the said or similar charter-party, and it was declared in the judgment in that action "that the charter-parties between the plaintiffs and the defendants were not terminated or suspended by the requisitioning of any of the chartered steamers by the British Government, and that the plaintiffs (meaning the present defendants) are entitled to all payments made or to be made by the British Government for the requisitioned steamers, and that the defendants (meaning the present plaintiffs) are not entitled to any share thereof."

The steamer was requisitioned by the Admiralty in Jan. 1917, under the proclamation of the 3rd Aug. 1914, and whilst under requisition it was sunk by a mine or torpedoed in the North Sea. The defendants were advised that as time charterers of the steamer they were included in the term "owners" in the proclamation of the 3rd Aug. 1914 as construed by Lord Parker of Waddington in his judgment in the case of *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (115 L. T. Rep. 315; (1916) 2 A. C. 397), and as such might be entitled to some part of the compensation paid by the Admiralty. The defendants accordingly served the notice on the Director of Admiralty Transports, and subsequently delivered to the Admiralty their claim for submission to the Admiralty Transport Arbitration Board.

Douglas Hogg (Sir *John Simon*, K.C. with him) for the plaintiffs.—The Admiralty under T.99 have agreed to pay ascertained value of the ship to be determined by arbitration. The defendants' interest in the steamship determined automatically upon this sinking. The rise in the rate of freights cannot alter the legal rights of the parties. [ROWLATT, J.—Is not the value of the ship ascertained by considering how long the ship may be employed?] That is the main element in the value of the ship. The charter-party gives an option to replace her, and the plaintiffs want the money to replace her.

A. Adair Roche, K.C. (*Dunlop* and *Stenham* with him) for the defendants.—The claim for compensation for the loss of this steamship was made to the Admiralty Transport Arbitration Board. It was a matter of grace: (see the proclamation of the 3rd Aug. 1914, p. 386, of the Manual of Emergency Legislation). The defendants are entitled to a share in the compensation awarded. The defendants' interest was an insurable matter, and was covered by the Admiralty's war risks insurance. The defendants' claim has been made before the only tribunal before which it can be made. Referring to freight, see *Chinese Engineering and Mining Company* v. *Sale and Co.* (33 Times L. Rep. 464). There the sum accepted covered both interests, and only the question of division came before the court. Here the fund does not yet exist which is to be divided. But the defendants have made a claim. The proper remedy would be to give the banker's guarantee, and then bring an action against the defendants if the Admiralty award nothing to the defendants. It has been held in *Lobitos Oilfields Limited* v. *Lords Commissioners of the Admiralty* (33 Times L. Rep. 472) that the Admiralty Arbitration Board can be called upon to state a case. An injunction cannot be given such as is claimed here. Injunction in the case of contracts can only apply to malice. There is no malice here. The defendants had an interest in the steamship. He also cited

Tamplin Steamship Company v. *Anglo-Mexican Petroleum Products Company*, 115 L. T. Rep. 315; (1916) 2 A. C. 397.

Sir *John Simon*, K.C. in reply.—Under clause 18 the owners have the right to substitute another ship. The vessel was at the plaintiffs' risk. By clause 19 of the charter-party T. 99 the Admiralty is bound to pay the plaintiffs only. There is a

fundamental distinction as regards the time charterer between a ship living and a ship lost. When the ship is lost, the time charter comes to an end, and the time charterers have no further interest in the ship. The principle of the division of the freight does not apply to the body of the ship.

Cur. adv. vult.

July 6.—ROWLATT, J. read the following judgment:—

In this case the plaintiffs had chartered a steamer to the defendants for eight years odd from June 1914. In March 1915 the Government requisitioned the steamer upon terms, so far as material for the present case, of the form of charter known as T. 99, by which the Government assumed war risks on her ascertained value. Early in the present year the ship was lost by war risks, and the present action is for a declaration that the sum to be paid by the Government in respect of the loss belongs solely to the plaintiffs.

Under the original time charter between the plaintiffs and the defendants the position was that the plaintiffs were to insure, and that, in the event of the loss of the ship, the charter was to terminate with an option to plaintiffs to substitute another ship. The plaintiffs could insure or not as they pleased and against such risks as they chose. Owing to the circumstances arising out of the war, shipping increased enormously in value, but, owing to the time charter, the owners would in fact enjoy no increased profit from the working of the ship for the remainder of the eight years. Nevertheless, if they chose to insure the ship at her increased value, they would be entitled to do so; and, seeing that if the ship was lost they would have to pay such increased value to replace her, it would have been a prudent thing for them to do. If they had done this and there had been no requisition, and the ship had been lost by a peril insured against (whether peril of war or peril of the sea), I cannot conceive that the right of the owners to receive and hold the whole of the insurance money could have been questioned. Further, when the Government requisitioned, had the Government charter provided that the owners should insure against war risks, it would, I imagine, have been equally clear that they would have been entitled to the whole of the benefit of the policy, just as under the actual form of Admiralty charter they would have been entitled to the whole of the benefit of any insurance against ordinary risks if the ship had been lost by ordinary perils. But by the Government charter T.99 the Government assumed the war risk, thereby making it unnecessary for the owners to insure such risks. It seems to me quite clear, subject to the argument which Mr. Roche addressed to me, that the owners should enjoy the benefit of that term in the charter, just as they would have enjoyed the benefit of a policy giving them the same protection. But Mr. Roche put forward this argument. The Order in Council, he said, under which the Government requisitioned, provided for compensation to the owners. For the purposes of the enjoyment of the benefit of the Admiralty charter (which did not destroy the time charter) the defendants, as between themselves and the plaintiffs, are entitled to share the position of owners with them. The provision of the Admiralty charter by which the Government assume war risks, continues Mr. Roche, is part of the compensation given to the owners. So be it; but it does not follow because the defendants are entitled to an interest in the benefits of the charter, speaking generally, that they are entitled to share in every element of such benefit. The parties must share the benefit or compensation according to their interests, and this part of it is in respect of an interest entirely the plaintiffs'—namely, that in having the ship, if lost, replaced by a sum of money equivalent to her value which, the charter coming to an end by that loss, would be entirely the plaintiffs'. Mr. Roche says this is a fallacy, because it treats the insurance moneys as something accruing after the loss of the ship, and the consequent determination of the charter-party, whereas those moneys replace a floating and still chartered ship. But this is not so; the ship has been converted into money by the same event as determined the interest of the charterers; and the owners take the money as they would have taken the ship had the charter been determined by some other event or by effluxion of time.

But I may put the case in another way. I cannot but think that the argument of the defendants is based upon a false idea generated by the use of the word "compensation." It suggests that there must be compensation not for the use of the ship by the Government, but for the accident that during that use an event happened which determined the charter-party. The charterers had the use of the ship subject to the possibility of that event happening. They could have insured against that event had they been so minded. The Admiralty took the vessel, and the charterers still remained exposed to the possibility of that event happening, and, if the Admiralty did not take her for voyages other than those in which the charterers would have employed her, the risk of determination of the charter would have been the same; and this risk could have formed no element in any possible claim by the charterers for compensation under the Order in Council. If, on the other hand, the Admiralty put her to a use enhancing the risk of the charter being determined, this might have formed the subject of a claim of a very special character by the charterers. The assumption of war risks by the Admiralty is not, however, even to the slightest extent, by way of satisfaction of any such claim as that. It merely provides for the hire and insurance of a chattel.

For these reasons I think the plaintiffs succeed. It was argued that the claim for a declaration was misconceived, as tending to prevent the defendants resorting to the arbitral tribunal which has jurisdiction to deal with any claim they may make. I do not debar the defendants from making any claim they think they can put forward, so long as they do not claim in respect of the assumption by Government of the war risk on the ascertained value of the ship. This claim I decide the plaintiffs are alone entitled to make. There will be a declaration in the terms of the first paragraph of the prayer, substituting, to prevent any possibility of mistake, the words "of such ascertained value" for the word "thereof." This will entitle the Admiralty to deal solely with the plaintiffs in respect of the

claim in question. The plaintiffs must have the costs of the action.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Maxwell* and *Dampney.*

Solicitors for the defendants, *Paines, Blyth,* and *Huxtable.*

July 19 *and* 27, 1917.

(Before ROWLATT, J.)

CLAPHAM STEAMSHIP COMPANY LIMITED (in liquidation) *v.* NAAMLOOZE VENNOOTSCHAP HANDELS-EN TRANSPORT MAATSCHAPPIJ VULCAAN, GEWERKSCHAFT DEUTSCHER KAISER OF HAMBORN, ACTIEN-GESSELSCHAFT FÜR HUTTENBETRICH, AND THYSSEN AND CO. (*a*)

War—Contract with Dutch company—German shareholders—Benefit of or support of enemies—Effect of outbreak of war.

The V. Company was a Dutch company, which had all its shares held by three German companies. It was managed by two German directors resident in Holland, but they were subject to the control of a supervisory committee of Germans resident in Germany. The plaintiffs, who were the owners of the steamship F., *entered into a charter-party with the V. Company whereby the steamship was chartered to the V. Company for a period of about five years from Feb.* 1913. *The plaintiffs sought a declaration that the charter-party was put an end to by the outbreak of war.*

Held, that the maintenance of the charter-party in a state of suspension during the war would have the effect of supporting the enemy during the war, and the nature of the charter-party was such that the outbreak of the war made it illegal in toto *even though suspended or postponed in performance. Therefore the plaintiffs were entitled to the declaration asked for.*

ACTION in the Commercial List tried by Rowlatt, J.

The plaintiffs' claim was for a declaration that a charter-party dated the 18th Jan. 1913 between the plaintiffs as owners of the steamship *Ferngarth* and the defendants the Naamlooze Vennootschap Handels-en Transport Maatschappij Vulcaan as charterers became dissolved and terminated by the outbreak of war between this country and Germany, the said defendant company or firm having made such charter-party as agents for a German firm or company, the Gewerkschaft Deutscher Kaiser of Hamborn and (or) the Actien-Gesellschaft für Huttenbetrich and (or) Thyssen and Co., and being enemy companies or firms by reason that the members were Germans and carrying on business in Germany; and for a declaration that such charter-party was conditional on a guarantee dated the 22nd Feb. 1913 given by the defendants the Gewerkschaft Deutscher Kaiser, which guarantee was dissolved by the outbreak of war.

The plaintiffs by their points of claim alleged that by a time charter-party dated the 18th Jan. 1913 between the plaintiffs, a British registered company as owners of the British steamship *Ferngarth,* and the defendants the Naamlooze Vennootschap Handels-en Transport Maatschappij Vulcaan of Rotterdam (hereinafter called the charterers) as charterers it was agreed that the plaintiffs should let and the defendants should hire the steamship for about five years from delivery to the defendants as charterers in the trades specified in the charter-party at the rate of hire to be paid monthly in advance until redelivery on the termination of the charter-party. There accompanied the said charter-party and the said charter-party was conditional upon a written guarantee dated the 22nd Feb. 1913, addressed to the plaintiffs and signed by the defendants the Gewerkschaft Deutscher Kaiser, guaranteeing to the plaintiffs due fulfilment by the said charterers of their obligations under the charter-party. On the 4th Aug. 1914, on the outbreak of war with Germany, the *Ferngarth* was discharging at Rotterdam under the charter-party. By telegram of the 5th Aug. 1914 the charterers gave notice suspending the charter-party during the continuance of hostilities under clause 27 of the charter-party as in the event of war between the nation to whose flag the chartered steamer belonged and some other European Power.

Thereaftor it became known to the plaintiffs that the charterers being a Dutch company limited by shares, registered at Rotterdam, and having a branch office at Antwerp, was in fact the property and under the control of the defendants the Gewerkschaft Deutscher Kaiser of Hamborn, Germany; the Actien-Gesselschaft für Huttenbetrich of Duisberg-Meiderich of Germany, and A. Thyssen and Co., a partnership of Mulheim Ruhr in Germany, all three such defendants being enemy corporations or firms. The charterers were at all material times agents or nominees or a branch of the said enemy corporations and made the said charter-party as trustees for and on behalf thereof, and the steamer was worked under the said charter-party on their behalf—viz., for the purpose of carrying ore to Rotterdam for delivery by Rhine lighters into Germany. By proclamation dated the 29th Feb. 1916 the said charterers were put on the list of statutory enemies under the Trading with the Enemy (Extension of Powers) Act 1915.

The plaintiffs took the proceedings under the Legal Proceedings against Enemies Acts 1915.

The defendants by their defence denied that the said charter-party was conditional upon the guarantee.

They further alleged that the first-named defendant company was duly constituted and incorporated under the laws of the kingdom of Holland, and as such, and not otherwise, entered into the said charter-party. The defendants counter-claimed for a declaration that the said charter-party is effective, existing, and binding upon the plaintiffs.

Sir *John Simon,* K.C., *R. A. Wright,* and *C. R. Dunlop* for the plaintiffs.—It is contended that the first defendants are to be regarded as a German company or firm. Although nominally a Dutch company, it clearly exists to further the operations of the other three defendant companies, who are German. The object of the charter-party in question was to provide tonnage for the purposes of the business of the enemy companies. The outbreak of the war made the maintenance

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

of any contractual relations with the defendants illegal, and mere interruption or postponement of performance did not remedy the illegality. They referred to

Daimler Company Limited v. *Continental Tyre and Rubber Company (Great Britain) Limited*, 114 L. T. Rep. 1049; (1916) 2 A. C. 307;
Zinc Corporation Limited v. *Hirsch*, 114 L. T. Rep. 222; (1916) 1 K. B. 541.

The plaintiffs are entitled to the declaration asked for.

Greer, K.C. and *A. Neilson* for the defendants. —The charter-party only provides for lawful voyages, and can therefore be observed during the war without rendering any service to the enemy. The charter-party is interrupted for the period of the war, and the question is whether it is still in existence for any purpose. This question should be answered by applying the test formulated by Lord Loreburn in *Tamplin (F. A.) Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (115 L. T. Rep. 315; (1916) 2 A. C. 397). [They also referred to the dicta of Willes, J. in *Esposito* v. *Bowden* (7 El. & Bl. 763, at p. 781).]

Cur. adv. vult.

July 27. — ROWLATT, J. — In this case the plaintiffs, who are the owners of the steamship *Ferngarth*, seek a declaration that a charter-party by which their steamer was chartered to the first defendants (whom I shall call the Vulcaan Company) for a period of about five years, commencing in Feb. 1913, was put an end to by the outbreak of war. The Vulcaan Company are a Dutch company, but all the shares are held by the three companies who are the other defendants and are German companies. The Vulcaan Company is managed by two directors who are Germans resident in Holland, but they are subject to the control of a supervisory committee of Germans resident in Germany. The Vulcaan Company clearly exists only to further the operations of the three German companies, and is in fact nothing but a branch establishment organised under the convenient machinery of a subsidiary company.

The charter-party immediately in question had for its object the provision of tonnage for the purposes of the business of the German companies.

In these circumstances the plaintiffs contend, first, that the Vulcaan Company is to be regarded simply as a German, that is to say, an enemy company; and, secondly, that therefore the outbreak of war necessarily put an end to the contract. I understood the learned counsel to contend as a general proposition universally applicable that the outbreak of war made the maintenance of any contractual relation with the defendants illegal, even with interrupted performance, and that no question of the effect of the interruption on the supposed intention of the parties could arise. I do not think it necessary to decide whether or not the effect of war can be put as high as this. There are formidable difficulties in the way. It was conceded that a contract under which nothing remained to be done but to pay a sum of money would not be put an end to by war, though the remedy by action for its recovery would be postponed until the state of war came to an end. In such a case the obligation would remain during the war, but it would be temporarily unenforceable.

It is nothing to the purpose to say that that would be the case if a cause of action accrued. I apprehend that the position would be the same if the payment was subject to a period of credit unexpired at the outbreak of war. In any case to say that the cause of action remains involves saying that the obligation remains, and there may be other cases where it would be proper to hold that the obligation may remain though performance during the war becomes illegal. The question is whether or not this is such a contract.

Nor do I think it necessary to decide whether the effect of the decision in *Daimler Company Limited* v. *Continental Tyre and Rubber Company (Great Britain) Limited* (114 L. T. Rep. 1049; (1916) 2 A. C. 307) is to require me to hold on the facts of this case that the Vulcaan Company is an enemy company. It seems to me enough to say that the effect of this contract is to oblige British subjects to render services for the benefit of enemies.

Mr. Greer, for the defendants, contended that this charter-party only provided for lawful voyages, and that it could therefore be observed during the war without performing services for the enemy. But any voyage under this charter would be for the benefit of enemies whether or not the goods were carried to an enemy country. There is no room for a lawful voyage. That being so, the charter-party is at least interrupted for the period of the war, and the question is whether or not it is still in existence for any purpose. That question, Mr. Greer contended, ought to be answered by applying the test formulated by Lord Loreburn in the case of *Tamplin (F. A.) Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (115 L. T. Rep. 315; (1916) 2 A. C. 397), and he said that I ought therefore to ask myself whether the contract was impliedly conditional on the absence of such an interruption as that with which the parties are confronted.

Mr. Greer next insisted that no such condition could be implied, because the parties had contemplated the risk of war, and by clause 27 had provided for the case by giving an option to either party to suspend the charter-party in such an event. It is clear that the first step in this argument must be to make good the proposition that the illegality with which this charter-party was affected by the outbreak of war was rigidly confined to its performance during the war, and did not taint the maintenance of the obligation during the war to resume such performance at its close.

If this is so, Mr. Greer may be justified in saying that it is a mere interruption like that in the case of *Tamplin (F. A.) Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (*sup.*), where the enforced discontinuance of the chartered services in obedience to the requisition of the British Government could not conceivably impart any illegality in looking to their resumption. Further, if this view is correct, there is much to be said for Mr. Greer's next step—namely, that, having regard to the case of *Tamplin (F. A.) Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (115 L. T. Rep. 315;

(1916) 2 A. C. 397), the interruption is not such as to put an end to the charter even without clause 27, and much less with it. On the other hand, if the contract is such that the maintenance during the war of the obligation to resume performance on the return of peace is illegal, then there is no question of any implied condition on the principle expounded in the *Tamplin* case (*sup.*). The whole contract becomes illegal.

Upon this crucial point Mr. Greer laid stress on what was said by Willes, J. in *Esposito* v. *Bowden* (7 El. & Bl. 763, at p. 781)—namely, that the outbreak of war had the effect of an Act of Parliament making illegal intercourse with the enemy during its continuance—and the reasoning in the same judgment at p. 792 of the report makes it appear that the learned judge was treating the performance of the contract as illegal only as to part of its possible scope and was inquiring whether or not that made the whole voidable. The position in that case was, however, very different from that in the present case. The charter-party was not with or for the benefit of an enemy, and performance was only illegal if and so far as it would consist in shipping goods exported by the enemy. Here the charter-party is for the benefit of the enemy, and the view that I take is that its nature was such that the outbreak of war made it illegal *in toto* even though suspended or postponed in performance.

If the contract still subsists the position created by the outbreak of war acting upon the contractual engagements of the parties is to withdraw the ship for the duration of the war while assuring the benefit of her services to the enemy at the moment of its conclusion. Now, in considering this position I must not let my outlook be confined to the circumstances of the present moment, or of the present war as it has developed in fact. I must look at the question as a general one to be answered as at the moment of the outbreak of the war.

It seems to me that if at the moment when war breaks out the enemy is entitled to retain his assurance of tonnage to be available at the end of the war his commercial position is fortified even during the war. He is enabled, by the prospect of shipping facilities which he has, to keep together his connection with neutral or enemy merchants overseas, and even (if he likes to speculate on the war being short, or if he can obtain contracts with conditions protecting him if it should be long) to enter *de presenti* into new contracts to be performed when peace arrives. His ability to do these things at least for a time helps to drive his adversary to the necessity for a long war. In any case it enables the enemy fully to commit his own shipping for the purposes of his trade during the war without being hampered by the necessity for having it free at the end, for then he has the right to the services of the shipping of his adversary.

On the other hand, the adversary must not commit his shipping on pain of being liable for damages if peace should find him unable to resume the fulfilment of his contract with the enemy charterer. I do not think that the law will allow a British subject to remain in this relation with an enemy. I do not base my decision on the ground that the maintenance of the charter-party in a state of suspension during the war will benefit the enemy after the war. That may or may not make it illegal. What I say is that it supports the enemy during the war.

In deciding on these grounds that this charter-party was put an end to by the outbreak of war, I am applying what I conceive to be the principle which lies at the root of the rule which makes trading with the enemy illegal, and I think that I am applying it on the lines approved by the Court of Appeal in *Zinc Corporation* v. *Hirsch* (114 L. T. Rep. 222; (1916) 1 K. B. 541), though the special features of the two cases are, of course, very different, and perhaps I am carrying the application a little further.

Since writing the above I have read a report of the decision of the Court of Appeal in *Rio Tinto Company* v. *Ertel Bieber und Co.* (14 Asp. Mar. Law Cas. 44; 116 L. T. Rep. 810). That decision, like that in *Zinc Corporation* v. *Hirsch* (*sup.*) was based primarily on the circumstances that the contract involved actual intercourse with the enemy during the war. So far, however, as I am able to judge, at least one of the Lords Justices was of opinion that that case fell within the principle which I think is applicable here.

For these reasons I make the declaration asked for by the plaintiffs, and they must have the costs of the action.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Lowless* and *Co.*, agents for *Ingledew* and *Fenwick*, Newcastle-on-Tyne.

Solicitors for the defendants, *Pritchard* and *Sons*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Monday, July 2, 1917.

(Before Sir S. T. Evans, President.)

The Königsberg. (*a*)

Prize Court—Prize bounty—Aeroplanes—Naval airmen—Assistance in destroying enemy warship—Airmen as part of crews of attacking vessels—Claim to share in prize bounty—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 armed ship 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.*

In July 1915 *a German cruiser had taken refuge in the R. river in German East Africa, where an attack was made upon her by two of His Majesty's warships. Owing to the position of the enemy's vessel the British warships were unable to obtain a sight of her, and a successful attack was only accomplished by reason of the assistance rendered by the pilots and observers of two aeroplanes belonging to the Royal Naval*

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

Air Service which had been specially lent to the British vessels for the purpose. The names of the pilots and observers were borne on the books of the two British vessels.

Held, that the pilots and observers formed a part of the crews of the British warships, and were entitled to share in the prize bounty awarded as a result of the destruction of the German cruiser.

THIS was a motion on behalf of the officers and crews of His Majesty's monitors *Severn* and *Mersey*, and also on behalf of the pilots and observers of two aeroplanes, which were attached to the two monitors, for a declaration that they were entitled to prize bounty amounting to 1920*l.* in respect of the destruction of the German armed cruiser *Königsberg* in the Rufigi river, German East Africa, in July 1915.

From the affidavit of Captain Eric John Arthur Fullerton, D.S.O., who was in command of H.M.S. *Severn*, and from the report of Vice-Admiral Sir Herbert King-Hall, Commander-in-Chief, Cape of Good Hope station, it appeared that the German cruiser had taken refuge in the Rufigi river, and when an attack was made upon the vessel on two different dates in July 1915 it was out of sight of the monitors. It was then that the two aeroplanes rendered valuable assistance in carrying out the operations, and as the report of Vice-Admiral Sir Herbert King-Hall said: "The observers in the aeroplanes, by their excellent spotting, soon got the guns on the target, and hit after hit was rapidly signalled." The aeroplane pilots and observers belonged to the Royal Naval Air Service, whose headquarters were some thirty miles away, but they had been lent to the *Severn* and the *Mersey* for the purposes of the operations of these monitors against the *Königsberg*, and their names were borne upon the books of the two monitors.

The complement of the *Königsberg* was 384 persons, and it was ascertained from prisoners that the cruiser had always been kept ready for sea, and was so at the time of the engagement.

Commander *Maxwell-Anderson*, R.N., in support of the motion.—The pilots and observers of the two aeroplanes were entitled to share in the prize bounty. They formed a part of the crews of the monitors, their names being borne on the ships' books, and they had taken part in the destruction of the German cruiser. The fact that they were not on board at the time of the engagement made no difference. A boat's crew of a man-of-war formed a part of the ship's company for the purpose of being awarded prize bounty, even though the crew might be working some distance away from the ship at the time of the engagement. The position of the pilots and the observers was quite analogous.

Harold Hardy (*Mordaunt Snagge* with him) for the Procurator-General.—The Crown agreed with the contention of the claimants that the pilots and the observers of the aeroplanes were entitled to participate in the prize bounty.

The PRESIDENT.—This is an application made on behalf of officers and ships' companies of His Majesty's monitors *Severn* and *Mersey* for prize bounty in respect of the destruction of the German armed cruiser *Königsberg* in the Rufigi river, in German East Africa, under the circumstances which have been fully detailed. The only special feature in this case is that the application is made not only on behalf of the officers and the crews of the two warships, but also on behalf of the pilots and the observers who were serving in the two aeroplanes engaged in the action to be included amongst those who are entitled to have prize bounty granted and distributed to them. This is the first occasion upon which such an application has been made. The pilots and the observers of the two aeroplanes belong to the Royal Naval Air Service, and it is admitted that they were attached to the *Severn* and the *Mersey* for the purpose of operating against the *Königsberg*. It is quite clear, also, that the services which were rendered by them in bringing about the destruction of the German cruiser were of an extremely valuable character. The question which is now for me to decide is whether they are entitled to share in prize bounty which is awarded under the Naval Prize Act 1864 and the Order in Council made thereunder on the 2nd March 1915.

The relevant section of the Naval Prize Act 1864, s. 42, 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 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 dated the 2nd March 1915. I think that I am acting well within my powers under the above section in deciding that the pilots and the observers belonging to the two aeroplanes formed a part of the crews of the *Severn* and the *Mersey*, to which they were attached, and I pronounce and declare that they are entitled to share in the prize bounty to be awarded in respect of the destruction of the *Königsberg*. I find, also, that at the time of the beginning of the engagement there were 384 persons on board the *Königsberg*. and the amount of the prize bounty to be distributed is therefore 1920*l.*

Solicitors for the claimants, *Botterell* and *Roche*, for *Holt* and *Co.*, Navy Agents.

Solicitor for the Procurator-General, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 27, 1917.

(Before Lord Reading, C.J., Pickford and Scrutton, L.JJ.)

New Zealand Shipping Company Limited *v.* Société des Ateliers et Chantiers de France. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Shipbuilding—Contract to become void if builder unable to deliver—War—Non-delivery of ship—Whether contract void or voidable at purchaser's option.

The defendants agreed by a contract of the 6th March 1913 *to build a steamer for the plaintiffs. By clause* 5: "*The said steamer, unless the construction thereof shall be delayed by fire, strike, or lock-out, or any other unpreventable cause . . . shall be completed ready for trial by the 30th Oct.* 1914." *By agreement the date of completion was subsequently extended to the 30th Jan.* 1915. *By clause* 12: "*In case the builders become bankrupt or insolvent, or fail, or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void, and all money paid by the purchasers shall be repaid to them with interest at* 5 *per cent. . . . except only in the event of France becoming engaged in a European war, when the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all.*"

The builders contended that in the events that had happened the clause became operative on the 30th July 1916, *and the contract then became void. The purchasers claimed the ship or damages for non-delivery, and contended* (inter alia) *that the builders were not entitled to say the contract was void, but that it was only voidable at the purchasers' option.*

Held, that clause 12 *became operative on the 30th July* 1916, *and the contract then became void.*

Per Lord Reading, C.J.: "Void" means void to all intents and purposes according to the ordinary meaning of language in every contract where the word is employed, though there are cases where a party, being in default, cannot set up that the contract is void.

Decision of Bailhache, J. affirmed.

Appeal by the plaintiffs, the purchasers, from a decision of Bailhache, J. on an award in the form of a special case.

1. By agreement between the builders and the purchasers dated the 6th March 1913 the builders agreed to construct for the purchasers a steamer as therein provided. The said agreement was executed in English and also in French, and copies are attached hereto and made part of this case.

2. The said agreement contained the following clauses:

(5) The said steamer, unless the construction thereof shall be delayed by fire, strike, or lock-out of workmen, or any other unpreventable cause beyond the control of the builders (in which case a fair proportionate extension of time shall be allowed, shall be completed ready for trial by the 30th Oct. 1914 and delivered afloat as usual in the port of Dunkirk, free of dock and other dues, as soon as such trial has been completed to the satisfaction of the purchasers or their representatives.

(7) In the event of the said vessel not being completed and ready for trial on or before the 30th Oct. 1914 . . . the builders undertake to pay the purchasers as liquidated damages the sum of 10*l.* for each working day during which such delivery may be delayed beyond the 30th Oct. 1914, unless such delay is due to any of the causes specified in clause 5 hereof. . . .

(12) In case the builders become bankrupt or insolvent, or shall fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them with interest accrued thereupon at 5 per cent., and that without it being necessary for the purchasers to take any legal action for the recovery of this money. The builders will hand to the purchasers the guarantee of a bank, who will undertake to repay this money in the event of its becoming due as stated above. Except only in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all.

3. In consequence of alterations in the design of the vessel the parties subsequently agreed that the 30th Jan. 1915 should be substituted for the 30th Oct. 1914 as the date by which the vessel was to be completed ready for trial.

4. The vessel was in course of construction when on the 2nd Aug., 1914 France became engaged in a European war. France has ever since continued to be so engaged.

5. The builders were prevented by unpreventable causes beyond their control, within the meaning of clause 5, from completing the vessel ready for trial by the 30th Jan. 1915, and have ever since been prevented by the same causes.

6. It was contended for the builders (*a*) that the eighteen months expired on the 30th July 1916, and (*b*) that upon such expiration the contract became void and at an end except for the repayment to the purchasers of the moneys paid by them under clause 3 of the contract. It was contended for the purchasers as to (*a*) that the several periods limited by clause 12, including the period of eighteen months, did not begin to run until the builders were in default, and, the builders not yet having been in default the eighteen months have not begun to run, and as to (*b*) that in any case the contract does not become void at the expiration of the period limited, but is voidable at the option of the purchasers, who continue to be entitled to require the builders to perform it within the contract time as extended by the operation of the causes specified in clause 5 of the contract.

7. Subject to the opinion of the court, I decide and award as to (*a*) that eighteen months mentioned in clause 12 of the agreement expired on the 30th July 1916, and as to (*b*) that the builders in the events which have happened are entitled to treat the contract as null and void except for the repayment with interest at 5 per cent. of all moneys already paid to the builders by the purchasers, and I award and direct that the purchasers shall pay to the builders the builders' costs of the arbitration to be taxed, and shall also pay the costs of this my award.

8. The question for the court is whether I was right in my award as to the questions (*a*) and (*b*) submitted. If I was right, my award is to stand. If I was wrong on both or either of the questions, I leave to the court to make such order as to the court may seem just, and I also leave to the court to deal with the costs of the reference and award.

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

Bailhache, J. decided in favour of the defendants.

The plaintiffs appealed.

Leck, K.C., *Roche*, K.C., and *Simey* for the appellants.

Sir *John Simon*, K.C., *Barrington-Ward*, and *Jacques Quartier* for the respondents.

The following cases were cited during the arguments:

Doe v. *Bancks*, 4 B. & Ad. 401;
Roberts v. *Davey*, 4 B. & Ad. 664;
Malins v. *Freeman*, 4 Bing. N. C. 395;
Hyde v. *Watts*, 12 M. & W. 254, 268;
Hughes v. *Palmer*, 19 C. B. N. S. 393;
Davenport v. *The Queen*, 37 L. T. Rep. 727; 3 App. Cas. 115, 128;
Jay's Furnishing Company v. *Brand and Co.*, 112 L. T. Rep. 458; (1915) 1 K. B. 458, 464, 465, 466;
Rex v. *Inhabitants of Stoke Damerel*, 7 B. & C. 563;
Pearse v. *Morrice*, 2 Ad. & E. 84, 94;
Lazarus v. *Cairn Line*, 17 Com. Cas. 107.

Lord Reading, C.J.—By an agreement made between the builders and the purchasers of a ship, the builders agreed to construct the ship upon the terms of an agreement in writing executed both in French and in English. A question arose as to the effect of the agreement, which was referred to arbitration, and eventually the umpire gave a decision in the form of a special case, which was heard by Bailhache, J., who decided against the shipowners and in favour of the shipbuilders. The question before us is whether that decision is correct.

The agreement provided that the purchasers would pay when the vessel is completed, including satisfactory trial trip, the sum of 98,450*l*. The contract was to be completed upon a date which originally was fixed as the 30th Oct. 1914; in truth, according to the language of clause 5, she was to be completed ready for trial, but no point turns upon that. Both parties agreed that the contract is to be treated as if it said, for the purpose of this case, "completed for delivery by the 30th Oct." By another agreement of the parties that date was extended to the 30th Jan. 1915. By clause 5 the steamer was to be delivered by this fixed date, which I now treat as the 30th Jan. 1915, "unless the construction thereof shall be delayed by fire, strike or lock-out of workmen, or any other unpreventable cause beyond the control of the builders (in which case a fair proportionate extension of time shall be allowed)." By clause 9 the builders are responsible for all risks to the steamer while in course of construction and during the trial down to the date of actual delivery. Then by clause 12, which is the important clause, it is provided: "In case the builders become bankrupt or insolvent, or shall fail, or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void." Then there are words, which are not in dispute, the effect of which is that the money paid by the purchasers shall then be repaid with interest at 5 per cent., and that the builders will hand to the purchasers' bankers a guarantee so as to make them secured creditors and safe to get the return of their money should the events happen. At the end of the clause there is this further stipulation: "Except only in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all."

On the part of the builders it is contended that, France having become engaged in a European war, the maximum extension of time is eighteen months, and that must be added to the 30th Jan. 1915, the date arrived at by the supplemental agreement, and that on the 30th July 1916 this clause became operative and the contract became void if the ship had not been delivered within the meaning of the words which I have read of clause 12; and that the purchasers are then entitled to a return of their money with interest, and there is an end of the matter. The shipowners, on the other hand, who have contracted for the building of a valuable ship, in March 1916 say: "We claim the ship or damages, and you, the builders, are not entitled to say that this contract is void, first, because the date has not yet arrived inasmuch as there have been unpreventable causes beyond your control which therefore extend the time beyond the 30th Oct., and you must add to that the eighteen months at the end of clause 12," so that, according to the shipowners, the date at which the contract will become void is after the time has expired during which the builders cannot complete the building of the ship, with the addition, the war having supervened, of eighteen months added. They say that because the umpire has found, and the finding of fact binds the court, that the vessel was in course of construction when the war began, and that the builders were prevented by unpreventable causes beyond their control from completing the vessel by the 30th Jan. 1915.

Upon the shipowners' first point the question is whether "the date agreed by this contract," the words used in clause 12, are to be treated as the 30th Oct. 1914, or the 30th Jan. 1915 by the added agreement, or whether there must be added to the period for the completion of the contract all the time during which work is suspended by unpreventable causes beyond the control of the shipbuilders. The umpire decided against the shipowners. Bailhache, J. took the same view, and I come to the same conclusion upon this point. I think that the date agreed by this contract is calendar date, and that that means the substituted date of the 30th Jan., and to that must be added the eighteen months provided in case of war, which brings us to the 30th July 1916. On the 30th July 1916 this clause becomes operative, and I therefore think that the decision of the court below was right on this point, and that the contention of the shipowners is wrong.

It is, of course, to be observed in this case that the position is very different from what one ordinarily finds in these cases between the shipbuilder and the shipowner, the contracting party, that is, the purchasing party. The real inwardness of this dispute is that whereas in March 1913, when the contract was made, only ordinary considerations applied, and parties formed their own opinion as to the cost of materials and labour, and therefore the eventual cost of the ship when completed, the war has supervened and has made the enormous difference with which we are all familiar with regard to the value of ships, and the builder wishes not to perform the

contract, so that whatever he has in hand he can sell at the enormously enhanced price, if there is a ship which he has ready to deliver. It may be that he is in the difficulty that he has not one, and from the builder's point of view one can readily understand that that is the position, the war having supervened, and he cannot deliver it as has been found. He is not in default in any way; he is simply unable to deliver owing to the war, owing to unpreventable causes beyond his control. The shipowner is not content with getting his money back with 5 per cent. interest, because the value of the ship if it had been delivered to him and the value of the contract if he could get damages for breach of it, upon his reading of it, is, of course, a very large sum.

Primâ facie, looking at the language of the contract, it is stipulated that on the happening of the event the contract shall become void, and, if so, the shipbuilder would be right, but it is contended by the purchaser that void means voidable at the shipowner's option. In support of this, reliance is placed by Mr. Leck on a number of cases of landlord and tenant, in which, no doubt, the expression is at times used that "void" means voidable. Without going through all the authorities, I have come to the conclusion that "void" means void to all intents and purposes according to the natural and ordinary meaning of the language in every contract where you find the word used; nevertheless you may have a case in which the party who is setting up that the contract is void is relying or has to rely upon his own default or wrong in order to bring the clause into operation. If that is the true position, the result would be that we should have to read this contract as if it enabled a man to do that which the English law never permits unless it is plain by the language of the agreement between the parties that it is to be permitted—namely, that a party shall take advantage of his own wrong or default.

The question now is whether we are constrained by the circumstances of the case and the application of this principle to adopt a construction which would enable a party to take advantage of his own wrong. I cannot see how in this case that would result from affirming the judgment of Bailhache, J. I think that the learned judge was right in the view that he took, and that, notwithstanding all the cases to which attention has been called, he construed the contract rightly by saying that it was not a contract which was voidable only at the option of the shipowner, the purchaser. In dealing with the landlord and tenant cases in 1838 Coltman, J. says in *Malins* v. *Freeman* (Bing. N. C. 399): "It is so contrary to justice that a party should void his own contract by his own wrong that unless constrained we should not adopt a construction favourable to such a purpose." I believe that is the true underlying principle of these cases in which the word "void" has been construed as if it appeared to have the effect of being read as voidable, and that you must always read any such clause, unless there are clear words to the contrary, subject to the condition that the person who is seeking to set up the invalidity is not himself in default or in the wrong. On that view I think there is no difficulty whatever in this case, and I think that the appeal fails and must be dismissed.

PICKFORD, L.J.—I agree, and I have nothing to add.

SCRUTTON, L.J.—On the first point I agree. On the second point I think that clause 12 and all other clauses are to be read subject to an overriding condition or proviso that the party shall not take advantage of his own wrong, and therefore is estopped from alleging invalidity of which his own breach of contract is the cause. In this case the shipbuilders are unable to deliver the steamer in the contract time and are not in default. They can therefore allege that the contract is void.

Appeal dismissed.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Calder, Woods, and Pethick.*

March 29, 30, *and April* 26, 1917.

(Before Lord COZENS-HARDY, M.R., WARRINGTON and SCRUTTON, L.JJ.)

INVERKIP STEAMSHIP COMPANY LIMITED *v.* BUNGE AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Demurrage — Detention after lay days — "Reasonable time" — Unreasonable delay —Damages of unliquidated amount or demurrage at fixed rate.

Where a charter-party declared that if the ship to which it related were detained for loading longer than a stated period the charterers were to pay demurrage at a fixed rate, provided that such detention should occur by default of the charterers or their agents, it was held that a detention which occurred after the specified lay days did not constitute a breach of contract not covered by the special provision as to demurrage payable for the same and therefore giving rise to a claim for damages of an unliquidated amount, but that demurrage at the rate fixed by the charter-party applied to the detention which actually took place.

Western Steamship Company Limited *v.* Amaral, Sutherland, and Co. Limited (12 *Asp. Mar. Law Cas.* 358; 109 *L. T. Rep.* 217; (1913) 3 *K. B.* 366) *considered.*

Decision of Sankey, J. (infra) *affirmed.*

THE facts of the case as found by Sankey, J. are fully stated in the judgment which was delivered by the learned judge on the 9th Nov. 1916, on which date the action came on for trial before his Lordship sitting without a jury in the Commercial Court.

A. Adair Roche, K.C. and *R. A. Wright* for the plaintiffs.—It was an implied term of the charter-party that the defendants should not be allowed to keep the vessel on demurrage at the specified demurrage rate for more than a reasonable time. See

Carver's Carriage by Sea, 5th edit., sect. 609.

The question for decision in this case is whether the plaintiffs are entitled to recover damages for the detention of the vessel from the 17th Sept. until she was loaded on the 29th Sept. A reason-

(*a*) Reported by T. W. MORGAN and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

able time had elapsed on the 17th Sept. Where the days on demurrage are not limited by contract they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge: (see per Lord Trayner in the Scottish case of *Lilly and Co.* v. *Stevenson and Co.*, 32 Sc. L. Rep. 212; 2 Sc. L. T. 434; 22 R. 278, 286). This view of the law was adopted by Bray, J. in *Wilson and Coventry* v. *Otto Thoresen's Linie* (11 Asp. Mar. Law Cas. 491; 103 L. T. Rep. 112; (1910) 2 K. B. 405, 408). As a reasonable time had been exceeded in this case, the plaintiffs were entitled to claim for the damage actually suffered. This case is distinguishable from *Western Steamship Company* v. *Amaral, Sutherland, and Co.* (12 Asp. Mar. Law Cas. 358; 109 L. T. Rep. 217; (1913) 3 K. B. 366). Moreover, Bray, J.'s decision in that case was discharged by the Court of Appeal. Hence the particular point involved in this case is still open. See also

Ardan Steamship Company v. *Andrew Weir and Co.*, 10 Asp. Mar. Law Cas. 135; 93 L. T. Rep. 559; (1905) A. C. 501.

Where a reasonable time has been exceeded there is no obligation on the ship to wait for cargo:

Dimech v. *Corlett*, 1858, 12 Moo. P. C. 199, 231.

D. C. Leck, K.C. and *Theobald Mathew* for the defendants.—Looking at the charter-party, there is no such implied term as that contended for by the plaintiffs. Stipulations for demurrage may be either exhaustive or partial. See

Scrutton on Charter-parties and Bills of Lading, 7th edit., p. 283.

The learned author there says that, after the lapse of a reasonable time, the shipowner can take the ship away, but if he allows her to stay on he can only claim demurrage at the agreed rate. Lord Trayner's observations in *Lilly and Co.* v. *Stevenson and Co.* (*ubi sup.*) were *obiter* and are not binding. *Ardan Steamship Company* v. *Andrew Weir and Co.* (10 Asp. Mar. Law Cas. 135; 93 L. T. Rep. 559; (1905) A. C. 501) has no application on the point arising in this case. The point is concluded in my favour by the decision in *Western Steamship Company* v. *Amaral, Sutherland, and Co.* (12 Asp. Mar. Law Cas. 358; 109 L. T. Rep. 217; (1913) 3 K. B. 366). The defendants rely on their legal rights under the charter-party which could not be affected by the fact that the plaintiffs wrote the letter giving the defendants notice that after the 17th Sept. they would claim 200*l.* per day as damages for the detention of the vessel. Moreover, the plaintiffs had failed to prove that a reasonable time had been exceeded in the loading of the vessel.

R. A. Wright in reply.

Nov. 9, 1916.—Sankey, J.—I should have preferred to reserve my judgment in this case, were it not for the fact that I am more or less bound to give the judgment which I am about to give. The plaintiffs in this case are the Inverkip Steamship Company Limited, and the defendants are Messrs. Bunge and Co. By a charter-party dated the 16th July 1915 the plaintiffs agreed to let their steamship *Inverkip* to the defendants for the purpose of carrying a cargo of grain from Galveston or Key West to a safe port in the Mediterranean, not east of the west coast of Italy and excluding Africa. The charter-party contained a clause as to demurrage as follows:

Steamer to be loaded according to berth terms, with customary berth dispatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of fourpence British sterling, or its equivalent, per net register ton per day, or *pro ratâ*, payable day by day, provided such detention shall occur by default of charterers or their agents.

A further clause provided as follows:

Time for loading, if required by charterers, not to commence before the 25th Aug. 1915.

The sum of 4*d.* per ton of the net registered tonnage works out at 46*l.* 15*s.* 4*d.* per day. The *Inverkip* duly proceeded to Galveston, but before she arrived there the shipping apparatus at Galveston had been partially destroyed by a tidal wave. The vessel was intercepted, and, instead of going to Galveston, she went to Newport News, arriving there on the 18th Aug. She began almost immediately to get ready, and it is agreed that her lay days under the charter-party began on the 25th Aug., ended on the 31st Aug., and on the 1st Sept. demurrage would begin to run. From the 1st Sept. to the 17th Sept. demurrage was duly tendered to and accepted by the master of the vessel.

But the owners of the vessel then said:

This vessel has already been a reasonable time on demurrage; the demurrage rate is only 46*l.* 15*s.* 4*d.* per day, and we do not intend to accept that sum any longer.

The defendants tendered the demurrage, which was placed in a bank, and amounts altogether to about 500*l.* or 600*l.*, and this has been brought into court by the defendants.

On the 17th Sept. the plaintiffs wrote through their solicitors as follows:

We have seen our clients with reference to your letter. Our instructions are that several other steamers which arrived at Newport News after the *Inverkip* have obtained berths, have been loaded, and sailed. It is not because no berth is available that she is kept waiting, but because the cargo is not ready to ship. In these circumstances we are instructed to give you notice that our clients contend that the vessel is no longer on demurrage, and that as from this date they will claim damages for detention, which they estimate at 200*l.* per day. They have therefore instructed the master not to accept any further payment of demurrage. If you are not prepared to accept this, our instructions are to get the question decided.

That was the position contended for by the plaintiffs.

The defendants replied as follows:

We must protest against the course which the owners threaten to adopt, and must refer them to the charter-party which defines the rights of the parties.

The position contended for by the defendants was that they were entitled to have the vessel on demurrage rates. They paid the amount into the bank.

The plaintiffs insisted that demurrage had come to an end, and that they were entitled to 200*l.* per day as damages. The defendants said that all they were liable for was the demurrage at 46*l.* 15*s.* 4*d.* per day. The *Inverkip* had been lying in the stream, and on the 24th Sept. she was moored to a berth and a coal shoot was used to load her. She was only able to load a few tons, and on the following day, receiving no cargo, was again anchored out in the stream.

On the 27th Sept. she was ordered to pier No. 8, and this time the loading was continuous, so that by Wednesday, the 29th Sept., all the cargo was on board, and later the ship was put out into the stream waiting a berth for bunkers and the stevedores to finish trimming the ship.

Two questions call for my decision:

(1) Was the vessel kept an unreasonable time? (2) If she was kept an unreasonable time, is the plaintiffs' contention that they are entitled to be paid 200*l.* with respect to each day after a reasonable time has expired correct, or is the defendants' contention that they are only liable to pay 46*l.* 15*s.* 4*d.* per day correct?

Now, with regard to the first of these contentions. The plaintiffs alleged that every day after the 17th Sept. was a day for unreasonable time. I will therefore consider whether the plaintiffs were right in saying that the reasonable time expired on the 17th Sept.

The defendants say: (1) That owing to a tidal wave which destroyed the shipping apparatus at Galveston, a great excess of vessels went to Newport News, and, as a result, there was a great congestion of shipping there. (2) The grain which was to load the vessels had to be diverted from Galveston to Newport News, and there is only a single railway company taking grain there. Consequently, there was delay in getting grain to the port. (3) The number of appliances at Newport News was not large, and on the 4th or 5th Sept. one of the grain elevators was burned down. These three facts: (1) Congestion of shipping; (2) necessity of diverting the traffic; and (3) destruction of one of the grain elevators, according to the defendants, so delayed things that it was unreasonable to expect to load by the 17th Sept. The defendants say, further, that they did in fact load within a reasonable time. Did they? I notice that a table of shipping put in by the plaintiffs gives a considerable number of ships, about thirty, which had to go to Newport News, under similar circumstances. It seems to me that every ship with two exceptions, the *Inverkip* and the *Ampleforth*, got away in much quicker time. But Mr. Leck has pointed out, and rightly, that that is not a very accurate guide, because I do not know the circumstances under which these ships went into Newport News. I do not, however, attach much importance to this, and I propose to rely on the evidence of the master, taken on commission. Mr. Roche said we have allowed for all these things: (1) Congestion of shipping; (2) diversion of traffic; and (3) the burning of the elevator; but, allowing for all these factors, a reasonable time had expired on the 17th Sept.

On this point I find that a reasonable time had elapsed on the 17th Sept. I have now to consider the rights of the parties in view of my finding that a reasonable time for keeping the steamer on demurrage expired on the 17th Sept. For the plaintiffs it is said in effect that when a chartered vessel arrives at her loading port, and has duly given notice of readiness, three periods have to be looked at: (1) The lay days, during the currency of which no payments are due from the charterer to the shipowner. (2) The demurrage days, which may be a fixed number of days, or the charter-party may provide an agreed rate of demurrage, without specifying any number of days, and in the latter case all the circumstances have to be taken into account to ascertain what is a reasonable number of days for demurrage. (3) If the fixed or the reasonable number of days is exceeded there has then to be considered and ascertained the amount of that excess, and for the detention during the extra period the court, in default of agreement between the parties, has to determine what is payable.

In this case demurrage at the rate of 46*l.* 15*s.* 4*d.* per day up to the 17th Sept. has been paid, and no question arises as to that, but after the 17th Sept. the plaintiffs claimed to be entitled to be paid 200*l.* per day as damages for the detention of the vessel. On the other hand, the defendants say that in each case the court must have regard to the charter-party, which by the clause as to demurrage may be exhaustive on the subject. A charter-party in dealing with demurrage may do one of three things: (1) It may provide for a fixed number of days for demurrage. Thus, assuming that under the charter-party there are five lay days and five days for demurrage, and, instead of taking ten days for loading, the vessel takes eleven days, the shipowner will be entitled on the eleventh day to damages for detention. (2) The charter-party may provide that there shall be so many lay days and a reasonable number of demurrage days. In such a case, in default of agreement, it is for the court to say what is a reasonable number of days, and then all days in excess of that number will be detention days. (3) The charter-party may not fix the number of demurrage days, nor provide that there shall be a reasonable number of demurrage days, but merely says that a certain rate shall be paid for demurrage.

In this case I think the defendants' contention is correct, and I have to see whether under this charter-party the parties have provided exhaustively for the question of demurrage. The material provision of the charter-party is:

> Steamer to be loaded according to berth terms, with customary berth dispatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of fourpence British sterling, or its equivalent, per net register ton per day, or *pro ratâ*, payable day by day, provided such detention shall occur by default of charterers or their agents.

This clause does not fix a particular number of days for demurrage, nor does it say that there shall be a reasonable number of days for demurrage, leaving it to the court to decide what is a reasonable number of days. It appears to be exhaustive. It says that for every day the vessel is detained—I do not use this word in a technical sense—the sum of 4*d.* per net register ton shall be payable day by day.

It seems to me that upon this point I am really concluded by the judgment of Bray, J. in *Western Steamship Company* v. *Amaral, Sutherland, and Co.* (12 Asp. Mar. Law Cas. 358; 109 L. T. Rep. 217; (1913) 3 K. B. 366), which I think is a decision *in pari materiâ*. In his judgment in that case Bray, J. said (1913) 3 K. B., at p. 369): "The question of law which I have to decide in this case is substantially whether the contention in par. 4 of the defence is well founded, that contention being that no provision, either express or implied, was contained in either of the charter-parties that the agreed rate

of demurrage should only apply to a reasonable number of days over and above the lay days in each case." And a little further on he said this: "In this case the steamer was detained for a considerable number of days. Under those circumstances what was to be done? The answer is, 'If longer detained, consignees to pay demurrage.' There is no limitation upon those words in the document. Why, then, should I put any limitation upon them? The limitation which in substance Mr. Leck asks me to put is, 'if rightfully detained.' I have no right to put in that word 'rightfully,' and, apart from authority, I should have no hesitation in coming to the conclusion that, 'if longer detained' means if detained whether rightfully or wrongfully. So long as the steamer is in fact detained, the agreed rate of demurrage is what the charterer has to pay."

In this case the plaintiffs ask me to read into the charter-party a stipulation, not that 4*d.* per net register ton shall be paid in respect of each day over the number of lay days, but that a certain amount shall be paid for a certain number of days, and that, thereafter, a sum to be agreed upon between the parties, or, in default of agreement, to be fixed by the court, of a different amount shall be paid.

In my opinion, the parties have in this case agreed that one and the same rate, namely, 4*d.* per net register ton per day shall be paid however long the ship is detained. I do not mean that the ship can be detained for ever; I mean while she is detained for the purpose for which she has gone to the port, in this case to load grain. It is open to the shipowners to take the ship away after a reasonable time.

The case of *Western Steamship Company* v. *Amaral, Sutherland, and Co.* (12 Asp. Mar. Law Cas. 358; 109 L. T. Rep. 217; (1913) 3 K. B. 366), which was decided by Bray, J. as a preliminary point of law, went to the Court of Appeal, and that court, without expressing any opinion as to the correctness or otherwise of Bray, J.'s judgment, considered that the facts should be gone into, and accordingly a new trial was ordered. Subsequently the parties came to terms, so there has been no decision of the Court of Appeal upon the question. I have, however, to notice two cases which were cited on behalf of the plaintiff. The first of these is the Scottish case of *Lilly and Co.* v. *Stevenson and Co.* (22 Rettie, 278, 286), in which this dictum of Lord Trayner's was relied upon: "Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may exist or emerge." That observation is in favour of the plaintiffs' contention, but with regard to it I may remark, first, that it was *obiter*, and, secondly, that, although I should naturally treat everything Lord Trayner said with the greatest possible respect, I am not bound to adopt his view, nor, indeed, am I bound to follow the decision of Bray, J. in *Western Steamship Company* v. *Amaral, Sutherland, and Co.* (*ubi sup.*). The other case to which I was referred was *Ardan Steamship Company* v. *Andrew Weir and Co.* (10 Asp. Mar. Law Cas. 135; 93 L. T. Rep. 559; (1905) A. C. 501), but it seems to me to have no application to the present case. There the shipowners claimed damages for the detention of the vessel owing to delay in providing the cargo. The charter-party contained a clause which provided that delay caused by riots, strikes, &c., or any other accidents or causes beyond the control of the charterers should be excepted. The gist of the case was the charterers' neglect to supply a cargo. The House of Lords, reversing the decision of the Court of Session, held that the chartererers were liable, and the ground of their decision was that it was the charterers' primary duty to furnish the stipulated cargo, there being nothing in the charter-party to qualify that obligation.

I have also been referred to two text-books which, owing to their general use in the Profession, may be taken as authoritative. The two books are Carver's Carriage by Sea and Scrutton's Charter-parties and Bills of Lading. In Carver's Carriage by Sea, sect. 609, it is said that: "Charter-parties frequently stipulate for a rate of demurrage to be paid in case the ship is detained beyond the agreed or proper time without stipulating for any particular number of extra days to be allowed by the shipowner. In such cases the true view seems to be that the charterers are entitled to keep the ship on demurrage for a reasonable time."

From that passage the inference is drawn that after a reasonable time damages for detention are due, and that again is in favour of the plaintiffs' contention. On the other hand, it is said in Scrutton, L.J.'s book (7th edit., p. 283): "Stipulations for demurrage may be (1) exhaustive; as 'ten days for loading and demurrage at 20*l.* per diem afterwards,' which covers all delay. On such a provision the shipowner cannot say that the provision for 20*l.* a day demurrage only applies to a reasonable time, after the lapse of which he can claim damages for detention. After the lapse of a reasonable time he may take his ship away, but if he allows her to stay on he can only claim the agreed rate of demurrage."

That last sentence brings me to the last point of my judgment. At first I thought it might be said that there was a fresh contract for 200*l.* to be payable day by day as from the 17th Sept., but I am satisfied that is not so. The plaintiffs wrote saying that they intended to insist upon their right to charge 200*l.* per day after the 17th Sept. But the defendants then took up the position that they were going to insist on their right to pay 46*l.* 15*s.* 4*d.* a day. In these circumstances the notice given by the plaintiffs, which has been relied upon by them, does not, in my opinion, advance matters. The parties must be relegated to their legal rights. I have come to the conclusion that I ought to decide in favour of the defendants' contention.

From that decision the plaintiffs now appealed.

Roche, K.C. and *R. A. Wright* for the appellants.

Leck, K.C. and *Theobald Mathew* for the respondents.

Roche, K.C. replied.

The arguments adduced in the court below were repeated, and the authorities there cited were again referred to.

Cur. adv. vult.

April 26.—The following written judgments were delivered:—

Warrington, L.J.—The question in this case is whether the plaintiffs (shipowners) are entitled to recover from the defendants (the charterers of one of the plaintiffs' vessels), in respect of the detention of that ship, damages of an unliquidated amount, or demurrage at the rate per ton per day fixed by the charter-party. The learned judge in the court below, Sankey, J., has accepted the defendants' view and awarded the agreed rate. This is very much less than the plaintiffs claim to be entitled to on the other footing, and they appeal to this court.

The learned judge was of opinion that the detention was for a period longer than was in his opinion reasonable, but that, notwithstanding this fact, the clause providing for the payment of the rate per ton per day was wide enough to cover the detention which had occurred; and that even if the shipowners might properly have withdrawn the ship they did not do so, and therefore must accept what the contract allows them. In so deciding, the learned judge was following the decision of Bray, J. in *Western Steamship Company Limited* v. *Amaral, Sutherland, and Co. Limited* (*ubi sup.*).

I think the case is simply one of construction. Does the provision as to demurrage payable for detention after the fixed lay days apply to the detention which actually took place; or does such detention constitute a breach of contract not covered by the special provision, and therefore giving rise to a claim for damages at large?

The charter-party is dated the 19th July 1915. It provided that the ship was to proceed to New Orleans or Galveston and there to load from the charterers or their agents a full and complete cargo of wheat or Indian corn and (or) rye. It contained the following stipulation, on which the question turns: "Steamer to be loaded according to berth terms, with customary berth dispatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of fourpence (4*d.*) British sterling, or its equivalent, per net register ton per day, or *pro ratâ*, payable day by day, provided such detention shall occur by default of charterers or their agents." It is also provided that the time for loading, if required by the charterers, should not commence before the 25th Aug. 1915, and that in certain events the charterers should have the option of cancelling the charter at noon on the 15th Sept.

After the date of the charter-party, about the 16th or 18th Aug., the port of Galveston was wrecked by a tidal wave. Much shipping, including the ship the subject of the present charter-party, was in consequence diverted to Newport News, and great difficulty, owing to the pressure of shipping, defective transport arrangements, and the destruction by fire of one of the elevators at Newport News, was experienced in loading and dispatching ships at and from that port. In fact the ship arrived at Newport News on the 18th Aug., and five lay days began on the 25th and ended on the 31st Aug. No substantial work was done in the matter of loading until the 27th Sept.; it was completed on the 29th, and the ship sailed on the 31st.

On the 17th Sept. the shipowners gave notice that as from that day they claimed damages for detention, estimated at 200*l.* a day, and had instructed the master not to accept any further payment of demurrage. Demurrage up to the 16th Sept. was paid at the fixed rate, and it was tendered afterwards, but was not accepted.

There was evidence that the delay was occasioned by the defendants' failure to provide a cargo, in this sense, that, owing to the change of ports and the other circumstances I have mentioned, it was impossible to obtain a cargo at Newport News for the ship. A new cargo had to be obtained elsewhere, and was not ready so as to enable the ship to be loaded earlier than the actual time.

It was contended that on the true construction of the charter-party the clause I have read is confined to mere delays in loading and does not extend to cover detention occasioned by failure to provide a cargo. Reliance was placed on the case of *Ardan Steamship Company* v. *Andrew Weir and Co.* (*ubi sup.*) as establishing that the obligation to load in accordance with the charter-party and the obligation to provide a cargo are separate and distinct obligations, and I accept that view. But I cannot hold that in the present case the provision for demurrage is confined to delay in loading.

The demurrage becomes payable only in case of default by the charterers. There are no words limiting that default as the plaintiffs contend it should be limited. And I can find nothing in the contract sufficient to introduce such a limitation. It is true that the clause begins with the words: "Steamer to be loaded," &c., but this seems to me to do no more than indicate that the detention referred to is detention at the port of loading, detention at the port of discharge being dealt with by a subsequent clause.

I think the answer to the plaintiffs' claim is that, whether deliberately or by inadvertence, the parties have provided that the shipowners shall accept compensation at a fixed rate in respect of the detention which has in fact occurred, and therefore they must be content with that.

I prefer to express no opinion on the question whether or not the plaintiffs were entitled to withdraw the ship on the 17th Sept. or on any other day. That question does not arise.

The result is that in my opinion the appeal fails.

Scrutton, L.J. — The Inverkip Steamship Company Limited, owners of the steamship *Inverkip*, appeal against a decision of Sankey, J. that the sum paid into court by the defendants, Bunge and Co., the charterers of the *Inverkip*, for demurrage at her port of loading is sufficient.

The charter, dated the 6th July 1915, provided that the steamer should call at Key West for orders for New Orleans or Galveston to load a grain cargo: "Steamer to be loaded according to berth terms with customary berth dispatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of fourpence (4*d.*) British sterling, or its equivalent, per net register ton per day, or *pro ratâ*, payable day by day, provided such detention shall occur by default of charterers or their agents." This was a printed clause, and, from my experience, the rate of demurrage (about 47*l.* a day) was low for that time.

By a written clause the steamer was to be discharged at the rate of 500 tons per running day, demurrage at the rate of 100*l.* per running day. "Time for loading, if required by charterers, not to commence before the 25th Aug. 1915." Option of cancelling if steamer not ready to load by the 15th Sept. 1915.

Just before the vessel arrived at Key West for orders a tidal wave seriously damaged the shipping facilities at Galveston, and great delay was probable at that port, for which the steamer would get no demurrage. It was accordingly arranged that the steamer should be ordered to Newport News at 6*d.* reduction in freight. She arrived there on the 18th Aug., and her lay days began on the 25th Aug. The five lay days in the demurrage clause expired on the evening of the 31st Aug.

Unfortunately the same idea had occurred to the persons interested in numerous other ships going to Galveston, and they also were diverted to Newport News. There was great congestion of the ships in the harbour and of their cargoes on the rail to Newport News and on the 5th Sept. one of the two elevators in the port was burnt. In the result many ships had long delays. Out of a list of thirty-three ships furnished to us, six went away in ballast after waiting an average of twelve days. Some ships which arrived in the beginning of September took nearly a month to load. The ships, however, which arrived about the same time as the *Inverkip* were loaded in an average of about a fortnight; but the *Inverkip* and the *Ampleforth*, both chartered by Messrs. Bunge, and with cargo to be supplied by the same shippers, took over five weeks to load.

It is difficult to draw accurate conclusions from the list, as it does not distinguish between the ships originally destined for Newport News and those diverted thereto. But I have no doubt on the evidence (1) that there was considerable and unusual delay owing to the congestion of shipping and railways due to the Galveston disaster, so that the "customary berth dispatch" would be much longer than in normal times; (2) that the shippers of Messrs. Bunge were in default in sending down cargo, perhaps through financial weakness.

The charterers paid demurrage daily up to the 17th Sept., when the shipowners claimed they were not bound to wait any longer, and proposed to withdraw the steamer. They were no doubt influenced in this by the fact that the rate of demurrage was low. The charterers repudiated this claim, and proposed to take proceedings in in American courts to detain the steamer. The captain waited, but refused to accept the daily chartered demurrage, which the charterers paid into the bank.

On the 20th Sept. the shipowners issued a writ claiming a declaration that the charterers were not entitled to keep the ship on demurrage after the 17th Sept., and damages for detention. Towards the end of September the charterers supplied cargo, and the *Inverkip* was loaded by the 29th Sept. The shipowners then claimed thirteen days' damages for detention at 200*l.* per day, and the charterers paid into court thirteen days' demurrage at the chartered rate.

Sankey, J. found that the vessel was "kept an unreasonable time" by every day after the 17th Sept., but, following a decision of Bray, J. in *Western Steamship Company Limited* v. *Amaral, Sutherland, and Co. Limited* (*ubi sup.*), held that as the vessel stayed and loaded cargo under the charter she could only claim the charter rate of demurrage, and the amount paid into court was therefore sufficient. He gave judgment for the charterers with costs. The shipowners appeal.

The sum agreed for freight in a charter covers the use of the ship for an agreed time for loading or discharging known as "the lay days," and for the voyage. But there is almost invariably a term in the agreement providing for an additional payment known as "demurrage," for detention beyond the agreed lay days. This is sometimes treated as agreed damages for detaining the ship, sometimes as an agreed payment for extra lay days.

In my view, the mere fact that the charterer has not loaded the ship in the lay days does not entitle the shipowner to withdraw the ship from the service. And whether the payment for these days after the lay days, on which the ship is detained, is treated as agreed liquidated damages or as an agreed payment for time which the charterer has a right to use at his option, the amount to be paid for these days is fixed by the charter. On the other hand, it is obvious that the charterer is not entitled to keep the ship on demurrage "for ever." What is the time when he may treat his obligation to stay as removed and sail away?

Counsel for the shipowners said that this time came when a reasonable time had elapsed. Asked, "A reasonable time for what?" they had some difficulty in answering. Take a charter "to load with customary steamship dispatch," which, under the decision in *Hulthen* v. *Stewart and Co.* (9 Asp. Mar. Law Cas. 403; 88 L. T. Rep. 792; (1903) A. C. 389), means "to load in a reasonable time, having regard to the existing circumstances for a charterer having a cargo ready," or to pay 50*l.* a day demurrage for every day on which the vessel is detained beyond the lay days. The reasonable time for loading is exhausted by the lay days. What is the second reasonable time at the end of which the ship may leave? Her days on demurrage are part of an unreasonable time for loading, is the court to determine what is a reasonable degree of unreasonableness?

In my view, the test of reasonable time is not one that is applicable. To enable the shipowner to abandon the charter without the consent of the charterer, I think the shipowner must show either such a failure to load as amounts to a repudiation or a final refusal to perform the charter, which the shipowner may accept as a final breach, and depart claiming damages (see *Mersey Steel and Iron Company* v. *Naylor, Benzon, and Co.*, 51 L. T. Rep. 637; 9 App. Cas. 434, at p. 439), or such a commercial frustration of the adventure by delay under the doctrine of *Jackson* v. *Union Marine Insurance Company* (2 Mar. Law Cas. O. S. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125) as puts an end to the contract.

Neither of these positions avails here. The charterers were not repudiating the contract, but were paying the agreed demurrage under it, and were promising and expecting to begin to load the ship every day. While, as the charter contemplated under the cancelling clause, lay days might begin as late as the 14th Sept., and days in

demurrage after lay days expiring in that case on the 20th Sept., and the ship was in fact loaded by the 29th Sept., I cannot make any finding of commercial frustration of the adventure, the delay being provided for by demurrage.

One main argument of the shipowners' counsel, as I understood it, was, that as the charterer was bound to have a cargo ready for loading and had not such a cargo, the demurrage provision did not apply. This is in my experience an entirely novel argument. Ships with twenty lay days have frequently loaded no cargo for say twelve days because none was there, and either finished in their lay days or in some demurrage days. But it has never been contended or understood to be the law that because there was no cargo there when the ship was ready to load, the charterer had lost the benefit of the demurrage days or lay days, and was bound to load in a reasonable time or pay damages for detention. It would often be greatly to the disadvantage of the ship that such a view should be taken.

Mr. Roche founded this argument on the case of *Ardan Steamship Company* v. *Andrew Weir and Co.* (*ubi sup.*), a Scotch appeal relating to the great glut of ships in 1900 at Newcastle (N.S.W.). The decision is not very easy to understand, in that the noble Lords do not state their views as to the correctness of the two decisions of the English Court of Appeal as to the same port and glut of ships: (*Barque Quilpué Limited* v. *Brown*, 9 Asp. Mar. Law Cas. 596; 90 L. T. Rep. 765; (1904) 2 K. B. 264; and *Jones Limited* v. *Green and Co.* (9 Asp. Mar. Law Cas. 600; (1904) 2 K. B. 275).

Coal is loaded at Newcastle from collieries a short distance from the quays and cranes at which there was no storing facilities for coal, the custom of the port being to load in regular colliery turn. In *Barque Quilpué Limited* v. *Brown* (*ubi sup.*) the charter was to load in regular turn from D. Colliery. In *Jones* v. *Green* (*ubi sup.*) it was to load in the usual and customary manner from a named colliery as ordered by purchasers, who ordered Wallsend Colliery. There was great pressure of orders at the collieries. The ships were loaded in regular colliery turn, but after very long delay. The English Court of Appeal decided each case in favour of the charterers.

In *Ardan Steamship Company* v. *Andrew Weir and Co.* (*ubi sup.*) the charter was "to load in the usual and customary manner a full and complete cargo of Australian coal as ordered by the charterers." The ship loaded in her turn, but after long delay. The House of Lords decided in favour of the ship, and Lord Halsbury said that delay in loading was one thing, failure to provide a cargo and load another, and the ship was given damages for detention (there being no demurrage days in the charter), her loading time being calculated not from her getting a berth in regular colliery turn, but from her arrival.

I, like Sankey, J., am unable to see the bearing of this decision on the present case. Here the cargo had to be provided at the port on the 25th Aug.; the lay days have been calculated from that day, and demurrage paid according to charter terms. If there was a breach in not having cargo ready on the 25th Aug., the only consequence is detention of the ship, and the damages for that which is the same detention, however it arises, are agreed in the charter and have been paid. The truth is the shipowners have made a bad bargain as to demurrage rate in loading, emphasised by their having secured an agreement for a much higher demurrage rate for discharging and are anxious to get out of it. I can see no valid, legal, or business reasons for helping them to do so.

As to the authorities cited, Lord Trayner's dictum in *Lilly and Co.* v. *Stevenson and Co.* (22 R. 278; 2 Sc. L. Rep. 212; 2 Sc. L. T. Rep. 434) was not necessary for the decision of the case, the facts of which were nothing like the present case, and turned on the somewhat unusual application of excepted perils to the demurrage period. For the reasons already stated I cannot agree with it or with the late Mr. Carver's approval of it.

So far as Bray, J.'s decision in *Wilson and Coventry* v. *Otto Thoresen's Linie* (*ubi sup.*) follows these dicta in allowing the ship to sail at "a reasonable time after the expiration of the lay days," I cannot agree with it, and, indeed, the learned judge fixed his "reasonable time" partly by the future engagements of the ship, which is a little puzzling. The decision negatives the right of the ship to sail at the expiration of the lay days when there is a provision for demurrage, and in this I agree.

In *Western Steamship Company Limited* v. *Amaral, Sutherland, and Co. Limited* (*ubi sup.*) Bray, J. explained his decision in *Wilson and Coventry* v. *Otto Thoresen's Linie* (*ubi sup.*), and held that where the ship stayed and loaded she could only claim the charter-party rate of demurrage. This was followed and adopted by Sankey, J. in the present case, and in this I agree, though on the facts of this case I think the result would have been the same had she left. She could not have obtained damages for detention.

The judgment appealed from was, in my opinion, correct in result, and the appeal must be dismissed with costs.

Lord Cozens-Hardy, M.R.—I agree.

Appeal dismissed.

Solicitors for the appellants, *William A. Crump and Son.*

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 1, 5, *and* 6, 1916.

(Before Bray, J.)

Broken Hill Proprietary Company v. P. & O. Steam Navigation Company. (*a*)

Bill of lading—Exception clause—Liberty to carry by any steamer—Right to overcarry and tranship—Goods carried by mail steamer—Steamer calling at port of destination—Cargo not discharged—Cargo carried to next port—Transhipment of cargo—Loss of part of cargo—Loss by excepted risk—Liability.

A bill of lading contained a clause exempting the

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

defendants from liability for the act of God, the King's enemies, and all perils, dangers, and accidents of the seas and navigation of what kind soever, and accidents, loss, damage, delay, or detention arising out of the employment of the defendant company's vessels in connection with the carriage of His Majesty's mails, or loss, delays, or any other consequences due to riots or commotion, transhipment, warehousing, or to ships not having room at port of transhipment. There was another clause in the bill of lading as follows: "The company 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 the company or to other persons proceeding either 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 company's expense, but at merchant's risk."

The plaintiffs shipped at S., on board the defendants' mail steamer M., *a quantity of lead for delivery at C. under the bill of lading referred to. On the arrival of the mail steamer at C. there were riots at that port, which seriously interfered with the discharge of cargo. In consequence of these difficulties the steamer left the port without having discharged the plaintiffs' lead, and carried it on to B., where it was transhipped to the* N. *On the way back to C. this vessel (the* N.) *was stranded and part of the cargo was lost.*

Held, that the defendants had liberty to overcarry the goods in the circumstances of the case to B., to tranship them, and to send them back to C.; and that it was in course of doing what they were entitled to do that the goods were lost by perils of the sea, and the defendants were protected from liability.

Trial by action in the Commercial list by Bray, J. without a jury.

The plaintiffs, who were the shippers of and the holders of the bill of lading in respect of 986 bars of lead loaded on the defendants' steamship *Mooltan* at Sydney, in accordance with a bill of lading dated the 12th May 1915, for delivery at Colombo.

The plaintiffs claimed, firstly, damages for breach of contract and breach of duty in and about the carriage of the said lead; and, secondly, the repayment of 351*l.* 4*s.* 3*d.* paid under protest as a general average deposit.

The bill of lading contained clauses as follows:

Exceptions and Conditions.—The act of God, the King's enemies, restraints of princes, and all perils, dangers, and accidents of the seas and navigation of what kind soever, and loss, damage, delay, or detention arising out of or consequent upon the employment of the company's vessel in or assistance rendered by them in the performance of His Majesty's mail service, or loss, delays, or any other consequences arising from riots or civil commotion or from transhipment or warehousing or from ships not having room at port of transhipment are all excepted. . . . The company 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 the company or to other persons proceeding either 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 company's expense, but at merchant's risk.

The defendant company had a contract with the British Government under which they carried the mails from Australia to Brindisi, and the *Mooltan* was one of the vessels employed by them in connection with the mail contract. Usually this vessel, after calling at Colombo and taking on board the mails from Shanghai, would proceed straight to Aden and there take on board the Indian mails which would have been carried by another vessel from Bombay. The *Mooltan* would then proceed to Brindisi. In April and May 1915, owing to the vessel which usually carried the mail from Bombay to Aden having to be docked, the defendant company gave notice to the Postmaster-General and by advertisement in Australia that on the voyage in question the *Mooltan* would call at Bombay to pick up the Indian mails instead of, as usual, proceeding straight from Colombo to Aden.

On the 12th May 1915 the plaintiffs' goods were stowed in the *Mooltan's* hold together with other cargo, and the *Mooltan* sailed from Sydney on the 15th May, arriving at Colombo on the 2nd June, where she picked up the China mails which had been carried thence from Shanghai. There were at the time riots and civil commotions at Colombo which would seriously interfere with the labour required to discharge cargo at that port. In consequence of these difficulties, the captain thought that if the *Mooltan* remained to discharge her cargo at Colombo, she would not get to Bombay in the time fixed by the mail contract. The result was, that the steamer left Colombo with the plaintiffs' lead on board. At Bombay the lead was transhipped into another vessel, the *Nubia*, and sent back to Colombo. On the voyage back this vessel was stranded and a quantity of the lead was lost.

MacKinnon, K.C. and *R. A. Wright* for the plaintiffs.—They cited

Sargant and Sons v. *East Asiatic Company*, 1915, 21 Com. Cas. 344;

Lilley v. *Doubleday*, 44 L. T. Rep. 814; (1881) 7 Q. B. Div. 510, 511.

Clavell Salter, K.C. and *Micklethwait* for the defendants.—They referred to

Hadji Ali Akbar v. *Anglo-Arabian and Persian Steamship Company*, 10 Asp. Mar. Law Cas. 307; 95 L. T. Rep. 610; (1906) 11 Com. Cas. 219.

Bray, J. [after stating the facts as above].—The plaintiffs claim from the defendants damages for breach of an agreement to deliver the plaintiffs' lead at Colombo by the *Mooltan*. The defendants say that the lead was lost by perils of the sea, in reply to which the plaintiffs say that the loss occurred on a voyage from Bombay to Colombo which was not the voyage contemplated by the parties to the bill of lading. By way of rejoinder the defendants say that they had liberty to carry the lead beyond Colombo and on to Bombay if it became reasonably necessary to do so, and that in view of the condition of affairs in Colombo at the time of the arrival of the *Mooltan* there such circumstances did exist as rendered it reasonably necessary to overcarry the plaintiffs' lead. The defendants further rely on the clauses in the bill of lading exempting them from liability for any loss, damage,

delay, or detention arising out of or consequent upon the employment of the ship in connection with His Majesty's mail service, and from loss arising from riots or civil commotion. The important clauses in the bill of lading in this case are, first, the exceptions clause, and then the clause by which the "company 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 the company or to other persons proceeding either 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 company's expense, but at merchant's risk."

This clause is difficult to construe, partly because Bailhache, J. in *Sargant and Sons* v. *East Asiatic Company* (1915, 21 Com. Cas. 344) placed an interpretation upon a clause in precisely the same language. If I thought that the decision of Bailhache J. there covered this case I should feel that I ought to follow it. I am not bound to do so. But it is a very good rule that the Commercial Court should follow previous decisions of a judge sitting in that court. In *Sargant's* case (*sup.*) Bailhache, J., after reading the clauses of the bill of lading, which included one in similar terms to the one in this case, said: "On examination these clauses do not seem to me applicable to the circumstances of this case. In my judgment it is impossible to find in any of these clauses, or in all of them put together, a reservation of the right claimed by the defendants—namely, a right to carry goods into their port of destination by the original carrying ship, and then to refuse to deliver them there to the person entitled to demand delivery and who duly makes his demand; to carry them away to some other and perhaps distant port, and to return them to their destination in the shipowners' good time. The clauses relied on appear to provide for the case of the carrying steamer failing to put into the port of destination, but not for the case of refusal to deliver goods at their port of destination when the original carrying steamer is herself actually in such port for the purpose of delivering cargo."

It is undoubtedly a rule of construction that in order to construe a particular clause in a document you must have regard to the whole document, and for that reason it may be that the words in one contract have one meaning and in another contract have another meaning, owing to considerations arising from language in another part of a contract. It is a further rule, and a very important one, that in construing a clause, whatever may be the context, you must take into consideration the surrounding circumstances as known to or contemplated by the parties at the time they entered into the contract. That is emphasised in a case I have had to consider—viz., *Butterley Colliery Company* v. *New Hucknall Colliery Company* (102 L. T. Rep. 609; (1910) App. Cas. 381), where Lord Halsbury said this: "I think that what was said by Lord Blackburn in *Wear River Commissioners* v. *Adamson* (3 Mar. Law Cas. O. S. 521; 37 L. T. Rep. 543; 2 App. Cas. 743, at p. 763), and quoted by Farwell, L.J. in this case, is very relevant here, since I think a great deal of the difficulty of construction is solved by considering what are the facts to which the language is applied. Lord Blackburn said: 'In construing a document in all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring farther and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.'"

The *Mooltan* was a mail steamer, and I cannot doubt that that fact was perfectly well known to the plaintiffs. There is, moreover, a special provision with regard to mail steamships in the contract, which shows that the parties contemplated that there might be damage or loss from delay or detention arising out of or consequent upon the existence of the mail contract, and the fact that the vessel was performing duties thereunder. Anyone who took that into consideration would know that under a mail contract there are definite days and times when vessels have to be at, or to start from, particular ports. He would know that if she called at any intermediate port the vessel would not be expected to stop an unreasonable or unusual time there, and therefore that if there were obstacles at that port at any particular time it might be necessary for the vessel to leave without having discharged all her cargo.

I must consequently construe this clause having regard to that fact. Was the clause intended to meet such a case as this? The words used are very wide, and, if they are construed according to their natural meaning, they seem to me quite wide enough to include this case. But there is no doubt that in construing clauses in bills of lading, which are intended for the protection of the shipowner, great care must be taken, although general words are used, to see whether they are really intended to meet every possible case.

The earlier part of the clause gives the defendants "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 the company [or to other persons proceeding either directly or indirectly to such port." I think it is conceded that the liberty thus conferred applies to every case except where it is sought to exercise it capriciously. The clause then proceeds: "And in so doing"—that is to say, in carrying the goods—"to carry the goods beyond their port of destination."

I have come to the conclusion, having regard to what was known by the parties and to the considerations I have mentioned, that the clause was intended to meet such a case as this. The earlier part of the clause, which contains provisions as to the vessel by which the goods are to be carried, applies in every case where the action of the shipowner is not dictated by mere caprice. *Primâ facie*, therefore, if one has to construe the earlier part of the clause as being in general, I have come to the conclusion, having regard to what was known by the parties, and to the considerations I have mentioned, that the clause was intended to meet such a case as this, where there were dis-

turbances in the port which would have lengthened very materially the time taken in discharging the cargo, and therefore necessitated the *Mooltan* leaving Colombo before her cargo destined for that port was fully discharged in order that she might perform her mail contract. In my opinion this was such a case as was contemplated by the parties.

On these grounds, it seems to me that I must decide this case in favour of the defendants, and hold that they had liberty to carry the goods, in the particular circumstances of this case, to Bombay, to tranship them, and to send them back to Colombo; and that it was in course of doing what they were at liberty to do that the goods were lost by perils of the sea. I should say that I arrive at that conclusion without deciding the question whether the case may not also be governed by the words relating to loss, &c., arising out of or consequent upon the employment of the vessel in the performance of His Majesty's mail service.

I do not decide that point. My judgment must be for the defendants.

Judgment for defendants.

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

Solicitors for the defendants, *Freshfields.*

Oct. 16, 17, 18, 31, 1916, *and Jan.* 11, 1917.

(*Before* BRAY, J.)

WILSON BROTHERS BOBBIN COMPANY LIMITED *v.* GREEN. (*a*)

Insurance — Marine — War risks — Suing and labouring clause—Delay excluded—Interference by German warships—Expenses of storage and Reshipment of cargo—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 78.

By a policy of marine insurance the plaintiffs insured with the defendant and other underwriters a cargo of birch wood shipped on board the Norwegian steamship A. for a voyage from Raumo to Garston. The policy was against war risks only. All claims arising from delay were excluded, and the policy contained the usual suing and labouring clause. The vessel sailed in Nov. 1914, *but owing to the interference of German war vessels, the master put in to a Norwegian port and there landed the cargo. The cargo was stored there for some time, and afterwards reshipped to England.*

Held, that the plaintiffs were entitled under the suing and labouring clause to recover the expense of storage of the cargo in Norway until such time as they could by reasonable diligence have secured facilities for reshipment to Garston and they were also entitled to recover the proper cost — as at such date — of reshipping and forwarding the cargo to its destination.

Great Indian Peninsula Railway Company *v.* Saunders (1861, 1 *B. & S.* 41; 1862, 2 *B. & S.* 266) *distinguished.*

TRIAL of action in the Commercial List by Bray, J.

The plaintiffs were the owners of a cargo of birch squares shipped on board the Norwegian steamship *Aranda* from the Baltic port of Raumo to Garston, Liverpool. The defendant was one of the underwriters of a Lloyd's policy on the goods in question.

The claim was for the loss of 600 standards of birch squares valued at £8,000. The plaintiffs sued the defendant to recover his proportion of the value of the birch wood in question, on the ground that there had been a constructive total loss thereof. They also claimed certain expenses under the suing and labouring clause of the policy.

The policy was to cover war risks only as "excluded by the f.c. and s. clause in marine policies, including risk of mines, torpedoes, and bombs," and there was a clause excluding all claims arising from delay.

The *Aranda* sailed from Raumo on 22 Nov., 1914, but owing to the interference of the German warships (wood goods having been declared contraband by Germany) the vessel was obliged to put in to the Norwegian port of Grimstadt. The wood was there landed, and the discharge was finished about the middle of Jan., 1915.

At this time it was thought that the Norwegian Government would not allow the wood to be reshipped and sent to England during the period of the war. The Norwegian Government had given Germany a guarantee that this vessel should discharge its cargo at Grimstadt. In Dec. 1914, the plaintiffs alleged that the further carriage of the goods to this country was impossible and gave notice of abandonment, but this the defendant refused to accept. In Feb. 1915, the plaintiffs were informed that they were free to send the wood on to England, and accordingly in March they began to attempt to obtain tonnage to send the goods to Garston, but it was not until Sept. that they succeeded in doing so. They then chartered a small vessel, the *Jens Riis*, which made one voyage taking about 70 to 100 standards, and then refused to make a second voyage. Arrangements were then made with another vessel, the *Mink*, to take the goods. This vessel made two voyages, not to Garston direct, but to an East Coast port, from whence the goods were taken on to Garston.

In July 1915, the action came on for hearing on the question of the constructive total loss claim. At the trial, Bray, J. held that the plaintiffs had failed to establish their claim for a constructive total loss, and accordingly gave judgment for the underwriter.

The matter now came before the court on claims under the suing and labouring clause. The plaintiffs claimed to recover under this clause the costs of disharging, storing and insuring the cargo at Grimstadt; the cost of reshipping the goods to England and the freight and expenses through to Garston.

Leslie Scott, K.C., and *G. D. Keogh* for the plaintiffs.

Leck, K.C., and *R. A. Wright* for the defendant. —The claim arises from delay and is therefore excluded by the express terms of the policy. Moreover, the goods, as soon as landed and stored at Grimstadt, were safe, and the perils insured against had ceased to exist, and there was no necessity to sue and labour at all. It was only suing and labouring to avert a loss which was not

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

covered by the policy. [They referred to *Great Indian Peninsula Railway* v. *Saunders* (1861) 1 B. & S. 41; (1862) 2 B. & S. 266.]

Leslie Scott, K.C. in reply.—The loss here sustained came within the terms of the policy, under which the goods were insured until their safe arrival at Garston, and the defendant is liable for the expenses of storing and reshipping and all expenses incurred to protect the goods. All the expenses incurred here are properly attributable under the suing and labouring clause, and are recoverable from the underwriter under the said clause. [He referred to *British and Foreign Marine Insurance Company* v. *Sanday and Co.*, 13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A. C. 650.] *Great Indian Peninsula Railway* v. *Saunders* (*ubi sup.*) is no longer law: moreover, it is distinguishable from the present case.

Cur. adv. vult.

Oct. 31, 1916.—BRAY, J.—The action is brought under a policy of insurance to recover 8000*l.*, being the value of 583 standards of birch squares shipped on board the steamship *Aranda* for a voyage from Raumo to Garston. The policy was against war risks only. There had been another policy which was an ordinary marine policy which excepted war risks, and the policy under which this action was brought was to cover the war risks. This policy excluded "all claims arising from delay."

Originally, there were two claims, one for total constructive loss, and the other on a suing and labouring clause. The question of constructive total loss was tried before me some time ago, and I decided it in the defendant's favour.

The *Aranda* sailed from Raumo on the 22nd Nov. 1914, and three days later was stopped by German vessels. In consequence of this, she was obliged to put in to the Norwegian port of Grimstadt. The cargo was there landed, and the discharge was completed on the 15th Jan. 1915. At that time it was thought that the Norwegian Government, which had given a guarantee to the German Government that the wood in question should be discharged at Grimstadt, would prevent it being reloaded and sent on to England during the period of the war. But in February, information was obtained from the Foreign Office that the owners of the goods were free to send them to England.

In March the owners began to make inquiries about tonnage to take the goods to Garston, but none was obtained until the month of September, when the *Jens Riis* was chartered. This vessel made one journey, taking about 70 to 100 standards, and then refused to take any more. Then another vessel, the *Münk*, was chartered, and this vessel carried the cargo, not to Garston direct, but to an East Coast port from whence the goods were forwarded to Garston.

The plaintiffs claimed to recover the general average expenses up to the time of discharging the goods at Grimstadt, the expenses of their storage there, and the expenses of the reshipping to England, which would include the cost of a fire insurance policy which they had entered into. The case is governed by the Marine Insurance Act 1906, s. 78, which provides as follows:—

(1) "When the policy contains a 'suing and labouring' clause the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause notwithstanding that the insurer may have paid for a total loss or that the subject-matter may have been warranted free from particular average either wholly or under a certain percentage. (2) General average losses and contributions and salvage charges as defined by this Act are not recoverable under the suing and labouring clause. (3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under 'the suing and labouring' clause. (4) It is the duty of the assured and his agents in all cases to take such measures as may be reasonable for the purpose of averting or minimising the loss."

There is no dispute as to the principle of the claim for general average expenses up to the time of landing the goods at Grimstadt. The steamship was obliged to go to that port owing to the interference of the German warships. It was a war risk, and I understand the parties are able to come to an arrangement as to the amount.

The claim for the expenses of the storage of the wood at Grimstadt and of its reshipment to England may be dealt with together. The first point made by Mr. Leck for the defendant was that, as the claim arose from delay, it was excluded by the express terms of the policy. In my opinion that is not a good point. I do not think the clause excluding all claims arising from delay in any way affected the suing and labouring clause. But the next point is a much more serious one. Mr. Leck said that the goods were safe when they were landed and stored at Grimstadt, and that there was no necessity to sue and labour at all, or it was only suing and labouring to avert a loss which was not covered by the policy. He relied mainly on the case of *Great Indian Peninsula Railway Co.* v. *Saunders* (*ubi sup.*). That case has to be very carefully considered. The facts were as follows: The plaintiffs shipped at London for Bombay certain iron rails "freight to be paid here, ship lost or not lost." They paid the freight and by a policy in the common form insured for the voyage the rails valued at 4,500*l*, "warranted free from particular average unless the ship be stranded, sunk or burnt." Soon after sailing the ship was, in consequence of damage by perils of the sea, compelled to put back to Plymouth in such a state as not to be worth repairing. The rails were landed and sent by the plaintiffs to London, and thence in other vessels to Bombay, the plaintiffs having to pay 825*l* as freight. It was held that this extra freight was particular average, and therefore within the warranty, and consequently was not recoverable from the underwriters, and, further, that the plaintiffs could not recover this sum under a clause in the policy by which the assured were authorised to "sue and labour" for the preservation of the subject of the insurance, the policy being in effect against total loss only, and the iron, at the time this expense was incurred to forward it to its destination, being in no peril of total loss either actual or constructive.

Blackburn, J., in giving the judgment of the Court of Queen's Bench, said (1 B. & S., at p. 52): "It was, however, further argued by Mr. James, that the plaintiffs were entitled to recover under the clause which authorites the insured to sue and labour for the preservation of the subject

matter of the insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is, under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance (5th edit.), S. 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination at a time when the iron was not in any peril of loss either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not have been a constructive total loss, according to *Rosetto* v. *Gurney* (1851, 11 C. B. 176), unless the amount of the extra freight exceeded the value of the goods when forwarded, which is not the case here; and an actual loss is out of the question. It seems to us that the plaintiffs here cannot in any view recover, unless we deprive the warranty of the effect which it was intended to have. We therefore give judgment for the defendant."

Mr. Leslie Scott said that since *British and Foreign Marine Insurance Company* v. *Sanday and Co.* (13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A. C. 650) that was no longer law. I do not think *Sanday's* case (*ubi sup.*) laid down new law at all. It was the law long before then, before the passing of the Marine Insurance Act, 1906, that what was insured in a policy of this kind on goods was their safe arrival at the port of destination.

There was the unanimous judgment of the Court of Queen's Bench in *Great Indian Peninsula Railway Company* v. *Saunders* (1861, 1 B. & S. 41), which was affirmed by the Court of Exchequer Chamber (1862, 2 B. & S. 266, and I cannot at *nisi prius* say that it was wrongly decided; I am rather inclined to think it was rightly decided. However, in my opinion it is clearly distinguishable from the present case. That case was decided on the ground that the loss was a particular average loss, and the policy contained a warranty that it was free from particular average. The policy in this case contains no such clause. If the loss was incurred by the perils insured against, namely, war risk, it covered partial loss, particular average loss, as well as total loss, and it seems to me that there was, at all events, a danger of a partial loss here. The goods were at Grimstadt, the port of destination was Garston, and the goods could not be safely got to Garston without incurring the expense of storage at Grimstadt and the cost of reloading and forwarding, and therefore, in my opinion, these were expenses—I will leave out the word "proper" for the moment—incurred in endeavouring to avert that loss. The next question raised by Mr. Leck was that the plaintiffs did not act reasonably; that if they had acted with reasonable diligence the goods could have been reshipped long before, at a much lower freight, and that they did not take reasonable steps to obtain tonnage as soon as they might have done. Now, I have carefully considered the case, and I am bound to say that I think Mr. Leck is right on that point. On the evidence, I think that if the plaintiffs had acted with reasonable diligence they could have had a ship ready to load the cargo at Grimstadt by about the middle of April, 1915, at a lower rate of freight than they in fact paid.

In considering the question of the amount of the expenses, I think I must take it from the defendant's evidence that at that time the freight to London would be about 72*s.* for deal. But it was admitted by defendant's witnesses that some additional freight would be required in respect of these birch squares, and I propose, therefore, to add 20*s.* to the 72*s.* which was named by the defendant, and to say that for 92*s.* a vessel could have been chartered by about 15th April, 1915, so that storage and re-shipping expenses must be calculated upon that footing. I understand that if I settle the principle the parties can agree. I think I must name a time, having regard to the question of storage, and I therefore fix the date already referred to. The parties must endeavour to agree the amounts upon that footing, and the matter can be mentioned again in order that I may give judgment as to the costs.

[*Jan.* 11, 1917. — Accordingly, the case was mentioned again. The parties having agreed as to the figures, judgment was entered for the plaintiffs for the amount so agreed. As, however, the defendant had paid into court an amount in excess of the agreed figure, Bray, J., made the usual order in such circumstances with regard to the costs.]

Judgment for plaintiffs.

Solicitors for plaintiffs, *Rawle, Johnstone*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for defendant, *William A. Crump* and *Son.*

July 10, 11, *and* 13, 1917.

(Before ROWLATT, J.)

BRITISH AND FOREIGN STEAMSHIP COMPANY LIMITED v. THE KING. (*a*)

Requisitioned by Admiralty—War risks taken by Admiralty—Collision due to warlike operations—Loss of steamship—Liability.

The steamship St. O. *was requisitioned by the Admiralty under the terms of charter-party T. 99 C., clause* 24 *of which provided that the Admiralty should not be liable if the vessel should be lost through collision or any other cause arising as a sea risk. Clause* 25 *provided that "the risks of war which were taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extended clause: Warranted free from capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss."*

On the 31*st Dec.* 1915 *the* St. O. *was engaged as a transport for the troops in connection with the*

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

evacuation of Gallipoli. About 5.30 p.m. she was running with no lights showing in pursuance of Admiralty orders. At the time a large number of other vessels belonging to the transport services of Great Britain and the allies were in the neighbourhood, and all were navigating without lights in consequence of the hostilities then in progress. The night was very dark, and, although a good look-out was being kept, the St. O. *came into collision with a French battleship and was sunk. The collision could not have been avoided by any care or skill on the part of those on board the* St. O.

Held, that the loss of the steamship was due to warlike operations, and was within the risks which had been taken by the Admiralty under clause 25 *of charter-party T.* 99 *C. The shipowners were therefore entitled to judgment.*

Petition of Right tried before Rowlatt, J. in the Commercial Court.

The suppliants were the owners of the steamship *St. Oswald*. In March 1915 the *St. Oswald* was requisitioned by the Director of Transports on behalf of the Lords Commissioners of the Admiralty for immediate use on Government service, and was taken into the service of the Admiralty on the terms of a contract made between the suppliants and the Director of Transports on behalf of the Lords Commissioners of the Admiralty contained in a charter-party known as T. 99 C.

Clause 21 of charter-party T. 99 C. provided as follows:

The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorised by them, and shall in all respects comply with the confidential instructions for masters of transports; but he shall be solely responsible (on behalf of the owners) for the management, handling, and navigation of the ship.

Clause 24 provided that:

The Admiralty shall not be held liable if the vessel shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk.

Clause 25 provided that:

The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extended clause: Warranted free from capture and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss.

The steamship continued in Government service until her loss.

On the 31st Dec. 1915, about 5.30 p.m., the *St. Oswald* was engaged as a transport in the Eastern Mediterranean. She was employed in the embarkation of troops from Gallipoli, and she had left the harbour at Imbros bound for Helles, Gallipoli, with no navigation or other lights showing, in pursuance of orders and instructions from the Admiralty. Her side lights were in position and were lighted, but obscured, and her masthead light was ready lighted, but was not hoisted or showing. After she had rounded Cape Kephalo off Imbros a course was set south-east half south magnetic, and in obedience to her orders she went at full speed for Helles. The night was very dark and a good look-out was being kept on board. Shortly afterwards the hull of a large vessel, which proved to be the French battleship *Suffren*, was seen about half a mile away approaching rapidly. The *St. Oswald* starboarded her helm, and almost simultaneously the *Suffren* ported her helm. The *Suffren* soon afterwards struck the *St. Oswald* on the port side well forward of amidships, causing the *St. Oswald* to sink and become a total loss. The suppliants said that the ramming and loss of the *St. Oswald* could not have been avoided by any reasonable care or skill. They alleged that the loss owing to navigating without lights was a consequence of warlike operations.

The answer on behalf of the King was that the *St. Oswald* was lost by reason of a cause arising as a sea risk — namely, a collision within the meaning of clause 24 of the charter-party.

Leslie Scott, K.C., *Roche*, K.C. and *A. T. Miller* for the suppliants.—The steamship *St. Oswald* was requisitioned by the Admiralty and was employed as a transport in connection with the evacuation of Gallipoli. The steamship was being navigated without lights on a dark night, by order of the Admiralty. It was necessary to avoid showing lights in order to avoid the risk of attack from submarines and to avoid attracting the fire of Turkish troops on the mainland. While so steaming without lights under Admiralty orders, the steamship came into collision with the French battleship the *Suffren*, and sank in a few minutes. It is contended that the *St. Oswald* was engaged in warlike operations at the time of the collision, and that the collision was the result of a war peril within the meaning of the phrase in the charter-party T. 99 C., under which the vessel was requisitioned by the Admiralty. The suppliants claimed from the Admiralty payment as for a loss by war peril. Alternatively, if the collision was not the result of a war peril, but was the result of a marine peril, the Admiralty by ordering the vessel to go with lights out had taken the navigation out of the hands of the master. Therefore the Admiralty ought to indemnify the suppliants against the results of their doing so. The *Suffren* was also running with all lights out at the time of the collision on account of the submarine danger. In these circumstances, warlike operations were the effective and proximate cause of the collision. See

Ionides v. *Universal Marine Insurance Company*, 8 L. T. Rep. 705; 14 C. B. N. S. 259;
Leyland Shipping Company v. *Norwich Union Fire Insurance Society*, 14 Asp. Mar. Law Cas. 4; 116 L. T. Rep. 327; (1917) 1 K. B. 873;
France (William), Fenwick, and Co. v. *North of England Protecting and Indemnity Association*, 14 Asp. Mar. Law Cas. 92; 116 L. T. Rep. 684;
Reischer v. *Borwick*, 7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548.

"Warlike operations" are any behaviour different from the way of peace, and going without lights was quite foreign to ordinary navigation. As to the alternative argument that

the Admiralty had taken the control out of the hands of the master, see

Kruger and Co. v. *Moel Tryvan Ship Company*, 10 Asp. Mar. Law Cas. 465; 97 L. T. Rep. 143; (1907) A. C. 272;
Dugdale v. *Lovring*, 32 L. T. Rep. 155; L. Rep. 10 C. P. 196.

The *Attorney-General* (Sir F. E. Smith) and *G. W. Ricketts* for the Crown.—The onus is on the suppliants to show that their vessel was lost through a war risk. The charter-party was entered into at a time when both parties had the war in their minds, and they could have expressly provided for the case of navigating without lights if they had thought it important. Absence of light was no doubt a contributory cause, but it could not be shown to be the proximate cause of the collision. As to their second point, the parties had put their agreement into writing in the clauses of the charter-party, and no implied, unwritten condition could be read into the contract.

Leslie Scott, K.C. replied.

Cur. adv. vult.

July 13.—ROWLATT, J. read the following judgment:—

In this case the suppliants' ship was rammed and sunk by the French warship *Suffren* while steaming at night without lights from Imbros to Cape Helles to take part in the removal of our forces. She was at the time under requisition to the Admiralty on the terms of a form of charter-party which contained the following clause—clause 24:

The Admiralty shall not be held liable if the vessel shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk.

Clause 25 of the charter-party provided as follows:

The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extended clause: Warranted free from capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss.

The question that I have to decide is under which of these clauses the loss in this case falls. The ship was lost by collision, but if that collision was the proximate consequence of warlike operations the case falls within the war risks clause. That is the result of what was laid down in *Ionides* v. *Universal Marine Insurance Company* (*ubi sup.*). There the ship was lost by stranding, and the proximate cause was not the hostilities, but the master being out of his reckoning. But the illustrations given by Erle, C.J. show that if the vessel had been caused to strand by hostilities the proximate cause of the loss would have been, not the stranding, but the hostilities. The war risks clause takes out of the operation of the marine risk clause the cases where the marine risk of stranding (or in this case of collision) is actuated by the hostilities. It is a consequence of the hostilities. This differentiates a case of this kind from cases where there are not two causes. A loss due to a leak caused by a rat's gnawing a pipe is a loss by perils of the sea, but if there had been a clause taking out of the exception of perils of the sea consequences of gnawing by rats, I take it that the loss would have been due to such a consequence. I have, therefore, to determine whether the collision here was the consequence of the steaming without lights by the suppliants' ship and the *Suffren* on this night, which the Attorney-General admitted was a warlike operation.

The judgment of Willes, J. in *Ionides* v. *Universal Marine Insurance Company* (*sup.*) shows that that means the proximate consequence. Now these vessels sighted each other at a distance of about half a mile, which was traversable at their combined speeds in a minute and a half. The significance of the distance separating moving objects which are approaching one another is relative to their size and speed. Here the *St. Oswald* sighted the *Suffren* on her starboard bow. The *Suffren* must have sighted the *St. Oswald* on her port bow for her port light was seen. That was the position in which warlike operations had placed these vessels. If both had kept their courses there probably would have been a collision. Both, at any rate, thought so. If both had starboarded or both ported, or if one had kept her course and the other had either starboarded or ported, they would have gone clear. As it happened one starboarded and the other ported (practically simultaneously). They thus were brought on courses forming intersecting circles, and so they came into collision. The Attorney-General declined to affirm (and I asked him specifically as to the *Suffren*) that either vessel did wrong in the circumstances. He merely said that it was not affirmatively proved that the collision was the consequence of the warlike operations. It seems to me that the true view is that these vessels were in instant peril, as the consequence of the warlike operations, and that the manœuvres which they executed did not constitute an intervening cause of the collision, but are to be regarded merely as an attempt which failed to escape from the existing peril. It is the converse of the position in *Ionides* v. *Universal Marine Insurance Company* (*sup.*), where the absence of the light merely prevented the master from correcting his already mistaken course.

If I could say that the *Suffren* was to blame for starboarding I should have held that the negligence of her commander had intervened and immediately caused the disaster. As it was, I think that the warlike operations brought the vessels into a position where escape or destruction depended upon sudden action, which might be fortunate or disastrous, but which had to be taken. It was all a consequence of the warlike operations. It might have turned out otherwise, but that is only another way of saying that the consequence might have been different. If the *Suffren* had run down the *St. Oswald*, without seeing her at all, it could be said that she might have missed her. The circumstance that the commander of the *Suffren*, constrained to instant action as a consequence of warlike operations, took, of two courses open to him, the one which turned out to be the fatal one does not break the chain of consequence. That is just what steaming without lights brings

about. That is why it causes losses, namely, because it prevents ships from seeing each other until it is too late to ensure safety, though by good fortune they may escape.

For these reasons, I think that the suppliants are entitled to judgment.

Judgment for the suppliants.

Solicitors for the suppliants, *Lightbound, Owen, and Co.*

Solicitors for the King, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, June 11, 1917.

(Before Swinfen Eady and Scrutton, L JJ. and Bray, J.)

Hogarth Shipping Company Limited *v.* Blyth, Green, Jourdain, and Co. Limited. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Bill of lading — Incorporation of charter-party "conditions" and "exceptions" in bill of lading—Cargo—Conclusive evidence clause — Whether incorporated — Inconsistency.

A claim made by receivers of cargo for short delivery of a number of bags of sugar was based upon a provision in a charter-party, alleged to be incorporated in the bill of lading, that the bill of lading was to be deemed conclusive proof of cargo shipped. The charter-party provided by clause 12: *"The captain to sign Eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped, and their conditions to form part of this charter-party. . . ." The bill of lading stated that there had been shipped* 87,966 *bags and* 7453 *pockets of sugar and five cases sugar samples, to be delivered, subject to the exceptions and conditions thereinafter mentioned, in good order and condition, and continued: "The following are the exceptions and conditions above referred to. Weight, measure, quality, contents, and value unknown." The bill of lading contained the words in writing: "Freight and all other conditions and exceptions as per charter-party." The arbitrator found that the bill of lading numbers of bags were overstated, and that the ship delivered all the bags which it received; that the bill of lading was not conclusive as to cargo shipped; and the receivers were not entitled to recover any sum from the shipowners.*

The appellants contended that, having regard to the terms of the charter-party, the bill of lading incorporated the provisions of clause 12 *of it, that the bill of lading was to be deemed conclusive proof of cargo shipped, and accordingly that the bill of lading in question must be deemed conclusive proof of cargo shipped, and that it was not competent for the arbitrator to entertain the question whether the quantity delivered by the ship included all the bags which it actually received, when the deficiency was included in the quantity stated in the bill of lading to have been shipped. The respondents relied upon the clause in the bill of lading, "weight, measure, quality, contents, and value unknown," and contended that with such a provision the bill of lading was not conclusive as to the quantity shipped; they disputed the incorporation of the conclusive evidence clause and claimed that if there was any discrepancy between the charter-party and the bill of lading the latter prevailed.*

Held, that the conclusive evidence clause was not incorporated into the bill of lading as a "condition" nor as an "exception" of the charter-party; but, even if it were an exception, it was not incorporated in the bill of lading, as it was repugnant to the "weight, &c., unknown" clause.

Decision of Lush, J. affirmed.

Appeal by the receivers of cargo from a decision of Lush, J. on an award stated in the form of a special case by an arbitrator.

The points of claim delivered in the arbitration were as follows:

1. By a charter-party dated the 27th Oct. 1914 and made between the respondents and Blyth, Greene, Jourdain, and Co. Limited, acting on behalf of the Royal Commission on the Sugar Supply, acting on behalf of His Majesty the King as aforesaid, it was agreed, *inter alia*: (*a*) That the *Baron Napier* should proceed with all possible speed to Port Louis, Mauritius, and there load . . . a full and complete cargo of sugar in bags not exceeding 7200 tons and not less than 6800 tons . . . and being so loaded shall therewith proceed as ordered . . . to London, Liverpool, Avonmouth, Cardiff, Hull, Newcastle, Leith, or Clyde (one port) at a freight of 1*l.* 3*s.* 9*d.* per ton; (*b*) the captain to sign Eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped. 2. The captain of the *Baron Napier* duly signed a bill of lading duly tendered to him by Elias Mallac et Cie. for 87,966 bags of sugar and 7453 pockets of sugar weighing 7144 tons 8cwt. 3qrs. 17lb. 3. These bills of lading were duly indorsed by Messrs. Mallac et Cie., and the said Royal Commission on the Sugar Supply are (acting as aforesaid) *bonâ fide* holders thereof in due course. 4. The respondents have delivered only 87,802 bags and 7447 pockets and four empty bags, whereby the claimants have suffered damage to the extent of 277*l.* 19*s.* 3*d.* 5. The claimants admit that there is due from them to the respondents a sum of 129*l.* 6*s.* 2*d.* in respect of balance of freight due to the respondents, but say that they are entitled to retain and set off this amount against their claim of 277*l.* 19*s.* 3*d.* as set forth in par. 4 hereof. The claimants claim 277*l.* 19*s.* 3*d.* less 129*l.* 6*s.* 2*d* = 158*l.* 13*s.* 1d. (*sic*).

The points of defence were as follows:

1. The charter-party dated the 27th Oct. 1914 is admitted and referred to for its terms. 2. The respondents will refer to the bill of lading for its terms, which are not correctly set out in the points of claim. The bill of lading contains the qualification "weight, measure, quality, contents, and value unknown; ship not liable for reasonable wear and tear of packages, leakage, breakage, sweat." The bill of lading was also subject to the usual exceptions, on which the respondents will, if necessary, rely. 3. Par. 3 of the points of claim is admitted. 4. The respondents deny that they only delivered 78,802 bags and 7447 pockets and four empty bags, or that they short delivered the alleged or any quantity of sugar, or that the value was as alleged. 5. The respondents in fact delivered all the sugar shipped and all the bags shipped. 6. The respondents deny that they are indebted to the claimants in the sum of 277*l.* 19*s.* 3*d.* or in the sum of 158*l.* 13*s.* 1*d.*

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

as alleged, or at all. 7. The respondents claim the sum of 129*l.* 6*s.* 2*d.* balance of freight. 8. While denying all liability, the respondents are willing to give credit for 4*l.* 2*s.* 5*d.*, being 160 bags at 6*d.* each and six pockets at 4½*d.* each, and say that that sum is sufficient to satisfy the claimants' claim (if any).

Award in the form of a special case:

Whereas by a charter-party dated the 27th Oct. 1914, made between the Hogarth Shipping Company Limited (hereinafter called the shipowners), as owners of the steamship *Baron Napier*, and Blyth, Greene, Jourdain, and Co. Limited, as charterers, acting in fact as agents for the Royal Sugar Commission (hereinafter called the receivers), it was agreed that the *Baron Napier* should load at Port Louis, Mauritius, a full and complete cargo of sugar in bags not exceeding 7200 tons and not less than 6800 tons and deliver the same at one of certain ports specified in Great Britain at freight of 1*l.* 3*s.* 9*d.* per ton. The charter-party provided that charterers' responsibility was to cease on cargo being loaded, and that the captain was to sign Eastern trade bills of lading, which were to be deemed conclusive proof of cargo shipped, and their conditions to form part of the charter-party at any rate of freight required by the charterers without prejudice to the charter-party. And whereas the *Baron Napier* loaded a cargo of sugar in bags at Port Louis, Mauritius, and the captain signed a bill of lading dated the 26th Nov. 1914 acknowledging receipt of 87,966 bags of sugar and 7453 pockets of sugar (two pockets being the equivalent of a bag) weighing net 7144 tons 8cwts. 3qrs. 17lb. to be delivered to order subject to the exceptions and conditions mentioned. And whereas among such conditions was the following, "Weight, measure, quality, contents, and value unknown." And whereas there was further in writing on the bill of lading the provision "Freight and all other conditions and exceptions as per charter-party." And whereas the vessel discharged her cargo at Manchester to the receivers . . . And whereas I was requested to state this my award in the form of a special case. Now I make my award in the form of a special case in the manner following:

1. The charter-party and bill of lading are to form part of this award and special case.

2. The points of claim and the points of defence respectively delivered by the parties are to form part of this award and special case.

3. The net weight of sugar which the shipowners claim to have delivered and on which their claim to balance of freight, namely, 129*l.* 6*s.* 2*d.*, is based is 7098 tons 7cwts. 25lb.; this net weight has been arrived at by taking the tare on the gross weight declared by the Manchester Ship Canal Company, who weighed on behalf of the receivers, such gross weight being 7231 tons 13cwts. 20lb. I find that such net weight is correct and shows a short out-turn as compared with the bill of lading weight of approximately 46 tons.

4. I find that all the sugar actually shipped was delivered at Manchester, and that there was no loss of sugar on the voyage or during discharge. No claim was made against the shipowners based on the above difference in weight. There was evidence that considerable differences between bill of lading and out-turn weights were common in sugar cargoes.

5. I find that in respect of numbers of bags there was a considerable shortage in the numbers delivered as compared with the bill of lading numbers. The final numbers as counted on a recheck by the Manchester Ship Canal Company were 87,802 bags and mats and 7447 pockets and four empty bags, being a short delivery as compared with the bill of lading numbers of 160 bags and six pockets. There was no evidence called on behalf of the shipowners to account for such a loss of empty or damaged bags during discharge, or to enable me to say that any number were so lost. I find that the bill of lading numbers of bags were overstated. I find that the ship delivered all the bags which it received.

6. The claim put forward for the receivers was based solely on the short delivery of bags as compared with the bill of lading numbers, and the amount of the claim, namely, 277*l.* 19*s.* 3*d.*, was arrived at by a calculation of the average or estimated contents of 160 bags and six pockets. The claim depended on a contention that the bill of lading, though not conclusive as to weight, was conclusive as to numbers of bags therein stated as having been shipped.

7. Subject to the opinion of the court, I decide that the bill of lading, by reason that the ship's obligation to make delivery thereunder is expressly subject to the condition that the weight is unknown, cannot be construed as a bill of lading conclusive as to the cargo shipped, and I decide that it cannot be construed as conclusive as to numbers of bags stated, while not conclusive as to weight of cargo.

8. No claim was put forward before me by the receivers that the bill of lading in the form in which it was signed constituted a breach of the shipowners' obligations under the charter-party.

9. Subject to the opinion of the court, I find and award that the receivers are not entitled to recover any sum from the shipowners on the claim submitted to me, and I find and award that the shipowners are entitled to be paid the sum of 129*l.* 6*s.* 2*d.* for balance of freight together with their costs of this arbitration to be taxed. I also award that the receivers shall bear and pay the costs of this award.

10. The question for the court is whether I am right in deciding as I have done in regard to the construction of the bill of lading in par. 7 hereof.

11. If the court is of opinion that I am right in so deciding, this award will stand.

12. If the court is of opinion that I am wrong in so deciding and that the receivers are entitled to claim that the bill of lading is conclusive as to numbers of bags and that in consequence the receivers are entitled to claim for short delivery on the basis of the average and estimated weight of 160 bags and six pockets, then I award that they are to be paid by the shipowners 277*l.* 19*s.* 3*d.* less a deduction of 129*l.* 6*s.* 2*d.* balance of freight, or 158*l.* 13*s.* 1*d.* (*sic*), together with their costs of this arbitration to be taxed, and I also award that the shipowners bear and pay the costs of this my award.

13. If the court is of opinion that I am wrong in so deciding and that the receivers are entitled to claim that the bill of lading is conclusive as to numbers of bags but not otherwise, and that the receivers are therefore only entitled to recover the value of 160 bags and six pockets in the sense of skins or receptacles, then I award that they are to be credited by the shipowners against the balance of freight with 4*l.* 2*s.* 5*d.* and are to pay such balance, namely, 125*l.* 3*s.* 9*d.*, to the shipowners together with the shipowners' costs to be taxed of this arbitration and are also to bear and pay the costs of this my award.

G. A. H. Branson for the appellants.

C. T. Le Quesne for the respondents.

Cur. adv. vult.

The following judgments were read:—

June 11.—SWINFEN EADY, L.J.—This is an appeal from a judgment of Lush, J. on a special case stated by an arbitrator.

A claim was made by receivers of cargo for short delivery of a number of bags of sugar. The claim is based upon a provision in a charter-party, alleged to be incorporated in the bill of lading, that the bills of lading are to be deemed conclusive proof of cargo shipped.

The arbitrator found that the bill of lading numbers of bags were overstated, and that the ship delivered all the bags which it received. Also that the bill of lading was not conclusive as to cargo shipped, either as to numbers of bags or weight of their contents, and he found that the receivers were not entitled to recover any sum from the shipowners. If, however, contrary to his opinion, the court should consider that the bill of lading is conclusive as to numbers of bags of sugar shipped, then the arbitrator awarded that there were 160 bags and six pockets short delivered, and that their value on the basis of average and estimated weight was 277*l.* 19*s.* 3*d.*, from which 129*l.* 6*s.* 2*d.* balance of freight would have to be deducted; if, however, the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles, then the receivers were entitled to 4*l.* 2*s.* 5*d.* for short delivery.

Lush, J. held that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles, and determined that the receivers were entitled only to 4*l.* 2*s.* 5*d.*

The receivers appeal from this decision. There is not any cross-appeal by the shipowners in respect of the 4*l.* 2*s.* 5*d.* Indeed, by their defence they offered to give credit for that amount while denying liability. It appears from the points of claim that the parties claiming are the Royal Commission on the Sugar Supply acting on behalf of His Majesty the King; they claim as indorsees of the bill of lading, which had been duly indorsed to them by Elias, Mallac, and Co., the shippers of the cargo (acting for the Mauritius Commercial Bank), and in par. 3 of the points of claim they allege that they are the *bonâ fide* holders in due course of the bills of lading.

Par. 3 of the points of claim is expressly admitted by par. 3 of the points of defence. The arbitrator in par. 8 of his award stated that no claim was put forward before him by the receivers that the bill of lading in the form in which it was signed constituted a breach by the shipowners of their obligations under the charter-party.

The circumstances which give rise to the difficulty are the respective provisions of the charter-party and the bill of lading, which are alleged to be conflicting. The charter-party provides that the ship shall load a full and complete cargo of sugar in bags not exceeding 7200 tons and not less than 6800. Clause 12 is as follows: "The captain to sign Eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped, and their conditions to form part of this charter-party, at any rate of freight required by the charterers, without prejudice to this charter-party, but at not less than the average charter rate, unless the difference is paid in cash before signing, at current rate of exchange for ninety days' sight bank bills." The charter-party is dated the 27th Oct. 1914, and is expressed to be made between the Hogarth Shipping Company Limited as owners and Blyth, Green, Jourdain, and Co. Limited, of London, merchants. It is signed by agents for the owners, and by H. D. Blyth and Co. as agents for the merchants. The proceedings in the arbitration were expressed to be between the Sugar Commission acting on behalf of His Majesty and the Hogarth Steam Shipping Company Limited, although the order made by Lush, J. was intituled as if the arbitration were between the shipping company and Blyth, Green, Jourdain, and Co. Limited. This seems to have been a slip. The claim, which went to arbitration, and was the subject of the special case was a claim by the Shipping Commission as indorsees of the bill of lading, and it is on that footing that, in my opinion, the matter has to be decided. The bill of lading states that there has been shipped in good order and condition 87,966 bags and 7453 pockets of sugar, weighing gross 7,390,125 kilos, and five cases sugar samples, marked and numbered as per margin, and to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition. Then appears: "The following are the exceptions and conditions above referred to: weight, measure, quality, contents, and value unknown." The marks and numbers of the bags and pockets are stated in the margin, with the gross and net weight in kilograms, the latter being also expressed in imperial weight as 7144 tons 8cwts. 3qrs. 17lb. The bill of lading contains the words in writing, after the date and before the signature: "Freight and all other conditions and exceptions as per charter-party."

The appellants contend that, having regard to the terms of the charter-party, the bill of lading incorporated the provision of clause 12 of it that the bills of lading are to be deemed conclusive proof of cargo shipped, and, accordingly, that the bill of lading in question must be deemed conclusive proof of cargo shipped, and that it was not competent for the arbitrator to entertain the question whether the quantity delivered by the ship was all the bags which it actually received, when the deficiency was included in the quantity stated in the bill of lading to have been shipped.

The respondents rely upon the clause in the bill of lading—weight, measure, quality, contents, and value unknown—and they contend that with such a provision the bill of lading is not conclusive as to quantity shipped; they dispute the incorporation of the conclusive evidence clause, and, moreover, claim that if there is any discrepancy between the charter-party and the bill of lading the latter prevails.

Some suggestion was made during the hearing of the appeal that the bill of lading used in the present case was not in the common form known as "Eastern trade bills of lading," but nothing turns upon this, as, so far as the provision in question is concerned—"weight, &c., unknown"—it is not in dispute that it appears in every form of "Eastern trade bill of lading" produced to the court. A clause in a bill of lading—"weight, measure, quality, contents, and value unknown"—will protect a shipowner against liability to an indorsee on the footing of estoppel, as regards the weight, measure, &c., appearing in the bill of lading. The shipowner is bound to carry and deliver safely the goods received by him, whatever their weight, measure, &c., may be. But the description in the bill of lading amounts to no more than this—that the shipper represents that such and such are the weights, contents, &c., but that the owner has no knowledge of the matter and does not admit the accuracy of this description. It is open to a shipowner to prove that the whole of the goods, in fact, shipped have

been delivered, although the quantity so delivered is less than the quantity signed for by the master in the bill of lading. The bill of lading is only *primâ facie* evidence against the shipowner, and may be displaced: (*Jessel* v. *Bath*, L. Rep. 2 Ex. 267; *Henry Smith and Co.* v. *Bedouin Steam Navigation Company* (1896) A. C., p. 70; *Compania Naveria Vasconzada* v. *Churchill and Sim*, 10 Asp. Mar. Law. Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237). This is not in dispute. If the clause "weight, &c., unknown" is to apply, and be given effect to, and the conclusive evidence clause is not incorporated, the claim of the appellants, which is as indorsees of the bill of lading, fails. The question, therefore, arises: Is the conclusive evidence clause incorporated in the bill of lading by the words "freight and all other conditions and exceptions as per charter-party"? It was determined in *Serraino* v. *Campbell* (7 Asp. Mar. Law. Cas. 48; 64 L. T. Rep. 615; (1891) 1 Q. B. 283) that the words "all other conditions as per charter" did not incorporate into the bill of lading an exception of "stranding occasioned by the negligence of the master," which was included in and covered by a stipulation in the charter-party, "Negligence clause as per Baltic bill of lading 1885." Lord Esher, M.R. said (1891) 1 Q. B., at p. 290): "After full consideration, I think that the words ought to be construed as meaning all those conditions of the charter-party which are to be performed by the consignee of the goods. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee—indeed, they are not conditions which are to be performed by anyone." The authorities on this subject were again reviewed in *Diederichsen* v. *Farquharson* (8 Asp. Mar. Law Cas. 333; 77 L. T. Rep. 543; (1898) 1 Q. B. 150). The words in that case were "freight and all other conditions as per charter-party"; it was held that the omission of the words "they paying" or "paying" before "freight" made no difference; that the conditions of the charter-party incorporated into the bill of lading were limited to such as were to be performed by the consignee, and did not include the exemption of the shipowner from liability in respect of deck cargo, which the charter-party provided should be carried at merchant's risk. In that case A. L. Smith, L.J., after referring to *Serraino* v. *Campbell* (*sup.*) and the rule of construction there laid down, said (1898) 1 Q. B., at p. 154): "Again, in the year 1895, in *Manchester Trust* v. *Furness* (1895) 2 Q. B., pp. 282, 286) my brother Mathew treats this rule of construction as then well known and settled, as in truth it was; and in the same case upon appeal (8 Asp. Mar. Law Cas. 57; 73 L. T. Rep. 110; (1895) 2 Q. B. 539, 545) the present Master of the Rolls, Sir Nathaniel Lindley, said, with reference to the words in a bill of lading, 'they paying freight and other conditions as per charter-party': 'The effect of that reference has been considered more than once; it has been considered in *Serraino* v. *Campbell* (*sup.*), and also in *Fry* v. *Chartered Mercantile Bank of India* (14 L. T. Rep. 719; L. Rep. 1 C. P. 689), and the effect of the reference is to incorporate so much of the charter-party as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for incorporating mor than that.' If ever there was a rule of construction laid down and settled by overwhelming and conclusive authority, from the House of Lords downwards to the court of first instance, it is this, and yet it is now insisted upon by the shipowner that when by his captain he signed the bill of lading in this case upon the 19th Aug. 1896, containing the words 'freight (in print) and all other conditions as per charter-party,' the word 'paying' being left out, he, by so doing, incorporated into the bill of lading conditions which otherwise would not have been incorporated, and which it was well known would not be. With the contention that the word 'freight' does not mean 'paying freight' in this mercantile document I cannot agree, for in my judgment the words 'freight' and 'paying freight' therein mean the same thing." The conclusive evidence clause is not, therefore, incorporated into the bill of lading as a "condition" of the charter-party.

In the present case, however, "exceptions" as well as "conditions" are mentioned: "Freight and all other conditions and exceptions as per charter-party." This language will suffice to incorporate exceptions which are not inconsistent with the rest of the bill of lading. Is the conclusive evidence clause an exception? In my opinion it is not. The exceptions are provisions which limit the obligation of the shipowner or carrier to deliver the goods safely; he agrees to do this unless prevented by excepted perils. The conclusive evidence clause is not an exception or qualification of the shipowner's liability, but an extension of it; it renders him liable for goods stated to have been shipped on board, whether actually so shipped or not. But if, contrary to my view, the conclusive evidence clause is an exception, then I am of opinion that it is not incorporated, as it is inconsistent with and repugnant to the clause "weight, &c., unknown." In *Serraino* v. *Campbell* (*sup.*) the court considered the decision of the Exchequer Chamber in *Gray* v. *Carr* (1 Asp. Mar. Law Cas. 115; 25 L. T. Rep. 215; L. Rep. 6 Q. B. 522), and Lord Esher said that the subsequent cases showed the practical mode of carrying out the principle of that decision is this: "You are first to read into the bill of lading all the conditions of the charter-party; if some of those conditions are so large as not to be applicable to a bill of lading at all, they are to be treated as inconsistent, and must be struck out." The same principle is applicable to exceptions. Exceptions contained in the charter-party are to be read into the bill of lading so far as not inconsistent with it. No exception can be introduced which would be repugnant to some provision already in the bill of lading. It would not, however, be repugnant to introduce an additional exception. There is nothing repugnant to a provision that a shipowner shall carry and safely deliver certain goods, unless prevented by certain named perils, to add 'or unless prevented by certain other named perils.'" But there is a distinct contradiction between a clause "weight, contents, &c., unknown," thereby providing against any admission by the shipowner of weight or contents, and a provision in the bill of lading making the weight and contents specified in the bill of lading conclusive evidence against the shipowner

and affecting him with knowledge of the weight and contents.

Moreover, clause 12 of the charter-party runs: "The captain to sign Eastern trade bills of lading . . . and their conditions to form part of this charter-party." And in the bill of lading in question, and in all Eastern trade bills of lading so far as we have been informed, where the shipowner agrees to deliver "subject to the exceptions and conditions hereinafter mentioned," the clause "weight, measure, quality, contents, and value unknown" is in terms expressed to be one of the exceptions or conditions "above referred to." The bill of lading ought not to be interpreted as having inconsistent provisions incorporated in it, if this can be avoided. In my judgment the conclusive evidence clause forms no part of the bill of lading in question, and accordingly this appeal fails, and should be dismissed.

Scrutton, L.J.—This is an appeal from a decision of Lush, J. affirming in the result, with a trifling variation, but for different reasons, the decision of a legal arbitrator stated in the form of a special case.

Curiously enough the first difficulty is to decide who are the parties to the dispute. Lush, J.'s decision is embodied in a judgment purporting to be between the Hogarth Shipping Company and Blyth, Green, Jourdain, and Co. Limited, and the notice of appeal is given by Blyth, Green, Jourdain, and Co. Limited, receivers. But the pleadings in the arbitration and the decision of the arbitrator purport to be in an arbitration between the Hogarth Shipping Company and "the Royal Commission on the Sugar Supply acting on behalf of the King." Blyth, Green, Jourdain, and Co. Limited appear on the charter as charterers, and are found by the arbitrator to be agents for the Sugar Commission. The latter are alleged by the points of claim and admitted by the defence to be indorsees of the bill of lading, and are called by the arbitrator the receivers. No explanation was given to us of this change in the parties to the proceedings; I can only conjecture that it was thought undesirable to make orders for costs against a Royal Commission acting on behalf of the King, and I treat the party litigating with the shipowners as being in fact charterers and also receivers as indorsees under the bill of lading issued under the charter. The second difficulty is to decide what is the claim made which has been adjudicated upon by the arbitrator, formulated in the special case and decided by Lush, J. Is it a claim on the charter or on the bill of lading? For on consideration I agree with the view expressed by Bray, J. in *Steamship Den of Airlie* v. *Mitsui* (106 L. T. Rep. 451; 17 Com. Cas. 121), that the issuing of bills of lading to a charterer, even though he has assigned them, does not necessarily terminate his rights under the charter. And I think it is, to say the least, very arguable that the charterer here might sue on the charter for failure to deliver, alleging that the clause in the bill of lading, "weight, &c., unknown," was not a "condition," and therefore not incorporated in the charter.

I do not think the points of claim in themselves are sufficiently clear to exclude a claim under the charter; but Mr. Branson for the goods owners frankly admitted that this claim had not been argued before the arbitrator or before the learned judge below; nor did he himself raise it in this court. Under these circumstances I do not think we ought to consider such a claim on appeal, though, speaking for myself, I should desire to reserve the question whether in a similar case to this such a claim, properly raised, should not succeed.

I approach the matter, therefore, as a claim under the bill of lading. This bill, though now presented by the charterer, was given to a vendor, who made the goods deliverable to his order. He, therefore, reserved the *jus disponendi* and was an independent contractor and not merely an agent of the charterer. Under these circumstances I agree with the reasoning of Hamilton, J. in *Steamship Calcutta Company* v. *Weir* (11 Asp. Mar. Law Cas. 395; 102 L. T. Rep. 428; (1910) 1 K. B. 759, 770), that the indorsement of the bill to the charterer, when the latter claims on the bill of lading, does not alter or affect his rights, which are founded on and limited by the bill of lading.

Does, then, the bill of lading incorporate the "conclusive evidence" clause of the charter-party? It contains the clause "freight and all other conditions and exceptions as per charter." Whatever view one might take of the word "conditions," in the absence of authority, there is now a long line of decisions binding on this court, and acted on for years by commercial men, that the word "conditions" usually only incorporates "conditions" to be performed by the consignee of the bill of lading, including therein obligations on the shipowner qualifying or relevant to such conditions: (*East Yorkshire Steamship Company* v. *Hancock* (1900) 5 Com. Cas. 266). An attempt was made to enlarge the meaning of the word "conditions" in *Diederichsen* v. *Farquharson* (*sup.*), but the judgments of Sir A. L. Smith, M.R. and Collins, L.J. point out why the long line of authorities and practice prevent such a meaning being given to the word "conditions." In the only case where the word "conditions" has been given a wider meaning, *The Northumbria* (10 Asp. Mar. Law Cas. 314; 95 L. T. Rep. 618; (1906) P. 292), the wording of the clause was "all other conditions, including negligence clause," which showed that the parties were using "conditions" in a wider sense. The earliest cases in which this limitation was put on the word "conditions" were cases where it was sought to introduce "exceptions" to excepted perils, for the consequences of which the shipowner was not liable from the charter into the bill of lading. To meet these decisions the wording of the clause was sometimes varied to read "all conditions and exceptions as per charter." It is arguable that, as in *East Yorkshire Steamship Company* v. *Hancock* (*sup.*), obligations on the shipowner relevant to the conditions to be performed by the consignee were introduced by the word "conditions," so in this case the term "exceptions" introduces terms as to the shipowner's liability, to which the exceptions apply. But on consideration I have come to the conclusion that the court is not justified in straining the terms of a well-known clause to get a meaning, however reasonable, which the parties might quite well have expressed in plain language, but have not. No one in ordinary language would call the "conclusive evidence clause" an "exception,"

If the conclusive evidence clause is not incorporated, it is admitted the receivers cannot on this bill of lading, and on the facts found, succeed.

I regret this result: for it is difficult to believe that any sensible business people put the conclusive evidence clause into the charter in order that it should have no effect on the liability for cargo carried; but the result is due partly to the way in which the claim has been framed and argued, partly to the apparently incurable habit of commercial men of using two printed forms referring to each other without any clear thinking as to how much of each form they intend to be their bargain, especially when these forms contain phrases which have been the subject of settled judicial construction in the courts for many years.

I agree, with some reluctance, that the appeal fails.

Bray, J.—This is an appeal from a judgment of Lush, J. on a special case stated by an arbitrator in an arbitration between Messrs. Blyth, Green, Jourdain, and Co. Limited, called in the special case "the receivers," and the Hogarth Shipping Company, called the shipowners, in respect of a claim made by the former against the latter for short delivery of bags of sugar. The receivers were acting as agents for the Royal Sugar Commission. Nothing, however, seems to turn on that, but I agree with what has been said as to who are the real parties to this arbitration. The material facts were as follows: By a charter-party dated the 27th Oct. 1914 the shipowners, who owned a ship called the *Baron Napier*, agreed with the receivers, who were the charterers, that the ship should proceed to Fort Louis, Mauritius, and there load a cargo of sugar in bags from the charterers and therewith proceed to London, Liverpool, or other ports as ordered, at a freight of 1*l.* 3*s.* 9*d.* per ton. By clause 12 it was provided: [His Lordship read clause 12, which is set out above.] The ship duly proceeded to Fort Louis, Mauritius, and there loaded from a firm called Elias, Mallac, and Co., stated to be acting for the Mauritius Commercial Bank, a full cargo of sugar. The captain signed the bill of lading presented to him by the shippers, which stated that there had been shipped 87,966 bags of sugar and 7453 pockets of sugar weighing 7144 tons 8cwts. 3qrs. and 17lb. This bill of lading contained a provision that the cargo was to be delivered subject to the conditions and exceptions thereinafter mentioned. Amongst the conditions and exceptions were the following: "Weight, measure, quality, contents, and value unknown" (this was in print); then followed other exceptions, and just above the signature of the captain were the words (in writing) "Freight and all other conditions and exceptions as per charter-party." The ship proceeded to Manchester, and when she arrived there the number of bags and pockets was short of the numbers stated in the bill of lading by 160 bags and six pockets. The bill of lading had been indorsed by Elias, Mallac, and Co., the shippers, to the receivers, and, when the bags had been counted, the receivers made a claim against the shipowners for 277*l.* 19*s.* 3*d.*, the value of the bags and pockets short delivered. The claim was disputed by the shipowners and was referred to arbitration, Mr. R. A. Wright being the arbitrator. After hearing the evidence he was requested to state the award in the form of this special case, and so stated this case. He found the facts I have mentioned, and also that in fact the ship had delivered all the sugar actually shipped, and that there was no loss of sugar on the voyage or during discharge. The receivers contended that that finding was irrelevant, the shipowners being conclusively bound by the number stated in the bill of lading. Subject to the opinion of the court, the arbitrator decided that the bill of lading, by reason that the ship's obligation to make delivery thereunder was expressly subject to the condition that the weight was unknown, could not be construed as a bill of lading conclusive as to the cargo shipped, and that it could not be construed as conclusive as to the number of bags stated while not conclusive as to the weight of the cargo. Lush, J. held that it was conclusive as to the number of bags, but not as to the contents, and under par. 13 of the award held that the shipowners must give credit to the receivers against the freight for 4*l.* 2*s.* 5*d.*, the value of the bags, but no more.

A question arose before us as to whether the claim was on the charter-party or the bill of lading. I think the appellants' counsel admitted that the claim was on the bill of lading, but, however that may be, I think it is clear that it was so; it was a claim by Blyth, Green, Jourdain, and Co. as receivers. The recitals in the award state that the dispute was between the shipowners and the receivers. The award is that the receivers are not entitled. (See also pars. 12 and 13.) They are called throughout receivers, and they were the holders of the bill of lading, which, as I have already stated, had been indorsed to them by the shippers. The first question, therefore, to be considered is whether the twelfth clause of the charter-party was incorporated in the bill of lading under the words "freight and all other conditions and exceptions as per charter-party." The twelfth clause is not, in my opinion, an exception. The word "exceptions" in a bill of lading usually means what are called "the excepted perils." They are exemptions in favour of the shipowner from his liability to safely carry and deliver, but if they include exemptions in favour of the consignee they cannot include a provision like this, which imposes an additional liability on the part of the shipowner. It is alleged to be a condition. Now, the meaning of these words "freight and all other conditions as per charter-party" has been discussed in many cases. The effect of these words is summed up by Mr. Carver in his work on Carriage by Sea, art. 160, thus: "The context must in each case be looked at, but the general result of the cases is that the words mean all those conditions of the charter-party which are to be performed by the consignee of the goods or which relate to the mode of delivery to him by the shipowner." He refers to *Serraino* v. *Campbell* (*sup.*). In that case the question was whether the words included what was really an exception. That could not arise here, because the word "exceptions" is added; but Lord Esher, M R, (1891) 1 Q. B., at p. 290, said: "After full consideration I think that the words ought to be construed as meaning all those conditions which are to be performed by the consignee of the goods." Reliance is placed on the words "paying freight," but in *Diederichsen* v. *Farquharson* (*sup.*)

the word "paying" was absent, yet the court of Appeal held that that made no difference. Collins, L.J., on p. 162 of (1897) 1 Q. B., says, after citing with approval Lord Esher's judgment: "The ground on which this rule rests is that, inasmuch as freight has to be paid by the consignee as a condition of receiving the cargo, the words 'other conditions' are to be read in their natural meaning, and, following upon the word 'freight,' must be taken to import conditions to be performed by the consignee in relation to the receiving by him of the cargo. I think it can make no possible difference to this construction that the words 'payment of' before 'freight' are omitted. 'Freight, in my judgment, is obviously equivalent to 'payment of freight' or 'he or they paying freight,' otherwise it could not be described as a condition so as to justify the words 'other conditions' which follow it. The canon of construction above stated is, therefore, applicable to this bill of lading, and excludes all terms of the charter-party which cannot be brought under the category of conditions to be performed by the consignee. It has been urged that the absence of exceptions in the bill of lading is a reason for giving a larger interpretation to the words 'all other conditions as per charter-party.' In my judgment this fact can make no difference, the basis of the rule being what I have stated."

In *Manchester Trust* v. *Furness* (*sup.*) Lindley, L.J. deals with the argument that the holder of the bill of lading takes it with notice of the charter-party, and, after referring to *Serraino* v. *Campbell* (*sup.*) and saying that these words only refer to conditions to be performed on the delivery of the cargo, says that there is no authority whatever for incorporating more than that, and the equitable doctrine of notice has no application to commercial transactions. In the above cases the words "and exceptions" were not there, but I do not think that the addition of those words can enlarge the meaning of the word "conditions." Having regard to the canon of construction laid down by those cases, it remains to be seen whether the twelfth clause of the charter-party falls within it. It is clear, I think, that it does not. It is not a condition to be performed by the consignee, nor one to be performed on the delivery of the cargo. It relates to the form of the bill of lading which the captain is to sign, and it is an agreement between the shipowners and the charterer that the bills of lading are to be deemed conclusive evidence of the cargo shipped, and that their conditions should form part of the charter-party. It is not really a condition to be performed by anyone. It is a term of the contract, a stipulation. No doubt the charter-party forms a good and binding agreement between the parties to the charter-party, but it is not an agreement to which the shipper or the holder of the bill of lading is made a party, and if this provision is not incorporated into the bill of lading it gives no rights to the holder of the bill of lading. The cases in which the shipowner has been held bound by this agreement are either cases between the shipowner and charterer, such as *Lishman* v. *Christie* (6 Asp. Mar. Law Cas. 186; 57 L. T. Rep. 552; 19 Q. B. Div. 333), or cases where it has been admitted that the clause was incorporated into the bill of lading, such as *Mediterranean and New York Steamship Company* v. *Mackay* (1903) 1 K. B. 297). But suppose this twelfth clause is incorporated into the bill of lading. Then there have to be considered the words already in the bill of lading—"weight, measure, quality, contents, and value unknown." These words have also been the subject of decisions. In *Jessel* v. *Bath* (*sup.*) it was held there these words controlled the statement of the weight. On p. 274 of L. Rep. 2 Ex. Bramwell, B. said, "This document, though apparently contradictory, means this: a certain quantity of manganese has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct"; and Martin, B., on p. 273 says, "The person, therefore, signing the bill of lading, by signing for the amount with this qualification 'weight, contents, and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter." So that if the twelfth clause is to be considered as incorporated an inconsistency at once arises. In one part of the bill of lading the captain says: "I will not agree to be bound by the weights, measures, &c., given to me by the shipper," and in another part—namely, the part which is said to incorporate the twelfth clause—we have him saying: "I agree to be bound by the weights in the bill of lading." Can they be reconciled? Lush, J. thinks they can by holding that the shipowner is bound by the statement as to the number of bags, but not bound by the statement that they contain sugar. I cannot say that I am satisfied with that construction. It is impossible to believe that this is what the parties intended. I think they cannot be reconciled, and this furnishes an additional reason for holding that the parties did not intend that the twelfth clause should be incorporated. But if it is incorporated and the two are not reconcilable, which is to prevail? I think the words appearing in the bill of lading itself. They are words, as I have pointed out, which have received a clear judicial interpretation, and they cannot, I think, be controlled by such general words as "all other conditions and exceptions as per charter-party." The clear and express clause must prevail. I have so far assumed that this is not to be treated as a claim by the charterers under the charter-party, but, if it is, the same difficulties and inconsistencies will arise. Now, we find that the shippers presented a bill of lading for the captain to sign which contains this clause, that the weights, &c., shall not be conclusive. How came this to be done? We do not know; nor do we know what was the transaction between the shipper and the charterers or receivers. It seems to me under all these circumstances we ought not to hold that the shipowner is bound by a clause which prevents him from setting up the true facts. The charterers or receivers have their remedy against the shippers, unless they have precluded themselves by agreeing to accept the bill of lading weight as conclusive, and, even if they have so agreed, they may be able to throw the blame on the shippers for presenting to the captain for signature a bill of lading in this form. The justice of the case seems to be with the ship-

owners. I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Waltons* and *Co.*

Solicitors for the respondents, *Botterell* and *Roche.*

June 26 and 27, 1917.

(Before Lord READING, C.J., PICKFORD and SCRUTTON, L.JJ.)

NEW CHINESE ANTIMONY COMPANY LIMITED *v.* OCEAN STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Statement of shipper that 937 tons were put on board—Statement qualified by shipowners' agent—"Weight, measurement, contents, and value, except for the purpose of estimating freight, unknown" clause—Prima facie evidence of receipt—Onus of proof.

A bill of lading presented to and signed by the shipowners' agent stated that 937 tons of ore were shipped. A document attached to the bill of lading by the shipowners' agent stated that a quantity, said to be 937 tons, had been received. The bill of lading contained the clause "Weight, measurement, contents, and value, except for the purpose of estimating freight, unknown."

Held, that the shipowner was not bound by the statement in the bill of lading that 937 tons had been received, and upon the evidence he had delivered all received.

Smith *v.* Bedouin Steam Navigation Company (1896) *A. C.* 70) *distinguished.*

Jessel *v.* Bath (*L. Rep.* 2 *Ex.* 267) *and* Lebeau *v.* General Steam Navigation Company (27 *L. T. Rep.* 447; *L. Rep.* 8 *C. P.* 88) *applied.*

McLean and Hope *v.* Fleming (25 *L. T. Rep.* 317; *L. Rep.* 2 *Sc. & Div.* 128) *considered.*

Decision of Sankey, J. reversed.

APPEAL by the shipowners from a decision of Sankey, J.

The plaintiffs, shippers of Chinese antimony oxide ore, sued the defendants, the shipowners, to recover damages for the short delivery of 76 tons.

By their points of claim the plaintiffs said:

By bill of lading dated the 13th Dec. 1914 . . . the defendants acknowleged to have received from the plaintiffs as shippers 937 tons of Chinese antimony oxide ore on board their steamship *Tientsin* at Hankow in good order and condition for delivery at London, the said goods to be delivered at the port of Shanghai . . . to be re-reshipped on the steamship *Peleus* for delivery in London. In breach of the said contract . . . or duty of the defendants . . . the defendants have wholly failed to deliver at London or at all . . . 76 tons of the said ore. . . . The value of the said 76 tons was 1988*l.* 18*s.* 3*d.* Weight shipped as per bill of lading, 937; weight as delivered in London, 861.

By their points of defence the defendants said (*inter alia*):

The said bill of lading contained a clause "weight . . . unknown," and further provided that the carrier's responsibility should cease on delivery from the ship's deck. Save that the quantity of antimony oxide ore shipped under the said bill of lading was therein stated as "a quantity said to be 937 tons," the defendants make no admission as to the quantity alleged by the points of claim to have been shipped nor as to the quantity therein alleged to have been delivered. All the ore shipped . . . was delivered. . . . Alternatively . . . if there was any short delivery . . . same was due to loss of weight caused by the drying of the said cargo in the course of transit from Hankow to London and (or) to necessary and unavoidable loss of weight in the handling and transhipment of the cargo at Hankow and Shanghai. For such loss the defendants are not responsible.

The bill of lading, dated the 16th Dec. 1914, provided:

Shipped or delivered for shipment in apparent good order and condition by the New Chinese Antimony Company Limited on board the steamship *Tientsin* lying in or off the port of Hankow and bound for Shanghai nine hundred and thirty-seven (937) tons antimony oxide ore in bulk and being marked and numbered as per margin, the said goods to be delivered at the port of Shanghai . . . and to be . . . numbered and reshipped on board the steamship *Peleus* on (or) about the 22nd Dec. 1914, and failing shipment by any prior or subsequent steamer, each steamer having liberty as regards the whole or any part of the goods, at the risk of the owners thereof, before shipment, or any time during the transit as often as may be deemed expedient, to ship by or to tranship to any other vessels or to land, or store, or put into bulk, craft, lighter, or conveyance belonging to the shipowners or not, and with liberty for the carrying vessel to deviate, to call at any ports in or out of the customary route in any order or for any purpose. . . . Weight, measurement, contents, and value (except for purpose of estimating freight) unknown. Transhipment of cargo for ports where the ship does not call, or for shipowners' purposes, to be at shipowners' expense, but at the risk of the owners of the goods from the time goods leave the ship's deck, where ship's responsibility shall cease. Goods forwarded by rail are deliverable at any railway station within or nearest to the port named, and must be taken away by the consignees immediately after arrival. Goods forwarded by steamship or otherwise for shipment or after transhipment to be subject to the conditions and exceptions of the forwarding conveyance, and at the risk of the owners of the goods. Goods to be forwarded as soon as practicable, but without liability of the shipowner for detention, and cost of warehousing to be borne by the owners of the goods.

Lighterage.—Any goods may be landed or stored or put into hulk, lighter, or craft, whether belonging to the owners or not, at the ports of shipment or of delivery or at any point of the transit at the risk of the owners of the goods, and the shipowners shall not be responsible for loss or damage however arising and although due to the wrongful act, negligence, or default of persons acting for or under contract with or in the employ of the owners or not. In any lighterage done by or on behalf of the Ocean Steamship Company Limited, the China Mutual Steam Navigation Company Limited, the Nederlandsche Stoomvaart Maatschappij Ocean, or the Tientsin Lighter Company Limited, the conditions of this bill of lading shall be part of the contract between all parties interested until the cargo is landed, after which it shall be at the risk and expense of the owners of the goods.

A document attached to the bill of lading, which was signed on behalf of the shipowners, stated:

No mark. A quantity said to be nine hundred and thirty-seven tons. Estimated freight, 1292*l.* 5*s.* 7*d.* Freight paid.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Sankey, J. gave judgment for the plaintiffs in respect of 23 tons short delivered.

The defendants, the shipowners, appealed.

Roche, K.C. and *Claughton Scott* for the appellants.

MacKinnon, K.C. and *R. A. Wright* for the respondents.

The facts and arguments appear sufficiently from the judgments.

Lord Reading, C.J. — The plaintiffs are shippers of Chinese antimony oxide ore, and they sued the defendants, a steamship company, to recover 1998*l.* damages for short delivery of 76 tons of antimony oxide ore shipped in bulk and received by the defendants for carriage from China to London on a through bill of lading from Hankow. The judge, after hearing a number of witnesses, gave judgment for the plaintiffs for the sum of 529*l.*, which represented the value of 23 tons, and as to the remaining 53 tons he held that wastage, owing to the inherent vice of the antimony ore itself during the course of transhipment or handling or otherwise, accounted for the loss. The defendants have appealed to this court, and ask that judgment be entered for them on the ground that notwithstanding that many, indeed most, of the judge's findings of fact are in their favour, he attached too much weight to the statement in the bill of lading that 937 tons had been shipped, and thereby fell into the error of finding that the defendants, the shipowners, were responsible for the loss of 23 tons. Although the amount involved is not large, the questions raised are of importance, and the facts require careful investigation before dealing with the law applicable to them.

It appears that the antimony ore was first mined or won at Changsha, which is up country in China some 250 miles from Hankow, and that the ore when shipped is carried in lighters on one or two rivers until it reaches Hankow, and when this ore reached Hankow it was taken to Panoff's Yard, which is in the Russian Concession at Hankow, and there it remained for a little time. According to the evidence, when shipped from Changsha there were 960 tons on board, and when it was received from Panoff's Yard for the purpose of being shipped on the *Tientsin* there were 937 tons on board, so that somewhere between the shipment at Changsha and the receipt of the goods from Panoff's Yard 23 tons had disappeared. At Hankow there is evidence to show that by the tally, the system adopted at Hankow, there were 937 tons received from Panoff's Yard. There is evidence to that effect in Mr. Crush's statement, in the letters which were read from Hankow, and I think it must be taken that there was no evidence to the contrary, and that therefore we must assume that 937 tons were received from Panoff's Yard. The bill of lading is then given, dated the 16th Dec., for a through voyage from Hankow by the *Tientsin* to Shanghai, there to be discharged and shipped in the *Peleus*, which was voyaging from Shanghai to London, and the antimony ore was to be carried, therefore, on this through bill of lading from Hankow to London for delivery to the shippers' agents. When the vessel arrived in London the antimony was sent in several coasting vessels from London to Newcastle, and when eventually it was delivered at the quay at Newcastle the total weight was 861 tons. It is for the difference of 76 tons between that 861 tons and the 937 tons that the plaintiffs brought their action.

The learned judge had a body of evidence called on behalf of the defendants, which he accepted, that this cargo was of a very wasting kind, that the antimony oxide ore when loaded in wet weather stuck in the interstices of the baskets, and then when it dried there was evaporation of the moisture, with the result that the antimony oxide was very friable, crumbling, and dusty, easily lost and easily blown away by wind, and so forth; moreover, that this cargo was shipped in bulk, which was, in the learned judge's words, a very rare occurrence. The cargo is usually shipped in bags, which appears to be a less wasteful package or means of shipment. The only reason why in this instance it was shipped in bulk was because it was inconvenient or because it would have occupied too much time to get the bags, and therefore, although it had been intended to ship in bags, in the end the shippers shipped in bulk. As a result of that they have lost, according to the judge, 23 tons of this valuable ore.

The question is whether the judge is right in his view that the defendants are responsible for the other 23 tons. The defence set up was that the defendants had delivered all they had received. They called evidence to show that all the antimony oxide put on the ship had been delivered to the coasting vessels carrying from London to Newcastle, and they said that dealing with a cargo of this character, of this particularly wasteful kind, there was evidence which ought to have sufficed for the learned judge, and they ought to have been held not liable for any loss inasmuch as there was no short delivery. Very largely this is a question of fact, and if I had come to the conclusion that the judge's judgment depended solely upon his view of the evidence when he had had an opportunity of seeing and hearing the witnesses, and that his conclusion in this case did not depend upon any view of the law, but was solely based on the evidence, I certainly should not feel justified in differing from him upon the matter which has been presented to us, but, after a good deal of examination of his judgment and consideration of the evidence, I have come to the conclusion that throughout the judgment he has in mind that there is a presumption against the shipowner because of the statement in the bill of lading that 937 tons had been shipped, and that he paid no regard to the words weight and contents and value, except for the purpose of estimating freight, unknown." I think that it is for this reason only he has allowed the 23 tons against the defendants. I do not think that he has exactly weighed in his own mind the full effect of the presumption against the shipowner, but he certainly has taken the view that the presumption is one of which the shipowner has not discharged himself. I think for this reason he has disregarded the handling of the antimony oxide at Hankow twice after it had left Panoff's Yard, where it was established to be 937 tons. He had the gravest doubt as to whether he ought to accept 937 tons even at Panoff's Yard. Using his own language, he said: "I should say that the 937 is not the correct weight which was received on board the vessel," and then

he proceeds: "I think that it is most unfortunate that the ship should have signed, from no fault of its officers, that 937 tons were put on board, but I think it is very difficult to say that that onus has been discharged."

What is the onus? It is the onus of upsetting the *primâ facie* case that 937 tons had been received. I am not at all sure that the learned judge's error may not have arisen from counsel for the defendants having assumed that there might be some onus upon them. It is not clear, but from something that has taken place during the course of the argument in this court I am not all convinced that that has not led the learned judge to the conclusion that there was some kind of onus placed upon the defendants, the shipowners. He says, after recalling the evidence which in the main he accepted, that if there were eight handlings of the ore in bulk a loss of 8 per cent. is not in any way excessive. I cannot find any statement of his dissenting from that view. He then goes on to say, and I think they are very important words: "Apart from any handling from Hankow on board the *Tientsin*, there were a number of handlings afterwards in the course of the voyage." Then he proceeds to deal with the various handlings, and points out that one gentleman, Mr. Lambert, put the loss as at least 1½ per cent. on each handling. Then he again recalls that another witness has said that a loss of 8 per cent. is not at all surprising. He contrasts it with the evidence which is given by the plaintiffs, and he rejects the plaintiffs' evidence on this point; he does not think it right to accept it, and gives effect to the defendants' evidence. Then, having done that, he says that he comes to the conclusion: "I do not think there has been sufficient evidence given for me to say that Mr. Claughton Scott has entirely displaced the evidence from the bill of lading that 937 tons were shipped." It is having regard to those passages that I come to the conclusion thad he has accepted that 937 tons were shipped on the *Tientsin* at Hankow, not because he thought it was the true view of the facts—indeed, he indicates that it is not the correct view—but because he thinks that there is a presumption against the shipowner which the shipowner has failed to remove. If it rested merely there, and that there was some presumption against the shipowner, I think it is one which ought to be very easily displaced, and that it was open to him, if he came to the conclusion that he did not believe that the true weight was 937 tons put on board, to give effect to the evidence notwithstanding the statement in the bill of lading and notwithstanding the various documents which were put before him.

But I come to the conclusion that his judgment cannot stand on a broader ground. There is this statement in the bill of lading that 937 tons were shipped—that is a statement prepared by the shipper and brought by him for the acceptance and signature of the defendants' agent—then, the defendants' agent seeing that, accepts in the margin of the bill of lading not 937 tons but a quantity said to be 937 tons; then there is in the body of the bill of lading the clause, "weight, measurement, contents, and value, except for the purpose of estimating freight, unknown." The learned judge has dealt with the case, I cannot but think, without giving full or proper effect to the words "weight unknown." He has based himself, as I understand his judgment, on *Smith* v. *Bedouin Steam Navigation Company Limited* (1896) A. C. 70), decided in the House of Lords, but I think he has omitted to notice that in that case there was a definite statement of a number—that is, 1000 bales of jute—stated in the bill of lading, and there was no clause as in this case, "weight unknown," or any qualifying words such as "a quantity said to be." When reference is made to the authority of *Jessel* v. *Bath* (L. Rep. 2 Ex. 267), I think that the true effect of a bill of lading is this: Where it cannot be argued that the printed words of a clause, "weight and contents unknown," are inconsistent with the written or typewritten words in the bill of lading, and that, therefore, one must treat the whole of the bill of lading as the contract, the words "weight unknown" have the effect of a statement by the shipowners' agent that he has received a quantity of ore which the shippers' representative states is of the weight of 937 tons, but which he, the shipowners' agent, does not accept as of that weight, and he makes no admission that the weight is 937 tons; indeed, on the contrary, he says: "Though the shipper has said 937 tons is the weight, the weight is unknown to me, and I do not accept his statement except for the purpose of estimating the freight for the carriage of the goods, inasmuch as there must be some quantity stated so that the calculation may be made," and for that purpose I come to the conclusion, but for that purpose only, that the shipowner accepts that statement of the weight in such a bill of lading as the present. That is the view which is to be found, I think, in *Jessel* v. *Bath* (*sup.*). The words of Martin, B., which are so often quoted, are applicable to this case (L. Rep. 2 Ex., at p. 273): "That is a common, well-known trade, and it is obvious that goods must be shipped on board hastily, and that goods shipped in bulk at a considerable distance frome the shore, as is the case at Genoa, for instance, cannot by possibility be weighed. The person, therefore, signing the bill of lading, by signing for the amount with this qualification, 'weight, contents, and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter. The insertion of the weight in the margin, and the calculation of freight upon it, does not carry the matter any further; he calculates the freight, as it is his duty to do, upon the weight as stated to him. The qualification is perfectly reasonable, and I do not understand how a statement so qualified binds anyone. Bramwell, B. says the same thing (L. Rep. 2 Ex., at p. 274): "This document, though apparently contradictory, means this: A certain quantity of manganese has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present." There is one other authority which was referred to—*Lebeau* v. *General Steam Navigation Company* (1 Mar. Law Cas. O. S. 435; 27 L. T. Rep. 447; L. Rep. 8 C. P. 88)—and the passage in question is in Lord Esher's judgment when he was Brett, J. There was there a question

as to the contents of a case, not as to the weight; the same words as here were in the bill of lading, "weight, value, and contents unknown." The shipment was of a closed case containing silk goods, and the closed case when delivered contained linen goods. It was said against the shipowner: "You are responsible because this was received by you and admitted by you to be a case containing silk goods, and therefore you must pay the difference in value." The answer by the shipowner was: "No; we said weight and contents unknown, and therefore all that we are admitting is that we received a closed case." The Court of Appeal in this case held that the shipowner's contention was right. Lord Esher says (at p. 96 of the Law Reports): "When a closed case is offered to him with a representation as to the nature of its contents on the bill of lading, he may accept it without alteration of the bill of lading; but if he alters the bill of lading by inserting a statement that the contents are unknown, it is clear, as a matter of business, and it seems from the American cases and *Jessel* v. *Bath* (*sup.*) to be the law, that he thereby declines to accept the declaration of the shipper. He says in effect: 'I accept this case as it appears on the outside; I know nothing about the inside, and will be bound by no statement in reference to it.' It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of lading in the modified form by which there is no binding statement as to the contents of the package."

As against those authorities we were referred to the case of *McLean and Hope* v. *Fleming* (1 Mar. Law Cas. O. S. 160; 25 L. T. Rep. 317; L. Rep. 2 Sc. & Div. 128), and I will only say with reference to that case that it does not seem to me to touch the particular point with which I have been dealing. Indeed, so far as one can gather from the report, *Jessel* v. *Bath* (*sup.*) was not even cited to their Lordships. Whether it was or not, the decision of the House of Lords really rests upon the conclusion that the burden, whatever it was, upon the shipowner had been discharged. Again, it is to be observed that, although there is nothing throughout the speeches of their Lordships to show that the point was before them, the reporter has made a note which shows that in this bill of lading were the words "weight, quality, and contents unknown," but no significance seems to have been attributed to them. It may be that they escaped observation. That is a little difficult to believe in view of the counsel who argued it or of their Lordships who dealt with it. I think probably the truer reason is that it was not necessary to touch on this matter for the purpose of the decision which the House of Lords was then giving. At any rate, *McLean and Hope* v. *Fleming* (*sup.*) is not an authority which in the slightest degree detracts from the decision of *Jessel* v. *Bath* (*sup*).

I arrive, therefore, at the conclusion that the statement in the bill of lading of 937 tons is not a statement which binds the shipowner except for the purpose of estimating the freight, and therefore when Sankey, J. assumed 937 tons as the weight shipped at Hankow because of the bill of lading, he was assuming a weight by which the shipowner was not bound. If that is so, it seems to me to result that you must at least take into account the two handlings at Hankow, where from Panoff's Yard they are put into lighters, taken from the lighters to the ship *Tientsin*, handled again by removal from the lighters to the vessel *Tientsin*, and stowed there, and if that had been taken into account, I cannot but think that Sankey, J. would have given judgment for the defendants, and the only reason why he did not take it into account was because he thought he was bound to exclude it on account of the statement in the bill of lading. That being the case, and as I am not differing merely from a conclusion of the learned judge upon the evidence which was before him, I have arrived at the conclusion that judgment must be entered for the defendants, and therefore I think that this appeal must be allowed.

Pickford, L.J.—I agree.

This was an action for short delivery of a cargo of antimony ore shipped in bulk. I will not say it is admitted, but it is found by the learned judge upon evidence to my mind absolutely conclusive, that to ship this produce in bulk is, to use his expression, "asking for trouble." If you ship it in bulk the loss by wastage, if it has to be handled on several occasions, is certain to be extraordinary—that is to say, extraordinary as compared with an ordinary cargo carried in the ordinary way. That is what we start with.

Looking at this evidence as far as one can judge from it on paper, accepting, as the judge did, the evidence for the defendants as being substantially correct with regard to the incidents of the carriage of a cargo of this kind, I should have found myself, without any examination of the niceties of the onus of proof arising, that there was no liability on the defendants for the loss of this part of this cargo that occurred; but the judge has not found that, and of course upon a finding of fact I should be very loth indeed to interfere with his judgment, if it were clearly a finding of fact and was founded upon correct principles.

This can hardly be said to be a finding of fact in the strict sense. The judge, after going through all the facts, says: "I have made a calculation to the best extent that I can, and I think that the amount of this cargo lost through no fault of the shipowners at all was 53 tons." We do not know, therefore, the basis upon which he arrived at that figure of 53 tons, and that makes it in my opinion easier to interfere with his decision.

The real ground upon which differ from him is this: I think he based his opinion upon a wrong consideration, with the greatest respect to him. I think he has accepted the position as being this: That there is in this case the same burden upon the shipowner of disproving the figure of 937 tons, which appears in the bill of lading, as existed and was laid upon the shipowner in *Smith* v. *Bedouin Steam Navigation Company* (*sup.*), to which he referred at the beginning of his judgment and upon which he seems to have founded his reasoning. It was argued that that was right, and that in an action against the shipowner for short delivery of cargo the words "weight, contents, and value unknown" have practically

no effect, that they are inserted simply for the purpose of protecting the person who is actually the signer of the bill of lading. I asked both counsel what effect was to be given to the words in an action of this kind. From one I got no answer, and from the other the answer was that it made very little difference indeed. That was the view I think that the judge took, but I do not think that it is the right one. The bill of lading begins: "Shipped or delivered for shipment 937 tons antimony oxide ore in bulk," and it has below it "weight, measurement, contents, and value, except for the purpose of estimating the freight, unknown." It is quite true that that is one of those many printed clauses often inconsistent, often unintelligible, and not infrequently illegible, that make up what is called a bill of lading, but still it cannot be disregarded, and I think that very considerable weight ought to be given to it even if that were the only thing to be considered, but it is not, because, in order to emphasise the fact that the shipowner does not intend to be bound by that statement of 937 tons, he attaches in the margin a document which begins, "No mark. A quantity said to be 937 tons," and therefore you have the statement, "I say that there was shipped 937 tons; I say that because it is said to be 937 tons, but I do not know the weight myself—weight unknown." To attach to such a statement as that anything like the same weight as there is to what may be called a clean bill of lading without any qualification seems to me wrong. I do not in the least dissent from what has been said by my Lord, that no presumption arises here at all, but, assuming that there was any presumption arising from such a statement as that, it is obvious that the burden of disproving it must be of the very lightest, and that almost any evidence or almost any consideration would be sufficient to upset it. I think there was ample evidence to upset such a presumption as would arise from this document. The weighing was done in a way which the judge says was not satisfactory. To that I do not attach very much importance, because, after all, that would be speculating as to whether the weight were right or not, but what is still more important was this, that the weight was not the weight taken as the cargo went into the ship; it was the weight taken as it came out of the yard of a firm of Panoff and Co., and before it was put in the lighters into which it was put for the purpose of being carried to the ship *Tientsin* in which it was to be carried to Shanghai, and out of which lighters it was taken in order to be put into the *Tientsin*, and therefore there were two handlings, and there was ample evidence upon which the judge believed that where you handle a cargo of this kind there always is and must be some wastage. It seems to me that fact alone would be sufficient to displace any presumption that might arise from this document in this form, that the 937 tons, taken, if you like to take it, as the weight that came out of Panoff's Yard, was the weight that went into the *Tientsin*. If that presumption is once displaced, then it becomes a question of whether the shipowner has delivered the cargo, whatever it might have been, and the actual weight which he took into his ship. It seems to me that there was ample evidence upon which the judge could find, and I think, if he had taken the same view of the bill of lading he would have found that the shipowner had delivered all that was given to him, allowing for the natural wastage in consequence of the handling, and that view of the judge became of the greatest possible importance for the reason pointed out by my Lord. There were eight handlings of this cargo from the time it left Hankow to the time it arrived at Newcastle, the weights being taken at Hankow and at Newcastle respectively. Taking the view that the judge took with regard to the presumption of onus arising on the bill of lading, he expressly and purposely excluded the two handlings which I have mentioned at Hankow. That would be right if the shipowner were bound by the statement of 937 tons shipped on the *Tientsin*, but it is wrong if you once displace that as a finding of the quantity binding on the shipowner, because you have to take into account that there would be a certain amount of loss in putting into lighters and taking out of lighters for the purpose of shipment on the *Tientsin*.

For these reasons I think the judge did not proceed upon the right principle and basis, and therefore I see no difficulty in the way of differing upon his finding of fact. Looking at the evidence, if I am not bound by the judge's finding of fact, I should have no hesitation in saying that the result is that the shipowner has delivered what was given to him less the amount that was lost by wastage in the various handlings of this cargo carried in bulk as it was, and therefore, according to all the evidence, necessarily involving extraordinary loss by wastage. For these reasons I think that judgment should be entered for the defendants.

Scrutton, L.J.—I have come to the same conclusion, but as we are differing from the learned judge below, and as we have been urgently entreated not to differ from him on a mere question of fact, I think it right to state the reasons why I differ in my own words. I should be very slow to differ from a judge who, having seen the witnesses and heard the evidence, on a pure question of fact, has arrived at a conclusion, because I might have come to some different conclusion, and I think that the court, before it differs from such a finding, should be clearly satisfied that the judge has acted on some wrong principle of law, or that it can clearly put its finger on a specific mistake of fact clearly proved.

This action is one for damages for short delivery of cargo, and the case made by the plaintiffs was that 937 tons of antimony oxide were put on board the defendants' ship at Hankow and that 861 tons were delivered at Newcastle—a shortage of 76 tons. The judge has said that 53 of those 76 tons are accounted for by the wasting nature of the cargo, and he gives judgment for 23 tons which the shipowner has not accounted for. The plaintiffs themselves made some allowance for wastage, but a very small amount. The cargo is by its nature of a wasting character. There are many cargoes which, when put on board a ship, you can be sure from their own nature will come out weighing less than they went in; sugar will leak; some cargoes will evaporate their moisture and weigh less. The best example, of course, of a wasting cargo is a cargo of ice; you can be quite certain that ice shipped in an ordinary ship will not come out the same weight as it went in. This par-

ticular cargo of antimony oxide wastes for this reason—a great part of it is fine dust. If it is shipped wet, some of it adheres to the sides of the vehicle in which it is carried or the vehicle in which it is shipped. If it is shipped dry some of it blows away, some is carried away by the pumps in bilge, and a wastage happens at every handling; like coal, the larger lumps break up and become smaller and make dust. Obviously one has a considerable difficulty when one tries to prove how much of such a cargo has been lost through its own inherent defects or nature and how much has been lost by the shipowner without any cause to protect him.

The first thing one has to do is to find out what quantity was shipped. On that point I find my first clear difference with the judge. As I read his judgment he has started with this—that the bill of lading states 937 tons; that that is *primâ facie* evidence that 937 tons were shipped, and the shipowner must account for the shortage. He begins by referring to *Smith and Co.* v. *Bedouin Steam Navigation Company* (*sup.*), and says that in the language of Lord Halsbury, L.C. (1896) A. C., at p. 76), you might say they had given a bill of lading for 937 tons received: "If that fact is once established, it becomes the duty of those who attempt to get rid of the effect of that fact to give some evidence from which your Lordships should infer that the goods were never on board at all." He continues by saying that the defendant has the onus upon him of upsetting the *primâ facie* case that he received 937 tons. Then he adds at a later stage: "I do not think there has been sufficient evidence given for me to say that Mr. Claughton Scott has entirely displaced the evidence from the bill of lading that 937 tons were shipped." Therefore it seems to me quite clear that the judge has started with this: "Here is a bill of lading which is *primâ facie* evidence of the shipment of 937 tons; the shipowners must displace that *primâ facie* evidence." Statements in a bill of lading may be conclusive evidence against the shipowner; they may be so under the third clause of the Bill of Lading Act (18 & 19 Vict. c. 111) where they are signed by certain people and sued on by certain people mentioned in that section. They may be so when other persons for value have acted upon the statements and when an estoppel is established against the shipowner because he has made a statement knowing it may be acted on by another person who has given value on the faith of the statement. A well-known example of that is the case of *Compania Naviera Vasconzada* v. *Churchill and Sim* (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237).

If the statement is not conclusive, it may yet be *primâ facie* evidence, so that, if no further evidence is given, the shipowner is bound by it, but before you can get a statement either to be conclusive evidence or to be *primâ facie* evidence you must have a statement. This bill of lading is "937 tons, a quantity said to be 937 tons, weight unknown." The first point upon which I should differ from the judge, although I do not gather that his attention was specifically directed to this point, is that, in my view, the bill of lading is no *primâ facie* evidence of any weight at all. I put to counsel in the course of the case a case which is not a shipping case, a box tendered to a warehouseman or a bank with a receipt "one box of jewels," signed by the warehouse or the bank, "received, contents unknown." It appears to me that such a document contains no statement whatever as to contents. The form of signature repudiates the statement which is made by the person delivering it, and says: "I do not accept that statement." When one gives a bill in that form, it appears to me, quite apart from authority, that you could not say it was any *primâ facie* evidence on the person who signed it stating that the weight of the contents were unknown. But for the argument I have listened to I should have thought that that was the clear result of authorities, many of them established for many years. It appears to me to be what Martin and Bramwell, BB. said in *Jessel* v. *Bath* (*sup.*), what Brett, J. said in *Lebeau* v. *General Steam Navigation Company* (*sup.*), what the Privy Council said in the case of *The Ida* (32 L. T. Rep. 541), and the only thing I can find to contradict it is that in the Scottish case of *McLean and Hope* v. *Fleming* (*sup.*), where in fact the bill of lading had in it the words "weight unknown," the House of Lords did not refer to those words, but treated such a bill as if it might be *primâ facie* evidence. The reporter called attention in a note to the fact that the words "weight unknown" were in the bill. The House of Lords do not refer to it, and I cannot believe that they meant to overrule Martin and Bramwell, BB. without referring to them in any way or any evidence that the question was discussed. I start, therefore, with this, and this is where in the first place I differ from the judge. He starts with the bill of lading as *primâ facie* evidence of 937 tons shipped. It appears to me that the bill of lading was no *primâ facie* evidence at all.

It was pressed upon us that it would be very inconvenient commercially that such bills of lading should not be evidence of the quantity shipped. It is a very true observation, and the answer is that some nations do find it so inconvenient that they have legislated to make a bill of lading *primâ facie* evidence of the quantity shipped, and they require the shipowner to state the quantity shipped in the bill. The fourth clause of the Harter Act 1893 in the United States has that effect, and there is a similar clause in the Dominion of Canada Water Carriage of Goods Act 1910 (9 & 10 Edw. 7, c. 61), s. 9, but England has not yet thought it necessary to insert any such clause in its shipping legislation. If there is no statement in the bill of lading which is either conclusive or *primâ facie* evidence against the shipowner, the shipper starts with the burden of proving what quantity was put on board, and in this case the shipper is able to do this. He says: "I cannot prove what was put on board the ship the *Tientsin*, but the cargo was weighed at a yard in Hankow and it there weighed 937 tons; after that weighing took place the cargo was carried down in some 9000 baskets to lighters, tipped into lighters and carried in the lighters to the ship, taken out again in baskets or some form of receptacle and tipped into the hold." If one has to start, therefore, with the weighing at Panoff's Yard and not with the going into the ship, there are two handlings which follow the weight of 937 tons and come before the cargo is put into the ship. The judge in his judgment, while accepting the position that each handling loses weight in this wasting cargo, has said that he considers the

matter apart from any handling at Hankow on board the *Tientsin*, and that is the only reason he has started with the bill of lading and thought it was *primâ facie* evidence. Once the bill of lading has gone as *primâ facie* evidence there are two handlings which the judge has not considered, and which, if included at the rate of 1 per cent., and many of the defendants' witnesses put the minimum loss for handling at 1½ per cent., would account for the difference which the judge has held to be short shipment. Further, when the judge proceeds to speak of the number of handlings he only speaks of four, and one transit in the coasting vessel. That certainly omits two handlings at Newcastle. Then I find this: the judge, as I think through an error of law, started with the bill of lading as evidence of the cargo put on board the ship, when, in my opinion, it is no evidence, and has disregarded what happened between the weighing at Panoff's Yard and the putting on board the ship, and has not counted the handlings at Newcastle. Therefore it appears to me, as it has appeared to my brothers, that there is ample material for accounting for the whole of the shortage by the wasting nature of this cargo, particularly in view of the evidence, which is often given as a matter of form, but which is, at the same time, very often a matter of reality, that the ship has delivered all it has received.

For these reasons—quite agreeing that one should not differ from a judge on a matter of fact only—I think he started with a wrong view of the law, and that led him to disregard certain matters of fact which he ought to have considered, which would have accounted for the 23 tons he finds to be the shortage, as well as the 53 tons which he finds to be wastage. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Ballantyne, Clifford,* and *Hett.*

Solicitors for the defendants, *Stokes* and *Stokes,* for *Cameron, MacIver,* and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

July 30 *and* 31, 1917.

(Before Bailhache, J.)

Furness, Withy, and Co. Limited *v.* Rederiaktiebolaget Banco and others. (*a*)

Foreign ship in United Kingdom — Charter-party—Baltic and White Sea time charter—Exception of restraint of princes—Emergency legislation of country of owners — Performance of contract prevented.

By a charter-party made in the United Kingdom on the 13th Nov. 1916 *the defendants, who were the Swedish owners of a steamer called the* Z., *of* 3186 *tons gross register, chartered the* Z. *to the plaintiffs for a period of six months. The steamer was to be employed on voyages between certain ports, all of which were outside Sweden. The charter was on a Baltic and White Sea time charter form, and contained an exception of restraint of princes. The owners and the master were Swedish subjects ordinarily resident in Sweden. The King of Sweden, in the exercise of a power given to him by the Swedish emergency legislation, made decrees prohibiting Swedish ships of more than* 200 *tons gross register from carrying goods for freight between ports outside Sweden. On the* 15*th Nov.* 1916 *the ship loaded a cargo of coal at Barry, under the charter-party, for Genoa. She went one voyage to Genoa and delivered the coal. She then returned to Cardiff, and the plaintiffs proposed to load another cargo of coal for carriage to Italy. This was objected to by the defendants on the ground* (inter alia) *of the Swedish emergency legislation, and they (the defendants) refused to proceed with the time charter.*

Held, that there may be a restraint of princes where the restraint can operate, and can only operate in the case of a ship, upon the owners or the master; and it is a case of restraint of princes if the performance of the contract will render the owners or the master liable to pains and penalties—imprisonment and fine—and the owners and the master are within the jurisdiction of the Sovereign or Government by whose law the performance of a particular contract is illegal. The defendants were entitled to rely upon the exception of restraint of princes. Judgment for the defendants.

Observations of Bramwell, B. in Rodocanachi *v.* Elliott (2 *Mar. Law Cas. O. S.* 399; 31 *L. T. Rep.* 239; *L. Rep.* 9 *C. P.* 518) *and of the Court of Appeal in* Sanday *v.* British and Foreign Marine Insurance Company (13 *Asp. Mar. Law Cas.* 116; 113 *L. T. Rep.* 407; (1915) 2 *K. B.* 781) *applied.*

Trial of action in the Commercial List before Bailhache, J. without a jury.

The defendants were Swedish subjects ordinarily resident in Sweden. They were the owners of the steamship *Zamora*, which was chartered by the plaintiffs on a Baltic and White Sea time charter form for six months, to be employed on voyages between certain ports, all of which were outside Sweden. The defendants objected to the steamship going to Italy with a cargo of coal, upon the ground (*inter alia*) that such voyage contravened Swedish emergency legislation, and they refused to allow the plaintiffs to have any further use of her. The plaintiffs brought an action to restrain the defendants from using the ship otherwise than in accordance with the terms of the charter-party. The defendants relied upon the exception of restraint of princes provided for in the charter-party.

The facts are fully indicated in the headnote and the judgment.

Leck, K.C. and *R. A. Wright* for the plaintiffs. —The ship was in or about to come into the United Kingdom. It was therefore outside Swedish territorial limits and free from any Swedish control. The prohibition by Swedish law does not operate as a restraint of princes, within the meaning of the charter-party, where, as in this case, the ship was outside Swedish territorial limits.

Dunlop for the defendants.—Admitted that it is law that the mere fact that a contract is illegal by the law of a foreign State to which one of the contracting parties is a subject will not

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

make that contract illegal or unenforceable if it is an English contract to be construed and enforced according to English law. But the defendants rely upon the exception of restraint of princes. To constitute restraint of princes it is enough that the owners and master are Swedish subjects and amenable to the Swedish criminal law in the event of their disobeying the prohibition. [He referred to dicta of the Court of Appeal in *Sanday* v. *British and Foreign Marine Insurance Company* (13 Asp. Mar. Law Cas. 116; 113 L. T. Rep. 407; (1915) 2 K. B. 781); also of Bramwell, B. in *Rodocanachi* v. *Elliott* (2 Mar. Law Cas. O. S., 399; 31 L. T. Rep. 239; L. Rep. 9 C. P. 518).]

Bailhache, J. — On the 13th Nov. 1916 the Swedish owners of a steamer called the *Zamora* made a six months' time charter with the plaintiffs, Messrs. Furness, Withy, and Co. The steamer was then in the United Kingdom, or shortly to come into the United Kingdom, and she was to be employed during the six months on voyages within certain limits. It is sufficient for my purposes to say that all those limits were outside the kingdom of Sweden. The charter was on a Baltic and White Sea time charter form, with which by this time we are all very familiar; and in clause 14, amongst the exceptions, there was an exception of restraint of princes.

It appears that there was existing at this time, at the date of the charter, some emergency legislation in Sweden, which apparently is very similar in form to our own emergency legislation; power is given to the King of Sweden to make certain proclamations and regulations, and then he, under the statute giving him that power, makes these proclamations. He has made proclamations and regulations—decrees I think they are called—and No. 271 and No. 273 are the material ones for this purpose. By decree No. 271 it is provided that "goods shall not be carried between places outside the kingdom by Swedish vessels of a gross tonnage of 200 tons register or more."

The effect of that was to prevent the carriage of goods between ports neither of which is in the kingdom of Sweden. Then, by decree No. 273, there is a regulation against making time charters for a longer period than six months. If I had been left alone to read those two decrees together, I should not myself have thought that No. 271 was applicable to No. 273. I should have thought myself that No. 271 referred to voyage charters and No. 273 referred to time charters; and there might be a time charter for six months which kept or might keep the vessel for the whole of those six months outside Swedish waters. Mr. Schonmeyer, a Swedish advocate, has given evidence here that the effect of the Swedish law is that No. 271 and No. 273 must be read together; and, although you may in a time-chartered ship carry goods outside the kingdom of Sweden, one of the ports between which you carry the goods must be a Swedish port. It may be so; and at any rate for my purpose, as he is the only witness called before me as to the Swedish law, I must accept what he says upon that matter, having no evidence to the contrary.

Now, the vessel was chartered in this country. The contract is an English contract, and no doubt has to be construed according to English law. She did go on one voyage to Genoa, and the owners then objected, not upon the ground that there was any restraint of princes at all, but upon the ground of the danger which the ship incurred in navigating the waters between this country and Italy. It was upon that ground that the owners at first declined to proceed with the time charter. They did not state the restraint of princes point until a later date. But, of course, if they have the restraint of princes point, and can rely upon it, they can justify their refusal to proceed with the charter-party upon any ground which existed at the time and which is in fact a good justification for their refusal.

It is conceded by Mr. Dunlop and is, I think, quite clear law, that the mere fact that a contract is illegal by the law of a foreign State to which one of the contracting parties is a subject will not make that contract illegal or unenforceable if it is an English contract to be construed according to English law and to be enforced according to the law of this country. Therefore, if it were not for the exception of restraint of princes, the Swedish owners in this case could not rely upon the fact that this charter-party is illegal according to Swedish law. But they have the words "restraint of princes."

I was for some time in doubt whether the restraint arises from a foreign law; and the foreign Government, against whose law the contract is intended to be performed, is not in a position to stop the performance of the contract by force, and by force applied to the subject-matter of the contract—that is, in this case, either to the ship or the cargo. I am not aware myself of any case in which there has been an instance of restraint of princes in which the foreign Government has not been in a position to enforce the restraint by actual physical action upon the subject-matter of the contract—the ship or the cargo. But Mr. Dunlop has referred me to a good many expressions in the well-known case of *Sanday* v. *British and Foreign Marine Insurance Company* (*ubi sup.*), which was decided last year, I think, in the House of Lords, and certainly to expressions in the judgment of Bray, J. in that case and in the Court of Appeal, and of the Lord Chief Justice — and, indeed, to my own expressions — and, in particular, to some expressions in the judgment of Bramwell, J. in the case of *Rodocanachi* v. *Elliott* (31 L. T. Rep. 239; L. Rep. 9 C. P. 518) which are material.

Putting all those expressions together, it seems to me that a number of judges have said this: that you may have a restraint of princes where the restraint can operate, and can only operate in the case of a ship, upon the owner or the master; and it is a case of restraint of princes if the performance of the contract will render the owner or the master liable to pains and penalties—imprisonment and fine—and the owner and the master are within the jurisdiction of the sovereign Government by whose law the performance of a particular contract is illegal.

I doubt whether this is not carrying restraint of princes further than it has ever been carried before; certainly further than it has ever been carried in any reported case of which I have any knowledge. But it seems to me to follow from

the observations made by Bramwell, L.J. in *Rodocanachi* v. *Elliott* (*ubi sup*). and from the observations made by the Court of Appeal in *Sanday* v. *British and Foreign Marine Insurance Company* (*ubi sup.*).

The result, although this may be no extension of the doctrine, is that the plaintiffs' case fails, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*.

Solicitors for the defendants, *Thain Davidson* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 8 *and* 9, 1917.

(Before HILL, J. and Elder Brethren of the Trinity House.)

THE JESSIE AND THE ZAANLAND. (*a*)

Collision—Steamship at anchor broken adrift by another and driven into a third steamship at anchor—Action for damage by the steamship at anchor against the steamship broken adrift and the third steamship—Both defendants held to blame.

The plaintiffs' steamship, which was at anchor, was run into by another steamship which had been at anchor, but which had been broken adrift by a third steamship. The plaintiff steamship sued the steamship which collided with her for the damage she had sustained, and, on that vessel alleging that it was the fault of the third steamship which had collided with the first defendant, the plaintiff vessel joined the third vessel as defendant. On the trial of the action against both defendants it was proved that the plaintiff vessel was at anchor showing proper anchor lights; that the first defendant, the vessel which had been lying to her port anchor, ought to have had her starboard anchor so placed that it could be let go at once, whereas in fact it took eight to ten minutes to let it go; and ought to have made use of her engines sooner. The second defendant admitted that she was to blame for the collision with the first defendant, but alleged that the collision between the first defendant and the plaintiff was not a result of the negligence which caused the collision between the two defendants.

Held, that the plaintiffs were entitled to recover against both defendants, on the ground that the second defendant had set the first defendant adrift, and that the collision with the plaintiff was the consequence of the first defendant being set adrift; and that the first defendant was to blame, because it had not been shown that the collision could not have been avoided by the exercise of reasonable skill and care on her part.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Carbo I.*; the defendants were the owners of the steamship *Jessie* and the owners of the steamship *Zaanland*. The owners of the *Carbo I.* first sued the owners of the steamship *Jessie*, and, on the owners of that vessel alleging that the collision between the *Jessie* and the *Carbo I.* was caused by the *Zaanland* colliding with the *Jessie*, the owners of the *Carbo I.* joined the owners of the *Zaanland* as defendants in the action they had brought against the *Jessie* alleging that the collision between the *Carbo I.* and the *Jessie* was caused by the negligence of those on the *Jessie* or the *Zaanland* or by their joint negligence.

The case made by the plaintiffs was that shortly before 2 a.m. on the 1st Aug. 1916 the *Carbo I.*, a steel screw steamship of 1379 tons gross and 841 tons net register, 250ft. long, manned by a crew of nineteen hands all told, was, whilst on a voyage from Rouen to Blyth in water ballast, in the Downs off Deal. The wind was very light and variable, the weather was fine and clear, but dark, and the tide was setting to the northward and eastward and running strong. The *Carbo I.* was at anchor, heading about S.S.W. She carried the regulation lights for a vessel at anchor, which were being duly exhibited, one forward and one aft, and were burning brightly, and a good anchor watch was being kept on board of her.

In these circumstances those on board the *Carbo I.* particularly noticed the two anchor lights of the *Jessie*, distant about five ships' lengths and bearing from two to three points on the port bow, apparently angled a little to the south-westward, and coming nearer to the *Carbo I.* The *Jessie* continued to approach, apparently increasing her angle and moving further to the westward and with her starboard side about amidships struck the stem of the *Carbo I.*, doing her considerable damage.

Those on the *Carbo I.* charged those on the *Jessie* with bad look out and with failing to keep clear of the *Carbo I.*, and, in the alternative, alleged that the *Zaanland* was so negligently navigated that she came into collision with the *Jessie*, which was at anchor, causing her to come into collision with the *Carbo I.*

The owners of the *Jessie* denied that the collision was caused by their negligence or that of their servants, and alleged that shortly before 1 a.m. G.M.T. on the 1st Aug. the *Jessie*, a steel screw steamship of 2256 tons gross and 1445 tons net register, of about 280ft. in length, whilst in the course of a voyage from Genoa to West Hartlepool, laden with a cargo of iron ore for the Ministry of Munitions and manned by a crew of twenty-two hands all told, was brought up in the Downs about abreast of Kingsdown awaiting orders. The weather was fine and clear, the wind about W.S.W., light, and the tide ebb, setting to the northward with a force of about three to four knots. The *Jessie* was lying riding securely to her port anchor with her head to the tide. Her regulation anchor lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances the steamship *Zaanland* was so negligently navigated that she came into collision with the *Jessie*, breaking her adrift and causing her considerable damage. The engines of the *Jessie*, which steamship was unable to get out her starboard anchor owing to the damage to her tackle, were at once ordered to be put full speed ahead as soon as possible, and her helm was put hard-a-port, but before the *Jessie* could be got under control she drifted with the tide into collision with the anchored steamship *Carbo I.* The *Jessie* with her starboard side amidships struck the stem of the *Carbo I.*, causing and sustaining damage.

(*a*) Reported by L. F. O. DARBY, Esq., Barrister-at-Law.

The collision between the *Jessie* and the *Carbo I.* was a consequence of the collision between the *Jessie* and the *Zaanland*, and could not have been avoided by the exercise of reasonable and ordinary care and skill on the part of those on the *Jessie*.

The owners of the *Zaanland* by their defence admitted that the collision between the *Zaanland* and the *Jessie* was solely caused by the negligent navigation of the *Zaanland*, but they denied that the subsequent collision between the *Jessie* and the *Carbo I.* was caused by the collision between the *Zaanland* and the *Jessie*.

They alleged that shortly before 12.37 a.m. on the 1st Aug. 1916 the *Zaanland*, a screw steamship of 5470 tons gross and 3526 tons net register, manned by a crew of thirty-five hands, was in the Downs. The weather was fine and clear, but there was thick smoke on the water. There was no wind, and the tide was flood of the force of about two to two and a half knots. The *Zaanland* was steering about N. 20 degrees E. true, and, with engines stopped, was proceeding to an anchorage and was making very little way. The regulation under-way lights were being duly exhibited and were burning brightly, and a good look-out was being kept.

In these circumstances two anchor lights of the steamship *Jessie*, which had been obscured by a steamer which the *Zaanland* was following, were seen about 300 yards ahead. The helm of the *Zaanland* was at once put hard-a-port, but she had too little way on to answer her helm sufficiently to go clear of the *Jessie*, and just before the collision the engines were put full speed ahead and the helm hard-a-starboard to throw her quarter clear. Notwithstanding these manœuvres, her port side about amidships grazed against the port bow of the *Jessie*. The *Zaanland* sustained some damage and caused little damage to the *Jessie*.

Those on the *Zaanland* alleged that the collision between the *Jessie* and the *Carbo I.* was caused by the negligence of those on the *Jessie* in not keeping a good look-out and in not keeping clear of the *Carbo I.*

R. H. Balloch for the plaintiffs, the owners of the *Carbo I.*

A. D. Bateson, K.C. and *D. Stephens* for the defendants the owners of the *Jessie*.

Laing, K.C. and *C. R. Dunlop* for the defendants the owners of the *Zaanland*.

HILL, J.—The collision in this case took place in the Downs at 2 a.m. (summer time) on the 1st Aug. 1916, between the steamship *Carbo I.* and the steamship *Jessie*. The weather was fine and clear, the wind very light, and the tide ebb running to the northward and eastward of the force of three to four knots. The *Carbo I.*, a steamship of 1379 tons gross, was at anchor heading to the tide. The *Jessie*, a steamer of 2256 tons gross, which was at the moment of collision in motion, collided with the *Carbo I.*, the *Jessie* with her starboard side about amidships striking the stem of the *Carbo I.* The *Carbo I.* originally sued the *Jessie* alone. The *Jessie* pleaded that the collision could not be avoided by the exercise of reasonable skill and care on her part; that the *Jessie* had herself been at anchor; that the steamship *Zaanland* had negligently collided with her and broken her adrift; that the tide had carried her down on to the *Carbo I.*; and that the *Jessie* had done everything that it was possible for her to do to prevent that happening, but it was, so far as she was concerned, inevitable.

Upon this the plaintiffs joined the owners of the *Zaanland* as defendants, and claimed against them in the alternative, alleging that the negligence of the *Zaanland* caused the *Jessie* to collide with the *Carbo I.* The owners of the *Zaanland* admitted that the collision between the *Zaanland* and the *Jessie* was due to the negligence of the *Zaanland*, but denied that the collision between the *Carbo I.* and the *Jessie* was caused by the collision between the *Zaanland* and the *Jessie*, and said that it was due to the negligence of the *Jessie* in not avoiding the *Carbo I.*

The question I have to try is whether the plaintiffs have established their case against the *Jessie* or their case against the *Zaanland*, or, it may be, against both. It can hardly be, and was not really, suggested that a case has been established against neither. No doubt the trial in such cases resolves itself into a struggle between the two defendants, each seeking to throw the blame upon the other. But it remains none the less a trial of the question whether the plaintiffs have established a case against both or against one and which of the defendants.

The evidence consists in the log of the *Carbo I.*, the chief officer's log and engineer's log of the *Jessie*, the evidence taken before an examiner of four witnesses from the *Jessie*, and the bridge book and engine-room log of the *Zaanland*. The evidence has to be considered together with the admissions in the pleadings.

The followings facts are proved or admitted and are beyond question: That the *Carbo I.* was at anchor with her anchor lights duly exhibited; that the *Jessie* collided with the *Carbo I.*; that the *Jessie* was at the time of the collision in motion—I do not say under control, but in motion—and was carried by the tide down upon the *Carbo I.*; and that the collision between the *Jessie* and the *Zaanland* was due to the negligence of those on board the *Zaanland*. A question of fact much debated between the *Jessie* and the *Zaaland* was as to the interval which elapsed between the two collisions. The log books of the *Jessie* make it fifteen minutes, and the witnesses from the *Jessie* put it at the same, or at ten minutes.

The conclusion at which I have arrived, with the assistance of the Trinity Masters, is that it cannot have been anything like so much. The *Jessie* was anchored some 500 yards from the *Carbo I.*, which was astern of her, but somewhat on the starboard quarter; the tide, which was setting from the *Jessie's* position at anchor towards the *Carbo I.'s* position at anchor, was running at three to four knots—*i.e.*, at a rate which would carry the *Jessie*, if free, to the *Carbo I.* in four to five minutes; the *Jessie* which, when at anchor, was lying heading to the tide with 50 fathoms to her port anchor, was struck by the *Zaanland* in the port bow and knocked pretty well athwart the tide; the brake of the windlass was broken and the port cable ran out, with the result that the tide would drift the *Jessie* to the length of the cable, some 70 fathoms or 140 yards, towards the *Carbo I.*, and after a momentary check, the lashings of the cable parted,

and the cable with its anchor was lost. This could only have taken a very short time—the witnesses put it at a couple of minutes—and the *Jessie* would then be only some 350 yards from the *Carbo I.*, in a tide which would carry her that distance in about three minutes. These considerations lead me to the conclusion that the interval between the two collisions cannot have been more than five minutes. I should add that the times in the log on which counsel for the *Zaanland* relies are impossible times, at least so so far as the engineer's log is concerned. If the engines were going full speed ahead for ten minutes the collision could not have happened, but if you cannot rely on the ten minutes you cannot rely on any of the times.

The facts admitted and found are, then, these: The *Zaanland* by negligence breaks the *Jessie* adrift; some five minutes afterwards the *Jessie* collides with the *Carbo I.*; the *Carbo I.* is at anchor with proper lights. In my opinion that is *primâ facie* evidence in the plaintiffs' favour against both the *Zaanland* and the *Jessie*, and each of them is called on to show that they were not negligent, or, if negligent, their negligence did not cause or contribute to the collision. It is a *primâ facie* case against the *Jessie*, because the *Jessie*, in motion, has collided with the *Carbo I.* at anchor. It is a *primâ facie* case against the *Zaanland* because the *Zaanland's* admitted negligence has set adrift the *Jessie*, and in a very short time the tide carries the *Jessie* on to the *Carbo I.* To meet that *primâ facie* case the *Jessie* says: "I was not negligent. There was nothing I could do. I could not let go my starboard anchor; it was on the forecastle head and could only be let go if it could be lifted out by the crane and catfall, but two of the blocks of the catfall were broken by the first collision; and anyhow, if I had been able to let go the starboard anchor it would not have brought the *Jessie* up before she struck the *Carbo I.* Secondly, I put my engines full speed ahead within a couple of minutes, as soon as it was found that the starboard anchor could not be used, and put the helm hard-a-port to throw my stern clear, but before the collision could be avoided the tide carried me down on to the *Carbo I.*" Therefore, say they, once the *Jessie* was adrift the collision was inevitable, and the *Zaanland's* negligence broke the *Jessie* adrift. The *Zaanland* says that the *Jessie* ought not to have had the starboard anchor in such a position that it could not be let go at once (admittedly, even if the catfall was not damaged, it would take eight to ten minutes), and if it had been let go at once the second collision would have been avoided. Secondly, they say that a timely use of the engines must have avoided the collision, for all that was needed was that the *Jessie* should travel forward about half her own length.

These contentions raise points upon which I have naturally to rely very much upon the advice of the Trinity Masters, and they advise me as follows: As to the *Jessie's* anchor, when a ship like the *Jessie* is at anchor to a single anchor in a place like the Downs, ordinary careful seamanship requires that the second anchor should be so placed that it can be let go at once if the necessity arises, and that it is contrary to such seamanship to have the anchor, as here, so placed that it must take eight to ten minutes to get it out; and that this rule of seamanship applies equally whether the ship at anchor has steam handy or not. But they further advise me that supposing the starboard anchor to have been in such a position that it could be let go at once, and supposing it to have been let go at once—*i.e.*, immediately the port anchor was lost—the utmost that can be said is that it might have avoided the collision; it cannot be affirmed that it would have avoided the collision.

As to the *Jessie's* engines, they advise me that a more instant use of the engines might have avoided the collision, but having regard to the shortness of the time and the strength of the tide, it cannot be affirmed that it would have avoided the collision.

I accept this advice. But in applying it I must remember that some allowance must be made for those on board the *Jessie* in consideration that they had just been in collision with the *Zaanland*. Negligence is want of proper skill and care in the particular circumstances, and one of the circumstances is the fact that the *Jessie* is suddenly put in a position of difficulty by the fault of the *Zaanland*.

Having regard to all the circumstances, I hold that the *Jessie* was not negligent in not sooner using her engines. But I hold that the *Jessie* was negligent in carrying her starboard anchor as she did. It it had been carried out-board it could and would have been let go at once, and if it had been let go at once the collision might perhaps have been avoided.

The result of these considerations is that, in my view, the plaintiffs have established a case against each of the defendants, and neither has displaced that case. The *Zaanland* is to blame because her negligence set the *Jessie* adrift, and in the existing circumstances of the *Jessie's* anchor, the collision with the *Carbo I.* was the consequence of the *Jessie* being set adrift. The *Jessie* cannot escape blame, because it has not been shown that the collision with the *Carbo I.* could not have been avoided even if the *Jessie* had not been negligent in the manner in which the starboard anchor was carried—that is to say, it has not been shown that, so far as the *Jessie* was concerned, the collision was inevitable. I therefore give judgment for the plaintiffs against both defendants.

I desire to add that I am deciding nothing as between the *Zaanland* and the *Jessie*. It may be that as between them the presumptions of fact are different, and the onus may be on the *Zaanland* to prove that the negligence of the *Jessie* in regard to the starboard anchor did contribute to the collision. That is not before me in this action, and I do not decide it. All I am deciding here are the rights of the plaintiffs against the defendants, and not the rights of the defendants *inter se*.

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

Solicitors for the *Jessie*, *Botterell* and *Roche*, agents for *Botterell*, *Roche*, and *Temperley*, West Hartlepool.

Solicitors for the *Zaanland*, *Clarkson* and *Co.*

May 2, 3, *and* 24, 1917.

(Before Sir S. T. EVANS. President, and Elder Brethren of the Trinity House.)

THE ECHO. (*a*)

Collision—Crossing steamships—Steamships making for a pilot boat—Duty of the hold-on steamship under art. 21 *to keep course and speed—Right of the hold-on steamship to slacken her speed and alter her course on approaching a pilot boat—Collision Regulations* 1897, *arts.* 19, 21.

Two steamships, one of them leaving the Humber and the other entering it, were approaching a pilot boat for the purpose of dropping and taking up their pilots. The steamships were on crossing courses. Under art. 21 *the steamship leaving the Humber should have kept her course and speed; but, instead of doing so, she ported and stopped her engines in order to let the pilot boat come alongside. A collision between the two steamships having occurred, the steamship entering the Humber, whose duty it was to keep out of the way of the vessel leaving the Humber, in an action for the damage caused, alleged that the other steamship had been guilty of a breach of art.* 21.

Held, that the steamship leaving the Humber was not guilty of a breach of art. 21, *for she was engaged in the manœuvre of dropping her pilot, a manœuvre which, as those on the other steamship must have known, necessitated her altering her course and slackening her speed, and that the alteration of her course and the slackening of her speed were not under the circumstances a breach of art.* 21, *as they were proper steps taken in the execution of the manœuvre in which she was obviously engaged.*

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Laxton*; the defendants and counter-claimants were the owners of the *Echo*.

The case of the plaintiffs was that shortly before 1.15 p.m. on the 28th Jan. 1916 the *Laxton*, a screw steamship of 1017 tons gross and 508 tons net register, 220ft. long, manned by a crew of sixteen hands all told, was, whilst on a voyage from Goole to Treport, laden with a cargo of coal, near the mouth of the river Humber, in charge of a duly licensed Humber pilot. The wind was S.S.W., a fresh breeze. The weather was fine and clear, and the tide was ebb of a force of about two and a half knots. The *Laxton* was just opening out from Spurn Point, and was standing across towards the Bull Lightship, heading about S.S.W. and making eight knots. A good look-out was being kept on board of her.

In these circumstances those on board the *Laxton* observed the *Echo* distant about three miles and bearing about four points on the port bow. After passing the Bull Lightship the engines of the *Laxton* were reduced to half speed, in order to ease down for the pilot cutter. About five minutes later the engines were further reduced to slow and the helm was ported so as to round for the pilot cutter, which was then to the southward, and one short blast was sounded on the whistle. The *Echo* continued to approach, causing risk of collision, and, although the engines of the *Laxton* were stopped and reversed full speed astern and three short blasts were sounded on her whistle, to which the *Echo* replied with three short blasts, the *Echo* with her stem struck the port side of the *Laxton* a little before the bridge, doing her so much damage that she shortly afterwards sank.

Those on the *Laxton* charged those on the *Echo* with bad look-out, with failing to keep out of the way of the *Laxton*, and with failing to slacken speed or stop or reverse.

The case of the defendants and counter-claimants was that shortly before 1.18 p.m. on the 28th Dec. 1916, the *Echo*, a screw steamship of 500 tons gross and 292 tons net register, 172ft. long, and manned by a crew of thirteen hands all told, was, whilst on a voyage from Gothenburg to Hull with a general cargo, at the entrance to the river Humber, between the Chequer Shoal Buoy and the Bull Lightship. The weather was hazy, with rain; the wind about south, a gale; and the tide ebb of the force of two to three knots. The *Echo*, which was following another steamship, was steering a course of W.N.W. magnetic, and making about five or six knots through the water. A good look-out was being kept on board of her.

In these circumstances those on the *Echo* particularly noticed, distant about one and a half miles and bearing about five to six points on the starboard bow, the *Laxton*, which was approaching on a course that would take her well clear under the stern of the *Echo*. Shortly afterwards the course of the *Echo* was altered to N.W. by W. to shape towards a small boat from the pilot cutter, and the *Laxton* continued to approach in a direction to pass safely astern of the *Echo* until she was a short distance off, when she was suddenly seen to be swinging under port helm. Thereupon the engines of the *Echo* were stopped, her helm was put hard-a-port, and her whistle lanyard was pulled to give the regulation signal, but no effective sound came from the whistle owing to the presence of water therein, and shortly afterwards her engines were put full speed astern and her whistle was sounded three short blasts. Nevertheless the *Laxton*, which continued to swing under port helm, although she sounded three short blasts on her whistle just before the *Echo* blew that signal, came towards the *Echo*, and with her port side about amidships, struck the stem of the *Echo*, doing her serious damage, for which her owners counter-claimed.

Those on the *Echo* charged those on the *Laxton* with bad look-out, with neglecting to keep her course, with improperly porting, with neglecting to ease, stop, or reverse her engines, and with failing to indicate her intended manœuvres by whistle signals.

Laing, K.C. and *R. H. Balloch* for the plaintiffs.—The *Laxton* had the starboard side of the *Echo* open on her port side; the vessels were not starboard to starboard. It was the duty of the *Echo* to keep out of the way. The *Echo* says the *Laxton* ported and stopped and drifted on to her. The question is, Did the *Laxton* keep her course and speed within the meaning of art. 21? In *The Roanoke* (99 L. T. Rep. 78; 11 Asp. Mar. Law Cas. 253; (1908) P. 231) it was held that a vessel was at liberty to alter her speed when making for a pilot boat although she was on a crossing course with another vessel making for the same boat; but in that case the vessel which altered her speed did not change her course. [THE PRESIDENT.—In this case you say the change of

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

course was necessary to effect her purpose.] The *Laxton* is not guilty of a breach of art. 21. The *Echo* had a bad look out, and did not see the *Laxton* until she was very close. The *Laxton* did not try to cut out the *Echo*; she was stopped at the time of the collision. Even if the *Laxton* is to blame, the fault is that of the pilot, and pilotage is compulsory.

Bateson, K.C., and *Stephens* for the defendants.—The crossing rule applies:

The Albano, 10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193.

A vessel may ease her engines if she is in a position of safety, but it has never been held that she has a right to port into a position of danger and, having created that position, cast a duty to keep out of the way on the other vessel. When the *Laxton* was coming down the Humber she must have had the *Echo* starboard to starboard. She did not see the *Echo* until she had the *Echo* four points on her port bow; this convicts her of a bad look-out. Those on the *Laxton* either never saw the *Echo*, or altered from a course of S.E. to W.S.W. without paying any attention to her. If the *Laxton* chose to break art. 21 she ought to have stopped; she ought not to have kept two or three knots speed, or, if she kept her speed, she ought not to have taken helm action. The *Laxton* is alone to blame for porting and for not stopping, for bad look-out, and for making for the pilot boat without paying any attention to the *Echo*.

R. H. Balloch in reply.—The speed of the *Laxton* was moderate; she was coming up slowly to the pilot boat, for the pilot boat had to row to her. The fact that the pilots thought that the *Laxton* was next on turn shows that she had not pushed ahead of the *Echo*. The *Laxton* was bound to keep her course and speed until it was clear that the *Echo* could not avoid collision by the action of the *Echo* alone. It is true that the case of *The Roanoke* (*ubi sup*) only justifies an alteration in the speed of the vessel, but the same principle applies to an alteration in the course.

The following are the material collision regulations:—

Art. 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.

Art. 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.

Judgment was reserved, and was delivered by the President on the 24th May.

THE PRESIDENT.—The facts upon which the decision in this case depends are within a narrow compass; and they are clearly established, quite outside the region of doubt, by the evidence. They can be stated briefly: The plaintiffs' vessel, the *Laxton*, was proceeding upon a voyage out of the Humber. The defendants' vessel, the *Echo*, was coming on her voyage into the Humber. Before the collision the two vessels were making for the pilot cutter, stationed about a mile to the S.S.E. of the Bull Lightship, the one in order to drop and the other to pick up her pilot. The pilot cutter was at her usual station in the state of the tide as it then existed. At all material times, as they approached the pilot cutter, the *Laxton* was on the starboard bow of the *Echo*. The *Echo* was navigated by the master, who was alone on the bridge with his helmsman. He had the responsibility of keeping the look-out, of operating the telegraph to the engine room, of giving signals, and the orders to the wheel. In a word, he had all the duties as well as the responsibilities of navigating the ship, except only the actual working of the wheel. His evidence cannot be accepted against that of the plaintiffs. His marking of the chart to indicate where the vessels were when he first sighted the *Laxton* and where the collision took place was hopelessly wrong, and his evidence generally was not reliable. It should be stated that the day of the collision was the first time he had gone up the Humber in charge of a vessel. But he knew that the *Laxton* as well as his own vessel was making for the pilot cutter.

Before the collision three vessels were proceeding out of the Humber at distances of about half a mile—each of which had a pilot to drop. The first, the *Ardnagrena*, had dropped her pilot into the small boat of the pilot cutter. The small boat afterwards made for the *Laxton*, which was following in the wake of the *Ardnagrena*, in order to take her pilot. The *Laxton's* speed had been reduced so that the pilot might be dropped. By the time of the collision the small boat was alongside on the starboard side of the *Laxton*, and had actually received the latter's rope. I accept the plaintiffs' account of the place of collision.

The third vessel—the *Professor Buys*—followed the *Laxton*, and was reducing her speed similarly and for the same purpose.

The *Echo*, however, proceeded on her course till almost immediately before the collision without reducing her speed very materially from her admitted full speed of eight knots through the water.

The tide was ebb of the force of about two and a half knots on both pleaded stories, and was running from N.W. to S.E.

In some of the defendants' documents the strength of the tide was put at over five knots, and the cause of the casualty was stated in the master's deposition to have been "the strong tide."

The defence made against the plaintiffs' case at the trial was that the plaintiffs' look-out was defective; and that the *Laxton's* course and speed had not been kept. I find that the look-out on the *Laxton* was well kept and efficient.

As to the change in course and speed, I find that at all material times the *Laxton* was carefully and properly navigated both as to course and speed in approaching the pilot cutter and the pilot vessel. The helm was ported gradually and effectively to counteract the tide, and to arrive at the proper and usual place to drop the pilot. The speed was gradually and carefully reduced for the same purpose.

It was not contended, indeed, for the defendants that there was any fault in the navigation of the *Laxton* towards the pilot cutter, assuming that she was right in making for it. She was proceeding on her voyage in the way and for the purpose described to the knowledge of the master of the *Echo*, which was the giving-way vessel. In the

circumstances the *Echo* cannot be heard to complain that the *Laxton* failed to keep her course and speed in accordance with art. 21.

As to speed in similar circumstances, the case of the *Roanoke* is a leading authority. The judgments of Lord Alverstone and Farwell, L.J. may be usefully referred to. But I will only cite a passage from a judgment of Kennedy, L.J.: "I will deal, in the first place, with the construction of art. 21 in its application to the circumstances of the present case. *Primâ facie* the direction to keep course and speed appears rigidly to enjoin a maintenance of heading and speed, but it has been held in the case of the *Velocity* that this is not a correct view so far as regards course, and I think that a corresponding qualification ought for similar reasons of practical good sense to be admitted in regard to speed. 'Keeping her speed' ought, I think, to admit the interpretation of keeping that speed which, according to the criterion of good seamanship, is the right speed to be kept in the performance of the nautical manœuvre in which the vessel is at the time engaged. It would be a strange thing if a vessel in order successfully and in the ordinary and proper way to perform a proper nautical manœuvre must alter her speed, but, nevertheless, must be held to infringe art. 21 by such alteration if it takes place at a time when she is being approached by another vessel, which is either overtaking her within art. 24, or is a crossing steamship which has her on the starboard side within art. 19, although the manœuvre in which she is engaged, and the necessity of altering speed which the manœuvre involves, are perfectly obvious to the overtaking or crossing vessel, and although the alteration of speed in no way prevents such overtaking or crossing vessel, if properly navigated, from keeping out of her way. It seems to me that this cannot be the right interpretation of the injunction to keep her speed. It would introduce into navigation not infrequently a probable source of danger. A steamer approaching her landing place for goods or passengers, or drawing up to an anchorage, must often either reduce her speed or abandon her object; and yet, if the interpretation of art. 21, for which the *Windsor's* counsel contend, is correct, she is bound, under pain of liability, should a collision occur, for a breach of art. 21, to adopt the latter alternative, if she has in view either a crossing steamer, which has to give way under art. 19, or an overtaking vessel under art. 24. But surely the officer who is navigating the crossing or the overtaking vessel will, in manœuvring his own ship, which has to keep out of the way, count, and ought to be able to count, upon the vessel which he has to avoid being so handled in regard to speed as well as to course, as the proper execution of the nautical manœuvre in which she is obviously and visibly engaged may dictate; and indeed he may be dangerously misled if she acts differently."

As was there sufficiently indicated, the same reasoning must be applied to change of course as to change of speed; and for change of course, if direct authority were needed, it is supplied by the case of *The Velocity* (L. Rep. 3 P. C. 44).

In my opinion there was no negligence in the navigation of the *Laxton*.

On the other hand, I find that the collision was he result solely of the faulty navigation of the *Echo* in not keeping an efficient look-out; in not keeping out of the way of the *Laxton*, by reducing or stopping her speed, or by passing under her stern if it was deemed necessary; and in proceeding at too great a speed towards and into the port side of the *Laxton*.

Judgment must be entered for the plaintiffs on their claim and on the counter-claim with costs. There will be the usual reference of the registrar and merchants to ascertain the damages which the plaintiffs are entitled to recover.

Solicitors for the plaintiffs, *Botterell* and *Roche* agents for *Botterell, Roche*, and *Temperley*, Newcastle.

Solicitors for the defendants, *Holman, Fenwick*, and *Willan*, agents for *Hearfield* and *Lambert*, Hull.

PRIZE COURT.

April 17, *May* 7, 8, *and June* 6, 1917.

(Before Sir S. T. EVANS, President.)

THE RIJN. (a)

Prize Court—Cargo—Cargo shipped from neutral State in enemy vessel—Shipment before outbreak of war—Cargo conditional contraband—Enemy vessel taking refuge in neutral port after declaration of war—Transhipment of cargo to neutral vessel—Neutral vessel sailing to neutral State—Consignees of cargo named—Ultimate enemy destination—Declaration of London—Order in Council, No. 2, of the 29th Oct 1914*—Declaration of London, arts.* 35, 43.

In June 1914, *prior to the outbreak of war, a German vessel, the* A., *sailed from a South American port with a cargo of cocoa beans shipped by a neutral firm in Ecuador. The cargo was consigned to Hamburg. Whilst on its way war broke out and the German vessel took refuge at Las Palmas. As a result of negotiations between a Dutch firm and certain persons in Germany, the cocoa beans were transferred from the German vessel to a Dutch vessel, the* R., *in March* 1915, *and bills of lading were made out whereby the goods were consigned to the Dutch firm in Holland. The Dutch vessel sailed from Las Palmas at about* 4 *p.m. on the* 23*rd March* 1915 *for Holland, but on her way up the English Channel she was ordered to proceed to Portsmouth, and on the* 6*th April* 1915 *the cargo was seized as contraband destined for an enemy base of supply.*

Cocoa beans being foodstuffs were among the class of goods declared to be conditional contraband by a proclamation dated the 4*th Aug.* 1914. *This was a declaration not only to the enemy, but to all neutral countries. For some State reason the Foreign Office in Nov.* 1914 *gave to the Dutch Government a list of foodstuffs to be dealt with as conditional contraband which did not include cocoa beans. This list was not sent to all neutral European countries, and Spain never received such a list. The proclamation of the* 4*th Aug.* 1914 *therefore stood without any qualification as to Spain, and the qualification was withdrawn as to Holland on or before the* 23*rd March* 1915, *when the British Government informed the Dutch authorities that the proclamation of the* 4*th Aug.* 1914 *as regarded foodstuffs was in full force. It was known then to both the*

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

Spanish and the Dutch authorities that cocoa beans were conditional contraband when the R. *sailed from Las Palmas on the 23rd March* 1915.

The Dutch firm to whom the cargo was consigned after the R. *left Las Palmas claimed the cocoa beans, or the proceeds of their sale, on the following grounds:* (1) *That the goods were not contraband;* (2) *that they could not be seized as they were consigned to named consignees in a neutral port within the meaning and protection of the Declaration of London Order in Council, No.* 2, *of the 29th Oct.* 1914, *modifying the Declaration of London;* (3) *that they could only be condemned, if at all, on payment of compensation under art.* 43 *of the Declaration of London; and* (4) *that the facts did not show the destination to be Germany.*

There was no evidence that the Dutch firm had paid for the goods, and it was admitted that the goods had been insured with German companies and that certain payments had been made by the German underwriters in respect of the same.

Held, that the goods were contraband at the time of seizure; that they were not protected by the provisions of the Declaration of London Order in Council, No. 2, 1914; *that art.* 43 *of the Declaration of London did not apply so as to entitle the claimants to compensation; that the claimants were not the real owners of the goods, which were in reality destined for Germany; and that therefore the goods were good and lawful prize.*

THIS was a case in which the Crown claimed the condemnation of a number of bags of cocoa beans as contraband.

The cocoa beans were shipped at a South American port in June 1914, on a German vessel, the *Assuan*, by a firm known as the Associacion de Agricultores del Ecuador, and were consigned to Hamburg. Owing to the outbreak of war, in Aug. 1914, the *Assuan* put into Las Palmas. Early in 1915 a German, named George Otto Embden, of Hamburg, got into communication with a Dutch firm of Amsterdam, Messrs. P. Onnes and Zoon, with the result that Messrs. P. Onnes and Zoon chartered a Dutch steamship, the *Rijn*, to go to Las Palmas, take in the cargo of the *Assuan*, and proceed to Rotterdam. The nature of the dealings between Embden and P. Onnes and Zoon and the events which led up to the transhipment of the cargo and the sailing of the *Rijn* from Las Palmas are fully set out in the judgment of the President. Whilst on her way from Las Palmas to Rotterdam, the *Rijn* was diverted to Portsmouth, and the cargo was seized as contraband on the 6th April 1915.

Messrs. P. Onnes and Zoon put in a claim to the cargo or its proceeds on the grounds which are set out in the headnote and more fully in the judgment. The claim was resisted by the Crown, the contention being, apart from everything else, that it was false and fraudulent.

By par. 1 of the Declaration of London Order in Council, No. 2, 1914, dated the 29th Oct. 1914, it is provided:

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:— . . .

(iii.) 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 or if they show a consignee of the goods in territory belonging to or occupied by the enemy. (iv.) In the cases covered by the preceding paragraph (iii.), it shall lie upon the owners of the goods to prove that their destination was innocent.

[NOTE.—The Declaration of London Orders in Council were finally withdrawn in July 1916.]

By the Declaration of London 1909 it is provided:

Art. 35. Conditional contraband is not liable to capture, except when found on board a vessel bound 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. 43. 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.

The *Attorney-General* (Sir F. E. Smith, K.C.), *Branson*, and *Joy* (for *Harold Murphy*, serving with His Majesty's forces) for the Procurator-General.

Sir *Erle Richards*, K.C. and *R. A. Wright* for the claimants, Messrs. P. Onnes and Zoon.

MacKinnon, K.C. and *Lewis Noad* for the shipowners.

The following cases were cited during the course of the argument:

The Amiable Isabella, 6 Wheaton, 1;
The Sorfareren, 13 Asp. Mar. Law Cas. 223, 114 L. T. Rep. 46;
The Katwijk, 13 Asp. Mar. Law Cas. 399; 114 L. T. Rep. 1214; (1916) P. 177;
The Palm Branch, 13 Asp. Mar. Law Cas. 512; 115 L. T. Rep. 557; (1916) P. 230;
The Jeanne, 13 Asp. Mar. Law Cas. 567; 115 L. T. Rep. 838; (1917) P. 8.

June 6.—The PRESIDENT.—The cargo comprised in this claim consisted of 15,550 bags of cocoa beans. It has been sold, and realised over 87,000*l*. When it was seized it was laden on the Dutch steamship *Rijn*. She was then on a voyage from Las Palmas to Amsterdam. She sailed from Las Palmas on the 23rd March 1915. The ship was diverted to an English port in the English Channel on the 1st April, and the formal seizure was on the 6th April. The cargo had

been transhipped at Las Palmas from a German vessel, the *Assuan*, one of the Kosmos Linie. It was originally shipped in South America in June 1914 by the Associacion de Agricultores del Ecuador for a German port. The bills of lading and the shipping documents for that intended voyage were not produced at the hearing. At the outbreak of war the ship took refuge at Las Palmas. For seven or eight months the shippers, the Associacion de Agricultores del Ecuador, do not appear to have done anything in relation to the valuable cargo held up in the self-interned ship in the Canaries.

It was part of the case for the claimants that the goods were sent to agents in Germany for sale on behalf of the shippers, and that when the *Assuan* put into Las Palmas for safety from capture the cargo still belonged to the neutral shippers, and that it remained in them until the transhipment on the *Rijn*, or, at any rate, until the property became transferred by the alleged sale to the claimants in Jan. 1915. No evidence was given of any communication, direct or indirect, between the Associacion de Agricultores del Ecuador and any alleged agents in Germany or elsewhere with reference to the cargo for the long period of nearly three years, from the date of shipment up to the hearing in court, about a month ago. It did not appear that they took any part in the arrangement for the transhipment of the goods to the Dutch vessel. The court was not informed whether they approved of the transhipment, or of the alleged sales, or whether they were ever advised of them before or since. Whether they have been paid for the goods, or any of them, and if so when, how, and by whom, or whether they still hope or expect to be paid, whether they have any knowledge of these proceedings or any interest in the result of the present claim, are matters which are left in mystery. Having regard to the fact that the goods were originally consigned to Hamburg, that they were laden on a German vessel, that they were kept in that vessel for many months lying in refuge in a neutral port, that the important evidence already adverted to was not produced, that the person who introduced the business to the claimant described the German firms who made the contracts of sale as "the owners here" (namely, Hamburg), and to all the other facts which have come before the court, I cannot assume or find in favour of the claimants that the ownership in the goods had remained in the neutral shippers up to the time of the alleged sales or transhipment.

The first ray of light shed upon the cargo in the German vessel at Las Palmas was introduced by the appearnnce upon the horizon of one George Otto Embden, of Hamburg. No information was vouchsafed to explain how he learnt of or became interested in the interned cargo.

Mr. Michiel Onnes van Nyenrode, trading as Messrs. P. Onnes and Zoon, of Amsterdam (the claimants), has sworn that the first he heard of the cargo was at an interview with Embden at Hamburg, in Jan. 1915. (There was another partner in Messrs. P. Onnes and Zoon, but the gentleman already named transacted all the business relating to this matter, and I shall call him and the claimants "Onnes" for the sake of brevity.)

The next circumstance was that he found at his office at Amsterdam on his return from Hamburg the letter which is the first recorded step in the history of the present claim. It is dated Hamburg, the 13th Jan. 1915, and is as follows:

Dear Mr. Onnes,—I should like to propose to you to-day a large remunerative business. It is a question of about 15,000 bags of Arriba cocoa, which are at Las Palmas in the steamer *Assuan*, and which could be probably purchased from the owners here at 70 pfennige per pound ex Las Palmas. To that would be added about 5 per cent. general average charges which the purchaser must bear. You will be able to arrange the freight from Las Palmas at yours, or *viâ* Lisbon at 3-4 pfennige per pound, and the marine and war insurance at about 3 per cent., so that the cocoa would come out at about 80 pfennige c.i.f. Holland. The present value is about 65-68 cents there. The sum concerned amounts to about M.1,400,000. Perhaps you can arrange the financing at yours wholly or partially with your banks or with the Waren-Liquidations-Kasse. If you should arrange the whole of the financing at yours, I should claim a quarter of the profit for bringing the business to you; if you do not succeed in arranging the financing at yours, I should, contingently, be willing to finance the business for you up to an amount of M.1,000,000; but in such case I want at least five-eighths share, as I must renounce participation in the profit. I would purchase the cocoa here for your account. The payment would have to be made against delivery of the bills of lading for cash, less 1 per cent., or net cash against three months' bank acceptance. I have just received some further particulars. It is a question of 7100 bags and 8000 bags of Summer Arriba and 400 bags of Machala. The expenses of the transhipment at Las Palmas from the steamer to the export steamer are to be borne by the sellers. Quality according to Hamburg arbitration. Weight guaranteed 2 per cent. Any loss in weight in excess of that to be made good. The insurance policies are also to be handed over as they now stand. Delivery to be taken by the 31st Jan. Awaiting your reply by return after the receipt of this letter, stating whether you will do the business and in which way.—I am, with kind regards, yours truly (Signed), GEORGE OTTO EMBDEN. Perhaps a further quantity will be purchaseable.

I have already noted that the proposed sellers are described as "the owners here," that is, at Hamburg. Onnes seems to have gone to Hamburg again later, because on the 23rd Jan. Embden writes to him this letter, which is headed, "To be delivered by express messenger" (unless an express messenger was sent from Hamburg to Amsterdam):

Dear Sirs,—Referring to our conversation during your stay here, I confirm to you that I am willing to grant you a credit up to M.1,000,000 (1 million reichmarks) to carry through the cocoa business ex the steamer *Assuan*, under the following conditions:—Beyond interest at 7 per cent. for the money lent by me I am to receive a participation in the net profit, after deduction of all expenses, of five-eighths (in which Mr. C. Z. Thomsen participates to the extent of one-quarter). The negotiations for effecting the business are progressing. I await your confirmation.—Yours truly (Signed), GEORGE OTTO EMBDEN.

The answer to this letter was dated Amsterdam, the 28th Jan. 1915. This will be set out hereafter. Several remarkable things arise in reference to that answer, and to what happened before it was sent. For it appears that in the interval, namely, on the 26th Jan., three separate contracts had been made whereby Messrs. Petersen and Paulsen, of Hamburg, purported to have bought the cargo of cocoa beans for Onnes in different quantities from three Hamburg firms,

Messrs. Schlubach, Thiemer, and Co., Messrs. Schröder, Gebrüder, and Co., and Messrs. L. Behrens and Söhne, described as public trading companies. Some of them appear to act as bankers. The names are not unfamiliar to the court in connection with German trade and prize proceedings. No explanation was given of how each of the firms came to act as agents for the same principals for different parts of the same cargo, and on the same date. The three contracts are all in identical forms. They can be referred to for their terms. They all purport to be made "by instructions and for account of the Associacion de Agricultores del Ecuador." The provision as to payment was:

Payment: Wholly or partially cash, less 1 per cent. rebate, or three months' first-class bank acceptance against delivery of the documents, due (as to two) 1st Feb. current year, and (as to the third) due 15th Feb. current year.

The clause as to insurance was:

Insurance: The policies are to be delivered therewith as they now stand.

The final clause in each contract was a remarkable one, of which no explanation was given. It ran as follows:

This contract must be kept secret from everybody.

No communication of any kind passing between Onnes and Messrs. Petersen and Paulsen was produced. Indeed, no instructions from Onnes to Messrs. Petersen and Paulsen were ever mentioned at the hearing, nor was any explanation given of how, or where, or by whom, or on what terms they were authorised to act for Onnes. If I remember aright, no reference to that firm is made in the many affidavits made by Onnes in the course of the proceedings.

According to the claim filed, Onnes asserts that he bought the goods on the 26th Jan. 1915. According to his first affidavit he says that he purchased from the three Hamburg firms already named, "who, as he saw afterwards from the contracts dated the 26th Jan. 1915, acted for the South American house, the Associacion de Agricultores del Ecuador."

The invoices are dated from Hamburg as follows:

From Schröder, Gebrüder, and Co., 27th Jan. 1915.
From Behrens and Söhne, 29th Jan. 1915.
From Schlubach, Thiemer, and Co., 10th Feb. 1915.

The copy of the last invoice which was supplied to me made no reference to the Associacion de Agricultores del Ecuador. The charter-party by which Onnes hired the ship was dated at Amsterdam, the 27th Jan. 1915. Then came the answer of Onnes (already mentioned), dated the 28th Jan. 1915, to Embden's letter of the 23rd Jan., introducing new terms and figures in a way which required some explanation, but no explanation was given. The letter was as follows:

Dear Sir,—In reply to your favour of the 23rd inst., we beg to inform you that we accept your proposal to make us a cash advance of M.1,000,000 under the conditions stated by you, namely, 7 per cent. interest and ¼ per cent. commission per month. We beg to pay out therefrom the amounts which we owe in respect of the cocoa purchased. On the 1st Feb. we have to pay the sum of M.1,542,905.87, against which we ourselves remit M.590,000, so that you will please pay out for us M.952,905.67. Moreover, we have to pay on the 15th Feb. an amount of M.164,469.18, and on that day we will remit you M.50,817.36, so that you will please pay out for us M.113,651.82. In all, we shall then owe you M.1,066,557.49, so that the amount is rather over M.1,000,000, to which, however, you will doubtless raise no objection. We beg you to be good enough to confirm the payments to us. And remain, yours truly (Signed) P. ONNES AND ZOON.

The reply of Embden, dated the 31st Jan., also headed "To be delivered by express messenger," was:

Dear Sirs,—I received your favour of the 28th inst., and, in accordance with your instructions, I will make the following payments on the basis of the credit opened for you of M.1,000,000, for the cocoa business ex s.s. *Assuan*: On the 1st Feb., current year, M.952,905.67, and on the 15th Feb. M.113,651.82—a total of M.1,066,557.49.—Yours truly (Signed) GEORGE OTTO EMBDEN.

The various affidavits of Onnes did not disclose, nor did any evidence in the case disclose or suggest, that Onnes and Embden had any interview at Hamburg other than the one referred to by Onnes in answer to interrogatory 12, which apparently was early in January, before the receipt by Onnes of Embden's letter of the 13th Jan., which he "found at his office when he returned from Hamburg."

No evidence was given to satisfy me that any payment was made by Onnes for the goods, either to the three German firms mentioned, or to Embden, or to the Association. In the first affidavit of Onnes, sworn on the 23rd Aug. 1915, he deposed that the goods were "bought and paid for" when lying in the *Assuan*. He does not say whether by cash or three months' acceptance, or how, or when, or to whom. Nothing could have been easier than to have given the usual business proof of payment, if payment had been made in the ordinary course of business. It appears to me significant in this connection also that in three notarial declarations made on behalf of the three German firms on the 27th Nov. 1915 the sale is declared, but there is no mention of any payment.

To proceed with the history of the cargo, the chartered vessel *Rijn* in due course proceeded to Las Palmas, and the cocoa beans were transhipped from the German to the Dutch steamer, and the latter sailed for Amsterdam on the 23rd March. The master, however, had orders to call at the Hook of Holland for instructions as to whether the discharge should be at Rotterdam. These were not given by Onnes. The shippers' agents at Las Palmas were the Woermann Linie, who acted for the Kosmos Linie, both German companies. They no doubt got their orders from Embden. On the ship's voyage she was met by a British cruiser, diverted, and the cargo formally seized on the 6th April.

The main contentions of Sir Erle Richards, counsel for the claimants, were:

(1) That the goods were not contraband;

(2) That they could not be seized as they were consigned to named consignees in a neutral port, within the meaning and protection of the Order in Council of the 29th Oct. 1914, modifying the Declaration of London;

(3) That they could only be condemned, if at all, on payment of compensation under art. 43 of the Declaration of London; and

(4) That the facts did not show the destination to be Germany.

I must now set out certain facts relating to the question whether cocoa beans were or ought to be treated as contraband. Cocoa beans are, of

course, foodstuffs. They were accordingly among the class of goods declared to be conditional contraband as far back as Aug. 1914. That was a declaration, not only to the enemy, but to all neutral countries. For some reasons of State, however, our Foreign Office, in Nov. 1914, gave the Dutch Government at The Hague a list of foodstuffs which would be dealt with as conditional contraband, which did not include cocoa beans. This was not sent to all European neutral countries. As to Spain, the Declaration of Aug. 1914 stood without any qualification. Accordingly, having regard to the provisions of art. 43 of the Declaration of London, the *Rijn* would be deemed to be aware that cocoa beans as foodstuffs were on the contraband list before she left Las Palmas, and indeed before she began to receive the transhipped cargo. But as to Holland, it was not until the 22nd March, or perhaps the morning of the 23rd March 1915—the day when the *Rijn* sailed from Las Palmas—that it was communicated to the Dutch authorities that this country would act so as to give the Declaration of Aug. 1914 its full effect as regards foodstuffs.

The owners of the vessel acted with strict neutral correctitude. They insisted on a clause in the charter-party that the cargo should be consigned to the Netherlands Overseas Trust. The Trust, however, would not assent to become consignees, as they regarded cocoa beans as goods which would not be treated as contraband. This led to the consignment being made to the claimants, but subject to a supplemental agreement dated the 9th Feb. 1915, whereby, if the cargo was to be declared conditional contraband, the claimants would at once transfer their consignment to the Trust. This was not done before the seizure.

The Netherlands Overseas Trust are deserving of every confidence. But it is well known that in Scandinavian countries provisions and guarantees against re-exportation into Germany have constantly been evaded and broken. It was the shipowners in the present case who were anxious to make it clear that their ship was only engaged to carry the cocoa beans to Holland for consumption there, and not for exportation into Germany. That is shortly the course of events.

Was the cargo conditional contraband at the material time? The material time was the date of seizure; and, whatever view may be taken of the information given to The Hague authorities and by them to the shipowners, or of the knowledge attributable at the Canaries, it cannot be doubted that the goods, when seized, were conditional contraband. Art. 43 of the Declaration of London, so far from supporting the first main contention of the claimants, is obviously opposed to it. It in fact speaks of goods declared contraband while on the high seas without the knowledge of the parties concerned as "the contraband," although it provides that "the contraband" should only be condemned on payment of compensation. The comment of M. Renault is to the same effect. He says that the provision was intended "to spare neutrals who might, in fact, be carrying contraband, but against whom no charge could be made," and he adds that "while it would be unjust to capture the ship and condemn the contraband, on the other hand the cruiser cannot be obliged to let go on to the enemy goods suitable for use in the war of which he may stand in urgent need." Art. 43 clearly was not intended to take out of the category of contraband goods which by reason of their quality had been included in the list. The first main contention of the claimant therefore fails.

The next question which arises is whether the claimants can invoke art. 43 and claim the benefit of compensation under that article. This is a question of law and of fact. As to the law, I think that it is clear from the terms of the article and of the comment that it was only intended to comprehend neutral ships and cargoes, that is, it applies only to ships of neutrals innocently carrying cargo which turned out in fact to be contraband, and to cargo of neutrals which was in fact contraband and was innocently laden and carried on a neutral ship. If the cargo was contraband, both the enemy ship carrying it and the cargo, to whomsoever it belonged, would be subject to capture and condemnation, and an enemy cargo on a neutral ship would also be similarly subject, notwithstanding the Declaration of Paris. Questions of fact arising under the article will be considered and determined later in connection with various other matters, such as ownership, conduct, destination, and title to claim.

The next contention of the claimants to be considered is whether they are protected by the Order in Council of the 29th Oct. 1914. This again involves law and fact. As to the law, in my opinion the exceptions made in clause 1 (3) of the order were only intended to operate in favour of *bonâ fide* neutral consignees. This is the conclusion I have come to, both on consideration of the language of the order itself and from what is known from public dispatches between this country and America as to its history. I also adhere to what I have said in other cases, that a named consignee is a *bonâ fide* consignee in the ordinary business and commercial sense, and that a person who acts merely as a conduit pipe, or channel, for the purpose of enabling the goods to reach the enemy direct, and who merely lends himself or his name as an intermediary or instrument for that purpose, whether for great, small, or no remuneration, is not such a person as was intended by the term "named consignee." A sham or dummy consignee, although an existing person, is not such a person as was contemplated by the order. The facts under this head will be the same as those found in connection with art. 43.

In order to deal with the final contention for the claimants, and to ascertain the facts material to the other contentions, it is necessary now to proceed upon a further investigation of the position, relationship, and conduct of Onnes and Embden, and of the facts generally. After the detention of the steamer, Onnes telegraphed to Embden at Hamburg as follows:

> Steamer *Rijn* detained at Ryde. We await explanation and to know what requirements may in the end be imposed by England. We have requested our Government to aid us in obtaining the release of ship and cargo. As it is possible at any moment that important decisions may have to be taken, we think your presence here desirable, as we do not wish to bear the responsibility of coming to a decision alone.

Embden's reply was by telegram as follows:

> *Re Rijn.* My presence here [that is, at Hamburg] is important. Further details by letter. Keep me informed about everything by telegram.

Then there is a letter from Embden (dated Hamburg, the 6th April) which is as significant as it is daring. The material parts of this letter are as follows:

If England will release the *Rijn* only if the cargo is reconsigned to the Overzeetrust, you must undertake the business of reconsigning it and get the captain to warn you of the exact hour when he leaves the port in which he is interned. I will then go to Berlin and try and induce our Government to allow the *Rijn* to be brought into Zeebrugge by putting it to them that we are dealing with a cargo sold to Germany which cannot be carried to its place of destination on account of its reconsignment to the Overzeetrust, effected at the desire of England. I cannot to-day say whether the naval staff will accede to my request; but there is a prospect of their doing so. In the meantime it is necessary that we should be informed when the *Rijn* can sail again so as to be able to receive her at the proper time. I hear, furthermore, that bank guarantees for the Overzeetrust are only given if the shipment was to be discharged to the Trust in the first instance, and not in the case of subsequent reconsignment. That would be very favourable for us. Even if you cannot break off the agreement which you have entered into with the Trust, there is still this way out of the difficulty, namely, that you should sell the cargo to the firm C. W. H. van Dam and Co., Rotterdam, Rivierstraat, 7, and that this firm should attempt to export it as though in transit. If the re-exportation cannot be worked in any way at all, the cocoa must be sold there, which would not be so bad as we should get a comparatively high price. Still, we want first to direct all our energies towards facilitating the re-exportation. As regards the indemnification of Carl Lassen, I had at the time, settled with him that he should receive M.9000 for all forwarding charges, inclusive of all extra expenses, exclusive of freight, and beyond that, a special further compensation of M.1000 for the agent. Further, in the event of re-exportation being impossible, M.500 to M.1000, according to the time spent and the expenses entailed. Herr Zenner looked me up on Sunday and informed me that he would reckon 0.50 per 100 kilos for the cost of unloading the cargo from the steamer and transhipping it into the trucks. I did not at that moment bring it to his attention that these expenses were included in the M.10,000 which had been agreed upon, as I had not with me the agreement which was made as the result of our conversations at the time. I am writing to him to-day as per inclosed copy, and am asking him to verify from you the fact that I informed you immediately at the time that I had agreed to the indemnity of M.10,000 including all extra expenses* excluding freight.—Yours, &c., GEORGE OTTO EMBDEN.

* Hence, also, the cost of transport from the ship to the trucks.

Perhaps it is not a matter of surprise that these communications were kept hidden by Onnes, and their purport denied.

After the letter was disclosed by the Procurator-General, an attempt was made to explain it by Onnes in his affidavit of the 30th March 1917, which is not particularly successful. He attributes the suggestions of Embden contained in it (which he calls objectionable, and, in fact, criminal) to "the abnormal mental condition of the so-called war-psychose, which he knew at the time prevailed among the Germans," and to the "overstrained nerves" of Embden, "particularly in those days when he expected every day to be called in as a soldier." He says he paid no attention to it. Whether he resented it in any reply I do not know. In the answer to the ninth interrogatory he denied that Embden had proposed or suggested to him that in order to obtain the release of the cargo it should be reconsigned to the Netherlands Oversea Trust. But a few days afterwards he certainly approached the Trust with that view, as appears from the letter of the Trust to his lawyer of the 16th April.

After the writ was issued, and appearance was entered, the first formal step taken by Onnes in the proceedings was the making of a declaration before the British Consul at Amsterdam on the 18th May 1915, in which he said the cargo had become the full property of his firm to the exclusion of all others, and that it had continued to be so up to the moment that he abandoned the goods to his underwriters under the stipulations of the policy. (It may be here noted that no mention was made by Onnes of Embden until more than a year later).

This leads me to state the facts, so far as they have come to the knowledge of the court, with regard to the insurance on the goods. In an affidavit sworn on the 8th Dec. 1915 Onnes disclosed nine policies of insurance, with a note appended "that other policies of insurance have been paid off, and are no longer in my possession." In a later affidavit he said he could not set out a complete list of the insurances which had been paid off and had passed out of his possession, and added: "These policies were for the most part contracted in Hamburg with German insurance companies. The total sum insured by these policies amounted to M.1,880,000." Finally, he stated that 497,250 guilders and M.1,470,000 had been paid, and the latter on the German policies, making altogether over M.2,250,000. The total amounts of the three invoices were M.1,734,702, and these included 1850 bags which were not laden on the *Rijn*. The value of the objects sold, according to the three declarations of the alleged agents dated the 27th Nov. 1916, was M.1,100,000. The claimants, therefore, make out that considerably more than the value of the goods has been paid by the underwriters. Onnes states in terms in his last affidavit: "It is the interest of the underwriters I am defending in the Prize Court." It was faintly suggested that an order might be made for an inquiry to ascertain what portion of the insurances may have been paid by neutral underwriters; but, as I have said in other cases, the Prize Court will not embark on any such inquiry.

A short reference may be made to the accounts, or, rather, absence of accounts, kept by the claimants. Copies of a few book entries were produced, said to relate to some part of the transactions, but they were unintelligable and inexplicable to the claimants' own counsel. There are no accounts as between the claimants and Embden, or Messrs. Schlubach, Thiemer, and Co., or Messrs. Schröder Gebrüder, or Messrs. L. Behrens and Söhne, or the Association, or any of the underwriters.

I have now stated the facts fully, and it only remains to state the conclusions which I have formed, namely:

(1) No satisfactory evidence has been given to show that the property in the goods was in neutrals at the time of the transhipment. The inference I draw is that the goods had before that time become the property of some consignees in Germany.

(2) The claimants have failed to establish that the property in the goods ever became vested in them, or that they are, or ever were, the owners.

(3) If, however, the property had become vested in them, they acted in the whole transaction merely as instruments for Embden, and subject to his directions, for the purpose of getting the goods through to Germany.

(4) The real owner of the goods at the time of seizure was Embden, of Hamburg.

(5) The intended destination of the goods when they left Las Palmas was Hamburg, an enemy base of supplies.

(6) The claimants acted in concert with Embden in an attempt to get the goods to Hamburg by pretending that they were neutral purchasers on their own account, and also acted in concert with him in putting forward a false claim before this court.

(7) Even assuming that the legal title to the goods had passed to the claimants, they would not be entitled in the circumstances to any protection under the Order in Council of the 29th Oct. 1914, or to any compensation under art. 43 of the Declaration of London.

(8) Even assuming that the claimants were genuine neutral purchasers of the goods, they had parted with the property in them by abandonment to the underwriters, who were mainly Germans.

(9) According to the claimants' own case, if the goods or their proceeds were released, the underwriters—mainly German—would be entitled to the proceeds, or to any compensation under the article referred to.

Any one of the above grounds would be sufficient to bar the claim. I therefore disallow it.

I condemn the goods seized, being conditional contraband destined for an enemy base of supplies, and their proceeds as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche*.

Solicitors for the shipowners, *W. A. Crump* and *Son.*

June 21, 22, *and July* 23, 1917.

(Before Sir S. T. EVANS, President.)

THE AXEL JOHNSON; THE DROTTNING SOPHIA. (a)

Prize Court—Contraband goods—Wool going to enemy country for combing—Combed wool to be returned to neutral country—By-products kept in enemy country—Doctrine of infection—Doctrine of Prize Court.

Where goods which are absolute contraband are on their way to an enemy country, a belligerent captor need not concern himself with any question as to their alleged ultimate destination or the alleged special treatment which they are to receive in the enemy country. The fact that the goods are absolute contraband and have an enemy destination is sufficient to make them the subject of condemnation.

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

Certain bales of wool, absolute contraband of war, were shipped on two Swedish vessels from Buenos Ayres. The wool was consigned to a neutral firm in Sweden, but was seized by the British authorities at Kirkwall whilst on its way to Gothenburg. The evidence clearly showed that it had an enemy destination and was intended for Germany. The claimants, the Swedish firm, asserted that even if the wool was going to Germany (which was denied) it was only being sent there for the purpose of combing, and was to be returned to Sweden as combed or spun wool, and that therefore, although the waste wool, with its by-products, might be retained in the enemy country, the wool itself was not the subject of condemnation.

Held, that the wool, being contraband and on its way to Germany, must be condemned as good and lawful prize.

THIS was a case in which the Crown sought the condemnation of 179 bales of wool as absolute contraband destined for Germany.

The facts of the case are set out in the headnote and more fully in the judgment.

The *Attorney-General* (Sir F. E. Smith, K.C.), the *Solicitor-General* (Sir Gordon Hewart, K.C.) and *T. Mathew* for the Procurator-General.

Sir *Erle Richards*, K.C. and *Le Quesne* for the claimants, the Aktiebolaget Skanska Yllefabriken of Christianstad.

The following cases were cited in the course of the argument:

The Kim, 113 L. T. Rep. 1064; (1915) P. 215;
The Kronprinsessen Margareta, 116 L. T. Rep. 508; (1917) P. 114.

Cur. adv. vult.

July 23.—The PRESIDENT.—This case raises a question of some importance as to the law applicable to contraband articles belonging to neutrals which were on the way to an enemy country to be treated or manufactured.

Seventy-five bales of wool laden on the *Axel Johnson* were seized on the 2nd May 1916. Two lots of seventy-five and twenty-nine bales laden on the *Drottning Sophia* were seized on the 14th June 1916. Wool was declared absolute contraband by Proclamation on the 11th March 1915. The Aktiebolaget Skanska Yllefabriken claim the 179 bales.

The seventy-five bales on the *Axel Johnson* and the lot of seventy-five on the *Drottning Sophia* are alleged to have been bought by them from Messrs. Staudt and Co., of Berlin, and the twenty-nine bales on the *Drottning Sophia* from Messrs. Hardt and Co., of Berlin. They say that they had paid for the goods, and were the owners when the seizure was effected. The bill of lading for the *Axel Johnson* shipment was dated the 15th March 1916. The shipper was stated to be "Mr. Edward Blombergh, of Buenos Ayres." Delivery was to be at Gothenburg to the order of the Aktiebolaget Skanska Yllefabriken, of Christianstad. The bill of lading for the *Drottning Sophia* shipment was dated the 2nd April 1916. The shipper was stated to be Mr. Edward Blombergh. The delivery and consignees were the same. The invoices and bills of lading were sent, in the first place, to Messrs. Staudt and Co. and Messrs. Hardt and Co. respectively.

When some of them reached the claimants is not certainly ascertained. Only one of the

Drottning Sophia bills of lading for the twenty-nine bales was received by the claimants, and that only some days before the 1st Sept. 1916, long after the seizure. The circumstance is set out in the affidavit of Mr. Engberg, the manager of the claimant company of that date, thus:

The claimants had made several inquiries in order to get the bills of lading, but without any result. Some days ago the bill of lading referred to under clause 9 above (*i.e.*, clause 9 of the affidavit) came to hand in a usual envelope without any letter or other notification as to the sender. I suspect that the other copies of the bill of lading have been lost or kept by somebody in the transit from America.

In this latter case also it appears that the marine and war insurances were to be covered by Messrs. Hardt and Co. Moreover, in both cases, the goods were shipped by enemy firms, and the claimants had no possession before the seizure, and such title as they had was a paper title.

But the main question argued was whether, assuming that the claimants were the owners of the wool, it was subject to seizure and confiscation as contraband. I propose to deal with the case on that basis, adopting the same assumption as to ownership, without deciding it.

The right to seize the wool and the power to condemn it depend upon its destination. The foundation of the doctrine of absolute contraband is the right accorded by international law to a belligerent to prevent contraband articles from reaching the enemy, and so to deprive him of the opportunity of using them for the purpose of war.

The succinct statement in art. 30 of the Declaration of London is, in my opinion, an accurate statement of the law of nations upon the question, and I adopt it and the comment of M. Renault upon it accordingly. The article reads thus:

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.

In order to arrive at a proper conclusion as to the destination of the wool in this case regard must be had to certain facts emerging from the evidence, which have a close bearing upon the matter.

The wool had to be combed before it could be used in the claimants' factory. No facilities existed in Sweden before the war for combing wool. Sweden had imported wool already combed from this country and from Germany. After the war broke out arrangements were made between Swedish manufacturers and German and Austrian spinners for the combing, which were known in the Swedish wool trade as the "Exchange Policy." The plan was to import raw uncombed wool from South America and forward it to German and Austrian spinners to be combed or spun; and to allow a proportion of the wool (from 30 per cent. to 40 per cent. of the amount combed) and all the by-products of the combing operations—namely, the short wool or "noils," and wastes, and animal fats—to be retained by the spinners. These by-products and fats, as well as the wool, were of importance, and in great demand in Germany for purposes immediately connected with the war, and with the manufacture of explosives. Engberg himself said in one of his affidavits that the combing always takes away a good deal of the wool in the form of waste, and he therefore required a bigger quantity, and ordered 150 bales instead of 100 accordingly.

In negotiating for the purchase from Messrs. Staudt and Co., one of the terms of the arrangement was that "The yield is to be valued for combing."

On the 21st Sept. Messrs. Staudt and Co. wrote to the claimants a letter which must be set out in full:

Sept. 21, 1915. — (Confidential). — Aktiebolaget Skanska Yllefabriken, Christianstad.—Confirming our letter of the 11th Sept. Mr. Scheuermann, based on his conversation with your director, Mr. Engberg, communicated with the head office for export permits of woollen yarns, and we are able to inform you in that connection—of course without engagement on our part—that for the present the question of one-third of the wool sent to Germany by Swedish manufacturers for combing or spinning purposes being left by them in Germany is to be waived. It is, on the contrary, intended to return to the Swedish firms passing orders the whole sliver or the whole quantity of yarn that was obtained from the parcel of wool in question, and only the waste wool, residues, and throw-outs would have to be left in Germany, against adequate payment. In view of the German Government holding out the prospect of such far-reaching obligingness, it must surely be a matter of greatest interest to every Swedish manufacturer to import as much as possible from La Plata, and we would ask you to consider the question of perhaps ordering a certain quantity of your other qualities also. As soon as the wool which you import shall have reached Sweden, you will be so good as to apply to us, and we shall then enter into communication with the head office for export permits for the purpose of arranging everything in your interest. We were glad to note that, if necessary, you are prepared to give us your assistance respecting the importation for our own account to Sweden, and shall take the liberty of approaching you again later on on this subject. Of course this matter must be handled in a strictly confidential manner.—Yours, &c., Per Staudt and Co., (Sgd.) SCHEUERMANN.—(Sgd.) G. BAM.

The translation supplied by the claimants renders the first paragraph as follows:

We hereby confirm our letter of the 11th Sept. Your manager, Mr. Engberg, and our Mr. Scheuermann have had a conference with the commission for export of the wool, and we beg to inform you, without responsibility from our side, that the Swedish manufacturers who send their wool to Germany for combing and spinning must leave one-third of the parcel in Germany.

But I doubt whether that is as accurate as the Crown's version. In any event, I give the claimants the benefit of the Crown's translation, which is more favourable to them.

Later the claimants requested Messrs. Staudt and Co. "not to indicate in any way whatever, either in the invoices or in any other papers in this connection," that the wool was intended for combing purposes, "in order to avoid drawing the special attention of the English to the lots." To this request Messrs. Staudt and Co. assented with prompt willingness. In fact, they had even forestalled the request, for they said:

What you mention respecting the drawing up of the invoices had already received our attention, and our people will, of course, say nothing in the documents about the wool being destined for combing purposes.

Earlier than this Messrs. Staudt and Co. gave general directions to their Buenos Ayres branch to

Put on all European bills of lading neither the name of the firm nor of the owner, but of a neutral.

It was at first intended by Messrs. Staudt and Co., apparently, that the wool should be shipped in the name of Simon Hermanos. Later, one Edward Blombergh, of Gothenburg, was out in Buenos Ayres, and the claimants directed Messrs. Staudt and Co. to transfer and deliver the wool to him, as if he had been a purchaser, and said that he would act as shipper and the Swedish Government as consignees. This was done in view of the difficulties which it was said the English were placing on the Swedish import trade. Similar directions were given to Messrs. Hardt and Co. in reference to their *Drottning Sophia* shipment. Blombergh adopted the role of shipper in both cases as if he was a merchant at Buenos Ayres; but the Swedish Government were not named as consignees. He probably shrank from using the name of the Government by the mere direction of the claimants. He has not taken the opportunity of giving any evidence in explanation.

In this way the goods were afloat, consigned to the claimants at Gothenburg, not in transit to Christianstad, where the claimants' business was, nor to Norrkoping for combing. Gothenburg was more convenient for transhipment to Germany than for transhipment or transmission overland to Christianstad or Norrkoping.

An attempt was made by Engberg in his first affidavit to show that the goods were intended to be combed in Sweden. He deposed:

The combing of the wool in question should take place beforehand at Forenade Yllefabrikerna in Norrkoping.

That was a disingenuous statement, as the whole of his conduct and the facts show. In order to give an air of truth to it he referred to an alleged agreement, evidenced by copies of two letters of the middle of May 1916 after the seizure. The originals were not produced. In any event, the agreement only purported to provide for combing, subject to certain conditions, of a quantity up to 600-1000 kilos. per week, and a total up to 12,000 kilos.; but "the combing was to take place within a month after information, but not before the 1st Aug. 1916." It will be noted that the shipments in these two vessels alone exceeded 80,000 kilos. The aforesaid statement by Engberg in his affidavit did not derive any substantial strength from this attempt to support it.

Having regard to the facts established by the evidence, I cannot entertain any doubt about the destination of the wool. I find it was shipped to Gothenburg for the purpose of it being forwarded directly to Germany. This, in my view, is enough to dispose of the case and to justify the condemnation of the wool as absolute contraband destined for enemy territory.

But it was contended that even in this event the wool was not subject to condemnation, because it was intended to be sent back to Sweden as combed or spun wool, notwithstanding that parts of it—waste wool, with its by-products and fats—were to be retained in the enemy country. I cannot accept that contention. If absolute contraband is once traced and captured on its way to enemy territory, a Court of Prize will not embark upon inquiries as to what will, or, to speak more strictly, what may ultimately become of it. Such an inquiry would be a dangerous fetter to fasten upon belligerent captors. Captors know how to act when they find goods useful for the enemy in war on their way to the enemy country; but they would be unduly puzzled and hampered in their action if they had further to consider what the future history of a dealing with the goods might be. After contraband articles reached German territory in the guise, or even character, of neutral goods, the neutral owners themselves might, by the allurements of high prices, or the prompting of political sympathies, be persuaded to dispose of the goods to the enemy. Apart from this, who could with any feeling of certainty predict, with reference to the wool in question, that the German Government would not retain a substantial portion of it as part consideration for the combing, or, indeed, requisition, or retain the whole of the wool on terms to be either imposed or arranged? Moreover, part of it which would necessarily be left behind would be of substantial use in the war; and this court would not, and ought not, in my opinion, to make any distinction between the various parts.

I will add that the claimants upon the undisputed facts pretended, and falsely pretended, that the wool had been transferred and delivered to Blombergh before shipment, and that he was an independent shipper and not the German vendors. Following upon this project the bills of lading were falsely made out. And this was done with the avowed object of evading search and capture. I need not again refer to the authorities which I have cited in other cases for the proposition that false papers made out for the purpose of deceiving possible captors will invalidate a claim: (see *The Sorfareren*. 114 L. T. Rep. 46).

I will only quote a couple of passages from Mr. Dana's edition of Wheaton's International Law, which are in point, and to which, so far as I remember, I have not previously called attention. At p. 663 it is said: "By the present practice of nations, if the neutral . . . make use of fraudulent devices to mislead the belligerent, and defeat or impair the right of search, he is liable to condemnation for unneutral acts in aid of the enemy. . . . Producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious articles. At the same time, the belligerents have the further security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practices or hostile service."

For the reasons given I pronounce an order that all the goods claimed be condemned as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor*.

Solicitors for the claimants, *Botterell* and *Roche*.

Thursday, Oct. 18, 1917.

(Before Sir S. T. EVANS, President.)

THE SIGURD. (*a*)

Prize Court — Reprisals Order in Council of the 11th March 1915*—Seizure of goods on neutral ship—Detention—Order for release of cargo—Erroneous construction of order—Claim of owners of cargo for costs and damages.*

The S. *was a neutral sailing ship which was completely laden with a cargo at a German port before the outbreak of war, and a portion of the goods were consigned to a neutral firm in South America. The bill of lading in connection with these goods was dated the 27th July* 1914*, eight days before the declaration of war. The goods were of German origin. The* S. *did not set sail from Germany until Oct.* 1914. *Owing to damage sustained through bad weather, she was compelled to put into a neutral port, where she was detained for repairs until March* 1915. *Owing to the nature of the damage suffered, part of the cargo had to be taken out of the vessel and was subsequently reloaded. The* S. *sailed from the neutral port on the 23rd March* 1915.

On the 11th March 1915 *the Reprisals Order in Council was issued, which enacted* (inter alia) *that every merchant vessel which sailed from a port other than a German port after the 1st March* 1915 *having on board goods of enemy origin or goods which are enemy property may be required to discharge the same in a British or an allied port, there to be detained in the custody of the marshal of the Prize Court until dealt with by the court in such manner as may in the circumstances appear just. Under the provisions of this order the* S. *was ordered, on the 5th April* 1915*, whilst on her way to South America, to proceed to a British port and there to discharge her goods.*

On the 28th June 1917 *the Procurator-General asked for the condemnation of the goods, but the President ordered their release, on the ground that the* S. *was to be regarded as a neutral vessel which sailed from a German port prior to the 1st March* 1915*, and not as one which sailed from a port other than a German port, although she left the neutral port where she had been repaired after the 1st March* 1915. *The owners of the goods now asked for costs and damages in connection with the wrongful seizure.*

Held, that, although the seizure had been made under a wrong construction of the Reprisals Order, the claimants were not entitled to either costs or damages in connection therewith.

The decision in The Luna (*Edw.* 190) *followed.*

THIS was an application on behalf of Messrs. Weber and Co, a firm carrying on business at Merceria, Concepcion, Chili, against the Procurator-General for costs and damages in connection with the seizure and detention of a portion of the cargo on board the sailing ship *Sigurd*, of which they were the owners.

The *Sigurd* was a Norwegian vessel, and she loaded a varied cargo at Hamburg in July 1914, just before the outbreak of war. Among the goods carried were certain packages consigned to Messrs. Weber and Co., the claimants. The bill of lading was dated the 27th July 1914. For some reason or other the *Sigurd* did not sail for Hamburg until the 21st Oct. 1914, when she met with very bad weather and was compelled to put into Christiania, whence she was afterwards sent to Stavanger, where extensive repairs had to be carried out. In order to carry out these repairs it was necessary that a portion of the cargo should be unshipped. Eventually, however, the *Sigurd* set sail from Stavanger on the 23rd March 1915. She was stopped in the North Sea on the 5th April 1915 by a British patrol boat and ordered to proceed to Stornaway, where the goods in question were ordered to be discharged under the provisions of the Reprisals Order in Council dated the 11th March 1915.

By the Reprisals Order in Council, dated the 11th March 1915, it is provided as follows:

Art. 2. No merchant vessel which sailed from any German port after the 1st March 1915 shall be allowed to proceed on her voyage with any goods on board laden at such port. All goods laden at such port must be discharged in a British or allied port. Goods so discharged 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.

Art. 4. 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.

When the case came before the Prize Court on the 28th June 1917, at which time the Crown asked for the condemnation of the goods under the Reprisals Order, the President decided in favour of the claimants, on the ground that the *Sigurd* was to be regarded as a neutral vessel which had sailed from a German port before the 1st March 1915, and not as one which had sailed from a neutral port after the 1st March 1915. He therefore ordered the goods to be released, and the claimants now asked for costs and damages through the improper seizure and detention.

MacKinnon, K.C. and *Balloch* for the claimants.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Pease* for the Procurator-General.

The PRESIDENT.—On the 28th June 1917 I decided a point of law raised in this case, arising out of the Order in Council of the 11th March 1915. I only arrived at my decision after considerable argument, and I decided the case simply upon certain assumed or agreed facts, merely the facts relating to the question of whether the ship had left Germany before or after the war, and facts of that kind. I ordered the goods to be released because, in my view, as I said in my judgment, the Order in Council did not apply in such a case as this. The owners of part of the cargo thus ordered to be released now make a claim against the Crown for costs and damages on the ground that the seizure was wrongful and was a seizure which entitled them in accordance with the principles applicable in this court to costs and damages.

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

I do not know the facts with regard to the claimants or with regard to the property in the goods. Certain matters have been stated by the learned Attorney-General, which, he says, raise a suspicion that the goods may belong to the enemy, and that the result of giving costs and damages would be to award costs and damages to that enemy. I say nothing on that point to-day, because I have not full particulars before me.

Assuming, and assuming merely for the purpose of deciding the question of law which has been argued here to-day, that the claimants are properly before the court, and that if costs and damages were to be allowed it is right that they should recover them—so far as I am concerned, in any future proceedings it must not be said that I have decided the case on any other ground than the assumed ground that the claimants are rightly before the court and are persons entitled to be paid costs and damages if my decision were in their favour.

The question I have to decide to-day is whether or not the seizure in the circumstances in which this was made was one which imposes the obligation on the Crown to answer to the claimants, the owners of the goods, in costs and damages.

The point which was argued on the 28th June 1917 was a very important one, and not at all an easy one to decide. It was argued by the first law officer of the Crown, and I am told to-day that my judgment is on its way to be reviewed in the Privy Council. That means that the first law officer of the Crown and the other law officers of the Crown still think that the point is arguable, and very likely they have advised that my judgment is wrong. I only say that to show that it is an important legal point involving difficulties.

Having said so much, I will only say that I shall follow the case of *The Luna* (Edw. 190), which was decided by Lord Stowell. That was a case where the capture was made in circumstances very similar to this, by reason of a wrong construction placed on an Order in Council. Lord Stowell said that where there was a legal difficulty of that kind he would not impose upon the captors the obligation of paying any costs or damages. That case is referred to and dealt with, among other cases, in the case of *The Ostsee* (Roscoe's English Prize Cases, vol. 2, 432; 9 Moo. P. C. 150) at the time of the Crimean War. The judgment of the Privy Council about that case says this: "The question of expenses does not seem to have been argued, and Lord Stowell probably felt that he was going to the very verge of the law, for he says, 'I cannot in this instance refuse the captors their expenses, but in no future case arising on the same state of facts will the court grant this indulgence.'"

I do not presume to say what I think Lord Stowell probably felt, though I see no indication in the judgment in *The Luna* (*ubi sup.*) that Lord Stowell felt that he was going to the very verge of the law. The Privy Council in *The Ostsee* (*ubi sup.*), referring to that case and others with which they were dealing under that same head, said: "If, however, these cases are to be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the respondents here, where no questions of law of any kind appear to have existed."

That passage shows that the case of *The Luna* (*ubi sup.*) was not disapproved of by the Privy Council, and tends to show that the case was one which they would have approved of if they had found it necessary on the facts of that case to deal with it. I accept the case of *The Luna* (*ubi sup.*) as an authority which I will and ought to follow. The result is that the claim for costs and damages is disallowed.

As to the costs of the legal proceedings, I have allowed that application to be made to-day which properly ought to have been made at the conclusion of the hearing in June last. It follows, I think, from my decision in this case that I ought not to give the claimants any costs at all.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Stokes* and *Stokes.*

June 28 *and July* 26, 1917.

(Before Sir S. T. EVANS, President.)

THE ACHILLES. (*a*)

Prize Court—Enemy company—Branches established in British and neutral countries—Trading between British and neutral branches—Enemy goods shipped from neutral branch to British branch—Goods shipped on British ship—Goods landed in England—Storage in warehouse at port of landing—Limits of port—Seizure—Right to seize in port—Trading with the Enemy Proclamation (*No.* 2)*—Licence to trade.*

An Austrian company had branch establishments in various parts of the world, and two of these were at Manchester and Bangkok. After the outbreak of war, the manager of the Manchester branch wrote to the Trading with the Enemy Committee, and, after stating full particulars as to the constitution and the business affairs of the company, asked whether it was possible, under the prevailing circumstances, for business transactions to be continued between Manchester and the East, pointing out at the same time that this branch was anxious not to infringe the law as to trading with the enemy. In reply, he received a letter from the secretary of the committee in which it was stated that from the facts set out there appeared to be no reason why business should not be continued as usual. The reply further referred the manager to par. 6 *of the Trading with the Enemy Proclamation* (*No.* 2) *of the* 9*th Sept.* 1914. *The manager thereupon ordered certain hides from the Bangkok branch, and these were shipped on board a British steamship in Nov.* 1914. *The steamship arrived at Liverpool in Jan.* 1915, *and the hides were stored in a certain warehouse in Liverpool, where they were subsequently seized on behalf of the Crown.*

The application of the Crown for condemnation was resisted on the grounds (a) *that the goods were outside the limits of the port of Liverpool when seized, and were therefore not subject to condemnation; and* (b) *that under par.* 6 *of the Trading with*

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

the Enemy Proclamation (No. 2) of 1914, coupled with the letter of the secretary of the Trading with the Enemy Committee, there was in existence a licence to trade between the Manchester and the Bangkok branches of the company.

Held, that the claim failed on both points, and that the hides were confiscable as lawful prize.

THIS was a case in which the Crown sought the condemnation of a portion of the cargo of the British steamship *Achilles*, consisting of a number of bales of hides.

The hides, of which there were 226 bales, were shipped on the steamship *Achilles*, a British vessel, at Bangkok by the Bangkok branch of an Austrian company, Messrs. Alois Schweiger and Co. Limited, which had business houses in various parts of the East and also a house in Manchester. The manager of the Manchester branch of the company was Mr. Sylvius Kempton, and it was he who had ordered the hides to be shipped from Bangkok for Liverpool, after the outbreak of the war, and after he had been in communication with the Trading with the Enemy Committee, in order to take care that nothing should be done which might infringe the law as to trading with the enemy. Mr. Kempton was a gentleman of Roumanian origin, who had been naturalised in this country in 1903, and in his affidavit in support of the claim made to the hides he stated that the Manchester branch of the Austrian company had been carried on entirely by British subjects, and ought not to be regarded as an alien enemy. Moreover, the Manchester branch had never, since the outbreak of war, remitted money to Vienna, and, indeed, had always carried on its operations independently. When Mr. Kempton applied to the Trading with the Enemy Committee he had stated fully the facts as to the position of the Austrian company and the Manchester branch of the business, and the reply which he had received from the secretary of the committee was in the following terms:

> In reply to your letter I beg to say that from the facts stated it would appear that there is no reason why the Manchester business of Messrs. Alois Schweiger and Co. Limited should not continue business as usual. I would refer you to par. 6 of the Royal Proclamation on Trading with the Enemy of the 9th Sept. 1914.

There was further correspondence between Mr. Kempton and the secretary of the Trading with the Enemy Committee, but this took place subsequently to the shipment of the goods.

The *Achilles* left Bangkok in Nov. 1914, and arrived at Liverpool on the 15th Jan. 1915. The 226 bales which were now in question were put into a warehouse in Liverpool on behalf of Messrs. Alois Schweiger and Co. Limited, where they were subsequently seized on behalf of the Crown. On the 30th March 1916 the Manchester branch was ordered to be wound-up, and the controller appointed by the Board of Trade now put in a claim on behalf of the Austrian company, to test the question whether the hides were assets of the branch house, and whether the proceeds of them were available for the liquidation of the demands of English creditors.

It was admitted that the hides when afloat and up to the time of their arrival at Liverpool were enemy property, but it was contended that when the goods had been placed in the warehouse at Liverpool they were outside the port of Liverpool for the purpose of lawful seizure as maritime prize, and that they were not liable to seizure by reason of par. 6 of the Trading with the Enemy Proclamation of the 9th Sept. 1914, together with the implied licence granted to the Manchester branch by the letter of the secretary of the Trading with the Enemy Committee addressed to Mr. Kempton.

Par. 6 of the Trading with the Enemy Proclamation (No. 2) of the 9th Sept. 1914 is as follows:

> Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Austen-Cartmell* for the Procurator-General.—The claim put forward must fail on both grounds. The warehouse in which the hides were stored is within the port of Liverpool; but in any case the seizure was lawful in view of the decision of the Privy Council in *The Roumanian* (114 L. T. Rep. 3; (1916) 1 A. C. 124). Again, par. 6 of the Trading with the Enemy Proclamation (No. 2) of the 9th Sept. 1914 did not exempt the goods from confiscation: (see *The Eumaeus*, 114 L. T. Rep. 190). As to the letter from the secretary of the Trading with the Enemy Committee, it might be looked upon as a valuable expression of opinion, but it could not in any sense be construed as a licence to trade.

Leslie Scott, K.C. and *Latter* for the claimant.—The goods were outside the port of Liverpool and were not liable to seizure. The particular warehouse in which they had been stored was never a part of the old port of Liverpool, and it is not now within the limits of the port. No doubt wide powers as to seizure have been given by reason of the decision in *The Roumanian (ubi sup.)*, but that case was different from the present. There the oil in question had been put on shore owing to the exercise of belligerent sea power, whereas here there was an ordinary commercial transaction, and once the goods had been landed and placed outside the limits of the port they could not be seized. But if this contention is wrong, the goods are immune from seizure by reason of par. 6 of the Order in Council of the 9th Sept. 1914, as well as under the licence which was impliedly granted to Mr. Kempton by the secretary of the Trading with the Enemy Committee in his letter of Sept. 1914. The intention of the paragraph is to make all trading transactions between branch houses of an enemy business, when established in British, allied, or neutral territories—such neutral territories not being in Europe—perfectly legitimate. Here was a transaction between the Manchester branch and the Bangkok branch, and the parties concerned were entitled to rely upon immunity from capture. Par. 6 alone is sufficient to support the claim, but if anything further is needed, there is the correspondence which passed before the hides were shipped, and this operated as a Crown licence.

The *Attorney-General* in reply.—There is no warrant or precedent to support the limitation of the right of seizure in port such as that put forward on behalf of the claimant, just as there is none to give the extended meaning to par. 6 of

the Trading with the Enemy Proclamation, which is contended for. As to the alleged licence, there is no power conferred upon the secretary of the committee to give a Crown licence, and, if a wrong opinion has been expressed, "the Crown can never be prejudiced by the *lâches* of its officers."

Cur. adv. vult.

July 26.—The PRESIDENT.—After the war began the Manchester branch of a Vienna company—Messrs. Alois Schweiger and Co. Limited—was placed under a controller appointed by the Board of Trade. The claim in this case is made by the controller, who desires the question which arises to be decided by the court.

The subject-matter of the claim is a quantity of hides, consisting of 226 bales. These bales were shipped by the Bangkok branch of the Austrian company on the *Achilles*, a British ship bound from Bangkok to Liverpool. This was done on the instructions of Mr. Sylvius Kempton, the manager of the Manchester branch. Mr. Kempton had some communicatien with the Trading with the Enemy Committee of the Board of Trade as to carrying on the business of the branch. No complaint whatsoever is made as to the conduct of Mr. Kempton in reference to the shipment in question, or as to any other matter in connection with the business of the Manchester branch after the war began.

The material facts in the case are not in dispute. They can be shortly stated. It was admitted that the hides, when afloat and when they arrived in Liverpool, were the property of the enemy company. After their arrival they were discharged and placed in a Liverpool warehouse near the docks. They were seized in that warehouse.

Two contentions were put forward as grounds for the application to release the goods. First, it was said that they were seized on land outside the port of Liverpool. Secondly, that either by virtue of par. 6 of the Order in Council of the 9th Sept. 1914 or by a licence from the Crown the goods were immune from confiscation.

As to the first point, the matter is concluded by the decision in the *Roumanian* (*ubi sup.*). Some evidence was given as to the limits of the old port of Liverpool. If that evidence was strictly acted upon, it would appear that most of the great docks on the eastern bank of the Mersey would have to be excluded from the port. In my view the warehouse where the hides were seized was a warehouse of the port of Liverpool, and on this, and on the broader ground stated by the Judicial Committee of the Privy Council in the *Roumanian* (*ubi sup.*), the goods which had been subject to capture as enemy property while afloat remained subject to capture in the warehouse.

Upon the second point, as to the suggested licence, the contention fails on both branches of the argument. Par. 6 of the Order in Council already referred to gives no licence or protection for the goods in question. That provision affords a protection for a person acting within it from being affected with the offence of trading with an enemy. It has no application to the case of the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods. In a word, the provision protects a person trading within its purview, but leaves untouched the question of title to or property in any goods; and it cannot possibly be construed as taking away from a captor the right to capture or to seize enemy goods on a British ship or in a British port.

As to the argument that the correspondence passing between Mr. Kempton and the Trading with the Enemy Committee constituted a licence which made the goods immune from seizure, that contention is also without foundation. There are many old authorities in the Prize Court of this realm upon questions of licence. They establish that an alleged licence must be strictly proved; and also that it must be strictly construed. It is clear that the committee referred to had no authority to give a licence which could defeat the rights of captors; and it is, in my opinion, equally clear that they never purported to give any such licence. It was said that Mr. Kempton desired to get possession of the goods so as to satisfy the claims of British creditors against the Austrian company. That does not affect the question which I have to decide. If the proceeds of the goods were so applied, the enemy company would *pro tanto* be relieved of their obligation to those creditors.

Moreover, it was not shown to the court that the other assets of the Manchester branch were not sufficient to satisfy the demands of all the British creditors. However that may be, the legal position in my opinion is clear. But the controller was quite justified in seeking the decision of the court. That decision is that the goods in question in the circumstances were properly seized; and the order of the court is that they be condemned as good and lawful prize in favour of the Crown in its rights to droits of Admiralty.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimant, *Busk, Mellor,* and *Norris,* for *Slater, Heelis,* and *Co.,* Manchester.

House of Lords.

March 19, 20, 22, 23, 26, *July* 12, *and Oct.* 29, 1917.

(Before Earl LOREBURN, Lords DUNEDIN, ATKINSON, SUMNER, and WRENBURY.)

BECKER, GRAY, AND CO. v. LONDON ASSURANCE CORPORATION. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance — Charter-party — Outbreak of war — Peril of capture by men-of-war—British goods on German ship—Ship puts into neutral port and remains there—Loss of venture—Claim for constructive total loss.

The appellants, English merchants, shortly before war was declared, took out a policy of marine insurance with the respondents on jute belonging to them shipped at Calcutta on board a German vessel for carriage to Hamburg. The property in the goods was not to pass to the vendees, a German firm, until the goods were delivered to them at Hamburg. The policy covered (inter alia) *peril of capture by men-of-war. During the voyage war was declared, and the master on reaching the*

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

Mediterranean on the 4th Aug. 1914, *fearing the capture of his ship by the British and French fleets, put into Messina, and a month later moved to Syracuse, where he stated he had abandoned the voyage. On the 1st Sept.* 1914 *the appellants gave the respondents notice of abandonment, and claimed that there had been a constructive loss of the goods by peril insured against.*

Held, that the frustration of the adventure was not due to a peril insured against. To constitute a loss by capture, though actual seizure were not essential, the risk must have been so imminent as to compel the ship to take refuge in some neutral port, whereas here the ship had gone into a neutral port before she had even so much as sighted a man-of-war by the voluntary act of her master for the very purpose of avoiding the risk of capture.

Sanday *v.* British and Foreign Marine Insurance Company (13 *Asp. Mar. Law Cas.* 289; 114 *L. T. Rep.* 521; (1916) 1 *A. C.* 650) *distinguished.*

Decision of the Court of Appeal, reported 13 *Asp. Mar. Law Cas.* 318; 114 *L. T. Rep.* 734; (1916) 2 *K. B.* 156), *affirmed.*

APPEAL by the plaintiffs from an order of the Court of Appeal, reported 13 Asp. Mar. Law Cas. 318; 114 L. T. Rep. 734; (1916) 2 K. B. 156, affirming a judgment of Bailhache, J., reported *ibid.*; (1915) 3 K. B. 410, in an action tried before him as a commercial cause.

Sir *John Simon*, K.C. and *R. A. Wright* for appellants.

Leslie Scott, K.C., *Adair Roche*, K.C., and *T. Mathew* for the respondents.

The following cases were referred to:

British and Foreign Marine Insurance Company v. *Sanday and Co.*, 13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A. C. 650;
Esposito v. *Bowden*, 7 E. & B. 763;
Karberg (Arnold) and Co. v. *Blythe, Green, Jourdain, and Co.*, 13 Asp. Mar. Law Cas. 235; 114 L. T. Rep. 152; (1916) 1 K. B. 495;
Rodocanachi v. *Elliott*, 31 L. T. Rep. 239; L. Rep. 9 C. P. 518;
Butler v. *Wildman*, 3 B. & Ald. 398;
Hadkinson v. *Robinson*, 3 Bos. & P. 388;
The Knight of St. Michael, 8 Asp. Mar. Law Cas. 360; 78 L. T. Rep. 90; (1898) P. 30;
Kacianoff v. *China Traders' Insurance Company*, 12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121;
Smith v. *Universal Insurance Company*, 6 Wheat. Rep. 176;
Nickels and Co. v. *London and Provincial Marine and General Insurance Company*, 6 Com. Cas. 15;
Lubbock v. *Rowcroft*, 5 Esp. 50;
Roux v. *Salvador*, 3 Bing. (N. C.) 266;
Reischer v. *Borwick*, 7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548;
Leyland Shipping Company v. *Norwich Union Fire Insurance Company*, 14 Asp. Mar. Law Cas. 4; 116 L. T. Rep. 327; (1917) 1 K. B. 873;
Grill v. *General Iron Screw Collier Company*, 14 L. T. Rep. 711; L. Rep. 1 C. P. 600;
Hamilton v. *Pandorf*, 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518;
Nobel's Explosives Company v. *Jenkins*, 8 Asp. Mar. Law Cas. 181; 75 L. T. Rep. 163; (1896) 2 Q. B. 326;
Miller v. *Law Accident Insurance Society*, 9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712;
Jones v. *Schmoll*, 1 T. Rep. 130.

Earl LOREBURN.—I agree with the order appealed from, because it seems to me that both parties have accepted as sufficient the Admiralty statement that a German steamer would have been "in peril of capture" if she proceeded on or after the 5th Aug. on a voyage to Hamburg. They have left that evidence there without more. It is therefore the measure of the danger which the ship would have to run in proceeding on this voyage. That will not be enough for the plaintiffs' case. I should have thought that capture would have been a certainty, but I have no right to act upon my own beliefs or conjectures upon a question of fact when there is evidence on which the parties rely. And there may be very good reasons of which I am unaware for being content with the Admiralty view.

Lord DUNEDIN.—I think that the facts of the case, and the law applicable thereto, were so clearly and accurately stated by Bailhache, J., the trial judge, that in truth there is little left to add. His judgment was confirmed unanimously by the learned judges of the Court of Appeal.

If there were no decisions on the point, and the expression "Men-of-War, Enemies, and Restraints of Princes," as used in a policy of insurance, had to be considered for the first time, it might not be difficult to say that the adventure in this case was frustrated by the outbreak of war, and, that being so, to hold that it fell within the words as above. This, indeed, is the result at which the jurists of the Continent and of America have arrived. Thus Phillips on Insurance (c. 13, sect. 10, par. 1115), after stating the question "Whether a loss consequent upon imminency of a capture, arrest, restraint, or detention is within the risk assured by insurance against such perils," cites Emerigon and other foreign jurists, and pronounces the correct rule to be as follows: "When after the risk has begun the voyage is inevitably defeated by blockade or interdiction at the port of departure or destination or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended; and also that an assurer on the cargo has a right to abandon."

The English authorities have not adopted this rule. They have followed the view of Lord Alvanley expressed in the case of *Hadkinson* v. *Robinson* (3 Bos. & P. 388) in 1803. The current of authority is unbroken, and the case of *Kacianoff* v. *China Traders' Insurance Company* (12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121) may be taken as a modern example. We are asked to construe an expression in a mercantile document of ancient origin, interpreted by decisions that have stood for more than a century. In such a case the only safe rule for a court is *Stare decisis*. I do not cite the cases because that has been done in the courts below.

In accordance with the English rule the question to be asked is: Was the frustration of the adventure due to a peril, or to something done in order to avoid a peril? The onus to show that the loss was due to a peril is on the appellants. How do they seek to show it? What they really urge may be reduced to two things. First, the

fact of the master putting into Messina instead of going on. Second, the statement by the Admiralty that in their opinion a vessel proceeding on or after the 5th Aug. 1914 through the Mediterranean on a voyage to Hamburg would have been in peril of capture by the allied fleets.

Now, the first fact is equally consistent with conduct to avoid a peril as with the existence of a present and actual peril; and the second is far short of proof of actual peril to the ship. The letter is entirely vague—indeed, it could not be otherwise—as to when the peril would begin or become imminent. I am of opinion, therefore, that the appellants fail to discharge the burden upon them, and that is enough; though if I had to decide positively I should decide as Bailhache, J. did, that the captain went into Messina to avoid a peril and not under the stress of an actual peril.

There remains the argument founded on the decision of this House in *Sanday's* case (13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A. C. 650). The direct application of that case fails for the simple reason that this was a German ship, and that there was no illegality in the master continuing the voyage if he thought fit. He did not think fit, and his action it was that terminated the adventure. *Sanday's* case (*sup.*) was not intended to decide and did not decide that by the mere declaration of war all goods *in transitu* to a German port or town were constructively totally lost. It was urged that in this case in terms of the policy the risk continued till the goods were delivered to the consignee, and as the consignee could not get delivery without paying freight to the German captain—which would be trading with the enemy—that constituted a loss of the adventure of the same character as in *Sanday's* case. The answer lies in the facts. It was not the impossibility of paying freight, but the conduct of the captain that actually put an end to the adventure. The same doctrine of *causa proxima* which decides the first point decides this also.

I think the appeal should be dismissed.

Lord ATKINSON.—I agree.

Lord SUMNER.—The *Kattenturm* left Malta, westward bound, on the 3rd Aug. 1914. The next that is known of her is that the captain took her into Messina on the 6th, saying that he did so to avoid capture. Between the 3rd and the 6th he had found out that Germany was at war. How or when he learned this; why he chose Messina as his port of refuge; whether he so much as saw a hostile vessel or was seen by one, we do not know. To sail direct from Malta to Messina need not have taken three days. No doubt, after proceeding some substantial distance on his course, he turned back, but anything beyond that is guesswork. He may have counted on a short war and expected to go on again soon, but I think he abandoned the voyage to Hamburg when he bore up for Messina. No point, however, has been made that, with the abandonment of the voyage, the voyage policy also determined, so as to discharge underwriters from a loss only caused thereafter, and I will not pursue the subject. There is evidence of the existence of peril of capture from the 5th Aug. onwards, but it is carefully limited. The Admiralty's reply to an inquiry made on the plaintiffs' behalf, which is not before us, has been accepted as admissible evidence. It states that "any German steamer proceeding on or after the 5th Aug. through the Mediterranean on a voyage to Hamburg would have been in peril of capture . . . when outside neutral territorial waters." That is all. We know nothing of the actual numbers of the possible captors or of their particular positions; we do not know if the presence of the *Kattenturm* was known to any of them. Memory may tell us that some of them at any rate had other things to think of just then, but I suppose we must act as if we knew nothing about it. I lay no stress on the words "on a voyage to Hamburg," although during some part or possibly the whole of the 5th Aug. the *Kattenturm* was on a voyage to Messina, and was no longer on a voyage to Hamburg. That she would have been "in peril of capture" conveys by implication that she would have had a chance of escape, but here again the plaintiffs give us no information. At any rate, there is no evidence of any peril of capture before the 5th Aug. As to the subsequent period, we know nothing of the ship's speed or equipment, or of the state of her bunkers. I have no doubt that the opinion of the Admiralty was sound, and I should have been a good deal surprised (and, may I say? disappointed) if she had gone on her way and had escaped capture, but when or where that fate would have overtaken her no one can tell. Certainly, no one who realises the vast size of the ocean and its multitudinous vicissitudes can doubt that she might well have evaded capture for many days, and for all that we know she might have been lost by fire or stranding or some cause unconnected with hostilities before ever any enemy hove in sight.

In these circumstances the plaintiffs' argument was rested mainly on (1) loss by capture or some consequence of hostilities or, (2) alternatively, by restraints of princes. The sequence of events under the first head was as follows. Peril of capture outside neutral territorial waters led the captain to the reasonable conclusion that having got safely into Messina he had better stay there. This involved the frustration of the commercial adventure of carrying the cargo to Hamburg and there delivering it under the bills of lading, whereby, in law, the cargo became a loss. On the second head the point was that from the outbreak of war the plaintiffs were by English law restrained from trading with the enemy or doing any acts in furtherance of such trading. Hence as they could not, *durante bello*, lawfully pay freight against delivery of the goods in Hamburg, their adventure came to a sudden and untimely end on the outbreak of war, and their cargo was forthwith constructively a loss. In neither case does the argument avail, if the loss was one "which is not proximately caused by a peril insured against (6 Edw. 7, c. 41, ss. 55 (1).

If there is any real distinction to be drawn between a loss by perils insured against and a loss by successfully avoiding them, between a loss by capture and a loss by the fear of it, one might think that it arises in this case. It was self-restraint, not restraint of princes, that hindered the captain from putting to sea. I do not say that he ought to have done otherwise, but the plain fact is that he could do as he liked. On both contentions, if the captain had chosen to go

on the plaintiffs could not have prevented him. He might have picked his own time; he might have weighed his chances at leisure; reasonable delay would not amount to abandonment of the voyage. Even an early peace was not wholly beyond the bounds of possibility. Accordingly, the plaintiffs further argued that the captain's election was not the proximate cause of the loss, because to have done otherwise would have been mere folly; that he had no real choice at all; and that British subjects, whom the law forbade to trade with the enemy *in futuro* by paying freight to this German ship in Hamburg, if ever she arrived, were in law restrained *in præsenti*, so that a loss of their cargo proximately resulted. The possibility that in the meantime events might occur which might legalise the act and avert a loss, such as the conclusion of peace or the grant of the Royal licence to pay the freight in order to get the goods, was, they said, of no significance.

These contentions have involved some criticisms of the rule of proximate cause, or rather of its true application in insurance cases, which, I venture to think, proceeded from a misapprehension of what this rule really is. There is no mystery about it. Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the "common sense cause," and, though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance. I venture to say so because eminent judges have sometimes seemed to differ on the point. Lord Denman, speaking of this rule in *de Raux* v. *Salvador* (4 A. & E., at p. 483), says: "Such must be understood to be the mutual intention of the parties to such contracts. In *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B., at p. 550) Lord Lindley says the same thing. In *Leyland Shipping Company* v. *Norwich Union Fire Insurance Company* (116 L. T. Rep. 327; (1917) 1 K. B., at p. 892), on the other hand, Scrutton, L J. doubts this and considers the rule to be a judge-made rule. I daresay few assured have any distinct view of their own on the point, and might not even see it, if it were explained to them, but what they intend contractually does not depend on what they understand individually. If it is implicit in the nature of the bargain, then they intend it in law just as much as if they said it in words. I think that it is so implied. Indemnity involves it apart from decisions. In effect it is the act of the parties.

I am not aware that any branch of the law of contract attaches importance to remote causes as such, though, where human responsibility is material, it may be necessary to go beyond and behind the mere event which caused the loss or damage. This is why a carrier is liable for losses by perils excepted from his contract to carry and deliver, where the previous default of those for whom he is responsible has brought that peril into injurious operation. His express stipulation for exemption has to be reconciled with his implied undertaking to have the carriage performed with care: (*Grill* v. *General Iron Screw Collier Company*, per Willes, J., 14 L. T. Rep. 711; L. Rep. 1 C. P., at p. 612; *Hamilton* v. *Pandorf*, per Lord Halsbury, L.C., 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas., at p. 524). So in marine insurance, where "the loss is attributable to the wilful conduct of the assured" (Marine Insurance Act 1906, s. 55 (2) (*a*), after the loss by perils insured against has been proved the question still remains whether the assured's wilful conduct caused them to operate. In other cases the insurer "is liable for any loss proximately caused by a peril insured against even though the loss would not have happened but for the misconduct or negligence of the master or crew": (sect. 55 (1) (*a*) In a contract of sale or carriage or service the contractor promises to do something for a price, a freight, or a wage, and his liability depends not simply on the question whether something has happened or failed to happen, but whether more remotely it happened or failed to happen owing to his breach of his obligation. In a contract of indemnity (and a contract of suretyship is very analogous) the insurer promises to pay in a certain event and in no other, namely, in case of loss caused in a certain way, and the question is whether the loss was caused in that way, and whether the event occurred, and the remoter causes of this state of things do not become material. If contracts of marine insurance were still regarded, as once they were, as aleatory bargains this would be plain on the face of them. One need only ask, has the event, on which I put my premium, actually occurred? This is a matter of the meaning of the contract, and not, as seems sometimes to be supposed, of doing the liberal and reasonable thing by a reasonable assured. This is why, as it seems to me, the *causa proxima* rule is not merely a rule of statute law, but is the meaning of the contract writ large. This is also why the reasonableness of the conduct of the *Kattenturm's* captain, and the unreasonableness of suggesting that he might have done otherwise are alike off the point. So long as his action was voluntary it was his action and not that of the captain of a British man-of-war, and the policy insures against the second, but against the first only when it amounts to barratry. There is no case here of duress nor opportunity for saying that his will was not free, except upon grounds too theological to be worth pursuing.

It must be admitted that the terminology of causation in English law is by no means ideal. It would be the better for a little plain English. I think "direct cause" would be a better expression than *causa proxima*. Logically, the antithesis of proximate cause is not real cause but remote cause. Lord Ellenborough uses *causa causans* as its equivalent in *Gordon* v. *Rimington* (1 Camp. 123). Abbott, C.J. speaks of "immediate" cause in *Walker* v. *Maitland* (5 B. & Ald. 171); Lord Fitzgerald of "direct and immediate" cause in *Cory* v. *Burr* (5 Asp. Mar. Law Cas. 109; 49 L. T. Rep. 78; 8 App. Cas., at p. 406), and my noble and learned friend, Lord Loreburn, of "direct" cause in *Sanday's* case (13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A. C., at p. 659). Many similar expressions might be quoted.

Again, it is important that the same word should mean the same thing when used in a mercantile contract, whether that contract be of one

description or another. Perils of the seas do not mean one thing in a bill of lading and something else in a policy; restraints of princes do not bear a different interpretation in the one or in the other, but this is not the question. Restraints of princes may excuse non-delivery of cargo under a contract of carriage, and yet not cause a loss of cargo recoverable under a contract of insurance. It is settled now that mere apprehension that a restraint of princes will come into operation is not the same thing as its existence or available for either purpose. There is also authority for saying (*Nobel* v. *Jenkins*, 8 Asp. Mar. Law Cas. 181; 75 L. T. Rep. 163; (1896) 2 Q. B. 326) that if restraint of princes is in being and reasonably likely in the long run to prevent performance of a contract, if its further performance is proceeded with, any further performance is forthwith excused, although the direct operation of the restraint has not yet occurred. This is because the contract of carriage, truly construed, so stipulates. It has no bearing upon the question whether a refusal of further performance, though excusable, is the effect of the carrier's exercise of judgment or the effect of the restraint of princes.

Many cases have been cited to your Lordships, but none to the contrary of this. In *Rodocanachi* v. *Elliot* (31 L. T. Rep. 239; L. Rep. 9 C. P., at p. 522) the Germans had prevented all communication between Paris and other places from the 19th Sept. down to the date of the writ. Events before the 19th Sept., it was held, might give rise to some claim against carriers, but could afford no defence to underwriters, if, as was the case, a loss by restraint of princes then occurred and thenceforward continued. The contention that some direct action on the goods was necessary was rejected. There was no question of election or volition on the part of those in charge of the goods. How this case helps the appellants I cannot see. That in Rodocanachi's case the goods were ashore and here were afloat makes no difference. It is said that regard must be had to changes in the mechanism of war, and that cruisers at Gibraltar as truly shut up this jute in Messina in 1914 as the German besiegers shut in the silk at Bercy in 1870. I do not suppose that any rule can be laid down to fix the distance from which an encircling force may be said to besiege a beleagured city, or from which a hostile force may be said to restrain its enemies. I doubt if changes in the speed of ships or the possibility of signalling by wireless telegraphy or otherwise affect the matter. They help the hunter no more than the quarry. *Miller* v. *Law Accident Insurance Society* (9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712) was a case in which a f.c.s. clause warranted the policy free of certain perils and their consequences. It was held that beyond doubt there was a loss by restraint of princes under the policy apart from the warranty; the only question was whether it was also caused by perils included in the f.c.s. clause, so as to be taken out of the insurance. Stirling, L J. expressly says at p. 721 that the captain did not act voluntarily. The frustration of the adventure was caused by the direct operation of an order, which was an act of State and was backed by the existence of available force though its employment proved to be unnecessary.

I will not review the cases generally or discuss the differences between the English and the United States authorities, but I will refer to a decision of Lord Mansfield, which shows at how early a date a strict construction was applied to causation in policies of insurance. It is *Jones* v. *Schmoll* (1 T. R. 130, note). The policy was on prime slaves, male and female, to pay for mortality by mutiny exceeding 10 per cent. A mutiny occurred and was suppressed; much blood was shed. Lord Mansfield allowed the value of those slaves who died of wounds or jumped overboard when fired on as being losses by mutiny, but not the value of "such as being baffled in their attempts chose a mode of death by fasting and died through despondency," because "this is not a mortality by mutiny, but the reverse, for it is by failure of mutiny." The cases down to that of *Kacianoff* v. *China Traders' Insurance Company* (12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121) all follow one uniform and logical line. If any is illogical it is *Butler* v. *Wildman* (3 B. & Ald. 398), for there the dollars went to the bottom, and that by the prompt decision of the master. The adventure of which they formed part was captured, and so they may be said to have been lost to their owners by capture, though the Spanish captors never got them. The immediate and actual control, which the captors possessed by armed force over the whole adventure, was equally a capture of the part, and perhaps it is the best way of putting it to say that the captors captured the whole adventure but the captain baulked their profiting by a part of it, though as the owners did not get their dollars back their loss by capture was not adeemed.

I think *Sanday* v. *British and Foreign Marine Insurance Company* (*sup.*) is distinguishable. There both ship and goods were British, and your Lordship's judgments were based on the fact that the ship abandoned the voyage as the proximate result of the outbreak of war. It was held that no distinction could be drawn for the purpose of causation between the event which called the subject's duty into existence and the subject's obedience to that duty. So high was the obligation that an act done in performance of that obligation did not casually bear the character of a voluntary act or of a new intervening cause. Such a decision does not support the contention that the abandonment of the voyage by a ship, which was under no such obligation, is other than the captain's voluntary act or that the obligations of a purely passive cargo-owner can divest that voluntary act of the character of a new intervening cause, which it would otherwise bear.

If it were otherwise, some remarkable consequences would follow. At 11 p.m. on the 4th Aug. 1914, all the world over, every parcel of goods owned by His Majesty's subjects and laden on board of German vessels or of neutral vessels bound for German ports, for freight not prepaid, suddenly became a total loss. Both ships and goods might be safe and sound and likely to remain so; cargo-owners and shipowners, captains and crews, might all be ignorant of the outbreak of war. The assured, for want of advice that their goods were afloat, might have made no declarations to underwriters under floating policies, and the underwriters might be

quite unaware that they were at risk. None the less on that day and at that hour the ocean became suddenly full of constructive total losses securely laden in uninjured ships. British underwriters are entitled to sue and labour for the defence, safeguard, and recovery of the goods insured or to endeavour to salve them for the benefit of whom it may concern, but they, equally with British cargo-owners, would be forbidden to pay freight to German shipowners for that purpose. Indeed, unless by British capture they could come by their own again, the] cargo-owners would have to let their goods remain in enemy hands, and that at the expense of British underwriters. Where the ships belong to His Majesty's subjects such is the law—your Lordships have so decided; but I should be loth to carry that decision beyond its true *ratio decidendi*. The language of my noble learned friends, Lord Loreburn, at p. 658; Lord Atkinson, at pp. 664 and 665; Lord Parmoor, at p. 670; and Lord Wrenbury, at p. 672 of (1916) 1 A. C, shows that the illegality of any further prosecution of the voyage, both ship and master being British, was the ground of the decision.

In truth, in the present case the outbreak of war imposed no practical disability on the British cargo-owners then and there beyond what already existed. Their obligations as British subjects had nothing to do with the actual termination of this adventure. The declaration of war, at the time when it was made, only prohibited acts which the plaintiffs were in any case already powerless to perform. If it frustrated the adventure, it did so eventually, but at the same time, though for different reasons and in a different way, the captain of the *Kattenturm* frustrated it forthwith. If he had continued the adventure and had proceeded, the cargo-owners might have sustained a recoverable loss by other perils insured against without any illegality on their part.

The appellants' other contentions may be shortly disposed of. This is not a case in which the subject-matter of the insurance was abandoned "on account of its initial total loss appearing to be unavoidable" within sect. 60. Neither is it a case of loss by any other peril "that may come to the hurt" of the cargo similar to enemies, as in the *Knight of St. Michael* (8 Asp. Mar. Law Cas. 360; 79 L. T. Rep. 90; (1898) P. 30). It is said that there was a direct loss by "enemies" when the German captain refused to deliver to the plaintiffs' representative at Messina, except on payment of freight, which he had not earned, and of charges which were not due. To be sure he said that he did so by order of his Government, but I do not see why we should believe him. Bailhache, J. did not, and it does not appear what motive he had for speaking the truth. Committed in neutral waters his act was a mere civil wrong, and not one falling within the cause of loss called "enemies" in the policy. For these reasons I think that the appeal fails and should be dismissed with costs.

Lord WRENBURY agreed in the appeal being dismissed.

Solicitors for the appellants, *Rehder* and *Higgs*.
Solicitors for the respondents, *Waltons*.

Judicial Committee of the Privy Council.

July 24, 25, *and Oct.* 16, 1917.

(Present: The Right Hons. Lord PARKER OF WADDINGTON, Lord WRENBURY, and Sir ARTHUR CHANNELL)

THE HAKAN. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE).

Prize Court—Neutral ship—Contraband cargo—Enemy destination—Knowledge of shipowner of the character of the goods—International law—Practice of maritime States—Condemnation of ship—Confiscation of cargo.

Knowledge on the part of the shipowner of the contraband character of the cargo is sufficient to justify the condemnation of the ship, at any rate where the contraband constitutes a substantial part of the whole cargo.

Where a neutral shipowner lets his ship on a time charter to an enemy dealer in conditional contraband for carriage to an enemy base of supply, with knowledge that the conditional contraband is vitally necessary to and has been requisitioned by the enemy Government for the purposes of the war, he is thereby "taking hostile part against the country of the captors" and "mixing in the war" within the meaning of those expressions as used by Chase, C.J. in The Bermuda (3 *Wall.* 514), *and the ship is liable to condemnation and the cargo to confiscation as good and lawful prize.*

Decision of the President (*reported* 13 *Asp. Mar. Law Cas.* 479; 115 *L. T. Rep.* 389; (1916) *P.* 266) *affirmed.*

APPEAL by the shipowners from a decision of the President (Sir Samuel Evans) sitting as judge of the Prize Court (reported 13 Asp. Mar. Law Cas. 479; 115 L. T. Rep. 389; (1916) P. 266), pronouncing the Swedish steamship *Hakan* liable to condemnation and her cargo to confiscation as good and lawful prize.

R. H. Balloch for the appellants.

Sir *Frederick Smith* (A.-G.), Sir *Gordon Hewart* (S.-G.), *R. A. Wright*, K.C., and *Pearce Higgins* for the Crown.

The facts fully appear from the judgment.

The following authorities were referred to:

The Ringende Jacob, 1798, 1 C. Rob. 89; 1 Eng. P. C. 60;
The Mercurius, 1799, 1 C. Rob. 288;
The Neutralitet, 1801, 3 C. Rob. 295; 1 Eng. P. C. 309;
The Bermuda, 1865, 3 Wall. 514;
The Zamora, 114 L. T. Rep. 626; (1916) A. C. 77;
The Jonge Margaretha, 1 C. Rob. 189;
Wheaton, Dana's edit., pp. 664 and 665;
Westlake's International Law (War), 2nd edit., 291;
Hall's International Law, 6th edit., 666.

The considered opinion of the board was delivered by

Lord PARKER OF WADDINGTON.—The Swedish steamship *Hakan*, the subject of this appeal, was captured at sea by H.M.S. *Nonsuch* on the 4th April 1916, having sailed the same day from Haugesund, in Norway, on a voyage to Lübeck, in Germany, with a cargo of

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

salted herrings. Foodstuffs had as early as the 4th Aug. 1914 been declared to be conditional contraband. The writ in the present proceedings claimed condemnation of both ship and cargo, the former on the ground that it was carrying contraband goods and the latter on the ground that it consisted of contraband goods.

It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods (see the Declaration of London).

The cargo owners did not appear or make any claim in the action, although, according to the usual practice of the Prize Court, even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothenburg. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in Council. Under these circumstances, the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship.

In their Lordships' opinion, goods which are conditional contraband can be properly condemned whenever the court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes: (*The Jonge Margaretha*, 1 C. Rob. 189). The fact that the goods in question are on the way to an enemy base of naval or military equipment or supply would alone justify an inference as to their probable application for warlike purposes. But the character of the place of destination is not the only circumstance from which this inference can be drawn. All the known facts have to be taken into account. The fact that the goods are consigned to the enemy Government, and not to a private individual, would be material. The same would be the case if, though the goods are consigned to a private individual, such individual is in substance or in fact the agent or representative of the enemy Government.

In the present case Lübeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively or at all as a base of naval or military equipment. On the other hand, it is quite certain that the persons to whom the goods were consigned at Lübeck were bound forthwith to hand them over to the Central Purchasing Company, of Berlin, a company appointed by the German Government to act under the direction of the Imperial Chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the Government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany had made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes, and this being so, their Lordships are of opinion that the goods were rightly condemned.

The second question their Lordships have to determine relates to the condemnation of the ship for carrying the goods in question. It is, of course, quite clear that if art. 40 of the Declaration of London be applicable the ship was rightly condemned, inasmuch as the whole cargo was contraband. The Declaration of London has, however, no validity as an international agreement. It was, it is true, provided by the Order in Council of the 29th Oct. 1914, that during the present hostilities its provisions should, with certain very material modifications, be adopted and put in force. But the Prize Court cannot, in deciding questions between His Majesty's Government and neutrals, act upon this order except in so far as the Declaration of London, as modified by the order, either embodies the international law or contains a waiver in favour of neutrals of the strict rights of the Crown. It is necessary therefore to consider the international law with regard to the condemnation of a ship for carrying contraband apart from the Declaration of London.

It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in *The Neutralitet* (*No.* 1) (3 C. Rob. 294): "The modern rule of the law of nations is certainly," he says, "that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such 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 policy of modern times has, however, introduced a relaxation on this point, and the general rule now is that the vessel does not become confiscable for that act. But this rule is liable to exceptions where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."

It is to be observed that Lord Stowell does not say that the particular cases he refers to are the only exceptions to the modern rule. On the contrary, his actual decision in *The Neutralitet* creates a third exception. It should be observed too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship. He held in the case before him that this ground for the modification of the rule entirely failed, so that the ancient rule applied. The reasoning is sound. For if the ancient rule was modified because of the possible want of knowledge on the part of the

shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge, and if he sails under a false destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. In his earlier decision in *The Ringende Jacob* (1 C. Rob. 89) Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might be properly inferred, the rule thus stated does not differ from that laid down in the subsequent case of the *Neutralitet*. But the words used have by some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo, there must be on the part of the shipowner some intention or conduct to which the epithets "malignant or aggravating" can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in the *Neutralitet*. Sailing under a false destination or false papers may possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But, in the case of the shipowner who also owns the contraband on board his ship, it is difficult to see where the malignancy or aggravation lies, if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction.

Nevertheless, it was this construction of Lord Stowell's words in the *Ringende Jacob* rather than the reasoning on which his decision in the *Neutralitet* case was based, that was adopted by the Supreme Court of the United States in the case of *The Bermuda* (3 Wall. 514). In that case Chase, C.J., in delivering the opinion of the court, says as to the relaxation of the ancient rule: "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. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting. . . . Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent and the general features of the transaction must be taken into consideration in determining whether the neutral owner intended or did not intend by consenting to the transportation to mix in the war.

Passing from the English and American decisions to the views which were at the commencement of the present hostilities entertained by the Prize Courts or jurists of other nations, we find what at first sight appears to be considerable divergence of opinion. If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred, and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible.

Referring, for example, to the view entertained in Holland, their Lordships find that, although the ship is *primâ facie* confiscable if an important part of the cargo be contraband, proof that the master or the charterers could not have known the real nature of the cargo will secure the ship's release. In other words, the proportion of the contraband to the whole cargo raises a presumption of knowledge which may be rebutted. Again, according to the views held in Italy, the ship carrying contraband is liable to confiscation only where the owner was aware that his vessel was intended to be used for the carrying of contraband. Here knowledge is made the determining factor, the manner in which knowledge is to be proved or inferred being left to the general law. Again, according to the views entertained in Germany, a ship carrying contraband can only be confiscated 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 formed more than a quarter of the cargo. Here also knowledge is made the determining factor, though there is a concession to the neutral if the proportion of the contraband to the whole cargo be sufficiently small. Once more, in France the test of the right to confiscate is whether or not the contraband is three-fourths in value of the whole cargo. This view may be looked on as defining the circumstances in which an irrebuttable inference of knowlege arises. The views entertained in Russia and Japan are similarly explicable. In their Lordships' opinion, the principle underlying all these views is the same. There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo, but in some cases the inference as to knowledge arising from the extent to which the cargo is contraband cannot be rebutted, while in others it can, and in some cases, even where there is the requisite knowledge, the contraband must bear a minimum proportion to the whole cargo.

It follows that the views entertained by foreign nations point to knowledge of the character of the goods being alone sufficient for condemnation of a vessel for carrying contraband; in other words they support the principle to be derived from the reasoning in the *Neutralitet* rather than the principle which has been deduced from the dictum in the *Ringende Jacob*, and developed in the *Bermuda*. It should be observed that both

Westlake and Hall agree that knowledge is alone sufficient to justify confiscation: (see Westlake, International Law (War), 2nd edit., 291; Hall International Law, 6th edit., 666).

Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate where the goods in question constitute a substantial part of the whole cargo.

In the light of what has been said as to the rule of international law, their Lordships will now, proceed to consider the special facts of this case. The owners of the ship are a Swedish firm carrying on business at Gothenburg. On the 8th Jan. 1916 they chartered the ship to a German firm of fish dealers for a period of six weeks from the time when the vessel was placed at charterers' disposal with power for the charterers to prolong this period up to the 16th May 1916. The voyages undertaken by the charterers were to be from Scandinavian to German Baltic ports. It must have been quite evident to the owners that the ship would be used for the importation of fish into Germany. They must also have known that foodstuffs were conditional contraband. It is almost inconceivable that they did not also know of the food difficulties in Germany and of the manner in which the German Government had in effect requisitioned salted herrings to meet the exigencies of the war. They had an opportunity in the court below of establishing their want of knowledge if it existed, but they did not attempt to do so. The inference that they did in fact know that the vessel would be used for the purpose for which it was used is irresistible. If knowledge of the character of the goods be the true criterion as to confiscability, the vessel was rightly condemned.

Even on the hypothesis that something beyond mere knowledge of the character of the cargo is required, something which may be called "malignant or aggravating" within the principles of *The Ringen de Jacob* or *The Bermuda* (*sup.*) decisions, that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of his trade at a time when the conditional contraband is vitally necessary to and has been requisitioned by the enemy Government for the purpose of the war is, in their Lordships' opinion, deliberately "taking hostile part against the country of the captors" and "mixing in the war" within the meaning of those expressions as used by Chase, C.J. in *The Bermuda* (*sup.*).

In their Lordships' opinion the appeal fails, and should be dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitor for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, July 30, 1917.

(Before DARLING, AVORY, and SHEARMAN, JJ.)

HAWS (app.) *v.* BROWN (resp.). (*a*)

Seaman—Engagement—Signing articles—"Lawfully engaged"—Neglecting to join ship—Offence—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 221—*Defence of the Realm Regulations Consolidated* 1917 *sect.* 39A.

A person who, having engaged to serve on board a particular vessel, fails to join his ship, is guilty of an offence under sect. 39A *of the Defence of the Realm Regulations Consolidated* 1917, *although he has not signed articles under the Merchant Shipping Act* 1894.

The respondent, a seaman, entered into an agreement with the agent of the owners of a certain steamship stationed at a port in the north of Scotland and duly requisitioned by the Admiralty, whereby he undertook to proceed from L. on a certain date to the named Scottish port. At the time of entering into the agreement he signed a document under which, after promising to start by a certain train from L., it was stipulated that articles should be signed when the respondent had got on board the steamship. The respondent never left L. and never joined the ship. On an information being laid against him under sect. 39A *of the Defence of the Realm Regulations, it was contended on his behalf that, as he had not signed articles in accordance with the requirements of the Merchant Shipping Act* 1894, *he could not be convicted, as he had never been "lawfully engaged" within the meaning of that Act. The magistrate before whom the case was heard was of opinion that there had been no lawful engagement inasmuch as no ship's articles had been signed by the respondent, and he therefore dismissed the information.*

Held, that the learned magistrate was wrong; that although the respondent could not have been forced to proceed to sea unless he had signed articles, he was nevertheless guilty of an offence against the Defence of the Realm Regulations Consolidated 1917 *in that he was "lawfully engaged" within the meaning of sect.* 39A *of the regulations when he entered into the agreement with D., and that the case must be remitted to the magistrate with a direction to convict.*

CASE stated by the stipendiary magistrate of Liverpool.

An information was preferred by the appellant, Alison Davie Haws, against the respondent, Walter Brown, for that he, the respondent, having been "lawfully engaged" to serve on board the British steamship *Castle Eden*, while requisitioned by the Admiralty, did on the 12th April 1917 fail to join the said ship.

At the hearing of the information it was proved that the information was laid under sect. 39A of

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

the Defence of the Realm Regulations 1917, and that the proper authority for the proceedings had been obtained from the principal naval transport officer, Liverpool.

The following facts were either proved or admitted:—

1. The British steamship *Castle Eden* was requisitioned by the Admiralty.

2. The said steamship was with His Majesty's fleet in the north of Scotland.

3. The owners of the steamship, being in need of a certain number of seamen of various ratings, resolved that the men required should be engaged in Liverpool and sent to Scotland.

4. Instructions were thereupon given by the owners to the Shipping Federation Limited to engage eight men.

5. A man named Deacon, acting for and on behalf of the owners, agreed with and proposed to engage the respondent, Walter Brown, to serve as an able seaman on the steamer on the 12th April 1917.

6. It was further agreed between Deacon and the respondent, Brown, that the latter should be at the Exchange Station, Liverpool, on the afternoon of the 12th April 1917, and should proceed thence to Thurso, in Scotland, where the *Castle Eden* was then lying.

7. In pursuance of the agreement named a document was drawn up by Deacon and signed by Brown, and also by other seamen who were engaged at the same time as Brown, in the following terms (*inter alia*): "We, the undersigned, hereby agree to be at the Exchange Station this afternoon at 4.15 p.m. to proceed to Thurso, and there sign articles on steamer *Castle Eden*."

8. The respondent saw Deacon about 2.45 p.m. on the afternoon of the 12th April 1917, when he, the respondent, informed Deacon that neither he nor the other men who had been engaged and had signed the agreement would proceed to the vessel.

9. Subsequently the respondent, as well as the other men, again verbally agreed to serve on the *Castle Eden*, and to present themselves at the Exchange Station, Liverpool, as previously arranged.

10. The respondent never appeared at the Exchange Station, and never joined the steamship.

The learned stipendiary magistrate was of opinion that the respondent had not been lawfully engaged to serve on the steamship *Castle Eden*, in accordance with the requirements of sect. 39A of the Defence of the Realm Regulations Consolidated, dated the 31st Jan. 1917, because the term "lawfully engaged" as therein used had the same meaning as in sect. 221 (*b*) of the Merchant Shipping Act 1894. The respondent had not been and could not be "lawfully engaged" in accordance with the terms of the Merchant Shipping Act 1894, except by agreement in the form provided by that Act, duly signed by him. The learned magistrate therefore dismissed the information.

By sect. 221 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), it is provided:

> If a seaman lawfully engaged, or an apprentice to the sea service, commits any of the following offences, he shall be liable to be punished summarily as follows: . . . (*b*) If he neglects, or refuses without reasonable cause, to join his ship, or to proceed to sea in his ship, or is absent without leave at any time within twenty-four hours of the ship's sailing from a port, either at the commencement or during the progress of a voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion, or is not treated as such by the master, be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days' pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses properly incurred in having a substitute; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour.

By sect. 39A of the Defence of the Realm Regulations, consolidated and revised to the 31st Jan. 1917, it is provided:

> If a person lawfully engaged to serve on board any ship or vessel belonging to or chartered, hired, or requisitioned by the Admiralty or Army Council (*a*) neglects or refuses without reasonable cause to join his ship or vessel, or to proceed to sea in his ship or vessel, or deserts or is absent without leave from his ship or vessel or from his duty at any time; or (*b*) joins his ship or vessel, or is whilst on board his ship or vessel, in a state of drunkenness so that the performance of his duties or the navigation of his ship or vessel is thereby impeded, he shall be guilty of an offence against these regulations; and the master, mate, or owner of the ship or vessel, or his agent, or any naval or military officer, or any superintendent as defined by the Merchant Shipping Acts 1894 to 1914, with or without the assistance of any police constable, may convey on board his ship or vessel any seaman whom he has reason to believe to be guilty of an offence under paragraph (*a*) of this regulation, and police constables are hereby directed to give assistance if required. The exercise of the powers conferred by this regulation shall not be subject to the restrictions imposed by the Merchant Shipping Acts 1894 to 1914, or the exercise of any similar powers conferred by those Acts, and for the purposes of this regulation a copy of any entry made in an official log book in manner provided by the Merchant Shipping Act 1894 shall, if it purports to be signed and certified as a true copy or extract by the officer in whose custody the original log book is intrusted, be admissible in evidence.

Greaves Lord for the appellant.—The learned magistrate was wrong. The prohibition in the Merchant Shipping Act 1894 was merely against carrying a man to sea without his having first signed articles. This was a different case. The respondent had been engaged, and had been "lawfully engaged," and he was therefore liable to the penalties prescribed by the regulations.

Abinger for the respondent.—The learned magistrate was right in dismissing the information. Before a seaman could be said to be "lawfully engaged" he must have an opportunity of knowing the details of his agreement to serve. There was nothing of the kind in the present case. The respondent, like other seamen with him, had engaged to proceed from Liverpool to Thurso, and there it was that the articles were to be signed. Until these were signed there was no lawful engagement, and there was full opportunity afforded of withdrawing from the arrangement entered into with Deacon. If a conviction was obtained in a case like the present,

all the benefits conferred upon seamen as to their engagements under the Merchant Shipping Acts would be swept away.

Greaves Lord in reply.—It was to be remembered that vessels at the present time were often stationed at ports where there was little or no opportunity of engaging crews. Men had to be engaged wherever they could be obtained, and it was not possible for the articles to be signed until the men were on board.

Darling, J.—In this case the respondent, a seaman named Walter Brown, was summoned, after having been lawfully engaged to serve on board the British steamship *Castle Eden*, a vessel which had been requisitioned by the Admiralty, for failing to join the ship. The facts are fully set out in the case stated, and it appears that the respondent had entered into an agreement, and it was a "lawful agreement," with a man named Deacon, who was acting on behalf of the owners of the steamship.

The engagement with the respondent—it was also signed by other seamen—was as follows: "We, the undersigned, hereby agree to be at Exchange Station this afternoon at 4.15 to proceed to Thurso, and there sign articles on steamer *Castle Eden*, at the undermentioned rates, &c. . . ." He did not present himself at the Exchange Station, and then he was summoned, and proceedings were taken against him under sect. 39A of the Defence of the Realm Regulations.

On behalf of the respondent it has been contended that he did not commit any offence at all, because he had not been lawfully engaged on board the steamship. As I have already stated, the information was laid under sect. 39A of the Defence of the Realm Regulations, and this section not only makes it an offence if a seaman who has been "lawfully engaged" fails to carry out his engagement, but also if he neglects or refuses to proceed to sea in the ship, although he could not be forced to proceed to sea in a ship unless he had signed articles. I think, however, that it is quite plain that a seaman may commit an offence against the Merchant Shipping Act and also against these regulations by refusing to join the ship, on board of which he may be asked to sign the articles under which he will have to sail. He could not be convicted of the offence of refusing to go to sea unless he had signed articles. But in this particular case I think that the learned magistrate should have convicted. The respondent was, in my view, lawfully engaged by Deacon on behalf of the owners, and, as the words of the section imply, if a person who is lawfully engaged neglects or refuses without reasonable cause to join his ship, he must be deemed to have committed an offence, the respondent was guilty of an offence by declining to proceed to Thurso after being engaged at Liverpool. This appeal must be allowed, and the case will be sent back to the learned magistrate with a direction to convict.

Avory, J.—I agree.

Shearman, J.—I am of the same opinion.

Solicitors for the appellant, *G. H. Walker* and *Tree*, for *Weightman, Pedder*, and *Co.*, Liverpool.

Solicitor for the respondent, *Alexander Smith.*

Monday, July 2, 1917.

(Before Rowlatt, J.)

W. Millar and Co. Limited *v.* Owners of Steamship Freden. (*a*)

Charter-party—Cargo of maize—Dead-weight capacity guaranteed—Whether lifting capacity or capacity to carry maize.

A charter-party provided that a ship should load "a full and complete cargo of maize in bags." The shipowners guaranteed that the ship's dead-weight capacity was 3200 tons, and freight was to be paid on that quantity. The lifting capacity of the ship was 3200 tons, but her cubic capacity did not admit of her loading 3200 tons of maize.

Held, that the guarantee was in respect of the ship's lifting capacity, and not her capacity to carry tons of maize.

Action in the Commercial List.

The plaintiffs, the charterers of the steamship *Freden*, claimed in the action to recover damages for breach of a charter-party dated the 23rd Dec. 1915.

By the charter-party it was provided (*inter alia*) that the *Freden* should proceed to Durban and there load from the charterers' agents "a full and complete cargo of maize in bags." She was then to proceed to any one safe port in the United Kingdom and deliver the cargo upon payment of freight at rates varying according to the port of discharge selected. Clause 5 provided: "The owners guarantee the ship's dead-weight capacity to be 3200 tons and freight to be paid on this quantity."

The ship had in fact a lifting capacity of 3200 tons, but she had only sufficient cubic capacity to load about 3080 tons of maize.

The charterers claimed as damages the freight paid by them to the shipowners under the charter-party on the balance of 118¾ tons which the ship was unable to load—namely, 400*l.* 15*s.* 8*d.*

MacKinnon, K.C. and *R. A. Wright* for the charterers.—The guarantee of 3200 tons must be read as a guarantee of capacity to load that amount of maize, which the parties had directly in mind, the charter-party dealing with the carriage of maize, and maize only, the words "or other lawful merchandise" having been struck out. They referred to

Mackill v. *Wright*, 14 App. Cas. 104.

Leck, K.C. and *Alexander Neilson* for the shipowners.—The guarantee was in respect of the lifting capacity of the ship, and not of her cubic capacity. Her lifting capacity was correctly given, and the owners' warranty is satisfied. The maize not being a dead-weight cargo, the charter-party should not be construed with reference to maize. They referred to

Carnegie v. *Conner*, 61 L. T. Rep. 691; 24 Q. B. Div. 45.

Cur. adv. vult.

Rowlatt, J. read the following judgment:—In this case the charter-party provided that the ship should load and the charterers provide at Durban a full and complete cargo of maize (the words "wheat and (or) flour and (or) other lawful merchandise" which are in the printed form being struck out). She was then to proceed and discharge at one of a number of ports as ordered.

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

The freight was to be payable at and after rates which varied according to the port of discharge. Then follows this clause: "The owners guarantee the ship's dead-weight capacity to be 3200 tons, and freight to be paid on this quantity." This is substituted for the printed clause which made freight payable per ton of wheat and (or) flour delivered or, if other cargo was shipped, the total freight to be equal to freight on a full cargo of wheat and (or) flour. The effect of the alteration is to make the charter-party one at a lump-sum freight, varying, however, with the port of discharge. The ship in fact had a lifting capacity of 3200 tons, but she had not cubic capacity to take on board maize of that weight. It was agreed that if she had been able to load more than 3200 tons the charterers would have been entitled to ship it without paying more freight, and the owners would have been entitled to call upon them to do so, though the damages, if they refused, would possibly have been nominal. Those results follow because it is a lump-sum freight. But the charterers say that as they could only load less, they are entitled not *eo nomine* to a reduction of freight, but to damages for breach of the guarantee, which damages would include (and they claim no more) return of the freight in respect of the short amount of the cargo they were able to load.

The short question is, therefore, whether "ship's dead-weight capacity" in this charter-party means her capacity to carry tons of maize or her abstract lifting capacity. The latter, in my opinion, is the primary meaning of the phrase; indeed, it can have no other meaning in itself unless it is used with reference to some cargo. In this charter-party if the cargo had formerly been described as lawful merchandise I should have thought that it would have been abundantly clear that the contract simply was that freight was to be paid on the dead-weight capacity of the ship in the abstract sense taken and guaranteed to be 3200 tons, and that the cargo carried had nothing to do with it. It could not have been contended that the guarantee was of capacity to carry 3200 tons of an average or reasonable cargo or anything of that sort. Does, then, the mere mention of maize as the cargo to be carried change the meaning of the phrase "ship's dead-weight capacity" from a designation of the ship's lifting capacity in the abstract to a designation of something quite different, namely, of her combined lifting and cubic capacity applied to the ratio of bulk to weight existing in maize? For all I know, shipowners may be aware of the weight of South African maize, which, according to the evidence, has been exported for ten or twelve years, but if the plaintiffs' contention upon the point of construction is right it seems to me it would have to prevail also in the case of a new kind of cargo. I cannot adopt that view unless I am constrained by authority, It seems to me to involve giving words a secondary sense by reading them in close connection with a provision in another part of the document in a case where such connection is not necessary to afford a simple or natural meaning to the whole.

To test it by approaching the matter from the opposite point of view, assume the parties to have desired to provide for the carriage of a cargo of maize at a freight calculated on the guaranteed dead-weight capacity of the ship in the strictest sense, would they not have written down exactly what they have written here, and were they bound to add an explanation that though they had mentioned maize as the cargo they did not intend to change the sense of the words "dead weight capacity" so as to make it mean "capacity to carry maize"?

It is said, however, that the effect of *Mackill* v. *Wright* (14 App. Cas. 104) is to compel them to do this. In that case the language and the circumstances were both different from what is found here. The owners guaranteed that the vessel should carry not less than 2000 tons of dead-weight cargo, and it was provided that should the vessel not carry the guaranteed dead-weight as above there was to be a *pro rata* reduction per ton to be made from the first payment of freight. The cargo was to be "all such goods and merchandise as the charterers should tender," but there was written in the margin "including machinery," and some measurements that represented the largest pieces were given. It certainly would seem clear that the deduction from the first payment of freight must have been intended to depend on the amount, if any, which the ship failed in fact to take on board, and which the parties could see at the time, and not on a measurement of the ship's lifting capacity, to be undertaken before the first payment of freight, in order to see whether the guarantee was fulfilled. Moreover, there could be no doubt that the parties in making their bargain had had regard to the probable bulk for weight of the intended cargo. The entry of the figures in the margin was enough to show that. In short, the real dispute was whether the cargo shipped corresponded with what was intended. I do not think that that decision lays down the general rule that the mere mention of the cargo in the early part of the charter-party has the effect contended for by the present plaintiffs upon words such as we have here. I do not observe from the report of the argument of the distinguished counsel for the respondents in that case that they ever contended for such a rule, and I do not think that it would be making a correct use of the decision to take passages from the speeches of the learned Lords in which they state the existence of the connection in that particular case between the guarantee and the mentioned cargo for the purpose of applying it to the facts and to treat those passages as affirming a general rule that there always must be such a connection. *Carnegie* v. *Conner* (61 L. T. Rep. 691; 24 Q. B. Div. 45) does not, in my opinion, affect the point in this case.

For these reasons in my judgment this claim fails.

Solicitors for the plaintiffs, *Sturton* and *Sturton*.

Solicitors for the defendants, *Botterell* and *Roche*.

Thursday, Oct. 18, 1917.

(Before DARLING, AVORY, and SANKEY, JJ.)

COLBOURNE AND ANOTHER *v* LAWRENCE. (*a*)

Desertion of seaman—Meaning of "left behind"—Merchant Shipping Act 1906 (6 *Edw.* 7, *c.* 48), *s.* 28.

The respondent was master of a British sailing ship, one of the crew being a seaman named G., who had signed articles at Dublin on the 5th Feb. 1915. *G. deserted the ship at New York on the 25th May* 1915 *and did not rejoin her during the voyage. The ship arrived at Bristol on the 21st Aug.* 1916 *and the official log-book contained an entry recording the desertion of the seaman, but contained no statement of the amount due to him on account of wages at the time when he deserted the vessel. On a summons against the respondent under sect.* 28 *of the Merchant Shipping Act* 1906 *for failing to enter in the official log-book as soon as might be a statement of the amount due to G., a seaman left behind out of the British Isles, on account of wages at the time when he was left behind, it was contended for the prosecution that a seaman who deserted his ship at a port out of the British Isles and was not brought away from such port by such ship was a seaman "left behind" out of the British Isles within sect.* 28 *of the Act, and it was contended for the respondent that a deserting seaman who had joined another vessel and had left the port where the desertion took place whilst the vessel still remained in port could not be described as a seaman "left behind." It was proved that the ship had remained in port at least several days after the desertion, and that probably the seaman had joined another vessel and possibly was on his way to England before the respondent's ship left New York. The justices dismissed the summons, holding that there was no evidence that the seaman had been left behind, but that there was every reason to believe that he had gone to sea in another vessel, leaving the respondent's ship behind.*

Held, that the words "left behind" included a deserting seaman as to whose movements the master might have no knowledge, and the case must be remitted to the justices to be dealt with accordingly.

CASE stated by justices for the city of Bristol.

1. The respondent, Henry Lawrence, master of the British ship *Invermay*, was summoned on the information of the appellant Brown, agent for the Solicitor to the Board of Trade, for unlawfully failing to enter in the official log-book of the said ship, as soon as might be, a statement of the amount due to A. W. Grass, a seaman belonging to the ship and left behind out of the British Isles, on account of wages at the time when he was left behind, such omission being alleged to be an offence under the Merchant Shipping Act 1906, s. 28 (1) (*a*) and (10).

2. The appellant Colbourne was the superintendent of the mercantile marine, an officer of the Board of Trade at the port of Bristol, and the proper officer referred to in sect. 28 of the above Act.

3. At the hearing on the 18th Sept. 1916 the following facts were proved:—

(1) The ship *Invermay* was a British sailing ship registered at the port of Aberdeen, and at the material times the respondent was her master.

(2) By articles of agreement opened at the port of Dublin on the 5th Feb. 1915 for the voyage which commenced at that port on the 12th Feb. 1915, the said seaman was engaged amongst others as a member of the crew of the said sailing ship for a voyage not exceeding three years' duration to any ports or places within the limits of 75 degrees N. and 60 degrees S. latitude, commencing at Dublin and proceeding thence to New York 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. The articles and the official log for the voyage were put in evidence.

(3) The said A. W. Grass, who signed the articles on the 5th Feb. 1915, deserted the ship at New York on the 25th May 1915.

(4) The said Grass did not rejoin the ship during the voyage.

(5) The ship arrived at Bristol on the 19th Aug. 1916, and on the 21st Aug. 1916 the respondent delivered the agreement, account of crew, and official log-book to the superintendent of mercantile marine.

(6) The official log contained an entry recording the desertion of the seaman, and it was proved that he was in fact a deserter and took away all his effects when deserting the ship, and these facts were reported to the British consul at the port of desertion.

(7) The official log contained no statement of the amount due to the seaman on account of wages at the time when he deserted the ship, but the respondent's seamen's wages account book (which he delivered to the superintendent) contained particulars as to the balance of wages.

(8) Although there had previously been cases in Bristol in which masters had not made such entries in the official log no proceedings had previously been taken.

4. It was contended for the appellants that a seaman, who deserted his ship at a port out of the British Isles and was not brought away from such port by such ship, was a seaman "left behind" out of the British Isles within sect. 28 of the Merchant Shipping Act 1906, and that the failure of the respondent to enter in the official log-book a statement of the wages due to the seaman at the time when the ship sailed without him on board constituted an offence under the section.

5. It was contended for the respondent:

(1) That the provisions of the Act being penal it must be construed strictly, and that a deserting seaman who had joined another vessel and had left the port where the desertion took place whilst the vessel still remained in port could not be described as a seaman "left behind."

(2) That a seaman who had been entered in the ship's articles as a deserter was not left behind within the true interpretation of the section.

(3) That there was no evidence that the seaman had been left behind.

(4) That it was not the practice of masters to treat deserters who were believed to have deserted for the purpose of joining other ships as men who had been "left behind," and that these words had in practice been interpreted as applying to men

(*a*) Reported by J. F. WALKER, Esq., Barrister-at-Law.

who had (*a*) been unable to join in consequence of accident, illness, misadventure, or the like; (*b*) been punished for some offence and remained in prison or under restraint.

Evidence in support of these points was given by the respondent and by two masters called on his behalf, and it was proved that the vessel had remained in port at least several days after the desertion, and that the strong probability was that the seaman had joined another vessel and gone to sea and possibly had either returned to England or was on his way before the *Invermay* had left the port in which the desertion took place.

6. The justices held that they must construe the words of the section strictly and in their ordinary meaning, and they found as a fact that there was no evidence that the seaman had been left behind, but that there was every reason to believe that he had gone to sea in another vessel leaving the *Invermay* behind in the port where he had deserted.

They also found that it was not the practice of masters to enter in the official log or to treat seamen who had deserted for the purpose of joining other vessels as men who had been left behind and they dismissed the case.

7. The question was whether the justices came to a correct decision in point of law.

The Merchant Shipping Act 1906, s. 28, provides:

(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 provisions 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, . . . (10) If the master of the 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. . . .

The *Solicitor-General* (Sir Gordon Hewart, K.C.) (*G. A. H. Branson* with him) for the appellants.—There is no evidence that the seaman Grass had left the ship behind by going off in another vessel, but, even if there had been such evidence, he would have been a seaman "left behind" within the meaning of sect. 28. He referred to

Deacon v. *Quayle*, 12 Asp. Mar. Law Cas. 125; 106 L. T. Rep. 269; (1912) 1 K. B. 445.

Inskip, K.C. (*A. T. Miller* with him) for the respondent.—The words "left behind" are to be strictly construed against the Crown in their plain and literal meaning. They do not mean merely "absent from the ship at the time of sailing." They mean that the seaman is in the port when the ship leaves. A seaman is not "left behind" if, before the time when his ship leaves, he has already left the port in another vessel. The prosecution did not lay the foundation for their case by proving that the seaman was left behind. It cannot be said that sect. 28 (1) (*b*) shows that in all cases of desertion by a seaman he is left behind. That paragraph only deals with cases where the seaman is left behind. A seaman who has gone away in another ship does not require relief or repatriation. In sects. 37 and 38 of the Act the words "left behind" are clearly used in their natural sense.

DARLING, J.—This case turns entirely on the meaning to be given to a very few words in sect. 28 (1) of the Merchant Shipping Act 1906. That sub-section says: "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 provisions of the section—(*a*) as soon as may be, enter in the official log-book a statement of . . . the amount due to the seaman on account of wages at the time when he was left behind . . ". The man who is said in this case to have been left behind was a seaman who deserted in a foreign port and left nothing on board the ship, and, although it is absolutely uncertain, it may be that before the ship left the port he had sailed from it in another vessel. We have no information about that. It is contended by the Solicitor-General that the man comes within the words "left behind," and that the amount due to him for wages should have been entered in the log-book. If the section went no further I should agree with Mr. Inskip, and I should think that the ordinary commonplace meaning was to be given to the words "left behind," and that if the seaman left the ship, and if it was not known that he had gone off in another ship, it would be improper to describe him as a seaman left behind. But the sub-section goes on to say in par. (*b*) that the master, on the termination of the voyage, shall furnish certain accounts, including any expenses caused "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." If, therefore, a seaman has deserted, the master is bound to give some account of him, and par. (*b*) provides that he shall do so at the termination of the voyage and in a particular form. But it all comes under the words "if a seaman is left behind," and I think that although the master would clearly not be obliged to make those entries in the log-book if the section stopped at the end of par. (*a*), yet when one reads par. (*b*) one sees that the Legislature used the words "left behind" to cover something more than being left on the shore when the ship actually sails away. The Legislature apparently observed that something had been omitted, and by *arrière pensée* they inserted these words as to the cause of the seaman's absence. In the case of a deserter, with regard to whom it is not known where he has gone, the mere fact that he has deserted makes it very difficult to know whether he is staying on shore or whether he has left on another ship. I think that the words "left behind" include a deserter as to whose whereabouts the master may be quite uncertain. So to hold does not impose any burden on the master. The appeal must be allowed, but, as there is no moral blame on the appellant and the offence is a technical one, it will be without costs.

AVORY, J.—There is no finding of fact in this case, and there is no evidence, that the seaman did in fact join another vessel and go to sea before the ship from which he had deserted left the port in which the desertion took place. There is therefore no foundation for the contention put forward by Mr. Inskip that the seaman had not been left behind. The case has not been stated for the purpose of a decision on that question of fact, but it has been argued on the

assumption that this seaman had gone to sea before the ship from which he deserted left the port. On that assumption the question is whether he can properly be described as having been left behind out of the British Islands within sect. 28 (1). It is important to observe the words "out of the British Islands" in that sub-section. The magistrates have made the mistake of construing the words in the Act without having regard to the general tenor and object of the whole section in which they occur. It is true that if you construe the words "left behind" by themselves you would not speak of a man following another as leaving him behind. But it is reasonable to hold that the words merely mean that the master, when he leaves the port, must, as soon as may be, enter in the official log-book the required particulars with regard to any seaman whom he has not brought away with him; in other words, who has been left behind. It is immaterial whether the seaman is still standing on the quay or has gone to prison or has in fact joined another ship. As was pointed out in *Beacon* v. *Quayle* (*sup.*), the whole purpose is to carry out the objects of sects. 221 and 232 of the original Act of 1894, and when you look at the purpose of those sections it supports the view of the Solicitor-General that the words "left behind" include a deserter, whether he remains in the port at the time when his ship sails, or whether he has joined another ship and has perhaps sailed in her. The appeal succeeds, and the case must be remitted to the justices to be dealt with.

SANKEY, J.—I agree.

Appeal allowed and case remitted.

Solicitor for the appellants, *Solicitor to the Board of Trade.*

Solicitors for the respondent, *Ford* and *Ford*, for *Wansbrough, Robinson, Tayler*, and *Taylor* Bristol.

Monday, May 14, 1917.

(Before ATKIN, J.)

ASSOCIATED PORTLAND CEMENT MANUFACTURERS LIMITED *v.* HOULDER BROTHERS AND CO. LIMITED. (*a*)

Carriage of goods—Specified ship—Not ready to load on agreed date—Ship subsequently lost—Measure of damages.

Where the defendants agreed with the plaintiffs that a particular ship should be at a certain port on a particular date ready to load a cargo of goods from the plaintiffs' barges to be carried abroad, and the specified ship was not there on the date agreed upon and was sunk at sea on the following day, it was held that the defendants had committed a breach of their contract on the day fixed for loading, and that the contract having come to an end by the sinking of the ship on the following day, the measure of damages to which the plaintiffs were entitled was limited to the two days' detention—namely, from the date of the breach to the date of the ending of the contract.

ACTION in the Commercial List tried before Atkin, J.

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

The plaintiffs claimed damages for the detention of their barges at Northfleet owing to the defendants' failure to have their ship ready for loading goods from the plaintiffs' barges on the date agreed upon. The plaintiffs had arranged with the defendants to send a cargo of goods from London to Buenos Ayres. The defendants had notified the plaintiffs that their steamship the *Argentino* would be ready for loading at Northfleet on the 25th May, whereupon the plaintiffs, in accordance with the usual practice, loaded their barges and sent them to Northfleet. The ship, however, was not there on the date arranged, and was lost at sea on the following day, being sunk by an enemy submarine through no default of the defendants. The plaintiffs' barges were detained for several days, but eventually another ship was provided. It was the usual practice in that trade that when the shipowners notified senders of goods that a particular ship would be ready for loading on a particular date, the goods would be sent on in barges and then loaded into the ship. If, in fact, the ship was not ready for loading on the date fixed, the shipowners would pay demurrage in respect of the time during which the barges would have to be detained pending the arrival of a ship on which the cargo could be loaded.

F. O. Robinson for the plaintiffs.

R. A. Wright for the defendants.

The following cases were cited:

Taylor v. *Caldwell*, 8 L. T. Rep. 356; 3 B. & S. 826
Davis v. *Garrett*, 6 Bing. 716.

ATKIN, J.—The *Argentino* was named as the ship, and a date was given for having the goods alongside. It was a contract to take the goods on a named ship, and when that ship was lost on the 26th May the contract was at an end. It was a term of the contract that the ship should be ready for loading on the 25th May. It was not, however, a condition precedent, and the plaintiffs could not repudiate the contract on the ground that the ship was not ready on the date named. The plaintiffs' remedy is damages for the delay. Now, the plaintiffs contend that they are entitled to damages for the whole period during which the barges were detained. That contention cannot be upheld. The plaintiffs are only entitled to recover such damages as flow directly from the actual breach of their contract by the defendants. That is to say, they are only entitled to recover such damages as were incurred between the date when the contract ought to have been performed and the date when it was at an end. For these reasons, there must be judgment for the plaintiffs for 4*l.* in respect of two days' detention.

Judgment accordingly

Solicitors for the plaintiffs, *Leonard* and *Pilditch.*

Solicitors for the defendants, *Downing, Handcock, Middleton*, and *Lewis.*

Friday, Jan. 11, 1918.

(Before BAILHACHE, J.)

PYMAN STEAMSHIP COMPANY LIMITED *v.* LORDS COMMISSIONERS OF THE ADMIRALTY. (*a*)

Charter-party—Salvage — Owners liable for perils of the sea—Admiralty liable for war risk—Apportionment of salvage where war risk imminent.

The steamship R., *which had been requisitioned by the Admiralty and was held by them under a time charter, broke her propeller while in the North Sea on a voyage from Rotterdam to the Tyne. There was a gale blowing and a high sea running, and there was imminent risk of the vessel running on to a German minefield. Another vessel, answering signals of distress, took the* R. *in tow and brought her safe to Rotterdam. As a result of salvage proceedings the sum of* 3000*l.* *was agreed to be paid to the salvors, it being left to an arbitrator to decide the incidence of liability as between the owners of the* R. *and the Admiralty. By clause* 18 *of the charter-party the Admiralty were not to be liable for sea risks, but by clause* 19 *the Admiralty took the ordinary war risk. An arbitrator found that while the vessel was disabled she was exposed to the danger of driving on to the minefield and to added risk from submarines, and that the Admiralty were liable to pay* 750*l.*, *part of the said sum of* 3000*l.*, *stating his award in the form of a special case.*

Held, that, although primarily the disablement of the vessel was due to perils of the sea, the arbitrator was right in holding that there was an imminent war risk from which the vessel had been delivered, and that the award must be affirmed.

AWARD stated in the form of a special case for the opinion of the court:

Whereas an agreement made the third day of March 1916 is in the following terms: An agreement made this third day of March 1916 between the Pyman Steamship Company Limited of West Hartlepool, the owners of the steamship *Raithwaite* of the first part, and the commissioners for executing the office of the Lord High Admiral of the United Kingdom of the second part. Whereas the steamship *Raithwaite*, which was requisitioned by the Admiralty under the terms contained in the charter-party T. 99, broke her intermediate propeller shaft during bad weather on the 17th Feb. 1915, whilst on a voyage from Rotterdam to the Tyne in ballast and was thereby disabled, and afterwards employed the steamship *Caledonia*, which towed her back to the Hook of Holland, and a tug named the *Louwerzee*, which towed her from the Hook up the river to Rotterdam.

And whereas the owners and underwriters of the steamship *Raithwaite* have paid in settlement of the claim of the owners of the *Caledonia* for salvage the sum of 3000*l.* And whereas the owners of the steamship *Raithwaite* claim that the said sum of 3000*l.* should be divided equally between their ordinary underwriters and the Admiralty, as both the salving and the salved vessels are alleged to have been in more danger owing to the risk of minefields than the ordinary risks which were likely to accrue during the performance of the salvage services. And whereas the Admiralty dispute liability for any portion of the salvage which has been paid to the owners of the *Caledonia*.

Now it is hereby agreed between the said parties that (1) the question of whether the said salvage should be divided equally between the owners, ordinary underwriters, and the Admiralty be referred to the sole arbitration of Frederick Ninian Robert Laing, K.C. (2) The parties of the first part shall produce to the Treasury solicitor at least a week before the reference the log-books, correspondence, policies of insurance, correspondence with underwriters or agents, and other documents in their possession which relate to the salvage services and the payment of the said sum of 3000*l.*, or to any other matters in question in the arbitration and any statements of witnesses which they intend to put before the arbitrator. (3) The arbitrator may call for any further evidence or for any further information on any matter he may consider necessary, and may act upon any evidence he may deem proper without being bound by any rules of evidence. (4) The arbitrator shall make his award as to the costs of this submission and of his award as he may deem just. In witness, &c. And whereas I, the said Frederick Ninian Robert Laing, have taken upon myself the burthen of this arbitration. And whereas I have heard the parties by their counsel and duly considered the documentary evidence and the arguments adduced before me. And whereas the parties by their counsel during the hearing agreed and requested that I should make my award in the form of a special case. And whereas I assented to the said request of the parties. Now, therefore, I do make this my final award in the form of a special case.

SPECIAL CASE.

1. The steamship *Raithwaite* was requisitioned by the Commissioners of the Admiralty for immediate Government service by letter from the Secretary to the Admiralty, dated the 15th Feb. 1915, to the owners or managing directors of the said steamship upon the terms of charter T. 99, which was attached to the said letter. Copies of the said letter and of the charter T. 99 are annexed hereto and may be referred to for their terms.

2. The said charter T. 99 contained (*inter alia*) the following clauses:

(18) The Admiralty shall not be held liable if the steamer shall be lost, wrecked, or driven ashore, injured, or rendered incapable of service by or in consequence of dangers of the sea or any other cause arising as a sea risk.

(19) The risks of war which are undertaken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause. Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after a declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost at the time of such loss, or if she be injured, on the ascertained value of such injury. Should a dispute arise as to the value of the steamer, the same shall be settled as laid down in clause 31.

3. On the 17th Feb. 1915 the steamship *Raithwaite* broke her intermediate propeller shaft whilst on a voyage from Rotterdam to the Tyne in ballast, and was thereby disabled, and afterwards salvage services were rendered to her by the steamship *Caledonia*, which ultimately towed her back to the Hook of Holland, and, with the assistance of a tug named the *Louwerzee*, towed up the river to Rotterdam. I find that the facts relating to the nature of the accident and the situation of the *Raithwaite* and the state of the weather and the character of the services of the salvors are narrated with substantial accuracy in the letter of the master of the *Raithwaite* to Messrs. G. Pyman and Co. of West Hartlepool, dated the 21st Feb. 1915. A copy of the letter is annexed hereto and may be referred to for its terms, and with it is a marked chart showing the position of the minefields, which was used at the hearing.

4. On the 21st June 1915 the master and owners of the steamship *Caledonia*, which was a steamship

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

belonging to the Netherlands, issued a summons in the High Court of Justice at Rotterdam against the owners of the steamship *Raithwaite*, claiming salvage for their services rendered to the steamship *Raithwaite*. A copy of this summons is annexed hereto, and may be referred to for its terms.

5. The owners of the steamship *Raithwaite*, with the approval of their underwriters, have since paid to the salvors in settlement of their claim, and of the action referred to in the last preceding paragraph, the sum of 3000*l*., and counsel for the Admiralty has before me admitted that the said sum of 3000*l*. is a reasonable amount to have paid in respect of the said salvage services, and I so find.

6. On the 15th Nov. 1915 Messrs. Botterell, Roche, and Temperley, acting for the owners of the steamship *Raithwaite*, wrote a letter to the director of transports suggesting that the sum of 3000*l*. before-mentioned should be divided in moieties between the Admiralty and the marine risks underwriters on the ship for the reasons stated in the said letter, and on the 12th Jan. 1916 the director of transports replied repudiating any liability. Copies of the two letters are annexed hereto, and may be referred to for their terms. The letters of the 20th May 1915 referred to in Messrs. Botterell, Roche, and Temperley's letter are also annexed for reference.

7. Accepting, as I do, the statement of the facts relating to the salvage services as narrated by the master of the *Raithwaite* (see par. 3 hereof), I find as a fact that the steamship *Raithwaite* as she lay at anchor disabled was, in addition to the ordinary sea perils to which she was exposed, in danger from drifting mines driving on to one or other of the minefields, if her anchor failed to hold her, and that the danger from drifting mines and enemy submarines was accentuated by the fact that the steamship *Raithwaite* was unable to steam and was in consequence compelled to remain in a danger zone, offering an easy target for the enemy until she was towed away into safety by the salvors. Taking these matters into consideration I find that the sum of 750*l*. out of the total sum of 3000*l*. for salvage may be properly treated as representing the amount by which the salvage reward payable to the salvors was enhanced or increased by reason of war risks to which the salved vessel was exposed, and from which she was rescued when the salvors rendered their services to the vessel. I also find that the master of the steamship *Raithwaite* in accepting the services of the salvors did so with the object of saving his vessel both from the marine risks and the war risks to which she was exposed, and that the sum of 750*l*. is a reasonable sum for the owners to have paid for rescuing the vessel from such war risks, and that the war risks hereinbefore mentioned were and are "consequences of hostilities and war-like operations" within the meaning of clause 19 of T. 99.

8. It was contended by counsel for the owners of the steamship *Raithwaite* that the chief risks to which the vessel was exposed and from which she was rescued arose from her proximity to the minefields and from dangers of drifting mines and enemy submarines, and that at least a moiety of the salvage paid should be paid to the owners of the steamship *Raithwaite* by the Admiralty as underwriters of the war risks, the other moiety being borne by the underwriters on the marine risks: that clause 19 of T. 99 was a contract of indemnity and in substance and in fact was a contract of marine insurance, though not embodied in a policy under which the Admiralty insured the vessel against total or partial loss arising from all war risks; that the owners, having become liable to pay salvage in respect of both marine and war risks, such liability constituted a partial loss of the subject-matter insured, and was recoverable under the contract of marine insurance; and that the loss should be borne in moieties by the war risks and marine risks underwriters. He cited the Marine Insurance Act, s. 65; *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 A. C. 755); *Balmoral Steamship Company* v. *Marten* (9 Asp. Mar. Law Cas. 321; 87 L. T. Rep. 247; (1902) A. C. 511).

In the alternative he contended that, treating T. 99 as a contract by charter only, it was the duty of the master to take salvage assistance to save the ship from impending loss or risk of loss or damage from war risks against which the charterers were liable to indemnify the owners, and that there was an implied contract by the charterers to indemnify the owners in respect thereof.

9. Counsel for the Admiralty contended that the Admiralty were not bailees of the ship, that the salvage services arose out of sea perils only, and that the owners only were liable for the agreed salvage, which was for an indivisible amount. That clause 19 of T. 99 was not in any sense a contract of marine insurance, and that the liability of the Admiralty under the charter-party covered only total loss and injury of the ship from war risks and did not cover payments made to avert these risks, and that no such contract could be implied. That there had been no loss or injury to the *Raithwaite* under clause 19, and consequently that there was no liability upon the Admiralty under the charter-party.

10. Subject to the opinion of the court I decide and award (*a*) that clause 19 of T. 99 is not a contract of marine insurance, and that there was no partial loss of the subject-matter insured, and that there is no liability on the commissioners for executing the office of the Lord High Admiral of the United Kingdom as underwriters or insurers of the steamship *Raithwaite* to contribute to the amount of salvage paid by the owners in respect of the salvage services rendered to the steamship *Raithwaite*.

(*b*) That treated as a contract by charter-party there is a duty on the owners and master of the *Raithwaite* arising under the terms of T. 99 to do what is reasonably necessary to protect the charterers from their liability under clause 19 of the charter-party, and that whereas in this case the master was apprehensive of the dangers to his ship arising in consequence of hostilities or warlike operations, as well as from marine risks, and took assistance to avert the consequences not only of the marine risks but of the war risks, he was rightly performing his duty to the charterers, and that they are liable in law to indemnify the owners of the steamship *Raithwaite* against the reasonable expense or liability, which I assess at the said sum of 750*l*.

(*c*) That the Admiralty, as charterers of the steamship *Raithwaite*, are under a liability to the owners of the steamship *Raithwaite* to pay to them the said sum as being a reasonable sum incurred and paid by the said owners for the purpose of safeguarding the vessel from loss or injuries from war risks which were reasonably apprehended and for which the charterers were liable under the said charter.

(*d*) That the charterers, the commissioners for executing the office of the Lord High Admiral of the United Kingdom, do pay the said sum of 750*l*. to the Pyman Steamship Company Limited, the owners of the steamship *Raithwaite*, and that they do bear and pay their own costs of the reference, arbitration, and of this my award, and that they do pay the Pyman Steamship Company Limited their costs in the same.

11. The questions for the court are whether, on the facts found by me, I am right in holding that under the terms of the charter-party the owners and master of the steamship *Raithwaite* owe a duty to the charterers to take reasonable and proper steps to safeguard the vessel from loss or injury arising from all consequences of hostilities or war-like operations, and for that purpose to incur reasonable expenses or liability, and whether I am right in holding that the charterers are liable to repay to the owners such reasonable sum as they may

have properly paid or become liable to pay for that purpose.

If the court should hold that I am wrong in so holding, I leave the court to make such order as to the court shall seem just, and to deal with the costs of the reference, arbitration, and award.

In witness, &c.

Dunlop (Sir *Gordon Hewart*. S.-G.) with him) for the Admiralty.

R. A. Wright, K.C. and *Balloch* for the owners.

The following cases were referred to:

Becker, Gray, and Co. v. *London Assurance Corporation*, 14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101;

Five Steel Barges, 6 Asp. Mar. Law Cas. 580; 63 L. T. Rep. 499; 15 Prob. Div. 142;

The Port Victor, Cargo ex, 9 Asp. Mar. Law Cas. 182; 84 L. T. Rep. 677; (1901) P. 243;

Ruabon Steamship Company v. *London Assurance*, 9 Asp. Mar. Law Cas. 2; 81 L. T. Rep. 585; (1900) A. C. 6;

Marine Insurance Company v. *China Transpacific Steamship Company Limited* (*The Vancouver Case*), 6 Asp. Mar. Law Cas. 68; 55 L. T. Rep. 491; 11 App. Cas. 573;

The Haversham Grange, 10 Asp. Mar. Law Cas. 156; 93 L. T. Rep. 733; (1905) P. 307.

BAILHACHE, J.—This is a case which comes before me on appeal from an award stated in the form of a special case by the well-known Admiralty counsel, Mr. Laing, who has given his award to the extent of 750*l.* in favour of the owners of the *Raithwaite* against the Lords of the Admiralty, and the question is whether that award is right or wrong.

The question arises in this way. The Lords of the Admiralty took the *Raithwaite* from her managing owners, Messrs. Pyman, Watson, and Co. Limited, under a charter-party in the form "T. 99," dated the 15th Feb. 1915. The *Raithwaite* was, in Feb. 1915, on a voyage from Rotterdam to the Tyne. When she got into the North Sea she broke her intermediate propeller shaft. The circumstances under which the shaft was broken, and the events which happened afterwards, are stated in detail in the master's letter to his owners dated the 21st Feb. 1915, which is made part of the award. It appears that when the vessel broke her intermediate propeller shaft every effort was made to mend the shaft, but without success. She cast anchor for a time. For a time the anchor dragged, but ultimately it held. She made signals of distress, which were not observed and attended to until the following morning, when a steamer named the *Caledonia* came alongside. It was bad weather, and there was a gale blowing and a high sea running. Before the anchor of the *Raithwaite* held, and as she was drifting, she was drifting in the direction of some German mines, which were about six miles off. During the salvage operations, when the anchor was hove up and attempts were being made to make fast to the *Caledonia*, she further drifted in the direction of these same mines. Attempts were made to tow her to the Tyne, but they only resulted in her still further drifting towards the mines. Ultimately the vessel's head had to be turned round, and she was taken to Rotterdam, where a tug and the *Caledonia* took her into port.

In a salvage action a salvage award of 3000*l.* was made for services rendered by the *Caledonia* and a tug. The owners, having paid this 3000*l.*, seek to make the Lords of the Admiralty, the time charterers, responsible for a portion of the award. They sought to make them responsible for a moiety of the award, but they agreed to refer the matter to Mr. Laing to decide between them, and he decided in favour of the owners, but for the sum of 750*l.* instead of 1500*l.*

Whether the time charterers are liable for any portion of this 3000*l.* depends, in my opinion, entirely on the terms of the charter-party "T. 99," which was in existence between the parties at the time, and that again may be still further reduced by saying that it depends upon the construction to be put on clauses 18 and 19. By clause 18 it is provided that "the Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea, or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk. That is to say, the owners took the sole responsibility for any damage that might be caused to the *Raithwaite* by sea perils. By clause 19 the risks of war are taken by the Admiralty in these terms:

> The risks of war which are undertaken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause.

The common form of f.c. and s. clause is then set out.

Mr. Laing says in par. 7 of his award:

> Accepting as I do the statement of facts relating to the salvage services as narrated by the master of the *Raithwaite* (see par. 3 hereof), I find as a fact that the *Raithwaite* as she lay at anchor disabled was, in addition to the ordinary sea perils to which she was exposed, in danger of driving on to one or other of the minefields if her anchors had failed to hold her, and that the danger from drifting mines and enemy submarines was accentuated by the fact that the *Raithwaite* was unable to steam and was in consequence compelled to remain in a danger zone, offering an easy target for the enemy until she was towed away into safety by the salvors. Taking these matters into consideration, I find that the sum of 750*l.* out of the 3000*l.* paid for salvage may be properly treated as representing the amount by which the salvage reward payable to salvors was enhanced or increased by reason of war risks which the salved vessel was exposed to and from which she was rescued when the salvors rendered their services. I also find that the master of the *Raithwaite*, in accepting the services of the salvors, did so with the object of saving his vessel both from the marine risks and the war risks to which she was exposed; that 750*l.* is a reasonable sum for the owners to have paid for rescuing the vessel from such war risks; and that the war risks hereinbefore mentioned were and are "consequences of hostilities and warlike operations" within the meaning of clause 19 of T. 99.

So Mr. Laing finds as facts that the *Raithwaite* as she lay at anchor in her disabled condition was exposed to two different sets of perils. She had suffered one marine risk and was exposed to more. She was also exposed to war risks, and he finds that the salvage award was enhanced by the sum of 750*l.* by reason of her exposure to those particular war risks which he enumerates—namely, the danger of drifting on to the minefields in close proximity to the *Raithwaite*.

Under these circumstances are the Lords of the Admiralty liable to pay that sum of 750*l.* by reason of the terms of clause 19? Of course it is quite true to say that the salvage award is *quâ* the salvors an indivisible sum; but that does not seem to me to dispose of the question, because the further question remains, How is the incidence of that sum to be borne as between the two parties to this contract of charter-party? The fact that it is, so far as these salvors are concerned, an indivisible sum does not seem to me to be very material to the question I have to determine. It is said—and, I think, said with perfect truth—that in these days any vessel which incurs a sea peril also incurs, in more or less degree, a war risk peril at the same time. I am referring, of course, more particularly to vessels which are broken down in the North Sea. In the North Sea there is always a danger of minefields, and there is always the danger of submarines prowling about the sea. One of the best ways—perhaps almost the only way—that a vessel can hope to escape from these prowling submarines is by reason of her power of motion—if possible, her superior motion—and the *Raithwaite* had lost altogether all power of motion. Therefore, even if there had been no minefields in the immediate proximity, it is quite clear the *Raithwaite*, having broken down, was exposed not only to sea perils, but, as matters are now, to some risk of war perils also; but I have no doubt that is a matter which is taken into account when salvage awards are made. Not only is a disabled vessel subject to war perils as well as marine perils, but the salvors themselves coming to the assistance of a disabled vessel run serious war risks at the same time.

If there had been only these general dangers to be taken into account I should have thought myself that the whole of this salvage award of 3000*l.* would have to be borne by the owners of the *Raithwaite*, and by the owners alone. But those are not the facts in the case now before me. Here there was not only the ordinary danger which all vessels broken down in the North Sea run from all risk, but this vessel was moreover in the particular and imminent danger of drifting on to a minefield, and it was from that particular risk that she was saved by the salvors. It seems to me that I may fairly put the matter to myself in this way. Suppose that the only risk to which the *Raithwaite* had been subject was the risk of drifting on to one of these minefields, that there had been no sea peril at all, and that the award had been made to the salvors who had salved her from that risk of 750*l.*, upon which of these two parties would payment of that 750*l.* fall? Mr. Dunlop has urged that under clause 19 such a payment as that would have had to be borne by the owners, unless the *Raithwaite* had in fact so far drifted or come into contact with one of the mines as to suffer some physical injury from the explosion of one of the mines. I do not take that view of the case.

It seems to me that once you get the imminent danger of her drifting on to a minefield and salvage services rendered to relieve her from that position of imminent danger she is in effect brought within clause 19 of the charter-darty. It cannot be necessary, to bring her under clause 19, that she should be allowed to drift on to a minefield and to sustain injury from an exploding mine before the Lords of the Admiralty become liable to pay. In my judgment, put in that way, that is the real point in this case, and the answer to it is the answer which I have given.

It is quite true, of course, that in this case it was first of all a peril of the sea which caused the war peril to come into operation; but that does not seem to me to be a matter of any moment in this case. This is not an insurance action, and I am not considering a question of *causa proxima* or *causa remota*. I have to deal with all the facts as I find them. I should like to add that I do not regard the Lords of the Admiralty as insurers in this case, and they are not underwriters. I treat them simply as persons who have made a contract, not an underwriting or an insurance contract, but an ordinary time charter contract in the form of clause 19 of the charter-party. Nor do I accept the argument of Mr. Wright at any rate in its entirety, that they are liable because they are persons who have derived a benefit from these salvage services. There are many classes of persons who derive benefit from salvage services who could not be made liable to pay salvage awards either in a direct action by the salvors or in an indirect action by the owners of the vessel saved who have to pay the award and seek to recover it back from persons who have derived a benefit from it. If one is to treat them as liable on the ground that they have derived a benefit from such services one would have to hedge about the classes of persons so made liable with innumerable restrictions.

I prefer to base my judgment on the ground that here are people who have entered into a contract that if the vessel suffers injury from a war risk peril they will pay. A war risk peril was imminent—so imminent that a salvage award of 750*l.* was made in respect of the rescue of the vessel from that peril, and it seems to me that, inasmuch as they are liable to pay if she had sustained injury, they are liable to pay the persons who came to her rescue and intervened and prevented that injury from happening.

I think the award of Mr. Laing is quite right. The amount has not been challenged, and therefore the award must stand. I am not quite sure that the way by which I arrive at this result is the same as that which led Mr. Laing to make his award. That, however, is immaterial. The award must stand, with the usual consequences as to costs.

Award affirmed.

Solicitors for the owners, *Botterell, Roche,* and *Temperley.*

Solicitor for the Admiralty, *Solicitor to the Treasury.*

Nov. 12, 13, *and* 15, 1917.

(Before Bailhache, J.)

China Mutual Steam Navigation Company Limited *v.* Sir Joseph Maclay, Bart. (*a*)

Defence of the realm — Shipping Controller — Powers — Requisition of ships — Owners services — Profits — Ultra vires — *Action against Shipping Controller in official capacity — New Ministries and Secretaries Act* 1916 (6 & 7 *Geo.* 5, *c.* 68), *ss.* 5, 6 — *Defence of the Realm Regulations, reg.* 39BBB.

By a letter dated the 5th March 1917 *the Shipping Controller purported to requisition for the Government all of the plaintiffs' steamers (other than those already requisitioned by His Majesty's Government, by the Indian Government, or the Governments of any of the colonies) operating between the United Kingdom and the East. Until the plaintiffs were otherwise directed, they were to continue to run the vessels as for themselves, though actually for the account of the Government, crediting full earnings and debiting net charges. The plaintiffs were to be advised later as to the arrangements under which they would be credited with hire on requisitioned terms. One of the plaintiffs' vessels which was affected by this letter was the steamship* K, *which started from Liverpool to the East on the* 8*th April* 1917. *The plaintiffs claimed a declaration that, notwithstanding the letter of the* 5*th March* 1917, *the voyage of the* K. *was for the risk and account of the plaintiffs, and that the plaintiffs were entitled to receive and retain the profits, if any, of this voyage.*

The Shipping Controller was appointed under sect 5 *of the New Ministries and Secretaries Act* 1916. *Sect.* 6 *of that Act defines the duties of the Shipping Controller, and provides that he shall have such powers or duties of any Government department as may be transferred to him by Order in Council, and such further powers or duties as may be conferred upon him by regulations under the Defence of the Realm (Consolidation) Act* 1914. *Reg.* 39BBB, *which was made under the Defence of the Realm Act* 1914, *empowered the Shipping Controller, for the purpose of making shipping available for the needs of the country in such manner as to make the best use thereof, to requisition ships or cargo space or passenger accommodation in any ships or any rights under any charter, freight, engagement, or similar contract affecting any ship, and to require delivery of ships so requisitioned to himself or any person or persons named by him at such times and places as he may require.*

Held, that reg. 39BBB *was not invalid, but that it contained no power to requisition the services of the owners, and that therefore the order requisitioning the owner's services was* ultra vires.

Held, also, that the action lay against the Shipping Controller, and the plaintiffs were entitled to the declaration.

Action in the Commercial List tried before Bailhache, J.

The plaintiffs claimed a declaration that, notwithstanding a letter dated the 5th March 1917, written on behalf of the defendant as Shipping Controller, the voyage of the steamship *Keemun*, which left Liverpool on the 8th April 1917 bound for Penang, Singapore, Hong Kong, Shanghai, Nagasaki, Moji, Kobe, and Yokohama, was for the risk and account of the plaintiffs, the owners of the said vessel; and that the plaintiffs as such owners were entitled to receive and retain the profits (if any) of such voyage.

The plaintiffs were the owners of the steamship *Keemun*, a British steamer managed by Alfred Holt and Co., and for some time before the commencement of the action had been regularly employed in trade between the United Kingdom and ports in India, Ceylon, Burmah, Straits, China, Japan, and the Persian Gulf, or some of them.

The defendant was the Shipping Controller.

By a letter dated the 5th March 1917, signed by John Anderson and written on behalf of the defendant as Shipping Controller and addressed to Alfred Holt and Co., the defendant purported to requisition for His Majesty's Government all steamers other than those already requisitioned by His Majesty's Government, by the Government of India, or the Governments of any of the colonies, whether owned or chartered, which were then or might subsequently be operated outwards or homewards under the auspices of Alfred Holt and Co. between the United Kingdom and any port or ports in India, Ceylon, Burmah, Straits, China, Japan, or the Persian Gulf. Requisitions were to take effect as from the first occasion of the vessels' complete discharge in the United Kingdom, or, in the event of the operation of loading and discharging overlapping, on a date to be agreed as the date of such completion.

The letter also contained the passages following—viz.:

> Unless and until you are otherwise directed, it is not the desire of the Government to interfere either with the nature of your business or the method of conducting it which would have been followed if the steamers had not been requisitioned, except so far as these may be affected by the decisions of the representative committee of shipowners at home and of agents abroad referred to later. . . . You will continue, therefore, to run the vessels as for yourselves, though actually for the account of the Government, crediting full earnings and debiting net charges after allowances for all rebates, commissions, &c. You will be advised later as to the arrangements under which you will be credited with hire on requisitioned terms, &c. . . . To repeat: the general intention is, in a word, that you should run the steamers as for yourselves, though on account of the Government, who confidently look to you to conduct the business with as much zeal and care as if your own interests alone were still involved.

The steamship *Keemun*, which was within the operation of the letter referred to, was completely discharged in the United Kingdom on the 17th March 1917, and afterwards, in the ordinary course of her trade, started on the 8th April 1917 on a voyage from Liverpool to Penang, Singapore, Hong Kong, Shanghai, Nagasaki, Moji, Kobe, and Yokohama laden with a general cargo procured by the plaintiffs.

The plaintiffs claimed the declaration set out above.

The defendant by his defence said that the points of claim disclosed no cause of action against him.

Alternatively, and without prejudice to his contention that the points of claim disclosed no cause of action against him, he relied upon sect. 6

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

of the New Ministries and Secretaries Act 1916 and reg. 39BBB of the Defence of the Realm Regulations, and said that he had power at all material times to control and regulate any shipping available for the needs of the country in such manner as to make the best use thereof, having regard to the circumstances of the time, and to take such steps as he thought best for providing and maintaining an efficient supply of shipping, and to make orders accordingly.

The defendant further said that he thought the writing of the said letter and the proper carrying out of its terms by all persons (including the plaintiff company) to whom it might be addressed the best steps to take for providing and maintaining an efficient supply of shipping, and wrote and sent to the plaintiff company the said letter because he so thought, and that the said letter was written in order to control and regulate the shipping of the plaintiff company (which was shipping available for the needs of the country) in such manner as to make the best use thereof, having regard to the circumstances of the time.

The circumstances of the time were such that it had become necessary, in order to secure the most effective use of available tonnage, that all liner tonnage should be made equally available for any employment, and that there should be identity of interest and equality of reward between all lines, together with unity of control and wide common employment, with unrestricted freedom of disposition adapting supply to demand.

Alternatively, the defendant also said that the letter in question was written on behalf of His Majesty's Royal prerogative for the Defence of His Majesty's Empire.

The letter of the 5th March 1917, which was the subject of the proceedings, contained various directions with regard to the management and economical working of the shipping so requisitioned. It is not considered in the public interest to set out the letter in full.

Leslie Scott, K.C., *MacKinnon*, K.C., and *G. D. Keogh* for the plaintiffs.—The letter is an attempt on the part of the executive to tax the shipowners' profits, and this without the sanction of Parliament. Therefore the letter is *ultra vires*. Moreover, under this letter, the ships were not taken for use in the service of the Government, but were to be run for the Government's account. Therefore it cannot be a valid requisition. The Shipping Controller was appointed under and by virtue of sect. 5 of the New Ministries and Secretaries Act 1916, which provides as follows:

> For the purpose of organising and maintaining the supply of shipping in the national interests in connection with the present war, it shall be lawful for His Majesty to appoint a Minister of Shipping, under the title of Shipping Controller, who shall hold office during His Majesty's pleasure.

He derives his power from sect. 6 of the same Act, which is as follows:

> It shall be the duty of the Shipping Controller to control and regulate any shipping available for the needs of the country in such manner as to make the best use thereof, having regard to the circumstances of the time, and to take such steps as he thinks best for providing and maintaining an efficient supply of shipping, and for those purposes he shall have such powers or duties of any Government department or authority, whether conferred by statute or otherwise, as His Majesty may by Order in Council transfer to him, or authorise him to exercise or perform concurrently with or in consultation with the Government department or authority concerned and also such further powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act 1914, and regulations may be made under that Act accordingly.

Under that section the Shipping Controller has power to requisition such ships as may be necessary to make shipping available for the needs of a particular trade. But he has no power under that section to conscript the services of owners, managers, officers, and crews of vessels, nor to tax the shipowners. No Order in Council has been issued under that section. The words of the section are not wide enough to enable the Shipping Controller to carry out the duty stated at the commencement of the section—namely, that of controlling and regulating shipping. Reg. 39BBB is not a valid regulation. It was not authorised by the Defence of the Realm Consolidation Act. It was made by Order in Council on the 28th June 1917. Par. 3 provides as follows:

> The Shipping Controller may by order requisition or require to be placed at his disposal, in order that they may be used in the manner best suited for the needs of the country, any ships, or any cargo space or passenger accommodation in any ships, or any rights under any charter, freight engagement, or similar contract affecting any ship, and require ships so requisitioned to be delivered to the controller or any person or persons named by him at such times and at such places as the controller may require, where it appears to the controller necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country in such manner as to make the best use thereof having regard to the circumstances of the time.

The form of requisitioning under this letter is different from that which had previously taken place during the war, and cannot be said to be authorised by reg. 39BBB even if it is valid. If the letter is a valid requisition, managers and officers of the plaintiffs' ships might render themselves liable to prosecution for failing to carry out its directions.

The *Attorney-General* (Sir Frederick Smith, K.C.), the *Solicitor-General* (Sir Gordon Hewart, K.C.), and *Ricketts* for the defendant.—Sect. 6 of the New Ministries and Secretaries Act 1916 gives to the Shipping Controller the widest possible general powers to control and regulate shipping. If special powers are necessary to enable those general powers to be carried out, power is given to His Majesty to give him such special powers by Order in Council. The letter is a valid requisition. The Shipping Controller has the widest possible powers with regard to the requisitioning of shipping. In this case the ship was duly requisitioned, and the plaintiffs are not entitled to the declaration asked for. There is, however, a preliminary point. The defendant is a servant of the Crown, and the proceedings which are directed against him as such should be by petition of right against the Crown. The proceedings are not properly constituted. See

Dixon v. *Farrer*, 6 Asp. Mar. Law Cas. 52; 55 L. T. Rep. 578; 18 Q. B. Div. 43;

Raleigh v. *Goschen*, 77 L. T. Rep. 429; (1898) 1 Ch. 73;

Graham v. *His Majesty's Commissioners of Public Works and Buildings*, 85 L. T. Rep. 96; (1901) 2 K. B. 781;

Bainbridge v. *Postmaster-General*, 94 L. T. Rep. 120; (1906) 1 K. B. 178;
Dyson v. *Attorney-General*, 103 L. T. Rep. 707; (1911) 1K. B. 410;
Roper v. *His Majesty's Commissioners of Public Works and Buildings*, 111 L. T. Rep. 630; (1915) 1 K. B. 45;
Guaranty Trust Company of New York v. *Hannay and Co.*, 113 L. T. Rep. 98; (1915) 2 K. B. 536.

Leslie Scott, K.C. in reply.—The plaintiffs are entitled to the declaration. A petition of right will not lie in such a case as this. See

Feathers v. *The King* 12 L. T. Rep. 114; 6 B. & S. 257.

Cur. adv. vult.

Nov. 15, 1917.—The following judgment was read by

BAILHACHE, J.—This is an action brought against the Shipping Controller in which the plaintiffs, the China Mutual Steam Navigation Company Limited, claim a declaration that a certain voyage of the steamship *Keemun*, which left Liverpool for Eastern ports on the 8th April last, was for the owners' account. Behind this innocent-looking claim lies hid the grave question whether an order issued by the Shipping Controller on the 5th March last was within his powers or not.

The office of Shipping Controller was created by sect. 5 of the New Ministries and Secretaries Act 1916. His duties are defined by sect 6 of the Act, and by the same section he was to have, for the purpose of enabling him to perform those duties, the powers of any Government department or authority which His Majesty by Order in Council might transfer to him, and also such further powers as might be conferred upon him by regulations under the Defence of the Realm Consolidation Act 1914, and regulations might be made under that Act accordingly. No Order in Council has transferred any powers to the Shipping Controller, but a regulation—No. 39BBB—made under the Defence of the Realm Consolidation Act 1914 has conferred very wide powers upon him, among others the power of requisitioning ships.

It was contended for the plaintiffs that so far as the regulation purported to confer that power it was *ultra vires*. I think that contention unsound. The Defence of the Realm Consolidation Act 1914 empowers His Majesty in Council during the present war to issue regulations for securing the public safety and the defence of the realm, and I do not doubt that reg. 39BBB was rightly issued. The regulation was not issued until the 28th June last, but the plaintiffs agreed that this case was to be determined as if that regulation had been in force on the 5th March.

The order of the Shipping Controller of that date formulated a scheme for working the plaintiffs' fleet. This scheme had three essential features: (1) The steamers were requisitioned; (2) the owners were to work them exactly as if they were still running for their own account; (3) they were to run them, in fact, for the Government, accounting to the Government for all profits after deducting working expenses, hire of the steamship, and remuneration for their services; these two last items to be settled by agreement, or, failing agreement, by arbitration.

The scheme purported to be mandatory in all these respects. It is obviously a scheme which can only be worked as a whole. It is indivisible, and as a whole it must be judged. The scheme requisitioned three things—the ships, the owners' services, the profits; and the question to be determined is whether such a scheme, intended to be obligatory throughout, is within the powers conferred upon the Shipping Controller. The answer is to be sought in reg. 39BBB, where alone his powers are to be found. A close examination of that regulation has convinced me that it contains no power to requisition the services of the owners. Indeed, the Attorney-General, towards the close of his argument, admitted that such was the case. The scheme, therefore, is *ultra vires* in its second essential respect, and the order of the 5th March last cannot be supported.

It was urged for the plaintiffs that, taking the scheme as a whole, it is not a requisition of ships, but of owners' trading profits, and that it is, in effect, a taxation of the plaintiffs without Parliamentary authority—a revival of ship money in a new form. In the view I have taken of the right to requisition the owners' services this point does not appear to call for separate decision, since there could be no owners' trading profits unless the ships were managed by the owners. Trading profits could, no doubt, be made if the ships were taken out of the owners' hands on time charters, or by some other form of requisition open to the Shipping Controller, and such profits might be made by the controller as by any private time charterers, but the retention by the Government of profits so made could not be called taxation of the owners within any meaning of the word "taxation" known to me.

A preliminary point was taken by the Attorney-General that this action will not lie against the Shipping Controller, but that it should have been brought against the Attorney-General as representing the Crown. I do not think so. I adopt the observations upon this head of Romer. J. in *Raleigh* v. *Goschen* (77 L. T. Rep. 429; (1898) 1 Ch. 73, at p. 77) and the statement of the law by the then Attorney-General, Sir Richard Webster, at p. 78, in these terms: "If any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament, or State authority, the legal justification can be inquired into in this court; and in such a case it does not matter whether the defendant is the head of a department or not."

That statement of the law plainly contemplates that the officer of State whose conduct is in question would be the defendant to the action. I make the declaration asked.

I have now discharged my duty as judge, but, perhaps, in view of the public importance of this case, I may venture on two further observations. One is that if such a scheme as the Shipping Controller desires is to be carried out the services of the owners must be obtained by negotiation and not by command. The other is that I am so impressed with the advantage of the management of lines of steamers remaining where possible with the owners that I sincerely trust that, in the grave times through which we are passing, owners will fall in of their own free will and on reasonable terms with such arrangements as the Shipping Controller may think necessary. I should deeply regret if any judgment of mine

made his task more difficult or in any way hindered the wise and energetic use of our sadly depleted tonnage.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Stokes* and *Stokes*, agents for *Cameron, MacIver*, and *Co.*, Liverpool.

Solicitor for the defendant, *Treasury Solicitor.*

Judicial Committee of the Privy Council.

Oct. 29, 30, *and Nov.* 22, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, WRENBURY, and Sir ARTHUR CHANNELL.)

THE BARON STJERNBLAD. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE).

Prize Court—Contraband—Ostensible neutral destination—Suspicion of enemy ultimate destination—Seizure—Release of cargo—Damages and costs—Swedish War Trade Law of April 1916.

A Swedish firm shipped a cargo of cocoa beans by a Danish vessel from Lisbon to Gothenburg. On the way the vessel was seized and condemnation of the cargo claimed on the ground that it was contraband and had an enemy destination. The Swedish firm claimed the goods, together with damages and costs. Sir S. T. Evans, P. upon the evidence ordered the release of the goods to the claimants, but refused their claim to recover damages and costs.

Held, that the evidence by statistics proving the existence of a large re-export trade in cocoa beans from Sweden to Germany, which had developed since the outbreak of the war, was of itself such a circumstance of suspicion as justified the seizure, and that, even although the claimants might not be responsible for the existence of such suspicion, they were not entitled to recover damages and costs against the captors, because under international law the only question was whether circumstances of suspicion in fact existed.

Semble: *Although a Swedish subject is forbidden by the Swedish War Trade Law of April* 1916 *to give any assurance that his goods or their products are not intended for export to Germany, nevertheless the absence of such an assurance may be considered by the court in determining whether there were such suspicious circumstances as to justify the seizure.*

APPEAL by the claimants from the judgment of Sir Samuel Evans, P. in Prize of the 26th Nov. 1916 relating to the seizure of 3000 bags of cocoa beans on board the Danish steamship *Baron Stjernblad.*

Sir *Erle Richards*, K.C. and *Balloch* for the appellants.

Sir *Frederick Smith* (A.-G.) and *Stuart Bevan* for the Procurator-General.

The considered opinion of the board was delivered by

Lord PARKER OF WADDINGTON.—On the 18th April 1916 His Majesty's officer of Customs at the port of North Shields seized as prize 3000 bags of cocoa beans on board the Danish steamship *Baron Stjernblad.* the ground of seizure being that the goods were contraband of war.

It is not disputed that cocoa beans are contraband, but by the bills of lading the 3000 bags in question were deliverable to the appellants at Gothenburg, a neutral port, and the only question, therefore, was whether, beyond their ostensible destination at Gothenburg, they had a further or ultimate destination in an enemy country. The President decided on the evidence that they had not, and ordered their release to the appellants, but he refused to allow the appellants any damages or costs, and the present appeal is from this refusal.

The law on the subject is reasonably certain. It is clearly stated in the letter of Sir William Scott and Sir John Nicholl, printed pp. 1-11 of Pratt's edition of Story, J.'s Notes on the Principles and Practice of Prize Courts, and in the case of *The Ostsee* (9 Moore, P. C. 150). If there were no circumstance of suspicion, or, as it is sometimes put, "no probable cause," justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages. The reason is clear. It would be obviously unjust to compel a belligerent to pay damages or costs where he has done nothing in excess of his belligerent rights, and those rights justify a seizure of neutral property when it is in nature contraband and there is reasonable suspicion that it has an enemy destination. This may be thought hard upon the neutral owner, who will not be fully indemnified by a mere release of his property. So it is; but war unfortunately entails hardships of various kinds on neutrals as well as on belligerents. It follows that the real question to be decided on this appeal is whether, when the goods were seized, there were circumstances of suspicion justifying the seizure.

Some stress was laid by counsel for the appellants on the examples given by Sir William Scott and Sir John Nicholl in the letter above referred to of the circumstances under which seizure would be justified. All of them no doubt relate to suspicion arising either on the ship's papers or by reason of something done or omitted on the part of the master or crew. Their Lordships do not think that the writers of the letter intended their list of examples to be exhaustive, and it must be remembered that they wrote before the doctrine of continuous voyage had been applied either to contraband or to blockade. It is clear that the ultimate as opposed to the ostensible destination of goods would seldom, if ever, appear on the ship's papers or be within the knowledge of the master or crew. It would have to be proved or inferred from other sources, and it could hardly be contended that if the Crown were in possession of evidence obtained from such other sources from which an ultimate destination in an enemy country could be inferred as reasonably probable, the seizure of the goods would not be justified.

The appellants further contended that in considering whether there were circumstances of suspicion which justified the seizure the court must confine its attention to those circumstances for which the owner of the property seized is in some way responsible, and cannot take into con-

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

sideration circumstances the existence of which is not due to any act or omission on the part of such owner or his agents or employees. Before considering this contention their Lordships think it better to state shortly the several facts on which the Crown relies as raising a reasonable suspicion that the 3000 bags in question had an ultimate destination in Germany.

Cocoa and chocolate are important foodstuffs. Both are manufactured from cocoa powder, itself the product of the cocoa bean. In manufacturing cocoa powder cocoa fat is also produced, and from cocoa fat glycerine is easily made, and this can be readily converted into nitro-glycerine, an essential ingredient in many high explosives. Thus 100 tons of cocoa beans give about 60 tons of cocoa powder and 25 tons of cocoa fat, which last will yield 2½ tons of glycerine, and 2½ tons of glycerine can be converted into 6 tons of nitro-glycerine.

Prior to the war Germany was importing annually about 55,000 tons of cocoa beans—this was approximately one-quarter of the world's annual production. The outbreak of war cut her off from nearly 85 per cent. of her supply. The result was serious. In spite of the measures taken by the German Government to obtain supplies from other sources, to secure economy and to regulate distribution, prices rose rapidly until by March 1916 the price of cocoa in Berlin was eight or nine times its price in London. Under these circumstances there was every inducement to neutrals, and in particular to the neighbouring Scandinavian countries, to develop an export trade in cocoa beans or their products to the German Empire.

Turning now to Sweden, their Lordships find that prior to the war the imports of cocoa-beans into Sweden were between 1600 and 1700 tons only annually. There was no re-export trade to Germany. Since the outbreak of hostilities imports of cocoa beans into Sweden have increased tenfold, and a re-export trade to Germany has been developed. During the first year of the war such re-export trade amounted to over 1200 tons, it being the regular practice to ship cocoa beans to Gothenburg in Danish steamers and to reship them thence to Germany. Besides this the imports of cocoa into Sweden have since the outbreak of the war largely increased, and there has developed a considerable export trade from Sweden to Germany in cocoa powder, cocoa, chocolate, and cocoa fat, an export trade which was non-existent before the war. The fact that before the war Sweden imported cocoa and chocolate from Germany, and since the war has been unable to do so, has little bearing on the inference suggested by the circumstances to which their Lordships have referred.

The position is therefore this. If the shipments of cocoa beans to Sweden be considered collectively, a considerable portion thereof must be destined for or find its way into Germany, either by the re-export to Germany of the beans themselves or by the export to Germany of the various products of the beans. It must be remembered that in *The Balto* (14 Asp. Mar. Law Cas. 28; 116 L. T. Rep. 319; (1917) P. 79) it was decided that an intention to export to an enemy country the manufactured products of imported raw material might bring a case within the doctrine of continuous voyage. The decision is not binding on this board, but the appellants' counsel did not ask their Lordships to review it or question its validity in law. The appellants thus belong to a class of importers, some of whom must be engaged in a contraband trade, while others may not. It is impossible in any particular case to avoid suspicion or to predicate with regard to any particular importer that his intention is innocent.

But the matter does not stop there. It is not improbable that in the case of a reputable Swedish merchant, His Majesty's Procurator-General might accept his assurance or guarantee that neither the beans in question nor their products were intended for export to Germany, but would be consumed in Sweden. But here unfortunately a difficulty is raised by the Swedish War Trade Law of April 1916. According to such law it is unlawful for a Swedish subject to give any such assurance or guarantee without the consent of the Swedish executive, and such executive refuses to allow Swedish subjects to give any such assurance or guarantee with regard to the products of imported raw material. This law, or at any rate the way in which it is administered, has already on several occasions proved prejudicial to the proper determination in the Prize Court, according to international law, of questions arising between the Crown and Swedish subjects. Only the other day the President struck out a claim on the ground that the claimant, a Swedish subject, refused, under order of his Government, to give the discovery which had been ordered by the Prize Court, and their Lordships' board felt unable to advise His Majesty to give leave to appeal from the President's decision. It is quite impossible for a Prize Court administering international law to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on either generally or in any particular case. The Prize Court can, however, protect itself, but this is not so with the Swedish subject. He is in a dilemma. Either he must act in contempt of the order of the Prize Court and so lose his case, which may be a perfectly good one, or he must prove his case to the Prize Court, and in so doing incur penalties under his own municipal law. The position is anomalous, but the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers.

It appears that the assurance or guarantee given by the appellants prior to the seizure of the goods in question went only to the consumption in Sweden of the raw material, and said nothing about its products. It was only in the course of the subsequent proceedings before the Prize Court, when one of the directors of the appellant firm was examined orally, that evidence was adduced on this point, and this evidence, though accepted by the President as satisfactory, was not, in their Lordships' opinion, so conclusive as to make it unreasonable for the Crown to bring the case to trial. For example, it does not appear how the appellants dispose of the cocoa fat produced in the manufacture of cocoa or chocolate from the cocoa beans.

Their Lordships therefore conclude that, looking at all the known facts from the common-sense point of view, there were circumstances of suspicion calling for further inquiry, and amply sufficient to justify the seizure, so that the only remaining question on this part of the case is

whether the appellants are right in their contention that these facts, or some of them, ought to have been disregarded altogether, because their existence was not due to any action or omission for which the appellants could be held responsible.

Their Lordships are of opinion that this contention is wholly untenable. The question in every case is whether circumstances of suspicion exist, and not who is responsible for their existence. Thus the fact that documents are destroyed when search is imminent is a suspicious circumstance irrespective of the person responsible for such destruction, and whether this person acted on the instructions or in the presumed interest of the cargo-owners or otherwise. Indeed, in the present case the question how far the appellants were responsible for the growth of the export trade from Sweden to Germany in cocoa beans or their products was precisely one of the questions requiring investigation, and would be of the utmost materiality in determining the ultimate destination of the goods in question. If responsibility has anything to do with it, it would seem that the appellants were responsible for the absence of any assurance or guarantee as to the products of the goods, although their omission in this respect was due to observance of their own municipal law, and, further, a neutral cargo-owner would appear to be quite as responsible for the action of his own Government as he is for the action of the master or crew of the vessel on which the cargo is shipped.

There are two further points which require notice. It was contended that at any rate after the 4th Aug. 1916, the date when the oral evidence above referred to was taken, the Crown ought to have consented to a release of the goods. In their Lordships' opinion the Crown was amply justified in bringing the matter to trial. It was also urged that the Crown had improperly delayed the trial. Their Lordships see no evidence of this. The trial took place on the 27th Nov. 1916, the seizure having been made on the 16th April 1916. This does not appear an unreasonable interval, having regard to the heavy work of the Prize Court and the importance of the questions at issue. In any case, questions as to delay are eminently a matter for the President to deal with, and their Lordships could only interfere with his decision in very exceptional cases.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitor for the respondents, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Oct. 30, 1917.

(Before PICKFORD and BANKES, L.JJ. and SARGANT, J.)

NEWSUM *v.* BRADLEY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract of affreightment — Cargo— Freight — "Abandonment" of ship by crew under stress of enemy violence—Ship eventually salved—Abandonment of contract of affreightment—Notice of intention to abandon.

The plaintiffs were the indorsees of a bill of lading signed on behalf of the defendants, the owners of the ship J., for the carriage of a cargo of wood to be delivered at Hull on payment of freight as per charter-party. The J., while off the coast of Scotland, was, on the 7th Oct. 1916, *attacked by a German submarine, and the crew were compelled to take to their boats under threats from loaded revolvers. The enemy placed bombs on board the J., and the last the crew saw of the vessel led them to believe that she was sinking. The master, on arriving at Aberdeen on the 8th Oct., telegraphed to the owners: "Ship sunk yesterday submarine." On the 9th Oct. the owners wrote to the plaintiffs' agents: " . . . I advise you of the loss of my steamship* Jupiter, *which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. . . ." The vessel was subsequently found a waterlogged derelict and towed into Leith, where she was on the 11th Oct. taken possession of by the Receiver of Wreck. On the same day the plaintiffs claimed to elect to take possession of their cargo where the steamer was.*

Held, by Pickford and Bankes, L.JJ. (without deciding whether the master and crew had, on behalf of the owners, abandoned the performance of the contract), that the letter of the 9th Oct. was a notice by the owners to the plaintiffs that the owners were unable to perform the contract, and that they abandoned it. The cargo owners were therefore entitled to receive the cargo without payment of freight.

Held, by Sargant, J. (dissenting), that the master and crew had not abandoned the contract, and that the owners' letter of the 9th Oct. was not a notice of intention to abandon the contract.

Decision of Sankey, J. (ante, *p.* 79 ; 116 *L. T. Rep.* 669) *affirmed.*

APPEAL by the shipowners from a judgment of Sankey, J., reported *ante*, p. 79 ; 116 L. T. Rep. 669 ; (1917) 2 K. B. 112.

The facts, as found by Sankey, J., are set out at *ante*, p. 79 ; 116 L. T. Rep. 669, and there are further statements of the facts in the judgments of the Court of Appeal (*infra*).

Sankey, J. held that the owners had by their master and crew abandoned during the voyage the further performance of the contract, and that, the cargo owners having exercised their rights before the shipowners had resumed possession of the vessel, the contract of affreightment was at an end, and the plaintiffs were therefore entitled to take their cargo free of freight.

The shipowners appealed.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

MacKinnon, K.C. and *L. Noad* for the appellants.—Abandonment of a ship owing to stress of weather and abandonment owing to the stress of enemy and violence are totally different things, and the decisions in *The Cito* (4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 P. Div. 5) and *The Arno* (8 Asp. Mar. Law Cas. 565; 72 L. T. Rep. 621) have no application to the facts of the present case. Secondly, the owners' letter of the 9th Oct. was not an intimation of an intention to abandon the contract, but a mere colourless statement of historic fact. Believing as they did that the ship was sunk, it would have been irrelevant to write for the purpose of telling the plaintiffs that they could not perform the contract. They did not say that they would not perform the contract; nor, that, if the ship were salved, they would abandon the contract.

Leck, K.C., *R. A. Wright*, K.C., and *Le Quesne* for the respondents.—There is no distinction between abandonment by stress of weather and abandonment by stress of enemy violence, and *The Cito* (*sup.*) and *The Arno* (*sup*) govern this case. Secondly, the owners' letter of the 9th Oct. was a clear intimation that the owners could not, and therefore had no intention to, complete the contract.

MacKinnon, K.C. replied.

Pickford, L.J. — This is an appeal from a decision of Sankey, J. The action was brought by the owners of cargo on board the ship *Jupiter* for a declaration that they were entitled to receive delivery of their cargo without payment of freight. The declaration claimed was that they were entitled to receive delivery at Leith, because that was the port into which the ship was brought. As a matter of fact she was taken on to her original port of destination from Leith under an agreement that that should be done without prejudice to the rights of either party.

The facts are stated in the judgment of Sankey, J. at length, and I do not propose to repeat them more than is necessary to make what I have to say intelligible. The plaintiffs were the indorsees of bills of lading signed on behalf of the owners of the *Jupiter*, and they were also charterers of the *Jupiter*. When they became owners of the cargo by some intermediate indorsements of the bills of lading, which have not been detailed and I do not think matter, they were the charterers and they were the owners of the cargo. The charter-party and the bills of lading were for the carriage of a cargo of wood goods to be delivered at Hull on payment of freight as per the charter-party.

On the voyage to Hull the *Jupiter* was attacked off the coast of Scotland by a German submarine. The crew of the submarine obliged the crew of the *Jupiter*, by threats of shooting, to take to their boats; the Germans put bombs on board the *Jupiter*, exploded some of them and left some, as I gather from the story, which were still unexploded, but which exploded afterwards, and they towed the crew away in the boats a distance of about five miles. The last the crew saw and heard of the ship made them think that she was sunk; they heard explosions—whether they could see her or not I do not know—but at any rate such information as they could get, either by eye or ear, led them to believe that she was sunk. They were picked up by a vessel and taken into Aberdeen, and in Aberdeen they continued under the same impression under which they had been when cast off by the Germans, that the ship was gone, and the master telegraphed to his owners on the 8th Oct.: "Ship sunk yesterday submarine arrived all well Sailors' Home." There is no doubt, therefore, that when the master and crew got to Aberdeen they believed that the ship was gone and they had no intention of trying to rejoin her; it was no use trying to rejoin a ship which they thought was at the bottom of the sea.

The owners on receipt of that telegram wrote to the firm of P. R. Bordewick and Co., the brokers who effected the charter, and they, on getting it, wrote to Messrs. Newsum and Sons, the plaintiffs, to this effect: "Dear Sirs,—Steamship *Jupiter*.—We have the following letter from owner of this steamer to-day, which kindly note. 'It is with very great regret I advise you of the loss of my steamship *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely.' Will you kindly advise charterers, and oblige?" I think the effect of that is exactly the same as if that letter had been written direct by the owner to the charterers; he wrote to the broker and asked the broker to advise the charterers, and the broker did so.

On the 11th Oct. it came to the knowledge of the charterers, and also to the knowledge of the owners, that the ship had not sunk, but that she had been brought in by some ship of the navy into Leith, where she was in the possession of the Receiver of Wreck for that district, and at 2.27 p.m. on the 11th Oct. the cargo owners' solicitors telegraphed to the owners in Hull: "*Jupiter*.—We represent owners cargo of this steamer recently brought into Leith derelict. Our clients elect take possession their property where now lying. Please note." Of course that was done in the interest of the cargo owner for the purpose of taking possession of the cargo without paying the freight. At the same time on the same day they telegraphed to the Receiver of Wreck: "Steamer *Jupiter*.—We represent owners cargo. Understand she is now lying at Newhaven. Please note our clients claim elect take possession their property where steamer now is. Please do not allow cargo to be dealt with except with our sanction. Please do anything necessary protect property for our clients." But earlier on the same day, somewhere about 10.30 a.m, information had been received by the shipowner that the ship had been taken into Leith. He took no steps until he received the telegram which I have read from the cargo owners' solicitors, whereupon he took it to his solicitors, who wrote this letter on behalf of the owners to the charterers or their solicitors: "We act on behalf of the owners of the above steamship, and your telegram of this afternoon has been handed to us for reply. Immediately upon her arrival our clients retook possession of the vessel, and this prior to the reception of your telegram." That was at any rate a misapprehension; possession had not been taken by the owner. The owner had telegraphed to Furness, Withy, and Co., his agents, and had asked them to protect his interest and said that he was coming himself that evening, and he did come that evening, but at the time when this letter was written from Hull he had not taken possession, nor had he taken any steps to do so, nor had Furness, Withy,

and Co. on his behalf. "We think you will appreciate your clients have no election to take possession of their property where it now lies. On the contrary, our clients have already been advised that there is no great difficulty in bringing the vessel and her cargo to Hull, which is its destination under the charter and bills of lading. Please note that the cargo will be brought forward accordingly, and the freight will be earned and claimed in due course." If the owner had taken possession of the ship before the receipt of the telegram of the cargo owners' solicitors, the matter might and probably would have been in a very different position indeed, but that statement was, as I say, at least a misapprehension. The owner arrived in Leith on the evening, I think, of that day, and went down to the boat, but was not allowed to go on board. The next day he saw the senior naval officer and told him he had come for the ship, and said, "I am glad to have her back." The senior naval officer said, "You have not got her back; she belongs to the Receiver of Wreck." That was on the 12th. Up to that time the owner had not resumed possession of the vessel. He was allowed to go on board, and left behind an engineer to do some repairs to the engines, the Germans, I think, having damaged the engines. Then, after some considerable negotiations, it was arranged that the ship should be taken to Hull and the cargo delivered there without prejudice to the rights of either party. The shipowners did not, in fact, get full possession or get possession of the vessel until the 28th Oct. That, I think, is sufficient to state the facts.

On these facts the cargo owner claims that he is entitled to receive the cargo without paying freight, because he had an intimation given to him by the shipowner that he was not going to perform his contract, and he had accepted that intimation, and he was entitled so to accept it, and that when he accepted it the contract was at end, and, as the shipowner had not performed his contract because the cargo was in Leith and his contract was to bring it to Hull, he was entitled to have it without paying any freight. The question is whether the acts or laches of the owner and his servants, the master and crew, were such as to entitle the cargo owner to say: "I elect to treat this contract as at an end, and take my cargo where it lies, because it is my cargo and I am entitled to have it, and you cannot ask me to pay freight for it, because you have not completed the service which you contracted to render."

Up to a point it seems to me that this case is covered by authority. I quite agree with what the learned counsel for the appellants said, that it is no use looking at authorities unless you look at the principle which underlies them, and he accepted the statement of the principle by Gainsford Bruce, J. in the case of *The Arno* (72 L. T. Rep. 621; 8 Asp. Mar. Law Cas. 5) as being correctly stated. It is this: "The real question is whether, so far as the owner of the ship is concerned, there was on his part, or on the part of his servants, an act done so clearly indicating his intention not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to the contract." I would only add to that statement that in my opinion you might add inability to perform; it might be that he would be quite willing to perform it if he could, but if there were a communication by him to the charterer that he was unable to perform it, and for that reason was not going to perform it, it seems to me it would amount to the same thing.

It has been decided by cases which are binding upon this court—I will not use the word "abandonment," because a good deal has been said about it as being an ambiguous word—that the leaving of a ship by her master and crew under stress of weather, by reason, therefore, of perils of the sea which are an exception in the charter, or in the bill of lading, with no intention of returning, is such an act as entitled the charterer to say: "I put an end to this contract, and I will have my goods without paying freight." That was decided in *The Cito* (4 Asp. Mar. Law Cas. 468; 7 P. Div. 5) and *The Arno* (*sup.*), the *Arno* being a very strong case, because the shipowner had made an arrangement with the salvors by which they were to hand the ship over to him in order to enable him to earn his freight, and in that case the ship was taken to her port of discharge, but, in spite of that arrangement with the salvors, as he had not got possession of her, Gainsford Bruce, J. and the Court of Appeal held that the cargo owner was entitled to have the cargo returned to him without payment of freight.

In this case Sankey, J. has held that the leaving of the ship by the master and crew under stress of the King's enemies, which is also an exception in this charter, is just the same as leaving the ship under stress of weather; in other words, it does not make any difference whether you leave the ship because you will be shot if you do not, or whether you leave the ship because you will be drowned if you do not; and some support, I think, is afforded to that decision of the learned judge by the case, to which he referred, of the *W. S. Caine* v. *Owners of the Beilglade* (reported in Lloyd's List, the 3rd Aug. 1915), because the facts were there, as stated by the learned counsel, that the crew were obliged to leave by the Germans—her crew were driven off by the Germans, who failed to sink the ship—and during the argument Swinfen Eady, L.J. drew attention to a possible distinction between a case where the crew had been driven off by an enemy ship and where they had left in consequence of stress of weather. The judgment was that in that case there was an abandonment.

I do not rely very much upon it because the facts are not very clearly stated, and it is not quite clear whether the distinction, although alluded to by the Lord Justice in the argument, was present to the minds of the court when judgment was delivered; nor do I think it necessary in this case to determine the point. I do not wish to be taken as expressing any disapproval of Sankey, J.'s decision upon that point, but I do not think it is necessary to determine it. It does not seem to be disputed that if, whatever the reason of leaving the ship, the owner acquiesces in the position that the ship has been left derelict without her master or crew to carry out the contract, and while he is acquiescing in that position, especially if he has communicated his acquiescence to the charterer, the charterer says, 'I will treat the contract as at an end," under those circumstances the charterer is entitled to put an end to the contract. That

seems to me to be exactly what he did in this case. I will assume for the moment that a driving off by enemies is not abandonment within the cases—that is to say, that there is no act of volition as there is in the case of leaving a ship because of stress of weather—and that therefore the mere leaving would not be sufficient to give the charterer a right to rescind the contract, or put an end to the contract; I do not say it is so, but I will assume it for the moment. When the master and crew were cast off in this case they were picked up and taken into Aberdeen, and when they got to Aberdeen it is clear that they had no idea they could return, and had no intention of returning to the ship, which they thought was at the bottom of the sea. So far were they from thinking that, or intending that, that the master telegraphed to the owners that the ship was sunk. Upon that the owners sent the letter which I will repeat here: "It is with very great regret I advise you of the loss of my steamship *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely." That was intended for and was communicated to the charterers, and it seems to me, I say it with diffidence because we are not all agreed, that the letter is as clear an intimation as you could possibly have to the charterer that the shipowner considered himself in the position of inability to carry out his contract, and for that reason he was not going to carry it out. I quite agree that he did not say: "I do not intend to carry it out if I could," but "I am not in a position to carry it out. My ship is sunk and the crew are landed." It seems to me, as I say with diffidence, that it is quite clear, but, if it be not clear, it seems to me at any rate that letter comes under this principle, stated in many cases, that if one person sends a communication to another, ambiguously worded, which that person might fairly take to mean a statement that the contract is not going to be carried out, and that person acts upon it, the person who sends the letter is bound by it. I can quite understand that if the owner had met some independent person in the street, and had told him that his ship was sunk, it might have been simply a conveying of information without any intention that anybody should act upon it; but it seems to me between two business men, the charterer and the shipowner, when the shipowner writes to the charterer and says, "my ship is sunk and the crew are landed," it is equivalent to a clear intimation, and would be taken by a business man to be a clear intimation, that he is not in a position to carry out his contract.

After sending that letter, nothing had been done so far as the charterer was concerned, in fact nothing had been done at all, except a request to his agent to protect his interests, by the shipowner to resume possession or indicate any intention to carry out that contract before the charterers' solicitors sent the telegram of the 11th saying that they claimed to put an end to the contract and take the cargo where it was. It seems to me on these facts there was, even assuming the learned judge was wrong in the view that he took that leaving the ship under duress of enemies and in fear of your life is the same thing in principle as leaving the ship under pressure of bad weather and in fear of your life, ample evidence of an intimation on the part of the shipowner that he could not carry out and was not going to carry out his contract, to justify the charterer in giving notice that he considered the contract at an end, and that he was going to take his cargo where it lay.

It seems to me that brings it within the authorities cited, and I think the learned judge was right, and that this appeal should be dismissed.

BANKES, L.J.—I agree. Mr. MacKinnon has appealed to us to decide this case upon the principle or principles applicable to contracts in general, and not to treat the matter as though upon the decided cases there was some special branch of the law which was applicable to the case of a bill of lading holder or a charterer in a case where the vessel has been abandoned by the master and crew. Speaking for myself, I think that Mr. MacKinnon is entitled to make that appeal, and, so far as I am concerned, I think that the case ought to be decided, and I shall endeavour to decide it, upon general principles.

The general principle applicable to this case is this, stated shortly: That if one party to a contract repudiates it and refuses to perform it, the other party may accept the repudiation and elect to rescind it. There are a number of cases in which the principle has been applied and in which tests have been indicated as proper tests for the purpose of applying the principle. In *Freeth* v. *Burr* (29 L. T. Rep. 773; L. Rep. 9 C. P. 208) Lord Coleridge used language which has been more than once accepted in the House of Lords, and in the last case, *General Bill Posting Company Limited* v. *Atkinson* (78 L. J. 77, Ch.; (1909) A. C. 118) Lord Collins says this: "I think the true test applicable to the facts of this case is that which was laid down by Lord Coleridge in *Freeth* v. *Burr* (*sup.*) and approved in *Mersey Steel Company* v. *Naylor* (51 L. T. Rep. 637; 9 App. Cas. 434) in the House of Lords: 'That the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.'" He speaks of acts and conduct evincing an intention no longer to be bound, and, in my opinion, a party may, by his acts or his conduct, evince such an intention, either by indicating that he is unwilling to perform or to complete the performance of his contract, or that he is unable to perform or complete the performance of his contract.

It is quite true that in many cases in which the question has arisen the matter which had to be considered by the court was whether the particular act or the particular conduct or the particular language which was relied upon as a repudiation was an unequivocal statement of such an intention, or whether upon a true construction of the particular act or statement the proper inference was that it amounted to an unequivocal declaration of either unwillingness or an inability to perform. In the case of *Johnstone* v. *Milling* (54 L. T. Rep. 629; 16 Q. B. Div. 474) Bowen, L.J. says this when discussing this question: "The claim being for wrongful repudiation of a contract, it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention." I think that the letter which the owner wrote on the 9th Oct. to

the broker for the purpose of being communicated to the other part to the contract—namely, Messrs. Newsum—was, within the language of Bowen, L.J., such language that the other party was justified in inferring from it, the defendant's statement, that he was not in a position to continue to carry out the contract.

The letter is in these terms—it is not a statement that he has had a communication that his vessel has been lost or abandoned, and that as soon as he ascertains the exact circumstances he will be in a position to inform the charterers what he proposes to do; nothing of the kind: he accepts the statement of his master, that the vessel has gone to the bottom, and he passes it on in a statement that the vessel is at the bottom, and that the crew have all been landed safely—"It is with very great regret I advise you of the loss of my steamship *Jupiter* which steamer was sunk by enemy submarine on Saturday last." That purports to be a statement of fact, and, if the statement there were not correct, there could be no more conclusive indication, I think, of the impossibility of the owner fulfilling or completing his contract. If that is the correct interpretation to be put upon this communication, it gave the holder of the bills of lading the right to elect to accept it as a repudiation of the contract, and to rescind it accordingly. That letter was dated the 9th, and presumably it would be received on the 10th or the 11th. On the 11th the owner for the first time hears that the vessel has not been sunk, and he does not then make any communication to the holders of the bill of lading, but he decided to go north and ascertain for himself what the position was, and on that very day, and before he starts, he receives the telegram from Messrs. Crump, in which the holders of the bill of lading indicate quite plainly that they had elected, and they did treat the contract as at an end, and elected to take possession of their property where it was then lying. Under those circumstances, if my interpretation of the letter is right, the contract was at an end, and at an end, not because the abandonment necessarily was such an intimation that the adventure, if I may use that expression, had been abandoned, but because of the communication which the owner himself made.

There is no question here that can arise upon the facts as to the right of a person who has made such an intimation to revoke it before the election by the other party to the contract is made. No such question arises here, and I do not desire to express any opinion as to whether or not a distinction can be drawn between a case of abandonment by master and crew owing to stress of weather, which may be said to be a voluntary act as a result of a decision come to of their own free will, and a case where master and crew are driven from the vessel under threats that unless they immediately leave the vessel their lives will be sacrificed. I do not think for the decision of this case it is necessary to come to any decision upon that point. Apparently Sankey, J. thought there was no distinction, and I am not prepared to say one way or other whether I agree. It is sufficient for the purpose of my decision that, in my opinion, the interpretation could be put upon the letter of the owner to which I have already referred, as being an unequivocal statement that he is unable to perform his contract.

SARGANT, J.—In this case, as I am differing both from the decision of the learned judge in the court below and the decision of the two other members of this court, I need hardly say I do it with the greatest hesitation, but as I have formed a concluded and definite view myself, and as the question is one which depends upon the general law of contract, not specially upon the law of contract applicable to shipping, I think I ought to express my views.

The question here entirely depends upon whether there has been an abandonment by the shipowners of the contract, and I take the test as being, to repeat the passage quoted by Bankes, L.J., whether the acts and conduct of the party "evince an intention no longer to be bound." I have to consider the matter with regard to two questions: Was there an abandonment by the master as found by Sankey, J., and whether, if there was no abandonment by the master, there was subsequently an abandonment by the shipowners themselves, in view of the communication which they sent on the 9th Oct.

As regards the first point, I take the facts as stated by Sankey, J. very briefly. The enemy compelled the crew to take to their boats under threats from loaded revolvers. It is said, and I think that is the view taken by Sankey, J., the matter is the same as if the master and crew had abandoned the vessel under stress of weather. In my judgment it appears that the matter is *toto cælo* different; in the one case, of abandonment by stress of weather, the master and crew, or rather the master, the owners' agent, comes to the conclusion that the voyage cannot safely be performed, that the vessel may sink, and it is for that very reason, because the vessel is in peril and about to sink, that he quits the vessel. To state the case a little more narrowly with reference to shipping, I should like to put the matter on this first point in the way in which it is put by Gainsford Bruce, J., with certain words added by Lord Esher. Gainsford Bruce, J. has said, as Pickford, L.J. has read: "The real question is whether, so far as the owner of the ship is concerned, there was on his part, or on the part of his servants, an act done so clearly indicating his intention not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to the contract." Lord Esher says this: "Then arises the case which is dealt with in the *Cito*, where the master and crew of a ship abandoned her in mid-ocean—that is to say, go away with the intention of giving up the carrying of the cargo to the port of destination." That shows quite clearly that an abandonment under stress of weather is an abandonment because the master comes to the conclusion that the adventure cannot be continued, and, although he is quitting compulsorily in a certain sense inasmuch as he takes to the boats for his own personal safety, he is doing so on the very ground which renders the performance of the service and the completion of the voyage impossible. At the moment when he takes to the boats he does so because he has come to the conclusion that the vessel must sink, and the enterprise therefore has come to an end.

In the case before us, where the crew left the vessel because the enemy had revolvers pointed at the heads of the crew, and would have shot them if they had not left the vessel, the reason for leaving the vessel was not connected with the fact

that the vessel was going to be destroyed, although it was exceedingly possible that the vessel would in fact be destroyed. It seems to me that the position is exactly the same as if the German enemy had seized the master and crew, had bound them and had placed them in the boats, and then had towed them away to a considerable distance from the vessel, some five miles or more. In view of that distinction, and in view also of what appears to me to be the common meaning of the word "abandonment" as connoting some sort of voluntary act on the part of the person who abandons, I have come to the conclusion that the act of the crew in saving their own lives by obeying the directions of the Germans, with revolvers pointed at their heads, cannot be deemed to show any intention on the part of the master and the crew on behalf of the owners of abandoning the contract of affreightment.

That is the only ground on which the learned judge has proceeded in his judgment; but Pickford and Bankes, L.JJ. both take the view that even if the "leaving" of the vessel under the circumstances I have mentioned, did not amount to an "abandonment," yet there was an abandonment on the part of the owners themselves by what subsequently took place. The main circumstance that is relied upon is the sending of a letter to be communicated to the charterers or cargo owners in these terms: "It is with very great regret I advise you of the loss of my steamship *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. Will you kindly advise charterers and oblige?" In my judgment that cannot properly be construed as being more than what it purported to be, a communication of information received with regard to the vessel. I notice, for instance, "the crew have all been landed safely." It seems to me the natural meaning of that is to reassure the persons who are interested in the safety of the crew as to their personal safety, and I do not see how it can be, at any rate, any communication of any intention not to perform the contract on the part of the owners. No such communication of intention could have been of the least value or relevance. If the ship had gone to the bottom, no intention on the part of the owners could have made the slightest difference; the whole substratum of the contract would have necessarily disappeared, and under those circumstances I am unable to extract from that colourless telegram, to use the words that Bankes, L.J. quoted, "any act or conduct on the part of the owners which evinced an intention no longer to be bound." It was unnecessary for him to evince any intention not to be bound by the contract when the facts, which had been communicated to him, and which were then communicated to the other side, in themselves, and without any intention on the part of any person, absolutely destroy and put an end to the substratum of the contract.

Appeal dismissed.

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

Solicitors for the respondents, *William A. Crump* and *Son.*

Tuesday, Nov. 6, 1917.

(Before PICKFORD and BANKES, L.JJ. and SARGANT, J.)

MOOR LINE LIMITED *v.* LOUIS DREYFUS AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter party—Commission payable to charterers—Whether commission payable on demurrage as well as on freight.

The plaintiffs, the shipowners, sued the defendants, the charterers, for 137*l.*, *which the defendants had deducted from payments of freight to the plaintiffs under a charter-party of the* 21*st Sept.* 1915. *The charter-party, under which the charterers were to be liable for freight and demurrage, by a clause provided that: "A commission of* 2½ *per cent. is due on shipment of cargo to" the charterers, "vessel lost or not lost, whose agents at port of loading are to attend to ship's business on customary terms." The charterers contended that the clause entitled them to commission not only on the freight, but also upon payments which they had to make to the plaintiffs in respect of demurrage at the port of discharge.*

Held, that the defendants were entitled under the clause to commission on freight only, and not on demurrage at the port of discharge.

Decision of Bailhache, J. affirmed.

APPEAL by the defendants, the charterers, from a decision of Bailhache, J.

By a contract called the "North American Berth Contract" it was agreed on the 21st Sept. 1915 between the Moor Line Limited, owners of the British steamship *Hopemoor* (the plaintiffs), and Messrs. Louis Dreyfus and Co., London, the charterers (the defendants), that the *Hopemoor* should load at Norfolk or Newport or Baltimore from the charterers or their agents a complete cargo of Indian corn in bulk, and, being so loaded, should proceed to a safe port in the Mediterranean, excluding Africa, and deliver the same on being paid 11*s.* 3*d.* per quarter of 480lb. of heavy grain.

A clause of the berth contract provided as follows:

Charterers' liability under this contract to cease on cargo being shipped, but the vessel to have a lien thereon for all freight, dead freight, demurrage, or average. This clause to be embodied in Bs/lading, vessel's ordinary disbursements at port of loading to be advanced by charterers, if required by master, at current rate of exchange, subject to insurance and 2½ per cent. commission. A commission of 2½ per cent. is due on shipment of cargo to Louis Dreyfus and Co. [as charterers], vessel lost or not lost, whose agents at port of loading are to attend to ship's business on customary terms.

The charterers were to pay freight on London, one-third when discharge commenced, one-third when cargo was half-discharged, and the balance on completion. Demurrage at the port of discharge, if any, was to be paid by receivers at the rate of 120*l.* per running day or *pro rata* for part thereof. In paying the amount due for freight and for demurrage at the port of discharge to the shipowners, the charterers deducted the sum of 137*l.*, representing 2½ per cent. commission on demurrage, amounting to 5480*l.*, at the port of discharge.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law

The shipowners brought an action to recover the 137*l.*, claiming that commission was not payable on the amount of the demurrage at the port of discharge.

March 27, 1917.—Bailhache, J.—In this case the Moor Line Limited, the owners of the steamship *Hopemoor*, are suing Messrs. Louis Dreyfus and Co. for a sum of about 137*l.*, which they have deducted from payments of freight to the Moor Line Limited under a charter-party, dated the 21st Sept. 1915, in respect of the charter, and in respect of the laying up of the *Hopemoor* on the berth. The amount which is in dispute is a commission of 2½ per cent. upon demurrage, which was incurred in the discharge of the steamer at the port of discharge. The question is short, and turns upon the construction of one clause in the charter-party, which runs in this way: "A commission of 2½ per cent. is due on shipment of cargo to Louis Dreyfus and Co., vessel lost or not lost, whose agents at port of loading are to attend to ship's business on customary terms." A commission of 2½ per cent. is thus due on shipment of cargo to the charterers' vessel, lost or not lost.

It is contended on behalf of Louis Dreyfus and Co. that that clause entitles them to commission not only on the freight, which of course is not disputed, but also upon payments which they have to make to the plaintiffs in respect of demurrage at the port of discharge. It is contended, on the other hand, that the clause in that form only entitles them to deduct commission on the amount of the freight.

Mr. MacKinnon, for the plaintiffs, has referred me to the history of this condition. It stands in this way: Originally it was necessary in one or two cases for the owner to pay commission, and commission on the signing of the charter-party, and in those cases the custom then was that the broker was paid a commission of 5 per cent on the freight, and that commission became due to him on the sum in the charter-party. Latterly it has been the custom—I suppose now the invariable custom—to insert the broker's right to commission in the charter-party itself. The charter-party is not, of course, a contract between the shipowner and charterer and the broker, but the broker's commission is inserted in the charter-party, and when it is so inserted no difficulty arises about payment. The brokerage which is payable to the broker is expressed in different phraseology in different charter-parties. In many modern charter-parties the brokerage is expressed to be "on freight, dead freight, and demurrage." It is also commonly expressed that there is a brokerage to be due to the broker on the signing of the charter-party; and sometimes the words "ship lost or not lost" are added.

Of course, a difficulty arises from saying that brokerage on freight, dead freight, and demurrage is due on the signing of the charter-party, because on the signing of the charter-party it generally cannot be ascertained what the freight is. It is certainly not known that there will be any dead freight, and demurrage may or may not be incurred, and in a case of that sort (*Re Tatem Steam Navigation Company and Huni and Wormser*, July 12, 1916, not reported), which came first of all before a learned arbitrator—Mr. Clifton, a gentleman of large experience in these matters—and afterwards before Scrutton, J., the question did arise as to whether demurrage in a charter-party expressed in those words—"Commission to be on freight, dead freight, and demurrage, due on the signing of the charter"—could cover demurrage at the port of discharge, the difficulty being that it could not by any possibility be due on the signing of the charter-party. Then it was equally true in that case to say that you could not ascertain the freight until the vessel was discharged, particularly when that freight was payable on the weight of the out-turn, and you could not say, when the charter-party was signed, whether there would be demurrage at the port of discharge. The learned arbitrator and Scrutton, J. both held that, although the commission was expressed to be payable on the signing of the charter-party, yet that did not exclude the broker's right to have his commission at the port of discharge. That is not the question I have to decide here, and I only mention that case because it has been cited to me, just to say that it is not conclusive, and not as having any material bearing on the case now before me.

It has been said by Mr. Leck for the defendants that, seeing that modern forms of charter-parties very commonly express themselves in this way, "Commission to be paid on freight, dead freight, and demurrage," I must take it that when the charter-party merely says "commission" it means the same as if the charter-party went on to say, "Commission on freight, dead freight, and demurrage"; and he says that those words only express the custom which has now sprung up in this particular business of paying commission on those three items—freight, dead freight, and demurrage. I am unable to take that view of the matter. It seems to me not a scientific argument to say that, because it is commonly contracted for, therefore it is customary; and, when I find there is nothing said in the charter-party about it, I must treat the charter-party as though expressed in a different form, because I must treat the different form of expression as saying what the custom is in this particular trade. If custom is to be proved, custom must be proved, not by producing various forms of contract, but by giving evidence, independent of contract, of what the custom in fact is. The contracts may be in accordance with the custom, but they may not; and it may be said that it is necessary to put special words in the contract, and the custom has not been inserted, and it is not so.

If I disregard the other forms of charter-party and simply had to apply my mind to this form of charter party, I should have no difficulty in coming to the conclusion that under a form of charter-party which says: "Commission at 2½ per cent. is due on shipment of the cargo," that refers and can only refer to commission on the freight which is payable. It is true it is not ascertainable until the vessel is discharged, but it is more or less ascertainable when the cargo is in fact shipped; and I have come to the conclusion that the fact that other forms of charter-party do, when they mean that commission is to be paid not only on the freight, but also on the demurrage, not only say so, but say so in express terms, so far from that being an argument in favour of Mr. Leck's contention, is an argument the other way.

In my judgment the plaintiffs are right; and if brokerage is to be paid on more than the

freight—that is to say, on dead freight and on demurrage—either it will have to be proved that the custom has become sufficiently universal for me to take judicial notice of, or it will have to turn on the construction of the particular charter-party. I think the plaintiffs are right in this case, and my judgment must be for them for the amount claimed with costs.

The defendants appealed.

Leck, K.C. and *R. A. Wright*, K.C. for the defendants.—The defendants were not the brokers, whose interest ceases as soon as the charter is effected, but were the charterers, and commission is payable by the shipowners on all sums which they receive under the charter-party, which include demurrage at the port of discharge. It is a usual form in a charter-party to provide that commission is payable on freight, dead freight, and demurrage, and the claim as to commission in this case is general in its terms and means commission on freight and demurrage. [They referred to *Hill* v. *Kitching*, 3 C. B. 299.]

MacKinnon, KC. and *W. N. Raeburn*, for the plaintiffs, were not called upon.

Nov. 6.—PICKFORD, L.J.—I think this appeal must be dismissed. It entirely turns upon the construction of a few words in a charter, and Bailhache, J. has expressed so clearly the opinion that I have formed upon the meaning of the words that I see no use in my repeating his judgment. I merely add that I accept and adopt for my judgment in this matter the last paragraph of Bailhache, J.'s judgment, and I do not think there is any use in my occupying time in repeating it. The appeal will be dismissed with costs.

BANKES, L.J.—I quite agree. It seems to me the view taken by the learned judge was quite right. As I understand it, his view is that where you find in a charter a clause providing for payment of commission, without any special words either extending it or limiting it in any way, the inference, in the absence of any evidence of custom, is that the commission is payable on sums which become payable on the performance of the contract and not on any extra sums which become payable as compensation for non-performance of the contract. If that is the view of the learned judge, as I understand it to be, I quite agree with him.

SARGANT, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: for the plaintiffs, *William A. Crump and Son*; for the defendants, *Botterell and Roche*.

Judicial Committee of the Privy Council.

Oct. 23, 25, and *Dec.* 13, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, WRENBURY, Sir SAMUEL EVANS, and Sir ARTHUR CHANNELL)

THE LÜTZOW. (a)

ON APPEAL FROM THE PRIZE COURT, EGYPT.

Prize Court—Cargo—Commercial domicil—Branch business in enemy country—Purchase for branch in allied country—National character.

The appellants were an American company with branches at Hamburg and in Japan. The Hamburg branch, on instructions from the Japanese branch, bought for them aniline dyes from named German manufacturers. The dyes were paid for by a draft upon the Japanese branch, which was negotiated with bankers upon the security of the bills of lading by the Hamburg house. The goods were shipped on the 13th July 1914 from Hamburg to Japan by the German steamer L. The vessel was captured at sea on the 5th Oct. 1914, and the goods were condemned by the Prize Court at Alexandria.

Held, that, as the goods were not the "concerns" of the appellants' German branch, they were not liable to confiscation on the assumption that they were enemy property.

APPEAL against a decree (dated the 11th Aug. 1916) of His Britannic Majesty's Prize Court in Egypt.

The appellants were the American Trading Company, a company registered in the United States, with branches at Hamburg and Yokohama. The Japanese branch had instructed the Hamburg branch to purchase aniline dyes for them, and the order was executed and the goods shipped out to Japan by the German steamer the *Lützow*. While on the voyage war was declared, and the *Lützow* was seized as prize. The judge (Cator, J.) sitting in prize at Alexandria condemned the dyes as enemy property.

C. R. Dunlop and *Stenham* for the appellants.

Sir *Gordon Hewart* (S.-G.) and *A. T. Carter* for the respondent.

The facts and cases referred to sufficiently appear from the considered judgment of their Lordships, which was delivered by

Sir ARTHUR CHANNELL.—This is an appeal against a decree dated the 11th Aug. 1916 of His Britannic Majesty's Prize Court in Egypt, rejecting the claim of the appellants to certain goods seized as prize on board the German steamship *Lützow*, and pronouncing that the goods belonged at the time of seizure to a house of business in an enemy country, and as such were liable to confiscation, and condemning the same as good and lawful prize.

The American Trading Company, which claimed the goods as owner, is an American company registered in the State of Maine, in the United States of America. The head office of the company is in New York. Its head and direction is there, and its shares are held by subjects of the United States, except a few held by British subjects. It has branch offices in other countries. These branches are not incorporated separately,

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

and are in no way separate firms or entities. They are merely places where the business of the company is carried on by employees of the company. The branches kept, of course, separate accounts of the transactions of the branch, and they seem also to have kept some account or estimate of the profits made, or conventionally assumed to have been made, by the work of the branch. This was mere book-keeping, for all profits earned anywhere were for account of the company, and all property was the property of the company. Such accounts of profits are usual and almost necessary in such cases. The head office requires to know how the branches are doing to guide them as to continuing and developing or discontinuing the branches, and very commonly, and possibly in the present case, the managers of the branches are remunerated by a percentage on the profits of the branch. The company had and have a branch at Yokohama, and before the war had one at Hamburg. On the outbreak of the war something was done in the direction of discontinuing the business at Hamburg, and one of the questions in the court below and on the appeal is as to the effect of what was so done. The learned judge below has held on the facts proved before him that the appellants had not acted with reasonable promptitude in winding-up their business at Hamburg, which they professed to be doing, and that they must be considered to have been after the commencement of the war and at the date of the seizure of the goods and down to the time of his judgment continuing to have a house of business and to trade in Germany.

This finding, if it stands, brings the appellant company within a rule of international law: that, although it is a neutral company, it is liable to be treated as an enemy for some purposes, and that some, although of course not all, of its property may be treated as enemy property. When the present appeal was argued there was pending before the Board the appeal in *The Anglo-Mexican* (*ante*, p. 260; (1918) A. C. 422), which appeared to involve some questions arising on that rule, and their Lordships have reserved judgment in this case until that case was disposed of. That judgment has just been delivered, and various points on the rule in question have been dealt with. The principal question on this appeal is, however, one which in that case was abandoned, viz., whether the goods of the appellants seized on the *Lützow* come within the category of goods which are liable to be condemned as enemy property by reason of the appellants having so continued to carry on business in Germany. In the cases which establish the rule, the property liable to be treated as enemy property is described in words which vary somewhat, and which are often rather vague.

In *The Portland* (3 Ch. Rob., 41) Lord Stowell speaks of "the property of a merchant embarked in that trade," meaning the trade in the enemy country, and further down in the judgment, at p. 44, says:—"I know of no case nor of any principle that could support such a position as this: that a man having a house of trade in the enemy's country as well as in a neutral country should be considered in his whole concerns as an enemy merchant, as well in those which respected solely his neutral house as in those which belonged to his belligerent domicil." Again, in *The Jonge Klassina* (5 Ch. Rob., 297): "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 respect to transactions originating respectively in those countries."

In *The Venus* (8 Cranch, 252) there occur in the judgment of the majority the expressions "so much of the property concerned in the trade of the enemy as is connected with his residence," and again, "as to property engaged in the commerce of the enemy"; and Marshall, C.J., at the commencement of his dissenting judgment in that case, says that he concurred in so much of the judgment of the majority "as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy." Recently, Sir Samuel Evans, in *The Manningtry* (1916) P. 329), says "if a person be a partner in a house of trade in an enemy country, he is, as to the concerns and trade of that house," to be deemed an enemy, for which he refers to Pratt's edition of "Story," p. 60, where that expression is to be found. Wheaton (Dana's edition, p. 33) states the proposition thus: "The property of a house of business established in the enemy country is considered liable to capture and condemnation as prize." Hall, in his Treatise on International Law, following, apparently, *The Jonge Klassina* (*sup.*), states the proposition as to a trader in two countries that he must be regarded as a belligerent or a neutral, according to the country in which a particular transaction has originated.

In order to see whether the goods seized on the *Lützow*, and which were beyond doubt the property of the appellant company, were the concerns of the branch business of the appellants at Hamburg as to be liable, upon the assumption that the business of that branch was continued after the war began, to be condemned as enemy property, it is necessary to see what is to be found in the record as to the actual dealings with those goods.

They consisted of a large number of packages containing aniline dyes made in Germany. The Japanese branch sent directions from time to time to the Hamburg branch telling them to order these goods from named German manufacturers, the Chemikalien-Werk Griesheim Limited Company, Griesheim. Specimens of the various documents—that is, the so-called orders given by the Japan branch, the confirmations of those orders by the Hamburg house, the invoices by the Chemikalien-Werk to the Hamburg house, the invoices by the Hamburg house to the Japanese house, and the bills of lading are in the record, pp. 27 to 38. As the documents selected to be copied are specimens only, the exact dates of each of the orders do not appear, but they seem to have been sent off by Japan in Nov. and Dec. 1913; they were confirmed by Hamburg in due course, and the orders were given to the Chemikalien-Werk, who apparently executed the orders by about June 1914, and the goods were shipped on the *Lützow* by the 13th July 1914, the date of the bills of lading. The so-called orders were in a form in which they might have been if the branches were separate and independent firms or companies carrying on separate trading but doing business together on joint account according to a

course of business established between them—in fact, of course, they operated merely as directions by one employee of the company to another as to work to be done for their common employers. They directed that the goods should be "invoiced at cost for division of profits according to new rules," and stated that "financing was required for months" [*sic* in the specimen in the record], and that the drafts by Hamburg on Japan were to be arranged accordingly. The "new rules" referred to are not copied in the record or explained by any evidence. They doubtless were rules of the company providing for the mode of making out the estimate of the profits of each branch in cases where business was done partly by one branch and partly by another. It is not quite easy to see from the documents copied on the record how much is the original document and how much a note subsequently made on it, nor is it easy to trace the sums paid, as the documents copied are specimens only, but it seems that the Chemikalien-Werk were paid on the 27th July 1914 for the goods shipped on the 13th July 1914 by money raised by negotiating with the Hong Kong and Shanghai Banking Corporation a draft dated the 27th July 1914, drawn by the appellants' Hamburg branch on their branch in Japan, payable to the order of the bank at four months' sight. This was done under a letter of credit obtained either by the Japanese branch or by the head office of the appellants; and as security to the bank for the acceptance and payment by the Japanese house of this draft the bills of lading, dated the 13th July, were indorsed to and handed to the bank. As this was all in time of peace, there is no question here of any trading with an enemy in respect of these goods, nor is it possible to say that the goods were in any way tainted. It is only as enemy property at the date of the capture that they can be condemned, if at all.

The draft and the bills of lading arrived in Japan in September, and on the 28th Sept. the draft was accepted. On either the 6th or the 8th Oct. (the dates of the indorsements as copied in the record are not quite clear) the bank handed to the appellants' Japanese branch the bills of lading, indorsing them to their order, in exchange for a letter of trust agreeing to hold the bills of lading and the goods if received, and their proceeds if sold, in trust for the bank, until the acceptance was met. At some time or other this letter of trust was cancelled, but it seems quite clear that on the 15th Oct., when the *Lutzow* was captured, the bills of lading, duly indorsed, were in Yokohama in the actual custody of the bank and at the disposal of the appellants' branch there subject only to the bank's lien, or else they were in the actual possession of the branch on the terms of the letter of trust. It has not been suggested and could not be maintained that the acceptance of the draft drawn on the Japanese branch by the Hamburg branch although after the war began could be a dealing with the enemy by an ally of Great Britain which would justify the condemnation of the goods. It was obviously a dealing only with the bank who were the holders both of the draft and of the bills of lading, and, moreover, the transaction was done in pursuance of engagements entered into *bonâ fide* before the war.

On the outbreak of war the appellants were entitled to save themselves from being treated by Great Britain and her allies as an enemy in respect of their German branch by promptly ceasing to carry on trade in Germany, and if for the purpose of doing so they removed from Germany by sea any property they then had in Germany it would during its transit for that purpose be free from seizure and condemnation as enemy property. They had, of course, similar rights as to their Japanese branch if they had been afraid of being treated by Germany as an enemy in respect of that, but this risk they seem to have disregarded.

The executive committee of the appellants did, on the 25th Aug., resolve to close the Hamburg office, "as soon as it can be done without serious loss on the company through liquidation of stocks on hand, &c." They acted on this resolution so far as not to do any new business except in one small transaction said to have been done by the manager by inadvertence and in contravention of orders of his superiors. They proceeded, however, very slowly in the liquidation of their affairs, being apparently afraid of the serious loss they had contemplated as possible. They seem to have removed nothing from the country. They did materially reduce their stock, but at the date of the seizure of the goods in question, and at the time (the 11th Aug. 1916) when the judge of the court delivered his final judgment in this case, after having adjourned it for further evidence of what the company were doing, and having got that further evidence they were, in the opinion of the learned judge, still carrying on trade in Germany to some extent. That being a finding of fact, their Lordships would not, even although the same materials are before them as were before the learned judge, interfere with it unless it were in their opinion clearly wrong. On the whole their Lordships are inclined to the opinion that the view of the learned judge below on this point was right, but having regard to their opinion on another point of this case, it is not necessary to decide this. This judgment is based on the assumption that the judge was right in his view that the appellants had not so acted as to free themselves from the imputation of continuing to trade in Germany after the declaration of war. Does that make the goods on the *Lützow* goods which the appellants must be considered to own as Germans and not as neutrals? The goods were, of course, not the property and never had been the property of the Hamburg branch as such; in fact, and, even if that branch had been a separate firm or entity, it is by no means clear that these goods, bought as they were on directions coming from Japan, which in that case would have been properly called orders to buy for Japan, would ever have been the property of that firm at Hamburg. The directions they received were specific, both as to the goods to be bought, and as to the firm from which they were to be bought. They might have been merely agents to buy, and the property might have vested not in them but in their principals. The adventure was the selling in Japan of goods to be obtained from Germany, for which the Japanese agents of the appellants had either found purchasers or had ascertained that there was a market. The first origin of the matter was in Japan. The agents of the appellants who carried on trade for the appellants in

Hamburg under the name of a branch were certainly the persons who arranged the terms of purchase from the Chemikalien-Werk, and it was by their act that the property in the goods became vested in the appellants, but they had nothing further to do with the matter. They arranged as agents the details of the finance, but advanced no money, acting under a letter of credit not obtained by them; and before the war broke out they had parted with all control over the goods. They had indorsed the bills of lading and handed them over, not indeed with the intention of passing their property in the goods, for they never had any property, but with the intention of putting a final end to their part of the transaction, subject only to some book-keeping credit in their favour of a share of profits in consideration of the work they had done.

It has been suggested that a test whether these goods were "concerns" of the German branch would be whether they would be assets of the branch if it had become bankrupt at the date of the seizure. But on the facts the goods could not have been assets. There might have been a claim possibly for some share of profit out of the transaction, but the trustee in such a bankruptcy would not get the general property in the goods, which is the only thing seizable in prize: (see *The Odessa*, 114 L. T. Rep. 10; (1916) 1 A. C. 145).

If on the 15th Oct. the Germans had seized these goods and claimed to have them condemned as prize as being the property of persons liable to be treated as Japanese enemies they would seem to have had a stronger case than the British captors have. The fact that the goods were on a German ship undoubtedly raises a presumption against the claimants, but the claimants have clearly shown that the real and true ownership of these goods was neutral. In their Lordships' opinion the dealings with the goods seized on the *Lützow* by the appellants and their branches were *bonâ fide* from the beginning to the end, and the only British complaint against them is want of promptness in closing their trade in Germany. The rule as to concerns of a foreign trade is somewhat vague, but a careful examination of the dealings with these particular goods does not seem to bring them within the fair meaning of the expressions used or to make the ownership of them liable to be treated as German by reason of the appellants continuing some trade in Germany after the war had begun. If any nationality other than its own were to be attributed to the appellant company as owner of these goods it would be a Japanese nationality rather than a German. They were more the concerns of the Japanese than of the German branch, and the transaction had really originated in Japan, although the title to the goods had originated in Germany. On the view their Lordships take of the facts, it is unnecessary on this appeal to express any opinion on any other question. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed with costs of the appeal. It is not a case for damages or costs in the court below.

Solicitor for the appellants, *G. L. Lepper.*
Solicitor for the respondent, *Treasury Solicitor.*

Nov. 8, 9, *and Dec.* 17, 1917.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, and WRENBURY.)

THE HILLEROD. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Neutral ship—Contraband cargo—Neutral port of delivery—Inference of enemy destination—Condemnation of ship.

A neutral ship fully loaded with a contraband cargo had papers which purported to show that the cargo belonged to a neutral subject and was destined for a neutral country. While at sea the vessel was stopped and ordered to proceed to an English port, where the ship and cargo were seized.

The President condemned both cargo and ship. He found upon the facts that the cargo did not belong to the claimant, but had been acquired and shipped for Germany. And he condemned the ship upon two grounds—(1) *that, as the contraband goods exceeded half the entire cargo, the rule laid down in* The Maracaibo (115 *L. T. Rep.* 639; (1916) *P.* 284) *applied, and the shipowners were to be presumed to be parties to the ulterior destination; and* (2) *because in the absence of explanation by the shipowners, the conclusion from the facts was clear that they, as reasonable men, knew that this business was not the ordinary kind of importation and did not need and did not choose to ask questions, as they were themselves directly associated with the cargo owner in an attempt to convey the cargo to the enemy.*

Held, that the decision appealed from was right.

The Hakan (ante, *p.* 161; 117 *L. T. Rep.* 619; (1918) *A. C.* 148) *applied.*

Decision of Evans, P. affirmed.

APPEAL from a decree of Sir Samuel Evans, P. (dated the 22nd Aug. 1916), pronouncing that a cargo of about 730,000 gallons of oil, ex the steamship *Hillerod*, was absolutely contraband, with an enemy destination and belonged to enemy owners, and that the *Hillerod* and cargo were subject to confiscation, and condemning the ship and the proceeds of the sale of the cargo as good and lawful prize.

The appeal as to the ship was brought by Brix-Hansen and Co., a firm consisting of two partners, both Danish subjects, who carry on business as shipowners and shipbrokers at Copenhagen, and at to the cargo by J. Westerberg.

The question on appeal was whether the evidence justified the inference drawn by the learned president that the cargo was absolutely contraband, with an enemy destination, and belonged to enemy owners, and if so, whether the ship was subject to confiscation and ought to have been condemned.

The *Hillerod* was bound from Philadelphia to Trondhjem and Gothenberg with a cargo of lubricating oil. She was stopped at sea and ordered to proceed to Kirkwall, where, on the 16th Nov. 1915, the ship and cargo were seized. Lubricating oil was declared to be absolute contraband on the 11th March, 1915.

The cargo was claimed by J. Westerberg, a Swede by birth, naturalised in the United States, who was at the time in question consular agent at Malmö, in Sweden. His name appeared upon

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

the bills of lading as a consignee, and in the charter-party produced by the master (the genuineness of which was doubted by the British authorities when the vessel was searched at Kirkwall) he appeared as the charterer.

L. C. Thomas for the appellant Westerberg.

Sir Erle Richards, K.C. and *C. R. Dunlop* for the appellants Brix-Hansen and Co.

Sir Frederick Smith (A.-G.) and *D. Stephens* for the respondent, the Procurator-General.

The considered judgment of their Lordships was delivered by

Lord SUMNER.—On the 4th Nov. 1915 the Danish steamship *Hillerod*, bound from Philadelphia to Trondhjem and Gothenburg with a cargo of lubricating oil, was stopped in latitude 58 degrees 28 minutes N. and longitude 17 degrees 4 minutes W. by H.M.S. *Teutonic*, and was sent into Kirkwall. Ultimately both ship and cargo were condemned in prize by the learned President, from whose judgment the present appeals are brought by Mr. Joseph Westerberg, of Malmö, claiming the cargo, and Messrs. Brix-Hansen and Co., of Copenhagen, claiming the ship herself. The ship is now represented by a bond for 47,500*l*. In Aug. 1915 Messrs. Brix-Hansen and Co. resold her, about five weeks after they bought her, to Dampskibsselskabet Atlanterhavet A/S, of Copenhagen, and they in turn resold her in about two months to Messrs. Finn Friis and C. O. Lund, of Drammen, who gave the bond. Her price at the end of June 1915 was 30,750*l*.

The *Hillerod* was a steamer of 2942 tons gross and 1913 net, twenty-three years old, built at West Hartlepool, and recently Greek-owned. In addition to documents relating to the ship, there were found on board of her, when she was detained, a charter-party, captain's copies of two bills of lading, a manifest, and a certificate by the consignee of the cargo that it was purchased for consumption in Norway and Sweden and would not be re-exported directly or indirectly from Norway or Sweden. Lubricating oil was then an article of industrial consumption in both Norway and Sweden, but there was no lack of lubricants there. On the other hand, the shortage in Germany was very acute, particularly in the case of such oil as the *Hillerod* carried. Since the outbreak of the war its price in Germany had multiplied between seven and eight times. There can be no doubt that large quantities of lubricating oil, imported into Norway and Sweden, were being re-exported to Germany, or that the traffic, when successful, was lucrative and worth some risk to all concerned. In both bills of lading Mr. Joseph Westerberg was named as the consignee; one provided for the delivery of 1000 barrels, containing 49,615 gallons of refined lubricating petroleum, at Trondhjem, and the other for the delivery of 13,665 barrels, containing 680,504 gallons, at Gothenburg, in each case against payment of freight "on discharge in accordance with charter-party." The charter-party (which is not fully set out in the record) was in English, and was made between Mr. Westerberg and the Dampskibsselskabet Sjolland, of Copenhagen, for whom, apparently, Messrs. Brix-Hansen and Co. act, and in whose name the bill of sale was taken. It provided, rather ungrammatically, that the *Hillerod*, or substitute, now lying at Liverpool, after having completed a voyage from England to Sweden and Denmark and return to England, should "proceed to one charterer's option, two loading ports between Boston and Philadelphia," and there load a full cargo of oil in barrels and proceed to Drontheim and thereafter to Gothenburg for discharge. The charterer had the option of cancelling the charter if the ship was not ready to load on or before the 1st Oct. The cargo was to be taken from alongside the steamer at the ports of discharge at merchant's risk and expense. The ship was to be consigned to the charterer's agents at the ports of discharge, and they were to pay the costs of discharging, pilotage, and all port charges, and to provide an agent for Custom House business at their expense. Lay days at port of discharge were to commence on the day following receipt by charterer's agents of captain's written notice of readiness, discharging in fifteen running days, Sundays and holidays excepted. If the cargo was not discharged within the stipulated time, the charterer was to pay demurrage at the rate of 100*l*. per running day. Bills of lading were to be "issued to name of consignees" (though no consignee was named in the charter), and were not to be made out to order. The master was to have a lien on the cargo for all freight and demurrage. The charterer was to undertake to provide and forward certificate, duly legalised, from receivers of the cargo, that no transhipment of the cargo will take place. Finally, the provision as to freight, which was inserted after the description of the voyage and the stipulation for delivery of the cargo as customary, ran as follows: "In consideration whereof, the vessel shall be paid freight as follows: lump sum, 300,000 kroner, Danish currency"; and there was a clause providing for cesser of the charterer's liability when the cargo was shipped.

Both Mr. Westerberg and Messrs. Brix-Hansen and Co. filed affidavits, the former in answer to interrogatories. Both disclosed a certain number of documents. Their admissions are remarkable, but their Lordships are inclined to think that their omissions are more remarkable still.

Mr. Westerberg was by birth a Swede. At the age of twenty-seven he became a citizen of the United States of America and resided at Chicago, Illinois, "engaged in the practice of the law," till, at the age of fifty-two, he was appointed American consular agent at Malmö, in Sweden, where he entered upon his duties in Dec. 1913. The duties of this office not apparently occupying the whole of his time, he proposed to carry on business also as an importer of American goods, but down to June 1915 he had not entered into any actual transactions either in petroleum or in anything else. In June 1915 Consul Westerberg conceived the idea of importing American petroleum into Scandinavia. He did not do things by halves. His first venture was to be a whole shipload, and it involved over 40,000*l*. With such spirit did he plunge into it that he chartered the ship before he had so much as begun to negotiate for a cargo. Nor did he go about the matter by the somewhat tedious processes of mercantile correspondence. He sent an agent to America to buy the oil and he found the ship and negotiated the charter in his own person. There was a Mr. H. C. Hansen, who lived at an hotel in Stockholm, the Hotel Terminus, and Consul Westerberg gave this gentleman by word of mouth full power and

authority to act for him. They seem to have had entire trust in one another, for Mr. Hansen received no written instructions or credentials, and for his part was content to engage himself in extensive transactions in the United States in full reliance on the consul's mere word. Mr. Hansen departed for New York in the latter part of June.

The firm of shipbrokers with whom Mr. Westerberg dealt were Messrs. Brix-Hansen and Co., of Copenhagen. It is suggested that there was some relationship or connection between Mr. H. C. Hansen and Mr. Brix-Hansen, but their Lordships attach no importance to this. They might have been brothers and yet not have been friends, nor does their common patronymic necessarily indicate that they were even compatriots. Here too the consul eschewed correspondence and carried on his negotiations verbally, it would seem in Copenhagen, till the 22nd June. Presumably the American consulate at Malmö was not busy at the time. Mr. Westerberg swears that the charter was signed on the 22nd June. Mr. Stannow, a partner in Messrs. Brix-Hansen and Co.'s firm, gives the date as on or about the 22nd June. The document itself bears date the 22nd June, but from the other documents it is plain that the true date cannot be earlier than the 24th June. On the 22nd June Messrs. Brix-Hansen and Co. wrote from Copenhagen to Mr. Westerberg at Malmö, "Hereby we beg to confirm the fixture of steamship *Hillerod*," setting out the essential terms, and adding, "we shall to-morrow send you charter." This letter is acknowledged by Consul Westerberg, from Malmö, on the following day. The letter in which the charter was sent is not forthcoming, and indeed Mr. Westerberg's case is that the charter was signed by both parties at Copenhagen. Assuming this to be so, a curious incident then took place.

According to the "fixing" letter of the 22nd June freight was "payable when the steamer is ready to load," which could not be for another three months or so. Mr. Westerberg swears that on the 24th June he paid to Messrs. Brix-Hansen and Co. 300,000 kroner in cash for the freight of the *Hillerod*, and he produces their receipt, in which they undertake to pay 5 per cent. interest on the money "till the ship is cleared on the loading place," and declare that they are depositing at the same time as security the *Hillerod's* insurance policy. The document seems to imply a promise to repay the money in some event, but what that event may be is not stated.

No explanation of this transaction was vouchsafed by anybody. Consul Westerberg had the letter of the 23rd, which postponed his obligation to make payment of the freight until the ship should be ready to load; nevertheless, without any request, so far as the evidence shows, and without any advantage to himself, except 5 per cent. interest, he anticipated his obligation and paid over 16,500*l.* in cash. There is neither document nor affidavit to explain how he came to have this sum available. He may have had the money by him; he may have realised investments. It may have represented those savings of his active years, with which he had proposed to support the evening of his days in the land of his birth and in the service of the land of his adoption. On the other hand, the money may have been furnished by some third party, whose interest in the venture was more active than his own. Mr. Westerberg's evidence inevitably raises the question and deliberately leaves it unanswered.

Here ends the consul's active participation in the matter, but the transactions, which took place in the United States, as it is alleged, on his behalf, are equally puzzling. Mr. H. C. Hansen bought the oil from the Pure Oil Company of Philadelphia about the 29th July. The terms were net cash, not bills, against documents. The invoices were made out to Mr. Westerberg as seller, and are dated the 16th Oct. The amount was over 117,000 dollars, say 23,000*l.* The bills of lading were dated the 19th Oct. According to Consul Westerberg, "upon the presentation of the shipping documents of the oil by the Pure Oil Company, Philadelphia, to my bankers at New York, Kuhn Loeb and Co., the payment was made by them." Presumably this means that Kuhn Loeb and Co. did so on instructions received from Mr. Hansen, for Mr. Westerberg did not write to them, and that they paid the amount of the invoices, 117,783 dollars, and of the insurance broker's premium account, 9562 dollars, on behalf of Mr. Westerberg, against the two bills of lading and the certificates of insurance for 220,000 dollars, so valued, which are produced. No bill was drawn on Mr. Westerberg. No statement of account was rendered to him. In what sense Kuhn Loeb and Co. were his bankers is not stated, but they must have paid over 25,000*l.* on his behalf on the mere oral instructions of Mr. Hansen, who had no signed authority from him, and then have sent him the bills of lading and insurance certificates without receiving any repayment from him so far as any statement of his or any document shows. Of course, it is possible that as a capitalist Mr. Westerberg may have kept a credit balance in New York of tens of thousands of pounds, but one does not see why he should be so reserved about it. The circumstance would be an honourable one. At any rate, whether Kuhn Loeb and Co. were the consul's bankers or not, they were a firm much concerned in financing and facilitating trade with Germany, and have two partners who are associated with a house in Hamburg. When or why they sent the bills of lading to Mr. Westerberg he does not say, nor does he produce any covering letter from them; it may only have been after the capture of the *Hillerod* was known, and for the purposes of the proceedings in prize. If it was before, then he did nothing with them till afterwards.

At some date in October, which is not given, and may have been before the oil was paid for, Mr. Hansen returned to Sweden, and then for the first time Consul Westerberg was told of that purchase of oil for the sake of which he had hired the *Hillerod* and paid his 16,500*l.* Mr. Hansen was not given to writing letters any more than Consul Westerberg. He rendered his account by word of mouth, and handed over the letter of July, embodying his contract with the Pure Oil Company, to Mr. Westerberg in person. Mr. Westerberg was not inquisitive. He did not get any document from Mr. Hansen showing how the cargo was insured or what the premiums amounted to. So unconcerned was the consul that in Jan. 1916 he could not say from memory whether war

risk was effected on the cargo. This, too, is odd, for when he dispatched his emissary he told him to insure it in America, and the certificate of insurance had by this time passed through his hands, and the oil itself was in jeopardy of being lost by capture and condemnation. If he had taken enough interest in this, his first, venture to ask Mr. Hansen about the insurance, he might have learnt how it came about that, as early as the latter part of August, insurance brokers in New York were asking authority from the Mannheimer Versicherungs-Gesellschaft, of Mannheim, by a wireless message which was intercepted, to cover lubricating oil per the *Hillerod* to Gothenburg, F.P.A., including war risk up to 350,000 dollars, and why they got that authority through the Mannheim Company's agent in Christiania. Furthermore, on the 21st Oct. (misprinted "10th" in the record, p. 76) "Egberts," of New York, sent a wireless message to Warburg, of Hamburg, saying, in reference to a certain letter and number: "Representative gone, steamer is ready to sail, but we refused paying as policies do not cover risk. . . . Shipper insists on prompt payment under confirmation given by us as authorised by you"; and another message, intercepted on the 25th Oct. from "Lamsvelt," New York, to Warburg, of Hamburg, referred to the same letter and said: "Have paid 118,000 dollars for merchandise, 9000 dollars for insurance." Now "Egberts" and "Lamsvelt" are stated, on evidence which the learned President accepted, to be *aliases* for Kuhn Loeb and Co. On the 21st Oct. the *Hillerod* was ready to sail and Mr. Hansen probably had gone, since he was in Sweden before the end of the month. Of the 220,000 dollars insurance on the *Hillerod's* cargo only 120,000 dollars covered war risk. The Pure Oil Company had no discoverable means of getting paid unless a banker's confirmation had been given, and was not likely to have shipped any oil until it was given, or to waive prompt payment when they had shipped it; and, finally, Kuhn Loeb and Co. did, according to Mr. Westerberg, pay for him 117,783 dollars for the oil and 9562 dollars for the insurances. If he had ever troubled to ask his bankers, Kuhn Loeb and Co., anything about his own business he might have ascertained whether these messages related to the *Hillerod* without naming her, or whether the appearance of some connection is due to a mere coincidence.

Though Mr. Westerberg's is reticent, it is fair to assume that he asked Mr. Hansen something about the *Hillerod's* probable sailing date, and if so, he would have learnt enough to perceive that she might be at Trondhjem about the middle of November. In fact, when stopped on the 4th Nov., she was apparently about 900 miles off, and not until after the 7th Nov., when she reached Kirkwall, could the consul have had reason to suppose that she would not reach Trondhjem at all. Now he had no agents either at Trondhjem or at Gothenburg, and he took no steps to appoint any. He had not sold his cargo in advance, thinking, as he says, that a cargo of "spot" oil would go off at once, and he had made no arrangements for doing the ship's business, taking delivery overside, or securing wharfage or warehouse accommodation, though she might arrive almost any day. If he exceeded the time allowed him by the charter, which began the day after the captain had delivered a notice of readiness to discharge, he was liable for heavy demurrage day by day. Furthermore, either he received the bills of lading in good time or he did not. In the first event he must have seen that, according to them, freight was payable on discharge in accordance with the charter-party, yet, according to him, he had already paid freight, according to the charter-party, in full. In the second event he would not be entitled to delivery unless he produced the bills of lading, and he ran the risk of heavy demurrage, through the unaccountable delay of his bankers in forwarding them. Nevertheless, he remained calm. He took no steps. As a lawyer, he would appreciate his contractual obligations; as a merchant, engaged, and pretty deeply too, in his first venture, he would be concerned about his profits and uneasy about his liabilities. If the transaction was what he says it was, why did he not communicate with either Messrs. Brix-Hansen and Co. about the form of the bills of lading, or with Kuhn Loeb and Co. as to their whereabouts? Why did he take no steps to be ready to receive his cargo and land it? His serene composure may have been due to a *mens conscia recti*, but it may also have been due to the consciousness that when he had secured his charter and dispatched his agent, his part in the transaction had been played.

Two things are throughout characteristic of Consul Westerberg's first appearance as a merchant: the first is a notable indisposition to commit himself in black and white; and the second is an equally notable indifference to all but the first stage of his adventure. If his traffic was what it professed to be, namely, importation into Scandinavia for Scandinavian consumption, the explanation of the first peculiarity may simply be a dislike to having his private correspondence read by British Government employees, natural enough, no doubt, but hardly a sufficient reason for complicating a 200 000-dollar transaction. Of the second, the explanation must be his perfect trust in Mr. Hansen, of the Terminus Hotel, Stockholm. It seems a little hard that Mr. Hansen should have requited his confidence by not coming forward to clear up a mystery, of which no doubt he has the key.

The case of Messrs. Brix-Hansen and Co. involves somewhat different considerations. The President gave judgment against them on two grounds. The first was that as their ship was carrying goods, made contraband by the proclamation of the 11th March 1915, and having an ulterior destination in Germany, the shipowners must be presumed to be parties to that ulterior voyage, since the goods amounted to more than half of the cargo. As to this topic the opinion of their Lordships has been recently expressed in the case of the steamship *Hakan* (117 L. T. Rep. 619; (1918) A. C. 148), and it need not be pursued further. The President's second ground was that Messrs. Brix-Hansen and Co. were directly concerned and associated with Mr. Westerberg in attempting to carry absolute contraband to the enemy, and that the case was one of an attempt to mislead the court of a glaring character. The evidence for this conclusion must now be examined.

Messrs. Brix-Hansen and Co. presented a petition to their Lordships for leave to adduce further evidence explanatory of some of the

matters upon which the learned President had animadverted. Their Lordships intimated during the hearing that this petition could not be entertained. Some observations seem to have been made at the hearing by the appellants' counsel, to the effect that the evidence for the Crown raised points, for which the appellants were not prepared owing to lack of notice, but, whether there was any real grievance in this respect or not, no adjournment was asked for, as might and should have been done if further evidence was desired. The learned judge was struck by the unsatisfactory character of some of Messrs. Brix-Hansen and Co.'s evidence, and commented pointedly on the omissions. To permit them to make a general reply upon his judgment by filing fresh evidence on the hearing of the appeal would open the door to grave abuses. It cannot be doubted that, as intelligent men advised by competent English solicitors, they must have appreciated the points in their case, which would be the better for full explanation, and have known that, in the candour which they owe to the court, it behoved them to keep back nothing which was relevant to the issue. A claimant cannot be allowed to say, "My conduct may in some respects be ambiguous and my explanations may be chiefly marked by economy of statement, but so long as I leave matters involved in sufficient doubt nothing is proved to my detriment, for nothing definite can be proved. The court may not be able to make out exactly what has happened. It is better not to supply the clue: 'Not proven' will serve my turn."

Messrs. Brix-Hansen and Co. are, however, entitled to say that when it comes to affecting them with knowledge or notice of the ulterior destination of the cargo, this must be done upon consideration of matters which were before their minds. This, then, is the next question.

In what guise did Mr. Westerberg come to Messrs. Brix-Hansen and Co. in the first instance, and how did he comport himself? He was not known to them as a merchant, for he had had no previous mercantile transactions. As a social acquaintance or even as a subordinate official of the United States of America (with a salary of 200*l.* a year) he was hardly a person to whom, in the ordinary course of business, they would charter a ship at a freight of 16,500*l.* It is natural to expect that he came with some introduction, but as the evidence both of Consul Westerberg and Messrs. Brix-Hansen and Co. is silent on the point, it is natural also to infer that the introduction was one which it would do neither of them any good to mention. By the 23rd June the substance of the transaction had been agreed. No difficulty was anticipated in framing the general terms of the charter, and the matter might well have been conducted by post. Nevertheless, on the 24th June Mr. Westerberg returned from Malmö to Copenhagen. What for? His purpose appears to have been twofold. One was merely to obtain an option to discharge at a further port or ports for a suitable additional freight; the other was to undo to his own disadvantage the important stipulation relating to the lump-sum freight, which, as it stood, was in his favour.

The result of the consul's visit on the latter point was this. He paid over, then and there, in cash, on the 24th June, 16,500*l.*, which he need not have paid till the end of September. If it was regarded as a loan, he did not think fit to ask for any express promise to repay it, or any definition of the event in which the money would be repayable. It is true that he got not only a receipt for his money, but also security, but the security consisted of the simultaneous deposit of "the ship's insurance policy," a policy, therefore, under which there might never be any insurable interest, since the ship was one which, at that time, Messrs. Brix-Hansen and Co. had not even contracted to buy. If Messrs. Brix-Hansen and Co. failed to buy this ship, and exercised their right under the charter to tender a substitute, this policy would be no security and of no use to him; if they bought it, but utilised the ship in some other employment, in which the ship took no harm, the policy would be a security of no value, for there would be no claim upon it. As it happened Mr. Westerberg's 16,500*l.* came in very conveniently for Messrs. Brix-Hansen and Co. when they bought the ship, afterwards renamed the *Hillerod*, as they did a little later. The price paid was 30,750*l.* Thus on her first charter their new purchase would bring them in 53⅔ per cent. of her cost, and their new customer put them in funds to that extent three months before any freight was payable for the modest consideration of 5 per cent. on the amount of it. They, for their part, were free to complete her current voyage and to take a cargo outwards for their own account, and it is difficult to suppose that the freight so earned would not exceed the 200*l.* for which they would be liable as interest, nor is there one word in the evidence to show that Mr. Westerberg ever got, or even asked for, his 200*l.* at all. It must have seemed to Messrs. Brix-Hansen and Co. uncommonly good-natured of the consul.

When Messrs. Brix-Hansen and Co. came to draw up the charter, which was to be one of the documents carried on board the vessel, it was so drawn up as to express the real bargain only loosely. It was dated the 22nd June, and chartered the *Hillerod* "or substitute," though the *Hillerod*, and nothing but the *Hillerod*, had been the subject of the negotiation. It omitted to mention that in addition to Trondhjem and Gothenburg there were options for other ports, of course ports in Sweden, and it represented that the freight was not yet paid, though it had been paid already. It is not necessary that the court should be able to see for itself precisely how these discrepancies might subserve the shipowners' interests, if any question with captors should arise. It is for the shipowners to explain the matter. They may reasonably be supposed to have seen, or to have thought they saw, something to be gained by these departures from accuracy.

When Messrs. Brix-Hansen and Co. thought that the *Hillerod* was nearing the United States they wrote to the captain, under date the 16th Sept., inclosing the charter and pointing out that her ports of discharge were Trondhjem and Gothenburg. They said nothing about the option for further ports, of which the captain was apparently ignorant. It is true that, according to Mr. Westerberg, this option was abandoned by him four days later; but if the transaction was not a sham, Messrs. Brix-Hansen and Co., on the 16th Sept., were leaving their captain in the dark as to the charterer's right to send the vessel to a

further port and his obligation to pay further freight, and were thus preparing for dispute and delay. The natural inference is that, at any rate the option for additional ports, though given by them in writing by a confirmatory letter dated the 17th July, was in fact fictitious.

It is impossible to avoid some misgiving also as to the truthfulness of the alleged prepayment of freight. The 16,500*l.* may have been paid not as freight, but as a loan to enable the *Hillerod* to be bought at all. At any rate, in their letter of instructions to their captain, Messrs. Brix-Hansen and Co. told him nothing about this prepayment of freight, nor did Messrs. Flint, Goering, and Co., of Philadelphia, when they wrote to him on the 15th Sept. that his owners had instructed them to look after the outward business of his ship. If the captain acquainted himself with the contents of his charter, as his owners' letter told him to do, he would see that it was his business to refuse to sign bills of lading unless they reserved at least 300,000 kroner, payable on delivery of the cargo, and to exercise his lien on the cargo at ports of discharge until that sum was paid, a course which should greatly have upset the consul. This was in substance what he did in America. How, again, did it come about that Kuhn Loeb and Co. were content with bills of lading under which, apparently, 300,000 kronor were payable in Scandinavia? Since no correspondence is forthcoming or accounted for, their instructions must have come from Mr. H. C. Hansen by word of mouth. Either Mr. Hansen did not know of the prepayment or else he forgot to tell them. Consul Westerberg's imports of oil into Scandinavia, strictly for Scandinavian consumption, seem, even for a first essay, to have been loosely conducted. It is equally difficult to understand why, if their entire chartered freight was prepaid in June, before the voyage began, Messrs. Brix-Hansen and Co. were at the pains and expense to insure it against marine risks for 100,000 kronor, which is what they certify that they did in a statement signed by them on the 22nd Dec. 1915. Their office seems to have overlooked or to have misunderstood the transaction.

There were at this time two kinds of importation into Scandinavia, one as well known as the other: namely, importation for Scandinavian consumption only, and importation for ulterior transmission to Germany. The former was matter-of-course and involved no mystery. The latter had its perils, but also its commensurate profits, and mystery was one of its natural incidents, for, no doubt, the less the carrier could manage to know about it the better for him. In the absence of explanations from Messrs. Brix-Hansen and Co., which at the proper time they might have offered but did not, the conclusion from the facts is clear that, as reasonable men, they knew that this business was not the ordinary kind of importation, and if they knew no more, it was because they did not need and did not choose to ask questions. Even that knowledge is enough.

Their Lordships have no doubt that the cargo of contraband had an ulterior destination in Germany and that, when they carried it, Messrs. Brix-Hansen and Co. were fully alive to the fact.

As for Consul Westerberg, their Lordships entertain no doubt upon the evidence that he never was the owner of the cargo; that he was Mr. H. C. Hansen's agent and not his principal; that he lent for hire his respectable name and office as bonnet to cover a traffic the nature of which must have been apparent to him; that he did as he was told, took what was given him, and concerned himself no further in the matter.

Their Lordships will accordingly humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors for the appellant Westerberg, *Hewitt, Woollacott,* and *Chown.*

Solicitors for the appellants Brix-Hansen and Co., *Thomas Cooper* and *Co.*

Solicitor for the respondent, *Treasury Solicitor.*

July 19 *and* 20, 1917.

(Present: The Right Hons. Lord PARKER OF WADDINGTON, Lord WRENBURY, and Sir ARTHUR CHANNELL.)

THE SORFAREREN. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Neutral sailing ship—Cargo—Contraband—Ignorance of the declaration of contraband—Order in Council of the 29th Oct. 1914*—Declaration of London, art.* 43.

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 into 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 a proclamation of the 29th Oct.* 1914 *chrome ore was declared to be absolute contraband.*

In the prize proceedings for condemnation of a cargo of chrome ore shipped in June 1914 *from a foreign port on a Norwegian sailing vessel chartered by a German company, under a contract entered into in* 1913 *between an English company and a German company, two claims were put in, one by the English company, the sellers, and the other by the Swedish company, which alleged that the ore had been purchased by them from the German company. No claim was made on behalf of the German company.*

The board approved the view of the President that art. 43 *did not exclude the general rule applying that contraband belonging to an enemy on board a neutral vessel remained liable to condemnation without compensation. Accordingly the appeal of the Swedish company was dismissed and that of the English company withdrawn on the terms agreed between them and the Crown, which terms the board were prepared to approve.*

Decision of the President (*reported* 13 *Asp. Mar. Law Cas.* 223; 114 *L. T. Rep.* 46) *affirmed.*

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

APPEAL by the Aktiebolaget Ferrolegeringar, a Swedish company, as the alleged owners of 4000 tons of chrome ore (used in the manufacture of armour plates), cargo of the sailing ship *Sorfareren*, which was seized on the 2nd Nov. 1914 by H.M.S. *Africa* and condemned as prize on the ground that the goods at the time of seizure belonged to enemies of the Crown.

A second claim and joint appeal were made by the Chrome Company Limited, of London. The sole question argued was that of ownership.

MacKinnon, K.C. and *N. L. C. Macaskie* for the first appellants, the Swedish company.

Leck, K.C. and *Raeburn* for the second appellants.

Sir *Frederick Smith* (A.-G.) and *Stuart Bevan* for the Crown.

The appellants were alone heard.

The opinion of the board was delivered by

Lord PARKER OF WADDINGTON.—Their Lordships need not trouble counsel for the Crown.

Even if there was no doubt at all as to the *bona fides* of the documents adduced to support the claim of the Swedish Company, their Lordships are of opinion that these documents point simply to a sub-sale, and not to the German company having acted for the Swedish company so as to create any privity of contract between them and the English company or to cause the property in the goods, if it passed at all, to pass from the English company to the Swedish company.

They are further of opinion that there is no reason to doubt the correctness of the President's view as to the joint effect of the Declaration of Paris and art. 43 of the Declaration of London.

Under these circumstances, there seems to be no reason why the compromise which the Attorney-General has suggested between the Crown and the English company should not be given effect to.

The result is that the appeal of the Swedish company will be dismissed with costs, and that the appeal of the English company will be withdrawn on terms agreed between them and the Crown, which terms the board are prepared to approve.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the Swedish company, *Nicholson, Graham, and Jones.*

Solicitors for the English company, *Holmes, Son, and Pott.*

Solicitor for the Crown, *Treasury Solicitor.*

July 20, 24, and Nov. 6, 1917.

(Present: The Right Hons. Lord PARKER OF WADDINGTON, Lord WRENBURY, and Sir ARTHUR CHANNELL.)

THE PARCHIM. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE).

Prize Court—Cargo—Ante-bellum contract of sale—Post-bellum shipment—Enemy character of cargo seized—Passing of property.

A Hamburg firm chartered the Russian sailing ship P. on the 6th May 1914 to carry a cargo of nitrate of soda from South America to Europe, loading not to begin before the 13th July 1914. By a contract made on the latter date the charterers sold to the appellants, a Dutch company, the cargo on certain terms, one of which was that "Invoice price is due ninety days after receipt of first bill of lading, and to be paid by the buyers three days before maturity, or, in case of an earlier arrival of the ship, then against acceptance of the documents. . . . The buyers provide at once first-class bank guarantees for 5000l." The appellants named a Dutch port as the port of delivery and provided the required bank guarantee. On the 6th Aug. 1914 the loading was completed and the German firm took bills of lading in sets of three, making the cargo deliverable to their order. They indorsed in blank the bills of lading and on the 9th Sept. the first of each set was deposited by them at their bank at Amsterdam. On the 19th Oct. the German firm sent the appellants an invoice for the price—21,938l.—stating that that amount was due on the 9th Dec. The cargo was seized at Plymouth on the 6th Dec., but the appellants, who were unaware of the fact, had meanwhile written to the sellers' bankers at Amsterdam, who then held two sets of the bills of lading, inclosing a remittance with instructions not to pay the money over until they received the third set. The bankers received the third set on the 25th Jan. 1915. They thereupon paid the sellers and handed all the documents to the buyers.

The President decided that the property had not passed to the buyers so as to defeat the rights of the captors, and dismissed the claim of the Dutch company, who appealed.

Held, that the enemy character of goods seized as prize is to be determined by the general property, as opposed to any special proprietary right, and not by risk; that in the present case it appeared from the facts to be the intention of the parties to the contract that the property in the cargo should pass to the buyers on shipment, but that the buyers were not to have possession either of the cargo or the bills of lading until actual payment of the purchase price had been made; and that the inference that the property in the cargo had passed to the purchasers before capture was not displaced by the form of the bills of lading, which was ambiguous. Cargo released to claimants.

Decision of Sir S. T. Evans, P. reversed.

APPEAL by the claimants, a Dutch company carrying on business at Veendam, against a decree of Sir Samuel Evans, P. pronouncing the cargo at the time of seizure at Plymouth to have belonged to enemies of the Crown and condemning it as lawful prize.

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

MacKinnon, K.C. and *C. R. Dunlop* for the appellants.

Sir *Frederick Smith* (A.-G.), Sir *Gordon Hewart* (S.-G.), and *Theobald Mathew* for the Crown.

The considered opinion of the board was delivered by

LORD PARKER OF WADDINGTON.—This is an appeal from a decree of the Prize Court in England, whereby the cargo of nitrate of soda seized on board a Russian ship, the *Parchim*, was condemned as lawful prize, on the ground that it was enemy property at the date of capture. The appellants, a Dutch company, claimed the property as belonging to them, and their claim having been dismissed they now appeal.

The facts of the case are not seriously in dispute, though some details are not quite clear. The case turns for the most part on the proper inferences to be drawn from the facts and on the principles of law which should be applied.

It is well settled that the enemy character of goods seized as prize is to be determined by property and not by risk. So far as the court below is concerned this point may be taken as finally decided by the judgment of the learned President in *The Miramichi* (13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; 1915) P. 71). Their Lordships were invited to review this decision, but in their opinion this same rule was adopted by this board in *The Odessa* (114 L. T. Rep. 10; (1916) 1 A. C. 145) The latter case, which is binding on all courts, finally determined not only that property as opposed to risk was the real criterion, but that the property to be looked for was the general property as opposed to any special proprietary right, the reason being that the existence of a general property or *dominium* in personal chattels is recognised by the law of all civilised nations, whereas the existence of special rights and the question whether such rights are proprietary or otherwise depends largely on the particular municipal law which may be applicable. Thus the special property of a pledgee according to English law was ignored.

It was further contended that, in view of the principles explained in *The Odessa* (13 Asp. Mar. Law Cas. 215; 114 L. T. Rep. 10; (1916) 1 A. C.145), the practice which has prevailed in the Prize Court, and has in some cases at any rate been followed by this board, of deciding in accordance with English law to whom the property in captured goods belonged is altogether wrong. Their Lordships cannot accept this contention. Not only is it difficult to suggest any possible alternative, but it will appear upon a little consideration that the practice itself is just and equitable. The municipal law of this country as to the transfer of property in chattels is a branch of our commercial law, and based on mercantile usages common in their general substance and operation to the merchants of all nations.

The Sale of Goods Act 1893 is in fact merely a codification, and, as is generally admitted, a very successful and correct codification, of this branch of English mercantile law. It embodies the principle that the question whether a contract for the sale of goods does or does not pass the general property in the goods contracted to be sold must in all cases be determined by the intention of the parties to the contract. The Act codifies the rules by which such intention is to be ascertained, but the inferences based on the rules may always be displaced by the terms of the contract itself or the surrounding circumstances, including the conduct of the parties. No doubt the municipal law with reference to which the parties enter into the particular transaction is material in considering their intention as to the passing of the property; and if it appears that they contracted with reference to a municipal law other than English, and it be further proved that such municipal law is different in any material respect from the English law, this will of course be taken into account in determining their intention. But having regard to the presumption that unless the contrary be proved the general law of a foreign country is the same as the English law, the mere fact that the contract was entered into with reference to the law of another country will be immaterial. Having regard to the history of English mercantile law, the presumption referred to is itself quite reasonable. An investigation of the commercial codes of foreign countries would probably show that they differ from English commercial law rather in detail or in the inference to be drawn from particular facts than in substance or principle. For example, in countries where the civil law is more directly the basis of modern law than it is in this country, somewhat greater importance may be attached to risk as an indication of property. Or, again, the inference to be drawn from the possession of a bill of lading indorsed in blank may be somewhat stronger than it is in our law.

Their Lordships therefore are of opinion that in the present case the English municipal law, including the Sale of Goods Act 1893, was rightly applied in determining the character of the cargo at the date of capture.

Passing to the facts of the case, their Lordships do not find that any doubt has been suggested by the Crown as to the *bona fides* of the contract, which was not entered into either during or in expectation of the war or of the dealings of the parties under the contract.

A German firm, H. Fölsch and Co., of Hamburg, have a branch at Valparaiso, in Chile. They appear to have done a considerable business in shipping nitrate from Chile, and to have had a considerable quantity ready for shipment shortly before the war. On the 6th May 1914 by a charter-party set out in an appendix to this record, and which must be in a common form, as it has a heading, "The Hamburg Nitrate Charter-party of 1891," they chartered the Russian sailing ship *Parchim*, of 1714 tons register, then at Callao, to carry a cargo of not more than 2700 tons and not less than 2600 tons of nitrate of soda in bags from one of certain named ports on the West Coast of South America to a port within certain named limits in Europe. The vessel was to proceed in ballast from Callao to the port to be named for her loading, and the loading was not to commence before the 15th July; and if the vessel was not ready for loading on or before the 15th Sept., the charterers had power to cancel the charter. The vessel when loaded was to proceed to a port within the prescribed limits direct, if such port was named before sailing; and if no direct port was so named, then to Queenstown, Falmouth, or Plymouth, for orders. Rates of freight varying slightly in

various contingencies were provided for, and there was to be a reduction of 9*d.* per ton if a direct port was named. Taltal was named by the charterers as the port of loading under this charter. By contract dated the 13th July 1914 H. Fölsch and Co., of Hamburg, sold to the appellants, who, as already stated, are a Dutch company, the whole cargo per *Parchim*. It is upon this contract, and on what was done under it, that the question in this appeal turns. A translation of it is in the record. It is rather special in its terms, but with the exception of one clause, as to the time when the invoice price was to become due, it is not at all ambiguous. Almost all the terms have to be considered, and, omitting a very few passages which do not appear important, it is as follows:—

The Dutch company bought and the German firm sold—

The whole cargo of ordinary Chile saltpetre . . . per *Parchim* 2650/2750 tons dead weight, at the price of 9*s.* 1*d.* per cwt. cost and freight Channel for orders to the United Kingdom or Continent between Havre and Hamburg [certain ports excluded] with a deduction of 9*d.* per ton if duly ordered to a direct port upon [a certain basis of contract and analysis]. Position of the vessel *Parchim* arrived at Taltal on the 18th June as per Lloyd's Index. The relative charter-party stipulates loading days not before the 15th July, cancelling date the 15th Sept. The sellers to pay the cost of the telegram giving the order, but they are not responsible for its arrival in due time at the port of loading. The buyers have to take over the charter and letter of gratuity, if any, for the captain. . . . Insurance, including war risk, to be covered by the sellers upon the invoice value, plus premium, plus 10 per cent. imaginary profit, and to be charged at 62/6 per cent. £, and the buyer has to accept the policy of insurance against payment of the premium and costs. Should the ship be lost before the loading is completed, this contract is cancelled for that part of the cargo which is not yet laden.

The invoice price is due ninety days after receipt of the first bill of lading, and to be paid by the buyer three days before maturity, or in case of an earlier arrival already (*i.e.*, of the *Parchim*), then against acceptance of the documents plus ¼ per cent. accept commission.

The buyer provides at once first-class bank guarantee for 5000*l.* For the time between acceptance and maturity interest will be allowed at the rate of 1 per cent. below the London bank rate. . . .

In case the *Parchim* will be ordered to a French port . . . the freight will be increased by one-third per ton as per charter-party. The buyer has the option not to commence discharging before the 1st Feb. 1915 as per the condition referred to in the charter-party, any extra insurance for laying up to be borne by the buyers.

If the buyers make use at the proper time of the cancelling option of the charter-party on account of delay on the part of the ship, they have to ship the saltpetre by another vessel whenever opportunity arises, if possible, under similar conditions. Any freight difference *pro* and *contra* is for account of the buyers, also any hire for storing and/or fire insurance premium.

This, it will be seen, is not an ordinary c.i.f. contract. The insurance is separately provided for and the premium is not included in the price, and although the price includes freight, it is only the freight under the charter-party which the buyer is to take over. If the right to cancel that charter-party arises and the option to do so is exercised, the buyer has the responsibility of finding another ship to take the intended cargo. He has to pay any excess of freight over the chartered freight, also he has to pay the storage for the nitrate until loaded on another vessel. As the sum included for freight in the price is a mere matter of calculation and would be payable separately by the buyer and deducted from the price, the price is really for cost only, and the contract has far more of the characteristics of a contract f.o.b. Taltal than it has of a contract c.i.f. European port. Although the right to cancel was provided for, there was very little probability of its becoming exercisable. The ship was to arrive in ballast from Callao, and, if the notice in Lloyd's Index proved correct, had arrived some time before the contract. Practically damage to the ship would be the only thing which could prevent her being ready to load before the 15th Sept. It is clear that what was really contemplated by the parties, although they provided for another somewhat remote contingency, was the shipment on the *Parchim* of a sufficient part of the nitrate which the sellers had ready, and the effect of the contract was to provide that on shipment, or at all events on notification of the shipment, the cargo was to be at the risk of the buyers. If the ship was lost during the loading, the contract was to be cancelled only as regards the part of the cargo not loaded. As to that already on board it was to stand, so that the buyer would have to pay for it, although he would not get it. As to that which was shipped and as to the whole when the shipment was complete, the buyer clearly comes under liability to pay the price at a future date, the exact date of payment, but not the liability to pay, being somewhat in doubt owing to the clause as to receipt of the bill of lading being somewhat ambiguous. The liability to pay arises and continues quite independently of anything which may happen to the cargo after shipment, and the substantial question for consideration is whether the parties did not intend that the property should pass at the time the risk was assumed.

As to the clause which contains the slightly ambiguous phrase mentioning receipt of the bill of lading, without saying receipt by whom, it may be well before considering it to state what was done by the parties after the contract, as that throws considerable light on what they obviously accepted as the business meaning of the clause.

The Dutch port of Delfzyl was named by the buyers as the port to which the ship was to go direct, and the cablegram giving the direction duly arrived. The loading was completed by the 6th Aug. and bills of lading of that date in sets of three for various parcels, making up the whole cargo, were taken to the order of H. Fölsch and Co., of Valparaiso. At some time not stated, but before the 6th Sept., and either in Chile or in Europe, it does not appear which, they were indorsed in blank, "H. Fölsch and Co." The exact course of post from Germany and Holland to Taltal and Valparaiso, in Chile, is not stated, but it can scarcely be doubted on the facts that there was no communication by mail dispatched after the date of the contract and reaching Taltal before the 6th Aug. There is no evidence of any such communication by cable. The right inference upon the evidence is that the representatives of Fölsch and Co. in Chile did not know when they took the bills of lading either the terms of the contract of the 13th July or its existence. In

taking the bills of lading to order, the representatives of H. Fölsch and Co. probably followed a usual course of business, and had the bills of lading made out in the form most likely to be convenient, whatever the dealings of the firm in Europe with the cargo might happen to be. They could hardly have done it with express reference to any knowledge they had of the terms of the contract, and, unless the name of the buyer had been cabled to them, they could not have taken them in any other form than they did. For anything which appears, they may have immediately indorsed them in blank.

On the 9th Sept. the first of each set of bills of lading had arrived in Europe and was on that day deposited duly indorsed at the sellers' bank in Amsterdam by the sellers, to whom, presumably, it had been sent by mail. Both parties have acted on the view that the 9th Sept. was the day from which the ninety days' credit was to run—that is to say, that it was the day of "the receipt of the first bill of lading" within the meaning of the contract. The appellants' counsel has argued that there was then a receipt of the bill of lading by the appellants, and, in the sense that the bill of lading was then tendered for their inspection, probably they did receive it. But it seems quite clear from the whole clause that they were not then to take it from the sellers' bank, who held it. The provision as to their taking it up and paying the price if the ship arrived within the ninety days makes it clear that they never were to have it without paying the price. The bill of lading appears to be treated as the evidence of the shipment, and, on this being forthcoming, the ninety days was to begin to run. The reference to payment "three days before maturity" is, in the translation in the record, a little perplexing, but is not material on any question in this appeal. It is probably to be explained by the fact that it was anticipated—though it does not seem to have been obligatory—that a bill of exchange would be given, and that it was meant that the credit should only be for ninety days, and that if a bill of exchange carrying days of grace was given it was to be taken up three days before the maturity of that bill. Days of grace have been abolished in Germany, but not in Holland.

On the 19th Oct. an invoice was sent by the sellers to the buyers for the price of the cargo (21,938*l.* 9*s*), which was stated on the invoice to be due the 9th Dec. 1914, and this would be ninety days beginning with the 10th Sept. The invoice was accepted without objection by the buyers. This was the state of things when, on the 6th Dec. 1914, the *Parchim* was detained at Plymouth and the cargo captured; but the fact of the capture was not known to the appellants on the 9th, the due date for payment of the price. On that day the bank held the first and second of each of the sets of bills of lading, but not the third, and the buyers, conceiving themselves entitled to have all three bills of lading, deposited the whole of the price (21,938*l.* 9*s.*) with the bankers, but instructed them not to part with the money until they got the third bill of lading. The bankers accepted these instructions. They got the third bill of lading by the 25th Jan., and on that day they handed the money to the sellers and all the documents to the buyers.

The construction which their Lordships put on the somewhat ambiguous clause of the contract which mentions receipt of the bill of lading without saying whose receipt of it is referred to is this: The sailing ship coming round Cape Horn was estimated to take ninety days longer than the mail by which the first bill of lading, posted immediately after the completion of her shipment, would arrive in Europe. The buyer was to pay for the cargo at the estimated date of the arrival of the ship, or on her arrival if she arrived earlier than expected. Therefore the ninety days' credit was to begin to run when the buyer had been satisfied by production of the first bills of lading that the cargo had been shipped, and that the vessel might reasonably be expected in a further ninety days. Then, at any rate, if not before, he certainly came under a positive obligation to pay the price. He was, however, only to have the bills of lading when he did pay. The goods then most certainly were at his risk, and he had an insurable interest whether he had the property or not. He was entitled to have the policy whenever he chose to pay the premium. It appears that he did deposit the amount of the premium at the same time as he deposited the price on the 9th Dec. If the goods did not arrive, his remedy, if any, was on the policy. The bank which held the bills of lading was the bank of the sellers, but it was at Amsterdam, not in the country of the sellers but of the buyers. The course of business is left somewhat in doubt by the words used in the contract; probably the translation is not a very good one, or the document is on a form which has not been very skilfully filled up and altered, but the meaning is fairly clear, and it is made quite clear by the conduct of the parties. It seems to be that the bankers were to hold the documents as it were *in medio*. On the one hand, they were not to hand them over to the buyers without the money, but equally, as their Lordships infer, they were to hold them until the due date, and not hand them back to the sellers unless and until the buyers made default in taking them up according to the contract. The giving of a guarantee has been relied on in the argument, but it does not appear of great importance, and the fact that before the contract was signed a larger guarantee had been asked for and not insisted on is not a fact admissible for the purpose of construing the contract.

On these facts the learned President, possibly drawing somewhat different inferences, held that on the 6th Dec., the date of the capture, the property in the cargo remained in the German sellers owing to the form of the bill of lading and to the fact that, although indorsed in blank, it was still in the hands of the sellers' bankers with instructions not to hand it over to the buyers until the price was paid. His view was that in this state of things there was a *jus disponendi* reserved by the sellers which prevented there being an unconditional appropriation of the goods by their shipment. But that this is a very nice point, on which opinions may easily differ, is shown by the fact that in *The Sorfareren* (14 Asp. Mar. Law Cas. 195; 117 L. T. Rep. 259), the case which came before this board on appeal immediately before this present case, the learned President had himself come to the contrary conclusion on a contract which appears quite as favourable to the sellers as the contract in the present case. In the *Sorfareren* a compromise was agreed to between the Crown and one set of

claimants, which made it unnecessary for this board to form an opinion on this point in that appeal. The question now to be considered is whether the learned President in the present case gave as much effect as he ought to have to the fact that there was here a contract for the sale of the whole cargo of a named ship, and that that cargo was clearly at the risk of the buyers from a time anterior to the capture.

According to the authorities, it is beyond doubt that the fact that the cargo was at the buyer's risk from the moment it was placed on board points to the property having been intended to pass at that time. The general principle, subsequently embodied in the Sale of Goods Act 1893, s. 20, was, as early as 1873, laid down by Lord Blackburn in *Martineau* v. *Kitching* (26 L. T. Rep. 336; L. Rep. 7 Q. B., at pp. 453, 454), where he says: "As a general rule, *Res perit domino*, the old civil law maxim, is a maxim of our law; and when you can show that the property passed the risk of the loss, *primâ facie*, is in the person in whom the property is. If, on the other hand, you go beyond that and show that the risk attached to one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other."

It is true that in that same case and in others there are dicta of judges that an express clause stating at whose risk the subject-matter is to be at any particular time is to be construed as indicating that at that time the property is in someone else, otherwise the clause would be unnecessary; but that is an application of the maxim *expressio unius*, and the point does not arise in the present case. There is here no express clause dealing with the risk; it is on the whole tenor of the contract that it appears that the goods are at the buyer's risk after shipment, as he then becomes bound to pay the price at the end of an agreed period of credit. This fact is a strong argument, Blackburn, J. says, to show that it was meant that the property should then pass. Further, there is here a contract for the sale of the whole cargo of a named ship on a particular voyage. The cargo was not on board, so that when the contract was made it was a contract for the future sale of a sufficient but then unascertained part of the bulk then at the disposal of the seller and ready for shipment. *Anderson* v. *Morice* (35 L. T. Rep. 506; L. Rep. 10 C. P. 58, 609; 1 App. Cas. 713) was a case in many respects like this, and what was said by the judges is instructive, although there are sufficient differences in the facts to prevent the decision there being an authority here. There the plaintiff had bought "the cargo of . . . Rangoon rice per *Sunbeam* at 9*s.* 1½*d.* per cwt., cost and freight. . . . Payment by sellers' draft on purchasers at six months' sight, with documents attached." There, as here, the cargo was not on board at the time of the contract, and the ship was lost during the loading, when the greater part of the rice to make up the cargo was on board, but not the whole; the part not shipped was alongside in lighters, and was also lost. The contract did not, as the contract in the present case does, contain any clause providing for the case of a loss during loading. The question on which there was considerable difference of opinion was as to whether the part of the cargo which was on board was at the risk of the purchaser so as to give him an insurable interest. It was held that neither the property nor the risk passed as each bag of rice was put on board, and that neither passed until completion of the loading. Every judge, however, was of opinion that the property, as well as the risk in the whole cargo, would have passed as soon as the loading was complete; but there the phrase "with documents attached" showed that the purchaser was to have the bill of lading as soon as made out on his accepting the draft to be tendered with it for his acceptance. If the clause as to part loading, which is in the present case, had been in that contract, the purchaser would have had both property and risk in the part on board. In cases such as that was, and such as this is, as soon as a full cargo has been shipped the particular bags on board become *ipso facto* the cargo of the ship, and thereby become the subject-matter which has been agreed to be sold. The seller's representatives here were clearly authorised to select the particular bags of the description in the contract which were to go on board; no question arises here of the description and quality, as the certificates and analysis when tendered were accepted, a small rebate being made in respect of a slight variation which appears to have been justified by the contract; at any rate, it was not objected to. The shipment under such circumstances seems such an unqualified and decisive appropriation that it would require something very clear and express in the way of a reservation to make the appropriation a conditional one. The English cases, however, on which the Sale of Goods Act was founded, seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person by possession of the bill of lading gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract: (*Wait* v. *Baker*, 2 Ex. 1; *Gabarron* v. *Kreeft*, 33 L. T. Rep. 365; L. Rep. 10 Ex. 274). This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract: (*Mirabita* v. *Imperial Ottoman Bank*, 38 L. T. Rep. 597; 3 Ex. Div. 164; *Van Casteel* v. *Booker*, 2 Ex. 691; *Browne* v. *Hare*, 3 H. & N. 484; *Joyce* v. *Swann*, 17 C. B. N. S. 84). The *primâ facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by

the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak and may be rebutted by the other circumstances of the case.

Having regard to the doctrine that the master of a ship who gives to the shipper of goods a bill of lading becomes bailee of the goods to the person indicated by the bill of lading, a seller holding a bill of lading to his order would have a sufficient possession of the goods to maintain his lien, even if he had on shipment parted with the property. The seller in such a case makes the ship (even if it belongs to the buyer or is chartered by him) his warehouse so far as these goods are concerned, and the case as pointed out by Pollock, C.B. in *Browne* v. *Hare* is to be governed by the same rules as that of a person contracting to buy goods in a warehouse of the seller where they are to remain until paid for, so that the seller retains a lien. They may or may not become the buyer's property before he pays for them, according to the terms of the contract. The question whether, assuming the appropriation by shipment of the cargo to be unconditional, the property passed then, or only on notification of the appropriation, to the buyers, is not material in the present case, as on the 9th Sept. by the bills of lading, and on the 19th Oct. by the invoice, there was before the capture clear notification. The learned President in his judgment put out of consideration the events of the 9th Sept. and the 19th Oct on the ground that they took place after the outbreak of war, but in so doing he seems to have overlooked his own decision in *The Southfield* (13 Asp. Mar. Law Cas. 150; 113 L. T. Rep. 655; (1917) A. C. 390, note), and that of this board to which he was a party in *The Duksa* (13 Asp. Mar. Law Cas. 591; 116 L. T. Rep. 364; (1917) A. C. 386), to the effect that acts done after the outbreak of war are not invalidated when done in pursuance of obligations incurred before the war.

Their Lordships have come to the conclusion, after carefully considering all the facts, that it was the intention of the parties to the contract that the property in the cargo should pass to the buyer upon shipment, but that the buyer was not intended to have possession of the cargo or of the bills of lading which represented the cargo until actual payment at due date of the purchase price. With the exception of the form of the bills of lading, everything points to this conclusion. The contract is for the sale of the whole cargo of a named ship. On shipment, or at any rate on notification of shipment, the cargo is at the risk of the buyer, who has to pay for it whether it arrives or not. The cargo is to be insured for buyer's account and benefit, and insured at its arrived value, including profit, which the buyer alone could make. The buyer takes over the charter-party, and names the port of discharge. The only matter which seems to point to an intention not to pass the property on shipment is the form in which the bills of lading were taken. But this form was determined by the seller's agent without knowledge of the contract, and, though it may have been determined on general instructions from his principal, without particular instructions given in view of the particular contract. The way in which the seller subsequently deals with the bills of lading points rather to a desire to support his lien than to a desire to retain the property or any *jus disponendi* incident to the property. As soon as the bills of lading arrive in Europe he places them at the buyer's disposal, subject only to payment of the purchase price at due date. As soon as this is done he loses the possibility of withdrawing them from the contract, even if otherwise he could have done so. Under these circumstances the form of the bills of lading is, in their Lordships' opinion, quite insufficient to displace the strong inference of an intention to pass the property on shipment arising from the terms of the contract and the other facts.

It remains only to deal with the question of insurance, as to which a point was rather hinted at than seriously pressed in the argument. The appellants no doubt consented to take the risk which they did on this contract because they were to be insured against (*inter alia*) war risks. The appellants may have been entitled to recover on the policy, but as the policy itself is not in evidence but only the contract for it, their Lordships cannot be certain of this. It may be that the appellants have been paid by the underwriters, who are said to have been Germans, but there is no proof of the payment. No question was asked about it of the witness who gave evidence for the appellant at the trial. Possibly counsel considered that prize courts are not concerned with questions of insurance, because insurances are collateral contracts not affecting the property in goods.

It may be that had it been proved in fact that the appellants had been paid by the insurers, and that the appeal was being prosecuted for the benefit of the insurers, who were enemies, a further question would have arisen, but there is no such proof, and their Lordships express no opinion on this point.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed with costs, and that the cargo be released to the appellants.

Solicitors for the appellants, *Stokes* and *Stokes*.
Solicitors for the respondent, *Treasury Solicitor*.

Jan. 22, 23, *and March* 1, 1918

(Present: The Right Hons. Lords PARKER of WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS)

THE SÜDMARK (NO. 2). (a)

ON APPEAL FROM THE PRIZE COURT IN EGYPT.

Prize Court — Capture of ship and cargo — Ship taken into port and handed over to proper officer — Cargo discharged and warehoused before prize proceedings — Damage to cargo by fire at warehouse — Release of cargo to British owners — Claim by cargo owners — Duty of executive officers — Naval Prize Act 1864 (27 & 28 *Vict. c.* 25), *s.* 16.

The Naval Prize Act 1864, *by sect.* 16, *provides that "every ship taken as prize, and brought into port within the jurisdiction of a Prize Court shall forthwith, and without bulk broken, be delivered up to the marshal of the court; if there be no such marshal . . . to the principal officer of customs at the port."*

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

The German steamship S. *was captured in the Red Sea by B. the Captain of H.M.S.* Black Prince, *and taken to Alexandria. At that time Egypt was in British occupation, but there was no Prize Court, the nearest place at which a Prize Court was sitting being Gibraltar. Nor was there a marshal at Alexandria, and B. therefore handed the ship and cargo to G., the detaining officer, who, without getting leave from the Prize Court, removed the cargo from the ship and stored it in sheds on the quay. A fire broke out in the sheds and part of the cargo was destroyed.*

The cargo owners subsequently successfully claimed the release to them of the undestroyed part of the cargo, and were decreed damages against the captor and the detaining officer, who appealed.

Held, that there was no generally accepted rule of international law as to the officer in whose custody prizes should be placed when brought into a convenient port pending adjudication by a Prize Court; that Alexandria was a convenient port, and the captor was justified in delivering the ship and cargo to the detaining officer, who did not receive it as the captor's agent.

Held, further, that the damages did not flow from the failure to apply to the Prize Court for an order to unload; for had they done so, such an order in the circumstances would certainly have been granted. The cause of loss had nothing to do with any breach of duty by either of the defendants, and judgment therefore should be entered for them.

Lilley *v.* Doubleday (44 *L. T. Rep.* 814; 7 *Q. B. Div.* 510) *distinguished.*

Duties of captors and executive officers to owners of property seized as prize and rights of the Crown in such property considered and explained.

APPEAL from a judgment and decree of His Majesty's Supreme Court for Egypt, in prize.

By the decree the appellants, Captain Gilpin Brown, R.N. and Lieutenant Grogan, R.N., were ordered to pay damages to the respondents in respect of the destruction and damage to certain parcels of copra destroyed by fire in a warehouse where the cargo had been placed without application to or proceedings in prize.

Judge Grain, who tried the case, found that Lieutenant Grogan was agent for Captain Gilpin Brown, and that the appellants were in the position of bailees. Having broken bulk contrary to sect. 16 of the Naval Prize Act 1864 they were liable for the damage, and he ordered a reference as to the amount.

The facts sufficiently appear from the judgment.

Sir *Gordon Hewart* (S.-G.) and *James Wylie* for the appellants.

Leslie Scott, K.C. and *Dunlop* for the respondents, other than *Boustead* and *Co.*

Leck, K.C. and *A. M. Talbot* for the respondents, *Boustead* and *Co.*

Wylie in reply.

The following cases were cited:

Lilley v. *Doubleday*, 44 L. T. Rep. 814; 7 Q. B. Div. 510;
Gorris v. *Scott*, 30 L. T. Rep. 431; L. Rep. 9 Ex. 125;
The Betsey (*No.* 1), 1 Ch. Rob. 92;
The Washington, 6 Ch. Rob. 275;
The Maria, 4 Ch. Rob. 348;
The Catherine and Anne, 4 Ch. Rob. 39;
Morrison and Co. v. *Shaw, Savill, and Albion Company*, 13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 568; (1916) 2 K. B. 783;
Maisonnaire v. *Keating*, 2 Gall. 324;
The Gutenfels, 13 Asp. Mar. Law Cas. 346; 114 L. T. Rep. 953; (1916) 2 A. C. 112.

The considered judgment of their Lordships was delivered by

Lord PARKER OF WADDINGTON. — On the 15th Aug. 1914 the German steamship *Südmark* was captured in the Red Sea by His Majesty's ship *Black Prince*, under the command of the appellant, Captain Gilpin Brown. She had on board a general cargo, including a large quantity of copra consigned to Hamburg and 2000 tons of barley consigned to Antwerp or Hamburg. Until the contrary was proved, the enemy character of the cargo would be presumed from the enemy character of the ship. After the capture Captain Gilpin Brown brought the ship with the cargo on board through the Suez Canal to the port of Alexandria, and there handed her over to the appellant, Lieutenant Grogan, who had been appointed by His Majesty's military authorities in Egypt as detaining officer in respect of prizes brought to or captured in that port. Lieutenant Grogan caused the cargo to be unloaded and stored to his order in sheds belonging to the Egyptian Customs Administration. The unloading was completed early in Oct. 1914. On the 17th Oct. a fire occurred in the sheds where the cargo was stored, and a considerable part of the copra was burnt or damaged. What remained of the copra after the fire was, in the course of the proceedings for condemnation of the ship and cargo, released, with the consent of the Procurator for Egypt, to the respondents, who had entered a claim as owners, and the respondents thereafter brought an action in the Prize Court against Captain Gilpin Brown and Lieutenant Grogan to recover the loss occasioned by the fire. In this action Lieutenant Grogan has been held liable on the ground that he committed a breach of duty towards the respondents in causing the cargo to be unloaded and stored ashore. Captain Gilpin Brown has also been held liable on the ground that Lieutenant Grogan was his agent in causing the cargo to be landed, or, alternatively, that he was guilty of a breach of duty towards the respondents in handing over the ship and cargo to Lieutenant Grogan. Both Captain Gilpin Brown and Lieutenant Grogan are appealing from this decision. It will be convenient, in the first instance, to consider the duties of Captain Gilpin Brown as captor of the *Südmark*.

Seizures as prize are made by executive officers of the Crown in the exercise of the Crown's belligerent rights. The duties of these executive officers towards the owners of the property seized are the duties of the Sovereign, and fall to be determined by international law. On the other hand, the duties of these executive officers towards the Crown must be determined by municipal law. As will presently appear, it is important to remember this distinction.

The title of the Crown to property seized as prize is not complete without adjudication in its favour by the Prize Court. The first duty of the Crown is therefore to preserve the property in order that it may be dealt with as the Prize Court may determine. If the property seized be a ship

with cargo on board, the cargo should not (except under special circumstances) be disturbed until the ship be brought into a convenient port. The duty of the Crown to bring the ship into a convenient port without breaking bulk is generally discharged by the captors, and is sometimes referred to as the duty of the captors: (Pratt's Story on Prize Courts, pp. 37-39). But it makes no difference to the owners of ship or cargo by whom the duty is discharged. For any loss occasioned by a breach of the duty the Crown may be made liable through the executive officer responsible for the breach or some other proper officer. As a matter of practice it is quite common for the captors, under the orders of their superior officer, to hand the prize to some other officer of the Crown to be taken into a convenient port, and it is impossible to hold that such practice is contrary to international law. On the prize being so handed over, the duties of the captors themselves with respect to it are at an end, though the duty of the Crown remains.

The convenience of the port to which a prize is brought in for adjudication must be determined by all the circumstances of the case. Neutral ports are not convenient ports, for it is arguable that a neutral Power could not allow a prize to remain in its ports (except temporarily, and then only by reason of special circumstances, such as stress of weather or want of provisions) without committing a breach of neutrality, and, further, it might be difficult to execute the order of the Prize Court of the captors over vessels into neutral port. Other things being equal, the nearest available port should be preferred. A ship captured in the English Channel ought not, as a rule, to be taken to Gibraltar. It would be unreasonable to subject her to the risk of so long a voyage. But as between various home ports it would be quite proper to select the least congested port, or the port the voyage to which, though longer, would involve less danger from the risks incident to war. A convenient port must be such that the property can remain there in safety without being exposed to special risk from wind and tide. It should be capable of accommodating vessels of the draught of the captured ship. The real point to be considered is the safety of the prize, and the distance of the place where the Prize Court holds its sittings from the port selected is immaterial.

To the question whether Alexandria was a convenient port to which the *Südmark* might properly be brought after her capture, their Lordships, without hesitation, return an affirmative answer. It was not a neutral port, Egypt being in the military occupation of this country: (see *The Gutenfels* (13 Asp. Mar. Law Cas. 346; 114 L. T. Rep. 953; (1916) 2 A. C. 112.) For all material purposes it was a British port, and vessels detained there as prize would be subject to the orders of the appropriate British Prize Court. There was then no court in Egypt exercising jurisdiction in matters of prize, but the Admiralty Division of the High Court in this country had jurisdiction over all such matters, and there would be no difficulty in executing its orders in the port of Alexandria. The suggestion that the *Südmark* ought to have been taken to Malta, at considerable risk, merely because there was a court having jurisdiction in prize which sits at Malta, is, in their Lordships' opinion, untenable. It follows that Captain Gilpin Brown acted properly in bringing the *Südmark* into the port of Alexandria; but there is the further question whether he was justified in handing her over to the custody of Lieutenant Grogan.

So far as their Lordships can discover, there is no generally accepted rule of international law as to the officer in whose custody prizes should be placed when brought into a convenient port pending adjudication by the Prize Court. Inasmuch as the duty of the Crown to preserve the captured property subsists as well after as before the ship is brought into port, the matter is of little importance to the owners of the captured ship or cargo, and may be reasonably determined by the municipal law of the captors. In Germany prizes are handed over to the port authorities. In this country the persons to whom a prize should be handed over is in part regulated by statute. Sect. 16 of the Naval Prize Act 1864 provides that every ship taken as prize and brought into port within the jurisdiction of a Prize Court shall forthwith and without bulk broken be delivered up to the marshal of the court, but if there be no such marshal, then to the principal officer of Customs in the port. It should be noticed with regard to this section that it is one of a fasciculus of clauses dealing with procedure in Prize Courts, and procedure has always been recognised as a matter of municipal as opposed to international law. Further, the penalty for its breach is governed by sect. 37, and involves only the loss of prize-money—in other words, the loss of an advantage secured by municipal and not by international law. It should be noticed also that sect. 16 has no application unless there be a marshal or a principal officer of Customs to whom the prize can be delivered. If there be no such marshal or principal officer, the section is inapplicable, and the person to whom the prize is to be delivered would, according to our municipal law, fall to be determined by the Crown in the exercise of its prerogative.

There was no marshal or deputy marshal and no principal officer of His Majesty's Customs in Alexandria to whom delivery could be made pursuant to sect. 16, and it was no doubt for this reason that Lieutenant Grogan had been appointed on behalf of the Crown as detaining officer in respect of prizes brought to or captured in that port. Their Lordships cannot accept the suggestion that the principal officer of Egyptian Customs was the principal officer of customs within the meaning of that section. Under these circumstances, Captain Gilpin Brown was, in their Lordships' opinion, fully justified in delivering the *Südmark* to Lieutenant Grogan. It is difficult to see how he could have acted otherwise. The suggestion that he constituted Lieutenant Grogan his agent for the future custody of the ship and cargo is, in their Lordships' opinion, based on a misconception of the true facts. It is supported only by the subsequent conduct of Lieutenant Grogan in handing the ship to Captain Borrett for delivery with other prizes to the Prize Court marshal appointed by His Britannic Majesty's Supreme Court in Egypt, which had then obtained jurisdiction in prize matters, by Order in Council of the 30th Sept. 1914, made under an Act of Parliament passed on the 18th Sept. 1914 (4 & 5 Geo. 5, c. 79). This conduct constitutes no

foundation for saying that he was agent for Captain Gilpin Brown.

With regard to Lieutenant Grogan somewhat different considerations arise. His duty towards the cargo-owners was the duty of the Crown, that is to say, the duty of preserving the property pending adjudication by the Prize Courts. Only if in discharging the cargo he committed a breach of this duty can he be liable for any loss entailed thereby on the cargo-owners. The Prize Court is the proper tribunal to determine whether the circumstances did or did not, according to international law, justify the discharge. If Lieutenant Grogan had, as it is contended he should have done, applied to the Prize Court for leave to land the cargo, the same question would have arisen for determination. If the circumstances were such that the court, if applied to, would have authorised the discharge of the cargo, the cargo-owners can have suffered no damage by reason of the fact that Lieutenant Grogan did not make any such application. Their Lordships cannot accept the contention that the necessity of an application to the court before landing a prize cargo is so clearly a rule of international law that a neglect to make the application must in all cases render the officer responsible for the landing liable for a breach of duty. Such a rule would not be in the interests of the owners of the captured property. The circumstances may be such that prompt action is necessary in the interests of all concerned. In such cases the officer in charge of the property must act on his own responsibility. If there be no justification for landing the cargo, and the owner is prejudiced thereby, he has his remedy in the Prize Court. If the landing of the cargo is justified, the owner has no cause of complaint. The irregularity, if any, committed by the officer responsible for the landing in not having first obtained the leave of the court is in that case a mere technical breach of duty.

In the present case there can, in their Lordships' opinion, be no reasonable doubt that if an application had been made to the Prize Court it would have authorised Lieutenant Grogan to do what he in fact did. The steamship *Südmark* was undoubtedly a German vessel captured at sea, and therefore clearly liable to condemnation. The liability of the cargo to condemnation was in doubt. It depended upon whether its presumed enemy character could be displaced by evidence. But it was quite certain that it could never leave Alexandria on board the *Südmark*. It would have to be transhipped or landed. The captain, in the interests of the cargo-owners, was pressing for an immediate landing, on the ground that it would deteriorate if left on board. Under circumstances such as these it is the usual, if not the invariable, course for the Prize Court to order a cargo to be landed and stored on shore. Their Lordships cannot discover any circumstance which might have induced the Prize Court to depart from the usual practice. If applied to, it would have authorised Lieutenant Grogan to do what he in fact did.

Further, their Lordships are of opinion that the delay, necessarily incident to an application to the High Court in this country, for leave to land the cargo was, under the circumstances, a sufficient justification for landing the cargo without obtaining such leave. But even if Lieutenant Grogan were guilty of a breach of duty in not obtaining the leave of the Prize Court to discharge the cargo, it is difficult to see how the damage subsequently incurred by reason of the fire was in any way consequent on such breach. Captors or other executive officers of the Crown in possession of property seized as prize may properly be likened to bailees, if there be a question as to the amount of care they are bound to exercise, but the likeness cannot be extended beyond this point. Bailment is a matter of contract, and the measure of damage in the case of a breach of contract may be very different from the measure of damage in the case of a breach of duty which in no way arises out of contract. In their Lordships' opinion, *Lilley* v. *Doubleday* (44 L. T. Rep. 814; 7 Q. B. Div. 510) cannot be relied on in the present case.

It was suggested that if an application had been made to the Prize Court the appellants would, in some way or other, have obtained the advantage of some insurance effected or to be effected by the Prize Court marshal. This may or may not be the case, but their Lordships are quite satisfied that there is no obligation on the part of the Crown or its executive officers, or the Prize Court marshal, to effect insurances against fire for the benefit of cargo-owners, whether the cargo be landed or kept on board a captured ship. The loss of some possible advantage arising out of insurance usually effected in the interest of the Crown cannot therefore be made an item of damage for the breach of duty which Lieutenant Grogan is said to have committed.

For the reasons above indicated, their Lordships are of opinion that the order appealed from was erroneous and ought to be discharged.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, with costs here and below.

Solicitors for the appellants, *Treasury Solicitor.*

Solicitors for the respondents, *Linklater, Addison* and *Brown; Thomas Cooper* and *Co.*

Supreme Court of Judicature.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Jan. 29, *Feb.* 2, *Nov.* 5, *and Dec.* 12, 1917.

(Before Sir S. T. EVANS, President.)

THE HAMBORN. (*a*)

Prize Court—Neutral flag—Ship registered in neutral country—Real ownership—Ship under enemy control—Seizure as prize—Character of ship—Domicil—Right of Prize Court to determine real ownership of ship.

The Prize Court is not bound to determine the neutral or the enemy character of a vessel according to the flag which she is flying, or which she is entitled to fly, at the date of her capture, but is entitled to determine her true character and her real ownership in accordance with all the facts and circumstances

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

of the case. When, therefore, a vessel is owned by a company which is registered in a neutral country, but it appears that all the directors and all the shareholders of the company are alien enemies, the Prize Court is entitled to hold that the ship is enemy property and liable to condemnation.

THIS was a suit for the condemnation of the steamship *Hamborn* as prize.

The *Hamborn* was originally a Norwegian steamship called the *Trim*. In 1913 she was purchased by a Dutch limited company, the Vulcan Transport Company, which had its headquarters at Rotterdam. A single-ship company, the Hamborn Steamship Company, was then formed, half of the shares in it being held by the Vulcan Transport Company and the other half by the Vulcan Coal Company, also a Dutch company of Rotterdam. Of the 1000 shares of the Vulcan Transport Company, 998 were held by the Kaiser Company, all the directors and shareholders of which were Germans resident in Germany, with the exception of one, who was a Hungarian, and the remaining two shares were held by another German firm, Messrs. Thyssen and Co. The share capital of the Vulcan Coal Company was held by the Vulcan Transport Company, the Rhine Company, and the Lohberg Company. The directors of the Vulcan Coal Company were, with one exception, the same as those of the Vulcan Transport Company. All the directors and shareholders of the Rhine Company and the Lohberg Company were of German nationality. The Hamborn Steamship Company was registered in Holland, and the managing committee consisted of two Germans, resident in Rotterdam.

The *Hamborn* was captured by a British warship whilst running under a time charter with an American firm of shipowners on a voyage from New York to Cuba. The date of capture was the 27th Oct. 1915. The vessel was taken to Halifax, Nova Scotia, where a writ in prize was issued on the 31st Oct. 1915. Subsequently an order was made transferring the proceedings to England.

By an Order in Council dated the 20th Oct. 1915, art. 57 of the Declaration of London, which provided that "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly," ceased to be adopted and put into force. The order was published in the *Gazette* on the 26th Oct. 1915, the day upon which the *Hamborn* left New York.

On behalf of the Crown it was contended that the court was entitled to look beyond the nominal ownership of the vessel for her true character, that the company owning the vessel was really an enemy company, and that the flag which she was flying at the time of her capture was not conclusive.

On behalf of the claimants, the Hamborn Steamship Company, it was contended that the test to be applied was the domicil of the steamship company, and that the connection of the company with the enemy was too remote to entitle the court to condemn the vessel as prize.

The *Attorney-General* (Sir F. E. Smith, K.C.), the *Solicitor-General* (Sir Gordon Hewart, K.C.), and *Dunlop* for the Procurator-General.

MacKinnon, K.C. and *Balloch* for the claimants.

The following were cited in the course of the argument:

The Harmony, 2 Ch. Rob. 322;
The Indian Chief, Roscoe's English Prize Cases, vol. 1, 251; 3 Ch. Rob. 12;
The Vrow Elizabeth, 5 Ch Rob. 2;
The Fortuna, 3 Wheat. 236;
The San José Indiano, 2 Gall. 267;
The Industrie, Roscoe, vol. 2, 297; Spinks, 54;
The Ocean Bride, Roscoe, vol. 2, 309; Spinks, 66;
Daimler Company v. *Continental Tyre and Rubber Company* (*Great Britain*), 114 L. T. Rep. 1049; (1916) 2 A. C. 307;
The St. Tudno, 13 Asp. Mar. Law Cas. 516; 115 L. T. Rep. 634; (1916) P. 291;
Pitt Cobbett's International Law, 3rd edit., part 2, pp. 141, 142.

Cur. adv. vult.

Dec. 12.—THE PRESIDENT.—It is a settled rule of prize law, based on the principles upon which Courts of Prize act, that they will penetrate through and beyond forms and technicalities to the facts and realities. This rule, when applied to questions of the ownership of vessels, means that the court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture. The owners are bound by the flag which they have chosen to adopt, but captors as against them are not so bound. It has been said that "it is no inconsiderable part of the ordinary occupation of a Prize Court to pull off the mask and exhibit the vessel in her true character."

The question to be determined in the present case is whether the true character of the steamship *Hamborn* was Dutch or German; or, in other words, whether her owners were enemy subjects or neutral subjects. She was nominally owned by a limited company registered in Holland, and was flying the Dutch flag. Six separate companies appear upon the stage in the history of the vessel. For brevity's sake I shall call them by short English names. They are (1) the Hamborn Shipping Company, (2) the Vulcan Transport Company, (3) the Vulcan Coal Company, (4) the Kaiser Company, (5) the Rhine Company, and (6) the Lohberg Company. The first three of these companies were registered in Holland; the last three in Germany. The ship (formerly a Norwegian vessel) appears to have been bought by the Vulcan Transport Company. She was afterwards transferred to the Hamborn Shipping Company, which was formed as a one-ship company, and her name was changed to *Hamborn*, after a German town.

The Vulcan Transport Company were the managers of the ship. They acted in part through two men named Groninger and Nalenz, who were German subjects, although said to reside in Holland. The Hamborn Shipping Company did not pay any cash to the Vulcan Transport Company for the ship. The whole of the share capital of the Hamborn Shipping Company was held in equal shares by the Vulcan Transport Company and the Vulcan Coal Company. The directors of these two last-named companies were all Germans and resident in Germany. All the shares in the Vulcan Transport Company, except two, were held by the Kaiser Company; the remaining two were held by Messrs. Thyssen and Co., a German firm, of Mülheim. The Kaiser Company was not

only registered in Germany, but all its directors and shareholders were Germans resident in Germany, except one, who was a Hungarian.

All the shares in the Vulcan Coal Company were held between the Vulcan Transport Company, the Rhine Company, and the Lohberg Company. These last two named companies were also registered in Germany, and all their directors and shareholders were Germans. It is seen, therefore, that no one other than enemy subjects was a director, manager, or shareholder in any of the companies which are supposed to have had an interest, direct or indirect, in the Hamborn Shipping Company or the *Hamborn*; and no person other than a German (unless it be the one Hungarian) had any pecuniary or beneficial interest to the extent of even a pfennig in the shipping company or the ship. What was the object of registering the three companies, nominally Dutch, in Holland, I do not know. It is possible that there are similar provisions in the law of Holland with reference to the ownership of a Dutch vessel by foreign companies to those contained in our own Merchant Shipping Acts. But no information was given to the court as to this.

These being the facts, was the *Hamborn* in reality a Dutch or a German vessel? In my view there can be no doubt about the answer. She was a German vessel belonging to German owners.

In the course of the argument, minute criticism was made of the translation of art. 6 of the constitution of the Vulcan Transport Company, which dealt with the respective positions and powers of Groninger and Nalenz on the one hand and the five German directors of the managing company on the other. It was argued that Groninger and Nalenz were in the position of directors, and that the five German directors were a supervisory committee and not the directing body.

If it is necessary to deal with the question as one of substance and not of words only, I am of opinion that the result of the evidence shows that the correct translation of art. 6 is as follows:

The management of the company is intrusted to a committee consisting of at most seven managers (first fixed, as seen below, at two—namely, Groninger and Nalenz), who are appointed and dismissed by the general meeting of shareholders. The committee of management is under the supervision of the board of directors. In the absence of one or more of the directors, the members of the board of directors shall decide whether the vacancies are to be filled. In derogation of the foregoing as regards the manner of appointment there are appointed for the first time as the managing committee Mr. Hans Groninger and Mr. Carl Nalenz, both of Rotterdam.

Art. 10 similarly should read:

The committee of management require the assent of the members of the board of directors for the purposes therein set out.

So art. 11:

The members of the board of directors determine the conditions under which the committee of management are appointed and fix their salaries, without prejudice to the power of the general meeting to dismiss at any time one or more of the committee.

And, lastly, art. 16:

The members of the board of directors determine the general rules according to which the business of the company is to be carried on. In all current measures they serve the committee of management as an advisory council. The committee of management are always obliged to carry out the directions of the board of directors.

The above gives the effect of the clauses in language which is easily understood here. The difference in the names of the two bodies is not worth discussion. It is no greater than "the difference 'twixt tweedle-dum and tweedle-dee." The result is that Groninger and Nalenz, the two Germans at Rotterdam, were entirely under the control of the five German directors in Germany, and that the centre and whole effective control of the business of the Hamborn Shipping Company was in Germany.

Having regard to these facts the vessel must be regarded in this court as belonging to German subjects.

I perhaps ought to mention one other consideration which was placed before the court by counsel for the claimants, by reference to art. 57 of the Declaration of London, whereby it had been provided that the neutral or enemy character of a vessel was determined by the flag which she was entitled to fly. Whether if all the circumstances were known, it would be held in the courts of Holland that the vessel was "entitled" to fly the Dutch flag, I do not know. But in any event by an Order in Council of the 20th Oct. 1915 it was declared that the said art. 57 should from and after that date cease to be adopted and put in force, and that in lieu of the article the Prize Courts should apply the rules and principles formerly observed in them. The vessel was not captured till the 27th Oct. 1915.

It was said that the Order in Council was only published in the *London Gazette* on the 26th Oct. 1915, and that the vessel had no opportunity of changing her flag. Whether it was desired to change it, and how long it would have taken, I do not know. The date of the publication of the Order in Council, whatever it was, is in my view immaterial. The article was not in fact in force at the date of capture, and a ship which was really an enemy vessel had no protection under it. That is enough. But in truth, no serious argument was pressed upon the court on this head. The facts were stated rather in support of a plea *ad misericordiam*. The vessel being enemy property, such a plea, emanating from such an enemy, lacks not only force or favour, but is devoid even of a sense of decency.

The decision of the court is that the *Hamborn* is condemned as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor*.

Solicitors for the claimants, *Pritchard* and *Sons*.

Thursday, Jan. 17, 1918.

(Before Sir S. T. EVANS, President.)

THE GLENROY. (*a*)

Prize Court—British ship—Enemy goods—Goods diverted to British port—Discharge in British port—Perishable nature of goods—Sale by shipowners—Proceeds of sale—Liability to condemnation.

In the absence of any dealing with enemy goods, which have been discharged in a British port, of such a character as to change the ownership in the same, the Crown is entitled, in case the goods are sold, to claim the proceeds of the sale in the same way that it would have been entitled to claim the goods themselves if they had remained in specie.

THIS was an action on behalf of the Crown claiming the condemnation of the proceeds of sale of certain enemy goods.

The goods in question were 2800 bags of sesamum seed, an East Indian product cultivated for the sake of its oil, and these bags were shipped in June 1914, before the outbreak of the war, on the British steamship *Glenroy*, at Shanghai, by Messrs. Schnabel, Gaumer, and Co., a German firm carrying on business in Germany and in China. The seeds were consigned to Rotterdam "to order." Whilst on her voyage the *Glenroy* was diverted to the port of London, where she arrived on the 19th Aug. 1914. The seeds were unshipped and stored in the port of London, but, as they were of a perishable nature and unclaimed, the shipowners sold them in Sept. 1915 for the gross sum of 2414*l.* 6*s.* 4*d.* Freight, sale charges, lighterage, storage, &c., amounted to 585*l.* 0*s.* 2*d.*, leaving a balance of 1829*l.* 6*s.* 2*d.*, which was paid into the current banking account of the shipowners.

In July 1917 the Procurator-General first became acquainted with the real facts of the case and communications passed between the Solicitor to the Treasury and the shipowners, with the result that the shipowners paid over a cheque for the sum of 1829*l.* 6*s.* 2*d.* to the Procurator-General, and this was paid into the Prize Court for adjudication. Subsequently a writ in prize was issued claiming condemnation of this sum as droits of Admiralty.

The *Solicitor-General* (Sir Gordon Hewart, K.C.) and *M. Shearman* for the Procurator-General.—If the Crown had been aware of the circumstances of the case in Aug. 1914, when the vessel arrived at the port of London, and where the seeds were unshipped, it would have been within its right to seize the goods as enemy property on a British ship. The goods never became the property of any other person; in fact, there was no claimant to them. And just as the Crown was entitled to claim the goods in specie, so, in the absence of any dealing with them so as to create a right in anyone else, there was the right to follow the proceeds of sale if the goods were sold. The right of following the proceeds of sale after capture was clearly established: (see Story's Principles and Practice of Prize Courts, Pratt's edit., pp. 28-30). This right should be extended to the case of enemy goods which were in a British port and liable to seizure. There was no decision exactly in point, but the matter was dealt with to some extent by Lord Parker in his judgment in the case of *The Roumanian* (114 L. T. Rep. 3; (1916) 1 A. C. 124), where he said: "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." They also referred to

Lindo v. *Rodney*, 2 Douglas, 612n.
The Hoffnung, Roscoe's English Prize Cases, vol. 1, 583; 6 Ch. Rob. 383;
The Charlotte, Roscoe, vol. 1, 585n.

The PRESIDENT.—It is clear that these 2800 bags of sesamum seed belonged to the enemy. They were laden on a British ship on a voyage from Shanghai to Antwerp and Rotterdam, and entered the port of London, the vessel having been diverted thither whilst on her way to her destination after the commencement of the war. Acting strictly according to their rights, the shipowners—I dare say for good reasons or otherwise, because of the character of the goods—sold the goods, which realised a sum of 1829*l.* 6*s.* 2*d.* after payment of freight and other charges. While in port, as well as whilst they were at sea, the goods were liable to capture or seizure by the Crown. There is no evidence before me that they went further afield than the port of London, and they were there sold. Thereupon they became converted into money, and that money was in the hands of the shipowners. Somehow it came to the knowledge of the Procurator-General that there was that sum of money left in the custody of the shipowners, and there was a demand made for it by him, equivalent to the right of seizure. I think the goods were merely converted in port into money, and as the goods were subject to seizure and condemnation while they remained as specie, so in the case of the proceeds of their sale, nothing having arisen to interfere with or change their character, such proceeds are also subject to condemnation. Therefore I condemn this 1829*l.* 6*s.* 2*d.*, the net proceeds of the goods the subject of seizure as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor.*

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

Feb. 14, 15, *and* 19, 1918.

(Before Sir S. T. EVANS, President.)

THE BONNA. (*a*)

Prize Court—Edible fats shipped in neutral country—Edible fats conditional contraband—Fats to be manufactured for consumption in neutral country—Other edible fats of a similar character thereby released for export to enemy country—Continuous voyage — Principle of substitution — Limit of principle.

Cocoanut oil, which is largely used in the manufacture of margarine, was declared conditional contraband by an Order in Council dated the 14th Oct. 1915. *A large quantity of this article was shipped in a neutral vessel in* 1916 *from the East Indies and consigned to a Swedish firm of margarine manufacturers. Whilst on its voyage the vessel arrived at a British port, where the cocoanut oil was seized as prize. The Crown claimed the con-*

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

demnation of the oil on the ground that it was really intended for Germany, and, alternatively, that even if it was intended for manufacture into margarine in Sweden, and for consumption in that country, the result was the release of a large quantity of butter, which was, in fact, sent to Germany for consumption, and that therefore the doctrine of continuous voyage applied to the article. The Swedish firm resisted the claim on the ground that the cocoanut oil was intended solely for use in the manufacture of margarine for Swedish consumption, and that the doctrine of continuous voyage did not apply to the case.

Held, that it was not in accordance with the principles of international law that raw materials, which were conditional contraband, on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country should be subject to condemnation on the ground that the consequence might, or even would, necessarily be that another article of a like kind, and adapted for a like use, would be exported by other citizens of the neutral country to the enemy; but that if it was shown that in a neutral country particular manufacturers of an article were acting in combination with particular producers or vendors of a similar article, and that the intention and object of their combination was to produce the one article so that the other might be released for export to the enemy, then the doctrine of continuous voyage would apply, and the raw materials would be subject to condemnation as conditional contraband with an enemy destination.

THIS was a case in which the Crown claimed the condemnation of 416 tons of cocoanut oil seized on board the Norwegian steamship *Bonna*, on the 27th Aug. 1916.

The *Bonna* was a test case, and upon its decision depended the fate of the cargoes of six other vessels, the *Oscar Fredrik*, the *Prinsessan Ingeborg*, the *Axel Johnson*, the *Roxen*, the *Gyldenpris*, and the *Atna*.

The *Bonna* sailed from the Dutch East Indies with a cargo of 416 tons of cocoanut oil, a substance largely used in the manufacture of margarine, and consigned in the manner set out fully in the judgment. The claimants were the Kya Margarin Aktiebolaget Svea, of Kalmar, Sweden, and they resisted the claim of the Crown on the ground that the cocoanut oil had been bought by them for the purpose of the manufacture of margarine in their manufactory for sale and consumption in Sweden.

The contention of the Crown was that the manufacture of margarine had largely increased in Sweden since the outbreak of the war, and statistics showed that there had been an enormous export trade in butter carried on with Germany so long as edible fats were imported into Sweden. Later on, however, when a quantity of edible fats were seized as prize, and the importation of the same into Sweden declined, the exports of butter to Germany fell off. This showed that the import of edible fats had a considerable influence upon the trade with Germany, and, as it was an established principle that where raw material which was conditional contraband was liable to condemnation as prize if it was on its way to a neutral country, there to be manufactured into articles which were afterwards to be exported to an enemy country, this principle ought to be extended to cases like the present, where the importation of one article permitted of the exportation of an article of a similar character, and that this extension of the doctrine of continuous voyage was justifiable owing to the ramifications of modern commerce.

The *Solicitor-General* (Sir Gordon Hewart, K.C.), *R. A. Wright*, K.C., and *Pease* for the Procurator-General.

Leslie Scott, K.C. and *Le Quesne* for the claimants.

The following cases were cited in the course of the arguments:

The Balto, *ante*, p. 28; 116 L. T. Rep. 319; (1917) P. 79;

The Hakan, *ante*, p. 161; 117 L. T. Rep. 619; (1918) A. C. 148;

The Baron Stjernblad, *ante*, p. 178; 117 L. T. Rep. 743; (1918) A. C. 173.

Cur. adv. vult.

Feb. 19.—THE PRESIDENT—This claim relates to 416 tons of cocoanut oil shipped on the Norwegian steamship *Bonna*, and seized on the 27th Aug. 1916. The claimants are a Swedish company of margarine manufacturers and dealers carrying on business at Kalmar. The company was formed before the war, but its business increased largely after the war. Cocoanut oil was declared conditional contraband by an Order in Council dated the 14th Oct. 1915.

The case for the claimants was that the oil was their property, and was bought for the purpose of the manufacture of margarine in their own factory for sale and consumption in Sweden, and as such was not subject to capture or condemnation.

It was contended for the Crown that the claimants had failed to discharge the onus which, in the circumstances, rested upon them, to establish that the destination of the oil was neutral; and, further, that the oil was subject to condemnation on the ground either (1) that it, and the margarine for the manufacture of which it was acquired, should, in the circumstances, be deemed to have an enemy destination; or (2) that such margarine, when manufactured, would, to the knowledge of the claimants, be consumed in Sweden in substitution for Swedish butter to be supplied to Germany.

Of the total of 416 tons, 111 tons were shipped at Batavia and Sourabaya, in the Dutch East Indies, by Messrs. G. H. Slot and Co. as consignors to Messrs. Auguste Pellerin, Fils, and Co. as consignees at Christiania; and 305 tons at Sourabaya by Messrs. Burns, Philps, and Co. Limited, as consignors to Mr. Anders Mellgren as consignee at Gothenburg. All the consignments were intended for the claimant company, which had bought the former lot through Messrs. A. B. Nielsen and Co. of Christiania, and the latter through Mr. Ole Boe, of the same city. The goods were sold and bought under f.o.b. contracts.

It was said that the first-named consignees, Messrs. Auguste Pellerin, Fils, and Co., were inserted in some of the bills of lading through a mistake of the shippers, which was not discovered till after the vessel sailed. While she was on her voyage the shippers caused a cablegram to be transmitted to her master, asking him to alter the manifest by entering the name of Mr. Anders Mellgren as the consignee. This he did not do, but he pinned the cablegram to the manifest.

Whether it was intended that he should alter the bills of lading or not is in doubt.

Mr. Anders Mellgren was the French Consul at Gothenburg. He had no control over, or beneficial interest in, the goods. His name was used as consignee with his assent, accorded for a small commission. The object of this was, according to the claimants' story, to facilitate the passage of the goods into Sweden by satisfying any British cruiser or examining vessel that the destination of the goods was neutral, and so to avoid the diverting of the vessel and her cargo to a British port for search and examination.

How the alleged mistake of inserting Messrs. Auguste Pellerin, Fils, and Co. in some of the bills of lading arose has not been shown as clearly as could be wished. But, however that occurred, and whatever the object of consigning the goods to Mellgren may have been, the result was that the ship's papers did not show who were the real consignees for whom the goods were destined. This clearly placed upon the claimants the burden of proving that the goods did not have an enemy destination. Other matters arising upon the documents also required explanation, but I refrain from entering upon them, as that may be unnecessary in view of the decision to be pronounced upon the claim to the release of the goods.

As to the ownership and destination of the goods, having regard to all the circumstances, I have come to the conclusion that the oil was the property of the claimants, and was bought, and intended to be used by them in their own factory in the manufacture of margarine, and that such margarine was intended for consumption in Sweden.

Apart from these questions of fact, counsel for the Crown rested their case upon a broader ground. Statistics were given in evidence to show the increase of the importation into Sweden of raw materials for margarine and of the production and sale of margarine, and to show the simultaneous increase of the export of butter from Sweden to Germany. They were interesting, and beyond doubt they proved that the more margarine was made for the Swedes the more butter was supplied by them to the Germans, and that when, by reason of the naval activity of this country, the imports for margarine production became diminished, the Swedish butter was kept for consumption within Sweden itself, and ceased to be sent to the enemy.

Upon these facts counsel for the Crown formulated and founded their legal proposition. That proposition may be translated in practical terms in relation to the facts of this case, perhaps more usefully than if it were stated in abstract language. So translated, it may be stated thus:—

"Margarine and butter are of the same class of food, one being used as a substitute for, or even as an equivalent of the other. Margarine was produced in Sweden—by the claimants among others—with the result that, to the knowedge of the manufacturers, the butter of the country was being sent to Germany, where it would pass under the control of the Government. There was, so to speak, one reservoir of the edible fats, butter and margarine. As one part of the contents—the butter—was conveyed away for consumption in Germany, the other part—margarine—was sent in to take its place for consumption in Sweden. If the one part could be captured as conditional contraband, the other part was subject to capture also; and not only that part when completely manufactured, but the raw materials for it as well."

No authority was nor could be adduced for the proposition formulated in such an argument, but it was contended, nevertheless, that it logically followed principles recognised by international law.

Before pronouncing the decision of the court, I think it right to say that if it was established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article I should be prepared to hold that the doctrine of continuous voyage applied so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination.

I should go even further, and hold that if it was shown that in a neutral country particular manufacturers of margarine were acting in combination with particular producers or vendors of butter, and that the intention and object of their combination was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results.

But there is a long space between those two supposed cases and the one now before the court, and this space, in my view, cannot be spanned by the application of the accepted principles of the law of nations.

I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the consequences might or even would necessarily be that another article of a like kind and adapted for a like use would be exported by other citizens of the neutral country to the enemy.

I therefore allow the claim, and order that the goods seized, or the proceeds if sold, be released to the claimants.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche.*

Feb. 25, 26, *March* 11, 12, 18, 19, 20, *and April* 15, 1918.

(Before Sir S. T. EVANS, President.)

THE LEONORA. (*a*)

Prize Court — International law — Neutral ship — Cargo of enemy origin with neutral destination — Reprisals Order in Council of the 16*th Feb.* 1917 *— Terms of order as affecting neutrals — Inconvenience and loss to neutrals — Validity of order — Reprisals — Special circumstances of case — Right to condemn ship and cargo.*

By an Order in Council dated the 16*th Feb.* 1917 *it was provided,* inter alia, *that* (1) *a vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory, without calling at a port in British or allied territory, shall, until the contrary*

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

is established, be deemed to be carrying goods with an enemy destination or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court; (2) any vessel carrying goods with an enemy destination or of enemy origin shall be liable to capture and condemnation in respect of the carriage of such goods; and (3) goods which are found on examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.

The Order in Council was made as a reprisal for an enemy memorandum which was declared to be "in flagrant contradiction with the rules of international law, the dictates of humanity, and the treaty obligations of the enemy."

A neutral vessel sailed from a neutral port with a cargo of coal which was obtained from an adjoining country in the occupation and under the complete control of the enemy. The coal was conveyed through the occupied territory to the neutral port partly by rail and partly by water, and was consigned to a neutral firm in another neutral country which was contiguous to and in direct and constant communication with the enemy country. The vessel proceeded direct from one neutral country to the other neutral country, and made no attempt to call at a port in British or allied territory. During her voyage she was captured, and the Crown claimed condemnation of the vessel and the coal on the ground that there had been an infringement of the Order in Council. The claim of the Crown was resisted by the shipowner and by the owners of the cargo on the grounds that the Order in Council was invalid and contrary to international law as it interfered to a greater extent than was necessary with the trade of neutrals; that it made no provision for compensation for neutrals for loss or inconvenience caused by the Order; that neutrals were entitled to carry on their sea-borne trade without hindrance, subject to the risk involved in carrying contraband or in attempting to break a recognised legal blockade; that under the special circumstances of the case the coal was not of enemy origin or of enemy destination; and that no port had been appointed to which a neutral vessel should go for examination.

Held, that where under the circumstances of the case there is a 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; that an order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists; and that therefore the Order in question was perfectly valid, having regard to the circumstances existing in Feb. 1917.

Held, also, that the coal in question in the case was of enemy origin, and that the appointment of a port for the examination of the cargo was not a condition precedent to the enforcement of the operative clause of the Order.

THIS was a case in which the Crown claimed the condemnation of the steamship *Leonora* and her cargo of coal, under the provisions of the Reprisals Order in Council of the 16th Feb. 1917.

The case of the *Leonora* was really a test case, and upon the decision given in it depended the cases of seven other vessels, which had been seized and detained under similar circumstances. These vessels were the *Hermina*, the *Emma Fernstrom*, the *Tellus*, the *Bergvik*, the *Dagny*, the *Olof Wijk*, and the *James J. Dickson*. The first of these, like the *Leonora*, was a Dutch vessel; the other six were Swedish.

The *Leonora*, a Dutch steamship of 1155 tons gross register, belonged to a person named Jos de Poorter, of Rotterdam, and was chartered by a company called G. and L. Beijers Import and Export Aktiebolaget, of Stockholm, for the carriage of a cargo of coal from Rotterdam to Stockholm. The agents of the Stockholm firm at Rotterdam were the Coal Trade Company. The coal was produced in Belgian collieries under the control of the German Government, and sold by a department of that Government in Brussels to Beijers, who sub-sold it to a Swedish company. After the coal left the mines in Belgium it was carried by rail to Antwerp and then by water from Antwerp to Rotterdam. It was there shipped on board the *Leonora*. The cargo of the *Leonora* was a part of a consignment of 40,000 tons of coal sold by the German Government to Beijers, more than half of which had been delivered before the capture of the vessel, which took place on the 16th Aug. 1917 whilst on her voyage from Rotterdam to Stockholm. The *Leonora* had made no attempt to call at a British port. The capture was made and the proceedings in prize taken under the Order in Council of the 16th Feb. 1917.

By the Order in Council, dated the 16th Feb. 1917, it is provided as follows:

Whereas by an Order in Council, dated the 11th day of March 1915, His Majesty was pleased to direct certain measures to be taken against the commerce of the enemy; and whereas the German Government has now issued a memorandum declaring that from February 1917 all sea traffic will be prevented in certain zones therein described adjacent to Great Britain and France and Italy, and that neutral ships will navigate the said zones at their own risk; and whereas similar directions have been given by other enemy Powers; and whereas the orders embodied in the said memorandum are in flagrant contradiction with the rules of international law, the dictates of humanity, and the treaty obligations of the enemy; and whereas such proceedings on the part of the enemy render it necessary for His Majesty to adopt such further measures in order to maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries, and for this purpose to subject to capture and condemnation vessels carrying goods with an enemy destination or of enemy origin unless they afford unto the forces of His Majesty and His allies ample opportunities of examining their cargoes, and also to subject such goods to condemnation: His Majesty is therefore pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that the following directions shall be observed in respect of all vessels which sail from their port of departure after the date of this Order: 1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court. 2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect

only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in art. 1 shall arise. 3. Goods which are found, on the examination of any vessel, to be goods of enemy origin or of enemy destination shall be liable to condemnation. 4. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order. 5. This Order is supplemental to the Orders of the 11th March 1915 and the 10th Jan. 1917 for restricting the commerce of the enemy.

The case for the Crown, which is dealt with very exhaustively in the judgment of the President, was that the Reprisal Order of Feb. 1917 was perfectly justifiable under the special circumstances, more particularly on account of the conduct of marine warfare by the Germans, and that, therefore, as the vessel had failed to comply with the regulations contained in the Order, she was liable to be condemned as prize, as well as her cargo.

The case for the shipowner and the owners of the goods was thus summarised by the President:—

(1) No measure of retaliation by a belligerent for acts of an enemy admittedly committed in breach of international law, or even of the dicta tes of justice and humanity, is justifiable by the law of nations if and in so far as it affects neutrals with any inconvenience or loss.

(2) No measure for restriction of the enemy's commerce, whether taken by way of retaliation or otherwise, is justifiable by the law of nations, if thereby the trade of neutrals by sea is interfered with to a greater extent than it is by the existing rules relating to contraband, strict blockade, or unneutral service.

(3) No such measure is justifiable by the law of nations, unless full compensation for all inconvenience or loss is provided for the neutrals affected as their absolute and unqualified right.

(4) Neutrals are entitled to carry on their seaborne trade with the enemy with impunity, whatever breaches of international law the enemy may be guilty of, at any rate if they make a formal protest against the enemy's illegal conduct, subject only to the risk involved in carrying contraband, or attempting to break a recognised legal blockade of the enemy's ports or territory.

(5) Even if some measure of retaliation is allowed by the law of nations which may affect neutral commerce, the Order in Council of Feb. 1917 was invalid, because it imposed upon neutrals excessive interference, inconvenience, and loss.

(6) The Order in Council was invalid, at any rate, in the case of the *Leonora* and her cargo, because (*a*) the coal was not of enemy origin, and (*b*) no port had been appointed to which the vessel could go for examination.

The *Attorney-General* (Sir F. E. Smith, K.C.), the *Solicitor-General* (Sir Gordon Hewart, K.C.), *Greer*, K.C., *Clive Lawrence*, and *Pearce Higgins* for the Procurator-General.

Sir *H. Erle Richards*, K.C., *MacKinnon*, K.C., and *Bisschop* for the shipowner.

Leslie Scott, K.C., *Stuart Bevan*, and *Le Quesne* for the cargo owners.

Cur. adv. vult.

April 15.—The PRESIDENT.—These prize proceedings relate to eight steamships with their cargoes, which were captured in Aug. and Sept. 1917 whilst on voyages from Rotterdam to Stockholm, Gothenburg, and other Swedish ports. The cargoes consisted mainly of coal and coke. The steamship *Leonora* and one other were Dutch vessels; the other six belonged to Sweden. The captures were all made under the authority, or assumed authority, of an Order in Council issued on the 16th Feb. 1917. The Crown asks for the condemnation of the ships and also of their cargoes, in accordance with the provisions of that Order. The claimants, the owners of the various ships and cargoes, contend that the Order in Council is illegal and invalid, and that the captures were therefore wrongful.

The issue thus raised is obviously one of supreme importance, not only as between the belligerents and neutrals, but also in its results upon the position of the belligerents themselves, and its possible effect upon the proximate and, indeed, ultimate fortunes of the war. The same broad question arises in reference to all the captures; and possibly the decision in the first case may be sufficient to dispose of all the others; but there is no express agreement that it should be treated and accepted as a test case for the determination of the remaining ones.

The case of the *Leonora* is the one in which the evidence was taken, and the arguments heard, and it is to this case that the present judgment directly applies. As the hearing proceeded the material facts became undisputed in substance, and they may be summarised as follows:—

The *Leonora* was a Dutch steamer belonging to one Jos. de Poorter, of Rotterdam. She was a vessel of 1155 tons gross register. She was chartered by a company called G. and L. Beijer Import and Export Aktiebolaget, of Stockholm (which I shall call "Beijers"), for a voyage from Rotterdam to Stockholm, at a freight of 40kr. per metric ton. This was about ten times the amount of the freight ruling before the war. It was from 4*s.* 3*d.* to 4*s.* 6*d.* in July 1914. She was loaded with about 1677 tons of coal; the total freight was 67,099kr. In other words, the freight for this small tramp steamer was about 3700*l.* for the voyage of about 830 miles, as against a pre-war freight of 375*l.*

Beijers were the shippers, and the bill of lading, dated the 31st July 1917, was made out to themselves or their assigns. The vessel was captured by a British cruiser on the 16th Aug. 1917 in open waters some distance out from the Hook of Holland, and was taken first to Harwich and thence to the Thames. The coal was produced in Belgian collieries under the control of the German Government, and sold by a department of that Government in Brussels, called the Royal Imperial Central Coal Committee—or sometimes more shortly, the Chief Coal Office—to Beijers. It was part of a total quantity of 40,000 tons sold under a contract said to have been entered into on the 4th April 1917. More than half the total quantity appears to have been delivered before the capture of the *Leonora*, and about 1400 tons were laden on one of the other ships, the *Emma Fernstrom*—a Swedish vessel—captured a little later. The coal was either sub-sold by Beijers to the Stockholm Gas and Electricity Company, or bought by Beijers for them as their agents, upon a commission of 4 per cent.

The price had to be paid to the German Department—the Brussels Chief Coal Office—when the coal was placed on truck at the mine. It was carried by rail from the mine to Antwerp, and by water from Antwerp to Rotterdam. Both Beijers and the Stockholm Gas and Electricity Company claimed, in the alternative, as the owners of the coal. No point was made on behalf of the Crown about the ownership or the form of the claim. It is immaterial, therefore, which of the alternative claimants were the owners of the cargo.

When I come to deal with the argument of the claimants' counsel that the coal seized was not "of enemy origin" (within the meaning of that phrase in the Order in Council), it will be necessary to go more fully into the facts relating to the German occupation of Belgian territory (which comprised the district where the mines from which the coal was produced were situate), and to the control exercised by the German Government over such territory, and the industries located therein.

At this stage it is sufficient to note two matters in connection with the contract for the sale of the coal by the German Department to Beijers, and the contract between Beijers and the Stockholm company. In the latter, which was first in order of time, Beijers reserved to themselves the right of rescinding the contract without compensation for damages, or of making such alterations in the price, mode, and times of delivery as might be occasioned by measures, restrictions, or the like, introduced by "the authority in the country of production or exportation."

In the contract between the German Department and Beijers it was stipulated that the prices were liable to any contingent alteration imposed "by our Government" which would be communicated to Beijers as soon as it was notified to the Department in Brussels; in which event Beijers would have the right, so long as the coal had not left the mines, to withdraw from the contract if they informed the Brussels Department by telegraph to that effect immediately on receipt of the latter's communication. This contract also contained the following clause:

> We (that is, the German Coal Department at Brussels) must also reserve our right to send you (that is, Beijers) certain deliveries for Swedish customers who are in the interest of the German Empire, and must therefore be put by you in the first rank, that is, before you satisfy the wishes of your other customers.

The case for the Crown may be translated into quite simple terms. It was that the *Leonora* was carrying goods of enemy origin from a port in a neutral country, affording means of access to the enemy territory, to a port in a neutral country also affording means of access to the enemy territory; and was therefore liable to capture and condemnation in respect of the carriage of such goods under the Order in Council of the 16th Feb. 1917; and that the goods were also liable to condemnation under the same Order. The answer of the claimants is: the order was illegal and invalid as against neutrals; and, therefore, the capture was wrongful, and neither the vessel nor the goods can be condemned.

While the main contentions may be so succinctly stated, the arguments in support of them covered a wide area in the domain of international law; and were formulated and developed with learning, skill, and amplitude on both sides. Before approaching the questions of the construction, effect, and validity of the Order in Council, it is, in my view, essential to examine and to keep in mind the circumstances—exceptional, and, indeed, unique in their character—which led up to its promulgation. Its basis was retaliation, and its object was the restriction of the commerce of the enemy. It was intended to be, and was by its express terms stated to be, supplemental to an earlier Order in Council of the 11th March 1915, which was similarly based, and had the same object. It is, therefore, necessary to go back to ascertain the origin and operation of the first Order.

In the first week of Feb 1915—I think on the 4th Feb.—the German Government issued an official Declaration that the English Channel, the north and west coasts of France, and all the waters round the British Isles, would be treated as a "war area," and that all enemy ships, whatever their character, found in that area would be destroyed, and neutral vessels would be exposed to danger.

Even before this the enemy had shown how they were prepared to treat vessels belonging to their adversaries, whatever the class or mission of such vessels might be. Near the end of Oct. 1914 a German torpedo had sunk a French passenger steamer—the *Amiral Ganteaume*—with more than 2000 unarmed refugees on board, including a large proportion of women and children. By good fortune a British steamship, happening to be near, succeeded in rescuing most of the passengers, but a considerable number lost their lives.

The declaration by Germany of the "war area" already referred to was communicated by this country to all the important neutral countries (including, of course, Holland and Sweden) in a note dated the 1st March 1915. The note commented upon the declaration, and also foreshadowed the retaliatory measures which would be adopted, and were afterwards incorporated in the Order in Council of the 11th March 1915.

The British Note of the 1st March 1915 was presented to the Governments of Argentina, Brazil, Chili, Denmark, Greece, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United States, and Uruguay. It ran as follows:—

> Germany has declared that the English Channel, the north and west coasts of France, and the waters round the British Isles are a "war area," and has officially notified that "all enemy ships found in that area will be destroyed, and that neutral vessels may be exposed to danger." This is in effect a claim to torpedo at sight, without regard to the safety of the crew or passengers, any merchant vessel under any flag. As it is not in the power of the German Admiralty to maintain any surface craft in these waters, this attack can only be delivered by submarine agency. The law of nations in regard to attacks on commerce has always presumed that the first duty of the captor of a merchant vessel is to bring it before a Prize Court, where it may be tried, where the regularity of the capture may be challenged, and where neutrals may recover their cargoes. The sinking of prizes is in itself a questionable act, to be resorted to only in extraordinary circumstances and after provision has been made for the safety of all the crew and passengers (if there are passengers on board). The responsibility for discriminating between neutral and enemy vessels, and between neutral and enemy

cargo, obviously rests with the attacking ship, whose duty it is to verify the status and character of the vessel and cargo, and to preserve all papers before sinking or even capturing it. So also is the humane duty of providing for the safety of the crews of merchant vessels, whether neutral or enemy, an obligation upon every belligerent. It is upon this basis that all previous discussions of the law for regulating warfare at sea have proceeded.

A German submarine, however, fulfils none of these obligations. She enjoys no local command of the waters in which she operates. She does not take her captures within the jurisdiction of a Prize Court. She carries no prize crew which she can put on board a prize. She uses no effective means of discriminating between a neutral and an enemy vessel. She does not receive on board for safety the crew of the vessel she sinks. Her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war. The German declaration substitutes indiscriminate destruction for regulated capture.

Germany has adopted these methods against peaceful traders and non-combatant crews with the avowed object of preventing commodities of all kinds (including food for the civil population) from reaching or leaving the British Isles or Northern France. Her opponents are, therefore, driven to frame retaliatory measures in order in their turn to prevent commodities of any kind from reaching or leaving Germany. These measures will, however, be enforced by the British and French Governments without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity.

The British and French Governments will therefore hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation.

The treatment of vessels and cargoes which have sailed before this date will not be affected.

Then followed in due course the first Order in Council as a retaliatory order. It recited that the German Government had issued certain orders which in violation of the usages of war purported to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels would be destroyed, irrespective of the safety of the lives of passengers and crews, and in which neutral shipping would be exposed to similar danger in view of the uncertainties of naval warfare, and had warned neutrals against intrusting crews, passengers, or goods to British or allied ships.

It contained further recitals to the effect that the enemy's conduct gave to this country an unquestionable right to retaliation; that His Majesty had therefore decided to adopt measures in order to prevent commodities of any kind from reaching or leaving Germany, but that such measures would be enforced without risk to neutral ships or to neutral non-combatant life, and in strict observance of the dictates of humanity; and that the object of such measures was to restrict the commerce of Germany.

The operative part of this Order was directed to four classes of cases, in which it was intended to place difficulties or to impose restrictions on trade by or with Germany, through the carriage by sea of goods from or to that country—namely, (1) to goods laden on vessels voyaging to a German port; (2) to goods laden in a German port on vessels voyaging from a German port; (3) to goods carried on a vessel on her way to some port other than a German port when the goods had an enemy destination or were enemy property; and (4) to goods on board a vessel sailing from a port other than a German port, which were of enemy origin or were enemy property.

In these various cases it was provided that the vessels might be required to discharge the goods to which the Order applied in a British or allied port. But the vessels themselves were not made subject to the penalty of condemnation or even detention. The goods required to be discharged were to be placed in the custody of the marshal of this court; and, unless contraband of war, or requisitioned, they (or their proceeds if sold) were to be dealt with by restoration, or detention, until the conclusion of peace, or otherwise in such manner as this court might in the circumstances deem to be just.

A very large number of cases has been dealt with in this court under the order, and in the French Prize Court under a similar order.

Part of the argument of the present claimants involves the question of the validity or legality of this first Order. But it was not pressed in these proceedings, because in a case which came before me in Aug. 1915 and April 1916—namely, *The Stigstad* (13 Asp. Mar. Law Cas. 310; 114 L. T. Rep. 705; (1916) P. 123)—it was decided that this Order was valid. The question of its validity was then raised, although it was not much argued. But the appellate tribunal in that or in the present case may be asked to review and reverse the decision then pronounced. In the meantime, especially as the Order in Council has similarly been acted upon in scores or hundreds of cases since, I do not retract from the judgment, although I hope my mind will not on that account swerve in forming a decision upon the question now raised as to the subsequent Order of Feb. 1917.

To revert to the history of the enemy's conduct at sea after the Declaration of Feb. 1915, the German authorities lost no time in carrying into effect their threats. Their submarines sank British ships and destroyed lives of innocent persons in March 1915. In April they sank Dutch, Swedish, and Portuguese ships (Portugal at that time being a neutral). They also torpedoed a Belgian relief ship without warning and sank her in five minutes, causing the loss of seventeen lives—although it was in the daytime and the vessel was flying the Belgian Relief Commission's flag and displaying the commission screens on both sides, marked "Commission Belgian Relief, Rotterdam," in letters over 2ft. high and had actually been granted a safe conduct by the German Consul at The Hague.

And it will be remembered—can it ever be forgotten?—that on the 7th May 1915 the *Lusitania* was torpedoed and sunk when she was carrying nearly 2000 persons of all classes and ages, and that in that frightful disaster 1198 men, women, and children were drowned. No more callous or cruel crime has been committed since the day of Cain. The first murderer seemed, however, to have felt some shame and remorse, as he denied the crime at the outset, and afterwards moaned that his iniquity was more than could be forgiven. But the authors and instigators of the inhuman, fiendish atrocity of the *Lusitania* were such beings as could rejoice and revel in it. Lest the civilised

world, which stood aghast at the crime, might misunderstand or forget it, they struck a medal of a vile kind to celebrate and commemorate it, replicas of which were sent to neutral countries in proud proof of their prowess.

This being the attitude of the enemy, it is not to be wondered at, therefore, that throughout 1915 and 1916 the outrages continued. Nay, further, in the beginning of 1917 the severity of the submarine atrocities was to be increased, and a formal announcement of an almost unlimited submarine warfare in European waters was made by a Memorandum of the German Government, which was expressly directed against "all sea traffic." In order to appreciate its extent, and the interference of its operations with neutral shipping and sea commerce and its disregard of innocent human life, it should be read in its entirety.

Memorandum of projected German war measures at sea published in the *Deutsche Reichsanzeiger* of the 1st Feb. 1917.

From the 1st Feb. 1917 all sea traffic in the hereafter designated barred zones around Great Britain, France, and Italy, and in the Eastern Mediterranean, will without further notice be opposed by all weapons. Such barred zones are:—

(*a*) In the North an area around England and France, delimited by a line at twenty marine miles distance along the Netherland coast to Terschelling Light-vessel, the degree of longitude, from Terschelling Light-vessel to Udsire, thence in a line through the point 62 deg. North latitude, 0 deg longitude, to 62 deg. North, 5 deg. West; further to a point three marine miles south of the southern extremity of the Faroes; thence through point 62 deg. North, 10 deg. West to 61 deg. North, 15 deg. West; then 57 deg. North, 20 deg. West to 47 deg. North, 20 deg. West; further to 43 deg. North, 15 deg. West; then along latitude 43 deg. North to twenty marine miles from Cape Finisterre, and along the northern coast of Spain at twenty marine miles distance to the French frontier.

(*b*) In the south of the Mediterranean Sea. To neutral shipping the sea area remains open west of a line drawn from Point de l'Espiguette to 38 deg. 20 min. North and 6 deg. East as well as north and west to a strip sixty marine miles wide along the North African coast beginning at 2 deg. West longitude.

In order to connect this area with Greece a strip twenty marine miles wide runs north or east respectively of the following line:—38 deg. North and 6 deg. East to 38 deg. North and 10 deg. East, and 37 deg. North and 11 deg. 30 min. East, to 34 deg. North and 11 deg. 30 min. East, to 34 deg. North and 22 deg. 30 min. East. From here a strip twenty marine miles wide runs west of longitude 22 deg. 30 min. East into Greek territorial waters.

Neutral ships which navigate the barred zones will do so at their own risk. Even though provision be made that neutral ships which on the 1st Feb. are *en route* to ports in the barred zones will be spared during an appropriate period, it is nevertheless urgently advisable that they be warned by all means available and directed into other routes. Neutral ships which are lying in ports in the barred zones can with equal security still leave the barred zones if they depart before the 5th Feb. and take the shortest route to a free zone.

The traffic of regular American passenger steamers can continue to proceed unmolested on the following conditions:—

(*a*) If Falmouth is taken as the port of destination.

(*b*) If on the voyage out and back vessels are steered for the Scillies as well as to a point 50 deg. North and 20 deg. West. On this route no German mines will be laid.

(*c*) If steamers bear the following special signs, which in American harbours are permitted to them alone—namely, the hull and superstructure to be painted with vertical stripes, three metres wide, alternately white and red; on each mast to be a large white and red flag, chequered; at the stern the American national flag. During darkness the national flag and the painting must be as recognisable as possible from afar, and the vessels illuminated brightly throughout.

(*d*) If one steamer goes weekly in each direction, arriving at Falmouth one Sunday and departing on Wednesday.

(*e*) If the guarantee of the American Government be given that these steamers carry no contraband (according to the German Contraband List).

This called forth the second Retaliatory Order in Council now under consideration. It recited (*inter alia*) that the enemies' proceedings rendered it necessary for His Majesty to adopt further measures in order to maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries, and for that purpose to subject to capture and condemnation both the vessels carrying goods with an enemy destination or of enemy origin, and the goods themselves unless the vessels afforded to the forces of this country and its allies ample opportunities of examining their cargoes. It then set forth its cardinal provision that such vessels and goods should be liable to capture and condemnation. It also contained a clause that the Order was supplemental to the Order in Council of the 11th March 1915, and an intermediate one of the 10th Jan. 1917, for restricting the commerce of the enemy.

Some criticism was made upon other parts of the Order and its effect on the particular vessel captured, which will be noticed in the proper place after the legality of the Order in general has been considered. Its validity was attacked by the claimants upon the general ground that it was against the law of nations from various points.

It will be convenient to state the several contentions in condensed form, for the purpose of directing attention to them as branches of the arguments. Some were advanced and pressed by counsel for the cargo owners, others by counsel for the shipowners, in various degrees of urgency; but neither of the advocates actually disavowed any contention of his colleague. They may therefore be taken together.

I think they may be summarised fairly as follows:

(*a*) That no measure of retaliation by a belligerent for acts of an enemy admittedly committed in breach of international law, or even of the dictates of justice and humanity, is justifiable by the law of nations if and in so far as it affects neutrals with any inconvenience or loss.

(*b*) That no measure for restriction of the enemy's commerce, whether taken by way of retaliation or otherwise, is justifiable by the law of nations, if thereby the trade of neutrals by sea is interfered with to a greater extent than it is by the existing rules relating to contraband, strict blockade, or un-neutral service.

(*c*) That no such measure is justifiable by the law of nations unless full compensation for all inconvenience or loss is provided for the

neutrals affected as their absolute and unqualified right.

(*d*) That neutrals are entitled to carry on their sea-borne trade with the enemy with impunity, whatever breaches of international law he may be guilty of, at any rate if they make a formal protest against his illegal conduct, subject only to the risk involved in carrying contraband, or attempting to break a recognised legal blockade of the enemy's ports or territory.

(*e*) That even if some measure of retaliation is allowed by the law of nations which may affect neutral commerce, the Order in Council of Feb. 1917 is invalid, because it imposes upon neutrals excessive interference, inconvenience, and loss.

(*f*) That in this particular case as respects the *Leonora* and her cargo, the Order in Council is invalid (1) because the coal was not of enemy origin; and (2) because no port had been appointed to which the vessel could go for examination.

I shall deal with the last two heads separately later. As to the others, three main questions arise. First, does the Order in Council comply with, or does it offend against, the guiding principles of the law of nations? Secondly, are there any precedents or decisions in favour of or against its validity? And, thirdly, is there authority for or against it, apart from actual decision or ruling precedent?

War between powerful States must act and react not only upon the belligerents themselves, but also upon other States that take no actual part in it, and their subjects. When war is carried on by sea, neutrals are naturally more affected in relation to their trade than they are by land warfare. Belligerents who have had supremacy or superiority upon the waters have insisted progressively and effectively upon their right to bring pressure upon their enemies in proportion to their maritime power. In the development of the rules of international law touching this right, inevitable conflicts have arisen between belligerents and neutrals, as to what kind of acts belligerents are entitled to commit with the aim of defeating or afflicting their adversaries, however much neutral traders may suffer in the process; and as to what neutrals are entitled to do in the exercise of their commerce whatever the results to the belligerents might be.

In modern times, the two chief points of controversy have related to the carriage of contraband and to trading through blockaded ports. It is not necessary to pursue the interesting history of the development of the rules of international law upon these subjects. I only wish to note and to extract the principle upon which they are based. Broadly, the principle is that the maritime commerce of neutrals is subject to restriction by the acts of States at war, if that commerce tends to assist an enemy either directly in his warlike operations, or indirectly in the carrying on of his own trade upon which his power of continuing the war may largely, or even entirely, depend.

The object—and the legitimate object of a belligerent—is to destroy or to cripple the enemy's commerce. The result—and the inevitable result—to neutrals is interference with their trade. In the application of the principle, the boundary of the law of nations has been extended from time to time to adapt itself to new and ever-changing conditions. This law must from its nature have room for expansion. It cannot, and never could be, squeezed into a mould of a particular size or shape. It never had, nor could have, the quality of immutability attributed to the laws of the Medes and Persians. It could not be confined within artificial limits like an Act of Parliament. It has the essence and qualities of a living organism like the common law of this realm.

In the two branches already mentioned—namely, contraband and blockade—this natural development is clearly illustrated. Contraband goods were at one time comprised within a very limited catalogue. At the present day, the list is extensively enlarged. The result to neutrals has been that their trade in such goods has had to run greater and increasing risks and penalties.

Moreover, in recent times not only have the contraband goods themselves been subject to confiscation, but the neutral vessels which carry them have also been rendered confiscable in many cases. It has become established law, too, that other goods on the same vessel belonging to the same neutral owners suffer the same fate, although they have no contraband character or enemy destination. It may be added also that the application of the doctrine of continuous voyage to contraband trade has greatly encroached upon and fettered the trade of neutrals in time of war.

This doctrine was originated in connection with the so-called "Rule of 1756"; but since its extension to trade in contraband goods by the courts of the North American States at the time of the Civil War, it has become established as part of the law of nations.

The law of blockade has the same fundamental principle as that of contraband, and carries it out to a still greater extent, because it involves the confiscability of the vessels and of goods of all descriptions, by whomsoever owned, laden on whatsoever vessels, and whether proceeding to or from blockaded ports, if the vessels are captured in running or attempting to run the blockade.

The justification of these rules, so serious to neutrals, is the acknowledged right of belligerents to bring pressure on the enemy by curtailing or stopping all trade in all commodities whatsoever to or from the ports of the enemy, apart altogether from any direct relation of the trade or goods to immediate war uses. In the region of blockade changes in the rules have also been established which have involved, of necessity, substantial increases in the degree to which neutral commerce has suffered.

For a long time it was deemed necessary to prove a strict blockade of particular ports by war vessels which were stationary or remained in sufficiently close proximity to the ports. But now what are known as commercial blockades are fully recognised. Upon this question the convention called the Declaration of Paris was not very definite. The *effectif* character of a blockade, even with the added definition, was left in a somewhat general form, perhaps advisedly. It is well known that the United States of America never agreed or adhered to the convention, although they have acted largely in accordance with its articles.

A word as to the history of the attitude of the United States upon the question of blockade may be forgiven as showing the rapid and even sudden extension of the law. In 1859 the President of the United States (President Buchanan), in addition to the first requirement that all private property, enemy or other, should be immune from capture at sea, asked for the abolition of commercial blockades also, as a condition before the United States would adhere to the Declaration of Paris. In June of that year the United States Secretary (Mr. Carr), in a circular to the Powers, wrote as follows: "The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defence, is a legitimate mode of prosecuting hostilities. . . . But the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly Powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times": (Westlake, vol. 2, p. 262, and Moore's Digest, vol. 7, p. 781).

Yet only a couple of years had passed when President Lincoln declared a commercial blockade of the Confederate ports which extended over a coast line of 3000 miles, which Mr. Dana in his notes to Wheaton described as "one of the most extraordinary in history." At the outset the Federal fleet was not equal to such a gigantic task, for it consisted only of forty-five vessels of war. Merchant ships constantly succeeded in entering and leaving the ports on the blockaded coast. Even in 1863 and 1864 this was so. From Jan. 1863 to April 1864, of 590 vessels which attempted to run the blockade of the port of Charleston 480 succeeded: (see Geffcken zur Heffter, 4th edit., 1883, sect. 154 and note) But the United States insisted on, and foreign Governments recognised, the blockade. And as the war progressed the development of the naval resources of the Northern States enabled them to intercept much of the trade with the South; and this contributed largely to their ultimate success.

It is, of course, true that according to the existing rules of international law there can be no blockade of neutral ports or coast lines. The Order in Council does not purport to declare a blockade of the ports to which it applies in the strict sense in which that term is used in international law. But the object at which it aimed as regards the enemy is similar. In saying this I am not suggesting that the method adopted by the Order in Council has been accepted by the nations in such a way that it already forms part of established law. That some change will evolve upon this subject, in view of the kinds of weapons now used on and under the sea, and in the air, seems certain. Meantime, can it be said that what the Order in Council prescribes is in any essential principle different from a blockade? Is it not on the lines of a blockade, by whatever name it may be called? It is not a blockade of enemy ports, but it is a stoppage or quasi-blockade of the enemy's maritime trade through adjacent ports. It was strenuously argued, however, that the existing limits of the doctrines of blockade and contraband should not in any circumstances be extended or transgressed, even if some measures of retaliation on the enemy were allowed.

A man of acknowledged ability as an Admiralty constitutional lawyer and publicist, who was probably, and almost certainly, the real author of the British Orders in Council of 1807, wrote caustically in 1805 as follows: "To those idolaters of the neutral flag who hold a yard of bunting on the poop of a merchantman more sacred than the veil of a vestal, I have nothing to offer. If this inviolable emblem ought absolutely to arrest the arms of contending nations, and preserve in all cases the contents of the sanctuary from capture, it may with equal reason receive under its safeguard the colonial commerce as the general property of a belligerent. But there are some champions of neutral pretensions who, without openly contending for these extravagant doctrines, maintain stoutly that neutral merchants have a right to trade on their own account with the Powers at war, wherever, and in whatsoever commodities, they please. If contraband goods and blockaded places be graciously excepted, this is the utmost extent of their abstinence. All other neutral commerce they hold to be unquestionably legal": (*vide* War in Disguise, 3rd edit., 1805). The anonymous author was Mr. James Stephens; and in his place in Parliament some years later he tacitly admitted what had been said as to his connection with the Orders in Council: (see Parliamentary Debates for 1812). The last few sentences describe generally the contentions (or pretensions) of the present claimants.

Before leaving this part of the case I must make some observations upon the suggested hardships which neutrals would have to bear if the Order in Council was allowed to operate. Neutrals are apt to assert their so-called "rights" in times of war and to forget any corresponding "obligations." They proclaim vociferously their losses, but they do not speak loudly of their gains. Over and over again evidence has been given before me in this court of large, nay, huge, profits made by merchants in Holland and Scandinavia by reason of the war. Incomes have been doubled, trebled, quadrupled, even decupled, through the trade with Germany, which has been carried on through neutral ports having convenient access to the enemy territory. It was always thus. Commercial human nature is not averse to taking pecuniary advantage whenever it is possible, and does not concern itself overmuch with the difficulties or the distress which create the opportunity for profit.

I am tempted to make another quotation from the work just referred to, which appears to be apt: "If neutrals were really losers by the wars of their neighbours, it would perhaps be fortunate for mankind, but would give them no right to indemnify themselves by accepting, in the form of commerce, a bribe from the weaker party to protect him from the arms of the stronger. But in the last and present war, at least, this pretence has no shadow of foundation. Let the neutral Powers confess that their late vast apparent increase of commerce is fictitious, and that the frauds also are gratuitous; or let them admit that independently of the trade in question, they have enormously profited by wars, which to their friends have been highly disastrous. . . . The neutral has many fair indemnities, without any trespass on belligerent rights. The com-

parative cheapness of his navigation gives him in every open market a decisive advantage. In the commerce of other neutral countries he cannot fail to supplant the belligerents; and the latter will naturally give him the carriage of such of his own commodities as he before usually supplied them with, partly or wholly through their own navigation. . . . He obtains also a still larger increase of commerce, by purchasing from the one belligerent, and selling to his enemy, the merchandise for which in time of peace they naturally depended on each other. The decay of his old branches of trade, therefore, if any such decay arises from the war, is on the whole amply compensated."

After the first British Order in Council of Jan. 1807, issued in retaliation for Napoleon's Berlin Decree, Denmark made similar complaints to these now put forward for Holland and Sweden through the mouths of the claimants.

In the dispatch sent to the Danish Minister on the 17th March 1807, Lord Howick (afterwards Lord Grey), the British Foreign Secretary, made answer, in part, as follows: "It is principally from the success of the British maritime force, which has almost annihilated the navigation of the enemy, that the ships of Denmark and other neutral States are employed as carriers from hostile port to hostile port, in order to relieve the enemy from his distress; and it is notorious that the trade thus carried on is supported by the shameful misconduct of neutral merchants, who lend their names for a small percentage, not only to cover the goods, but in numberless instances to mask the ships of the enemy. The Danish Minister in his note seems, indeed, so intent upon asserting neutral rights as apparently to forget that there also exist corresponding neutral duties. Neutrality, properly considered, does not consist in taking advantage of every situation between belligerent States, by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party; but in observing a strict and honest impartiality, so as not to afford advantage in the war to either; and particularly in so far restraining its trade to the accustomed course which it held in time of peace as not to render assistance to one belligerent in escaping the other's hostilities. The duty of a neutral is—*non interponere se bello, non hoste imminente hostem eripere;* and yet it is manifest that lending a neutral navigation to carry on the coasting trade of the enemy is in direct contradiction of this definition of neutral obligations, as it is, in effect, to rescue the commerce of the enemy from the distress to which it is reduced by the superiority of the British Navy, to assist his resources, and to prevent Great Britain from bringing him to reasonable terms of peace."

The particular references here made are, of course, to the "Rule of 1756," and the decisions which extended it; but the general observations, both as to doctrines and to facts, are closely applicable to the circumstances of the present war.

I now leave the first of the three general main questions, with the expression of my view, that if it is permissible in the circumstances of the present war and in view of the enemy's conduct, to allow by way of retaliation any extension of the powers of a belligerent at sea for the restriction of the commerce of the enemy, it does not appear to me that the Order in Council proceeds upon any principle inconsistent with or essentially contrary to those already embodied in the law of nations.

The second and third general questions, which can be taken together, were: Are there any precedents or decisions, or any authority apart from actual decision or precedent, in support of or against the validity of this Order? There is no decision against it.

It was contended that no authority in support of it could be adduced from any of the early writers on international law. In my opinion no help is given on the subject by Grotius, Bynkershoek, Puffendorff, Vattel, or any of the great jurists of early days. I accordingly refrain from references to them. (It may be well in passing to notice that when these and other writers refer to "reprisals" or "retorsion," they usually have in view acts done before the outbreak of war. To avoid confusion, I prefer to use the term "retaliation" in reference to the provisions of the present Order in Council.)

I leave also aside the various decrees issued by States at war, particularly in the sixteenth and seventeenth centuries, directed to prevent any trade between their enemies and any neutrals, and the treaties made between States from time to time with the same object, because they do not appear to assist in the determination of the questions now in dispute.

The precedents relied upon in favour of the present order are the Orders in Council of the 7th Jan. and the 11th Nov. 1807 and the 26th April 1809, promulgated during the Napoleonic War, in answer to Napoleon's celebrated Berlin and Milan Decrees of the 21st Nov. 1807 and the 17th Dec. 1807. Reliance is also placed on some decisions relating to those orders.

The conditions prevailing at sea in those years as between this country and France and the other territories controlled by or under the influence of Napoleon were peculiarly like those which now exist between this country and its enemies, with the exception—the serious exception—of the submarine weapons used in this war by the Central Powers. The trading vessels of France had been swept off the open seas, as the trading vessels of Germany and the enemy countries have been during the present war.

In 1805 it was stated and truly stated that, with the exception of a few coasters, "not a single merchant ship under a flag inimical to Great Britain now crosses the Equator or traverses the Atlantic Ocean." In the Code des Prises, Tome 11, p. 385, this passage occurred: "Et quand il est malheureusement trop vrai, qu'il n'y a pas un seul vaisseau marchand, naviguant sous pavillon français, quel autre moyen d'exportation avons-nous, que l'emploi des vaisseaux neutres?"

Similarly, in 1917, it might be truly said that not a single merchant ship under a German or other enemy flag sailed on any open sea.

It is important to bear in mind the state of things in 1806 and 1807 when the Orders in Council of the latter year were issued, by reason of the criticisms then made—more particularly with reference to America—that they could not really be considered "retaliatory" because Napoleon's Decrees could not be carried into effect, and were no more than *bruta fulmina*, and there was nothing for which to retaliate. The

whole of Napoleon's celebrated "Continental System" was aimed at the complete annihilation of British commerce, and he used whatever means he could command to achieve that aim.

The first decree was issued by him from Berlin in the temper of the conqueror who just a month before had placed his heel on the neck of Prussia at the battle of Jena. It contained recitals egregiously unfounded and false, and proceeded to decree that the whole British Isles were in a state of blockade; that all trade and correspondence with them was prohibited; that every magazine, every kind of merchandise, every species of property which belonged to an English subject should be considered as lawful prize; that no ship from England or her colonies, or which should have touched there, should be admitted into any harbour; and various other matters.

Three days afterwards, on the 24th Nov. 1806, in order to give effect to it, the decree was recapitulated in a proclamation from the French Minister to the Senate of Hamburg, which stated "that as several of the citizens of Hamburg were notoriously engaged in trade with England, the Emperor of the French was obliged to take possession of the city in order to execute his decree"; and this threat was executed on the same day by Marshal Mortier and a division of the French Army.

The first British Order in Council of Jan. 1807 prohibited the trade of neutrals from one port to another, both of which should belong to, or be in the possession of, France or her allies, or should be so far under their control that British vessels might not fully trade with them; and ordered any vessel found so trading, after warning or knowledge, to be captured and brought in, and, together with her cargo, to be condemned as prize.

It is important to observe the foundation and the extent of the Order, as set out in the preambles. They state that the attempts of the enemy to prohibit the commerce of all neutrals with the British Dominions would give "an unquestionable right of retaliation, and would warrant this country in enforcing the same prohibition of all commerce with France; and that His Majesty, though unwilling to follow the example of the enemy by proceeding to an extremity so distressing to all nations not engaged in the war, yet felt bound by a due regard to the just defence of the rights and interests of His people not to suffer such measures to be taken by the enemy without taking some steps to restrain that violence, and to retort upon the enemy the evils of his own injustice."

The next Order, that of the 11th Nov. 1807, recited that the previous Order had not answered the desired purpose, either of compelling the enemy to recall his Orders or of inducing neutral nations to interpose with effect to obtain their revocation, but that, on the contrary, they had been enforced with increased vigour, and that further measures were necessary. It then contained various provisions which need not be here specifically referred to, the main one being an order that "all the ports and places of France, and her allies, or of any other country at war with His Majesty, and all other ports and places in Europe from which, although not at war, the British flag is excluded, and all ports or places in the colonies belonging to His Majesty's enemies, shall from henceforth be subject to the same restrictions in point of trade and navigation, with the exceptions hereinafter mentioned, as if the same were actually blockaded by His Majesty's naval forces, in the most strict and rigorous manner."

Then followed the Milan Decree of Dec. 1807, which was still more violent than its precursor from Berlin. I do not refer to its provisions, nor to some other minor orders issued from this country, as they afford no assistance. But there was the later British Order in Council of the 26th April 1809, which should be referred to as it revoked the one of Dec. 1807, and contained certain mitigations in favour of neutrals, chiefly intended for the United States of America.

This 1809 Order, and the one of Jan. 1807, were those in force at the dates of the decision of Sir William Scott in *The Fox* (Roscoe's English Prize Cases, vol. 2, 61; Edw. 311) and *The Snipe* (Edw. 381).

Before I examine these two decisions, I propose to observe upon other matters, prior in date, which have a bearing upon the question of the legality of the Orders in Council, and also throw significant light upon these two judgments, and upon some earlier cases decided by the Lords Commissioners of Appeal in Prize Cases.

The validity in law and the public policy of the Orders in Council were much debated in Parliament and discussed by commercial authorities. With the policy and its results, and the system of licences which afterwards came into vogue, a Court of Prize has no concern.

In order to appreciate matters strictly relative to the discussion of the legality of the Orders, it is essential to keep in mind that the opponents of the Orders were, in the main, champions of the cause of neutral America; that it was constantly asserted that an undertaking had been given to the Government of the United States by a M. Decrès, the French Minister of Marine, to the effect that the Orders were not intended to be used against the United States and would not be enforced against them; and for this reason it was urged against the Orders that no retaliation which would affect the United States was in these events justifiable; and (as I have before indicated) it was further urged that the French fleet had no power whatever to carry out the threats of Napoleon, and had not attempted to do so; and that accordingly there was nothing more than an empty menace for which no retaliation was necessary or justifiable.

There is no legal impropriety, I think, in referring to views of statesmen and lawyers (outside the courts) upon questions touching the law of nations, particularly in the special instances which I shall give.

I shall first call attention to the opinions expressed by Sir William Grant in the House of Commons in the course of a debate upon the Orders in Council. He was then Master of the Rolls. His character and learning were in the highest repute. Lord Brougham wrote of him that he was "in some respects the most extraordinary individual of his time—one certainly than whom none ever better sustained the judicial office"; and that when he was raised to the Bench, "the genius of the man then shone forth with

extraordinary lustre." He also described him as "the model of a perfect judge." Another eminent person, Lord Campbell, said of him: "Luckily for the public, the office of Master of the Rolls was at this time (that was, when Lord Erskine was Lord Chancellor) held by Sir William Grant, who comes up to the highest notion that can be formed of judicial excellence."

No praise could be higher, and it came from two witnesses who were not too indulgent or over-generous in their estimates of men. It is also, assuredly, a fact of special significance that Sir William Grant was at the time he pledged his great reputation in the opinions I am going to cite, the judge who presided over the Lords Commissioners as the Court of Appeal in prize cases from the decisions of the High Court of Admiralty in Prize, before which questions of law under the Orders in Council might, and did in fact, arise.

In the debate on the 5th Feb. 1808 Sir William Grant followed Dr. Laurence—himself a lawyer of eminence in the Admiralty and Prize Courts—and, according to the Parliamentary Debates of the time, spoke to the following effect: "His honourable and learned friend (that is, Dr. Laurence) had admitted that on a principle of retaliation measures of this kind were justifiable, and he agreed with his honourable and learned friend that when such measures were to operate upon innocent neutrals it ought to be grave matter of consideration whether they should be resorted to. His honourable and learned friend had stated that such measures ought to follow the acts of the enemy, or otherwise they would not be acts of retaliation. With this doctrine he agreed in part; but when the enemy departed from justice he was of opinion that we were justified in retaliating in substance, and not bound to adhere to the form. . . . The Orders in Council did not and could not alter the law of nations. The King might issue his declaration, because he was not to leave his courts to infer what was the law of nations, but the King's declaration did not alter the law of nations, but was to be justified by that law. . . . Persons entertained strange notions of the law of nations when they supposed that a nation could not perform an act of rigour for its own preservation without violating the rule of its conduct. But this could not be a violation of the rule, for the case was out of the rule. When the enemy abandoned the rule it was our duty not to be bound by it, but to inflict that injury upon him which he intended for us, until we forced him to peace. If France could continue to enjoy all the advantages of commerce through neutral trade, while we were suffering every injury that could result from her decrees, she would have no motive to peace, and this country would soon be reduced to the alternative, either of submitting to peace upon any terms or of continuing the war to an endless period. He thought that Europe might be made to feel that a maritime Power was much less dependent upon Europe than the Continent was upon the maritime Power. He could not suffer his country to perish merely because the measures which were necessary for its preservation might press upon neutral commerce which Napoleon had before violated. There was no contract without a reciprocal obligation, and if neutrals did not oblige the other party to adhere to the law of nations they could not complain of us for not adhering to it. The later orders were only in conformity with that law upon the principles of retaliation."

Sir William Grant may, therefore, be fairly cited as one who lent his great authority to the support of the Orders in Council on the ground that the law of nations permitted them as measures of retaliation.

Ten days later Sir John Nicholl took part in the debate on the second reading of the Orders in Council Bill. He was at that time the King's Advocate. He spoke as one in a position of responsibility; and in prefacing his speech he said that the House would naturally expect that he should lay before it his views and the grounds for his opinion, and that in doing so it was necessary for him to look to the policy and to the legality of the measure. I would mention of Sir John Nicholl that in 1809 and 1810 he also formed one of the Court of the Lords Commissioners of Appeal in Prize, and sat in cases where the legality of these very Orders in Council appears to have been raised. His speech was comprehensive and had obviously been carefully considered. Material parts of it are reported as follow: "It is evident that the decree of the French Government of the 21st Nov. 1806 is the foundation of the present proceedings. . . . The effect of that decree was to exclude us from all foreign Powers whatever; and to prevent them not only from carrying on their accustomed trade with this country, but even to exclude the possibility of one neutral nation trading with safety to another. . . . That decree of the French Government avowed itself to mean a retaliation for an imaginary offence; and what then became the duty of this country, and other countries, in consequence of this outrageous measure? It surely became their duty to render such a mode of unaccustomed warfare to be retaliated and retorted upon the enemy. It was our duty to do this with as much forbearance as possible against other countries. Although it was a just principle in the law of nations that other countries must naturally suffer, in a certain degree, by the methods adopted by belligerent Powers; yet it is the duty of each to render that suffering as little injurious as possible. . . . Be it recollected that our commerce constituted the sinews of war, and therefore those measures of retaliation which we adopted were absolutely necessary for our preservation and defence. . . . Upon the ground of retaliation we are perfectly justified . . . and founded upon the law of nations. In 1798 Russia, feeling at that period the aggressions and overweening tyranny of France, did issue an Order of a much stronger stamp than those issued by Great Britain; that Order authorised the seizure of all ships proceeding to France. I do not contend that the question of the conformity of these Orders to the law of nations cannot be viewed in the abstract. It may be asked: Will you repel injustice with injustice? —No. But I would ask: Is it to be endured that one belligerent shall be suffered to act towards another in a manner the most unjust and the most contrary to the laws of nations, and that the other belligerent shall be bound to observe the accustomed usages and conduct towards her? I do contend that France has acted towards this country in open violation of the law of nations; and I do maintain that this country is justified

in retaliating upon her. If it be said that the law of nations ought not to be observed, I do from my heart protest against such a principle. I do think that nothing but the most urgent necessity can warrant its non-observance. If, however, your enemy will not be bound by it, I do think that you have no other resort but that of going back to first principles, and looking to self-preservation. Much has been said of the infringement of neutral rights, but I have heard very little said of neutral duties. In the operation of these Orders in Council it never was in the contemplation of the framers of them to oppose neutral rights. If America suffers, it is what is unavoidable where her interest is so connected as in the present war between this country and France. These measures against America were alone intended to hurt France, not to injure or infringe upon the rights of neutrals."

That is all that need be quoted as to the legality of the Orders in Council. But I may be pardoned for adding the following passage, for reasons which will be obvious. It was delivered over a century ago, but it strikes also a familiar modern note: "The period in which we live is awful beyond example, and the contest in which we are engaged great beyond precedent. We are possessed of the dominion of the sea; France of the land; so far we are on a footing of complete equality. I regret to hear that so much clamour has been raised, by I know not what infatuation, for peace at the present moment. Are those who are such advocates for that measure satisfied that it would be a lasting, solid, and safe one? I very much fear that no peace of the kind could be obtained at present. I am satisfied that by carrying on the contest with that spirit and energy that become a free people, the issue will be speedy, honourable, and glorious."

Shortly afterwards, namely, on the 10th March 1808, another eminent authority spoke on the third reading of the same Bill, namely, Sir William Scott. He was then and had for many years been the judge of the High Court of Admiralty and Prize, and had already established a great body of prize law in this country, which has remained as a solid foundation ever since, not only in these islands, but in other countries also, particularly in the United States of America.

The Parliamentary Debates report that: "Sir William Scott entered into a learned discussion upon the law of nation, which, being in its nature conventional, was no longer binding than when the rules of this convention were adverted to by all parties concerned. When they were departed from by one party, the other was left to the guidance of natural justice; and by the laws of natural justice, retaliation was authorised as an essential part of self-defence. The right of retaliation the learned judge showed to be limited only by the extent of the annoyance which called forth the exercise of it. If an enemy restricted himself to the ordinary mode of warfare, then it was incumbent upon the other belligerent to carry on hostility under the same restrictions, but if he resorted to unusual modes of warfare then it was competent for his adversary to pursue his, even to neutral ground. The right was unquestionable; the only question was the prudence of exercising it."

The speech cannot be well or adequately reported, and the argument as contained in the report is not as logical or as cogent as that of Sir William Grant; but the fact remains that in the Senate as well as in the forum Sir William Scott justified the Orders.

Finally, I propose to draw attention to a learned discourse upon the subject of the law of nations and of the Orders in Council made by the great Lord Erskine. I do so more particularly because he strongly opposed the policy of the Orders in Council, chiefly in reference to their tendency on the United States of America, and because the ground upon which he denied their legality as retaliatory measures in the particular circumstances at the time, was to put it shortly, that the Berlin and Milan Decrees had not been executed against or acquiesced in by America. Any opinions of this eminent man therefore justifying retaliation in other cases are not reduced in importance, but rather are enhanced in value by reason of his general attitude of opposition on these special grounds. The speech was delivered in the House of Lords on the 8th March 1808. It was of a most eloquent and elaborate character. I must try to restrict quotations from it as much as possible, consistently with showing the bearing of Lord Erskine's views upon the questions raised in the present proceedings. He moved a series of resolutions, of which the third was as follows: "That the law of nations is a part of the law of the land, and that neutral nations not interposing in the war between His Majesty and his enemies have a legal right to such freedom of commerce and navigation as is secured to them by the law of nations."

This, as he said, he might assume without argument, apart from the exceptional circumstances. Indeed, it sounds axiomatic. But the phrase, "such freedom of commerce and navigation as is secured by the law of nations," seems to beg the question. After some discussion of the general proposition, however, he proceeded thus: "I am ready, however, to admit that this is only the ordinary condition of neutrals, while belligerents observe the law of nations towards one another, I admit that a different state of things may arise, concerning which, however, the public law is not silent, but observes the same principles of reason and justice. It is better, at once, to state the very case which produces the whole controversy, rather than imagine others, the application of which may be disputed. France issued her decree of the 21st Nov. 1806, which (taking it, for the present, in its severest interpretation, untouched by any subsequent constructions) announced a resolution to distress this country in a manner unauthorised by public law; subjecting to capture the ships and cargoes of neutrals carrying British commodities and manufactures, or going to, or coming from, Great Britain, with their accustomed trade. Such a decree undoubtedly announced a rule which the law of nations forbids as being, even as between belligerents (independently of the rights of neutrals) an aggravation of the sufferings of war which humanity and wise policy equally forbids, and which is, therefore, unauthorised by the practice of civilised States; such a decree (if carried into execution) would invest the belligerent with a right of retaliation; and, indeed, as between the belligerents only, I am not at all anxious to dispute whether the very

publication of such an unjust ordinance would not authorise the belligerent, so offended, to disregard the law of nations towards the adversary, as far as it touched him only; but it would be an utter perversion of the very term retaliation to carry it a hair's breadth further, until some act was done under the decree, as against a neutral, by which the wrong done to, and suffered by, the neutral became injurious in its effect to the offended belligerent. It is, indeed, quite astonishing to hear the word 'retaliation' twisted and perverted in a manner equally repugnant to grammar and common-sense. Retaliation, in the strict and literal interpretation of the word, from *re* and *talio*, as you have it in all your dictionaries, signifies to return like for like. Therefore, but for the particularity of the case, the term retaliation could apply only to the return of like for like upon the enemy who committed the injurious act; by like for like, I do not mean that the act of retaliation, as against the enemy, must be the same as the enemy's, which would be quibbling with the subject; because, as against him who injures me, I may return whatever is necessary to repel the injury suffered, and to secure me against its consequences. It was never, therefore, contended, as was lately supposed by a noble lord, that if an enemy violated a neutral territory in the prosecution of his hostility, the other belligerent could only follow him as if he were hunting him upon the scent; certainly not. There the neutral, from wrong or from weakness, is made the direct instrument of attack, and he is bound to give me not merely the same path through his territory, thus violated, but any path which will best enable me to avert the danger arising from the former violation. If the decree interdicting neutrals from trading with us, or visiting our ports, is executed upon a neutral, it is an interdiction which he has no right to submit to, because the moment it is executed we are injured by the interruption of his commerce with us. If he submits from favour to one unjust belligerent, he directly interposes in the war, and the neutral character is at an end; retaliation then would not only be strictly applicable, but just and legal; and if he submits from weakness, or from any other cause not hostile or fraudulent, we have an unquestionable right, without any invasion of neutrality, to insist, that what he suffers from the enemy he shall consent to suffer from us, otherwise he would keep an open trade with the enemy at our expense, relieving him from the pressure of the war, and becoming an instrument of its illegal pressure upon us. In that case the term retaliation, though not applicable perhaps in literal strictness, as it applies to the neutral, is substantially and justly applicable to him; because it is in fact retaliation upon the enemy, through the sides of the neutral . . . in doing or suffering, by either of which our commerce is alike interrupted. But I cannot, my Lords, conceive anything more preposterous and senseless than the idea of retaliation upon a neutral on whom the decree has never been executed, because it is only by its execution on him that we can be injured. What possible right, then, can we have to complain of, or to take any step against, a neutral, who in no shape whatever has been made an instrument of injustice by the enemy? What right can we possibly have to interdict his legal trade with the enemy, when, notwithstanding the decree complained of, we have continued in the undisturbed enjoyment of the whole trade of the neutral, just the same as if the decree had never existed? How can we possibly retaliate upon a neutral who has done nothing, although it is only by his doing or suffering that we can, by any possibility, be sufferers? But it has been said here formerly: Were we to wait three months, till we could learn from America her dispositions and intentions? Were we to wait three months more if they were doubtful? And, perhaps, three months afterwards till they were ascertained and acted upon? Certainly not, my Lords; no, nor an hour after France had acted upon the decree by condemnation in her Prize Courts, if America, cognisant of such condemnations, had submitted to the decisions, and, with the consent of her Government, continued her commerce with France, as with a friendly nation. I should have considered that as full evidence of acquiescence. But, my Lords, the term acquiescence, as applied to America, like that of retaliation, appears to me to be wholly unintelligible, until some act was done by France, under her decree, above all after the answer given to General Armstrong's demand of explanation; for how can America be said to have acquiesced in the interruption of her commerce, if, in no instance, her commerce had been interrupted?"

Then he referred to M. Decrès' alleged undertaking to General Armstrong (to which I have already alluded) and added: "But, I am wishing, my Lords, for the present to leave M. Decrès' explanation wholly out of the question, and to stand altogether wholly upon the non-execution of the decree, in order to examine the foundation of those dreadful consequences, which, it seems, must instantly have fallen upon us, if we had waited for its execution, and the acquiescence of America."

After dealing fully with the facts, Lord Erskine closed this part of his argument thus: "My Lords, I have therefore, I think, established that the Order of the 11th Nov. 1807, standing upon the execution of the decree, and the acquiescence of America, is wholly unjustified by either; she never, indeed, denied the principle of retaliation, if it were executed and acquiesced in; so far from it that Mr. Madison, in his very first letter to your Minister at Washington, says: 'The respect which the United States owe to their neutral rights will always be sufficient pledges that no culpable acquiescence on her part will render them accessory to the proceedings of one belligerent nation, through the rights of neutrals, against the commerce of its adversary.' . . . My Lords, it being thus matter of demonstration from facts uncontradicted, and incapable of contradiction, that the French decree was not executed on America, and that she never acquiesced, as it regarded her, even under its principle of publication, we are brought back again to the law of nations; we must be bound by its ordinary principles, and governed by their universal application. The circumstances upon which the new conjuncture has been assumed having been removed, there can be no other standard by which the justice of our conduct to other nations can be measured." The reference made above was to a dispatch from Mr. James Madison, afterwards President Madison, the

American Secretary of State, to the British Representative in Washington, dated the 20th March 1807.

After dealing with the law of nations in ordinary circumstances, Lord Erskine approached the question of the duty of the court with regard to Orders in Council, upon which his statement was as follows: "My Lords, it may now be asked, whether I mean to contend upon all these authorities, that the judge of the Admiralty ought not to carry the Orders in Council into execution. It may probably be said that my argument goes to that full extent; since if it be not competent for His Majesty to dictate to his Prize Courts a rule repugnant to the law of nations, the rule given by the orders ought, according to my doctrine, to be resisted by those courts. My answer, my Lords, to this seeming dilemma is by far the most important part of the whole subject, and it was for that reason I insisted at such length upon the injustice of introducing facts into the preamble of the Order, which had no existence; because, I maintain, that without such preamble the judge of the Admiralty could not, consistently with all the authorities, and most especially with his own, have given effect to the exceptionable parts. But with the preamble, the truth of which he is bound by, I have not contended that the Order is not a law to his court. I admit, my Lords, in the fullest extent, that it is the King's office and duty in the State to communicate with the Courts of the Admiralty and Prizes, and to issue orders, from time to time, for their government. The King alone can promulgate who are enemies and who are not; or what nations he chooses to consider his enemies, even before any declaration of hostilities. Without such acts of State the Courts of Admiralty and Prize could do nothing. I admit that it would be for the King, in the very case before us, to promulgate to the Court of Admiralty the hostile decree of France; and, if the fact were so, to promulgate also that it had been executed upon America, and her non-resistance to its execution. I admit also that if His Majesty, from unjust or mistaken counsel, is advised to promulgate such execution and non-resistance, that state of things is not traversable in the Courts of Admiralty, but must be implicitly received as the fact. And, finally, I admit that the rule given by the King upon the facts which he promulgates must be received and acted upon by the court, unless in the judgment and conscience of the judge it be plainly and manifestly repugnant to the law of nations. But I do maintain and positively assert that, in the very case before us, the Order of the 1st Nov. without its preamble would have been manifestly repugnant to the law of nations, and that the judges of the Courts of Admiralty and the Courts of Prizes ought to have refused to act upon it."

Most of the rest of the long oration deals with the provisions of the municipal law and other matters not now relevant.

After the Lord Chancellor (Lord Eldon) had replied justifying the Orders on the ground of retaliation, and pointing out that the Orders were directed against the enemy and not against neutrals, and that the latter only suffered indirectly, although inevitably, in their commerce, Lord Erskine in reply took the same line of argument as he had presented in moving the resolutions, and repeated:

"We had no right to retaliate through the medium of a neutral, except that State was too weak to resist, or showed a disposition to acquiesce."

It is surely significant that, notwithstanding the public discussions and controversies of 1807 and the following years, no decision of the British Court of Prize could be cited against the validity of the Orders in Council. Several cases were decided in the British Prize Court and in the Colonial Prize Courts in 1809 and 1810, which are not reported, and which were carried to appeal. In some of them the documents show that the validity of the Orders in Council was raised and questioned. But in all the appeals the sentences of condemnation were sustained; and in none of them was there a pronouncement against the legality of the Orders. Several of them were decided in March 1810. The court then consisted of Sir William Grant, Sir William Wynne, and Sir John Nicholl, except when the appeal was from a Vice-Admiralty Court, when Sir William Scott also formed one of the Court of Appeal.

I shall only make mention of one case tried on appeal before this court of four judges. That is the *Nymph*, in which both ship and cargo captured on a voyage to Leghorn were condemned by the Vice-Admiralty Court at Malta. The only ground alleged in the respondents' case as justifying the condemnation of the ship and the cargo was that the capture was properly made under the Order in Council of Jan. 1807. The appeal was dismissed and judgment of condemnation affirmed by the Appellate Court of the 15th March 1810.

In 1811 the case of *The Fox* (*ubi sup.*) was tried before Sir William Scott. The report in Edwards does not give the argument. But from the judgment it would appear that no argument was made against the legality of the Orders (then the Orders of the 7th Jan. 1807 and the 26th April 1809).

The Annual Register of 1811 deals somewhat more fully with the case, and discloses the fact that a similar decision was given in several other cases, similarly circumstanced, and founded upon the same principle. As the Annual Register for that year is not always available, the account in so far as it supplements the report in Edwards may, with convenience, be here reproduced.

It runs thus:—

"Admiralty Court, Doctors' Commons, June 18, 1811.—The ship *Fox*.

"The final judgment of the court in this important case was delivered yesterday morning; it had been delayed in consequence of an unexpected official communication of the revocation of the Berlin and Milan Decrees, upon which the British Orders in Council were founded, as it was under those Orders that the ship in question was captured.

"The *Fox* sailed from Boston, in the United States, on a voyage to Cherbourg, in the prosecution of which she was captured on the 15th Nov. last (that is, 1810) by the *Amethyst*, a frigate under the command of Sir Michael Seymour. A claim was given in by the owners as neutral subjects, and on the 30th May last (that is, 1811) the case came on for hearing.

"It was contended on behalf of the captors that as the vessel was bound for a port in France, she was violating the British Orders in Council of the

7th Jan. 1807 and the 26th April 1809, and under these Orders was clearly liable to condemnation.

"This was opposed by the claimants' counsel upon two grounds: First, that the Orders in Council had ceased to exist, because the French decrees upon which they were grounded had been revoked; and next, that if even those decrees could be considered as still in existence, the circumstances of equity which distinguished this case would justify the court in relieving the claimants from the penalty imposed by the Orders in Council.

"Upon this question the learned judge, Sir W. Scott, delivered a very elaborate judgment a short time since."

A *résumé* of the judgment is then set out. The account concludes as follows: "The sentence of condemnation was accordingly pronounced in this case, and likewise in several others, similar in circumstances, and founded upon the same principle."

In his judgment, Sir William Scott observed upon the novelty, the magnitude, and the complexity of the Orders in Council, and the attention which they excited both at home and abroad. In view of these well-known facts it is noteworthy that it had not been argued that in their retaliatory character they were at all repugnant to the law of nations, however liable they might be to be so described, "if merely original and abstract."

The learned judge said: "Retaliatory Orders they are. 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."

Of the measure adopted he said: "It is not an original, independent act of blockade, to be governed by the common rules that belong simply to that operation of law. It is in this instance a counteracting reflex measure, compelled by the act of the enemy, and as such subject to other considerations arising out of its peculiarly distinctive character. So far this retaliatory blockade (if blockade it is to be called) is co-extensive with the principle; neutrals are prohibited to trade with the enemy, because they are prohibited by the enemy from trading with England. England acquires the right which it would not otherwise possess, to prohibit that intercourse by virtue of the act of the enemy. Having so acquired it, it exercises it to its full extent, with entire competence of legal authority."

In the next year (1812) the case of *The Snipe* (*ubi sup.*) and other American ships captured on voyages to and from France came up for decision in the same court. The points argued are stated in the judgment as follows: "On the part of the captors it is contended that the ship and cargo are liable to condemnation under the British Orders in Council. On the part of the claimants, that the operation of those Orders had ceased, the French decrees to which they were retaliatory having been repealed; and consequently the British Orders having expired in point of justice and authority, and according to pledges solemnly and repeatedly given by the British Government that they should cease whenever the French decrees were actually revoked."

The alleged revocation was elaborately examined, and it was found that it had not been established. All the ships and cargoes captured before the 20th May 1812 were pronounced liable to condemnation. Sir William Scott had indeed pronounced judgment in earlier cases which could only be consistent with the view he held that the Orders were valid.

I will shortly refer to them in their chronological order.

The Comet (Roscoe, vol. 2, 10; Edw. 32) was decided in Oct. 1808. The court decreed condemnation (under the Nov. 1807 Order) of a vessel which was going in ballast from New York to Nantes. No doubt the judgment states that Nantes was "subject to a rigorous blockade," but the blockade was described as being under the Order in Council. No notification of a blockade of Nantes had been given. The Order declared that French ports (without naming them) would be treated "as if they were actually blockaded." The epithet "rigorous" was not, I think, intended to describe an actual blockade, but was used as in the penultimate preamble of the Order, and in clause 1 of the Order itself.

This decision was affirmed by the Lords Commissioners on appeal on the 3rd March 1810, Sir William Grant, Sir William Wynne, and Sir John Nicholl forming the court.

In *The Mercurius* (Roscoe, vol. 2, 15; Edw. 53), decided in Dec. 1808, the validity of the January Order was assumed; and the ship coming from Bordeaux and intending to go to Bremen would have been condemned under the order but for the fact that she was held to have honestly broken the voyage by calling at a British port for a British licence.

In *The Luna* (Edw. 190), decided in Jan. 1810, the order of the 26th April 1809 (which modified that of Nov. 1807), by limiting it to the ports of France, Holland, and parts of Italy) was treated as valid.

In *The Speculation* (Edw. 184), decided in April 1810, a ship and her cargo were condemned under the first Order in Council, because the ship was on a voyage between two Prussian ports from which the British flag was excluded. Apart from that Order, they would not have been subject to condemnation.

And in the latest stage, in June 1814, the case of *The Arthur* (1 Dods. 423) was decided upon the footing that the orders of Jan. 1807 and April 1809 were valid at the time of capture, in respect of which an alleged joint capture was made. This decision was given only a couple of days before the actual repeal of the Orders as regards America.

It is interesting to see how the Government of the United States regarded the situation after the end of the Napoleonic wars. The Great Congress of Vienna was attended by all the European Powers except Turkey. When all were settled, Mr. Adams in 1817, being then Secretary of State for the United States, wrote to Mr. Rush, the Minister for England, as follows: "The dereliction of the rights of maritime neutrality by all the Allied Powers at the Congress at Vienna and at the subsequent negotiations for settling the affairs of Europe at Paris have so far given a tacit sanction to all the British practices in the late wars that none of them would have a right to complain if the United States, on the contingency of a maritime war in which they should be engaged, should apply to the neutral

commerce of all those Allies the doctrine which they thus suffered Great Britain, without remonstrance, to apply against it in her late contest with the United States."

Mr. Adams had, towards the end of the Napoleonic wars, been United States Ambassador in England, and was acquainted with the whole situation arising between America and other neutral States and Great Britain out of the Orders in Council.

It will appear from what has been said that the matter in discussion has been regarded from two slightly different points of view; or perhaps, the point of view being the same, the results are expressed in two different forms.

If retaliation is permissible for conduct of a belligerent clearly contrary to the law of nations and of humanity, the acts of retaliation (assuming them to be in the circumstances reasonable) may be described as outside and beyond the limits of the law of nations, although justifiable; the alternative view is that the circumstances which call for such acts of retaliation extend that law so as to cover and comprehend them within its bounds.

The latter seems to me to be the preferable view. It is because the retaliation is regarded as forming part of the law of nations that it is cognisable in, and can be enforced by, a Court of Prize.

I now come to modern times. In the course of the present war the case of *The Fox* (*ubi sup.*) was discussed by the Judicial Committee of the Privy Council in *The Zamora* (114 L. T. Rep. 626; (1916) 2 A. C. 77). In the judgment, their Lordships made some important and valuable observations upon Orders of reprisal and retaliation. It was strongly contended before me that they were only *dicta* not necessary for the decision. If it were clear that they formed a ground for the decision my task in the present case would have been easier and shorter. But whether they were mere *dicta* or not, I should loyally accept their guidance. But beyond this let me add that I respectfully agree with them.

First, how did the judgment deal with the decision in *The Fox* case (*ubi sup.*)? Although their Lordships dissented from some parts of the judgment of Sir William Scott, they did not disapprove of his decision. On the contrary, they appear to have approved of it, if not expressly, at any rate tacitly, in the following passage: "The actual decision in that 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 already been laid down in *The Lucy* (Edw. 122)."

In the next place, as to the doctrine of reprisal or retaliation, their Lordships pronounced as follows: "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."

This judgment was delivered, of course, before the 1917 Order, but after the 1915 Order, which contained the main recital of the facts, afterwards adopted and amplified in the later Order.

I have no doubt that their Lordships had directly in their minds the Order of March 1915, when their judgment was delivered. If so, it is clear that their opinion was that international law justified retaliation by some such Order, although thereby inconvenience — which, of course, includes pecuniary inconvenience or loss —must be caused to neutrals.

For the various reasons which I have given fully, and I fear at too great length, I am of opinion that in the circumstances existing in Feb. 1917 the recognised guiding principles of international law justified an Order of Retaliation against the enemy with the object of curtailing or throttling his trade, although it prescribed measures outside and beyond the ordinary rules of blockade; that there are good precedents and authority for such an order; and that if, in view of the whole situation between the belligerents, the means for carrying it into effect are not excessive or unreasonable against the enemy, the consequential results to neutrals desiring or willing to trade with the enemy give such neutrals no right to complain or to claim compensation.

Let me add that if such a retaliation was not permissible by the law of nations, it is conceivable that neutral States might, by the exercise of their alleged right to carry on trade with a belligerent without interference, become the actual arbiters of the fate of a disastrous war to which they were not parties, and from which they not only did not suffer loss, but actually achieved gain.

The points that remain can be dealt with much more shortly. If a retaliatory Order was justified, does the Order in question entail on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case?

A milder Order had been tried, and for nearly two years. It was, as recited, found to be insufficient for the avowed and legitimate purpose. His Majesty's advisers thought that the new Order of 1917 provided the best or only means of meeting the emergency. The emergency was of the gravest possible character. The object of the perpetrators of the indiscriminate and unlimited depredations of the submarines was to starve these islands by sinking at sight all ships and cargoes, whether neutral or not, and by killing mariners, whatever their nationality. It is sufficiently notorious that the chief advisers of this dastardly and inhuman policy promised the German people that the activities of six or eight months would suffice to bring this country to its knees, or to effect its ruin. To adopt a phrase of "Historicus," the German Government by these means looked forward to "creating a terrestrial globe in which the unsymmetrical contour of the British Isles was to be blotted out."

Bearing in mind all these facts, I fail to see how it can be said that the Order in Council was not justified as against the enemy; and if so

justified, how it can be said that the consequences are inevitably unreasonable, or such as to render the Order illegal.

The first Order did not subject to confiscation the goods or the vessels. The former were to be detained till the end of the war; the latter were left to go free to ply their trade after discharging the goods. It occasions no startling surprise that such an Order was found ineffective against such a determined submarine warfare. When neutral ships were so immune, the enemy's trade, so profitable to owners of ships, was not likely to suffer greatly. The goods of enemy origin or for enemy destination were immovable by sea without the ships. The ships gave life and motion to the trade. If it was right to retaliate by attempting to prevent or destroy the commerce of the enemy, it was necessary that the vessels which engaged in carrying it on to and from the enemy country should come under some disability. A suggestion was made that detention till the end of the war would be sufficient. Who can tell? It may be that it would pay neutrals to have their vessels so detained and saved from the perils of sinking, and to have them delivered up at the conclusion of the war when they might be of an enormously enhanced value.

I cannot by any process of weighing in fine scales facts of which I have far less knowledge than the naval advisers say what the exact Order or measure of retaliation should be. It is enough to say that, according to the best opinion I can form, the present Order is not excessive as against the enemy or in its effect on neutrals.

I fail to see how it can be said that the effect on neutrals is excessive or unreasonable when similar disadvantages are imposed on them in many cases of carriage of contraband, in all cases of violation or attempted violation of blockade, and even in all cases of refusal of or resistance to visit and search.

I therefore decide against the contention of the claimants that the Order entails unreasonable consequences on neutrals having regard to all the circumstances.

Finally, there is the last contention of the claimants made under two heads:

First, was the coal of "enemy origin"?

It would be tedious to enumerate the scores of Orders made by the German Government for the control of the industries and indeed of all the affairs of the large part of Belgium of which the enemy is in occupation.

As to coal, some of the conditions attached to its sale and disposal have already been stated. It will be sufficient to add that a special Order about coal was made by the German Governor of Belgium on the 28th April 1915, the provisions of which were:—

(1) The distribution of all coal obtained in Belgium, as well as all coke, briquettes, and the sub-products of coke made in Belgium, is intrusted to the Central Coal Bureau at Antwerp, which is managed by the Chief of the Administration of the Governor-General. This Bureau can ask the Governor-General to grant authorisation to export.

(2) In order to regulate dealings in the products mentioned in art. 1, the producers must put the whole of their production at the disposal of the Central Coal Bureau, which, as intermediary, will determine the use to be made of these products.

The use will be made in accordance with certain rules established by the Central Coal Bureau and approved by the Governor-General. The amount realised by the sale will be paid to the vendors.

To cover the costs of organisation and administration of the Central Coal Bureau there will be levied a tax to be determined by the Chief of the Administration taking into consideration the total amount of the sales.

(3) Producers are forbidden to carry out contracts of sale made by them. A contractor who cannot fulfil his obligations by reason of this order shall not be liable to pay damages.

The Central Coal Bureau can make exceptions to this Order in the case of contracts made for the purpose of enabling the buyers to cover their actual requirements, the existence of which must be proved by them.

(4) Anyone who tries to keep the products in question from being used in accordance with art. 2 will be punished by a fine not exceeding 10,000 francs.

The amount of the fine will be determined by the Governor-General, who, besides this penalty, may confiscate the products the subject of the offence.

If this confiscation is impossible, the offender must pay the value of the goods confiscated, and if their value cannot be determined he must pay a sum corresponding to their probable value.

(5) The present Order comes into force at once.

The evidence shows that the Brussels Coal Department exercised complete control over the coal. It was suggested, though not proved, that the department paid some Belgian people interested in the colliery for the coal, but the German department had the full dominion over it, and were to all intents and purposes the owners, and acted in this particular contract as the vendors.

Some authorities were cited for the claimants as to the effect of the military occupation of a country by a belligerent upon the status of residents. These are beside the point. What I have to do is to ascertain what is comprehended in the phrase "of enemy origin" in the Order in Council.

If the original Belgian owners of the collieries had been permitted to work them themselves and to produce and dispose of the coal for their own profit, and if they had sold it to a German Government department, or even a German commercial concern, and these latter had sold it for export, even then I think the coal would have been "of enemy origin" within the meaning of the Order in Council; *à fortiori* in the facts of this case the origin was "enemy," in my opinion.

The contention of the claimants on this head therefore fails.

The second head, and the last question to be considered, is whether the Order is invalid because no British or allied port had been appointed at which the vessel might call for examination.

In order to clear the ground, I observe here that this point does not in any circumstances affect the confiscability of the goods. If they were of enemy origin they would in any event be subject to condemnation. This last contention was, and could only be, put forward on behalf of the owners of the vessel.

It was submitted that an "appointment" of a particular port should have made with or immediately following the Order, so as to form part of it; and that such an appointment was a condition precedent to the liability of the ship to condemnation.

It is best first to find the facts, and then to examine the legal contention. In fact, no appoint-

ment of a particular port had been made. Nor had any application been made to the British authorities for the appointment of any port of call for vessels trading between Holland and Scandinavia. None of the vessels employed in the carriage of coal from Dutch ports to Scandinavia have voluntarily called, or offered to call, at British or allied ports for examination.

It will be remembered that over 25,000 tons—I think I said more than half—had been carried under this very contract before the *Leonora* was seized. That is to say, there had already been about fifteen voyages in ships carrying this coal, assuming them to have been of equal capacity with the *Leonora;* and seven more vessels were captured in the following month. A large number of ships were thus employed to carry Belgian and German coal from Dutch ports to Scandinavia by sea, in order to relieve the German railways.

For particulars as to this and the exchange traffic reference may be made to the affidavit of Captain Longden, R.N., sworn on the 2nd Nov. 1917. It is of interest also to note the statistics given in Captain Longden's second affidavit, which show that in the first ten months of 1917 licences had been granted for export from Great Britain to Sweden of over 700,000 tons of coal in accordance with definite orders, and contracts from Swedish buyers, but that only 480,000 tons were taken; and, moreover, that licences for larger quantities would have been granted if orders had been given and the requisite amount of Swedish tonnage had been provided to ship the coal. In July and August alone the licences covered 130,000 tons, whereas only 84,000 tons were shipped. If it were necessary to pronounce a decision upon the proviso I should hold that it does not mean that a port should be appointed to suit all vessels and voyages, and that such an appointment should form, so to speak, a part of the Order.

It would seem to be so difficult as to make it quite impracticable to name once and for all one or more British or allied ports of call for all vessels trading to or from all ports affording access to enemy territory. But if any vessel desired to call at a British or allied port for examination, information could easily have been obtained at a port like Rotterdam; and if, after the Order in Council, any vessel had in fact called at any port in the United Kingdom her cargo would have been examined there. But the truth, and the uncontested truth, is that those interested in the *Leonora* and her cargo had no intention whatever of calling at any British port; on the contrary, they protested against being required or asked to do so.

The master of the vessel deposed that he had been informed by Mr. de Poorter's office—that is, the shipowners—and had also received written instructions from Mr. de Poorter that the voyage was to be direct from Rotterdam to Stockholm, and that he could not deviate. Indeed, he explained that his sailing permit made it unlawful for him to call at a British port, and that if he had done so, it would have entailed a "prison sentence" in his case, as well as serious penalties and consequences to his owners, including a penalty of imprisonment for the manager, who apparently was Mr. de Poorter himself. The master, it is true, said that he had not heard of the Order in Council until after the seizure. But even if that were the fact, it would not alter the situation. Moreover, it was not suggested that Mr. Jos. de Poorter, and the claimants, Beijers, were unaware of the Order which had been promulgated about seven months before. M. Jos. de Poorter is a large shipowner at Rotterdam, and as such has no doubt followed with critical attention the various regulations as to mercantile shipping. He who alone advances the contention now under consideration never dreamt of availing himself of any opportunity which was open, or which might be offered, of submitting his ship for examination at a British port. His sympathies and activities have been on the other side of the North Sea. Two of his vessels were used to coal German cruisers off South America early in the war. One of them was condemned by the Prize Court of the Falkland Islands in Jan. 1915. The other, *The Alwina* (see *post;* 118 L. T. Rep. 97; (1918) A. C. 444), formed the subject of prize proceedings in this court and in the Privy Council in 1916 and 1918. This latter ship was released on grounds of law, but Mr. de Poorter was ordered by reason of his conduct to bear and pay the costs and expenses of and incident to the capture and detention, and also of and incident to the prize proceedings. This order was approved by the appellate tribunal. Their Lordships approved of the following statement in the judgment of this court (13 Asp. Mar. Law Cas. 311; 114 L. T. Rep. 707; (1916) P. 131) upon the facts:

"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 supercargo, with a false destination, and in circumstances amounting to fraud in regard to belligerents. . . . What is clear is that 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."

I also find on reference to the Statutory List of this country (sometimes called the Black List) that Mr. de Poorter was placed upon the first of such lists on the 29th Feb. 1916.

What I have called the cardinal feature and the operative part of the Order in Council is the first part of clause 2. That is the retaliatory provision destined to bring pressure on the enemy by stopping his trade. (I may observe in passing that Mr. Schonmeyer, who had to a great extent the charge of the claimants' cases, attested the effect of this presure when he said in an affidavit that after the seizure of the *Leonora* the neutral shipping between Holland and Sweden was forced to stop because the ships would not continue if they had to go to a British port for examination.)

The proviso in the clause is a relaxation in favour of neutral shipowners who wish to show their *bonâ fide* neutral conduct by voluntary submission to examination at an English port. It is in no sense a condition precedent to the enforcement of the substantive part of the clause. If it were, the claimants would have to show their readiness and willingness to comply with its terms. Claimants cannot be heard to say, "True, we were carrying goods of enemy origin, and so

running the risk of capture and condemnation under the retaliatory Order; true, that we were proceeding direct from one port to another, both of which afforded access to enemy territory; true, that nothing would have induced us to call at any British port for examination; true, that we never asked or intended to ask that such a port should be appointed or named for our vessels; yet, as you had been good enough to promise a relaxation in certain events which did not happen, and the occurrence of which we would make sure should not happen, the Order must be disregarded altogether."

That was the contention in substance for the claimants upon this head. I think that it is wholly unwarranted.

This brings this lengthy judgment to an end. My task is done. The case is one of importance, of interest, and of some delicacy and difficulty. The preparation for it was facilitated by the able arguments at the Bar, which I wish very gratefully to acknowledge. I have, of course, given the case the most careful consideration in all its aspects. If there have been errors in the principles which have guided this judgment, or in the application of them, it is a consolation to know that the parties affected have the right to put their claims again to the test before another and a higher tribunal.

The judgment of the court is that the ship and the cargo be condemned as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the shipowner, *Guedalla* and *Jacobson.*

Solicitors for the cargo owners, *Botterell* and *Roche.*

Judicial Committee of the Privy Council.

Oct. 30, *Nov.* 1, *and Dec.* 13, 1917.

(Present: The Right Hons. Lords PARKER of WADDINGTON, SUMNER, WRENBURY, and Sir ARTHUR CHANNELL.)

THE ANGLO-MEXICAN. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Neutral partner in enemy business—Commercial domicil—Cargo—Shipment before war.

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 prior to 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 he was entitled to his share in the same or in their proceeds, if sold.

Held, that where a neutral by owning or being a partner in a business in an enemy country has acquired a commercial domicil in that country, he must be deemed to be an enemy in respect of his property or interest in such business, and if after the outbreak of war he desires to avoid the consequences entailed by such domicil, he must take steps within the interval allowed by law to discontinue or disassociate himself from the business, as the theory of commercial domicil is not subject to an exception where the goods in question are shipped during peace. In the case of goods shipped after the commencement of the war the circumstances of the shipment must be considered, as the shipment would be an election to continue, unless it were made without the privity of the claimant or as a step in discontinuing the business or disassociating himself from it.

Decision of Evans, P. (*reported* 13 *Asp. Mar. Law Cas.* 367; 114 *L. T. Rep.* 807; (1916) *P.* 112) *reversed.*

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

APPEAL by the Procurator-General from so much of the judgment of Evans, P. (reported 13 Asp. Mar. Law Cas. 367; 114 L. T. Rep. 807; (1916) P. 112) as decreed restitution of one fifth part of 276 bales of cotton sweepings or the proceeds of the sale thereof to the respondent, Richard Mayer, as neutral partner in the German firm of Reis and Co.

The goods in question were shipped at Savannah, U.S.A., shortly before the outbreak of the war on the British steamship *Anglo-Mexican.* Fifty of the bales were to be delivered at Antwerp and the remainder at Hamburg, in each case to the order of the shippers.

The *Anglo-Mexican* was diverted to the Port of London after the outbreak of war, and on the 4th Sept. 1914 the goods were seized.

The President held that a neutral partner did not lose his right to have his share in the partnership property protected from confiscation merely because he allowed the delivery of the goods to proceed in the ordinary course. The respondent had done nothing actively after the commencement of hostilities to further or to facilitate the delivery of the goods to the enemy house, and accordingly he ordered the release to the respondent of his one-fifth share and condemned the remaining four-fifths of the goods.

The Procurator-General, on behalf of the Crown, appealed against the release to the respondent of his one-fifth share.

Sir *Frederick Smith* (A.-G.), *Gordon Hewart* (S.-G.), and *J. H. W. Pilcher* for the appellant.

Inskip, K.C. and *C. J. Conway* for the respondent.

The following cases were referred to:

The Vigilantia, Roscoe's English Prize Cases, vol. 1, 31; 1 Ch. Rob. 1;
The Manningtry, (1916) P. 329;
The San José Indiano, 2 Gall. 268;
The Bernon, 1 Ch. Rob. 1;
The Gerasimo, 11 Moo. P. C. 88;
The Friendschaft, 4 Wheat. 105;
The Cheshire, 70 U. S. 231; 3 Wall. 231;
The Venus, 8 Cranch;
The Amiable Isabella, 6 Wheat. 1, 78;
The Eenrom, 2 Ch. Rob. 1, 8;
The Graaf Bernstorf, 3 Ch. Rob. 109;
The Welvaart, 1 Ch. Rob. 122;
The Lützow, ante, p. 187; 118 L. T. Rep. 265; (1918) A. C. 435.

The considered judgment of their Lordships was delivered by

Lord PARKER OF WADDINGTON.—Goods in respect of which this appeal arises were shipped at Savannah, U.S.A., shortly before the outbreak of the war, on the British steamship *Anglo-*

Mexican. They were shipped by, and at all material times belonged to, Reis and Co., a German firm with its head office at Friedrichsfeld, in Baden, but with branch offices at Boston, U.S.A., and at Salford, in the United Kingdom. The firm consisted of four partners, Edwin Reis and Ludwig Reis, German subjects residing and carrying on the firm's business at Friedrichsfeld; K. B. Straus, a German by birth, but naturalised and resident in the United Kingdom, who was in charge of the Salford office; and the respondent, Richard Mayer, also a German by birth, but naturalised and resident in the U.S.A., who was in charge of the Boston office. Richard Mayer's interest in the partnership concern was one-fifth share. The President has ordered the release to him of one-fifth of the goods in question or their proceeds on the ground that he was a neutral subject domiciled and resident in a neutral country though a partner in a German firm, and that the goods were shipped before the outbreak of the war. The Crown is appealing from this order.

The principles which ought to govern cases such as the present are not wholly free from doubt. It appears, however, reasonably certain that the question whethor a particular individual ought to be regarded as an enemy or otherwise depends *primâ facie* on his domicil, and domicil is, according to international law, a matter of inference from residence. Thus, if a neutral subject is at the commencement of or during the war to all appearance permanently resident in an enemy country, he will be regarded as an enemy. By taking up his permanent residence in a country other than that of his birth, he submits himself to and takes the benefit of the laws of that country, and in effect becomes one of its subjects. If, therefore, while this state of things continues, goods belonging to him are seized as prize, such goods will *primâ facie* be treated as enemy goods. But an acquired domicil may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicil in the country of the enemy, the goods will *primâ facie* be treated as belonging to a neutral. It has been sometimes urged that neutrals resident in a country which by the outbreak of hostilities becomes an enemy country ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicil. This point was much discussed in *The Venus* (8 Cranch, 253). In that case the majority of the judges of the Supreme Court of the United States decided against allowing any interval for election. It was not, they thought, desirable that a neutral after the outbreak of hostilities should be able for any interval, however short, to sit, as it were, on the fence ready to come down on either side according as it might prove to his advantage. The English authorities are not conclusive one way or the other. The point does not, however, fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany. His domicil was in the United States.

Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicil in the country in or from which the business is carried on, and this commercial domicil, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character. But a neutral having such a commercial domicil in a country which becomes an enemy country on the outbreak of hostilities ought, according to the views taken by British Prize Courts, to be allowed a reasonable interval during which he may discontinue or disassociate himself from the business in question. If he has done this prior to the capture at sea of any goods belonging to the business, such goods or his interest in them will not be confiscable. If he has not done this prior to the capture, but the court is of opinion that a reasonable interval for this purpose had not then already elapsed, the court will take notice of what he has done in that behalf since the capture, or will in a proper case even let the question of condemnation stand over to enable further action to be taken. If, on the other hand, he has already had a reasonable opportunity of discontinuing or disassociating himself from the business in the enemy country and has failed to take advantage of it, or if he has done some unequivocal act indicating an intention to continue or retain his interest in such business, the goods or his interest therein will be condemned as lawful prize.

It may happen that a neutral or the firm in which he is a partner has, besides the house of business in the enemy country, branch houses in other countries. In such a case nice questions may arise as to whether the captured goods ought properly to be regarded as appertaining to the enemy house or to one or other of the branch houses. A question of this sort came before their Lordships' board in the case of *The Lützow* (*post*, p. 265; (1918) A. C. 435), in which judgment is about to be given, and the original claim put forward on the respondent's behalf in the present case appears to have been framed on the contention that the goods now in question appertained to the American or to the English branch of the business of Reis and Co. and not to their German branch. Had this claim been made out, the interest therein of the respondent would not have been confiscable as enemy property. The claim, however, in this form was abandoned in the court below, it being admitted that the goods in question could not be regarded otherwise than as appertaining to the German house.

In support of the views above indicated, their Lordships refer to *The Gerasimo* (11 Moore's P.C. p. 96), where Lord Kingsdown, in delivering the opinion of the board, states the general principle as follows: "The national character of a trader is to be decided for the purposes of the trade by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war."

Their Lordships also refer to the following important passage in Mr. Justice Story's Notes (Pratt's "Story," at pp. 60 61): "In general a neutral merchant trading in the ordinary manner with a belligerent country does not, by the mere accident of his having a stationed agent there, contract the character of the enemy. But it is otherwise if he be not engaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy, for then it is in effect a hostile trade. So if the agency carry on a trade from the hostile country which is not clearly neutral, *and if a person be a partner in a house of trade in an enemy's country*, he is, as to the concerns and trade of that house, deemed an enemy and his share is liable to confiscation as such, notwithstanding his own residence is in a neutral country; for the domicil of the house is considered in this respect as the domicil of the partners. But if he has a house of trade in a neutral country, he has not the benefit of the same principle, for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. However, where a neutral is engaged in peace in a house of trade in the enemy's country, his property so engaged in the house is not, at the commencement of the war, confiscated; but if he continues in the house after the knowledge of the war, it is liable, as above stated, to confiscation. It is a settled principle that traffic alone, independent of residence, will in some cases confer a hostile character on the individual."

If the principles thus laid down be applied to the facts of the present case, it would appear that the interest of Richard Mayer in the goods in question ought to be condemned by reason of his commercial domicil in Germany. He might, it is true, have avoided this result by taking steps within the reasonable interval allowed by law to disassociate himself from the enemy firm in which he was a partner. But it is not suggested that he took any such step or that such reasonable interval has not elapsed. On the contrary, it is admitted that since the outbreak of the war he has been actively engaged in the affairs of Reis and Co. in Germany.

The contention of the respondent is based entirely on the following consideration: The goods in question were shipped in time of peace. There could therefore be no enemy taint affecting them when the war broke out. Since the outbreak nothing has been done in respect of them by virtue of which they could have acquired an enemy character. The criterion of character is therefore personal domicil. It will be observed that this contention with regard to goods at sea at the commencement of a war entirely ignores the doctrine of commercial domicil as determining the character of the goods. It leaves the character of such goods to depend on personal domicil, subject to the question whether the owner has done anything to impress upon them or taint them with an enemy character. In other words, it creates an exception to the theory of commercial domicil, and deals with the excepted cases on different principles. Counsel for the respondent was unable to suggest, and their Lordships have been unable to find, any logical justification for such an exception. If it exists at all, it must be attributed, as counsel for the respondent attributed it, to an over-scrupulous desire on the part of our Prize Courts to protect neutral interests. Further, if the exception exists, the rule which allows a reasonable interval in which the neutral owner can discontinue his commercial domicil in the enemy country will be reduced within very narrow limits, if it is not abrogated altogether, for a neutral owner will, by shipping goods after the war, or by otherwise taking part after the war in the affairs of the enemy house of business, have elected to continue his commercial domicil in the enemy country, and so brought the interval to an end. Nevertheless, the exception is said to be supported by authority, and their Lordships will therefore proceed to consider the several authorities on which reliance is placed.

The three earliest authorities referred to are *The Jacobus Johannes* (1785), *The Osprey* (1795), and *The Nancy* (1798), all of them decided by the Lords Commissioners in Prize Cases. The decisions are unreported, but the printed cases and appendices which were before the Lords Commissioners are preserved in the Admiralty Library, and their Lordships have had access thereto.

In *The Jacobus Johannes* the goods in question belonged to a firm carrying on business in the Dutch island of St. Eustatius. The goods had been shipped from St. Eustatius on the 5th Dec. 1780 on board a Dutch vessel bound for Amsterdam and were deliverable at Amsterdam. Hostilities between this country and Holland commenced on the 20th Dec. 1780. On the 3rd Feb. 1781 St. Eustatius was occupied by His Majesty's naval forces. On the 4th Feb. *The Jacobus Johannes* with its cargo was captured at sea. The firm which owned the goods consisted of two partners — namely, Haason, a Danish subject, but domiciled in St. Eustatius, where he carried on the business of the firm; and Ernst also a Danish subject, but domiciled at Copenhagen. Shortly after the occupation of the island by the British, Haason proceeded to wind-up the firm's business and finally left the island in April 1781. It is to be observed on these facts that Haason's personal domicil being Dutch at the date of capture he was *primâ facie*, at any rate, an enemy. If, according to the English as well as the American view of international law, he was not entitled to an interval after the commencement of hostilities in which he could abandon his acquired domicil, his share in the goods would in any event be confiscable. If he was entitled to an opportunity of abandoning his acquired domicil, the question would arise whether he had done so within a reasonable time. On the other hand, Ernst, who was domiciled at Copenhagen, could only be regarded as an enemy by virtue of the commercial domicil of the firm, and he was clearly entitled to a reasonable interval in which he might disassociate himself from the firm. The interest of Haason was condemned and that of Ernst released. It does not appear what were the reasons for this decision. It is quite possible that the case turned wholly on personal domicil, the doctrine of commercial domicil being yet undeveloped. It is also possible that, in the opinion of the Lords Commissioners, the connections of both partners with an enemy business had in fact been determined within a reasonable interval, and that such determination would justify the release of Ernst's

interest, but would not improve the position of Haason whose personal as well as commercial domicil at the date of capture was Dutch. Under these circumstances, their Lordships fail to see how the case can be relied on as an authority for the alleged exception to the general rule.

In *The Osprey* the property in question was a ship employed in the Southern Whale Fishery with her cargo of whale-oil and whale-bone. She had left Dunkirk on her whaling adventure on the 24th May 1792. War broke out between this country and France in Feb. 1793, and on the 15th May 1793 the ship and her cargo were seized as prize. The ship belonged to three persons, all subjects of the United States of America, two of whom were domiciled at Dunkirk and the third, one Rodman, was domiciled at Nantucket. The cargo belonged to the owners of the ship and the master and crew in shares, which were apparently settled by the custom of the fishery. Among the crew were other subjects of the United States, no doubt domiciled in America. The Lords Commissioners ordered a release of Rodman's share in the ship and cargo, and of the shares in the cargo of the American members of the crew. The reasons for this decision are again unknown, but, as in the case of *The Jacobus Johannes*, the case may have turned entirely on personal domicil. It should be observed that there was really no commercial domicil in an enemy country, the whole adventure being a high-seas adventure. Further, the whole adventure, except the return voyage, had apparently been carried out during peace, and had come to an end when the ship and cargo were seized as prize. There was in fact nothing from which, when the war broke out, the neutrals interested could disassociate themselves. Again their Lordships fail to see how this case can be relied upon as an authority for the alleged exception to the general rule.

In *The Nancy* the goods in question had been shipped early in July 1793, a state of open war having existed between this country and France since the 14th Feb. 1793. The shipment was made at Port-au-Prince, in the island of St. Domingo, by Stephen Zaccharie, the cargo being consigned to Zaccharie, Coopman, and Co., of Baltimore. It was not quite clear on the evidence whether the goods belonged to Stephen Zaccharie, and were deliverable to Zaccharie, Coopman, and Co. on his account, or whether they belonged to Zaccharie, Coopman, and Co. The partners in this firm were Stephen Zaccharie and two others — Coopman and Vochey. Coopman was an American by birth, and Stephen Zaccharie and Vochey, though French by birth, claimed to have been naturalised in the United States. All of them claimed to have an American domicil, but Coopman and Stephen Zaccharie were both of them in St. Domingo at the time of shipment, and also at and after the capture. The judge of first instance released the goods to Stephen Zaccharie, on the ground that they were at the time of capture his property, and that he was an American citizen. The Lords Commissioners reversed this decision, and condemned the goods as enemy property. It is not clear to whom they considered the goods to belong, but if they belonged to Stephen Zaccharie it is quite clear that he was at all material times actually trading in enemy territory; and if they belonged to the firm, it is equally true that two of the firm were at all material times trading in the enemy country on behalf of the firm. In respect, therefore, of the goods in question, there was, whoever was the owner and wherever such owner was personally domiciled, a commercial domicil by virtue of which the goods were confiscable. There could be no question of any reasonable interval for the owner to discontinue or disassociate himself from the trade in the enemy country, for the transaction originated after the outbreak and with full knowledge of the state of war. In this respect the case differed from *The Jacobus Johannes* or *The Osprey*, where the transaction originated in the time of peace. It has even less bearing than these cases on the point at issue.

The three cases of *The Jacobus Johannes*, *The Osprey*, and *The Nancy* were commented upon by Sir William Scott in *The Vigilantia* (1 Ch. Rob. at p. 15). After mentioning *The Jacobus Johannes* and *The Osprey*, he says that from these cases a notion had been adopted that the domicil of the parties was that alone to which the court had a right to resort. From this it appears that, according to the general opinion, both *The Jacobus Johannes* and *The Osprey* had turned entirely on the personal domicil of the claimants, the doctrine of commercial domicil being wholly ignored. But Sir William Scott proceeds to say of *The Nancy* that it had been decided on different principles, the Lords Commissioners distinguishing the former cases on the ground that "they were cases merely at the commencement of a war, and 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 heavily on neutrals to say that immediately on the first breaking out of a war their goods should become subject to confiscation." Sir William Scott adds that it was expressly laid down in *The Nancy* that if a person entered into a house of trade in the enemy country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country.

Sir William Scott had been counsel for one of the parties in *The Nancy*, and his account of what was said by the Lords Commissioners is no doubt based on personal knowledge. It is reasonably clear, in spite of a slight ambiguity in Sir William Scott's language, that the Lords Commissioners in *The Nancy* distinguished the two earlier cases on the ground that the goods in question in these cases had been shipped before the war, whereas in the case of *The Nancy* the shipment was after the commencement of hostilities. This was a perfectly legitimate ground of distinction, but it is a fallacy to suppose that a judge necessarily approves every case which he distinguishes from that with which he is himself dealing, and a still greater fallacy to suppose that he approves of it on any particular ground. The rule which Sir William Scott states to have been laid down in *The Nancy* is the rule by which an enemy character is imposed on goods by virtue of the commercial domicil of the owner, not a rule which leaves the personal domicil as the criterion of character, subject to a possible enemy taint imposed by the action of the owner. It is stated without exception. If Sir William Scott had considered that the Lords Commissioners were

countenancing or even suggesting an exception to the rule, he would certainly have said so, more especially as cases within the exception would fall to be decided on principles independent of commercial domicil.

The President appears to have treated the cases above referred to as authorities in the respondent's favour, and says that the doctrines there laid down have been followed by America and this country ever since. He refers in particular to *The Antonia Johanna* (1 Wheat. 159), *The Friendschaft* (4 Wheat. 104), *The San José Indiano* (2 Gall. 267), and *The Cheshire* (3 Wall 231). These are all of them American authorities, which upon examination appear to support the general principle of the effect of a commercial domicil acquired in an enemy country by a person whose personal domicil is in a neutral country. They do not support the exception to the general principle for which the respondent contends.

In *The Antonia Johanna* the goods in question were held to have been shipped for and on account of a house of trade in the neutral country, and the case therefore fell to be decided on the personal domicil of the partners in the neutral house of trade.

In *The Friendschaft* the goods in question belonged to a house of trade established in the enemy country. They had been shipped during the war. The doctrine of commercial domicil is stated by Mr. Justice Story, and the goods were condemned. No exception to the rule is mentioned.

In *The San José Indiano* the authorities on which the doctrine of commercial domicil is based are discussed at some length. The cases of *The Jacobus Johannes*, *The Osprey*, and *The Nancy* are mentioned, but not as creating any exception to the general doctrine.

Similarly in *The Cheshire* there is a statement of the general doctrine, but no allusion to any possible exception.

With regard to the British authorities, their Lordships have failed to find any authority for the respondent's contention, unless it be *The Jacobus Johannes*, *The Osprey*, and *The Nancy*, and Sir William Scott's comments on them in *The Vigilantia* (*sup.*).

In their Lordships' opinion these cases and comments afford a very slender support for the contention in question. It appears from the facts in each case that the point did not necessarily arise for decision. Each case is explicable without it having been raised or decided. The whole superstructure of the respondent's argument is ultimately based on what is said by Sir William Scott in *The Vigilantia*. But as above indicated, this is quite consistent with the general rule deduced from the other authorities.

Under these circumstances, their Lordships have come to the conclusion that there is no such exception to the general rule as that for which the respondent contends. A neutral owning or being a partner in a house of business in an enemy country has a commercial domicil in that country. This commercial domicil imposes an enemy character on his property or interest in such house of business. There is no question of any particular act on his part by which any particular goods belonging to him or his interest in any particular goods may be tainted. If having such a commercial domicil in a country which by the outbreak of war becomes an enemy country he desires to avoid the consequences entailed by such domicil, he may avail himself of the interval allowed by law to discontinue or disassociate himself from the business in question. Inasmuch, however, as goods at sea when the war commenced may be captured before such reasonable interval has elapsed, the court will in a proper case take notice of a discontinuance or disassociation taking place after the capture, or will even adjourn proceedings in the Prize Court to give an opportunity for such discontinuance or disassociation. In the case of goods shipped after the commencement of the war, the circumstances of the shipment must be considered. The shipment may have been made by or with the privity of the claimant in the ordinary course of the business in the enemy country. In such a case the claimant will have elected to continue the business, and there will be a case for condemnation. Only if the shipment was made without the privity of the claimant or as a step in discontinuing or disassociating himself from the enemy connection can there be any question of their release. Such a case will be determined in the same way as like questions, with regard to goods at sea when the war commenced. There is, in their Lordships' opinion, no principle upon which any such exception as that set up in the present case can be based. It is the duty of the court to hold an even hand between belligerents and neutrals, and not to create in favour of the latter, and at the expense of the former, exceptions or exemptions not clearly justified by the principles of international law.

Their Lordships are of opinion that the respondent's interest in the goods in question ought to have been condemned for the reasons above stated. It therefore becomes unnecessary to deal with the second argument put forward on behalf of the Crown, namely, that which was based on the alleged attempt of the respondent to deceive the court.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, with costs, and the respondent's interest in the goods in question condemned accordingly.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitors for the respondent, *Oppenheimer, Blandford,* and *Co.*

Jan. 30 *and* 31, 1918.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE GERMANIA (No. 2). (*a*)

ON APPEAL FROM THE PRIZE COURT, NEW SOUTH WALES.

Prize Court—Outbreak of war—Enemy merchant ship in British port — Seizure — Requisition — Valuation—Date at which valuation should be taken —Prize Court Rules 1914, *Order XXIX., rr.* 3, 4 *—Sixth Hague Convention, art.* 2.

On the outbreak of the war a German merchant ship was lying in the port of Sydney and was seized as prize. On the 6th Oct. 1914 *the Prize Court*

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

ordered the ship to be detained and made an order for her temporary delivery without appraisement upon the Lords of the Admiralty undertaking to comply with the provisions of Order XXIX. of the Prize Court Rules 1914. *On the 4th June* 1915 *the Prize Court made an order under Order XXIX., r.* 3, *for the immediate release and delivery of the ship to the Crown without appraisement, the order to be a confirmation of the delivery order already made. The order further directed that, unless the parties should within twenty-eight days agree the value, the question of value should be referred to the registrar under rule* 4 *of the same order, the value to be ascertained by him as at the 6th Oct.* 1914. *At the hearing before the registrar the shipowners applied for an adjournment until after the war in order to get evidence from Germany as to the value of the ship. The registrar refused the application. The shipowners appealed against both orders.*

Held, without expressing any opinion as to whether the appellants might ultimately establish a case for indemnity under the Sixth Hague Convention, (1) *that the value of the ship was properly ordered to be ascertained under Order XXIX., r.* 4, *by the registrar as at the 6th Oct.* 1914; *and* (2) *that the registrar rightly refused to adjourn the application.*

APPEAL from two orders of the Supreme Court of New South Wales, Admiralty Jurisdiction (in Prize), dated respectively the 4th June 1915 and the 10th April 1916.

The appeal was by the master and owners of the German steamship *Germania*, and there were heard and disposed of with this appeal appeals by the masters and owners of five other German steamships—the *Osnabrück*, the *Melbourne*, the *Tiberius*, the *Sumatra*, and the *Berlin*—with regard to which the circumstances were the same and similar orders had been made.

On the outbreak of the war the *Germania* (and the five other vessels mentioned above) was lying in port in Sydney Harbour and was seized as prize. On the 6th Oct. 1914 the Prize Court in New South Wales ordered that the ship be detained, and that she be temporarily delivered to the Lords of the Admiralty without appraisement upon an undertaking to comply with the provisions of Order XXIX. of the Prize Court Rules 1914.

That order was duly complied with and the vessel delivered.

On the 3rd June 1915 a notice was served upon the master that it was desired to requisition the ship. On the 4th June 1915 an order, the first of the two orders the subject of this appeal, was made that the vessel should forthwith be released and delivered by the marshal to the Crown without appraisement, and providing that the order should be a confirmation of the order of the 6th Oct., and it was thereby further ordered (under rule 4) that, unless the parties agreed the value within twenty-eight days, it should be referred to the registrar "to fix the amount to be paid by the Crown in respect of the value of the said vessel and her consumable stores and provisions," the order providing that the value was to be taken as on the 6th Oct. 1914.

The reference to the registrar was held in Aug. 1915. The only witness called on behalf of the Crown was a certified marine surveyor, who valued the vessel at 20,050*l.*, excluding the value of the stores and provisions on board. The appellants thereupon asked for an adjournment of the reference until after the war to give them the opportunity of getting evidence from Germany as to the original cost, insurance, and profits derived from the ship, in order to enable them to present a full and proper case as to the value of the vessel. The application was refused. The reference stood over till Dec. 1915, but no further evidence was called. In Feb. 1916 the registrar issued his report, by which he adopted the figures as determining the value of the vessel given in evidence by the marine surveyor, and a further sum (which was agreed) for the stores and provisions.

The appellants thereupon moved the Prize Court claiming that the registrar's report should not be confirmed on the ground that the evidence was insufficient; that it related to the value of the ship before the war; and that the adjournment should have been granted for the reason stated above. On the 10th April 1916 Cullen, C.J. made an order confirming the report. That order was the second order appealed from.

Bateson, K.C. and *A. Neilson* for the appellants.—The first order is wrong because the Chief Justice ought not to have fixed any particular date for valuation, and certainly not that of the 6th Oct., which was not the date of requisition. If any date should have been fixed at all, it should have been either the end of the war or the date of release or redelivery to the owners, or the date of actual requisition by the Crown (the 4th June 1915). By art. 2 of the Sixth Hague Convention the appellants are entitled to a sum which will indemnify them, and the value of the vessel to her owners, from a business point of view, is the sum they are entitled to receive. They referred to

The Ironmaster, Swab. 441

The Harmonides, 9 Asp. Mar. Law Cas. 354; 87 L. T. Rep. 448; (1903) P. 1.

[Sir SAMUEL EVANS referred to *The Philadelphia* (116 L. T. Rep. 794; (1917) P. 101)]. The appellants were certainly entitled to an adjournment, and his finding ought not to stand as there is no evidence, or no sufficient evidence, to support it.

Sir *Gordon Hewart* (S.-G.) and *Raeburn*, for the Crown, were not heard.

The judgment of their Lordships was delivered by

Lord PARKER OF WADDINGTON.—Their Lordships express no opinion as to whether the appellants may ultimately be able to establish a case for indemnity under the Sixth Hague Convention. This will depend (1) upon whether such Convention is binding in the events which have happened, and (2) upon its true construction; but their Lordships do not propose to deal with either of these points on the present occasion.

With regard to the proceedings in the court below, under Order XXIX. of the Rules of the Prize Court, they appear to have been perfectly regular. In particular, their Lordships consider that no mistake was made in not selecting the date for valuation contended for by the appellants. The only possible question is whether the appellants' application for an adjournment until the end of

the war, on the ground that during the war they were not in a position to obtain evidence of value, ought to have been granted. Their Lordships cannot accept the suggestion that if the appellants' representatives in Australia had asked for a licence to communicate with the appellants in Germany as to the evidence to be adduced on their behalf, such licence would have been refused; and no temporary adjournment for that purpose was ever even suggested to the court, much less made the subject of a formal application. Under these circumstances their Lordships think that neither the registrar nor the Chief Justice could have come to any other conclusion than the one arrived at.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors for the appellants, *Snow*, *Fox*, and *Higginson*.

Solicitor for the respondent, *Treasury Solicitor*.

Dec. 11, 13, 14, 17, 1917, *and Feb.* 1, 1918.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, WRENBURY, and Sir ARTHUR CHANNELL.)

THE LOUISIANA AND OTHER SHIPS. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court — Cargo — Conditional contraband — Named neutral consignee — Whether true consignee — Ultimate control — Doctrine of continuous voyage — How far modified by Order in Council of the 29th Oct. 1914 *— Declaration of London* 1909, *art.* 35.

The Declaration of London by art. 35, *which was not ratified by Great Britain, purported to abrogate the doctrine of continuous voyage in the case of conditional contraband.*

By clause 1 *of an Order in Council of the 29th Oct.* 1914 *(since revoked) it was provided that notwithstanding art.* 35 *conditional contraband should be liable to capture on board a vessel bound for a neutral port if the goods were consigned "to order," or if the ship's papers did not show who was "the consignee of the goods," or if they showed "a consignee of the goods" in territory belonging to, or in the occupation of, the enemy.*

Held, that, in considering, on the principle of continuous voyage, what is the ultimate destination of goods which are in their nature conditional contraband, it is the intention of the person who is in a position to control such destination which is really material.

Held, further, that the effect of the Order in Council was to waive the doctrine of continuous voyage except in those cases expressly referred to in the modification by the Order in Council. The words "consignee of the goods" mean some person other than the consignor to whom the consignor parts with the real control of the goods. Therefore if the named consignee is a mere agent, and bound to act with regard to the ultimate destination of the goods as some other person might direct, the doctrine of continuous voyage applies and the goods are liable to confiscation.

Decision of Evans, P. affirmed.

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

APPEAL by American claimants to cargoes of fodder stuffs shipped on board the neutral ships *Louisiana*, *Tomsk*, *Nordic*, and *Joseph W. Fordney* from decrees of the President, who had condemned the cargoes in each case as being conditional contraband destined for the enemy Government and therefore lawful prize.

Alexander Neilson for the appellants in the *Louisiana*, *Tomsk*, and *Nordic* appeals.

Sir *Erle Richards*, K.C. and *Balloch* for the appellants in the *Joseph W. Fordney* appeal.

Sir *Gordon Hewart* (S.-G.), and *D. Stephens* (Sir *Frederick Smith*, A.-G., with them) for the Crown.

The following cases were referred to:

The Rijn, *ante*, p. 144; 117 L. T. Rep. 347; (1917) P. 145;

The Kim, 13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215;

The Peterhoff, 5 Wall 28.

The considered judgment of their Lordships was delivered by

Lord PARKER OF WADDINGTON.—These four appeals relate to certain fodder stuffs (being part of the cargoes of the steamships *Louisiana*, *Tomsk*, and *Nordic*, and the whole cargo of the steamship *Joseph W. Fordney*) which were seized on behalf of His Majesty in April and May 1915 and have been condemned by the President as lawful prize. Each appeal is against the order of condemnation.

Fodder stuffs are not absolute contraband. They are conditional contraband only, that is to say, they cannot be condemned as lawful prize unless destined for the enemy Government or the enemy's naval or military forces. On the other hand, in determining this destination, the doctrine of continuous voyage is clearly applicable, and must be applied in every case in which the Crown has not waived its strict rights. The first question, therefore, in each appeal is whether the goods to which the appeal relates were destined for the enemy Government or the enemy's naval or military forces. The second question is whether, if so destined, the Crown has not, as contended by the appellants, waived its right to condemnation by the Order in Council of the 29th Oct. 1914, adopting during the present hostilities the provisions of the Declaration of London with certain additions and modifications, this order, though since repealed, having been in force when the goods were seized.

In considering cases such as those with which their Lordships have now to deal, it is well to bear in mind that, according to international law, neutrals may during a war trade freely as well with the belligerents as with other neutrals. If, however, the goods in which they trade are in their nature contraband, the traffic involves certain risks. For a belligerent State is entitled to seize the goods in transit, on reasonable suspicion that, being in their nature absolute contraband, they are destined for the enemy country, or, being in their nature conditional contraband, they are destined for the enemy Government or the enemy naval or military forces. The goods when seized must of course be brought into the Prize Court for adjudication, but in the Prize Court the neutral trader is not in the position of a person charged with a

criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists. The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject them to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction. Only if his goods had such destination can it be his interest to conceal anything or leave anything unexplained. If he does conceal matters which it is material for the court to know, or if he neglect to explain matters which he is or ought to be in a position to explain, or if he puts forward unsatisfactory or contradictory evidence in matters, the details of which must be within his knowledge, he cannot complain if the court draws inferences adverse to his claim and condemns the goods in question.

In each of these appeals their Lordships find that the evidence discloses no such simple story supported by documents as one would expect in the case of straightforward transactions between neutrals in America and neutrals in Sweden or Denmark. The position of almost every person concerned is obscured in a cloud of mystery. The evidence is in some points insufficient and in others conflicting or misleading, and the several claimants have thought fit to leave entirely unexplained a number of circumstances which urgently call for explanation.

The cases of the part cargo ex steamship *Louisiana* and the part cargo ex steamship *Tomsk* may be taken together, and their Lordships note the following points:—

1. The position of Klingener in the case of the shipment per steamship *Louisiana* and of Fritsch in the case of the shipment per steamship *Tomsk* is by no means clear. According to the appellants' manager, Mr. Harry B. Smith, these gentlemen were named as consignees in the bills of lading on the initiative of the appellants themselves, because it was thought that insurance companies required that there should be a named consignee resident in the country of the port of ultimate discharge. The appellants certainly gave Christensen and Schrei a guarantee that Klingener and Fritsch would indorse and deal with the bills as required by them. On the other hand, Klingener and Fritsch say that it was Christensen and Schrei who asked them to accept the respective consignments; but Christensen and Schrei do not confirm this story. There is no evidence that the appellants had any prior transactions with either Klingener or Fritsch, or how the appellants came to know of the existence of either of them. It is, however, quite certain that neither Klingener nor Fritsch had any real interest in the transaction or any duty beyond indorsing and dealing with the bills as directed either by Christensen and Schrei or the appellants, or possibly someone behind the appellants.

2. It appears that Christensen and Schrei originally claimed to be owners of the goods. In the case of the shipment per steamship *Louisiana*, this claim was first put forward on their behalf by the Danish Minister on the 25th April 1915 in a letter to Sir Edward Grey. In their declaration made on the 15th July 1915 to the Danish Ministry of Commerce they refer to the goods as having been "purchased and consigned to" them. The meaning of this is obscure. It looks at first sight as if they meant to suggest, though without saying this in so many words, that they had purchased the goods; but this is inconsistent with the correspondence annexed to the declaration. To what purchase they refer remains a mystery. In their subsequent affidavit they in effect say there was no purchase, the goods having remained throughout the property of the appellants. Their own claim to ownership was thus abandoned.

3. The case ultimately put forward was that Christensen and Schrei were the appellants' agents for the sale of the goods in question on the Scandinavian markets, but there appears to have been no formal contract of agency, nor any arrangement as to how the agents were to be remunerated. Indeed, the transactions in question were the first transactions between the appellants and Christensen and Schrei, whose address had been obtained by the appellants from a firm in New York whose name is not disclosed. Assuming that Christensen and Schrei were agents for sale, their authority to sell would appear to be in the nature of a simple mandate revocable at will by the appellants, or possibly by someone behind the appellants. In case of such revocation, Christensen and Schrei would be bound to deal with the bills of lading, or the goods represented by these bills in manner directed by the person entitled to revoke the authority.

4. Though the appellants are claiming as owners, it is remarkable that Mr. Harry B. Smith does not anywhere in his affidavit commit himself to the statement that his company ever at any material time owned the goods. The bills of lading, after indorsement by Klingener and Fritsch, appear to have been sent to him by Christensen and Schrei, and he says that his company is the holder or owner of the bills of lading, and entitled to the immediate possession of the goods. But the "ownership" of a bill of lading in the sense of holding it with a right to possession, which is what the affidavit seems to mean, does not always connote ownership of the goods comprised in the bill, and his affidavit is quite consistent with the ownership being in a third party on whose directions the appellants had acted throughout. It is also to be observed that Mr. Harry B. Smith does not state who forwarded the bills to Christensen and Schrei. He merely states that they were duly forwarded. It is left to Christensen and Schrei to depose to the appellants' ownership of the goods, as to which they would not necessarily know anything, and as to the appellants having forwarded the bills to them. In the case of the shipment per steamship *Louisiana*, they produced a letter from the appellants inclosing the bills, but they produced no letter covering the bills in the case of the shipment per steamship *Tomsk*. In the latter case there is reason to suppose that the bills were so forwarded by the firm of K. and E. Neumond of New York, who are admitted to have made some of the arrangements in connection with the shipment, though it does not appear in what capacity. This firm obtained the bills of

lading per steamship *Tomsk* from the agents for the ship, and, in consideration of the bills omitting reference to the fact that some of the bags had been torn and mended, gave the guarantee printed on p. 55 of the record. The connection of K. and E. Neumond with the transaction is wholly unexplained. Christensen and Schrei claim to have been their selling agents in Europe. This seems to suggest that K. and E. Neumond, and not the appellants, were in real control of the business in America. If, as originally declared by Christensen and Schrei, the goods had been purchased at all, that firm may well have been the purchasers, either on their own account or as agents for someone else.

5. That there was someone behind the appellants is rendered certain by the two wireless messages of the 1st and 9th April 1915 from the Guaranty Trust Company, of New York, to the Disconto-Gesellschaft, Berlin. In the first the Guaranty Trust Company tell their Berlin correspondent that the shipment per steamship *Louisiana* is being forwarded by them on account of "Albert." In the second the Guaranty Trust Company tell their Berlin correspondent that the shipment per *Tomsk* is being forwarded by them on account of "Albert" to Christensen and Schrei.

6. Mr. Greenwood, in his affidavit on behalf of the Crown, states certain facts which inevitably lead to the inference that the Albert mentioned in these messages was Heinrich Albert, a well-known agent of the German Government in the United States, who appears to have been acting through K. and E. Neumond, to whom he had been recommended by Christensen and Schrei, and to have been financed by the Disconto-Gesellschaft of Berlin, through the Guaranty Trust Company, of New York. The appellants, who must be fully aware of the connection of Heinrich Albert, K. and E. Neumond, the Disconto-Gesellschaft, and the Guaranty Trust Company with the transaction in question, have chosen to leave this connection entirely unexplained and Mr. Greenwood's affidavit entirely unanswered.

Under the circumstances above mentioned, the only possible conclusion is that the shipments per *Louisiana* and *Tomsk* were made by or on behalf of the German Government, through its agents in America, and that the details of the transactions were so arranged as to conceal the fact.

In considering, on the principle of continuous voyage, what is the ultimate destination of goods which are in their nature conditional contraband, it is the intention of the person who is in a position to control such destination which is really material. Had Klingener and Fritsch had any real interest it might have been their intention which mattered. Had Christensen and Schrei purchased the goods, or even had they obtained possession of the bills of lading under circumstances which entitled them to dispose of the goods notwithstanding orders to the contrary from the appellants or someone for whom the appellants were acting, the intention of Christensen and Schrei would have been a material point. Had the appellants been dealing with their own goods on their own behalf their intention might have been the determining factor. But if, as their Lordships find, the appellants were acting by the direction of an agent of the German Government, it is the intention of the German Government which must be looked for. It would be ridiculous to suppose that the German Government were speculating in fodder stuffs for the Scandinavian markets. These stuffs were urgently needed in Germany for the purposes of the war, and the only possible inference is that the goods in question were intended to reach Germany and be utilised for war purposes. It is true, no doubt, that the municipal laws of both Denmark and Sweden prohibit the export of fodder stuffs, but it is not clear that this prohibition includes transhipment at Danish or Swedish ports, or that licences for export are not readily granted by the Danish or Swedish authorities, at any rate if the stuffs in question are not really needed for home consumption. The experience of the Prize Court during the war has made it clear that the laws referred to, however stringent, can be evaded.

Their Lordships come to the conclusion that the President was fully justified in finding that the shipments per steamships *Louisiana* and *Tomsk* were destined for the German Government.

The facts in the case of the part cargo ex steamship *Nordic* are surrounded with equal mystery. The goods in question were consigned by the appellant Fordtran to Klingener. The bills of lading say that the vessel was bound for Gothenburg with liberty to call at any other port or ports in or out of the customary route in any order and for any purpose whatever. The goods were to be transhipped or forwarded at ship's expense, but at owners' risk from Gothenburg or any port of call to Landskrona. Attached to the bill was a declaration by the appellant that "to the best of his knowledge" the goods had been sold and were intended for consumption in Sweden. If, as he now claims, he was the owner as well as the shipper of the goods, he must have known whether or not he had sold them and to whom. He says in his affidavit that he made the shipment on order to Klingener on condition that payment was made after arrival of the goods. He does not say who gave the order or who was to pay, nor does he produce the order. Klingener was first put forward as owner of the goods. He says he ordered them from the appellant in or about Feb. 1915, but he does not say on whose behalf he gave the order. There is no evidence of business relations having previously existed between Klingener and the appellant, or how they became acquainted. Neither Klingener nor the appellant mentions Christensen and Schrei or K. and E. Neumond in connection with the transaction.

On the other hand, Christiensen and Schrei say that in March 1915 K. and E. Neumond notified them by cable of the shipment to Klingener, adding that in ordinary course if the goods had been received by Klingener he would have received them on their account. Klingener, therefore, had no real interest in the transaction. If he ordered the goods it was on the request of K. and E. Neumond, who obtained the bills of lading and sent them to Christensen and Schrei, though why this was done is unexplained, unless an explanation be found in the statement that Christensen and Schrei were selling agents for K. and E. Neumond, which suggests that the latter firm were

purchasing the goods and consigning them to the former firm for sale. The appellant, who ultimately claimed as owner of the goods, deposes to his right to immediate possession by virtue of his "ownership" of the bills of lading, presumably in the sense already mentioned, but not to his ownership of the goods. Lastly, there is the wireless message of the 1st April 1915, in which the Guaranty Trust Company, of New York, inform the Disconto-Gesellschaft, of Berlin, that they had forwarded the documents relating to the shipment per *Nordic* to Christensen and Schrei. Although this message does not mention "Albert," it may reasonably be inferred that the real transaction was similar to that in the former cases, and their Lordships come to a like conclusion as to the destination of the goods.

The case of the cargo ex steamship *Joseph W. Fordney* differs in some respects from the cases already dealt with. The cargo was shipped by the appellants, the Atlantic Export Company, and consigned to Klingener. Klingener had by letter dated the 18th Feb. 1915 ordered the goods for delivery c.i.f. Gothenburg or Malmö (at shippers' option) at specified prices, shippers covering war risks, and guaranteeing out-turn of weights within ½ per cent. Payment was to be by ninety days' acceptance from date of shipment. The draft was to be on Klingener's firm with documents and insurance certificates attached. Klingener guaranteed that the goods were intended for consumption in Scandinavia and would not be exported to any country at war with Great Britain. Though this letter appears on the face of it to bear the marks of a genuine transaction between seller and buyer, there is no evidence that the appellants had had any prior business relations with Klingener or how they became aware of his existence, and it would be somewhat remarkable if without further inquiry they had been ready to enter into a transaction of such magnitude with a total stranger. Klingener, however, appears to have had no real interest in the matter. He says he was requested to order the goods by Christensen and Schrei, but he does not produce any correspondence between himself and Christensen and Schrei on the matter. The latter firm say that Klingener ordered the goods on their behalf, but give no details as to how he came to do so. They say, however, that arrangements for the shipment were made by K. and E. Neumond, and that they acted as selling agents for this firm for Scandinavian business, which seems to suggest that the real purchasers were K. and E. Neumond, and that Christensen and Schrei were agents for sale only.

The appellants throughout have claimed as owners. They appear to have drawn a bill of exchange on Klingener for 375,831·26 dollars, the invoice price of the goods, making it payable to the Guaranty Trust Company of New York, who are said to have discounted it. The Guaranty Trust Company on the 23rd March 1915 forwarded the bill, with documents attached, to a Swedish Bank, and on the 2nd June 1915 wrote to this bank that they were instructed by the drawers that the usance of this bill might be extended to 180 days. The draft was ultimately returned to the Guaranty Trust Company because Klingener refused to accept it or take up the documents, and it appears to have been subsequently retired by the appellants. J. E. Baermann, the president of the Atlantic Export Company, in his first affidavit dated the 20th March 1915 declares that the shipment was made pursuant to a contract dated the 5th March, and that neither the negotiations preliminary to such contract nor such contract itself contained any information that the goods were for account of anyone other than Klingener. Neither the contract of the 5th March nor the negotiations preliminary to it are disclosed. There appear to have been no preliminary negotiations with Klingener. The contract of the 5th March must have been with someone else. He gave the order of the 18th Feb. on someone else's instructions, and there was no contract with him except such as resulted from the order and its acceptance by the shipment of the goods. The goods were not shipped till the 20th March. The only possible inference is that it was entered into by or through K. and E. Neumond. There is not, as in other appeals, any wireless message connecting Heinrich Albert or the Disconto-Gesellschaft with the transaction, but the date of the transaction and the fact that it was controlled by K. and E. Neumond and financed by the Guaranty Trust Company support the inference that it too was originated by the German Government. If K. and E. Neumond were acting for themselves, it would be their intention that would determine the destination of the goods in applying the doctrine of continuous voyage, and as to their intention there is no evidence. Indeed, the appellants' evidence betrays a desire to conceal the position of this firm in the matter.

Under all the circumstances, their Lordships come to the conclusion, though with more hesitation in this case than in that of the other appeals, that the President was right in finding that the goods were destined for the enemy Government.

The remaining point to be considered is whether the Crown has or has not by the Order in Council of the 29th Oct. 1914 waived its right to the condemnation of the goods the subject of these appeals.

The Declaration of London was a provisional agreement embodying certain somewhat sweeping changes in international law. Its thirty-fifth article in effect entirely abrogates the doctrine of continuous voyage in the case of conditional contraband. Parliament refused to consent to its ratification, and it never became binding on this country. It was, however, by Order in Council dated the 20th Aug. 1914 adopted by His Majesty for the period of the present war with certain additions and modifications. By one of these modifications it was provided that, notwithstanding art. 35, conditional contraband, if shown to be destined for the armed forces or a Government department of the enemy State, should be liable to capture to whatever port the vessel was bound or at whatever port the cargo was to be discharged. This modification, in effect, neutralised art. 35, and the doctrine of continuous voyage remained as applicable to conditional contraband as it had been before the order.

The application of the doctrine of continuous voyage to conditional contraband appears to have given rise during the earlier months of the war to certain diplomatic representations on the part of the United States. These representations are said to have led to the repeal of the order of the 20th Aug. 1914, and to the substitution therefor

of the Order in Council of the 29th Oct. 1914. By this last-mentioned order the Declaration of London was again adopted by His Majesty for the period of the present war with certain conditions and modifications. The material modification, however, now provided that, notwithstanding art. 35 of the declaration, conditional contraband should be liable to capture on board a vessel bound for a neutral port (1) if the goods are consigned "to order," or (2) if the ship's papers do not show who is "the consignee of the goods," or (3) if they show "a consignee of the goods" in territory belonging to or occupied by the enemy. The effect of the order is therefore to waive the doctrine of continuous voyage except in those cases expressly referred to in the modification. The appellants contend that none of the goods in question in these appeals can be brought within any of the cases referred to. None of the goods were consigned "to order." The bill of lading, which formed one of the ship's papers, showed in every instance who was the consignee of the goods, and neither the bill of lading nor any other of the ship's papers showed in any instance a consignee of the goods in territory belonging to or occupied by the enemy.

Their Lordships are of opinion that this contention cannot be sustained. It assumes that the words "if the ship's papers do not show the consignee of the goods" mean "if the ship's papers do not show a consignee of the goods." But on this interpretation there is no difference between the first case and the second, for a bill of lading which does not show a consignee is in effect for present purposes a bill to order. Further, the reason for not waiving the doctrine of continuous voyage in the case of consignments to order can only have been that in the case of such consignments the shipper retains the control of the goods, and can alter their destination as his interests may dictate or circumstances may admit. This control may, however, be retained by the shipper, even if he consigns to a named person, provided that the consignee be bound to indorse or otherwise deal with the bill of lading as directed by the shipper. It would be useless to retain the doctrine of continuous voyage in the case of consignments to order, if the shipper could escape the doctrine by consigning to a clerk in his office and procuring the clerk to indorse his bill. He would in this manner retain as full control of the goods as if the consignment had been to order. It is impossible, in their Lordships' opinion, to construe the order as an intimation to neutrals that, provided they make their consignment to named persons not residing in territory belonging to or occupied by the enemy, they may, in the case of conditional contraband, safely disregard the doctrine of continuous voyage. If the order were so construed, the modification of art. 35 would be absolutely useless, and conditional contraband could be supplied to the enemy Government through neutral ports as freely as if the thirty-fifth article had been adopted without any modification at all. In their Lordships' opinion, the words "the consignee of the goods" must mean some person other than the consignor to whom the consignor parts with the real control of the goods. It is said that such a construction would defeat the object in view, which must have been to make some concession for the benefit of neutral traders. But even if construed, as in their Lordships' opinion it ought to be construed, the effect of the order is to make a considerable concession. Under it merchants in one neutral country can, without risking the condemnation of their goods, consign them for discharge in the ports of another neutral country to the order of buyers or others to whom the principal in the ordinary course of business finally transfers the control of the goods. They are not concerned to inquire how such buyers or other persons intend to deal with the goods after delivery. No intention on the part of the latter to forward the goods to the enemy Government will render the goods liable to condemnation. This is no small concession.

In no one of the present appeals would the named consignee have had any real control over the goods consigned to him. In each case the named consignee was a mere agent for someone else and bound to act as that someone, whoever he might be, should direct. Under these circumstances their Lordships hold that the named consignee was not "the consignee of the goods" within the meaning of the Order in Council.

Each of these appeals must therefore, in their Lordships' opinion, be dismissed with costs, the costs of the petition to admit the supplemental record, in the case of the part cargo ex steamship *Louisiana*, being made costs in that appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Botterell* and *Roche; Thomas Cooper* and *Co.*

Solicitor for the respondent, *Treasury Solicitor.*

House of Lords.

Dec. 6, 7, 1917, *and Jan.* 28, 1918.

(Before the LORD CHANCELLOR (Lord Finlay) Lords DUNEDIN, ATKINSON, PARKER OF WADDINGTON, and SUMNER.)

DOMINION COAL COMPANY LIMITED *v.* MASKINONGE STEAMSHIP COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance (Marine) — Charter-party — "The war region"—Submarine activity.

By a supplemental agreement to a charter-party, the vessel was ordered by the charterers to trade "in the war region," war risk insurance premiums paid by the owners were to be refunded to them by the charterers.

In Oct. 1916, *while the vessel was trading in American waters, a German submarine destroyed in a few days six vessels, and then was not seen again, within the area approximate to that in which the vessel was trading, and would in future be trading, by the orders of the charterers. The owners insured the ship against war risks, and sued for the premiums so paid.*

Held, (the Lord Chancellor (Lord Finlay) dissenting), that the words "in the war region" indicated the area where from time to time war affected the risk which vessels would run. Although these words were not capable of a fixed geographical meaning, nevertheless the circumstances were such that it was reasonable to hold that at the time that

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

the premiums were paid the ship was trading in the war region, and the plaintiffs were therefore entitled to recover.

Per Lord Dunedin: The fact that underwriters put on an extra premium for war risks on ships pursuing their course in the place as to which the question arises, though not in itself conclusive, would form an element of evidence to be considered.

Decision of the Court of Appeal affirmed.

APPEAL by charterers, the defendants in the action, from an order of the Court of Appeal (Lord Reading, C.J., Bankes and Warrington, L.JJ.) which reversed a decision of Bailhache, J.

The action was brought to recover war risk premiums effected with underwriters on the steamship *Maskinonge*, which, under an agreement supplemental to a charter-party, the charterers were to refund to the owners should the former order the vessel to trade "in the war region." In Oct. 1916 the vessel was ordered to trade and was trading in American waters. There was a sporadic outburst of submarine activity by a single submarine for about a week, six vessels being torpedoed before the submarine disappeared. The owners having, on a cable reaching them that a submarine was doing damage to vessels in an area approximate to where their vessel was, insured her and sued the defendants under the supplemental agreement which provided:

If the steamer is ordered by the Dominion Coal Company Limited to trade in the war region, war risk insurance premiums payable by the owners shall be refunded to them by the charterers.

Bailhache, J. held that the incursion of a single submarine did not make American waters part of the war region, and he therefore dismissed the claim, but assessed the value of the ship in case a different view was taken in the Court of Appeal at 110,000*l.*

The plaintiffs appealed.

The Court of Appeal entered judgment for the plaintiffs for the sum of 1765*l.* 15*s.* 6*d.* (being the premiums based on the value of the ship as found by the judge at the trial) with costs.

The charterers appealed.

Leck, K.C. and *R. A. Wright*, K.C. for the appellants.

Greer, K.C. and *Greaves-Lord* for the respondents.

After consideration the House, the Lord Chancellor (Lord Finlay) dissenting, by a majority dismissed the appeal.

The LORD CHANCELLOR (Lord Finlay.)—This case raises an interesting question as to what constitutes "the war region" for the purposes of an agreement relating to the chartering of a steamship.

The documents constituting the contract are two: the charter-party dated 4th Nov. 1909, and a memorandum of agreement of 23rd Oct. 1915.

By the charter-party, Messrs. Roberts, of Liverpool, agreed to let, and the appellants agreed to hire, a vessel to be built, for seven consecutive St. Lawrence seasons, commencing with Spring 1912 to be "employed in any safe trade, St. Lawrence, Black Sea, and Baltic Sea excluded out of season," and it was provided that the owners should pay for the insurance of the vessel. The vessel, the *Maskinonge*, was built and was employed under this charter-party. The vessel was subsequently transferred by Messrs. Roberts to the Maskinonge Steamship Company Limited, and thereafter the memorandum of agreement of 23rd Oct. 1915 supplemental to the charter was entered into between Messrs. Roberts, the Maskinonge Steamship Company, and the Dominion Coal Company, by which Messrs. Roberts assigned to the Maskinonge Steamship Company all their rights under this charter-party, while the Dominion Coal Company released Messrs. Roberts and accepted the responsibility of the Maskinonge Steamship Company instead in respect of the charter-party. It was further agreed that, instead of trading for consecutive seasons, the vessel should trade for the Dominion Coal Company for six consecutive years, and the Dominion Coal Company agreed to vary the conditions of the charter-party by increasing the hire-money and by accepting the clause upon which this action is brought. That clause runs as follows: "If the steamer is ordered by the Dominion Coal Company Limited to trade in the war region war risk insurance premium payable by the owners shall be refunded to them by the charterers."

The vessel was accordingly worked under the charter-party as varied.

This action was commenced on the 24th Nov. 1916 by the owners (the respondents) against the appellants (the charterers) to recover the premium for war-risk insurance paid by the owners. It was alleged in the third of the points of claim that "the steamer was in or about Oct. 1915 ordered by the defendants to trade between Sydney (Cape Breton), Halifax, and Boston, all of which ports are situated in the war region, or in the alternative trading between such ports necessitated the steamer's trading in the war region." The case was tried before Bailhache, J., who decided in favour of the defendants (the present appellants), but his judgment was reversed by the Court of Appeal, who held that the vessel had been ordered to trade within the war region.

The facts lie in small compass. The vessel was employed in the coal trade, running between Sydney (C.B.), Halifax, and Boston. On the 8th Oct. 1916 a German submarine, in the course of a short space of time, torpedoed and sank five steamships, three of them British and two neutral, at spots marked on the chart put in evidence, which are all in the vicinity of the Nantucket Lightship. There was no repetition of outrages of this description in the waters on the east coast of North America. It appears to be probable that the destruction of these vessels was the work of a German submarine, which, after making its way across the Atlantic and spending some little time in a United States port, was on its way back to European waters. The outrage was an isolated one, but the effect of it was to produce a scare and to send up the premium for insurance in North American waters on the east coast very largely for two or three weeks.

On the 9th Oct. the respondents enquired by cable of the appellants what was the probable future employment of the *Maskinonge*, and the appellants on the same day replied that the proposed future employment was "coasting trade

as heretofore." The steamship was already insured against war risks by the respondents under a policy of the 6th June 1916 for six months in the aum of 30,240*l.* at 20*s.* per cent. On receipt of the appellants' cable the respondents effected a further insurance against war risks in the sum of 120,000*l.* from the 10th Oct. 1916 to the 9th Jan. 1917, at 2*l.* per cent.

The movements of the *Maskinonge* between the 3rd Oct. and the 15th Nov. 1916 are in evidence, and from time to time took her to Boston and back from Boston to Halifax and Cape Breton. Her route on these voyages would be within about 100 miles of the Nantucket Lightship, a distance which could be travelled by a submarine in a few hours. Before the sinkings of British and neutral vessels on the 8th Oct. the *Maskinonge* had passed on this route on her voyage from Boston to Sydney, 3rd to 5th Oct. After the 8th Oct. she did not again traverse it till her voyage from Sydney (C.B.) to Boston, between the 18th and 21st Oct., and thereafter on voyages 25th to 27th Oct., 28th to 31st Oct., and 3rd to 5th Nov. As there were no other torpedo outrages in these waters the scare died away in some two or three weeks, though it is stated that the premiums did not go down quite to the point at which they had been before the 8th Oct.

The action was brought to recover a proportionate part of the premiums on the current policy and the whole of the premiums on the new policy. No question now arises as to the amount. Bailhache, J. found that the value of the steamship for the purpose of insurance was 110,000*l.*, and the rate at which the respondents insured was that current on the 10th Oct. 1916. The appellants, while contesting liability altogether, did not raise any point as to a possible distinction between the current policy and the new one. Bailhache, J. gave judgment for the appellants (defendants) dismissing the action, but in the Court of Appeal judgment was given for the respondents (plaintiffs) for 1765*l.* 18*s.* 6*d.*, 110,000*l.* being taken as the value.

It was contended for the appellants at the bar of this House that "the war region" in the clause of the supplemental agreement of 23rd Oct. 1915 denoted the region in which war was raging at that date, and as it was admitted that the waters on the North American coast here in question were not within the war region as it then existed, it was claimed that the appeal must succeed. I am unable to accept this contention; it appears to me that "the war region" means any region which from time to time answers the description, whether larger or smaller than it was in Oct. 1915, and that it is impossible for the purposes of this clause to confine "the war region" within the limits which existed at the date of the supplemental agreement.

The case, then, is reduced to this—Were the waters in which the *Maskinonge* was trading part of the war region during the last two or three weeks of Oct. 1916? In my opinion, in order to come within these words, the waters in question must be within a region in which hostilities are carried on at the time in point of fact. No apprehension, however reasonable, would make it a war region if in reality it is not so. The mere fact that premiums have gone up because it is believed that certain areas are the scene of war-like operations will not make them part of the war region if this belief is erroneous.

I agree with Bailhache, J. when he says "I am going to take the words as they stand, and it seems to me quite clear that such an incursion by one submarine as I have described does not make the waters between Cape Breton and Boston 'the war region.'" One isolated outrage of this description does not constitute a war region. The submarine would appear to have been merely passing through on her return voyage. She did not cruise in these waters, and there were no continuous or systematic operations. If some such operations had been carried on, these waters would for the time have become part of the war region, although the precise limits to which it would extend might be difficult of definition.

If I rightly followed the argument for the respondents, it was that the outrage on the 8th October gave rise to a reasonable apprehension that these waters had become the scene of hostile operations and that the repetition of such acts was consequently to be expected. It was urged that the two things, the outrage and the consequent apprehension, taken together made the waters part of the war region. I cannot accede to this argument. A rise of premium against war risks in particular waters in consequence of erroneous information that German submarines were operating there would not make them part of the war region. How could such a rise of rates have this effect, because it was occasioned by the occurrence of an isolated hostile act, not sufficient in itself to make a "war region"? In the present case such apprehensions, however reasonable at the time, proved to be unfounded. It may have been a perfectly right and prudent thing for the respondents to effect the additional insurance, but they can recover the premium from the appellants only if the latter had sent the vessel to what was in fact part of the war region. The question must turn on what was done on the 8th. If the sinking of the five vessels was sufficient to constitute a war region, the respondents are right. If it was not sufficient, as Bailhache, J. held, I cannot see how the existence of apprehensions in consequence of the outrage helps the respondents' case.

The Lord Chief Justice, in the course of his judgment, relies upon the fact that the insurance market took the view that the war region had been extended from Europe to the coast of North America. But if I am right in thinking that the question whether the war region has extended to the coast of North America is one of fact, no amount of belief, however reasonable, will supply the absence of the facts necessary to constitute a war region. I do not think it is accurate to say, as Bankes, L.J. says, that what the parties were contracting about was some circumstance which would necessitate the payment of abnormal or exceptional premiums for insurance against war risks. They were contracting about the existence of one particular circumstance, and one only, which would have that effect, namely—the vessel's being ordered to "the war region." A war region is not constituted by the enforcement for it of exceptional war rates, as this may be due to a misapprehension of the facts, as was the case here. If the parties to the contract had intended to provide that the charterers should

pay any such abnormal or exceptional premiums, they would have said so.

In my opinion, the judgment of Bailhache, J. should be restored.

Lord DUNEDIN.—The war region must, in my opinion, indicate the region where from time to time war affected the risk that ships would run. There is no attempt at definition by means of a map or geographical description, and it is evident that the phrase neither has nor had at the time of the contract any fixed geographical meaning. If that be so, then I see no means of settling what is the war region except to say that it is that region which, in the opinion of reasonable men, would be from time to time so designated. The fact that underwriters put on an extra premium for war risks on ships pursuing their course in the place as to which the question arises would not be in itself conclusive, but it would form an element of evidence.

In the circumstances here, looking to the fact that the premiums were increased and to the comparatively small distance between the scene of the sinkings by torpedo and the route of the vessel, I think a reasonable man would, at the time that the policy was taken, have called this a war region.

I agree with the Court of Appeal.

Lord ATKINSON.—The purport and defects of the contract entered into between the parties have already been stated, and it is not necessary to repeat them.

Under the provisions of the agreement, dated the 23rd Oct. 1915, the appellants had power to trade with the steamer where they pleased. From the list of sailings furnished, it appears that from Nov. 1915 to the 8th Oct. 1916 they traded with the vessel, at first, mainly from Sidney, C.B., to Montreal and Halifax. During the latter end of Dec. 1915 and up to the 15th Feb. 1916, between Sidney and Boston. From this date to the 7th Aug. 1916 between Sidney, aforesaid, Montreal, and Quebec, and from the latter date till the 8th Oct. 1915 mainly between Canadian ports. With the exception of four or five trips to Boston, the vessel was all the time engaged in the coasting trade, never going further south than Boston. It was not disputed that up to Oct. 1916 the operations of German ships of war, and submarines, &c., against the mercantile marine of England, her Allies, and European neutrals was mainly confined to European waters. On the 8th Oct. 1916 one or more German submarines sunk by torpedoes or gunfire five vessels within a radius of twenty miles from the Nantucket Lightship. The most southern point to which the *Maskinonge* steamship, in her trips to Boston reached was about 100 miles from the scene of these attacks, and it was proved at the trial that submarines capable of crossing the Atlantic, as these submarines did, would traverse this distance in about seven hours. On the 9th Oct. 1916 the owners sent to the charterers a telegram in the following words: "Please cable latest position of *Maskinonge*, also probable future employment, account war insurance," to which the charterers replied as follows: "*Maskinonge*, Halifax, future employment proposed coasting trade as before." The owners had insured the vessel against war risk from the 1st June to the 1st Dec. 1916 in the sum of 30,240*l.* at 20*s.* per cent. On the 10th Oct., two days after the sinking of the ships near Nantucket Lightship they insured her in the increased sum of 120,000*l.* from noon, on the 10th Oct., till noon, on the 9th Jan. 1917, at 2*l.* per cent., plus stamp-duty and brokerage, amounting in all to 2535*l.* On the 12th Oct. 1916 they demanded this sum from the charterers together with a sum of 80*l.* 19*s.* 10*d.*, the proportion of the cost of the first insurance, 285*l.* 7*d.* in respect of the period from the 10th Oct. 1916 to the 1st Dec. 1916. The question for decision is, are the appellants liable to pay both or either of these sums. It was proved in evidence that directly on the news of the sinking of the ships at the Nantucket Lightship coming to Lloyd's the effect was that the rates of insurance went up to four or five times what they had been theretofore. The scare lasted for about a fortnight or three weeks, then people began to get into a more sober frame of mind, and rates were lowered, nor had any vessels been sunk on this coast since. Bailhache, J. valued the ship at 110,000*l.*

How is one to determine what is a "war region" within the meaning of this agreement? If it means an expanse or superficial area of the seas where the destructive engines of the enemy operate it may vary altogether in position from time to time, expand, contract or decrease to a vanishing point, therefore it cannot possibly mean in this agreement the region which happens to be a war region at the date of the agreement and none other. Such a construction would reduce the provision to an absurdity. It must, I think, refer to the region which may from time to time become a war region, the object of the clause being to require the charterers to pay the increased premium if they, having control of the ship, should order her to sail through waters where the danger of hostile attack probably awaited her. I do not think a region can be deemed to be a war region simply because underwriters at Lloyd's demand high rates for insuring against war risks on vessels sailing through it, nor, having regard to the speed and range of submarines, aeroplanes, and mine-layers, can it be confined to the particular spot or spots at which attacks by hostile war craft on mercantile vessels have been made or the immediate vicinity of such spots. It must, I think, for the purposes of such a case as this, mean an area of the sea in which men of reasonably-balanced mind acquainted with maritime affairs would reasonably apprehend that a ship traversing it would be subjected to hostile attack by the enemy's submarines, aeroplanes, ships of war, privateers, mines or other engines and instruments of war. It is impossible to fix and determine as a fact over what precise area of the sea the danger of hostile attack existed. A reasonable apprehension means an apprehension based on reasonable grounds, just as a reasonable belief means a belief formed on reasonable grounds, and while the fact that underwriters at Lloyd's charge largely higher rates for insuring against war risks ships voyaging through a certain area of the sea is not enough *per se*, in my judgment, to make that area a war region, it is a vital matter to be taken into account in determining whether or not the grounds for the apprehension of danger are reasonable in character. It is an element going to prove they are such.

In any given case it is for the person relying on a certain area of the sea being a war region to endeavour to prove the facts which he alleges show that reasonable grounds for the apprehension of hostile attacks by such persons as I have mentioned existed at the material time. It is for the tribunal before which the case comes to decide whether the grounds proved to exist are, in its judgment, reasonable in character, just as in an action for malicious prosecution it is for the court to determine whether the facts found by the jury constitute reasonable and probable cause for the prosecutor's belief and action. The person relying upon those grounds must of course himself *bonâ fide* believe in their existence and character, at the material time, that is the time when he takes action upon them. In the present case the 10th Oct. 1916 the date of the policy of insurance. In my view there was proof that reasonable grounds existed upon that day for the apprehension, by such a class of person as I have mentioned, that in the area to be traversed by the *Maskinonge* in her journeying to and from Sidney to Boston and back again along the sea coast of Canada and the United States she would be in danger of being attacked and sunk or injured by enemy engines and instruments of war such as I have described. If so, that area was in my view a war region within the meaning of the agreement of the 15th Oct. 1915; and as it is quite evident from the action the owners took in at once expending such a large sum of money to insure their ship that they honestly believed in the existence of these dangers, I think, they are entitled to recover the sums awarded to them. In my opinion, therefore, the conclusion at which the Court of Appeal arrived was right, and the appeal should be dismissed with costs.

Lord PARKER of WADDINGTON.—I cannot bring myself to believe that the "war region" referred to in clause B of the supplemental agreement, the provisions of which were to be in force for many years, was intended by the parties to be ascertained once for all when the agreement was executed. Such a construction would go far to frustrate the object with which clause B was obviously framed. The extent of the area referred to must, in my opinion, be ascertained from time to time as and when the owners of the vessel assert their rights under the clause.

What then does the expression "war region" mean? It cannot be confined to those particular portions of the high seas in which there have been actual operations of war. There are many parts of the English Channel in which there have been no such operations, and yet no one could doubt that the whole channel was within the war region. There have been operations of war as far away as the Falkland Islands, and yet no one would now contend that the Falkland Islands are within the war region. The reason is clear. Operations of war may under existing circumstances be reasonably apprehended in any part of the English Channel, but not in the seas which surround the Falkland Islands. It is thus impossible to specify at any moment what waters are within and what outside the "war region" without taking into account the element of reasonable apprehension. Whether at any moment there is such a reasonable apprehension must depend upon all the circumstances of the case. The fact that hostile operations have occurred in the neighbourhood may be material; their cessation or discontinuance may be material. The views taken by shipowners as to what their own interests require may be material, as also the current insurance rates. It is impossible to give an exhaustive list of the circumstances which may be material, and I shall not attempt to do so. I will content myself with saying that the circumstances in the present case at all material were, in my opinion, such that submarine activity along the North American coast between the mouth of the St. Lawrence and Boston might be reasonably apprehended, and that no prudent shipowner could be advised to leave his vessel engaged in trade along that coast to remain uninsured against the risks thereby entailed. Granting this, it appears to me that a vessel so engaged would within the meaning of clause B be engaged in the "war region."

For these reasons I think the appeal fails.

Lord SUMNER.—I agree. The words "in the war region" do not mean merely in the war region as it was in 1915, at the date of the agreement in question. This would defeat the object of the clause, for it would tie down the parties at the beginning of a long running contract to the state of things then existing, although in its nature that state of things must change from time to time. Nor can a broad line be drawn between North American waters, in which the ship had so far been trading, and other regions, mostly European, called for brevity "the war region." This would make a new contract. Again, I cannot concur in the language of Bankes, L.J. "War region is the region in which exceptional war rates are enforced by underwriters; that is the war region for this purpose and the purpose the parties were contracting about." I think this exaggerates and misconceives the relevance of the rates of premium charged after the events in question.

"The war region" is, in my opinion, the region which from time to time is the region of war. Whether the ship comes to the war or the war to the ship does not matter. The question is whether the charterers' order to trade, given in their telegram of the 9th Oct. 1916—namely, "future employment proposed coasting trade as heretofore," ordered the steamer into any waters, which were then part of the war region. I agree that mere fear that the war would shortly extend or mere mistaken belief that the war had already extended to such waters would not suffice. Some actual acts of war, affecting the waters referred to, are necessary, but the events of the 8th Oct. were enough for the purpose. On them alone it might properly have been said "the war has now extended to North American waters." So far as we now know, speaking after the event, there were no further acts of war in those waters after the 8th Oct., but this does not, in my opinion, affect the conclusion. At the time no one could prudently have affirmed that this would be so. It is the first occurrence of the kind that is crucial. It is this that sets persons interested promptly in motion. Ships must be covered and premiums raised forthwith in view of the appearance of this new peril. The parties to this contract must have known that in such an event the shipowner must immediately revise his insurance, and

could not rest content to run the risk with limited cover, if such was his position, as in fact it was, while he waited to see whether this submarine activity was what is called "sporadic" or not. I think they must be taken to have contracted with reference to this obvious business necessity. The evidence shows that what was done was reasonable. The news at once multiplied the premium rate. The shipowners at once paid large additional premiums. No one has been called to question the prudence or the necessity of their course. I infer from these circumstances, what is fairly obvious in itself, that the significance of the events of the 8th Oct. was not limited to that day, but applied to a substantial further period. No question has been argued as to the lesgth of the period for which the shipowners took out their extra war-risk cover.

There remains the area of this extension of the war region. Nantucket Lightship was 100 miles from the nearest point on the *Maskinonge's* then trading route. Does that fact place her trading outside the war region? I think not. The limit of the extension of the war region, caused by the event of the 8th Oct., is not confined to the actual area of the naval action. The *Maskinonge's* voyage lay well within the submarine's radius of action after quitting the Nantucket Lightship, whether she were to undertake another commerce raid or to make for a German port on a course, which would leave the waters in which that ship traded, at no considerable distance on her port hand. In either case they would offer further fields of action by no means unattractive. There was evidence that competent persons expected her to appear shortly off Halifax. This being so, I do not think that the *Maskinonge's* trading route can be said to have lain outside the war region on and after the 9th Oct., and the appeal fails.

Solicitors for the appellants, *William Crump* and *Son*.

Solicitors for the respondents, *G. H. Walker* and *Tree*, for *Weightman, Pedder*, and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 25 *and* 26, 1917.

(Before Pickford and Bankes, L.JJ. and Sargant, J.)

Countess of Warwick Steamship Company Limited *v.* Le Nickel Societe Anonyme.

Anglo-Northern Trading Company Limited *v.* Emlyn, Jones, and Williams. (*a*)

APPEALS FROM THE KING'S BENCH DIVISION.

Ship — Time charter-party — Hire—Requisition of ship by Admiralty—Restraint of princes—Frustration of commercial adventure.

In 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) *Lord Loreburn, though agreeing with Lord Buckmaster, L.C. and Lord Parker that the charter in that case [did not determine when the ship was requisitioned, yet concurred with Lords Atkinson and Haldane (thus making a [majority) in holding that the doctrine of commercial frustration applies to a time charter. The doctrine, therefore, applies to a time charter.*

In the first appeal, by a time charter-party, dated the 16th March 1915, *a vessel was chartered for not less than twelve months from the 29th March* 1915, *at a hire payable monthly. The vessel was requisitioned on the 30th Oct.* 1915 *by the Admiralty. The charterers paid hire up to the 30th Oct.* 1915 *only. The chartered owners sued to recover hire under the charter-party up to the 29th March* 1916, *less hire at a lower rate received by them from the Admiralty. The charterers pleaded that the charter-party had been determined by the requisition.*

In the second case, by a charter-party, dated the 2nd Oct. 1915, *a ship was let on hire at a monthly rate until the 19th Nov.* 1916. *There was an exceptions clause which included restraints of princes, but there was no provision for cesser of hire in respect of interruption of service due to that exception. On the 22nd July* 1916 *the ship was requisitioned by the Admiralty, and the requisition continued until after the 19th Nov.* 1916, *the rate of hire payable by the Admiralty being less than that payable under the charter-party.*

Held, in both cases, that the requisition had frustrated the adventure, and the charterers were not liable for the hire after the date of the requisition.

Tamplin Steamship Company Limited *v.* Anglo-Mexican Petroleum Products Company Limited (*sup.*) *discussed.*

Decisions of Sankey, J. (infra) *and of Bailhache J.* (*ante, p.* 18; 116 *L. T. Rep.* 414; (1917) 2 *K. B.* 78) *affirmed.*

The two appeals raised substantially the same point, and were heard together.

Countess of Warwick Steamship Company Limited *v.* Le Nickel Societe Anonyme.

The facts appear sufficiently from the judgment of Sankey, J.

March 23, 1917.—Sankey, J.—The plaintiff's claim is for 10,257*l.* 1*s.* 8*d.*, the balance of hire alleged to be due in respect of a time charter-party of the steamship *South Pacific*, dated the 16th March 1915. The charter was for a period of about, but not less, than twelve calendar months from the date upon which the vessel was placed at the disposal of the defendants, and the rate of hire was 4387*l.* per month payable in London in advance.

The *South Pacific* was placed at the disposal of the defendants on the 29th March 1915, but at the beginning of October she was requisitioned by the Admiralty, and was in fact handed over to them at the end of that month, when, by a document dated the 30th Oct., signed by the master and the defendants' agents, it was mutually agreed that "the steamer *South Pacific* was redelivered to owners under time charter on this date, and that the amount of bunkers then on board was 45 tons. . . ." It will thus be seen that, at the time of the requisitioning, five

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

months were due to run on the charter. The defendants contend (1) that the requisition put an end to the contract, because it frustrated the joint adventure between the parties; (2) that in any event the document of the 30th Oct. was a redelivery of the vessel to the owners, and that hire ceased. The plaintiffs contend (1) that the doctrine of frustration of adventure does not apply to a time charter, or at any rate to this time charter, and that, if it does, there was in fact no frustration of the adventure; (2) that there was no redelivery of the vessel.

Was there a redelivery of the vessel? I am of opinion that the circumstances do not constitute such a redelivery of the vessel as to enable the defendants to say that hire ceased. The master had no authority to redeliver her so as to determine the contract between the parties, nor do I think that either plaintiffs or defendants understood the document of the 30th Oct. in that light. All the document intended to do was to fix the amount of bunker coals left on board the vessel for which the plaintiffs were liable under the charter.

Next, does the doctrine of frustration of adventure apply to a time charter or to this time charter? In my view, after the decision of the Court of Appeal in *Scottish Navigation Company Limited* v. *W. A. Souter and Co.* (13 Asp. Mar. Law Cas. 539; 115 L. T. Rep. 812; (1917) 1 K. B. 222), this point is not open in this court. It was urged for the plaintiffs that the point did not fall for decision in *Souter's* case, because the Court of Appeal held the charter in that case not to be a time charter. It appears to me that Bankes, L.J. did decide that the doctrine was applicable to a time charter, and certainly A. T. Lawrence, J. said so in so many words. I feel, therefore, bound to hold that the doctrine does apply to a time charter, and see no reason for not applying it to the present time charter.

Thirdly, was there a frustration of the adventure? The fact is now ascertained that the vessel remained requisitioned for the whole of the remainder of the term—that is, five months—and is still in Government service. If, as was said by Swinfen Eady, L.J. in *Andrew Millar and Co. Limited* v. *Taylor and Co. Limited* (114 L. T. Rep. 216; (1916) 1 K. B. 402, at p. 415), it was the duty of the defendants to have waited a reasonable time for the purpose of seeing whether it was possible to fulfil their contract, it was clear that the parties would have discovered within such a time that the adventure was frustrated, having regard to the short period remaining under the charter.

In my view, however, in a case like the present I ought not to look at what has subsequently happened, but at the position on the 30th Oct. The authority for this is Scrutton, J. in *Embiricos* v. *Reid and Co.* (12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291, at p. 293; (1914) 3 K. B. 45, at p. 54), where he quotes Lord Gorell as saying, "I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach has to be considered"; "and the whole of his subsequent remarks," says Scrutton, J., "are valuable on this point. 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; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds."

It was contended by the defendants that the intervention of war amounted in law to a frustration of the adventure—*Geipel* v. *Smith* (26 L. T. Rep. 261; L. Rep. 7 Q. B. 404), where Lush, J. says: "If the impediment had been in its nature temporary, I should have thought that 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." This view apparently prevailed with Lord Atkinson in *Tamplin Steamship Company Limited* v. *Anglo-American Petroleum Products Company Limited* (*sup.*).

It was contended by the plaintiffs that the intervention of a strike does not amount to a frustration—see *Ropner and Co.* v. *Ronnebeck* (13 Asp. Mar. Law Cas. 47; 112 L. T. Rep. 723), where Bailhache, J. says: "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 a time of war to cases arising through the existence of a strike. To do so would be a new departure."

It was then urged that a requisitioning of a vessel was an act intermediate between war and a strike, but that it was more analogous to a strike, and therefore that it ought not to be held to be a frustration of the adventure. I do not think it possible in the state of the authorities to lay down any so logical a rule. In my view the question of frustration is a question of fact in every case which has to be decided by a judge on the material before him. In the present case five months remained of the charter-party, and, in the language of Scrutton, J., it is necessary to determine what were the reasonable commercial probabilities of the case on the 30th Oct. Upon this I have the evidence of Mr. Theodore Layman, who was called on behalf of the defendants. He is a shipbroker of experience, who during the war has chartered many steamers. He said that when steamers were requisitioned in October (I quote his own words) it was a question of "saying good-bye" to them; there was no expectation of their being returned before the end of the war, and no reasonable anticipation of getting the vessels back in five months.

In these circumstances the court has to apply the principles laid down in the House of Lords in the *Tamplin* case (*sup.*). Those principles are no longer in doubt, but the extraordinary difference in judicial opinion on the matter is an indication of the extreme difficulty of applying them to the facts of any particular case.

Having regard, however, to the fact that the unexpired period was five months only, and to the evidence referred to, I have come to the conclusion that there was a frustration of this adventure, that it put an end to the contract, and that the defendants are entitled to my judgment. If

the Court of Appeal hold that I am wrong, the amount due to the plaintiffs is 10,257*l.* 1*s.* 8*d.*

Judgment for defendants.

Anglo-Northern Trading Company Limited *v.* Emlyn, Jones, and Williams.

The award stated by an arbitrator in the form of a special case was as follows:

By a charter-party in the Baltic and White Sea Conference form, dated the 2nd Oct. 1915, the plaintiffs, the Anglo-Northern Trading Company Limited (hereinafter called the owners), agreed to let and the defendants, Emlyn, Jones, and Williams (hereinafter called the charterers), agreed to hire the steamer *Lowdale* for a term of about eleven or twelve calendar months (say from date of delivery till about the 30th Sept. or the 30th Oct. 1916) at 3631*l.* 5*s.* per calendar month, commencing from the time the steamer was delivered and placed at the charterers' disposal. The payment of hire was to be made in London monthly in advance. In default of payment the owners were to have the faculty of withdrawing the vessel from the service of the charterers without prejudice to any claim that they might have against the charterers under the charter.

The charter-party provided by clause 12 that in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer for more than twenty-four consecutive hours, hire should cease until she was again in an efficient state to resume her service; and it contained an exceptions clause which included, *inter alia*, restraint of princes, but there was no provision for cessation of hire in respect of any interruption of the services of the steamer due to that exception. The steamer (unless lost) was to be redelivered on the expiration of the charter-party. By a supplemental clause it was provided that any time occupied during the currency of the charter-party in the survey of the steamer was to be added to or deducted from the above periods at the charterers' option.

The steamer was delivered to the charterers on the 28th Oct. 1915, when hire commenced, but it ceased to be payable for two periods, amounting in all to one month and nineteen and one-twelfth days, while the steamer was undergoing survey in Nov.-Dec. 1915 and in May 1916. In respect of those periods the charter-party was admittedly extended by the charterers exercising the option given them to do so.

On the 26th July 1916 the steamer was requisitioned by the Admiralty, and she continued under that requisition until after the expiration of the period covered by the charter-party, the rate of hire payable by the Admiralty being 1529*l.* 10*s.* per month. At the time of requisitioning the vessel no information was given by the Admiralty of the probable duration of the requisition. At that time hire had been paid in advance by the charterers for the period expiring on the 28th July 1916, but no subsequent payment of hire was made under the charter-party. If the extended period of one month and nineteen and one-twelfth days (the time occupied in the survey of the steamer) was added to the 30th Sept. 1916, the charter-party would terminate on the 19th Nov. 1916. No formal redelivery of the vessel was ever made by the charterers, and on the 19th Nov. 1916 she was still under requisition to the Admiralty. No payment had been made by the Admiralty to the charterers, and presumably it would be paid to the owners. The owners claimed against the charterers hire from the 28th July 1916 to the 19th Nov. 1916, amounting, after giving credit for the hire, if and when received from the Admiralty, to 7782*l.* 6*s.* 4*d.*

It was contended for the owners that they were entitled to hire for the whole period of the charter-party as extended; that it was the charterers' duty to collect from the Admiralty the hire payable under the requisition; and that the act of requisition did not put an end to the charter or affect the rights of either party under the charter-party.

It was contended for the charterers that the Admiralty requisition put an end to the charter-party, and that, even if it did not do so, the owners were not entitled to payment of hire by the charterers until the sum due under the requisition from the Admiralty had been paid or credited to the charterers.

The arbitrator decided, subject to the opinion of the court, that the Admiralty requisition did not put an end to the charter-party, and that the owners were entitled to be paid hire until 2 a.m. on the 19th Nov. 1916, giving credit for the hire payable by the Admiralty. He therefore awarded that the charterers should pay to the owners 7782*l.* 6*s.* 4*d.* If his award was correct in point of law, it was to stand; if, however, the court should be of opinion that the charter-party was determined by the Admiralty requisition, he awarded that the owners should repay to the charterers 302*l.* 12*s.* 1*d.*, being the hire paid in advance for the period from the 26th July 1916, when the steamer was requisitioned, until noon on the 28th July 1916.

Bailhache, J. held that the requisition had frustrated the adventure, and the charterers were not liable for the hire after the date of the requisition. The shipowners in both cases appealed.

MacKinnon, K.C. and *R. A. Wright*, K.C. for the appellants in the first appeal.

Inskip, K.C. and *Raeburn* for the appellants in the second appeal.

The following cases were referred to during the course of the arguments:

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;

Modern Transport Company v. *Duneric Steamship Company*, 13 Asp. Mar. Law Cas. 490; 115 L. T. Rep. 535; (1917) 1 K. B. 370;

Scottish Navigation Company v. *Souter and Co.*, 13 Asp. Mar. Law Cas. 539; 115 L. T. Rep. 812; (1917) 1 K. B. 222;

Jackson v. *Union Marine Insurance Company*, 31 L. T. Rep. 789; L. Rep. 10 C. P. 125;

Embiricos v. *Reid and Co.*, 12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45;

Admiral Shipping Company v. *Weidner, Hopkins, and Co.*, 13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171; (1916) 1 K. B. 429; 13 Asp. Mar. Law Cas. 539; 115 L. T. Rep. 812; (1917) 1 K. B. 222;

Watts, Watts, and Co. v. *Mitsui and Co.*, 13 Asp. Mar. Law Cas. 580; 116 L. T. Rep. 353; (1917) A. C. 227;

Geipel v. *Smith*, 26 L. T. Rep. 261; L. Rep. 7 Q. B. 404;
Metropolitan Water Board v. *Dick, Kerr, and Co.*, 116 L. T. Rep. 201; (1917) 2 K. B. 1;
Andrew Millar and Co. v. *Taylor and Co.*, 114 L. T. Rep. 216; (1916) 1 K. B. 402;
Lloyd Royal Belge Société Anonyme v. *Stathatos*, 144 L. T. Jour. 42;
Attorney-General v. *Birmingham, Tame, and Rea District Drainage Board*, 44 L. T. Rep. 906; (1912) A. C. 227.

Leck, K.C. and *Barrington-Ward*, for the respondents in the first appeal, were not called upon.

Leck, K.C. and *Le Quesne*, for the respondents in the second appeal, were only called on as to whether there was evidence to support the finding that the delay occasioned by the requisition frustrated the adventure.

Oct. 26, 1917.—Pickford, L.J.—I propose to deal very briefly with the question of law raised by these cases because, in my opinion, which is in agreement with that of Bailhache, J. in the second case, that question has already been decided by authority binding upon this court. We have heard a long and interesting argument as to whether or not the law ought to be in the condition in which it is said to be. It would be irrelevant and indeed impertinent in me to discuss that point, if, as I believe, it is already covered by authority.

The charter-party in question in each case is a time charter-party. Distinctions have been drawn during the arguments between different kinds of time charter-parties according as they do or do not specify a defined voyage. I use the expression "time charter-party" in its ordinary sense as not specifying a defined voyage. This time charter-party in its exceptions clause includes "arrests and restraints of princes." It is in all material respects the same time charter-party which was discussed in *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (*sup.*). The question of principle seems to me to be this: On a charter-party of that kind, can either party have recourse to the doctrine of frustration of the adventure as laid down long ago in *Jackson* v. *Union Marine Insurance Company* (*sup.*)? Or, as counsel for the appellants in the present case put it: Can one in this charter-party imply a condition that the charter-party is only to remain in existence so long as something has not happened which will put an end to the joint purpose of the parties entering into it? In other words, does this case come within the scope of the principle enunciated by Lord Haldane in giving judgment in *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* (*sup.*) as follows: "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 *primâ facie* 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 has 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." In my opinion the House of Lords in that case by a majority decided that that principle does apply to such a case as this. It cannot be disputed that Lord Haldane and Lord Atkinson held that the principle does apply exactly to such a case. What is disputed is whether Lord Loreburn also so held. In my opinion there can be no question that he did, because in the course of his judgment, after considering *Dahl* v. *Nelson, Donkin, and Co.* (44 L. T. Rep. 381; 6 App. Cas. 38), *Geipel* v. *Smith* (*sup.*), and *Jackson* v. *Union Marine Insurance Company* (*sup.*), he proceeds to apply the principle to the case in question, and that is the principle expressed in the words of Lord Haldane which I have already read. It may be that Lord Loreburn differed from Lord Haldane and Lord Atkinson as to the person on whom lies the onus of proof. It may be that he thought that the requisition which in fact took place did not *primâ facie* bring the case within the doctrine of commercial frustration, while they thought that it did. If the requisition was such as would *primâ facie* put an end to the adventure, the onus would be on the person who said that it did not; if, on the other hand, it was not such as would *primâ facie* have that effect, the onus would be on the person who said that it did. I do not think that it much matters what view they took of the onus of proof. The important question is whether they all three held that the doctrine of frustration applies to such a case as this. In my opinion they all did so hold.

I am strengthened in that view by what is said by Bailhache, J. in the course of his judgment in the second of the cases now before the court, *Anglo-Northern Trading Company* v. *Emlyn, Jones, and Williams* (*sup.*). He says: "The authorities upon the point are difficult to reconcile, and there is such conflict of opinion on the subject among lawyers and commercial men that I reserved my judgment in the hope that I might be able to extract from the decided cases some definite rules which might serve as a guide to shipowners and time charterers, who are much perplexed to know what their respective rights are in such a case as the present, a case now of constant occurrence. I have found the task a difficult one, but with the diffidence which befits a judge of first instance, especially one whose opinion has been overruled, I venture to suggest

that the law at present stands thus: (1) The doctrine of commercial frustration is applicable to a time charter-party: (see per Lords Loreburn, Haldane, and Atkinson in the *Tamplin* case, *sup.*)." He adds, as another authority to the same effect, the cases of *Scottish Navigation Company* v. *Souter and Co.* and *Admiral Shipping Company* v. *Weidner, Hopkins, and Co.* (*sup.*). Then he says: "(2) The doctrine does not apply when the time charterer has the use of the vessel for some purpose for which he is under the terms of the time charter-party entitled to use her, even though that purpose is not the particular purpose for which he desires to use her." It is not necessary to consider that point here. "(3) It follows that the doctrine does not apply unless the owner is unable to give the time charterer the use of the vessel for any purpose whatever within the scope of the charter-party." That point does apply here, inasmuch as, although they have been requested to do so, the owners have never given the charterers the use of the vessel for any purpose. "(4) Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charter-party depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charter-party. (5) This raises another question—namely, when is the party desirous of relying upon the doctrine of frustration in a position to claim his right so to do? If he does so as soon as the event happens which in his view gives him the right, its duration must be a matter of estimate depending chiefly upon the nature of the event." That statement from the judgment of Bailhache, J. appears to me to be a very clear and correct summary of the authorities as they at present stand. If it be so, it follows that the broad question of principle is covered by authority. It is irrelevant to consider whether or not we agree with that authority, seeing that we are bound by it.

A further question arises in the first of the two cases before us which is a question of fact—namely, has it been shown that there has been such an interference with the purpose which the parties had in view in entering into the charter-party that the object of their adventure is frustrated? Sankey, J. has found that this has been shown, and I see no reason for differing from him.

I agree with Sankey, J. that the point of time to be looked at is that at which the requisition was made. It may be a question whether the court ought to determine the point of time upon evidence or may take judicial notice of a public event, such as the existence of the war which led to the requisitioning of the vessel; but whatever test be adopted, I think that the judgment of Sankey, J. was fully warranted. Only one witness was called before him, but he was a gentleman who had experience of these matters, and he gave very full evidence regarding them. The general effect of the evidence given by that witness was that when a ship was requisitioned by the Government, the average general expectation was that it would be detained for the period of the war. If, therefore, the judge confined himself to the evidence which was before him, the only conclusion to which he could come was that there was no chance of the return of the ship except in the event of its being found to be of no use when requisitioned. On the other hand, if the court has to consider the public events which were happening at that time, it was known that the war had lasted since the 4th Aug. 1914, and at the date of the requisition nobody expected that it would come to an end in five months. There was one campaign in France, another in Gallipoli, another in Mesopotamia, and another in South Africa, and none of these campaigns was likely to end within that period of time. Even if these campaigns came to an end by evacuation, there would be the need of shipping for the purpose of bringing home troops, horses, and stores, and, if we may look to these matters which everybody is supposed to know, I should think that the conclusion to which we should come would be the same.

It is alleged on behalf of the shipowners that at one time the charterers said that the ship might be given back in five months. I attach no importance to that allegation, because it appears that a different position was taken up by the charterers very shortly afterwards. In my opinion the finding of Sankey, J. was fully justified by the evidence which was before him. If it is admissible to look at the events which have subsequently happened in order to see what was likely to be the anticipation of the state of things at that time, I find it to be the fact that the ship is still requisitioned. Having regard to these events even more fully is the finding of the learned judge justified. That is all that it is necessary to say about the first of the two cases before the court.

The same considerations dispose of the second case with the exception of one point. It has been contended that the special case precludes the court from considering this matter. It is said that the doctrine of frustration has to be applied on a basis of fact—namely, that the anticipated duration of the detention must defeat the common object of the parties; and that the arbitrator, who is a gentleman of great experience and knowledge of these matters, has found that these facts do not exist in this case. If he had done so, then no doubt this court would not interfere. On looking at his award, however, I do not think that he has arrived at any such finding of fact. I think he intended to find the date of the requisition, the length of the unexpired part of the time charter-party, and the probable length of the requisition; but not necessarily to draw an absolute inference from these findings. Having found these particular facts, he says that he holds and decides, subject to the opinion of the court, that the Admiralty requisition did not put an end to the charter-party, and on that view he awards that the charterers do pay to the chartered owners a certain sum; and then he goes on to say that the question for the court is whether his award is correct in law, if it be correct his award is to stand, if, however, the court shall be of opinion that the charter-party was determined when the steamer was requisitioned, then he awards that the chartered owners shall repay to the charterers a certain amount as therein mentioned. I think the arbitrator meant to say that he had stated the three above-mentioned particular facts, and, without drawing from them conclusively the inference that the charter-party was at an end, he desired to know whether, in the

opinion of the court, he ought to draw that inference from them. In my opinion the authorities show that we ought to draw from these facts the inference that the charter-party is at an end. I therefore think that in both the cases before the court our decision should be in favour of the charterers.

Bankes, L.J.—I agree. As I have already given judgment in two of the previous cases in which the question of law now before the court was raised, I see no reason why I should again discuss that question at length. I agree with both the judgments appealed from, and I have nothing to add to what has been said by Pickford, L.J.

Sargant, J.—I agree.

Appeals dismissed.

Solicitors in the first case: for the appellants, *Holman, Fenwick,* and *Willan;* for the respondents, *Lawrence Jones* and *Co.*

Solicitors in the second case: for the appellants, *Winn-Jones* and *Co.;* for the respondents, *William A. Crump* and *Son.*

Wednesday, Feb. 6, 1918.

(Before Swinfen Eady and Bankes, L.JJ. and Eve, J.)

William Millar and Co. Limited *v.* Owners of Steamship Freden. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Ship—Charter-party—Cargo to be loaded—Dead-weight capacity guaranteed—Freight to be paid on that quantity—Whether lifting capacity in the abstract or capacity to carry cargo contracted for.

A printed form of charter-party provided that the ship to which it related should load and the charterers provide at a certain specified foreign port "a full and complete cargo of maize in bags." These words were substituted in place of certain words which were in the printed form and which were struck out.

The shipowners guaranteed the ship's dead-weight capacity to be 3200 tons, and freight was to be paid on that quantity. That clause was substituted for a printed clause which made freight payable per ton, the effect of the alteration being to make the charter-party one at a lump sum freight.

The lifting capacity of the ship was in fact 3200 tons. But her cubic capacity did not admit of her loading maize of that weight.

*Held, that the guarantee had reference to an existing fact, and was not a representation as to the quantity of the particular cargo which the ship could accommodate; that it was a measure of the ship's lifting or weight-carrying capacity in the abstract and not her capacity to carry tons of maize—*i.e., *the general capacity irrespective of the particular cargo that she was to carry on the particular voyage in question.*

Mackill *v.* Wright (14 *App. Cas.* 104) *distinguished. Decision of Rowlatt, J.* (ante, *p.* 166; 117 *L. T. Rep.* 446; (1917) 2 *K. B.* 657) *affirmed.*

The plaintiffs, as the charterers of a steamship known as the *Freden*, claimed to recover from the defendants, who were the owners thereof, damages for breach of a charter-party dated the 2nd Dec. 1915.

The charter-party was contained in a printed form, entitled "Adelaide Charter-party," certain words in the printed form being struck out and other words introduced by written interlineation.

By the charter-party as so modified it was provided (*inter alia*) that the steamship should proceed to a certain specified foreign port and there load from the charterers' agents "a full and complete cargo of maize in bags." The steamship was then to proceed to any one safe port in the United Kingdom and deliver the cargo upon payment of freight at rates varying according to the port of discharge selected.

Clause 5 of the charter-party provided that: "The owners guarantee the ship's dead-weight capacity to be 3200 tons, and freight to be paid on this quantity."

The steamship had in fact a lifting capacity of 3200 tons, but she had only sufficient cubic capacity to load 3081 tons 560lb. of maize—*i.e.*, 118 tons 160lb. less than 3,200 tons.

The charterers claimed as damages for breach of the guarantee the freight paid by them to the shipowners as under the charter-party on the balance which the steamship was unable to load—namely, 400*l.* 15*s.* 8*d.*, being at the rate of 3*l.* 7s. 6d. per ton.

It was agreed that if the steamship had been able to load more than 3200 tons the charterers would have been entitled to ship the same without paying more freight, and the owners would have been entitled to call upon the charterers to do so, though the damages, if they refused, would possibly have been nominal.

Those results followed because it was a lump sum freight—varying, however, with the port of discharge—which was the consequence of a printed clause in the charter-party relating to "wheat and (or) flour and (or) other cargo merchandise" being superseded by the clause above set forth.

The charterers, however, contended that as they could only load less, they were entitled, not *eo nomine* to a reduction of freight, but to damages for breach of the guarantee, which damages would include (and they claimed no more) return of the freight in respect of the short amount of the cargo that they were able to load.

The question was, therefore, whether "ship's dead-weight capacity" in this charter-party meant her capacity to carry tons of maize or her lifting capacity in the abstract.

It was decided by Rowlatt, J. (*ante*, p. 166; 117 L. T. Rep. 446) that the guarantee was in respect of the steamship's lifting capacity in the abstract, and not her capacity to carry tons of maize; and that it could have no other meaning in itself unless it was used with reference to some cargo. His Lordship distinguished *Mackill* v. *Wright* (14 App. Cas. 104).

From that decision the charterers now appealed.

MacKinnon, K.C. and *R. A. Wright*, for the appellants, referred to

Mackill v. *Wright*, 14 App. Cas. 104;
Carnegie v. *Conner*, 6 Asp. Mar. Law Cas. 447; 61 L. T. Rep. 691; 24 Q. B. Div. 45.

Leck, K.C. and *Alexander Neilson*, for the respondents, were not called upon to argue.

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

Swinfen Eady, L.J.—This is an appeal from the judgment of Rowlatt, J., and the case is reported *ante*, p. 166; 117 L. T. Rep. 446; (1917) 2 K. B. p. 657.

It is an action by the charterers for damages for breach of contract contained in a charter-party. Their case is that in breach of the charter-party the vessel which they chartered with a view to carrying 3200 tons of maize could not and did not load more than 3081 tons of maize, and that as it is a contract for a lump sum freight, they were damaged to the extent of the difference between the freight that they could have loaded and the freight on what they did load, and they seek to recover the difference between these two sums.

The charter-party is between the plaintiffs and the defendants for the ship to carry from Durban to a port in the United Kingdom a full and complete cargo of maize in bags. Then there is a rate of freight per ton according to the port of call to which the ship should be directed to discharge. There are different rates for different ports, but nothing turns upon that.

Then comes the clause upon which the whole contest has turned. "The owners guarantee the ship's dead-weight capacity to be 3200 tons and freight to be paid on this quantity." Therefore in order to ascertain the full sum of freight to be paid all that one has to do is to multiply the number of tons, 3200, by the rate per ton according to the port of discharge ultimately selected. It was therefore a contract for a lump sum freight and not for freight so much per ton delivery on arrival.

There was no dispute that the vessel was of a dead-weight capacity of 3200 tons; in other words that she could take on board a cargo to that extent without sinking the ship below her proper load line. With regard to the particular cargo of maize she was only able to take on board 3081 tons 560lb. But that was not because her dead-weight capacity was not as guaranteed or had been in any way misrepresented. It was because the cubic capacity of the space on board was insufficient to allow of the stowage of this maize in bags of more than 3081 tons.

On the one hand it is said on behalf of the plaintiffs that reading the guarantee of the capacity of the ship in connection with the cargo the shipowners had notice of what the cargo was to be. It was maize in bags, and you must read their guarantee with regard to 3200 tons as if it meant "we guarantee that the ship on this voyage will be of a capacity to take and will be able to carry 3200 tons of maize in bags." That in effect is what they say.

On the other hand, the defendants say: "That is not the language which is used, and that is not what we meant." What we said was, and what we adhere to is, "we guarantee that the ship shall be and is of a dead-weight capacity of 3200 tons, and so it is." It is a measure of the capacity of the ship, the general capacity irrespective of the particular cargo, that she was to carry on this voyage.

Reading the language as it stands in the contract the words seem to me to be really free from ambiguity. They are very simple. "The owners guarantee the ship's dead-weight to be 3200 tons." They guarantee the ship's dead-weight capacity, and that has nothing to do with what the ship will carry, nothing to do with any particular voyage, but it refers to the general capacity of the ship.

I think that Rowlatt, J. was quite justified in applying this language to the proposition which he was considering. He said (at p. 662 of (1917) 2 K. B.): "To test it by approaching the matter from the opposite point of view: assume the parties to have desired to provide for the carriage of a cargo of maize at a freight calculated on the guaranted dead-weight capactiy of the ship in the strictest sense would they not have written down exactly what they have written here?"

In my opinion, that is a clear and definite way of expressing the view that freight was to be paid, a lump sum, so much upon the guaranteed dead-weight capacity of the ship, and the charterers being entitled and indeed bound to load a full and complete cargo.

I must say that I am unable out of the language that has been used to extract the meaning which the plaintiffs desire to put upon the clause. The language used does not in its natural and ordinary meaning appear to me to be capable of bearing that construction.

Reference was made to the case of *Mackill* v. *Wright* (14 App. Cas. 106) in the House of Lords. The real dispute there was whether the cargo that was actually shipped corresponded to that which was intended, having regard to the representations which were made at the time that the contract was entered into.

It will be observed, however, that the language of the contract there was very different from that we have to consider here. There it was, "the owners guarantee that the vessel shall carry not less than 2000 tons dead-weight of cargo." That must have been a guarantee that the vessel shall carry the amount on the voyage in question—"on this voyage for which we are entering into a contract."

Then there was a subsequent clause, "and should the vessel not carry"—that is, "should the vessel not carry on this particular voyage"—"the guaranteed dead-weight as above, then any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight."

There was language there pointing to a guarantee with regard to the weight of cargo to be carried on that particular voyage, and not to the general carrying capacity of the ship. Here it is the opposite. The only guarantee is with reference to the general carrying capacity of the ship of a certain dead-weight capacity.

In my opinion the appeal fails and should be dismissed.

Bankes, L.J.—I agree.

The expression "the ship's dead-weight capacity," in my opinion has reference primarily to the vessel's lifting or weight-carrying capacity in the abstract, and I see nothing or I find nothing either in the position in which the words are used in this charter-party or in any other of the provisions of the charter-party itself to displace that primary meaning and lead one to the conclusion that the secondary meaning ought to be adopted here as contended for by the appellant.

That is, in my opinion, sufficient to dispose of this appeal. But I think it is possible to go further and to say that the words themselves

negative the contention, because if I understand Mr. MacKinnon's argument, it is that you ought to read it after the words "3200 tons" "of maize in bags." I will accordingly read the clause with those words in: "The owners guarantee the ship's dead-weight capacity to be 3200 tons of maize in bags." And then follows this: "And freight to be paid on this quantity."

That is just what they did not want. They wanted to provide that freight was not to be paid on the quantity of maize or the quantity of bags. They desired that freight should be paid on a tonnage—that is to say, the tonnage in the abstract of the vessel. I think that if you read those words in it negatives the argument that has been addressed to us in support of the appeal.

With reference to the case of *Mackill* v. *Wright* (14 App. Cas. 106), it seems to me that the language which is in that case relied upon has reference to that particular contract, and that particular contract is one which indicated on the face of it that the parties were contracting with reference to the capacity of that vessel in regard to that particular voyage, and that particular voyage was a voyage which as indicated on the face of the charter-party was one on which a certain class of cargo was to be carried.

In my opinion that language has really no reference to the particular case that we have now to decide, or the contract upon which the argument is founded.

On these grounds I think that this appeal fails and should be dismissed.

EVE, J.—Our judgment involves the construction of this particular contract, the terms of which are essentially different from those in the contract with which the House of Lords had to deal in the case of *Mackill* v. *Wright* (14 App. Cas. 106). Here the guarantee is the guarantee of an existing fact not a representation as to the quantity of the particular cargo which the ship could accommodate.

I think that appeal fails and should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Sturton* and *Sturton.*

Solicitors for the respondents, *Botterell* and *Roche.*

Feb. 5 *and* 6, 1918.

(Before PICKFORD, WARRINGTON, and SCRUTTON, L.JJ.)

HARRISON (T. AND J.) *v* KNOWLES AND FOSTER. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract — Sale of ships — Particulars — Specific existing chattel—Statement as to quality attaching to chattel — Condition or warranty — Innocent misdescription—"Not accountable for errors in description."

The defendants wishing to sell two steamships to the plaintiffs gave to them particulars in writing of the ships, which stated (inter alia) *that the dead-weight capacity of each ship was* 460 *tons. The particulars further contained the words "not accountable for errors in description." The plaintiffs, relying upon the particulars, agreed to buy the ships, and a memorandum of the contract, which made no direct references to the particulars, was signed by the parties on the 9th Dec.* 1915. *The dead-weight capacity of each ship was subsequently found to be only* 360 *tons. The plaintiffs, having accepted the steamers, claimed damages on the ground that the statement as to the capacity of the the ships was a condition of the contract, or, in the alternative, a warranty.*

Held, on the evidence, that the particulars formed no part of the contract, and the defendants were not liable.

Decision of Bailhache, J. (117 *L. T. Rep.* 363; (1917) 2 *K. B.* 606) *affirmed on the facts.*

APPEAL by the buyers from a decision of Bailhache, J., who held that the statement in the particulars as to the dead-weight capacity of the ships formed part of the contract; but that the statement, which was contractual, being a warranty and not a condition, the defendants were protected by the words "not accountable for errors," and were not liable.

R. A. Wright, K.C. and *Claughton Scott* for the plaintiffs.

F. A. Greer, K.C. and *Alexander Neilson*, for the defendants, were not called upon.

PICKFORD, L.J. (after stating the facts).—I take a different view from that reached by Bailhache, J. as to whether the particulars were intended to be made part of the contract. I do not think that they were. The document of the 9th Dec. 1915 was, I think, intended to be a memorandum of the terms of the contract, and, if so, the particulars were not part of the contract. They merely contained a representation made innocently as to the dead-weight capacity of the ships, which may have induced the plaintiffs to enter into the contract, but which afforded no ground for a claim for damages for breach of contract. As regards the decision of Bailhache, J. that the statement in the particulars as to dead-weight capacity was not a condition but a warranty, and that the discrepancy between 460 and 360 tons did not make the ships different commercially from those described, I will say no more than that it is a decision by a learned judge from whom I should be loth to differ; but before I came to a conclusion on that point I should wish to hear the defendants' counsel in support of the decision.

WARRINGTON, L.J.—I agree. The statement in the particulars as to the dead-weight capacity of the ships was a statement preliminary to the contract, and forms no part of it. It was not disputed that the particulars were in one sense the foundation of the contract, and if the statement were untrue in a material particular, though made innocently, it might be a ground for rescinding the contract. But there is a distinction between a statement of fact which gives rise to a right to rescission and a statement of fact which gives rise to a claim for damages. I have nothing to add to what Pickford, L.J. has said as to the decision of Bailhache, J.

SCRUTTON, L.J.—I agree with the result reached by Bailhache, J., but I arrive at that result by a different road. A statement may form part of a contract which the party making

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

it promises to be true, or it may be an innocent representation of fact which he does not promise to be true, but which if untrue in a material particular, and formed part of the inducement to enter into the contract, may give rise to a claim to rescind, but not to a claim for damages. It is a question of intention whether a representation amounts to a warranty: (*Heilbut, Symons, and Co.* v. *Buckleton*, 107 L. T. Rep. 769; (1913) A. C. 30; see also *Wallis, Son, and Wells* v. *Pratt*, 105 L. T. Rep. 146; (1911) A. C. 394). In my opinion the particulars formed no part of the contract between the parties. If they had, I should have desired to hear the defendants' counsel in support of the decision as to the discrepancy between 460 and 360 tons dead-weight capacity.

Appeal dismissed.

Solicitors for the plaintiffs, *William A. Crump and Son.*

Solicitors for the defendants, *Botterell and Roche.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, Jan. 11, 1918.

(Before Bailhache, J.)

Re A Petition of Right of the New Zealand Shipping Company Limited. (*a*)

Shipping—Registration of transfer—Fees—Transfer of mortgage to new trustees on death of one trustee—Whether fees payable—Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 *& 62 Vict. c.* 44), *s.* 3, *sched.* 1 (2).

Sect. 3 *of the Merchant Shipping (Mercantile Marine Fund) Act* 1898 *provides that: "Such fees shall be paid in respect of the registration, transfer (including transmission), and mortgage of British ships as the Board of Trade, with the consent of the Treasury, determine. . . ." Sched.* 2 (2) *of the same Act specifies the fees payable "on transfer, transmission, registry anew, transfer of registry, mortgage, and transfer of mortgage." Certain ships and shares of ships belonging to the N. Z. S. Company in respect of which first mortgages were created were transferred to trustees by a trust deed upon trust to allow the company to use the same. One of the trustees having died, the survivors indorsed the mortgages with the names of themselves and a new trustee as provided by sect.* 37 *and the first schedule of the Merchant Shipping Act* 1894. *Upon presentation of these indorsements to be recorded pursuant to the last-named Act, the registrar of British ships at P. demanded* 135*l.* 7*s.* 6*d. as due under sect.* 3 *of the Act of* 1898. *The company paid this sum under protest, and sought to recover the same by petition of right.*

Held, that the indorsement of the mortgages in the circumstances above set forth and substitution of a new trustee amounted to a transfer of mortgage within sect. 3 *of the Act of* 1898 *although no consideration passed, and that the fees were properly exacted*

Special case stated on a petition of right by agreement between the parties

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

1. These proceedings were commenced on the 29th Dec. 1915 by a petition of right whereby the New Zealand Shipping Company Limited (hereinafter called "the suppliants") sought repayment of the sum of 135*l.* 7*s.* 6*d.* paid by them under protest to the Registrar of British Ships at Plymouth, and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court.

2. The suppliants are a corporation incorporated under the laws of New Zealand and are owners of ships trading between Great Britain and New Zealand and other parts of the world. The said ships are registered under the Merchant Shipping Act 1894 as British ships at the Port of Plymouth.

3. For the purposes of securing an issue of 300,000*l.* debenture stock and interest thereon at 4 per cent. the suppliants executed an indenture dated the 5th Aug. 1896 (hereinafter called "the trust deed"). The parties to the trust deed were the suppliants of the one part and Sir Edwyn Sandys Dawes, K.C.M.G., John Francis William Deacon and William Ewing (hereinafter called "the trustees") of the other part. A true copy of the said deed is attached to and forms part of this case.

4. In accordance with the terms of the trust deed the suppliants proceeded to create and to have registered in the names of the trustees first mortgages over the ships and shares of ships in the trust deed referred to. Each of the said mortgages was in the statutory form and was recorded in the register book at the said port pursuant to sect. 31 of the Merchant Shipping Act 1894.

5. By clause 8 of the trust deed the mortgaged premises were to be held by the trustees in trust to permit the suppliants to hold, enjoy, and use and employ the mortgaged premises and to carry on therewith the business or any of the businesses authorised by their memorandum of association until the security thereby constituted should become enforceable, and then to take possession of and sell the trust premises as therein provided. The suppliants allege and the Attorney-General for the purposes of this case admits that the said security has not at any time become enforceable.

6. In accordance with the terms of the trust deed the suppliants have from time to time withdrawn ships and shares of ships from the trusts of the trust deed replacing them by ships or shares of ships of equal or greater value, and for the purposes of such replacement have created in the names of the trustees for the time being of the trust deed further statutory mortgages of their ships or shares of ships in the like form under the Merchant Shipping Acts, and such mortgages were recorded in the register book at Plymouth pursuant to the provisions of the Merchant Shipping Act 1894.

7. The fees payable under Sect. 3 of the Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 and 62 Vict. c. 44) in respect of each of such mortgages as aforesaid were paid at or about the time of such mortgage being recorded in the register book.

8. The said Sir Edwyn Sandys Dawes died on the 22nd Dec. 1903, and the suppliants by an indenture dated the 21st March 1904, in exercise of the powers conferred upon them by Art. 36 of the trust deed, appointed Bethel Martin Dawes a trustee thereof in the place of the said Sir Edwyn Sandys Dawes, deceased, to act as trustee jointly with the surviving trustees. A true copy of the said indenture is attached to and forms part of this case.

9. Shortly after the execution of such last-mentioned indenture there was written and placed upon each of the mortgages then subject to the trust deed, being the mortgages referred to in the last-mentioned indenture and enumerated in the schedule to that indenture, an indorsement in the statutory form by which the two surviving trustees transferred or purported to transfer

to the said John Francis William Deacon, William Ewing, and Bethel Martin Dawes the benefit of the therein within written security. These indorsements were in the form provided by Sect. 37 of and the First Schedule to the Merchant Shipping Act 1894, and such indorsements were thereupen recorded in the register book at Plymouth pursuant to such last-mentioned section, the fees payable or claimed to be payable under the said Merchant Shipping Act (Mercantile Marine Fund) Act 1898, in respect of each such transfer of mortgage being paid.

10. The said William Ewing died on the 9th Jan. 1915, and the suppliants by an indenture dated the 23rd March, 1915, in exercise of the powers conferred upon them by the terms of the trust deed, duly appointed the Honourable Sir Timothy Augustine Coghlan, I.S.O., a trustee thereof in the place of William Ewing, deceased, to act as trustee jointly with the surviving trustees. A true copy of this indenture is attached to and forms part of this case.

11. On the date of the death of the said William Ewing there were existing twenty-eight mortgages in the statutory form, of certain of the suppliants' ships or the several shares thereof as security under the provisions of the trust deed. The full particulars of the said mortgages are set out in par. 10 of the petition of right herein. All these mortgages then stood recorded in the register book in the names of the said John Francis William Deacon, William Ewing, and Bethel Martin Dawes.

12. On or about the 1st Nov. 1915 the said mortgages were respectively indorsed by the two then surviving trustees, according to the statutory form, with the names of the said surviving trustees and the said Sir Timothy Augustine Coghlan (the new trustee) to effect the purposes for which the said statutory form is provided. No valuable consideration passed between the parties in regard to this transaction. The three copy mortgages with the indorsements thereon attached to this case marked "A," "B," and "C" respectively, are copies of the mortgage of the 27th March 1901, of the mortgage of the 3rd Oct. 1904, and of the mortgage of the 18th April 1904 respectively, mentioned in par. 10 of the petition of right. The mortgages of the 18th July 1900 and the 23rd March 1903 (mentioned in the said par. 10, are in the same form as the said mortgage of the 27th March 1901, and all the mortgages mentioned in the said par. 10 other than those hereinbefore mentioned are in the same form as the said mortgage of the 18th April 1904.

13. Upon presentation of the said indorsements to the Registrar of British Ships at Plymouth (being the port of registry of the said ships) for the recording of the same pursuant to sect. 37 of the Merchant Shipping Act 1894, the said registrar claimed the sum of 135*l.* 7*s.* 6*d.* as due under sect. 3 of the Merchant Shipping (Mercantile Marine Fund) Act 1898 and the first schedule thereto.

14. The registrar arrived at the said sum of 135*l.* 7*s.* 6*d.* by charging on the gross tonnage subject to the several mortgages the maximum scale of fees that is chargeable under the second part of the first schedule to the Merchant Shipping (Mercantile Marine Fund) Act 1898 on the gross tonnage represented by the ships or shares of ships.

15. The suppliants refused to pay the said sum of 135*l.* 7*s.* 6*d.* or any part thereof, contending that the registrar's view of the law was erroneous, and that neither the said sum nor any other sum was legally demandable. The registrar, however, refused to record the said indorsements unless the said sum of 135*l.* 7*s.* 6*d.* was first paid by the suppliants; and it was ultimately arranged with the Treasury, through the solicitor for the Customs and Excise, that the suppliants should pay the said sum of 135*l.* 7*s.* 6*d.* under protest, and bring these proceedings to recover the same, in order that the legality of the said demand of the registrar might be judicially determined. The suppliants accordingly paid the said sum of 135*l.* 7*s.* 6*d.* under protest and presented the petition of rights herein, which has been duly indorsed by His Majesty's fiat.

16. The fees payable under sect. 3 and the first schedule to the Merchant Shipping (Mercantile Marine Fund) Act 1898 are payable into His Majesty's Exchequer.

17. Upon receipt by him of the said sum of 135*l.* 7*s.* 6*d.* the registrar proceeded to perform his statutory duty in respect of each such indorsement—namely, he recorded each of such endorsements by entering in the register book the names of the said John Francis William Deacon, William Ewing, and Sir Timothy Augustine Coghlan as mortgagees of the relative ships or shares of ships, and in the case of each such mortgage by memorandum under his hand notified on the instrument or purported instrument of tranfer that it had been recorded by him, stating the day and hour of record.

18. The said John Francis William Deacon was a holder of some of the said debenture stock. The said Bethel Martin Dawes and Sir Timothy Augustine Coghlan did not hold any of such stock.

19. The suppliants contend that the appointment of a new trustee on the death of a former trustee in the circumstances hereinbefore set forth with the resulting consequences, namely, the indorsement of the mortgages subject to the trusts of the trust deed and substitution of the name of the new trustee on the register of mortgages in the place of the deceased trustee (there being no transmission of any beneficial interest) is not a transfer, transmission, or mortgage of a British ship within sect. 3 of the said Act of 1898, neither is it a transfer of mortgage within the first schedule to the Act so as to attract on registration thereof or otherwise the duties or fees imposed under the said section or schedule. The suppliants also contend that in any view of the case no ships or shares of ships were transferred by the transaction hereinbefore set forth, and that there is no scale of charges fixed by the said schedule that is applicable to the said transaction or the registration thereof, and that nothing is under the said schedule or section chargeable in respect thereof. Further or alternatively the suppliants contend that such transfer, if any, as there may have been of the said mortgages was effected by the said indenture of the 23rd March 1915, being the appointment of the new trustee, and such indenture does not attract the fees or duties imposed by the said section or schedule.

20. The Attorney-General on behalf of His Majesty contends (1) that none of the Merchant Shipping Acts entitled the suppliants to have any of the said instruments of transfer registered without payment of a fee, (2) that the proceeding carried through by preparing and executing the instrument of transfer and getting it recorded by the registrar was in each case a "transfer of mortgage" within the meaning of the first schedule to the Merchant Shipping (Mercantile Marine Fund) Act 1898, so as to carry the statutory fee under the said schedule; (3) that the said fees were in the nature of a payment for the protection and benefits arising to the suppliants out of the registration of the said transfers, and (4) that the facts above in this case stated do not disclose any legal or equitable right in the suppliants to recover back the said sum of 135*l.* 7*s.* 6*d.* or any part thereof.

21. The question of law for the opinion of the court is whether in the facts and circumstances hereinbefore set forth the registrar was, on the true construction of sect. 3 of the Merchant Shipping (Mercantile Marine Fund) Act 1898, and the first schedule thereto and the other provisions of the Merchant Shipping Acts relevant hereto, entitled to refuse to record the said indorsements unless the said sum of 135*l.* 7*s.* 6*d.* was paid by the suppliants, and whether the said sum was in law payable by them as demanded.

22. It is agreed that subject to the approval of the court if the registrar was not entitled to demand the said sum of 135*l.* 7*s.* 6*d.* as a condition of recording the said indorsements there shall be judgment with costs for the said sum in favour of the suppliants. But that if the said fees were payable there shall be judgment dismissing the petition of right with costs against the suppliants.

A. M. Latter.
H. M. Giveen.

Walter Ryde, K.C. and *A. M. Latter* appeared for the suppliants.

H. M. Giveen (Sir *Gordon Hewart* (S.-G.) with him for the Crown).

The arguments of counsel sufficiently appear in the judgment of the court.

Bailhache, J.—This is a question submitted to me by a petition of right on an agreed statement of facts. The question is this: The New Zealand Shipping Company have trustees for debenture holders, and those trustees for debenture holders hold, and are the registered holders of the mortgages on certain ships. One of the trustees died and a new trustee was appointed. The new trustee was appointed by deed, which contained a declaration of transmission or transfer. The New Zealand Company were not satisfied with that, and desired to have the new trustees registered as the mortgagees of the shipping shares which the old trustees held. For that purpose they prepared transfers of mortgages with the names of the new trustees inserted as the transferees, and tendered those transfers for registration. Upon doing so the registrar demanded fees which amounted in the whole to a sum of 135*l.* or thereabout.

The New Zealand Shipping Company denied their liability, but paid under protest under pressure from the registrar, who declined to register without receiving fees; and the point to be determined is whether the registrar was right or wrong in so doing.

These, I think, are all the facts that are necessary to explain the statute upon which the answer to that question depends. The particular statute is the *Merchant Shipping* (Mercantile Marine Fund) Act, 1898, sect. 3 of which provides that "such fees shall be paid in respect of the registration, transfer (including transmission), and mortgage of British ships as the Board of Trade with the consent of the Treasury determine, not exceeding those specified in the first schedule to this Act and all such fee shall be paid into the Exchequer." The rest of the statute does not matter. The words which do matter are "such fees shall be paid in respect of the registration, transfer (including transmission), and mortgage of British ships as the Board of Trade, with the consent of the Treasury, determine not exceeding those specified in the first schedule to this Act." When I turn to the first schedule to the Act I find it is divided into two parts. It is headed "Table of maximum fees to be paid on the registration, transfer, and mortgage of ships." The first part deals with registration, and the second with transfer and mortgage. Under the heading "transfer and mortgage" the schedule runs on thus: "On transfer, transmission, registry anew, transfer of register, mortgage, and transfe of mortgage." Now in this case there was undoubtedly a transfer of mortgage. True it was only a transfer of the legal interest, but still it was a transfer of mortgage. Now Mr. Ryde, in his very careful argument for the New Zealand Shipping Company, has referred me very closely, and quite rightly, to the Merchant Shipping (Mercantile Marine Fund) Act 1898, sect. 3. He says that if you look at that section you will not find there any reference to the transfer of a mortgage, but you will find reference to "registration, transfer (including transmission), and mortgage of British ships." He contended that you must read in after the words "registration," "transfer," "transmission," and "mortgage" the words "of British ships." Read in that redundant way the section would provide that "such fees shall be paid in respect of the registration of British ships, transfer of British ships, transmission of British ships, and mortgage of British ships as the Board of Trade, with the consent of the Treasury, determine. Then he says in any statute of this kind it is no use, it is irrelevant to argue as to what the legislature may have intended; what you have to find out is the exact words of the statute and to construe those words in their natural meaning, and if a man falls within those words so construed he is liable, and if he falls without them he is not liable, however analogous his position may be to that of a person falling within these words.

This Act obviously follows the Merchant Shipping Act of 1894, which deals with the registration, transfer and transmission of ships and with the mortgage of ships, and in the section dealing with the mortgage of ships it deals with the transfer of a mortgage. That is connected up, and I cannot construe this section without reading it in connection with the schedule to the Act. If the section stood alone there would be, I think, notwithstanding that it follows the lines laid down by the Merchant Shipping Act of 1894, a great deal to be said in favour of Mr. Ryde's argument, but when we come to the schedule we find that the schedule does deal in terms with transfers of mortgages and specifies what are the fees to be payable on the transfers of mortgages. Now I must read the section and the schedule together. Mr. Ryde agrees to this, but says with great force that one would not expect the schedule to be a charging schedule; that the schedule is in terms a limiting schedule, limiting the fees which the Board of Trade may charge, and therefore he says one would not expect to find in that schedule a permission to charge on something which is not chargeable under the section which brings the schedule into operation. That is perfectly true, but I do not think that is quite the question which I have to decide. The question which I have to decide is what is the true meaning of the words "registration, transfer (including transmission) and mortgage of British ships" as interpreted in the light of or read together with, is perhaps the better expression, the schedule. Now when I read the section and the schedule together I find that mortgage or transfer—one or the other—by the schedule is extended to mean transfer of mortgages. I am not at all surprised that it is so, because, though for a moment I did forget what I said a couple of minutes ago, that one must look to the words of the Act and not outside it, and look to reason,

there is not the slightest reason why mortgages on registration should be subject to a fee and transfers of mortgages on registration should not be subject to a fee. The registration of a transfer would involve the same amount of trouble and the same care as the registration of a mortgage. So that I am not surprised to find that the schedule does expressly refer to transfers of mortgages and makes fees payable in respect of transfers as well as mortgages.

The point is an extremely short one; Mr. Ryde has been good enough to call my attention to everything which could be said in favour of his clients' view and to the relevant sections of the Merchant Shipping Act of 1894, and I have come to the conclusion that the registrar was right in demanding those fees, and this petition must be dismissed with costs.

Petition dismissed.

Solicitors for the suppliants, *Cattarns, Cattarns, and Harris.*

Solicitors for the Crown, *Solicitor of Customs and Excise.*

Thursday, Feb. 14, 1918.

(Before ATKIN, J.)

THOMSON AND CO. *v.* BROCKLEBANK LIMITED. (*a*)

Charter-party—Clause guaranteeing tonnage and capacity of vessel—Lump-sum freight—Claim by charterers for reduction owing to use of dunnage in loading.

By a clause in a charter-party the owners guaranteed to place 5600 *tons dead-weight cargo capacity and* 300,000 *cubic feet bale-space as per builder's plan at disposal of charterers, provided that if the dead-weight or bale-space placed at the charterers' disposal be less than the above, then the lump-sum freight which was payable was to be reduced* pro rata. *Owing to the use of dunnage for packing the cargo, the charterers were constrained to leave behind* 32 *tons of cargo, in respect of which they claimed a reduction* pro rata *in the freight.*

Held, that, there being no restriction as to what the cargo should be, save that it was to be unobjectionable, the question as to how much dunnage should be used was for the charterers, and their claim failed.

AWARD stated in the form of a special case.

This is the award of Howard Houlder, the umpire appointed by the arbitrators under the submission to arbitration contained in the charter-party hereinafter mentioned, stated in the form of a special case pursuant to sect. 7 of the Arbitration Act 1889.

1. Differences having arisen between the claimants (hereinafter called the shipowners) and the respondents (hereinafter called the charterers) as to the extent of the liability of the charterers in respect of a claim for a lump sum freight made against them by the shipowners under a charter-party made between the said parties and dated the 22nd Dec. 1916, such differences were referred under clause 24 of the said charter-party to Messrs. P. T. Pembroke and F. Newson as arbitrators, and they duly selected me as umpire in accordance with the said clause. The said arbitrators were unable to agree upon their award upon the matters referred to them as aforesaid, and gave me due notice to proceed as umpire to consider and award upon the said matters so referred.

2. The said charter-party (a copy of which is annexed to this case) was entered into by the respondents as the charterers and the claimants as the owners of the steamship *Benledi*, therein described, amongst other things, as of about the cubic capacity for cargo of 300,000 feet bale-space, excluding peaks and lazarette, and of 5600 tons dead-weight cargo capacity, and provided by clause 1 that the said steamer should proceed from Singapore to Calcutta and there load in a customary manner as ordered by the charterers or their agents a full and complete cargo of unobjectionable merchandise which the charterers bound themselves to ship, not exceeding what she could reasonably stow or carry over and above her tackle, apparels, provisions, coals, and furniture, and should therewith proceed to her specified port or ports and deliver the same on being paid freight at a lump sum of 78,000*l.* if to two ports, 500*l.* less if to one port only. The said clause was continued by writing in the margin thereof as follows: "Owners guarantee to place 5600 tons dead-weight cargo capacity and 300,000 bale-space as per builder's plan at disposal of charterers. If the dead-weight or bale-space placed at charterers' disposal be less than the above then the lump sum is to be reduced *pro rata.*"

3. Clause 2 provided amongst other things that nothing therein should exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage or insufficient dunnage or ventilation.

4. Clause 13 provided that the vessel's holds were to be sufficiently ventilated as customary, and that all requisite mats and dunnage were to be found by the steamer.

5. The said steamship duly arrived in Calcutta, and the charterers were at all times ready to ship 5600 tons dead-weight of cargo of unobjectionable merchandise.

6. The dead-weight cargo capacity in fact placed at the charterers' disposal by the shipowners was, owing to various causes, less than 5600 tons. The deficiency was not in any way attributable to the charterers.

7. The dead-weight capacity of the steamship was occupied to the extent of 32 tons by dunnage provided and used by the shipowners in stowing the cargo shipped; and by reason thereof cargo to the extent of 32 tons, which the charterers were ready to ship, remained unshipped. The cargo shipped was of the description contemplated by the charter-party.

8. The dunnage in question was necessary to enable the shipowners to fulfil their obligation under the charter-party to properly stow and ventilate the cargo in fact shipped.

9. The only dispute between the parties and submitted to my determination was whether the 32 tons of dead-weight so taken up should be taken into account in calculating the *pro rata* reduction in the said lump sum of 78,000*l.*

10. The shipowners contended that on the true construction of the said charter-party and guarantee therein, in par. 2 hereof set out, inasmuch as the amount of dunnage depended on the nature of the cargo, which within the limits of the charter was in the discretion of the charterers, the said 32 tons of dunnage represented to the extent thereof dead-weight cargo capacity placed at the disposal of the charterers by them, and that, although the dead-weight placed by them at the disposal of the charterers was in fact less than 5600 tons, I could not in law take into account the tonnage taken up by dunnage for the purpose of calculating and allowing a *pro rata* reduction in the said lump sum of 78,000*l.* in respect thereof.

11. The charterers contended that the dead-weight placed at the charterers' disposal should be calculated on the dead-weight tonnage in fact placed at their disposal and available for cargo shipped by them, and that the said 32 tons taken up by dunnage should be excluded from such calculation, and that, inasmuch as

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

the cargo shipped by them was such as was contemplated by the said charter-party, and inasmuch as the dead-weight placed at their disposal for such cargo by the shipowners was in fact less than 5600 tons, they were entitled to a *pro rata* reduction in respect of the said 32 tons of dead-weight so taken up by the said 32 tons of dunnage.

The question for the opinion of the court is whether, upon the terms of the said charter-party and guarantee therein contained and the facts herein stated, in law it is open for me to exclude the 32 tons of dead-weight taken up by the said 32 tons of dunnage from the calculation of the dead-weight cargo capacity placed at the disposal of the charterers by the shipowners, and under the said guarantee to reduce the said lump-sum freight *pro rata* by reason thereof.

If the court should be of opinion in the affirmative, then I find and award that the claimants are only entitled to the lump-sum freight subject to a *pro rata* reduction in respect of the said 32 tons.

And I award and direct that the claimants do pay to the respondents their costs of the reference and also the costs of this my award. If the court should be of opinion in the negative, I find and award that the claimants are entitled to the lump-sum freight without any reduction in respect of the said 32 tons, and I award and direct that the respondents do pay to the claimants their costs of the reference and also the costs of this my award.

Sir *Robert Aske* for the shipowners.—The short point is that the charterers contend that the space occupied by 32 tons of dunnage should have been occupied by cargo; but it was for the charterers to say what the cargo should be, and, so long as it was unobjectionable, the shipowners were not concerned. The matter is not different in principle from a case in which the charterer cannot get the weight into a ship owing to the peculiar nature of the cargo. He referred to

Millar v. *Steamship Freden*, *ante*, p. 166; 117 L. T. Rep. 446; (1917) 2 K. B. 657; affirmed on appeal, see *ante*, p. 247; 118 L. T. Rep. 522; (1918) 1 K. B. 611;
M'Kill v. *Wright*, 14 App. Cas. 106;
Carnegie v. *Conner*, 6 Asp. Mar. Law Cas. 447; 61 L. T. Rep. 691; 24 Q. B. Div. 45.

Stuart Bevan for the charterers.—The shipowners contend, in effect, that dunnage is cargo, but that is not so. The guarantee (see clause 2 of the special case, *sup.*) is, however, very specific. It is true there must be good stowage, but by clause 13 of the charter-party "all dunnage is to be found by the steamer." It was for the owners to show that the cargo was of such an out-of-the-way nature that more dunnage than usual was necessary. In *M'Kill* v. *Wright* (*sup.*) the guarantee was in different terms.

ATKIN, J.—This is a case stated by an arbitrator in a dispute arising under a charter-party entered into in Dec. 1916 between the owners of the ship *Benledi* and the charterers, who chartered it on a voyage charter. The question between the parties arises on the terms of a guarantee of dead-weight capacity. The charter-party provided that the ship was to proceed to Calcutta and there load a full and complete cargo of unobjectionable merchandise, not exceeding what she could reasonably stow and carry, and she was to proceed to certain English and Scottish ports. The only other provision I need deal with is under clause 13, which says the vessel's holds are to be sufficiently ventilated as customary, and all requisite mats and dunnage are to be found by the steamer. I should have said that in the first part of the charter-party there is a description of the ship. She is described as about 2509 tons net register tonnage, her cubic capacity for cargo 300,000 feet bale-space as per builder's plan, and of 5600 tons dead-weight cargo capacity.

But that description in the charter-party really is not material, because there is an express guarantee written in: "Owners guarantee to place 5600 tons dead-weight cargo capacity and 300,000 cubic feet bale-space as per builder's plan at disposal of charterers. If the dead-weight or bale-space placed at charterers' disposal be less than the above, then the lump-sum freight is to be reduced *pro rata*." The charterers did in fact load a certain cargo on board the ship of a kind contemplated by the charter-party as found by the arbitrator; but he finds that the dead-weight cargo capacity placed at their disposal was, owing to various causes, less than 5600 tons, and the only cause we are concerned with here is in respect of the 32 tons of dunnage.

The arbitrator finds that the dead-weight capacity of the ship was occupied to the extent of 32 tons by dunnage provided and used by the shipowners in stowing the cargo of the ship, and, by reason thereof, cargo to the extent of 32 tons, which the charterers were ready to ship, remained unshipped. The cargo shipped was of the description contemplated by the charter-party. The dunnage in question was necessary to enable the shipowners to fulfil their obligations under the charter-party to properly stow and ventilate the cargo in the ship, and the only question that arises is whether or not the lump-sum freight ought to be reduced in respect of that 32 tons. The charterers say that to that extent they had not 5600 tons dead-weight placed at their disposal.

That turns on the meaning of the guarantee, and it appears to me that the authorities point to this, that in the absence of express words in the charter-party, or in the absence of words by which the charter-party would be otherwise construed, a guarantee in these terms is a guarantee of what Rowlatt, J. in the case of *Millar* v. *Steamship Freden* (*sup.*) described as the abstract lifting capacity of the ship. Of course, it may be different. In the case of *M'Kill* v. *Wright Brothers and Co.* (*sup.*) there was a charter-party which provided that the ship should load all such goods and merchandise as the charterers should tender alongside for shipment, not exceeding what she could reasonably stow and carry, and there was a guarantee by the owners guaranteeing that the ship should carry 2000 tons dead-weight. There was also a note on the charter-party specifying the largest parts of the machinery that where to be included in the cargo.

The charterers there tendered a cargo not in excess of 2000 tons dead-weight, but consisting of railway machinery, with pieces of machinery much more numerous than specified in the marginal note. It was held there that although the cargo carried was less than the guaranteed dead-weight, yet because the charterers tendered machinery in excess of their specification they were not entitled to the benefit of the stipulation for the reduction of the freight. The value of that case lies, in the opinion of their Lordships,

as to the proper construction to be placed on the guarantee. Lord Halsbury in giving judgment, at p. 114, said: "The guarantee is the dead-weight carrying capacity, and no one acquainted with ships or mercantile usage could suppose that such a guarantee would involve the obligation to carry any sort of cargo whatsoever up to the guaranteed amount. The guarantee is as to dead-weight. But I so far agree with Lord Young that, if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried, it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to the particular subject-matter as to which they were contracting, but I fail to see that the learned judge is justified in holding that this was an ordinary cargo 'exactly such as was expected.'" Lord Watson uses words of the same kind. He says (at p. 116): "Business men are in the habit of making shipping contracts in these general terms for the purpose of a particular adventure; and whenever it appears that the precise nature of the cargo which the charterers had in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes a matter of reasonable inference that such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description."

So that there may be a guarantee that the vessel would carry a particular cargo, or there may be a guarantee merely in general terms. I think that in the absence of special circumstances or special words, which do not exist in this case, the guarantee is limited to abstract lifting capacity. It is expressed in somewhat similar terms in the case of *Carnegie* v. *Conner* (*sup.*), in which judgment was delivered nine months after *M'Kill* v. *Wright*. *M'Kill* v. *Wright* does not appear to have been cited, but it does not appear to me that the effect of *M'Kill* v. *Wright* would be to vary the judgment given by the learned judges. There was a guarantee. The owners guaranteed the ship to carry at least about 90,000 cubic feet, or 1500 tons dead-weight, of cargo, and Baron Huddleston says (at p. 47 in the Law Reports): "As I read it, it was nothing more than a contract that the cubical contents of the space in the ship's hold available for the stowage of cargo were not less than about 90,000 cubic feet, and that 1500 tons dead-weight were capable of being put on board without sinking the ship below the proper depth." Mathew, J., whose opinion in this matter is, of course, of the very highest weight, says: "I am of the same opinion. I do not think that there is any indication in this charter-party of an intention to guarantee that the ship shall carry the cargo specified in the charter-party to the amount there mentioned. The evidence which was tendered by the defendant that this ship was of an actual carrying capacity of 90,000 cubic feet, or 1500 tons, and which was objected to, appears to me to have been perfectly relevant to the issue and ought to have been received." Therefore I construe this guarantee as meaning that the ship would carry 5600 tons, if they were put upon her, without sinking her below the proper depth. The shipowner in a case of this kind has no knowledge as to the nature of the cargo that is going to be put on board, and it is quite plain from the facts as found that the cargo which could have been put on board her if it had not required dunnage and matting might have been of a weight of 5600 tons. The charterer has got the right to tender what cargo he pleases, and his cargo may require to be protected by dunnage or matting, and if he carries a very mixed cargo, which is a perfectly reasonable cargo to carry, he may require a very large number of separation boards or matting. All that is for his account. He has the space and the capacity put at his disposal for the purpose of carrying cargo. He may fill it up with cargo of the full weight, but if he chooses to carry cargo that requires a certain amount of protection, then he cannot use the space put at his disposal so as to carry the full amount of cargo that he would have carried if he had not required dunnage and matting.

I agree with what Rowlatt, J. said in a similar case (*Millar* v. *Steamship Freden*, *sup.*). It could not have been contended that the guarantee was a guarantee to carry 2000 tons of reasonable cargo or anything of that sort. It appears to me that if the owner places at the disposal of the charterer a ship having a capacity to carry 5600 tons of cargo, he has satisfied his contract. In this case he has done it. The matter is made quite plain by reference to the cubical capacity, which is to be gauged by reference to the builder's plan, and it is obvious that what is meant in these circumstances is that there is 300,000 cubic feet. This can be seen by looking at the plan which is available for carrying cargo. That space, even if is filled up with dunnage, will be there. The dunnage is used for the charterer's account, and he cannot complain that there has been a breach by the owners of their guarantee. I must answer the question put to me in the negative. The award will stand as awarded by the arbitrator, and the charterers must pay the costs of the hearing here.

Award affirmed.

Solicitors for the charterers, *Holman, Fenwick,* and *Willan.*

Solicitors for the owners, *Rawle, Johnstone,* and *Co.*, for *Hill, Dickinson,* and *Co.*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Dec. 19 *and* 21, 1917.

(Before Sir S. T. EVANS, President.)

THE BAWEAN. (*a*)

Prize Court—Enemy goods—Goods shipped in enemy vessel prior to outbreak of war—Vessel taking refuge in neutral port—Sale of goods to neutral merchants whilst in neutral port—Transitus—*Transhipment into neutral vessel—Goods brought in neutral vessel to British port—Warehousing in British port—Seizure whilst in port as prize—Protection of neutral flag—How far applicable when goods are transferred* in transitu—*Declaration of Paris, art.* 2.

A cargo, consisting of chests of tea, was bought by and consigned to a German firm from a neutral

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

port. The tea was shipped on a German steamship bound for a German port. The whole transaction was carried out and the vessel sailed from the neutral port some days prior to the outbreak of the war. Upon hearing of the commencement of hostilities the vessel proceeded to another neutral port, where she arrived on the 7th Aug. 1914, and remained there. The tea was unshipped, and in May 1916 it was sold to a firm of neutral merchants and paid for by them. It was then shipped on a neutral vessel and consigned to a firm of brokers in England for the purposes of sale in this country. On the arrival of the neutral vessel at the port of London, the tea was unshipped and warehoused in the port, but it was subsequently seized and claimed by the Crown as enemy property. This claim was resisted by the neutral merchants who had purchased the tea on the ground that the same was neutral property and had not an enemy destination.

Held, that, according to prize law, goods which belong to an enemy when they are once shipped retain their enemy character until they reach their destination, and no transfer will be effective so as to defeat the right of belligerents to capture unless the transferee has taken possession of the goods, and that therefore, the destination of the tea being a German port, it could not be transhipped from a German vessel to another vessel with a changed destination so as to take away its enemy character.

Held, also, that art. 2 of the Declaration of Paris had no application under the circumstances of the case.

THIS was an action on behalf of the Crown for the condemnation of a cargo of tea on the ground that it was enemy property.

The cargo consisted of 922 chests of tea, which were shipped in July 1914 at a China port on the German steamship *Kleist*. The tea was bought by and consigned to the firm of Messrs. Michaelsen and Sons, of Bremen. The *Kleist* was bound for Hamburg, but, having heard of the outbreak of war on the 4th Aug. 1914, she took refuge three days later—namely, on the 7th Aug. 1914—at the port of Padang, in Sumatra. The tea was stored at Padang, and on the 27th May 1916 it was sold by Messrs. Michaelsen and Sons to a Dutch firm, Messrs. Goldschmidt and Zonen, of Amsterdam On the 6th Sept. 1916, fresh bills of lading were made out and the tea was reshipped on the Dutch steamship *Bawean* for London. The transaction was carried out at Padang by Messrs. E. L. Tels and Co., the agents for Messrs. Goldschmidt and Zonen, and the tea was consigned to Messrs. Goldschmidt and Zonen at London, where it was arranged that a firm of brokers, Messrs. Batten and Co., should sell it for them. Although the purchase price of the tea was paid to Messrs. Michaelsen and Sons by a cheque drawn in their favour by Messrs. Goldschmidt and Zonen, it was clear from the various documents produced that the purchase was really made on a joint account of Messrs. Goldschmidt and Zonen and Messrs. E. L. Tels and Co. The *Bawean* duly arrived at London on the 12th Dec. 1916, and the tea was discharged and warehoused in the port of London, where it was seized as prize on the 24th Jan. 1917. The claim of the Crown was resisted by Messrs. Goldschmidt and Zonen on the ground that they had purchased the tea during transit, and that therefore it was not enemy but neutral property.

Dunlop for the Procurator-General.—When all the facts and the documents in connection with this case were examined it was clear that the case was not a genuine one. But, even assuming that the sale of the tea was genuine, it was still liable to condemnation on the ground that it was enemy property prior to transhipment. It was well established that in a state of war property continued as at the date of shipment until actual delivery, and no transhipment such as had taken place in the present instance could affect that rule. Such a transfer as the present was a fraud on belligerent rights. The tea was the property of German merchants when it was shipped, and, in spite of the transactions at Padang, it still continued to be enemy property, which it also was when seized in London. He cited

The Vrow Margaretha, Roscoe's English Prize Cases, vol. 1, 149; 1 Ch. Rob. 336;
The Jan Frederick, Roscoe, vol. 1, 434; 5 Ch. Rob. 127;
The Jeanne, 13 Asp. Mar. Law Cas. 567; 115 L. T. Rep. 838; (1917) P. 8;
The United States, 13 Asp. Mar. Law Cas. 568; 116 L. T. Rep. 19; (1917) P. 30.

Stuart Bevan for the claimants.—There was no evidence upon which the Crown could base its allegations of bad faith on the part of the claimants. The transaction was a perfectly *bonâ fide* one, and the claimants had obtained possession of the tea through their agents, Messrs. E. L. Tels and Co., at Padang. There was an executed contract of sale and delivery, and that distinguished the present case from those cited by counsel for the Crown. But, even if it was held that the transfer was of such a nature as not to change the character of the goods from enemy property to neutral property, the claimants were entitled to claim the protection of art. 2 of the Declaration of Paris, which provided: "The neutral flag covers enemy's goods, with the exception of contraband."

Dunlop in reply.

THE PRESIDENT.—In this case 922 cases of tea, weighing about 32 tons gross and about 24 metric tons net, were shipped on board a German vessel, the *Kleist*, belonging to the Norddeutscher Lloyd. The goods were destined for Hamburg, and it has been assumed that they were shipped on board this German vessel before the outbreak of war. But after the outbreak of war—namely, on or about the 7th Aug. 1914—the German vessel took refuge in the port of Padang, in Sumatra. She took refuge in order to escape capture herself, and no doubt also to protect the German goods which were on board from capture.

The vessel with the goods on board remained at Padang from the 7th Aug. 1914 until May 1916, a period of about a year and nine months. Towards the end of this time an arrangement was come to between Messrs. W. B. Michaelsen and Sons, a German firm of Bremen, to whom the tea was consigned, and Messrs. J. Goldschmidt and Zonen, a Dutch firm of Amsterdam, for the purchase of the tea. That arrangement was carried out by a contract of sale entered into on behalf of Messrs. Michaelsen and Sons, the owners of the tea, by a man named Wyngaard, of Amsterdam, and is evidenced by a letter dated the 22nd May 1916. The firm of Messrs. E. L. Tels and Co., of Amsterdam, who also had a

branch as agents at Padang, appear to have acted in the matter for the purchasers, Messrs. Goldschmidt and Zonen, and from the documents which have been put in it would seem that at that time and for some time afterwards Messrs. Tels and Co. and Messrs. Goldschmidt and Zonen were involved in this transaction on a joint account, a transaction which it was anticipated by both firms as being likely to be exceedingly profitable, as the tea was bought at a low price and it was thought likely that it would be sold in London at a much higher price. Pursuant to that arrangement for a joint adventure, Messrs. Goldschmidt and Zonen sent to Messrs. Tels and Co. an account on the 3rd Nov. 1916, giving certain figures with a balance amounting to a total of over 10,000 florins, for which they sent a cheque. It is said that on that date—namely, the 3rd Nov. 1916—Messrs. Tels and Co. backed out of the joint transaction, and were allowed to remain outside it by Messrs. Goldschmidt and Zonen. No information has been given to the court as to what became of the cheque to which I have just referred, and I am completely in the dark as to it. I do not know, therefore, how matters stand between Messrs. Tels and Co. and Messrs. Goldschmidt and Zonen, and the absence of information certainly leads to suspicion. At any rate, it was intended that the tea should be got hold of at Padang, that it should be shipped on board the Dutch vessel, the *Bawean*, and sent for sale to London, and that the bills of lading should be made out to the order of Messrs. Goldschmidt and Zonen. The actual sale of the tea was to be carried out in London by a firm of brokers called Messrs. Batten and Co. As all these matters have been set out, it has been suggested that there is plenty of evidence of *bona fides* on the part of the claimants; but when I consider the other matters connected with the case I am not so certain upon that point. Of course, the *Bawean* could not carry the tea to Hamburg without the risk of its being captured, apart from anything else, and no doubt it was seen by Messrs. Michaelsen and Sons and Messrs. Goldschmidt and Zonen that if they were to make any profit out of the sale of the tea the only way to manage it was to arrange that the cargo should be sent to and sold in some neutral country or London.

Then there are two questions which arise for my consideration—one of fact and the other of law. That of fact is the real object of the plan adopted by the parties to the transaction. I have no doubt that it was the intention—a very natural intention—on the part of Messrs. Michaelsen and Sons to save something from the burning. They had a valuable cargo of tea, which would become useless if it was kept any longer, and which they themselves could not tranship without a certain amount of risk. The tea could not be sent to Germany.

It was then that they got into communication with Messrs. Goldschmidt and Zonen, who were acquainted with the whole facts of the situation, and who were not likely to be unwilling to derive some benefit for themselves from dealing with a cargo which was, if left in its then condition, practically abandoned. It was then that the arrangement was made by which the tea was sold and transhipped into the *Bawean* for transport to London.

The object on the part of both Messrs. Michaelsen and Sons and Messrs. Goldschmidt and Zonen, in my view, was to defraud the belligerents of their rights of capture, and with that object, and by the arrangement made through Messrs. Tels and Co., the goods were transhipped from the German vessel to the Dutch vessel. There was a communication with the Consuls, and the result of the communication was this: Messrs. Tels and Co. asked the British Vice-Consul at Padang, and afterwards the Consul at Batavia, who was in a superior position, if there was any objection to shipment, and, reading the documents in plain English, Messrs. Tels and Co. must have represented to the people concerned that there was no objection on the part of the Consul. In one sense this was literally true; but not, I think, in the sense which was accepted by the parties. The answer of the Consul, Mr. Beckett, to the Vice-Consul at Padang did not authorise the Vice-Consul at Padang to express the opinion as coming from Mr. Beckett that he had no objection to the shipment. The statement in fact is, "I am not going to take any steps to object," but the instructions given by Mr. Beckett were, "You must express no official opinion." Saying that he "had no objection" would be expressing an opinion.

In this way the goods were got on the Dutch steamer from the German steamer. And having thus dealt with the question of fact it is now necessary to consider the question of law. It is quite clear law, according to the Prize Courts in this country, and in America too, and, I think, also in Germany, that goods which belong to an enemy when they are once shipped, and therefore become subject to the risks of capture by belligerents, will retain their enemy character until they reach their destination, and no transfer to a neutral will be effective so as to defeat the right of belligerents to capture unless the transferee has actually taken possession of the goods. I think that the destination of these goods, in the sense of that principle of law, was the destination of Hamburg, and, in my view, the goods could not be transhipped from a German vessel on to another vessel with the destination changed so as to affect the right of belligerents. If that is not so, the effect would be that at the beginning of war all cargoes upon German ships which might then be afloat might, if they could, be transferred legally to any neutral, and therefore all those cargoes would escape capture. That, I think, is not prize law. The doctrine has been laid down quite clearly in several cases. I am not going through them in detail, but I think it is, perhaps, well that I should refer to two cases. In the case of *The Jan Frederick* (*ubi sup.*) the question was fully gone into by Sir William Scott. The effect of that is this: to allow such transference while goods were *in transitu* after the outbreak of war—and the same rule applies where the outbreak of war is imminent—would be to encourage frauds on the rights of capture by belligerents, and you cannot always prove the objects of men's minds. That is, in order to close the investigation of any difficult matters of that kind, the law has pronounced that such transfers as this cannot be validly made during the war, because it would be so easy thereby to defeat the rights of belligerents.

The other case is that of *The Carl Walter* (4 Ch. Rob. 207), and I cite it because it illustrates the same principle.

With reference to these goods, both on the facts and on the pure question of law, I think this transfer to Messrs. Goldschmidt and Zonen was invalid. The goods still partook of an enemy character at the time that they were upon the sea, after they were transferred from the German vessel.

One other circumstance must be referred to. Mr. Stuart Bevan said he claimed some protection because the goods were under the Dutch flag. In my view, that does not arise. If the Declaration of Paris, upon which he relied, ever was a protection for this vessel, which I do not think it ever was, it had ceased to have any effect at the time when the goods were in port and had been discharged from the Dutch vessel. I condemn these goods, therefore, or their proceeds, as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Waltons* and *Co.*

House of Lords.

Dec. 10, 11, 13, 1917, *and Jan.* 31, 1918.

(Before the LORD CHANCELLOR (Lord Finlay), Viscount HALDANE, Lords DUNEDIN, ATKINSON, and SHAW.)

LEYLAND SHIPPING COMPANY LIMITED *v.* NORWICH UNION FIRE INSURANCE SOCIETY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance (Marine)—Perils of the sea—Exception of "consequences of hostilities"—Vessel torpedoed—Ship brought into harbour—Transfer to outer berth — Grounding — Loss—Proximate cause—Liability of insurer.

The plaintiffs insured their vessel with the defendants against ordinary marine perils. The policy contained the following clause: "Warranted free from 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 vessel was torpedoed near Havre, but her pumps kept her afloat until she got 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 she ultimately became a total wreck.

In an action by the shipowners claiming to recover as for a loss by perils of the sea:

Held, that the torpedoing of the vessel was the proximate cause of loss, and therefore the plaintiffs could not recover under the policy.

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

Decision of the Court of Appeal (*reported* ante, *p.* 4; 116 *L. T. Rep.* 327; (1917) 1 *K. B.* 873) *affirmed.*

APPEAL by the plaintiffs from a decision of the Court of Appeal, reported *ante*, p. 4; 116 L. T. Rep. 327; (1917) 1 K. B. 873, which affirmed the judgment of Rowlatt, J., reported 13 Asp. Mar. Law Cas. 426; 115 L. T. Rep. 219.

Leslie Scott, K.C. and *Raeburn* for the appellants.

R. A. Wright, K.C. and *Simey* for the respondents.

The facts and arguments are sufficiently stated in the considered judgments delivered by their Lordships.

The LORD CHANCELLOR (Lord Finlay).—This is an appeal from a judgment of the Court of Appeal affirming the judgment of Rowlatt, J. in favour of the respondents, the defendants in the action.

The action was brought by the appellants on a policy of marine insurance upon the steamship *Ikaria*. This policy was in the ordinary form covering, *inter alia*, perils of the seas, but contained the following clause: "Warranted free of capture seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

The appellants (plaintiffs) alleged that the vessel was lost by perils of the seas, while the respondents (defendants) contended that the loss was in consequence of hostilities or warlike operations, and was therefore excluded by the clause above quoted.

The *Ikaria* was on a voyage from South America to Havre and London. When stopped, on the 30th Jan. 1915 (Saturday) about twenty-five miles north-west of Havre for the purpose of taking up a pilot, she was struck abreast of No. 1 hatch by a torpedo fired by a German submarine. Two large holes were made in the vessel and No. 1 hold filled with water. The crew went on board a tug, fearing that the *Ikaria* might sink at once, but as she kept afloat they returned to her and brought her into the outer harbour of Havre. She was moored alongside the Quai d'Escale, where she was always afloat, and would have been saved if she had been allowed to remain there. A gale sprung up on the 31st (Sunday), causing the vessel to range and bump against the quay. The port authorities were apprehensive that she might sink, blocking the quay, which was urgently required for purposes connected with the war, and ordered that she should leave the quay and either be beached outside the harbour altogether or anchored in the outer harbour near the breakwater spoken of in the evidence as the Batardeau. The latter position was chosen, and the vessel was anchored with her head towards the Batardeau. There was a good deal of wind and sea. As the vessel was very much by the head in consequence of the damage done by the torpedo, at each low tide the vessel took the ground forward, while the rest of her structure was water-borne. She was thereby subjected to considerable strain, and the bulkhead between No. 1 and No. 2 holds having been weakened by the explosion of the tornado, the forward end crumpled up and she became a total

loss on Tuesday, the 2nd Feb. The appellants (plaintiffs) contended that her loss was due to the perils of the seas at her anchorage in the outer harbour. The respondants (defendants) contended that it was caused by hostilities. Both courts below have held that it was so caused by the torpedo, and that, as the warranty applied, the respondents were not liable.

In my opinion, Rowlatt, J. and the Court of Appeal were right in holding that the loss of this vessel was a consequence of hostilities, and therefore not covered by the policy sued on.

The only chance of saving the vessel after she had been struck by the torpedo was to take her into port, and Havre was obviously the proper port to take her to. The decision of the harbour authorities that the vessel could not be permitted to remain at the Quai d'Escale was final. That decision was given for very intelligible and weighty reasons, and there is no ground for thinking that the port authorities committed any error of judgment in ordering the removal, but those in charge of the ship had to obey the order, right or wrong. The Quai d'Escale consequently was no longar available for the vessel. The case must be dealt with just as if the episode of the vessel's being taken to that quay had not occurred, and she had been taken in the first instance straight to the anchorage near the Batardeau. What was the cause of her becoming a total wreck there? In my opinion, in substance, it was the injury by the torpedo.

The injuries received from the torpedo made it impossible for the vessel to keep the sea. She was taken into port. At the anchorage to which she was ordered she took the ground forward at low tides as her draught forward was 32 feet (owing to the injury caused by the torpedo) as against 16ft. aft, and she was greatly strained by the seas in this position. No. 1 bulkhead, which had been seriously weakened by the explosion of the torpedo, gave way, the vessel breaking her back, crumpling up forward and becoming a total wreck. She was not lost by any new peril, but by the natural consequences of the explosion of the torpedo.

On the 3rd Feb. 1915 the captain, writing to his owners from Havre, says that on the 2nd Feb. the Nos. 1 and 2 bulkheads gave out with a crash, and goes on to say: "I am practically certain that the vessel's back is broken in two places between the bridge and the stem—viz., on the fore part of No. 2 hatch, and again abreast the No. 1 hatch, and the side plating in both those places is very badly buckled, and the sheer of the ship is quite broken from the bridge forward to the forecastle hold, which is plainly visible from the shore." In a letter of the 4th Feb. he says: ". . . the ship from forward to amidships has absolutely foundered. Apparently the torpedo has wrecked the ribs and keelsons in the forward end, and then her weight being waterbore aft and on the ground forward has broken her back and opened her out forward. Her condition is hopeless." In his letter of the 10th Feb. the following sentence occurs: "It seems evident from the very sudden way in which the forward end of the vessel crumpled up that her structure was so weakened by the terrific force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads and afterwards by the bursting strain of the cargo as it swelled in the holds."

It was argued for the appellants that the torpedoing could not be regarded as the proximate cause of the loss of the vessel, as there was a *novus casus interveniens*—namely, the grounding in the outer harbour and the breaking of the back of the vessel by the consequent straining. Rowlatt, J. deals with this contention in the concluding passage of his judgment: "Was the grounding a new thing supervening which caused the damages? I cannot think so at all. Those were circumstances which, if you like, thwarted the attempt to save the ship. I grant you that, but they did not constitute a new departure as a casualty. I really 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. She has to move on again. She goes to a berth where she cannot be saved, and in fact where, in the effort to keep her there, she receives some slight further damage; but all through she is under the operation of the original torpedoing, and all the struggles that she made, whether she received further injury in the course of them, as she did to some extent undoubtedly, when she bumped on the quay and took the ground at the Batardeau, and all the efforts she made before she became a total loss, were merely efforts to escape from that casualty in the grip of which she was throughout." Swinfen Eady, L.J. says: "As the policy against sea perils in the present case contained a warranty against all consequences of hostilities or warlike operations, the question arises: Was the loss, assuming it to be by a peril of the sea, the proximate consequence and effect of hostilities? The facts show that the vessel was severely damaged by a torpedo, and that although every effort was made to save her, she sank, and was lost early on the third day afterwards. If to prevent her sinking she had been run ashore immediately after the accident and had become a total loss, the loss would certainly have been the direct consequence of hostilities. Does it make any difference that between two and three days were spent in abortive and unavailing efforts to save her? She was in imminent risk of sinking from the moment of being injured; she was removed from the Quai d'Escale because of the evident risk of her sinking there; she was unable to remain at the Quai, and never was able to reach and remain in any place of safety; the fact that she was so much down by the head prevented her removal to the inner harbour; she had the choice of going outside the breakwater with a view to being beached, or of remaining within the outer harbour; the latter was chosen, but, having regard to her draught, she was bound to ground at every tide at the place where she was moored, unless she could be considerably lightened and her draught lessened, which proved to be impracticable. The risk of her grounding there was deliberately incurred as part of the salvage operations. The train of causation from the act of hostility to the loss was unbroken. She was never out of immediate danger from the time she was first injured to her final loss, and the efforts to save her were acts done by way of salvage. There was not any new intervening cause of loss after the injury by torpedo, no new casualty causing the damage."

Scrutton, L.J. was disposed to differ, although in consequence of his view of the effect of the decision in *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 483; 71 L. T. Rep. 238; (1894) 2 Q. B. 548) he in the end concurred with the other members of the Court of Appeal. After referring to the finding of Rowlatt, J. that the vessel was sunk from her bulkheads giving way, having been weakened by the explosion, and from the strain of the grounding, or, in other words, from grounding in her damaged condition, Scrutton, L.J. goes on to say: "I agree with these findings, but I think it also follows, whatever the legal effect may be that the sinking did not necessarily follow from the explosion; that is to say, that, with fine weather and a stay in the first berth, the ship would have been saved; with the weather she in fact met, and in the berth to which in consequence of that weather she was ordered, she was lost."

I agree with Rowlatt, J. and the majority of the members of the Court of Appeal in their view of the facts and of the legal effect of these facts, and I cannot share the doubts expressed by Scrutton, L.J. The vessel could not remain at the Quai d'Escale, and her short stay there was merely an interlude which may be disregarded. In taking the vessel to the anchorage near the Batardeau, the best practicable course was adopted to save her. The effort was unsuccessful. She sustained further damage there owing to the fact that in consequence of the injury by the torpedo she took the ground foward at low tides. She was consequently strained severely by the motion of the seas and this, coupled with the weakened condition of the bulkhead caused by the explosion, led to her ultimate break-up. Such circumstances do not prevent the injury by the torpedo from being the proximate cause of the loss; indeed they appear to me to establish that the loss was a direct consequence of hostilities.

A great many cases were cited to your Lordships. I do not propose to deal with them in detail. The principles of law are well settled, and the question here is really one of fact. A great deal was said in the Court of Appeal about the case of *Reischer* v. *Borwick* (*sup.*). I cannot see that that case introduced any novelty into the law of marine insurance. The policy was against damage received in collision with any object. The ship ran against a snag, which made a hole in her. The vessel was anchored and the hole plugged, and a tug was sent to bring her to dock for repairs. Owing to the motion through the water when being towed, the plug came out and the ship sank. It was held that the loss of the ship was covered by the policy. It is obvious that in that case there was not the intervention of any new cause. The hole occasioned by the collision was the cause of the loss. The fact that ineffectual attempts had been made to stop the hole, and that the plug came out, did not introduce any new element of causation. We have had a good deal of discussion as to the decision in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518), a case in which the damage was caused by rats gnawing a hole in a pipe, through which sea water entered and damaged the cargo of rice. There was an exception in the charter-party and bill of lading for dangers and accidents of the seas, and it was decided that the shipowners were not liable. For the clear understanding of that case it is desirable to call attention to a fact which was pointed out by Lord Dunedin in the course of the argument of the present case, and which appears in the stated case for the appellants (Hamilton, Fraser, and Co.) and the evidence there referred to. The hole was in a supply pipe communicating with the sea below the water-line, through which sea water was pumped up into a bath, and the hole made by the rats during the voyage was at a point in the pipe above the water-line when the vessel was fully loaded, but permitted the water to flow into the vessel when she rolled in the course of her voyage.

I do not think that any observations are necessary upon the other cases to which our attention was called.

In my opinion, the appeal fails, and should be dismissed with costs.

Viscount HALDANE.—Many authorities were cited at the Bar in the course of the arguments in this appeal. But I do not think that the law applicable is obscure. The real question turns out to be one of fact. The insurance included among the perils which it covered those of the seas, but from these were expressly excluded all consequences of hostilities or warlike operations.

The ship insured, the *Ikaria*, was bound to Havre, and when about twenty-five miles from that port on Saturday, the 30th Jan. 1915, was struck by a torpedo from a German submarine. The impact was on the port side and the explosion tore a large hole there 3·15 metres wide and 2·6 metres high 4ft. below the water-line. A column of water which was thrown up burst out the bulwarks on the port side, No. 1 hold was filled with sea water, the fore peak was similarly about half filled, and some water penetrated into No. 2 hold. The vessel at once began to settle by the head, and the crew took to the boats. But the steamer did not sink, although much down by the head, and they returned, and, with the aid of a tug and a mine-sweeper and her own steam, she reached Havre. She was then 17ft. down by the head, her draught being 32ft. forward and 15ft. aft., while before she was torpedoed her draught had been 23ft. 6in. forward and 23ft. 9in. aft. The result of the increased draught forward was that she could not enter the inner harbour at Havre or the dry dock, and she was berthed in the outer harbour at the Quai d'Escale. This was a berth used for military, and particularly for British Red Cross purposes, and the only reason for allowing the steamer to go there was to save her if possible. Had she remained out at sea she would have sunk. The next morning, on the 31st Jan. 1915, an effort was made to pump the vessel and to lighten her cargo. But the wind rose and a swell ensued, and the *Ikaria* began to bump and the dislocation to increase. The port authorities therefore, fearing that she would sink and block the Quai, ordered her to be removed, and either to be taken right outside the harbour and beached, or to be moored alongside a breakwater called the "Batardeau." The latter alternative being chosen she was moored alongside the breakwater. But the bottom there was uneven and the water was only

30ft. deep, while the head of the steamer was drawing 32ft., and could not be prevented from taking ground. This the ship did and finally sank by the head as the tide rose on Tuesday, the 2nd Feb., only part of the cargo being salved.

The learned judge who tried the case, Rowlatt, J., found the facts broadly as I have stated them, and that the bulkhead between the holds No. 1 and No. 2 had been seriously disrupted by the explosion. He thought that if the *Ikaria* could have stayed at the Quai d'Escale she might have been saved. But she could not stay there and, partly because of the weakness of the bulkhead, and partly because of the grounding at the "Batardeau" she sank. He came to the conclusion, on the facts as proved before him, that "it was not made out if she had been a sound ship and had not met this torpedo, and had suffered the same grounding in the same trim at the same spot, that she would have suffered these injuries." In his view the grounding was not a new thing supervening which caused damage. The being moored as she was to the "Batardeau" merely thwarted the attempt to save the ship. The loss was therefore caused by the explosion itself.

The Court of Appeal took substantially the same view of the facts as Rowlatt, J., and the findings of fact were therefore concurrent. Swinfen Eady, J., was of opinion that it could make no difference to the conclusion that the loss of the ship was the direct consequence of the explosion of the torpedo, that "two or three days were spent in abortive and unavailing efforts to save her. She was in imminent risk of sinking from the moment of being injured." Bankes, L.J. took the same view. "You do not reach a place of safety unless you are allowed to remain there a sufficient time to ensure safety." Scrutton, L.J. did not differ from the finding of fact in the words I have quoted from Rowlatt, J., but thought that it might be held that the sinking did not necessarily follow from the explosion as described if, with fine weather and a stay in the first berth, the loss would have been averted, and that this would have been enough to make a general peril of the sea and not the explosion of the *proxima causa* within the meaning of the policy. But he considered himself bound to follow a previous decision of the Court of Appeal of the correctness of which he intimated doubt. He thought that *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548) had established that, on the facts proved, the *Ikaria* must be held to have been sunk as the immediate consequence of the explosion. This inference he could not, in his opinion, refuse to draw in view of what was held in *Reischer* v. *Borwick*, but he thought it inconsistent with what he considered ought to follow from the general principles affirmed by this House in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518).

I cannot find any such inconsistency between these two authorities as Scrutton, L.J. thought to exist. In *Reischer* v. *Borwick* there was a policy which covered collision with any object, but excluded perils of the sea. The ship struck a snag which made a hole in her. She was then anchored and the leak was temporarily plugged, and she was towed towards the nearest dock for repair. But while she was in course of being towed the water burst through the hole and she had to be run aground and abandoned. The Court of Appeal held that the *causa proxima* of the damage was in reality the collision with the snag. In the words of Davey, L.J. it was "the inrush of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the break of the condenser cannot justly be described as the cause of the ultimate damage." These words express what the common sense of mankind would assert in such a case. They are in no way inconsistent with what was laid down in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* There rice was shipped under a charter-party, and bills of lading which excepted "dangers and accidents of the sea." During the voyage rats gnawed a hole in a pipe in the ship and sea-water entered through it and damaged the rice. There was no negligence. It was held that the damage was within the exception, because, whether it was rats that had made the hole or whether, for example, a porthole had got open, the sea was in such a case not the less the immediate cause of the damage. In *Reischer* v. *Borwick* (*sup.*), although perils of the sea in general were excluded, a particular kind of such peril, collision, was expressly included. In *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* all dangers and accidents of the sea were excluded, and the inrush of water which arose from the gnawing of the pipe by the rats during the voyage was held to be excluded along with them as being a case falling within the class so defined.

In the case before us all consequences of hostilities or warlike operations are excluded from the perils of the seas insured against. There is nothing in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.*, or in the now familiar rule that the immediate cause of the accident is what is taken to have been in contemplation of the parties to a policy of marine insurance, which prevents the explosion from being taken to be in law, what it was in fact, the cause of the loss. The fact that attempts were made to obviate the natural consequences of the injury inflicted by the torpedo does not introduce any break in the direct relation between the cause and its effect in the shape of the damage sustained. I am therefore of opinion that the appeal must fail.

Lord DUNEDIN.—We have had a large citation of authority in this case, and much discussion on what is the true meaning of *causa proxima*. Yet I think the case turns on a pure question of fact, to be determined by common-sense principles. What was the cause of the loss of the ship? I do not think the ordinary man would have any difficulty in answering, she was lost because she was torpedoed. I shall state my view very briefly on the facts, but before I do so I wish to say a word as to the policy. It seems to me that the possibility of the prolonged and ingenious argument we have had in the case really flows from the form of the instrument, and the opportunity it gives for looking at one thing from different points of view. The policy, in time-honoured form, first specifies as the perils and adventures

which the underwriters are content to bear, perils of the sea in general terms; and then comes a detailed enumeration of certain perils. Now when the f.c.s. clause is added certain enumerated perils are cut out of the original insurance. When it is a case of one of the perils acting solely and sufficiently, such as, for instance, the peril of capture, no difficulty can arise. But there are certain perils which, so to speak, pray in aid the perils of the sea. A man-of-war fires a shot and hits the ship. If it only hits the top of the bulwark or a bit of the rigging there will be at the the worst only a partial average. But if the shot strikes between wind and water and makes a hole, the vessel will be sunk, and the reason of its sinking will not be the mere existence of the hole, but the fact that the sea comes in through the hole, and the vessel founders. Overwhelming by the sea is a peril of the sea in a general sense, and accordingly in such a case, if either the body of the policy or the exception were looked at alone, the peril incurred could be held to fall under either. In the exception it would fall under it, because the sinking was the direct result of the action of the man-of-war. In the body of the policy it would be immaterial whether it fell within the general expression "perils of the sea" or the particular expression "man-of-war." But the moment that the two clauses have to be construed together, it becomes vital to determine under which expression it falls. The solution will always lie in settling as a question of fact which of the two causes was what I will venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two. In other words, you seek for the *causa proxima*, if it is well understood that the question of which is *proxima* is not solved by the mere point of order in time.

In the illustration I have given no one would have the slightest doubt the dominant cause was the shot of the man-of-war. I would also like to remark that this class of competition between causes can only truly arise when you have to deal with an exception. I say this because of the great stress that was laid by the appellants' counsel on the case of *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518). There it was held that damage by sea water which came in through a hole in a bath supply pipe was a peril of the sea, though the sea would not have been admitted if a rat had not gnawed a hole in the pipe. It was the sea that spoiled the cargo, and the precise way in which it was admitted (putting aside negligence of the ship's servants, which, as it was a bill of lading and not an insurance case, would have altered the question) was immaterial, whether it was owing to rat, iceberg, sunken rock, or swordfish. If in that case there had been an exception of all dangers brought about by rats, then the decision, I take it, would have been different. I say all dangers brought about by rats, for if the exception had been merely against rats, then as a question of construction it might have been held that that only meant to refer to the predatory habits of the rat, and not to anything so exceptional as what occurred. I am not, therefore, pressed by the difficulty which was felt by Scrutton, L.J., in reconciling *Reischer's* case with *Hamilton's* case.

I now turn to the facts in the case. I concur with what has been said by the Lord Chancellor, and do not think it necessary to repeat. Summarised, the facts seems to me to come to this. After the torpedo struck her she was a doomed ship, unless she could get into a real place of safety. She nearly got to a place of safety, but never quite did so. What happened was in the circumstances the natural sequel to the injury by the torpedo. Water was admitted, at first only so far. She was down by the head, and therefore took the ground. The combined action of taking the ground and rising and falling with the tide, together with the swelling of the cargo, which had been wetted, strained her and broke her up, so that she became a total wreck. There is no better or truer account than that given by the master himself soon after the event, in his letter of the 10th Feb., when he writes to his owners and says: "There is no one here now who has the least knowledge of making or fitting shields over fractures in ships' bottoms, and even had there been it is very doubtful whether shields large enough to cover the two large fractures made by the torpedo could have been constructed and fitted in time to save her from sinking. It seems evident from the very sudden way in which the forward end of the vessel crumpled up that her structure was so weakened by the terrific force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads, and afterwards by the bursting strain of the cargo as it swelled in the holds."

I agree with the judgment of the Court of Appeal.

Lord ATKINSON.—I concur.

The appellants, by a policy of marine insurance dated the 8th July 1914, insured their steamship *Ikaria* against loss by perils of the sea. The policy contained a warranty clause which ran as follows: "Warranted free of capture seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war."

According to the decision in *Ionides* v. *Universal Marine Insurance Company* (8 L. T. Rep. 705; 14 C. B. N. S. 289), this clause is to be construed as if the assured had reinsured against the events enumerated, and the word "consequences" must accordingly be taken to mean proximate or direct or immediate consequences only: (see Willes, J. (14 C. B. N. S. 290), approved of in *Anderson* v. *Marten* (11 Asp. Mar. Law Cas. 85; 99 L. T. Rep. 254; (1908) A. C. 334). The policy, therefore, effects an insurance against perils of the sea other than those which are the direct and immediate consequences of hostile and warlike operations. The rule that in marine insurance policies the proximate not the remote causes are to be regarded, is supposed to be based upon the intention of the contracting parties, to be gathered from the language of the contract itself, taken in connection with the surrounding circumstances; but there is such a tendency in argument to treat concurrent causes as preceding and succeeding causes, the latter proximate, the former remote, and to split up complex causes into their components and establish a sequence

between them, that it is well always to bear in mind the warning given by Lord Lindley in *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548) that this rule of maritime insurance must be applied with good sense to give effect to and not to defeat the intention of the contracting parties.

I asked Mr. Leslie Scott, when opening the appeal, if the torpedo had opened such a rent in the *Ikaria's* side that the sea water rushed into her hold and sank her, could he recover on the policy sued on for a loss by perils of the sea? Of course he replied in the negative. Then the sea peril would be the direct and immediate consequence of hostilities or warlike operations. I then asked him if the captain of a torpedoed ship, having formed a judgment found to be reasonable in the circumstances, that his ship would, owing to her injuries, sink if kept in deep water, and accordingly beached her to prevent her total loss, would the owner be entitled to recover on such a policy as the present? And I understood him also to reply in the negative. I do not think the liability would be in the slightest degree altered if the ship should when beached settle down upon a rock of the existence of which the captain was not aware, and had broken her back.

On the whole of the evidence it is, I think, absolutely clear that the vessel was so damaged by the torpedo that she could not keep the sea, or at all events that there was no reasonable probability of her being able to do so. Now, the captain having got the choice he was under the circumstances bound to take, of beaching her outside the harbour or anchoring her inside the breakwater in order to continue the salvage operations he had already commenced at the Quai Marée, brought her to the latter place. The ship's taking the ground in her new anchorage was an obvious and necessary result, as she was drawing 32ft. 6in. forward and the depth of water at the anchorage was only 30ft. at low tide. The risk of her grounding forward was deliberately but reasonably run, and I really cannot see the difference in principle between taking this risk and taking the risk of beaching her completely. It is quite true that in the efforts to salve the cargo and the ship her injuries may have been aggravated, but none the less in my opinion was the loss the direct and immediate consequence of the torpedoing, and I do not think that any of the authorities cited are inconsistent with this conclusion. The appeal in my opinion fails, and should be dismissed with costs.

Lord SHAW.—On the 30th Jan. 1915 the *Ikaria*, bound from South American ports to Havre with a general cargo, was, about twenty-five miles north-west of Havre, struck by a torpedo fired from a German submarine. She sustained severe injuries; but, assisted by a tug and a mine-sweeper, she succeeded in making the port of Havre. She was then drawing 32ft. forward, the injuries and consequent filling being in the fore part of the vessel; and her depth was too great to permit her entry into the inner harbour. In the outer harbour she was berthed for a time at the Quai d'Escale. There being, however, a fear that she might sink there and so interrupt the traffic of the Red Cross organisation at that quay, she was taken to another portion of the harbour. At the latter point, notwithstanding all efforts by pumping and otherwise she bumped, broke her back and sank on the afternoon of the 1st Feb.

It is admitted that from the time of her being torpedoed everything was done to save her from the fatal effects of the collision, and that after she entered the harbour her officers were bound to obey the orders of the harbour master. The weather was rough, but not severely so.

I see no reason whatever to doubt that this happened as Captain Robinson, in his report of the 10th Feb., states. "It seems evident," says he, "from the very sudden way in which the forward end of the vessel crumpled up, and her structure was so weakened by the terrific force of the explosion, that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads, and afterwards by the bursting strain of the cargo as it swelled in the holds."

To the perils of the sea against which she was insured under the policy founded on, there was a warranty of exception—the words of the warranty being free of "all consequences of hostilities or warlike operations." The question in the appeal is whether the loss of the vessel was proximately caused by such hostilities or warlike operations. If so, the insurers stand free; if not, the insured can recover under the policy against perils of the sea.

I am of opinion that the loss was caused because the vessel was torpedoed, and that the warranted exception applies. If the case were not complicated, or supposed to be complicated, by legal decisions, there would seem to be no answer to this view. Notwithstanding the conclusion arrived at by Scrutton, L.J., I understand from his careful judgment that this would also be his opinion.

There was at one time an attempt to differentiate the meaning of the same contractual words as used in a policy of marine insurance from the meaning of the same expression as used in other maritime contracts; but in two judgments of your Lordships' House in the year 1887 the practice was condemned. I refer to *The Xantho* (6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 12 App. Cas. 510), in which the term under examination was "the perils of the sea." In that case Lord Macnaghten dealt with the "error of the Court of Appeal" thus: "They start with the assumption that the same words have different meanings when used in policies of insurance and when used in bills of lading. For that assumption there is, I venture to think, not any foundation." In the case of *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 527) the exception being considered was "dangers and accidents of the sea"; and Lord Watson observed, "Your Lordships have now disapproved of the novel doctrine that in a contract of sea carriage a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risks; that in the case of a charter-party or bill of lading the court ought to look to what has been termed the remote as distinct from the proximate cause of damage, whereas in the case of a policy the

proximate cause can alone be regarded." It would rather appear accordingly that this doctrine of proximate cause will be considered in the same light whether in contracts of marine insurance or in contracts of sea carriage, and good sense suggests that it should be so.

By the Marine Insurance Act 1906, s. 55, the expression has become statutory and "the insurer is liable for any loss proximately caused by a peril insured against, but subject as aforesaid he is not liable for any loss which is not proximately caused by a peril insured against." In this way the discussion of the scope of *proxima causa* is very relevant and its ascertainment vital.

In my opinion too much is made of refinements upon this subject. The doctrine of cause has been since the time of Aristotle, and the famous category of material, formal, efficient and final causes, one involving the subtlest of distinctions. The doctrine applied in these to existences rather than to occurrences. But the idea of the cause of an occurrence or the production of an event or the bringing about of a result is an idea perfectly familiar to the mind and to the law, and it is in connection with that that the notion of *proxima causa* is introduced. Of this, I will venture to remark that one must be careful not to lay the accent upon the word "proximate" in such a sense as to lose sight of or destroy altogether the idea of cause itself. The true and the overruling principle is to look at a contract as a whole, and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all.

To treat *proxima causa* as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up, which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

I illustrate that by the present case. Did the vessel perish because she was torpedoed or by a peril of the sea apart from that? It is replied, "She perished by a peril of the sea because sea water entered the gash in her side which the torpedo made." Certainly the entry of sea water was a peril of the sea, and certainly that entry of sea water was proximate in time to the sinking. But how could there be any exception in the case of a vessel lost in harbour or at sea to a loss by perils of the sea, if the proximate cause in the sense of nearness in time to the result were the thing to be looked to? It is hardly possible for the mind to figure anything which would interfere with or be an exception to a cause so proximate as the entry of sea water into or over the hull as the vessel sinks in the waves. The result of this is that the consideration of the exception of the consequences of hostilities, or indeed any other exception so far as I can at present figure, if that consideration be limited to a cause proximate in time, destroys the exception altogether. It might as well never have been written. In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency. Fortunately, this much would appear to be in accordance with the principles of a plain business transaction and it is not at all foreign to the law.

In *Reischer's* case (*ubi sup.*) Lord Lindley, then Lord Justice, speaking of *causa proxima*, says, "this rule is based on intention of parties as expressed in the contract into which they have entered, but the rule must be applied with good sense, so as to give effect to and not to defeat those intentions." A second example, which I here give, shows that, although insurers may limit their liability expressly to *causa proxima* and with elaborate astuteness may enumerate other facts and circumstances which would not be considered direct or proximate causes, the same result will follow, namely, that the proximate cause will be found to be, to use the words employed by Channell, J. in *Re Etherington and Lancashire and Yorkshire Accident Insurance Company* (100 L. T. Rep. 568; (1909) 1 K. B. 591), "the real effective cause of what has happened." "You must," said he, "have something that may be called a new intervening cause, in order to prevent the existing cause, which is operating to produce a well-known result, from being said to be the real effective cause of what has happened." Vaughan Williams, L.J. thought this view of Channel, J. was quite right. So do I.

To apply this to the present case. In my opinion the real efficient cause of the sinking of this vessel was that she was torpedoed. Where an injury is received by a vessel it may be fatal or it may be cured: it has to be dealt with. In so dealing with it there may, it is true, be attendant circumstances which may aggravate or possibly precipitate the result, but which are incidents flowing from the injury or receive from it an operative and disastrous power. The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold. The result is produced, a result attributable in common language to the casualty as a cause, and this result proximate as well as continuous in its efficiency properly meets whether under contract or under the statute the language of the expression "proximately caused."

I beg to express my sense of indebtedness to Mr. Wright for the brief but most cogent argument with which he assisted the House.

Appeal dismissed.

Solicitors for the appellants, *Alfred Bright* and *Sons*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the respondents, *William A. Crump* and *Son*.

Judicial Committee of the Privy Council.

Dec. 10, 11, 1917, *and Jan.* 22, 1918.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE ALWINA. (*a*)

Prize Court — Neutral ship — Contraband cargo intended for enemy warship — Abandonment of adventure — Sale of cargo to persons other than enemies — Capture on return voyage — Immunity of vessel from condemnation — Declaration of London, arts. 38, 48 — *Orders in Council of the* 20*th Aug. and the* 29*th Oct.* 1914 — *Costs — Prize Court Rules, Order XXVII., r.* 2.

If a neutral vessel carries contraband goods, even though her papers are false, and the goods are intended for an enemy destination, but in fact circumstances arise which frustrate the venture, and the goods are sold and delivered in a neutral port to other buyers, the vessel, if encountered on her next voyage, is not liable to capture and condemnation on the ground merely that she had carried contraband on a previous occasion.

Decision of Evans, P. (13 *Asp. Mar. Law Cas.* 311; 114 *L. T. Rep.* 707; (1916) *P.* 131) *affirmed.*

APPEAL by the Crown and cross-appeal by the Dutch owners of the steamship *Alwina* against a decree of the President (Sir S. Evans) of the Admiralty Division in Prize, reported 114 L. T. Rep. 707; (1916) P. 131.

The *Alwina* was a Dutch steamer belonging to the Holland Gulf Stoomvaart Maatschappij of Rotterdam, and her managing owner was Joseph de Poorter, a Dutch subject, who resisted the claim put forward by the Crown for condemnation of the vessel seized as prize under the following circumstances.

In Oct. 1914 the *Alwina* was chartered by a firm at Buenos Ayres, which the Crown alleged were merely agents for a German shipping company, and was ordered to leave Rotterdam, where she then was, for Newport (Mon.). There she loaded a cargo of 1600 tons of steam coal. The *Alwina* cleared from Newport on the 27th Oct. 1914, having on board a person named Van Dongen, who was at first described as a "steward" and subsequently as a "passenger," but who was in fact a German who left the ship on her arrival at Teneriffe.

The vessel remained at Teneriffe for two months as she was unable to get bunker coal owing to the authorities being suspicious that the real nature of her voyage was to carry the steam coal to German warships which were then at large in the Atlantic Ocean.

About that time the battle of the Falkland Islands was fought, and the German fleet dispersed. The master of the *Alwina* was ordered by the owners to sell the coal locally and to take his ship in ballast to Huelva, where she loaded a cargo of sulphur ore for Rotterdam. On the way there she experienced engine trouble and had to put into Falmouth for repairs, and was there seized by the Crown. Proceedings in the Prize Court followed.

By art. 38 of the Declaration of London as modified by the Order in Council of the 20th Aug. 1914:

> 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.

And as modified by the Order in Council of the 29th Oct. 1914:

> 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.

The President found that the cargo was contraband and intended for the enemy, but that, as the intention had never been carried out and the enterprise had been abandoned, neither the goods were subject to confiscation nor was the ship liable to condemnation. Accordingly he made a declaration for restitution to the owners, but directed that they should pay all costs incident to the capture and detention, and also of and incident to the prize proceedings.

The Crown appealed on the merits and law of the case. The owners appealed as to so much of the order as directed them to pay all costs.

Sir *Frederick Smith* (A.-G.) and *Bateson*, K.C., *H. H. Joy* (for *H. L. Murphy*, serving with His Majesty's forces) with them, for the Crown.— Upon the facts of the case the *Alwina*, although wearing the mask of neutrality, was clearly an enemy ship with an enemy cargo destined for the German fleet. Had she been captured on her way to Teneriffe she would clearly have been lawful prize, for a ship which lends itself to a belligerent loses its neutral character. If, therefore, the vessel was liable to seizure up to the time that the British fleet sunk the German fleet, and thereby frustrated the adventure, it would be absurd to hold that thereby the vessel became immune from capture. Here the charter was a sham. The parties concerned had all combined in a well-considered scheme to get coal for the use of the German fleet. In such circumstances there should be a declaration for condemnation. They referred to

The Caroline, Roscoe's Eng. P. C., vol. 1, 385; 4 Ch. Rob. 256;
The Rendsborg, 4 Ch. Rob. 121;
Carrington v. *Merchants' Insurance Company*, 8 Peters, 495;
The Fortuna, Roscoe's Eng. P. C., vol. 1, 193n.; 1 Dods. 81;
The Nancy, 3 Ch. Rob. 122;
The Elizabeth, 4 Ch. Rob., note to table of cases.

As for the question of costs, discretion is given by Order XXVII., r. 2, of the Prize Court Rules,

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

and the exercise of the discretion here by the President is in accordance with the practice of the Prize Courts.

Sir *Erle Richards*, K.C. and *R. A. Wright* (*Bisschop* with them) for the owners of the *Alwina*.—By art. 46 of the Declaration of London:

> 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 employ of the enemy Government.

On the facts none of the cases above specified apply to the present case. She had ceased to be *in delicto*, and liability to capture continued only while the *delictum* existed. Here the venture had come to an end. The facts bring the case within art. 38 of the Declaration of London, which provides that "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." [The cross-appeal as to costs was not argued.] They referred to

The Zamora, 13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77;
The Lisette, Roscoe, vol. 1,, 587; 6 Ch. Rob. 387;
The Imina, Roscoe's Eng. P. C. vol. 1, 289; 3 Ch. Rob. 167;
The Friendship, Roscoe's Eng. P. C. vol. 1, 599; 6 Ch. Rob. 420;
The Zambesi, 1 Br. & Col. P. C. 358.

The considered opinion of the board was delivered by

Lord SUMNER.—This is the Crown's appeal for the condemnation of the steamship *Alwina*, on the ground that she was when seized or had been engaged in unneutral service. She was owned by the N.V. Holland Gulf Stoomvaart Maatschappij, which is managed by Mr. Jos. de Poorter, a subject of the Queen of the Netherlands. On the 26th Oct. 1914 she cleared from Newport (Mon.) for Buenos Ayres *viâ* Teneriffe with a cargo of coals, and put into Teneriffe on the 6th Nov. ostensibly to bunker. There seems to have been something suspicious about her from the first, and, in fact, bunker coals were refused her. Somehow the notion got about that her cargo was being exported for the supply of the German squadron in the South Atlantic. Eventually the captain himself came to the conclusion that this was probably true. There was on board a man called Van Dongen, of whom Mr. Jos. de Poorter says: "The nationality of the said Van Dongen is supposed to be Dutch, but I cannot say anything as to that with any degree of certainty." In the ship's papers he figured sometimes as steward, sometimes as a passenger, though the ship had no quarters for passengers, and sometimes not at all. Mr. Jos. de Poorter knew nothing about him, and thinks he must have arranged his passage with the captain. As to that the captain maintains an impenetrable reserve. When the *Alwina* arrived at Teneriffe, Van Dongen at once went on board the steamship *Cap Ortegal*, and subsequently took up his quarters on shore. Now the steamship *Cap Ortegal* was a German armed cruiser, which, as it happened, was at Teneriffe when the *Alwina* arrived. In the long run Captain Glashouwer of the *Alwina* came to the conclusion that Van Dongen must be a supercargo, and a supercargo let him be.

According to the ship's papers the time-charterers of the ship and consignees named in the bill of lading were Messrs. A. M. Delfino y Hermanos of Buenos Ayres. The hire of the ship was paid in advance up to the 17th Jan. 1915. The price of the cargo was paid to Mr. Jos. de Poorter by Messrs. Delfino y Hermanos before the ship left Newport. Such was Mr. Jos. de Poorter's case. When, however, no bunker coals could be got at Teneriffe, Captain Glashouwer and Mr. Jos. de Poorter seem to have come to the conclusion that they must bring the adventure to an end then and there. Though Messrs. Delfino y Hermanos had paid in advance for the ship's hire and, as owners of her cargo, might have ordered part of it to be burnt in her furnaces in prosecuting the voyage to Buenos Ayres, no letter or telegram was sent to them in South America. Captain Glashouwer and Mr. Jos. de Poorter set about finding buyers, who would take delivery at Teneriffe, the one in Holland, the other on the spot. On a letter from Van Dongen the captain opened negotiations with a Spanish buyer, but, as this buyer resold to the *Cap Ortegal*, the bargain was cancelled by the Spanish authorities. Then Mr. Jos. de Poorter wrote that he had sold the coals to the owners of a German ship, the *Krefeld*, but she was unable to take delivery until the end of the war. He also telegraphed to Captain Glashouwer that he was to sell the coals, as the hire had not been paid and the charter was therefore cancelled. This was untrue. The hire had been paid. The charter was cancelled at Mr. Jos. de Poorter's verbal request. His manager happened to meet Messrs. Delfino y Hermanos of South America somewhere in Europe, and arranged with them, also verbally, to have the coal sold at Teneriffe. Eventually sold it was and discharged, the captain assuring the buyer that it was the entire property of his owners, the firm of Jos. de Poorter, and the *Alwina*, thus relieved of an embarrassing burden, made for home in ballast *viâ* Madeira on the 30th Dec. The German cruiser squadron had been destroyed off the Falkland Islands on the 8th Dec.

Off Madeira the *Alwina* was visited by British officers and ordered to proceed to Gibraltar. Some time afterwards it was found that several pages from her harbour log, covering part of her stay at Teneriffe, were missing. Of this Captain Glashouwer says: "I made the discovery of the said removal on the 15th Jan. 1915, after the said ship had left Huelva, and I have never been able to solve the mystery of their disappearance," and he entered in his log that this was "probably at Gibraltar," but this hardy suggestion is contradicted by all the officials concerned. The Chief Examining Officer of Shipping at Gibraltar allowed her to proceed to Huelva, and there she loaded a cargo of washed sulphur ore smalls in bulk for Rotterdam. A voyage charter and bill of lading for this are produced. On her way to Rotterdam she put into Falmouth owing to engine trouble, and there was detained and ultimately seized on the 23rd Jan. 1915.

The opinion of the learned President about the whole matter is expressed as follows: "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 supercargo, with a false destination, and in circumstances amounting to fraud in regard to belligerents. . . . What is clear is that 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."

On grounds of law he released the ship, but he ordered that the owner by reason of his conduct 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.

From this decision there are two appeals, which have been consolidated, the Crown claiming condemnation, Mr. Jos. de Poorter, or the Holland Gulf Stoomvart Maatschappij, claiming that the costs and expenses ought to be borne by the Crown. This cross-appeal, however, the shipowners have withdrawn without attempting to argue it, and no doubt in this were well advised. Their Lordships think that a conclusion on the facts adverse to Mr. Jos. de Poorter was inevitable, but, after carefully reconsidering the evidence, they are not minded to carry their view beyond the point reach by the President. The case is one of contraband.

Mr. Jos. de Poorter claims the benefit of the Declaration of London, as modified when it was adopted by the Orders in Council, dated the 20th Aug. and 29th Oct. 1914. By 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," and this, as modified, becomes, under the first order, "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," and, under the second, "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."

In *The Zamora* (13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77) their Lordships had occasion to observe: "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."

There can be no doubt, from the recitals contained in these instruments and otherwise, that the provisions above quoted were meant to operate in favour of neutrals, and to be a restrictive definition of the rights which His Majesty would exercise as a belligerent Sovereign in the present war, so long as they remained unrescinded. Whether the difference between these provisions and the general rules of international law, as laid down before the outbreak of this war, be great or small, or takes one form or another, it is not necessary to inquire. Unless this neutral vessel falls within the cases specified, it is enough for present purposes to say that "she may not be captured"—that is, in the course of her voyage from Huelva to Rotterdam—"on the ground that she has carried contraband on a previous occasion," to wit, coal on an outward voyage from Newport (Mon.) as far as Teneriffe, "if such carriage is at an end," as it was as soon as the coal was safely landed there. Now, she never succeeded in carrying contraband to the enemy, and she never proceeded to an enemy port, and so she has the good fortune to fall outside the cases specified and to escape condemnation. Such was the President's decision, and their Lordships think it was right. They will humbly advise His Majesty that both these appeals should be dismissed with costs.

Solicitors: for the Crown, *Treasury Solicitor*; for the owners of the *Alwina*, *Tarry*, *Sherlock*, and *King*.

Jan. 31, *Feb.* 1, *and March* 15, 1918.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE DERFFLINGER (NO. 2). (a)

ON APPEAL FROM THE SUPREME COURT FOR EGYPT (IN PRIZE).

Prize Court — Cargo — Consignees under bills of lading—Ownership.

The appellants, a company incorporated under the laws of Italy, carried on business at Genoa. They purchased goods in Manilla through the intermediary of G. and Co., a German firm, of Hamburg, which had a branch at Manilla, c.i.f. Genoa. The goods were shipped in July 1914 *on board the German vessel* D. *On the* 30*th July* 1914 *G. and Co., at Manilla, invoiced the goods to the appellants. The bills of lading were made out to the order of G. and Co., Hamburg, and forwarded to them. After indorsement G. and Co. sent them to an Italian bank at Florence to hold against the acceptance of the draft for* 55,375 *francs drawn upon the appellants by G. and Co., of Hamburg. On the* 2*nd Dec.* 1914 *the draft was accepted and the bills of lading handed to the appellants.*

The steamship D. *was seized as prize on the* 2*nd Aug.* 1914 *at Port Said and the goods condemned. The goods were claimed on the ground that the contract was governed by Italian law, according to which the property in the goods claimed passed to the claimants the moment they were shipped for conveyance to them at Genoa—i.e., at a time anterior to the capture of the vessel.*

Held, that it was the intention of the parties that the property in the goods should not pass until the draft was accepted, and as the draft had not been accepted at the date of seizure the condemnation was right.

Principle laid down in The Odessa (13 *Asp. Mar. Law Cas.* 215; 114 *L. T. Rep.* 10; (1916) *A. C.* 145) *applied.*

APPEAL from a judgment of the Supreme Court for Egypt (in Prize), dated the 14th April 1916,

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

by which the claim of the Societa Anonima "Il Truciolo" (the appellants) to forty-three bales of knotted hemp fibre, part cargo ex the steamship *Derfflinger*, was rejected and the bales adjudged to have belonged at the time of capture to enemies of the Crown and liable to confiscation as good and lawful prize and an order made for their sale.

The respondent was His Majesty's Procurator in Egypt.

F. D. MacKinnon, K.C. and *F. Boston-Bruce* for the appellants.

Sir *Gordon Hewart* (S.-G.) and *W. Lilley* for the respondent.

The considered opinion of the board was delivered by

Lord PARMOOR.—This is an appeal from a judgment of the Supreme Court for Egypt (in Prize) of the 14th April 1916. The court rejected the claim of the appellants to forty-three bales of knotted hemp fibre, part cargo ex the steamship *Derfflinger*, and pronounced the said bales to have belonged, at the time of capture and seizure, to enemies of the Crown, and as such subject to confiscation and condemnation.

The appellants are a company incorporated under the laws of Italy and are carrying on business in that country. The bales of knotted hemp fibre were purchased in Manilla at an inclusive price of 55,375 francs, on c.i.f. terms. The said bales were shipped to Hong Kong partly in the steamship *Chinhua* and partly in the steamship *Wunensang*, and at Hong Kong were reshipped on the German steamship *Derfflinger* for conveyance to the port of Genoa. The bills of lading relating to the shipments are dated respectively the 29th June and the 3rd July 1914, and were forwarded by a branch Germann and Co., of Manilla, to the house Germann and Co., of Hamburg, who forwarded the said bills to a bank in Florence, the Credito Italiano, with instructions to the said bank to deliver the said bills of lading to the appellants, against acceptance by them of a draft for 55,375 francs drawn on the appellants by the said Germann and Co., of Hamburg. On the 2nd Dec. 1914 the said bank accepted the said draft, and thereupon forwarded the said bills of lading to the appellants.

On the 15th Oct. 1914 the steamship *Derfflinger* was seized as prize of war and was condemned as prize by decree of the Supreme Court of Egypt (in Prize) on the 20th Jan. 1915. It was ordered, under the said decree, that the consideration of the cargo on board the *Derfflinger* should stand over with liberty to any party interested to apply. The appellants thereupon applied to the respondent, His Majesty's Procurator in Egypt, for the delivery of the said bales to them. They filed their claim in the Prize Court and asked for the release of the bales on the ground that they were neutral and the lawful owners thereof at the time of the seizure. On the 14th April 1916 judgment was delivered against the claim of the appellants and the appeal is brought against this judgment.

It has been settled by their Lordships, as a principle of international law, that the question whether goods seized as prize are enemy in character depends on property and not on risk, and that the property to be looked for is the general property as opposed to any special proprietary right: (*The Odessa*, 13 Asp. Mar. Law Cas. 215; 114 L. T. Rep. 10; (1916) A. C. 145; *The Parchim*, *ante*, p. 196; 117 L. T. Rep. 738; (1918) A. C. 157).

The only question, therefore, which arises in this appeal is in whom was the general property in the goods at the time of seizure on the 15th Oct. 1914. Their Lordships are prepared to accept the appellants' contention that the parties intended the transaction to be governed by Italian law. But it is quite clear on the evidence that the question whether and when the general property passes by virtue of a contract of sale of goods must, according to Italian law, be determined (as it is according to English law) by the intention of the parties to the contract. On the other hand, it does not appear that the Italian law has any special rules such as those recognised in the Sale of Goods Act 1893 as to how this intention ought to be discovered. After full consideration of all the circumstances their Lordships find themselves in agreement with the finding of His Honour Judge Grain that it was the intention of the parties to the contract that the property in the bales of knotted hemp fibre should not pass to the buyers until the draft held by the bank on behalf of Germann and Co. had been accepted. This draft had not been accepted at the date of seizure, and it follows that at that date the property in the bales was in the enemy firm Germann and Co., Hamburg, and liable to seizure and condemnation as enemy goods.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants, *Waltons* and *Co.*
Solicitors for the respondent, *Treasury Solicitor.*

Jan. 29 *and March* 15, 1918.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir SAMUEL EVANS.)

THE PROTON. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR EGYPT (IN PRIZE).

Prize Court — Ship — Enemy character — Flag — Evidence as to the true beneficial ownership and control of vessel—Declaration of London, art. 57 *—Order in Council of the* 29*th Oct.* 1914.

By art. 57 *of the Declaration of London the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.*

The P. *was a steamship entered on the Greek register and consequently entitled to fly the Greek flag. She was condemned by the Prize Court in Egypt on the ground that on the evidence the beneficial ownership and control of the vessel was in the German Government and not in the nominal owner, K., who was a Greek.*

Held, that the evidence justified the conclusion that the nominal owner, K., was merely an agent of the German Government and was not therefore entitled to the benefit of art. 57, *even assuming that that article was binding on the court, and therefore the vessel had properly been condemned.*

Extent to which Orders in Council are binding on the court considered and explained.

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

Rule laid down in The Zamora (13 *Asp. Mar. Law Cas.* 330; 114 *L. T. Rep.* 626; (1916) 2 *A. C.* 77) *applied.*

APPEAL from an order of the Supreme Court of Egypt, dated the 8th Feb. 1916, pronouncing the *Proton* to have belonged at the time of capture and seizure to enemies of the Crown, and condemning the ship as good and lawful prize.

The *Proton* was a steamship on the Greek register and entitled to fly the Greek flag. The Prize Court in Egypt held that she in fact belonged to the German Government, and that her continuing to fly the Greek flag was a mere blind to conceal her true nationality.

Balloch for the appellant.

Sir *Gordon Hewart* (S.-G.) and *Raeburn* for the Crown.

The considered judgment of their Lordships was delivered by

Lord SUMNER.—On the 8th Feb. 1916 the steamship *Proton* was condemned in prize. The present appeal is brought by George Kotsovillis, master, and Michael Kouremetis, claiming as owner of the ship. The former only represents the title of Kouremetis, his employer. He has no independent right of his own.

The *Proton* was on the Greek register and flew the Greek flag, nor is there anything in the evidence to show that she was not entitled to do so. The ground of condemnation was that, in truth, she belonged to the German Government. The appellants contend that her flag is conclusive to the contrary. They rely on c. 6 of the Declaration of London, which deals with enemy character, and by art. 57 provides: "Subject to the provisions respecting transfer to another flag" (which do not apply here), "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." It is not necessary to consider on the present occasion whether this provision would in any case apply if the use of the neutral flag were only part of a fraudulent design to defeat belligerent rights.

Their Lordships held in *The Zamora* (13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77, at pp. 96 and 97) that while the Crown cannot by Order in Council prescribe or alter the law to be administered by a Court of Prize, the court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be. The Declaration of London Order in Council, No. 2, 1914, which declared that the provisions of the Declaration of London should be adopted and put in force, was in force at the material time in this case. Does then art. 57 prescribe the law to be adminstered by a Court of Prize or does it direct that the rights of the Crown are to be mitigated in favour of a neutral or of the enemy? In their Lordships' opinion, the former is the effect of the article. It declares that a Court of Prize shall determine the character of a vessel alleged to be of enemy character by one single circumstance, the character of the flag which she is entitled to fly, and not by the entire body of relevant circumstances which determine the truth as to that character. This is a positive prescription as to a material part of the law of evidence.

Furthermore, the surrender of the rights of the Crown is a thing not to be inferred from doubtful language or from general considerations, especially in a case of fraud and in a matter so grave as the exercise of sovereign belligerent rights. The terms of this article are little adapted to a waiver of His Majesty's rights in favour of others: they clearly purport to prescribe the law on a topic which has been the subject of many decisions. Their Lordships are of opinion that, notwithstanding the Order in Council, it is their duty, sitting in Prize, to consider the facts proved, in order to ascertain what the character of the *Proton* really was.

When seized on the 16th May 1915 she was loading oats at the Turkish port of Kiuluk, in Anatolia, having lately arrived from Calymnos. One "Mihail Kromatis" was entered on the ship's papers as a seaman, and was on board purporting to act in that capacity, but he stated to the British officer who searched the vessel that he was really her owner travelling in the vessel to buy goods at one port and sell them at another, and he is now the chief appellant. The ship had left Piræus in ballast on the 22nd April for Adalia, where he bought, among other things, eggs, chickens, and bullocks, and sailed in her with them for Samos and Piræus. It is suggested that he was entered in the ship's papers as a seaman because there was no other capacity in which he could be entered, but this is mere guess-work. He came to Alexandria, presumably in the vessel, but did not think fit to remain for the trial or to give evidence on oath.

The master, however, gave evidence on his behalf. He swore that on the passage from Adalia, the weather being rough, some of the bullocks became seasick, whereupon it was decided to land them and the other cargo at the island of Calymnos. This was how the vessel came to be loading at Kiuluk. This story the learned judge did not believe, nor were their Lordships invited to give it credence. It was admitted that the *Proton* had been taken into Calymnos in order to pick up and run a cargo of contraband—namely, fuel oil in tins—into the Turkish port of Budroum, only a few hours away on the mainland. This enterprise, however, was forestalled. No doubt this is true so far as it goes, but there is a good deal more in her manœuvres than this.

Calymnos was the birthplace of M. Michael Kouremetis, and the day after his arrival in the *Proton* there arrived the steamship *Vassilefs Constantinos* laden with fuel oil consigned to his uncle, who was a tailor. M. Kouremetis promptly boarded her and tried hard to induce the captain to take the cargo of oil on to Budroum, but without success. He then tried to get it transferred to the *Proton*, but the ship's agent insisted that the oil must be landed. When this had been done, the Italian authorities, who were in occupation of the island, declined to let it go again. They suspected an attempt to supply this fuel to the Turks. Its quantity alone made it an unsuitable cargo for consignment to so small an island.

Who then was M. M. Kouremetis? Of Greek race and a Calymniote born, and therefore an Ottoman subject, for fourteen years or more he had been in business as a sponge merchant at Hamburg. He says that he prospered there, but there was evidence that about 1913 he failed in

business, having quarrelled with and become heavily indebted to his German partner, Herr Emil Stiller. He was then taken into the service of the Deutsche-Tripolitanische Handels-Aktien-Gesellschaft. He further says that, having made a considerable fortune, he proceeded to realise it at the outbreak of war and quitted Germany for home. On the 15th April 1915 he obtained a certificate of Greek nationality and became a subject of the King of the Hellenes, and two days later bought the *Proton* for about 160,000 francs. As he was also able about the same time to buy the fuel oil cargo, shipped in the *Vassilefs Constantinos*, and the flour, the corn, and some of the bullocks, shipped in the *Proton* at Adalia, he must have disposed of considerable sums. He says there were further sums, amounting to about 20,000 francs, which he had placed in the hands of two Calymniote merchants, Vouvalis and Manglis, and he claims to have possessed a great deal more money than this, and specifies amounts and to some extent its sources. There was, however, evidence to the contrary given by persons competent to speak to the facts. The brother of the appellant, Pantilis Kouremetis, could not say whether he was a poor man or a millionaire, but Aristotelis Manglis, a merchant of Calymnos, swore that Michael Kouremetis came home from Germany in the autumn of 1914 practically penniless, and in April 1915 was well provided with funds, and he appears to be quite innocent of any knowledge that he held 10,500 francs on deposit from M. Michael Kouremetis. Nicolas Vouvalis, too, is equally unaware of the deposit alleged to have been made with him. According to Dimitri Michael Maroulakis, of Calymnos, M. Michael Kouremetis told him that he was supplied with funds from the Turkish and German Embassies, had paid 24,000 francs to the Mutessarif of Adalia (which seems a large sum for mere baksheesh on the shipment of flour and bullocks), and was in the habit of frequently calling at the Germany Embassy in Athens.

All these facts are deposed to in affidavits, or, in the case of Vouvalis, are stated in a letter, which, as it appears without objection in the record, their Lordships take to have been admitted in evidence by consent. It is true that the affidavits contain many other statements which are not evidence and are not trustworthy. They revel in rumours, they abound in hearsay, they contain many exaggerations and some extravagancies, and after all they are affidavits. Still the learned judge was vigilantly on his guard against such parts of them as were inadmissible; he was well qualified to appraise them at their true value, and in the result he accepted them. On the other hand, the appellant gave no evidence on oath. A letter which he wrote to the Minister for Foreign Affairs of the Hellenic Government was allowed to be read in evidence, and probably would have been of no greater weight if formally attested, but the learned judge did not believe it. Numerous and precise statements are to be found in it as to the appellant's ample means, every one of which could have been readily and cogently confirmed by documentary evidence, which he must either have had in his possession or might easily have obtained. No such documents are forthcoming, and M. Kouremetis must accept the consequences, which, as has so often been pointed out in Courts of Prize, attend on those who advance claims, but withhold the evidence which, if their claims were just, candour and self-interest would alike have impelled them to give.

The learned judge disbelieved the appellant's case, and on the evidence found (1) that M. Kouremetis had not means of his own with which to buy the *Proton*; did not buy her and was not her owner; and only figured as her owner in order that she might continue to fly the Greek flag as a convenient but dishonest device; (2) that, in view of his enemy associations, he must have bought her with German money; (3) that only the German Government could have been concerned in laying out so much money on the ship in order forthwith to hazard her in so dubious and dangerous an adventure; (4) that, as M. Kouremetis was no seaman, he could only have been on board to look after the interests of the German Government, his employers. If the learned judge's first finding is right, this appeal fails, for M. Kouremetis has no character except that of owner in which he can claim to have the ship released to him, and, if not her owner, has no *locus standi* to criticise or complain of her condemnation. Their Lordships do not wish to be understood as casting any doubt on the other findings, but it is not necessary that they should express any opinion about them. It is enough to say that, in their opinion, the finding that the *Proton* did not belong to the appellant, and that his purported ownership was a mere blind to enable a German ship to conceal her character by continuing to fly the Greek flag as before, was well warranted by the evidence.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellant, *Botterell* and *Roche*.

Solicitor for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 20, 21, *and* 28, 1918.

(Before SWINFEN EADY, M.R. and SCRUTTON and DUKE, L.JJ.)

BRITISH AND FOREIGN STEAMSHIP COMPANY LIMITED *v.* THE KING. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Ship — Requisition by Admiralty — War risks taken by Admiralty—Collision due to "hostilities or warlike operations" — Loss of steamship—Liability.

A steamship was requisitioned by the Admiralty under the terms of charter-party T. 99, *clause* 24 *of which provided that the Admiralty should not be held liable if the vessel should be lost* (inter alia) *through collision or any other cause arising as a sea risk. Clause* 25 *provided that the risks of war which were taken by the Admiralty were those risks which would be excluded from an ordinary English*

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

policy of marine insurance by the following or similar but not more extended clause: "Warranted free from capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss."

On the 31st Dec. 1915 the steamship was employed as a transport for the troops engaged in the war. About 5.30 p.m. she was running with no lights showing in pursuance of Admiralty orders. At the time a large number of other vessels belonging to the transport services of Great Britain and the allies were in the neighbourhood, and all were navigating without lights in consequence of the hostilities then in progress. The night was very dark, and, although a good look-out was being kept, the steamship came into collision with a French battleship and was sunk. The collision could not have been avoided by any care or skill on the part of those on board the steamship.

Held, that the collision was occasioned solely by the absence of lights and the speed at which the vessels were proceeding, the absence of lights causing the collision in the sense that it prevented the vessels from seeing one another in sufficient time and when they were at such a distance apart as would have enabled them to take the ordinary steps dictated by good seamanship and steer a course by which each would have passed clear of the other.

Held, therefore, that the steamship was lost by the proximate direct and immediate consequence of warlike operations.

Decision of Rowlatt, J. (ante, *p.* 121; 117 *L. T. Rep.* 94) *affirmed.*

Petition of Right in which the following facts were stated:—

The suppliants were the owners of the steamship *St. Oswald*. In March 1915 the *St. Oswald* was requisitioned by the Director of Transports on behalf of the Lords Commissioners of the Admiralty for immediate use on Government service, and was taken into the service of the Admiralty on the terms of a contract made between the suppliants and the Director of Transports on behalf of the Lords Commissioners of the Admiralty contained in a charter-party known as T. 99.

Clause 21 of the charter-party provided as follows:

The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorised by them, and shall in all respects comply with the confidential instructions for masters of transports; but he shall be solely responsible (on behalf of the owners) for the management, handling, and navigation of the ship.

Clause 24 provided that:

The Admiralty shall not be held liable if the vessel shall be lost, wrecked, or driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk.

Clause 25 provided that:

The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extended clause: Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss.

The *St. Oswald* continued in Government service until her loss.

On the 31st Dec. 1915, about 5.30 p.m., the *St. Oswald* was engaged as a transport in the Eastern Mediterranean.

She was employed in the embarkation of troops from Gallipoli, and she had left the harbour at Imbros bound for Helles, Gallipoli, with no navigation or other lights showing, in pursuance of orders and instructions from the Admiralty.

Her side lights were in position and were lighted, but obscured, and her masthead light was ready lighted, but was not hoisted or showing.

After she had rounded Cape Kephalo off Imbros a course was set south-east half south magnetic, and in obedience to her orders she went at full speed for Helles.

The night was very dark and a good look-out was being kept on board. Shortly afterwards the hull of a large vessel, which proved to be the French battleship *Suffren*, was seen about half a mile away approaching rapidly.

The *St. Oswald* starboarded her helm, and almost simultaneously the *Suffren* ported her helm. The *Suffren* soon afterwards struck the *St. Oswald* on the port side well forward of amidships, causing the *St. Oswald* to sink and become a total loss.

The suppliants said that the ramming and loss of the *St. Oswald* could not have been avoided by any reasonable care or skill. They alleged that the loss owing to navigating without lights was a consequence of warlike operations.

On the 10th and 11th July 1917 the petition of right came on to be heard before Rowlatt, J. in the Commercial Court, when his Lordship reserved judgment.

On the 13th July 1917 the learned judge delivered judgment, in which he decided (117 L. T. Rep. 94) that the loss of the steamship was due to warlike operations, and was within the risks which had been taken by the Admiralty under clause 25 of charter-party T. 99; and that the suppliants were therefore entitled to judgment.

From that decision the Crown now appealed.

Sir *Gordon Hewart* (S.-G.) and *G. W. Ricketts* (with them *Greer*, K.C.) for the Crown.

Leslie Scott, K.C. and *A. T. Miller* for the suppliants.

Sir *Gordon Hewart* (S.-G.) replied.

The following authorities were referred to in the course of the arguments:

Ionides v. *Universal Marine Insurance Company*, 8 L. T. Rep. 705; 14 C. B. N. S. 259;

Le Quellec et Fils v. *Thomson*, 13 Asp. Mar. Law Cas. 445; 115 L. T. Rep. 224;

France, Fenwick, and Co. v. *North of England Protecting and Indemnity Association*, *ante*, p. 92; 116 L. T. Rep. 684; (1917) 1 K. B. 522;

Becker, Gray, and Co. v. *London Assurance Corporation*, *ante*, p. 156; 117 L. T. Rep. 609; (1918) A. C. 101, at p. 144;

Leyland Shipping Company v. *Norwich Union Fire Insurance Society*, *ante*, p. 4; 116 L. T. Rep. 327; (1917) 1 K. B. 873; on appeal, *ante*, p. 258; 118 L. T. Rep. 120; (1918) A. C. 351.

[Scrutton, L.J. referred to *The Xantho* (6 Asp. Mar. Law Cas. 207; 55 L. T. Rep. 203; 11 P. Div. 170; 12 App. Cas. 503).]

Cur. adv. vult.

June 28.—The following written judgments were delivered:—

Swinfen Eady, M.R.—This is the appeal by the Attorney-General on behalf of the King from the judgment of Rowlatt, J. in favour of the suppliants on the trial of a petition of right. The case is reported *ante*, p. 121; 117 L. T. Rep. 94; (1917) 2 K. B. 769).

The suppliants were the owners of the steamship *St. Oswald*, which was sunk in the Mediterranean on the night of the 31st Dec. 1915 after being in collision with the French battleship *Suffren*, and the question for decision is whether the loss was occasioned by a war risk or a sea risk.

The *St. Oswald* was a steel single-screw steamship of 3810 tons gross and 2411 tons net register and about 361ft. long, and she was requisitioned by the Admiralty for use on Government service when she was at Marseilles on the 28th March 1915. She was so taken up on the terms of a charter-party known as T. 99 and expressed to be made between the owners and the Director of Transports for and on behalf of the Admiralty.

Clauses 21, 24, and 25 of the charter-party are as follows: "21. The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorised by them, and shall in all respects comply with the confidential instructions for masters of transports; but he shall be solely responsible (on behalf of the owners) for the management, handling, and navigation of the ship. 24. The Admiralty shall not be held liable if the vessel shall be lost, wrecked, or driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk. 25. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause. Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she shall be totally lost, at the time of such loss."

The steamship continued in the service of the Admiralty until she was lost. On the 31st. Dec. 1915 she was engaged as a transport in the Eastern Mediterranean, assisting in the evacuation of troops from Gallipoli. About 5.30 p.m. she left the harbour at Imbros bound for Helles, Gallipoli. She had no navigation or other lights showing and was proceeding at full speed (which was between seven and eight knots) pursuant to orders and instructions from officers of the Admiralty. Her side lights were in position and lighted, but obscured; her masthead light was lighted, but not hoisted or showing. The night was dark and there was no moon. After rounding Cape Kephalo the vessel was put on a course for Helles, S.E. ½ S.

The chief officer shortly afterwards saw the loom of the *Suffren* bearing a little on his starboard bow, and almost immediately afterwards the *Suffren* displayed lights and he saw her masthead lights and her port light, whereupon he put his helm hard-a-port and uncovered his side lights and gave one blast, indicating that he was directing his course to starboard. Almost immediately afterwards he saw that the *Suffren* starboarded her helm; she gave two blasts; her green light came into view, and she struck and rammed the *St. Oswald* at an angle about 60 degrees on the port side, causing her to sink almost immediately.

The captain of the *St. Oswald* gave evidence that he was in the chart room, having handed over the vessel to the chief officer, after placing her on a course for Helles, when he heard the sound of one blast from his own ship, and rushed on the bridge and found the *Suffren* almost ahead. The helm of his own ship was hard-a-port, and he ordered that it should be kept at that. His vessel was swinging rapidly, but the *Suffren* came on and with her ram struck the *St. Oswald* on the port side about opposite the foremast, and she sank in about a minute and a half. The *Suffren's* speed was about twelve knots and the *St. Oswald's* seven or eight knots, so that the combined speeds would make about twenty knots, or a knot in three minutes.

The master estimated that when he came on to the bridge the vessels were only a quarter of a mile apart, probably less, so that it was a matter of some thirty to forty-five seconds before the impact occurred. Between the time when the *Suffren* was first sighted and the collision the interval was very short indeed. The time stated in the evidence differs somewhat from the time stated in the two written reports made by the master shortly after the catastrophe. But in each case it is an estimate only and difficult to judge with any degree of accuracy. The shorter period is probably nearer to the truth. The only evidence is that of the master and chief officer of the *St. Oswald*. No evidence was adduced of those on board the *Suffren*, and we are told that that ship was subsequently lost.

In the answer and plea of the Attorney-General to the petition it was alleged that the loss of the *St. Oswald* was occasioned by the fault and negligence of the master in not keeping or causing to be kept any, or, alternatively, any proper look-out, whereby the master did not become aware of the approach of the *Suffren* in sufficient time to avoid the collision. During the opening the Attorney-General abandoned the point that there was a bad look-out on the *St. Oswald*. The Attorney-General also stated that he did not take any point about the variation of the times given, and did not suggest negligence of any kind on the part of either ship. He also stated that he did not dispute that the sailing without lights was a military operation.

The attitude taken by the Attorney-General on the trial was that the suppliants had the burden of proving their case and had not discharged the burden. And the contention of the Solicitor-General before us has been to the same effect. Reliance was placed upon a passage in the second

written statement of the master that "the collision might have been avoided if both vessels had altered course to starboard from the time of first seeing one another, but was probably largely due to the uncertainty caused by the screening of navigation lights."

This statement was considerably modified by the master's evidence at the trial, that after the vessels first sighted each other they drew together so rapidly that there was hardly time to do anything, and that if the *Suffren* had ported her helm the ships were in such close order that it would not have availed to prevent the collision, and that the ships could not see one another in time to avoid the collision. He further said that the collision was solely due to carrying out the Admiralty orders and keeping lights screened.

Upon the facts I am of opinion that the collision was occasioned solely by the absence of lights and the speed at which the vessels were proceeding. They were unable to see one another in sufficient time to prevent a collision, which was inevitable at the moment when the vessels first perceived each other.

The Solicitor-General urged that the absence of lights could not cause a collision, although the presence of lights might prevent one. Having regard to the speed of the vessels, I am of opinion that it was the absence of lights which caused the collision—caused it in this sense, that it prevented the vessels from seeing one another at such a distance apart as would have enabled them to take the ordinary steps dictated by good seamanship and steer a course by which each would have passed clear of the other.

It was urged that by the terms of the charter-party a collision is expressly named as a marine risk, and not as a war risk. This is true. But there is also a warranty, "from all consequences of hostilities or warlike operations," and, if there is a collision as such a consequence, it is covered by the warranty and excluded from being a loss by a sea risk. If a vessel chartered under T. 99 were rammed and sunk by a hostlile warship, it cannot be doubted that such a loss, although arising as a result of a collision between two vessels, is a loss by warlike operations, and covered by the warranty.

The fact that the collision was between two vessels of the allies does not prevent it from being a consequence of warlike operations. The illustration put by Erle, C.J. in *Ionides* v. *Universal Marine Insurance Company* (14 C. B. N. S. 259, at p. 286) of a ship blown up by torpedoes placed to protect a port from hostile aggression was obviously the case of a friendly ship entering the port. But he pointed out that in that case the proximate cause of the loss would clearly be the consequence of hostilities, and so within the exception. In that case it was held that the proximate cause of the loss was not the extinguishment of the light on Cape Hatteras, but the fact of the captain having missed his reckoning and either not keeping a sufficient look-out, or not lying-to when his position was doubtful, and so running ashore.

In *France, Fenwick, and Co.* v. *North of England Protecting and Indemnity Association* (*ante*, p. 92; 116 L. T. Rep. 684; (1917) 2 K. B. 522) the proximate cause of the loss was that the ship ran upon a sunken wreck, which is an ordinary marine peril. To embark upon an inquiry as to how the wreck came to be there, and whether it arose from the violence of the seas or as a consequence of warlike operation, would be to investigate, not the proximate, but a remote cause.

In the present case the dispute is not determined by saying that the *St. Oswald* was lost through a collision, as the further question then arises, What occasioned the collision? And the answer is that it was solely occasioned by obedience to orders to sail without lights and to go at full speed. Such a proceeding was in defiance of the rules of good seamanship, but necessitated by the exigencies of the warlike operations then in progress.

In my opinion the *St. Oswald* was lost by the proximate direct and immediate consequence of warlike operations, and accordingly that the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—On the 31st Dec. 1915 the steamship *St. Oswald*, while engaged under requisition by the Admiralty in evacuating the British troops from the Gallipoli Peninsula, was run into and sunk by the French battleship *Suffren*. The *St. Oswald* till just before the collision was, by orders of the Admiralty, steaming without lights and at full speed. The *Suffren* till just before the collision was also steaming without lights.

The owners of the *St. Oswald* claimed her value from the Crown under the terms of the charter on which she was requisitioned. The material clauses are clauses 21, 24, and 25. Clause 21 says: "The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorised by them, and shall in all respects comply with the confidential instructions for masters of transports; but he shall be solely responsible (on behalf of the owners) for the management, handling, and navigation of the ship." Then clause 24: "The Admiralty shall not be held liable if the vessel shall be lost, wrecked, or driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk." Clause 25 is: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive 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 the declaration of war. . . ."

It was clear that the vessel was lost by collision. But the owners alleged that the loss and the collision were directly the consequence of hostilities or warlike operations, and were a risk of war for which the Admiralty was liable.

We are relieved from considering in this case how far precautions against enemy action are "hostilities or warlike operations," for in the court below, on a question from the judge, "You do not dispute, of course, that sailing without lights is a military operation?" the Attorney-General, for the Crown, answered "No, my Lord. . . . That is clear. I do not in the least dispute that it was a contributory cause." I deal with the case on this admission, and reserve the right to consider in any future case

the exact meaning of the term "warlike operations."

The risks taken by the Admiralty under the charter are the risks which would be excluded from an ordinary Lloyd's policy by the clause known as the "f. c. and s." clause. This brings into operation the rule of construction usually expressed in the maxim *Causa proxima non remota spectatur*, a phrase which, after many years of service, now finds the accuracy of its language somewhat in question.

Lord Sumner in *Becker, Gray, and Co.* v. *London Assurance Corporation* (*ante*, p. 156; 117 L. T. Rep. 609; (1918) A. C. 101) prefers the phrase the "direct" instead of the "proximate" cause. Lord Dunedin in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society*, 118 L. T. Rep. 120; (1918) A. C. 351) favours the expression "the dominant cause." Lord Shaw uses indifferently the terms "real," "efficient," "predominant." Lord Haldane uses the words "immediate cause."

We appear to be back in the regions from which I had thought the rule of proximate cause was intended to save us, where it is necessary to select from a number of contributory causes the principal one which caused the loss. Whatever the language, I understand the plaintiffs do not dispute that it is not enough for them to prove that the loss happened in the course of a military operation; or that a military operation was one of the contributory causes which together produced the loss. The military operation must be the direct or dominant cause of the loss, and no new and independent cause must operate after the military operation alleged.

The question then is: Have the plaintiffs proved that the direct or dominant cause of the loss was military operations, without the intervention of any new and independent effective cause There again the question in dispute is much limited by the attitude taken by the Crown at the trial. They did not affirmatively allege any other cause; they did not affirmatively allege or suggest that either ship was negligent. The learned judge says in his judgment: "The Attorney-General declined to affirm (and I asked him specifically as to the *Suffren*) that either vessel did wrong under the circumstances. He merely said it was not affirmatively proved that the collision was the consequence of the warlike operations."

I agree that the plaintiff who proves a state of facts consistent with liability or non-liability of the defendant fails. But the court cannot fail to be influenced by the fact that the defendant declines to allege any state of facts proving that he is not liable. The question then is: Have the plaintiffs in the present case proved that the loss and collision were directly caused by the military operation of steaming full speed at night without lights, in order to remove troops without attracting the attention of the enemy guns or submarines?

The court is in the most unsatisfactory position of having to pass judgment in the circumstances of the collision without nautical assessors, and on evidence from one ship only. In my experience, it is unusual in a collision case for the evidence of one side accurately to state the whole facts, and it is obviously almost impossible for evidence from one vessel at night accurately to state the course of or the look-out on the other ship. And the position is not made easier when the defendant declines to make any affirmative suggestion as to the circumstances of the collision, but only says that the plaintiffs' evidence leaves the matter ambiguous.

Two witnesses were called for the plaintiffs. The mate first saw the *Suffren* two points on his starboard bow; he did nothing till the *Suffren* almost immediately afterwards showed a red light, when he quite properly ported and blew two blasts. That is, having an apparently crossing ship on his starboard side, he took steps to keep out of her way by passing red to red. The *St. Oswald's* master, who was in the chart room below the bridge, came up at once on hearing the two blasts, and then saw the *Suffren* slightly on his port bow, just showing her green light. The collision took place almost directly and the *Suffren* struck the *St. Oswald* on the port bow by the foremast, at an angle of 60 degrees to the centre line leading aft. Those on the *St. Oswald* thought her head had altered five or six points.

It is obvious, as the *Suffren's* green light came into view, that she was acting under a starboard helm, and the angle of the blow, if the *St. Oswald* is right as to the alteration of her head, shows that the *Suffren* was originally a crossing ship and swung considerably under a starboard helm. It seems further clear that all these events happened in a very short time, probably in less than two minutes, and, as the boats were approaching at a joint speed of about twenty knots, that they probably saw each other at considerably less than a mile off.

If the ships had been carrying the normal lights, it would seem on the evidence before us difficult to justify the *Suffren's* action. As a crossing ship, with the other on her port side, she should have kept her course and speed. If by any chance the ships appeared to be meeting, of which there is no evidence, the *Suffren* should have passed port to port.

I have no doubt if we heard the *Suffren's* case we should hear a very different story. But it is one of the obvious results of steaming at night full speed without lights that ships may come on each other very suddenly, each with no sufficient indications of what the other ship is doing, and even of whether she is a steamship or sailing ship. And I am not disposed to treat an apparently wrong manœuvre in what has been called the agony of the moment, when the "agony" is produced by the order to steam full speed without lights, as a new and independent cause, preventing the original order from having its full effect. And this is particularly so when the defendants themselves will not take the burden of alleging that the *Suffren* was negligent.

I have come to the conclusion, therefore, that the appeal should be dismissed. But I desire to say that in my view this case must not be taken as deciding either that every collision where the vessels are steaming without lights is a war risk, or that steaming without lights by Admiralty orders is always a warlike operation.

DUKE, L.J.—The decision of this case depends upon the true answer to the question whether the loss of the steamship *St. Oswald* was caused by "collision" within the meaning of clause 24 of the charter-party made between the suppliants

and the Admiralty, or was the consequence of "hostilities or warlike operations" within the meaning of clause 25.

On the 31st Dec. 1915, while the Gallipoli peninsula was being evacuated by His Majesty's forces, the *St. Oswald* was ordered, as an auxiliary transport in the service of the Crown, to proceed from the island of Imbros to Cape Helles in the peninsula, a distance of about ten miles, as was stated, in order that she might there take troops on board.

Various ships were engaged in the undertaking of evacuation. It was a dark night, and, under orders issued by the proper naval authority, the vessel was navigated at her full speed of seven to eight knots an hour and without lights. While she was so proceeding, her chief officer saw ahead of her, a little on her starboard bow, a vessel which is now known to have been the French battleship *Suffren*. The *Suffren*, like the *St. Oswald*, was being navigated without lights, and her speed is estimated at from twelve to fourteen knots.

Almost immediately upon being seen from the *St. Oswald* the *Suffren* showed her lights. Her port-side light and her masthead light were seen from the *St. Oswald*. Thereupon the *St. Oswald's* lights were shown, the *St. Oswald's* helm was put hard-a-port, and a signal of one blast was given. The *Suffren* starboarded her helm and gave a signal of two blasts. The result of the alteration made in the courses of the two vessels was that the *Suffren* struck the *St. Oswald* on her port side with her ram with such force and weight that the *St. Oswald* sank in about a minute and a half.

By the terms of the charter-party the owners of the *St. Oswald* were to bear risks of loss in consequence of collision, and the risks which would be excluded from an ordinary English policy of marine insurance by the words "warranted free from . . . all consequences of hostilities or warlike operations" were to be borne by the Admiralty. The owners of the *St. Oswald*, alleging her loss to be within the risk accepted by the Admiralty, claimed by their petition of right to recover her value from the Crown.

Upon the hearing, the only evidence given was that of the captain and chief officer of the *St. Oswald*. The *Suffren* had been sunk at sea during the war. No case of negligence on the part of either vessel was set up for the Crown, and it was admitted by the Attorney-General in express terms that the sailing of the *St. Oswald* without lights was a military operation.

The view of the facts taken by the learned judge in the court below was that when the vessels sighted each other they were in instant peril of collision, that neither vessel was to blame, and "that the manœuvres which they executed did not constitute an intervening cause of the collision, but are merely to be regarded as an attempt which failed to escape from the existing peril. Escape or destruction depended upon sudden action which might be fortunate or disastrous, but which had to be taken." The learned judge found accordingly that the cause of this loss was the warlike operation of navigating at night at a high speed and without lights, and he gave judgment for the suppliants.

Counsel for the Crown relied, in supporting the appeal, upon the terms of the charter-party which leave with the owners the risks of collision, and the rule which is expressed in the maxim *Causa proxima non remota spectatur*. They contended that the evidence on the part of the suppliants did not prove the absence of lights to have been the proximate effective and immediate cause of the collision; that there was an evident and unexplained mistake on the part of the *Suffren* which was the direct cause of the collision; and that a mistake in the navigation of one of the two approaching ships is a peril of the sea, and not a risk from warlike operations. The case was likened to that of the *Linwood* in *Ionides* v. *Universal Marine Insurance Company* (14 C. B. N. S. 259).

There is no lack of guidance as to the principle upon which the cause of loss in a case like the present is to be ascertained. The discussion covers at any rate the period from Lord Bacon's time to the present year. Lord Bacon made it the subject of Title I. in the treatise on the Maxims of the Law, which he dedicated in 1596 to Queen Elizabeth. It has been expounded in the case this year in the House of Lords of *Becker, Gray, and Co.* v. *London Assurance Corporation* (*ante*, p. 156; 117 L. T. Rep. 609; (1918) A. C. 101). "A peril insured against acting upon the subject insured immediately and not circuitously" (per Lord Alvanley in *Hadkinson* v. *Robinson*, 3 Bos. & Pull. 392); "the immediate cause" (per Abbott, C.J. in *Walker* v. *Maitland*, 5 B. & A. 171); *causa causans* (per Lord Ellenborough in *Gordon* v. *Rimington*, 1 Camp. 123); "the proximate and absolute certain cause and the proximate immediate cause" (per Willes, J. in *Ionides* v. *Universal Marine Insurance Company*, at p. 289 of 14 C. B. N. S.); "the direct and immediate cause" (per Lord Fitzgerald in *Cory* v. *Burr*, 8 App. Cas, at p. 408); "the real moving cause" (per Lord Esher in *The Xantho*, 6 Asp. Mar. Law Cas. 207; 55 L. T. Rep. 203; 11 P. Div. 170, at p. 172; 12 App. Cas. 503); and "the real effective cause" (per Lopes, L.J. in *Pandorf and Co.* v. *Hamilton, Fraser, and Co.*, 5 Asp. Mar. Law Cas. 568; 54 L. T. Rep. 536; 16 Q. B. Div. 629) are successive expressions of the same idea. And in *Becker, Gray, and Co.* v. *London Assurance Corporation* (*ante*, p. 156; 117 L. T. Rep. 609; (1918) A. C. 101) Lord Sumner suggested that the cause to be ascertained is simply "the real and commonsense cause," and proposed to style it "the direct cause."

The cause of the loss which is here in question seems to me to be established in a manner which satisfies the requirements of the rule in all its modes of expression. I am satisfied, as Rowlatt, J. was satisfied, that the cause of the loss of the *St. Oswald* was the military or warlike operation in which she was engaged when she was sunk.

She was purposely navigated at full speed without lights during the night in an area in which other vessels were being similarly navigated. Such a mode of navigation involves special risks of collision, and involves also the risk that in conditions of imminent peril collision will result from movements made by mistake in efforts to avoid collision. A collision which occurred in this way in the course of a military operation brought about the loss of the *St. Oswald*. The risk began in the military operation, and the

military operation gave to the risk its conclusive effect.

I think, therefore, that the decisive question in the case ought to be answered in favour of the respondents, and that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the Crown, *Solicitor to the Treasury.*

Solicitors for the suppliants, *Lightbound, Owen, and Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRLTAY DIVISION.

ADMIRALTY BUSINESS.

Feb. 28, *March* 2 *and* 5, 1917.

(Before HILL, J. and Elder Brethren.)

THE ATHAMAS. (*a*.)

Salvage—Claims by the commanders and crews of vessels in the Royal Navy—Conditions which justify an award—Facts to be taken into account in making an award and in apportioning it between the crews of the vessels engaged.

A Greek steamship, after striking a German mine, was salved by services rendered by nine vessels in the Royal Navy. The officers and crews of these vessels having obtained leave from the Admiralty to put forward claims for salvage, instituted proceedings to recover salvage. The claim of one of the vessels was settled, but the claims of the other eight were tried. It was proved that the crews of all the vessels rendered services which contributed to the successful salving of the vessel.

Held, that as all the claimants had performed substantial services they were all entitled to share in the award. That the total sum awarded was not to be increased by the fact that the numbers of the salvors were increased by their working in relays. That though consideration was to be taken of special work done or risk incurred by individuals, too minute a view of the services of each set of salvors was not to be taken, and that the services were to be regarded as a whole.

SALVAGE SUITS.

The plaintiffs were the commanders, officers, and crews of His Majesty's torpedo boat destroyers *Electra* and *Fervent*, the torpedo boat No. 9, and the auxiliary trawlers *Seaflower*, *Sicyon*, *Marloes*, and *Croupier*, and Lieutenant Warley, R.N.R., and four surviving members of the crew of His Majesty's trawler *Resono* and the personal representatives of twelve others of the crew of the *Resono* who had lost their lives since the sevice was rendered.

The defendants were the owners of the Greek steamship *Athamas*, and her cargo and freight. The *Athamas* was a steamship of 3317 tons gross and 2477 tons net register, and when the services were rendered to her she was on a voyage from Galveston to Rotterdam, with a cargo of grain for the Belgian Relief Committee. The value of the *Athamas* was 80,000*l*. and of her cargo 57,000*l*., making a total of 137,000*l*.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The services were rendered by the crews of the respective vessels on 17th and 18th Nov. 1915, and are fully set out in the judgment of Hill, J.

Laing, K.C. and Commander *Maxwell Anderson*, R.N., for the plaintiffs.

Bateson, K.C and *Stranger* for the defendants.

HILL, J., after stating who the plaintiffs and defendants were, and the values of the salved property, proceeded:—

About 3.30 p.m. on the 17th Nov. 1915, the *Athamas*, when near the Galloper, struck a mine and received very serious damage. There is no evidence as to the precise nature of the damage, but that it was very serious is proved by the fact that No. 3 hold filled and No. 4 hold had 14ft. of water in it, and in the bulkhead between No. 3 and the engine-room there was a serious bulge. All this indicates very serious damage aft.

After the explosion the crew of twenty-nine left the *Athamas*, or, rather, the master and officers, with the best part of the crew, took to the boats, leaving behind some of their fellows and the English pilot. The *Resono* was close by (having on board twenty-one persons rescued from the boats of a Norwegian steamship which had shortly before been mined). She at once proceeded to the *Athamas*, took on board the officers and men in the boats, and sent one of the boats back to bring off the rest of the crew, who, not unnaturally, were in a state of panic. The English pilot seems to have been overlooked by the Greeks, and came off in a small boat by himself.

The *Resono* summoned assistance by wireless, and, after a short time, as there seemed a chance of saving the *Athamas*, decided to take her in tow. The master and crew of the *Athamas* refused to return to her. The mate and some of the crew did get as far as going in a boat towards her, but before they reached her their hearts failed them and they turned back. The second hand of the *Resono* and four of her crew then took the *Resono's* boat and went on board the *Athamas*, and there made fast the *Resono's* 2¾in. wire.

About 5 p.m. the *Resono* began to tow the *Athamas* on a course for the Kentish Knock. By about 11 p.m. the *Resono* had brought the *Athamas* to about two miles to the eastward of the Kentish Knock, the distance towed being eight and a half miles. The towage was difficult, partly owing no doubt to the low power of the *Resono* and partly to the sheering of the *Athamas* in a heavy swell. The *Athamas* was down by the stern, and there was no one on board to attend the wheel.

But this towage was very useful (1) in getting the *Athamas* away from the neighbourhood where she had struck an enemy mine and where there might be, and, in fact, were, others, and (2) in preventing the *Athamas* drifting, as, with the set of the tide, she probably would have drifted, on to a minefield to the south. At 3.40 p.m. the *Electra* and *Fervent* came up and accompanied the *Athamas* as escort. The T.B. 9 also came up, and was sent on ahead to meet the assistance which had been summoned.

About 11 p.m. the *Seaflower*, *Sicyon*, *Marloes*, and *Croupier* arrived. They had left Barrow Deep at 5.45 p.m. and met T.B. 9 at 10.30 p.m. In passing the Tongue Lightship they had given instructions for the light to be shown. About the same time the *Director Gerling* also arrived. The

crew of the *Athamas* was transferred from the *Resono* to the *Croupier*, and the *Resono* left for Harwich to land the crew of the Norwegian vessel.

About 3.25 a.m. on the 18th the *Robust* arrived. This brings all the claimants and the *Director Gerling* upon the scene. By their efforts the result was attained that the *Athamas* was brought into the Thames to Mucking Flats. She was beached at high water at 9.30 p.m. She was handed over to the Salvage Association on the following morning, the 19th.

The particular services of the *Resono* have already been stated. In addition, she did the boat work in making the *Director Gerling* fast to *Athamas*. She was engaged in all eight and a half hours. Her complement is nineteen all told, under Lieutenant Warley, R.N.R.

The services of the others may be thus summarised. The *Electra* (complement 59) was engaged about twenty-two hours. Her commander, as senior naval officer, was in charge of the operations. She acted as escort until the West Oaze Buoy was passed, and she acted as guide in fog through the Edinburgh Channel. The *Fervent* (complement 59) was engaged about twelve hours. She acted as escort. In passing the Kentish Knock she went ahead and displayed mark lights as a guide. The T.B. 9 (complement 38) was engaged about seven hours, and was chiefly useful in going off to inform the *Seaflower* and others as to the position of the *Athamas*. The *Seaflower* (complement 18) was engaged about thirty-eight hours and was actually fast to the *Athamas* about seventeen hours. When the *Resono* left and the *Director Gerling* and others were made fast, the *Seaflower* made fast astern to help to steer, and so continued until Mucking Flats were reached. The *Sicyon* (complement 14) was engaged about fourteen hours, and was actually fast for three and a half hours. When the *Resono* left the *Sicyon* made fast on the starboard side, and so continued till 3.25 a.m., when her place was taken by the *Robust*. Later, in navigating the Longsand Passage, she and the *Marloes* went ahead and acted as guides. She left at 7.45 a.m. Two of her men were on board the *Athamas* from 1.30 a.m. The *Marloes* (complement 11) was engaged about fourteen hours. She was standing by from midnight to 7.45 a.m. and acted as guide with the *Sicyon*. The *Croupier* (complement 15) was engaged about thirty-eight hours and actually fast for seventeen hours. When the *Resono* left she made fast on the port side of the *Athamas* (whose crew she had taken on board). Lieutenant King with two men were on board the *Athamas* from 1.30 a.m. till the vessel was beached. Lieutenant King held a pilotage certificate for the River Thames. The *Robust* (complement 17) was engaged about twenty hours, towing about sixteen hours, fast on the starboard side. The *Director Gerling* was fast and towing from midnight on the 17th Nov. to 11 p.m. on the 18th Nov.

No doubt so far as towing went the *Director Gerling* and the *Robust* were more important instruments than the trawlers. The total distance towed was about sixty miles, the total time of towage about thirty hours. The weather was moderate—a northerly wind with a heavy sea. In the Edinburgh Channel there was at times thick fog (at one time the flotilla anchored for an hour). There was also, of course, some danger from unlighted or partially lighted channels. There was the danger of other mines and of submarine attack upon a slowly moving flotilla. Whatever work had to be done was done by the salvors. The Greeks were only persuaded to go on board their vessel again after daylight on the 18th.

The chief element is, however the danger of the *Athamas*. As to the danger from mines and minefield from which the *Resono* saved her I have already spoken. As to the danger from the damaged condition of the ship, I have not the material to estimate it very precisely, but a ship with No. 3 hold full and No. 4 with 14ft. of water in it and damage to the bulkhead between No. 3 and the engine-room (even though it showed no sign of leaking), is obviously in a state of very considerable danger.

She needed to be got in promptly, and the assistance of those or other salvors was essential. And the assistance of these salvors was rendered very promptly and with great skill and success.

In making an award the court can allow nothing for the use of His Majesty's ships as instruments of salvage. They are ready to assist neutral ships as friends when exposed to the wrongs done them by the King's enemies. The court can only reward the commanders, officers, and crews.

In arriving at a fair award, I agree that it must be based upon the total service rendered; the total must not be increased because of the number of salvors acting in relays.

In distributing the award among the several salvors in cases like this, there is no doubt some difficulty. It is easy to point out that only some of the vessels engaged have actually towed and so forth. But I think the operation must be regarded as a whole.

The vessels which tow, the vessels which summon assistance, the vessels which act as guides or as mark boats in unlit channels, the vessels which act as escort against submarine attack, and the men who bring their knowledge of the minefields and the channels, co-operate in the result.

Of course, it must be clear that a substantial service was rendered by each set of claimants. But that condition being satisfied, if one were to try too minutely to weigh the comparative contributions, I think one would be likely to get at a less fair result than by taking a broad view of the services rendered by each. Attention must, of course, be paid to any special work of individuals, as the direction of the whole operations, or the risk run by men who go on board the mined vessel or do the boat work. And in this case I must remember I have not the *Director Gerling* before me.

I propose to award a total sum of 3500*l.*, distributed as follows (and when I give the name of the vessel I, of course, mean the commander, officers, and crew in each case): *Resono*, 550*l.*; *Electra*, 750*l.*; *Fervent*, 400*l.*; *Seaflower*, 400*l.*; *Sicyon*, 300*l.*; *Marloes*, 100*l.*; *Croupier*, 450*l.*; T.B. 9, 200*l.*; and *Robust*, 350*l.*

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Downing*, *Handcock*, *Middleton*, and *Lewis*.

Wednesday, May 9, 1917.

(Before Sir S. T. EVANS, President, and Elder Brethren.)

THE F. D. LAMBERT. (*a*)

Salvage—Services rendered by the officers and men of a British warship—Nature of service —Protection from submarine attack.

A British steamship was at anchor off Lowestoft when a portion of the German fleet attacked that town. Shells fell in the vicinity of the steamship, one of them struck her and caused a fire to break out on board her. The master and crew of the steamship put off from their vessel in boats with the intention of seeking refuge on board a lightship stationed near at hand. Before the lightship was reached a British torpedo gunboat came up and the crew of the steamship left their boats and went on board the gunboat. Some of the crew of the gunboat then boarded the steamship, put out the fire, lifted the anchors, raised steam, and took her into Yarmouth Roads; the gunboat meanwhile acted as escort to protect her from attacks by submarine. In an action for salvage by the commander, officers, and crew of the gunboat it was alleged that the steamship was badly on fire and in imminent danger of destruction by enemy submarines.

Held, that, though the services rendered by the commander, officers, and crew of the gunboat were salvage and they were entitled to an award, it was part of the duty of patrol vessels to protect the mercantile marine from submarine attack, and that, in the absence of sea peril, such protection was not to be regarded as a salvage service.

SALVAGE SUIT.

The plaintiffs were the commander, officers, and crew of His Majesty's torpedo gunboat *Dryad*, numbering 127 all told.

The defendants were the owners of the steamship *F. D. Lambert*. The *F. D. Lambert* was a screw steamship of 2195 tons gross and 1330 tons net register, and when the services were rendered to her was on a voyage from Almiera to West Hartlepool with a cargo of iron ore.

It appeared that at 3.50 a.m. on the 25th April 1916 His Majesty's ship *Dryad* was on her station when she received orders to proceed to sea. Shortly afterwards a squadron of German warships was seen, and the *Dryad* was under fire for some time. About 5 a.m. the *F. D. Lambert* was observed to be on fire. The *Dryad* made for her, and, falling in with the crew of the *F. D. Lambert*, who had taken to their boats, took them on board.

The *Dryad* then put a party consisting of fourteen men all told on board to extinguish the fire, and they lifted the anchors, raised steam, and navigated the *F. D. Lambert* into Yarmouth Roads. The *Dryad* meantime escorted her, protecting her from submarine attack. On the arrival of the *F. D. Lambert* in Yarmouth Roads her crew returned to her.

The value of the *F. D. Lambert* was 38,271*l.* 11*s.*, of her cargo 2681*l.*, and of her freight at risk 3806*l.* 9*s.*, making in all 44,159*l.*

The plaintiffs alleged that the *F. D. Lambert* had been abandoned by her crew; that she had been left in a strong tideway in eleven fathoms with only thirty fathoms of cable out; that she had been holed by shell fire, was badly on fire, and was in imminent danger of destruction by enemy submarines.

The defendants admitted that the services rendered were salvage services; they denied that they had any intention of abandoning their vessel, and alleged that the shell hole was well above the water-line; that the fire would have burnt itself out; and that the services were of a simple character.

A. D. Bateson, K.C. and *Lewis Noad* for the plaintiffs.

Laing, K.C. and *Balloch* for the defendants.

The PRESIDENT.—The services which were rendered by the commander, officers, and crew of the *Dryad* have been fully described, and they are admitted in the defence to have been services of a salvage nature. On the morning of the 25th April 1916, the *F. D. Lambert*, the defendants' vessel, was at anchor and had been at anchor for some hours in some place near the position described by the witnesses on one side or the other. I am not called upon to say what the exact position was. It was said there were issues of fact on this matter. I prefer to call them controversies with regard to position which are not real issues in the case at all.

She came to anchor about ten past nine, according to the evidence of the master, who gave his evidence very fairly and very honestly. She remained there until about four o'clock in the morning. The master of the *F. D. Lambert* had given instructions to be called about half-past three, and the intention was to get under way, and they were preparing to get under way about four o'clock in the morning.

Not very long after that shell fire was directed chiefly towards the coast from a portion of the German fleet, a considerable portion of the German fleet, and unfortunately one of the shells dropped upon or came into the *F. D. Lambert*. There were shells raining in the vicinity, and it is not to be wondered at that the master and crew of the *F. D. Lambert* thought their lives were in jeopardy. A portion of the ship, aft, was set on fire; and they could not save their ship by remaining on it; and I do not think anybody can blame them for the decision which was come to—namely, that they must try to save their lives for the time being. I do not think they wanted so much to get away from the ship as to put themselves in a position of greater safety. The further they were away from the ship the less likelihood there was of any fire being directed to them, and, of course, the target was much smaller.

I believe the master of the *F. D. Lambert*, when he says the intention was to go to the Corton Light Vessel.

I am not called upon to settle the controversy which has, I think very unfortunately, arisen between the two sides as to the position of the anchorage and as to the exact conversation which took place between the master of the *F. D. Lambert* and the commander of the *Dryad*—where it took place, when it took place, or exactly what it was. It is enough for me to say I believe the account

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

given by the master that he intended to go to the Corton Light Vessel. He gave his reason, and it was that the Corton was a lightship; and as a rule he thought—which was enough for him—that the Germans when their fleet came out, did not intend in that way or by submarines to destroy marks in the ocean which are charted and which may help them in their nefarious work as much as the marks help the mercantile marine of this country in its beneficial work.

The Corton Light Vessel was not reached before the *Dryad* came up.

The *Dryad* very properly, according to the decision of her commander, decided to take these men on board. They did not know what their intention was; they saw them coming away from a ship that had been shelled and was in fact burning, and they took them on board. Again, I am not blaming anybody for not investigating the circumstances of the shelling of the ship and the leaving of the ship by the master and crew. They had other things to think about, no doubt.

What was decided was to send some of the officers and crew of the gunboat *Dryad* to the *F. D. Lambert*.

If he had thought about it at all, I should imagine, putting myself in his place, that Commander Thurstan would have said: "Well, I had better ask the master, and the engineer particularly, of this ship if they care to go back to the ship." His account in the witness-box, which I accept, was that he really did not trouble himself about things like that, and he sent his boat. Bravely and courageously they went. Because, whatever risk there was to anybody returning to the *F. D. Lambert*, either from a continuance or a recommencement of the shell fire, was equally a risk to the more valuable expert men sent from the *Dryad* as it would be to the men of the mixed crew of the *F. D. Lambert*. Whatever risk there was these people were exposed to it.

Now, the services which were rendered, and which were of a salvage nature, were in the main at any rate these. That the master and crew of the ship herself, which was in a position, as it turned out immediately afterwards, to resume her voyage, were immediately taken back to their own vessel and the voyage was resumed. That, no doubt, was a help to the owners of the vessel, whose servants they were.

It is said that there was danger from submarines. Unfortunately there was danger at this time—there is danger still—from submarines, but it must be remembered that the protection by one of His Majesty's ships of a merchant vessel against submarines does not at all necessarily partake of a salvage nature. Patrol vessels round our coasts are expected to and do render services of that kind as part of their duties. But for such services our Mercantile Marine would fare very much worse than it does; and although I do not say that in no case if the protection of a ship from submarine danger to be taken into account when salvage services are rendered, yet, in a case where there is no sea peril at all the court must be very careful indeed not to lay it down that whenever there is such a protection afforded by one of His Majesty's ships that the services rendered in that way are to be rewarded by salvage remuneration.

The men who were sent from the *Dryad* to the *F. D. Lambert* put out the fire, but not—according to the evidence—until the whole of the woodwork of that part of the vessel was destroyed; and there is no evidence before me to show or to indicate that the fire—having regard to the way in which the ship is protected—would have spread itself to other parts of the vessel. The cargo was iron ore, there was an iron or steel bulkhead near, and the probability is the fire would have expended itself by destroying all that was destructible by fire.

That being so, I feel satisfied that the master of the *F. D. Lambert* would have remained on the Corton Light Vessel when he had reached her until such time as he could see what had happened to his ship. I do not think his mental attitude was that described by lawyers when they say there was no *spes recuperandi*, or when they say there was no *animus revertendi*. I do not think he intended to abandon the ship entirely; he was waiting to see what events would occur, and when, as would have happened half-a-dozen hours afterwards, the fire had expended itself, I feel no doubt the master, with the courage of our seamen, would, notwithstanding the fact that he had a mixed crew, have gone back to the vessel and done what he could to proceed with her on her voyage. In that sense I do not think there was any intention to abandon the vessel.

The term abandoment has been brought into these proceedings because of the old decision that if a vessel is abandoned it must be treated as derelict, and, for that very reason, you must give a very much larger award. When a vessel is derelict in mid-ocean and left to the perils of the sea, that must be, and is, taken into consideration; but in this case the vessel was not derelict. She was left for quite sufficient reasons for the time being, and I think the master and crew would have gone back when they saw that the vessel—except for that wooden part—was intact both with regard to cargo and motive power.

In this case the Admiralty have allowed the commander, officers, and crew of the *Dryad* to bring these proceedings claiming salvage, and it must be noted that whatever services would be attributable to the vessel herself if she had been a merchant vessel and not one of His Majesty's ships must be excluded. The award must be given simply and solely for services rendered by the commander, officers, and crew.

I do not wonder myself that the master of the *F. D. Lambert*, with his crew and two boats, had not started back for his vessel when the *Dryad* came up. They were low in the water; they had no glasses in their boats; and they did not know where the German fleet was. I dare say their courage was increased and their hopes raised when they heard from the *Dryad* that the probability was that the German Fleet had disappeared. It was then half-past five on the 25th April—that was full daylight; and so far as our experience goes in two and a half years, from that time until the evening closed in, there was no danger at all from submarines.

I must remember the whole of the circumstances, and I give the award I do because the value of the *F. D. Lambert* was considerable. Although it cannot be said she was actually saved by the services of these officers and crew

I give them the sum of 350*l.*, which I think is ample for the services rendered.

Solicitors for the plaintiffs, *William A. Crump and Son*, agents for *Gilbert Robertson*, of Cardiff.

Solicitors for the defendants, *Charles E. Harvey*.

April 26, 27, *May* 17 *and* 23, 1917.

(Before Sir S. T. EVANS, President.)

THE STRANTON. (*a*)

Collision—Compulsory pilotage—Vessel navigating in a district in which pilotage was compulsory—Vessel proceeding from a port outside the district to a port outside the district—Vessel not making use of any port in the district—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 605, 633—*Pilotage Act* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *ss.* 10, 11, 59, 60.

A British steamship on a voyage from Sharpness to Middlesbrough in ballast came into collision in the Downs off Deal with another steamship. In a collision action both vessels were held to be in fault. The steamship on the voyage from Sharpness to Middlesbrough was in charge of a pilot, and her owners alleged that as the vessel was in a district in which pilotage was compulsory, the vessel was in charge of a compulsory pilot, and that they were not liable for the damage done, as they were protected by sect. 633 *of the Merchant Shipping Act* 1894.

Held, that, though sect. 605 *of the Merchant Shipping Act which would have exempted the vessel from compulsory pilotage was repealed by sect.* 60 *and the second schedule of the Pilotage Act* 1913, *and though by sect.* 10 *of the Pilotage Act of* 1913 *subject to the provisions of the Act, all exemptions from compulsory pilotage ceased to have effect, yet the provisions of sect.* 11, *sub-sect.* 1, *excluded vessels merely passing through a compulsory pilotage district, that the steamship was therefore exempt from compulsory pilotage, and that her owners were liable for the damage done.*

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Benvorlich*.

The defendants were the owners of the steamship *Stranton*.

A collision took place between the two vessels on the 30th Dec. 1914 in the Downs off Deal. The *Benvorlich*, a steamship of 3380 tons gross and 2164 tons net register, was on a voyage from Sharpness to Middlesbrough in ballast. At the time of the collision she was in charge of a Trinity House pilot duly licensed for that district.

The *Stranton*, a steamship of 1678 tons gross and 1057 tons net register, was on a voyage from Jarrow to Rouen with a cargo of coal.

The trial of the action took place on the 26th and 27th April, and the President held that both vessels were to blame. The *Stranton* was held to be three-fourths to blame and the *Benvorlich* one-fourth to blame.

The President also held that the negligence on the *Benvorlich* was solely that of the pilot.

The owners of the *Benvorlich* contended that the pilot was compulsorily in charge, and that they were not liable for the damage done.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The point raised by the contention was argued on 17th May 1917.

The following are the material parts of the sections of the Acts which were referred to in the argument and in the judgment:—

Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 605 (1). The master and owners of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, shall be exempted from any obligation to employ a pilot in that district or to pay any pilotage rates when not employing a pilot within that district. (2) The exemption under this section shall not apply to ships loading or discharging at any place situate within the district or at any place situate above the district on the same river or its tributaries.

Sect. 633. 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.

The Pilotage Act 1913 (2 & 3 Geo. 5., c. 31):

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 text so requires, as a reference to that part of the district only.

Sect. 11 (1). Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either—(*a*) under the pilotage of a licensed pilot of the district, or (*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district who is *bonâ fide* acting as master or mate of the ship.

(2) If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.

[(3) Defined what class of ships were excepted ships; the *Benvorlich* was not within any of the classes enumerated in the section. (4) Provided that a pilotage authority may by by-law exempt from compulsory pilotage in their district certain classes of ships if not carrying passengers; the *Benvorlich* was not exempt under this sub-section.]

Sect. 59. This Act shall (except as expressly provided) come into operation on the first day of April, nineteen hundred and thirteen; Provided that any enactment, order, charter, custom, by-law, regulation, or provision, with reference to pilotage affecting any pilotage district in particular, and in force at the time of the passing of this Act, including any exemptions from compulsory pilotage taking effect thereunder, shall remain in force notwithstanding anything in this Act or any repeal effected by this Act, until provision is made by Pilotage

Order, or in the case of a by-law by by-law, made under this Act superseding any such enactment, order, charter, custom, byelaw, regulation, or provision.

Sect. 60 (1). The enactments mentioned in the second schedule to this Act are hereby repealed to the extent specified in the third column of that schedule. Provided that—(*a*) Any Order in Council, licence, certificate, by-law, rule, or regulation made or granted under any enactment hereby repealed, or in pursuance of any power which ceases in consequence of this Act, shall, subject to the provisions of this Act, continue in force as if it had been made or granted under this Act.

Among the enactments mentioned in the second schedule of the Act as repealed was sect. 605 of the Merchant Shipping Act 1894.

Dawson Miller, K.C. and *D. Stephens*.—The *Benvorlich* was proceeding from a port outside the compulsory pilotage district to a port outside the district. The vessel was exempt under sect. 605 of the Act of 1894. That section was repealed by sect. 60 of the Act of 1913. Sect. 10 of the Act of 1913 provides that pilotage shall continue to be compulsory in every pilotage district in which it was previously compulsory, and that, subject to the provisions of the Act, all exemptions from compulsory pilotage shall cease to have effect. This vessel is not an excepted vessel within sub-sect. 3 of sect. 11 of the Act of 1913, nor is she exempt under any by-law made under sub-sect. 4 of that section. Sect. 11, sub-sect. 1, does not by implication absolve her from taking a pilot, and her owners are protected by sect. 633 of the Act of 1894. [*The Earl of Auckland* (Lush, 164) was referred to.]

Laing, K.C. and *Raeburn* for the defendants.—The *Benvorlich* was not in charge of a compulsory pilot. The abolition of all exemptions by sect. 10 of the Pilotage Act 1913 is subject to the provisions of the Act. By sect. 59 of the Act of 1913 all exemptions from compulsory pilotage remain in force until pilotage orders are made, and no pilotage order affecting the *Benvorlich* has been made. Sect. 14 provides that the defence of compulsory pilotage is not to be extended to an area in which it was not previously compulsory. The *Benvorlich* is impliedly exempted by sect. 11 (1) of the Act of 1913. [*Cannell* v. *Lawther, Latta, and Co.* (12 Asp. Mar. Law Cas. 578; 112 L. T. Rep. 84; (1914) 3 K. B. 1135) was referred to.]

Dawson Miller, K.C. in reply.—Sect. 14 of the Pilotage Act 1913 deals with areas in which pilotage is compulsory. This case depends on the construction to be placed on sects. 10 and 11 of the Act of 1913.

Judgment was reserved and delivered on the 23rd May.

THE PRESIDENT.—The *Benvorlich* was held partly to blame for the collision in this case. Her owners pleaded that the vessel was in charge of a duly licensed pilot within a compulsory pilotage district, who was solely to blame, and relied upon this as a defence to the counter-claim for damages. The question is whether this defence avails them.

The collision took place in the Downs, off Deal, within the London Trinity House district. The vessel, however, was only passing through that district on a voyage between Sharpness and Middlesbrough, both of which places were outside the district. Under sect. 605 of the Merchant Shipping Act 1894 the vessel would be exempt from any obligation to take a pilot. That section was repealed by the Pilotage Act 1913 (sect. 60 and sched. 11). But for the decision of the question which arises, various provisions of the latter Act must be considered.

It was part of the scheme of the Act to supersede sect. 633 of the Merchant Shipping Act 1894 and to put an end, after a suspensory period, to the defence of compulsory pilotage in collision cases; and in the meantime to prevent the application of such a defence in any newly-created pilotage area (*vide* sects. 14 and 15). Counsel for the owners of the *Benvorlich* relied upon the last sentence of sect. 10, sub-sect. 1: "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." He candidly avowed his view that it was not the intention of the Act to abolish the exemption with which the present case is concerned, or to allow the defence of compulsory pilotage where it did not exist before. But he contended that a strict reading of the Act had that effect. It may also be stated in passing that the pilotage authority have never considered that pilotage was compulsory for a vessel passing through like the *Benvorlich*, either before or since the 1913 Act, and have accordingly never made arrangements for such pilotage. But the question, of course, remains, what has the Legislature enacted? It has been observed that the abolition of exemptions in sect. 10 was made "subject to the provisions of this Act." The provisions relating to compulsory pilotage are contained in sect. 11; and the only sanction which the Act contains are the penalties imposed by sub-sect. 2 of that section. The *Benvorlich* was not a ship to which those provisions and sanction apply. The words "while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district" exclude vessels merely passing through.

Moreover, sect. 59 expressly provides that any exemptions such as those contained in the Merchant Shipping Act 1894 shall remain in force, notwithstanding anything in the Act or any repeal effected by it, until provision is made by Pilotage Order or by-law made under the statute superseding them. No provision superseding the exemption now under discussion has been made by the London Pilotage Order and By-laws 1913. And, indeed, having regard to sect. 14 of the Act, no such provision could be made which would have the effect of allowing the defence of compulsory pilotage to an action for negligent navigation where it did not exist at the date of the passing of the Act.

Upon these grounds I decide that the owners of the *Benvorlich*, the defendants to the counter-claim, must bear the damages for which my judgment upon the facts rendered them responsible.

Solicitors for the plaintiffs, *Holman, Fenwick*, and *Willan*.

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

Wednesday, July 4, 1917.

Before Sir S. T. EVANS, President, and Elder Brethren.)

THE GORLIZ. (a)

Salvage — Services rendered by the officers and crews of vessels in His Majesty's navy— Matters to be considered in making an award— Responsibility for employing the property of His Majesty—Personal risk incurred by the salvors— Personal efforts and skill necessary to perform the service.

A Spanish steamship ran ashore in the Thames Estuary. Several vessels in His Majesty's navy came up and towed at the vessel, and she was ultimately got off. In an action for salvage brought by the commanders, officers, and crews of the salving vessels to recover salvage, it was admitted by the defendants that the services were salvage services.

Held that, in awarding salvage to the commanders, officers, and crews of vessels in His Majesty's navy, the responsibility taken by the officers in employing the property of His Majesty on such a service, the personal risks run by the salvors, and the work and skill necessary to perform the service, were the matters to be considered; that, though the services in the case were admitted to be salvage, yet, as the work done was no harder and no more dangerous than the work the salvors would be ordinarily engaged on, the award should not be a large one.

SALVAGE SUIT.

The plaintiffs were the commanders, officers, and crews of His Majesty's hoppers *Outpost* and *Watcher*, and His Majesty's trawlers *Croupier* and *Lynx II.*

The defendants were the owners of the Spanish steamship *Gorliz*, her cargo and freight.

The *Gorliz* was a steel screw steamship of 1850 tons gross register, and, when the services were rendered to her, was on a voyage from Bilbao to Jarrow with a cargo of iron ore.

It appeared that on 4th June 1916, while the *Gorliz* was proceeding through the Black Deep, she took the ground on the Sunk Sand shortly after high water, and, though attempts were made to get her off by means of her own engines, she remained fast ashore.

As the tides were taking off, the master decided to jettison cargo.

On the 5th June a lifeboat was engaged to assist in jettisoning cargo and to run out a kedge. That evening one of His Majesty's vessels came up, and those on board promised to send tug assistance.

On the 6th June, on the morning tide, the *Croupier* and *Watcher* attempted to get the *Gorliz* off, but failed. On the evening tide the *Croupier*, *Lynx II.*, and *Outpost* made another attempt and failed.

On the 7th June the *Goole No. 7*, the *Watcher*, and the *Outpost* attempted to get the *Gorliz* off on the morning tide, but failed, but she was got off on the evening tide by the *Goole No. 7*, the *Watcher*, and the *Outpost*.

The claim of the *Goole No. 7* was settled. The defendants admitted that the services were salvage services, but alleged that they were of a very simple character.

(a) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The value of the *Gorliz* was 54,000*l.*, that of the cargo 2000*l.*, and of the freight at risk 2000*l.*, making a total of 58,000*l.*

A. E. Nelson for the plaintiffs.

R. H. Balloch for the defendants.

The PRESIDENT.—In considering this case, it must be remembered that several matters which translated into money would be important matters have been entirely eliminated. First of all, you have to eliminate the value and remuneration which ought to be given in respect of the *Goole No. 7* as a salving instrument. In the next place, you must eliminate all the money that would be given by way of salvage remuneration to the master and crew of the *Goole No. 7*. And, finally, you must eliminate altogether the value of the four ships which are now part of His Majesty's fleet, the two trawlers and the two hoppers.

There is this also to be remembered, that danger to the salving instruments ought not to be taken into account, except in this regard and to this extent: that it might be right to give something by way of salvage remuneration to the person, whoever he was—only one, I believe, in this case—who took upon himself the responsibility of risking the property of His Majesty in the operations in which they were going to be engaged. Ordinarily speaking, that would not be done by any of the officers and crews of the salving vessels at all. It might be done by some other senior Admiralty officer, whose directions the officers and crews of the particular vessels might require to have and would have to follow.

I also want to make this observation: that although I am willing and anxious to remunerate generously the officers and crews of ships belonging to His Majesty where they take special personal risks and are allowed to claim by the Admiralty, or where they by their great efforts or skill contribute much to the salving of property, yet, if I have a case before me which is merely a case of using the vessels on which they are engaged without any personal risks to themselves and without the necessity for displaying or for the use of any special skill, or the rendering of any great and courageous service—if, in other words, the work done in connection with the salvage services by the officers and crews of these ships is no harder and no more risky than the work in which they would ordinarily be engaged —I do not think these claims are claims to be encouraged. The officers and crews are there to a great extent for the purpose of protecting the navigation of vessels which come to our shores.

In this case the vessel, the *Gorliz*, came from Spain, carrying a cargo of a very useful kind to this country.

I only want to make these general observations applicable to cases of this kind without in any degree seeking to take away any credit due to the officers and men in this case, but in the circumstances of this case the amount awarded must be small. There was no special risk, and they were doing their ordinary work. If they had not been doing this they would have been doing different work, equally hard, elsewhere.

It is admitted that a certain remuneration, by way of salvage, ought to be given to all four of His Majesty's ships. They are practically all the same kind of vessel. The *Lynx II.* was engaged

for one day, the *Croupier* for two days, the *Watcher* and the *Outpost* for three days each, and the *Watcher* and the *Outpost* happened to be engaged on the last tide, the evening tide of the 7th June, when the vessel was brought off.

I award the officers and crew of the *Watcher* 75*l*., the *Outpost* 75*l*., the *Croupier* 40*l*., and the *Lynx II.* 20*l*., making a total of 210*l*.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

July 9 and 22, 1917.

(Before HILL, J.)

THE PETONE. (*a*)

Maritime lien — Claim by seamen for wages — Claim by master for disbursements—Claims paid by stranger—Discharge of lien—Action in rem *by those who had satisfied the liens of the master and seamen.*

The owners of a steamship who were resident in New Zealand sold her through the agency of a firm in this country to persons resident in this country. The steamship when sold was in New Zealand, and under the contract of sale was to be delivered in New Zealand. On her arrival in this country the master and crew were owed sums for wages. The original owners, who had undertaken to engage a crew, were asked to pay the sums due to the crew, but failed to do so, and the firm who had acted as their agents for the sale of the steamship paid the necessary sums. Shortly after the arrival of the steamship in this country, and while the agents for the sale of the steamship were paying the sums due for wages and disbursements, the steamship was resold by the original purchasers, and was again resold before the agents of sale for the original owners issued a writ in rem *and arrested the vessel, seeking to recover the sums advanced to pay the wages and disbursements.*

Held, that persons who advanced money to pay the masters disbursements and seamen's wages without getting the protection of an order of the court when doing so do not get the benefit of the maritime lien which the master and seamen had.

Observations on the question whether an assignment of a debt supported by a maritime lien acts as an assignment of the lien.

MOTION by the owners of the *Petone* to set aside a writ *in rem* issued against the steamship *Petone* on the ground that the plaintiffs had no maritime lien and no right to arrest the steamship.

The plaintiffs were William Watson and Co., of London.

The defendants were the Petone Shipping Company Limited, of Cardiff.

The *Petone* was originally owned by J. Montgomery and Co., of Christchurch, New Zealand, and the vessel was registered in Lyttleton, New Zealand.

The plaintiffs acted as agents for sale for the owners, and on the 1st July 1916 entered into an agreement with Cunningham, Shaw, and Co. Limited, of London, to sell the ship to them. J. Montgomery and Co. undertook to engage a crew to bring the vessel to this country.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The vessel arrived at Swansea on or about the 1st Jan. 1917.

On the 3rd Jan. 1917 the plaintiffs paid sums to the master for the wages of the crew and for disbursements made by him.

On the 9th Jan. 1917 Cunningham, Shaw, and Co. Limited resold the vessel to the Coalition Shipping Company Limited.

On the 25th Jan. 1917 the plaintiffs paid money for the passages home of three officers of the vessel.

On the 24th April 1917 the Coalition Shipping Company Limited resold the ship to the defendants, the Petone Shipping Company Limited.

The plaintiffs instituted proceedings by a writ *in rem* on the 13th June 1917, claiming "865*l*. 1*s*. 2*d*. for payments made in discharge of seamen's wages, master's disbursements, and the passage of three of the officers home to New Zealand, and interest."

The præcipe to lead the warrant of arrest was dated the 20th June 1917.

The vessel was arrested and the defendants entered an appearance under protest and, subject to the protest, gave an undertaking to put in bail. The ship was then released.

The defendants moved the court to set aside the writ.

Stephens for the defendants.—The maritime lien of the master and seamen is not transferable. The *Petone* was sold before the action was started. The plaintiff's can have no rights against the vessel unless they are based on a maritime lien:

The Lyons, 6 Asp. Mar. Law Cas. 199; 57 L. T. Rep. 818.

The plaintiffs are not entitled to recover these sums in an action *in rem* unless they first get leave from the court to pay the amounts due and have a lien on the ship:

The Fair Haven, L. Rep. 1 A. & E. 67;
The John Fehrman, 16 Jur. 1122.

The court will not grant such an application after payment:

The Janet Wilson, Swab. 261.

To pay such sums as these and to then apply to the court is irregular:

The Cornelia Henrietta, L. Rep. A. & E. 51.

The Tagus (87 L. T. Rep. 596; 9 Asp. Mar. Law Cas. 371; (1903) P. 44) does not support the contention of the plaintiffs, for in that case the plaintiff was the master.

H. C. S. Dumas for the plaintiffs.—The case of *The Cornelia Henrietta* (*ubi sup.*) shows that the court does allow such payments as these, and does allow those who make such payments to stand in the shoes of those who have been paid. That course was adopted in *The Tagus* (*ubi sup.*). *The Andalina* (6 Asp. Mar. Law Cas. 62; 56 L. T. Rep. 171; 12 Prob. Div. 1) shows that the person who has paid wages stands in the same position as the person to whom he has paid them. The Merchant Shipping Act 1906 (6 Edw. 7, c. 48) was passed after the decision in *The Tagus* (*ubi sup.*), and, as that Act did not alter the effect of the decision, it must be assumed that the Legislature thought the decision right. The principle applied in *The Tagus* (*ubi sup.*) is merely an application of the principle of subrogation.

HILL, J.—This is a motion by the defendants, the owners of the steamship *Petone*, to set aside

the writ *in rem* on the ground that the plaintiffs' cause of action gives them no lien or right of arrest; and for consequential relief. The defendants are, and have been since the 24th April 1917, the owners of the *Petone*. They are the Petone Shipping Company Limited, of which the registered office is at Cardiff. The writ was issued on the 13th June 1917 and is a writ *in rem*, and the claim indorsed upon it is as follows: "The defendants' claim is for 865*l.* 1s. 2*d.* for payments made in discharge of seamen's wages, master's disbursements, and the passage of three of the officers home to New Zealand, and interest."

The præcipe for warrant of arrest is dated the 20th June 1917, and the affidavit to lead the warrant deposes that the plaintiffs on or about the 3rd Jan. 1917 paid moneys to the master for wages of the crew and on account of disbursements made by him as master, and on or about the 25th Jan. 1917 paid moneys for the passages home to New Zealand of three of the officers of the vessel. The ship was arrested, and on the 21st June 1917 defendants entered an appearance under protest. An undertaking to put in bail was given subject to the protest, and the ship by consent was released. The defendants now moved to set aside the writ on the ground that the plaintiffs' cause of action gave them no maritime lien and no right *in rem* independent of a maritime lien.

The material facts, as appearing from the affidavits, are as follows: The *Petone* was formerly owned by J. Montgomery and Co., of Christchurch, New Zealand, and was registered in Lyttleton, New Zealand. By agreement, dated the 1st July 1916, between J. Montgomery and Co. and Cunningham, Shaw, and Co. Limited, of London, J. Montgomery and Co. agreed to sell the ship to Cunningham, Shaw, and Co. Limited, the ship to be delivered in Lyttleton Harbour not later than the 31st Aug. 1916, and final payment to be made in Christchurch against bill of sale and delivery of the steamer. J. Montgomery and Co. agreed to engage the master and necessary officers and crew to bring the *Petone* to the United Kingdom, the purchasers paying 250*l.* per month for wages as from Durban until arrival in the United Kingdom, and half the cost (based on 250*l.* per month) for the time occupied from New Zealand until completion of discharge at Durban. J. Montgomery and Co. had liberty to carry cargo to Durban on their account, and were to supply the necessary coals and provisions as far as Durban.

The plaintiffs acted as agents of J. Montgomery and Co. in connection with this sale, and signed the agreement by telegraphic authority. The sale was completed, and Cunningham, Shaw, and Co. Limited resold the ship to the Coalition Shipping Company Limited, of Cardiff, and transferred her by bill of sale dated the 9th Jan. 1917. The Coalition Shipping Company Limited resold the ship to the defendants, the Petone Shipping Company Limited, and transferred her by bill of sale dated the 24th April 1917. By that time her register had been transferred to London. Before this the ship arrived at Swansea on or about the 1st Jan. 1917.

The circumstances of the payments made by the plaintiffs, which are the subject of the action, are thus stated in the affidavit of Mr. W. Harold Watson, a member of the plaintiff firm: "The said ship arrived at Swansea on or about the 1st Jan. 1917, but Cunningham, Shaw, and Co. Limited, though requested so to do, did not pay the said wages in accordance with the said agreement; and, to prevent the arrest of the ship by the master and crew, my firm paid the wages, the subject of this action, and also the passage money of three of the officers home to New Zealand, which Messrs. Cunningham, Shaw, and Co. Limited had likewise agreed to pay, but did not pay. My firm made the payments in the *bonâ fide* belief that they were making the same in relief of the liability of Cunningham, Shaw, and Co. Limited under their agreement, and to save the ship from arrest as aforesaid."

It is stated in an affidavit of Mr. Fairweather, a director of the defendant company, that there is a question of accounts between Messrs. Cunningham, Shaw, and Co. Limited and Messrs. J. Montgomery and Co. This is denied by Mr. Watson. It is immaterial to the present question to ascertain—what is not clear upon the affidavits—namely, whether the contract of the master and crew was with J. Montgomery and Co. or with Cunningham, Shaw, and Co. Limited. Whichever it was, it was not with the defendants, and the wages became due before the defendants became owners.

For the purposes of to-day it must be assumed that the master and crew had a maritime lien for wages and the three officers for their viaticum, and that the plaintiffs paid them off. The facts cannot be put higher than that in favour of the plaintiffs. It does not appear that there were any master's disbursements, unless the payment of the wages is treated as made by the master and the payment by the plaintiffs as a payment of the master's disbursements so made. It is, however, unnecessary to consider whether the circumstances were such as would give the master a lien for disbursements. The plaintiffs claim as having paid the men who had a wages lien, and the question of jurisdiction must be decided on that assumption. It may be that the plaintiffs also paid the master, who had a disbursements lien. But the payment of wages is sufficient, for that fact gives the plaintiffs a right to proceed *in rem*. I should add that it is not alleged that there was any constructive assignment by the seamen or the master to the plaintiffs of the debts due to them for wages or disbursements. What is alleged is that their claims were met out of moneys provided by the plaintiffs. Now, it is clear that the plaintiffs can only proceed *in rem* in this case if they are entitled to enforce a maritime lien, and it is not contended that they can have any right *in rem* except such as is founded upon a maritime lien; none of the statutory provisions giving a right *in rem* apply to them.

The question is, Have they or can they enforce in their own name a maritime lien? It is said that they can, because, having paid off the men who had a maritime lien for wages, the plaintiffs were entitled to stand in their shoes and enforce the maritime lien. And the decision of Phillimore, J. in *The Tagus* (*ubi sup.*) is said to conclude the matter. If that decision stood alone it would conclude the matter. It is a decision directly in point, and, apart from the respect which I should pay to a judge so experienced in Admiralty law and practice, I should be bound to follow it. In *The Tagus* (*ubi sup.*) the ship was

under arrest, and there were claims for wages and disbursements, and a mortgagee's claim. The master, before he became master, had been supercargo, and while supercargo had paid the crew's wages and made other disbursements. These he claimed, and he was allowed to recover against the *res* in priority to the mortgagee so much of those disbursements as were in respect of those wages. Phillimore, J. said: "There remains a question about the disbursements before he became master. In my opinion, if those disbursements are of the ordinary kind—port dues, coal bills, and so forth—he cannot claim them, and I so direct. I follow and concur in the decision in *The Albion* (1 Asp. Mar. Law Cas. 481; 27 L. T. Rep. 723), so that if the whole disbursements are, as apparently they are, payment of wages of the crew, who might have seized the ship, then I think that the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant should be applied, and he has a lien for any disbursements made, although he was not master, in payment of the wages of the crew."

The Albion (*ubi sup.*) is a decision only as to disbursements by one who subsequently became master, and the point of *The Tagus* (*ubi sup.*) for the present purpose is that Phillimore, J. acted upon a doctrine that one who pays off wages stands in the shoes of the seamen and has the seamen's lien.

On the other hand, there is a direct decision to the contrary in *The Lyons* (*ubi sup.*).

In *The Lyons* (*ubi sup.*) there was a mortgagee's suit against a foreign ship, and also an action by a necessaries man in respect of payments made before it had been finally settled in the case of *The Heinrich Bjorn* (6 Asp. Mar. Law Cas. 1; 55 L. T. Rep. 66; 11 App. Cas. 270) that the necessaries man had not a maritime lien even on a foreign ship. *The Lyons* (*ubi sup.*) was heard after that decision. It was contended for the necessaries man that at least he was entitled to priority over the mortgagees in respect of sums paid for wages. Butt, J., however, rejected that contention, and said: "That he is entitled to precedence in respect of these wages is a strong proposition, which I cannot accept."

In both these cases *The W. F. Safford* (Lush. 69) was cited. In that case an American ship was arrested in a necessaries action and also in a bondholder's action, and, the ship having been sold by order of the court, there were further suits against the proceeds by other necessaries men, of whom one, Da Costa, claimed as having paid the crew's wages by direction of the master. Dr. Lushington gave priority to Da Costa first and to the bondholder next, and then to the others. He said: "A bond is entitled to precedence over all claims except wages, or a subsequent bond or salvage claim. Seamen's wages, however, come first of all, according to the established practice of the court, and I am of opinion that Da Costa's claim is in the nature of wages, and must therefore be the first paid. If he has not advanced the money, the seamen would have no doubt arrested the ship and enforced their right to priority of payment."

It will be seen later that in other decisions of Dr. Lushington, both before and after *The W. F. Safford* (*ubi sup.*), he took a contrary view. The only other case which supports the plaintiffs' contention is *The St. Lawrence* (5 Prob. Div. 250) where, in a competition between a bondholder and a necessaries man who claimed in respect of advances for wages, pilotage, dock dues, &c., to a foreign ship, it was conceded that the necessaries man was entitled to priority in respect of the sums advanced by him for wages and pilotage, but not for dock dues, and Sir Robert Phillimore held that dock dues were in the same category, and that the reasoning of *The W. F. Safford* (*ubi sup.*) applied, and said: "I do not understand it to be disputed that a person who discharges claims of that character has the same rights and remedies for their recovery as the person to whom the money has been paid." In this case it will be seen that the doctrine in question was not disputed.

On the other hand, there are a series of cases in which the court has refused to recognise the doctrine. In *The New Eagle* (2 W. Rob 441) there was a balance of proceeds in court after satisfaction of a salvage claim, and this balance was claimed by mortgagees and by a Mr. Brambles, who claimed out of it 66*l.* advanced for seamen's wages, board, &c., on account of the ship. Dr. Lushington said: "When I first read the papers on which this motion was to be founded, I felt a strong disposition to support the claim of Mr. Brambles, so far as the law would enable me to do it, because the seamen had a right to resort to this court and take the body of the ship as the means of obtaining payment of their wages; but the law of this country has always struggled against such claims being allowed. I must be guided by the case of *The Neptune* (3 Haggard, 129), and I know of no principle recognised by the common law that allows any person who has made advances on account of a ship, unless it be on bottomry, to come here and make a claim. After the case of *The Neptune* (*ubi sup.*) it is very difficult to make a distinction between the proceeds and the ship itself. The proceeds may be paid to the mortgagees on the production of their deed."

Two years later, in *The Louisa* (3 W. Rob. 99), on a motion for apportionment of agreed salvage, a Mr. Clarke applied that the judge would decree him repayment of certain advances which he had made to some of the salvors while acting for them as their agent in negotiating the salvage remuneration. Dr. Lushington refused, and said: "The claim of Mr. Clarke is for the payment of a debt contracted solely upon the personal security of the salvors. In allowing him to convert that claim into a lien upon the property in the hands of the court, I should, I conceive, not only be exceeding my proper jurisdiction, but I should in so doing establish a precedent that might be productive of serious consequences hereafter, in encouraging advances of money that would be highly detrimental to the interest of the salvors themselves, particularly to the mates and seamen."

Before and after these cases there were a number of cases in which, the *res* being under arrest, application was made to the court on behalf of persons interested in the *res*, as bondholders or otherwise, for leave to pay off the crew, and cases in which the right to so pay without leave of the court and the claim against the *res* were expressly denied.

In the tenth (1856) edition of Abbott, p. 538, Mr. Serjeant Shee, after stating in the text that "A

maritime lien is not transferable and cannot be revived for the benefit of one by whom it has been discharged," adds the following note: "In cases of damage, that the *res*, often insufficient to compensate for the damage, may not be further burdened with the costs of mariners' suits, this rule has been relaxed by the present learned judge of the Court of Admiralty (*i.e.*, Dr. Lushington), and the suitor (where there is no appearance for the owner) has been allowed to pay seamen's wages and claim in respect of them; and see in a case of bottomry *The John Fehrman* (*ubi sup.*).

The practice had been established before Dr. Lushington's day. The earliest instance which I have discovered is *The Kammerhevie Rosenkrants* (1 Haggard, 62), where Lord Stowell in 1822 granted an application on behalf of bondholders to permit them "to pay the wages of the crew, in order to save the expense arising from their detention on board, and to decree that they should be reimbursed their advances out of the proceeds of the ship, prior to the satisfaction of any other claim thereon."

In *The John Fehrman* (*ubi sup.*), a bondholders' action in which there was no appearance, the bondholders asked leave of the court to pay wages, &c., and be repaid out of the proceeds of the ship and cargo when sold, and stated that in *The Corinthianer* (not reported) wages and pilotage had been paid by the bondholder in similar circumstances, and, when the proceeds had been brought into the registry, the court allowed the repayment of the wages, &c., paid, but remarked that the payments had been irregularly made. Dr. Lushington granted leave upon the bondholders giving security in case the owners should hereafter think fit to contest.

In *The Janet Wilson* (*ubi sup.*), a bondholders action, an owner applied for payment out of the proceeds of moneys advanced by him for wages, pilotage, and disbursements before he was aware of the bond. Dr. Lushington refused, and said: "I thought I had established in preceding cases the rule that it was not competent to any person without leave of the court to pay wages which might have been incurred and then come to the court and make application to have that money refunded. I thought I had declared in former cases that it was necessary application should be made to the court prior to the time the money was paid for leave to make such payment, and then the court would judge of the circumstances."

The next case in order of date is *The W. F. Safford* (*ubi sup.*). The next is *The Cornelia Henrietta* (*ubi sup.*), a bondholder's action, where, after arrest, the bondholder had paid wages and return passage moneys, and then applied that the sums so paid should be repaid out of the proceeds of the ship. There was no opposition. Dr. Lushington said: "Undoubtedly there has been an irregularity in this case. It has occurred before, and it is not the first time in which the court has sanctioned the payment of money by way of wages to the parties without the consent which ought to have been had upon application to the court. Looking at all the circumstances of the case, I think I ought not to withdraw my late approbation of what has been done . . . but I wish most expressly to declare that this is a practice I cannot in future sanction. . . ." And again: If in future times an attempt is made after the warning that has been given, the parties will do it at their peril." Another instance of leave obtained by bondholders will be found in *The Fair Haven* (*ubi sup.*).

Notwithstanding *The W. F. Safford* (*ubi sup.*), it must, I think, be taken that the considered opinion of Dr. Lushington was that no one had a right to pay off wages and thereby give himself a right against the ship. Upon whatever ground of convenience the bondholder or other person was allowed to pay off wages and claim against the ship, the fact that the leave of the court was necessary is quite inconsistent with any doctrine that he who pays off wages stands in the shoes of and has the maritime lien of the seaman. If that right existed, Dr. Lushington's warning was an empty threat.

Coming to Sir Robert Phillimore's time, I have already mentioned *The St. Lawrence* (*ubi sup.*). Before that, in *The Bridgwater* (3 Asp. Mar. Law Cas. 506; 37 L. T. Rep. 366), a bondholders' action, the bondholders applied for and were granted leave to pay off the crew out of freight in their hands, it being stated that they could not do it without the order of the court.

I cannot find any reported case in which Sir James Hannen dealt with the matter, but, in addition to *The Lyons* (*ubi sup.*), Butt, J. had the point in question before him in *The Andalina* (6 Asp. Mar. Law Cas. 62; 56 L. T. Rep. 171; 12 Prob. Div. 1), and dealt with it in a way which in my view is inconsistent with the alleged doctrine. In that case there were actions for wages by part of the crew and actions by necessaries men. One of these, Meek, claimed in respect of sums paid for towage, light dues, and wages to a seaman. The matter came before the court on a motion by the crew for payment out of court of the amount claimed for wages. *The W. F. Safford* (*ubi sup.*) was cited. Butt, J. said: "With regard to Meek's claim, I am of opinion that no part of it can rank before the claim of the seaman for wages. . . . With regard to payment of light and dock dues, I think that Meek's claim ranks after that of the seaman." It is said by counsel for the plaintiffs that this means that Meek's claim ranked *pari passu* with the seamen, but at the end of the judgment Butt, J. said: "Therefore the seamen have the priority I have already stated; as to priorities between the other claimants I say nothing; it is sufficient for to-day to decide the question raised by the present motion on behalf of the mate and seamen." What that means is that Meek should not stand in the shoes of the seaman he had paid; he was left with his necessaries lien (the *Andalina* was a foreign ship, and the decision was before the *Heinrich Bjorn*), and Butt, J. did not decide whether the fact that some of the necessaries were payment of wages gave Meek any priority over other necessaries men.

These, I believe, are the cases. For the view of the more modern text-writers I may refer to the thirteenth edition of Abbott, p. 883; the fourteenth edition, p. 1035; and vol. 26 of Halsbury's Laws of England, p. 625. They treat maritime liens, other than liens for bottomry, as not transferable.

In my view, the weight of authority is strongly against the doctrine that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant and has his lien, whether

it be regarded as a general doctrine or as applied to wages only.

I say nothing about contractual assignments of debts or claims supported by maritime liens. It is not necessary to consider how far such an assignment carries with it in all cases the maritime lien, it does so in the case of bottomry, whether it does so in any other cases it is not necessary to express an opinion. In the present case there is no question of assignment. The plaintiffs paid the wages and (or) disbursements. The master and crew have been paid and their debts satisfied. They assigned nothing to the plaintiffs. The plaintiffs do not claim as their assignees, but in their own right, as having paid the men off. Counsel for the plaintiffs contend that the doctrine is an application of the principle of subrogation. But I know of no principle of English law which says that one who, being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor is entitled to the rights and remedies of the person whom he pays. That is the position of the plaintiffs. They chose as volunteers to pay off debts which constituted a marine lien upon the ship. They did not, in my opinion, thereby acquire any maritime lien. They have, therefore, no right in *rem* based upon a maritime lien. They have no right in *rem* independent of a maritime lien.

The result is that the writ, arrest, and appearance must be set aside and the bail discharged. The plaintiffs must pay the costs of the action and of this motion.

The notice of motion also asks that they be ordered to pay the loss and expense occasioned by the arrest. But I should only do so by way of damages for wrongful arrest (*i.e.*, for arrest without reasonable and probable cause); but, in view of the conflict in the authorities, I do not find an absence of reasonable and probable cause.

Leave to appeal.

Solicitors for the applicants (defendants), *Stokes* and *Stokes*, agents for *Allen, Pratt*, and *Geldard*, Cardiff.

Solicitors for the respondents (plaintiffs), *Metcalfe, Sharpe*, and *Hay*.

House of Lords.

Nov. 30, *Dec.* 4, 6, 1917, *and March* 7, 1918.

(Before Lords Dunedin, Atkinson, Parker of Waddington, Sumner, and Parmoor.)

A. Coker and Co. Limited *v.* Limerick Steamship Company Limited. (*a*)

On appeal from the Court of Appeal in England.

Freight—Chartered freight payalle before sailing on signing bills of lading—Collection of freight from shippers — Ship partly loaded — Sinking at wharf owing to outbreak of fire—Action to recover freight.

The appellants chartered a ship from the respondents to carry a cargo from Liverpool to Archangel at a certain freight per ton delivered, the freight to be payable in cash less 3 per cent. in Liverpool before sailing on signing bills of lading. The parties contemplated that the full cargo might not sink the ship to her marks, and the charter provided that "should the cargo not be of a nature to load the ship to her draught required the charterers were to pay freight on the guaranteed dead weight of the ship—namely, 225s. per ton on 1950 tons, her registered dead weight, less 3 per cent."

This difference was to be paid on clearing in cash.

Before the cargo was completely loaded a fire occurred on board, which resulted in the vessel sinking at the dock side, and the voyage was treated as abandoned. All the bills of lading had not then been signed.

The shipowners sued the charterers, claiming to recover the charter freight.

Held, that under the agreement a proportional part of the advance freight became payable on the signing of each bill of lading.

Decision of the Court of Appeal affirmed.

Appeal from an order of the Court of Appeal affirming a judgment of Bailhache, J.

The action was commenced by the present respondents, who were the owners of the steamship *Coonagh*. The appellants are a company carrying on business in Liverpool as a steamship line carrying goods from Liverpool and Manchester to, among other places, Archangel. They own no steamers themselves, but for the purposes of their line they charter steamers sometimes on time charter and sometimes on voyage charter. They have a home flag and a settled form of bill of lading which is headed with the name and flag "Coker Line," and they advertised to intending shippers by means of printed cards the prospective sailings of vessels which they had chartered.

The action arose in connection with a charter-party, dated the 19th Nov. 1915, whereby the appellants chartered from the respondents the steamship *Coonagh* for a voyage from Liverpool to Archangel. The chartered freight was 225s. per ton delivered, payable on signing bills of lading, less 3 per cent. in Liverpool in cash before sailing. Before the loading was completed the steamship *Coonagh* caught fire and the efforts made to extinguish the fire resulted in her sinking in the dock.

The action was brought by the shipowners claiming from the appellants the balance of the chartered freight.

The material clauses in the charter-party are set out in the judgment of Lord Parker.

Leslie Scott, K.C. and *Raeburn* for the appellants.

R. A. Wright, K.C. and *Le Quesne* for the respondents.

The House after consideration dismissed the appeal, but varied the amount for which judgment was to be entered for the respondents.

Lord Atkinson.—In this case the ship *Coonagh*, belonging to the respondents, was chartered to carry a full and complete cargo of merchandise from Liverpool to Archangel.

Mr. Roycroft, the manager of the respondents, said in his evidence that having regard to the nature of this cargo, it was practically certain he would have to ascertain, and in fact he did have

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

to ascertain, by measurement the weight of several portions of the cargo actually shipped. He was not contradicted in this. The parties evidently contemplated that the full cargo might be so light that when fully loaded the ship would not be sunk to her marks. They, accordingly, provided that "should the cargo not be of a nature to load the boat to her draught required, charterers were to pay freight on the guaranteed dead weight of the ship, that is 225s. per ton on 1950 tons, her registered dead weight, less 3 per cent."

As soon as it became reasonably certain that the cargo to be loaded would not sink the vessel to her marks, the owner became entitled to be paid the advanced freight on 1950 tons at this rate, less 3 per cent., unless there was some condition precedent to be performed before they were entitled to assert this claim. The appellants, as I understand, contended that there was a condition precedent, which, in fact, was not performed, namely this, that all the bills of lading should be signed before the advanced freight became payable in Liverpool in cash before clearing. All the bills of lading had not been signed before the ship sank. It was admitted, it could not, upon the authorities, be successfully disputed, that, if the advanced freight became payable under the terms of the charter-party, the subsequent loss of the cargo could not affect the owners' right to that freight.

The provision in the charter-party on which this alleged contention was based is contained in two lines which run thus, "225s. per ton of 20cwt. delivered. The freight to be payable on signing bills of lading less 3 per cent. in Liverpool in cash before clearing." If this contention were sound, it would mean that the owners would be bound by the contracts with the shippers contained in the bills of lading to carry to Archangel and there deliver the goods shipped under all the bills of lading before they had received, or were entitled to receive, any portion of the advanced freight. If the captain should refuse to start till he had received the whole of the advanced freight he might thereby break the contract made with each of the shippers. It is scarcely conceivable that business men would enter into such a contract, and it certainly appears to me that on the true construction of the charter-party they never did so in this case. The words, "the freight to be payable on signing bills of lading," must mean, I think, that some kind of freight became payable on signing each bill of lading. It could not, of course, be the entire advanced freight, since that becomes payable in cash on clearing, not on signing each bill of lading. Neither can the clause, I think, mean that only the portion of the freight payable by the shipper proper to be appropriated to satisfy the advanced freight is to be then paid. *Primâ facie* the freight payable on signing a bill of lading is the freight the shipper, by virtue of the bill of lading, becomes bound to pay. And two provisions of the charter-party make it, in my opinion, perfectly clear that this, which may be called the shipper's freight, was the freight which, according to the terms of the charter-party, the owners were entitled to receive on the signature, on their behalf, by the captain or other authorised agent of each bill of lading.

The wharfinger's receipt, of which a specimen is printed, provided that the freight is to be paid on delivery of the bill of lading, and that the receipt is to be sent in along with the bill of lading, and a shipping note is to accompany each load of goods. The freight here mentioned i evidently the freight payable by the shipper. On the front of the bill of lading, a specimen of which is given, is stamped the words freight payable in Liverpool, and in the body of the bill is found the clause, "Freight and charges for the said goods as per margin with primage accustomed, to be due on the delivery of the goods for shipment and to be payable vessel lost or not lost by the shippers in Liverpool before the departure of the vessel at shipowner's option, and if not so paid shipowners and consignees to be liable to the owners for the said freight and charges without prejudice to the right of lien therein after referred to." The first of the above-mentioned provisions goes to show that the captain was to have nothing to do with the fixing of the amount of the freight, but that the freight mentioned in each bill of lading was, on the signing of the bill, to be taken as paid in discharge *pro tanto* of the advance freight, and that if the aggregate of these sums should not equal the entire advanced freight the balance should be paid in cash.

The bill of lading is to be sent along with the wharfinger's receipt and a shipping note is to accompany each load of goods, and the bills of lading are to be signed by the master as presented to him. There is no stipulation that they are all to be presented to him at the same time. The words suggest the contrary. For some reason, inscrutable to me, the first of the above provisions is said to be inapplicable to the present case. I cannot concur in that. I think they are entirely applicable to it.

The provisions run as follows: "The master to sign bills of lading as presented in accordance with wharfingers' or mates' receipts at any rate of freight, without prejudice to this charter, but, should the aggregate not amount to chartered rate of freight, difference to be paid on clearing in cash."

The second provision runs as follows: "The owner or master have an absolute charge and lien on the cargo for the security and payment of all freight."

No reference whatever is made in the charter to the receipt by the owners of only that portion of the freight payable by the shipper appropriate to the payment of the advanced freight. It would be rather a difficult matter to ascertain what that portion was, and it is, I think, certain that if it alone was meant to be paid, some method would have been suggested by which to ascertain it. It appears to me that these clauses plainly provide that the entire of the freight payable by each shipper should be paid or taken as having been paid to the owners through their agents, the captain, or other accredited agents against the advance freight, and accounted for by the owners, any balance of the advance freight remaining undischarged being paid in cash on clearing. No condition precedent remained therefore unperformed by the owners to disentitle them to this advanced freight of 11*l.* 5*s.* per ton on the registered dead weight of the ship, when once it was definitely ascertained, as it admittedly was at an early stage of the loading, that the provided cargo

would not sink the ship to her marks. These appear to me to be the plain rights and obligations of the parties on the face of the provisions of the charter-party. Any difficulty that has arisen is due to the fact that a course of dealing was adopted different altogether from that which the terms of the charter-party would suggest. The appellants were themselves wharfingers; they charter steamers for their trade but do not own any. When goods are sent to their wharves or warehouses for shipment they give wharfingers' receipts. They arrange the freight with the shipper, fill up the bill of lading, and on payment of this freight exchange the bill of lading for this receipt. The freight having been paid in advance is not mentioned in the bill of lading at all. The appellants then sign the bill of lading for the master. The specimen bill of lading is signed thus for the master, "J. J. Peters." That is the only contract the shippers have with the owners. It is not a contract made between the appellants and the shippers. If it were, why sign the captain's name? I concur with Bailhache, J. and the Court of Appeal in thinking that the appellants signed these bills of lading and received these freights for and on behalf of the shipowners. I also concur with them in thinking that the sum of 10,000*l.* paid by the appellants, which forms the subject of the counter-claim, was not a loan but a payment on account of the advanced freight, and that the counter-claim therefore fails. In my opinion the respondents are entitled to judgment as found by the Court of Appeal, varied by substituting for the sum of 1025*l.* 11*s.* 7*d.* mentioned therein the sum of 286*l.* 13*s.* 6*d.* and that subject thereto the appeal be dismissed with costs here and below.

Lord Parker of Waddington.—I am asked to say that Lord Dunedin and Lord Sumner concur in this judgment which I am about to deliver.

The question for decision turns entirely on the true construction of the agreement contained in the charter party. Under this agreement, the cargo is to be delivered at Archangel or as near thereto as the vessel may safely get, and freight is to be paid at the rate of 225*s.* per ton delivered, but there is a subsequent clause under which, if the cargo is not of such a nature as to load the vessel to the draught required the charterers are to pay freight on the guaranteed dead weight, namely, 1950 tons.

Inasmuch as freight is not as a general rule payable until it is earned, the freight under these provisions would not be payable whether at the rate of 225*s.* per ton delivered, or at the alternative rate of 225*s.* dead weight capacity unless and until the vessel had arrived at its port of destination and delivered the cargo. This event never happened, the vessel having sunk in dock before sailing. It is, however, quite a common thing for a charter-party to provide for advance payment in respect of freight and advance freight, once it becomes due, may be recovered, notwithstanding it is never in fact earned. In the present charter-party there is a clause in the following words: "The freight to be payable on signing bills of lading less 3 per cent. in Liverpool in cash before sailing." The effect of this clause is either to make 97 per cent. of the freight payable in advance leaving the remaining 3 per cent. to be payable if and when the freight is earned or to make the whole freight in advance, less 3 per cent. by way of discount or commission. It is not very material which view is taken. In the latter case the result of the freight (as opposed to advance freight) being made payable on delivery at the port of discharge would be limited to enabling the shipowner on weighing out the cargo to claim freight on any actual tonnage in respect of which advance freight owing to mistake or otherwise had not already been paid.

The real difficulty is to determine the effect of the words "payable on signing bills of lading." They may, as the appellants contend, mean that advance freight is only payable when the master has signed bills of lading covering the whole cargo. If this be the true construction no advance freight ever became payable, the loading being incomplete when the vessel sank. On the other hand they may mean, as the respondents contend, that as and when each bill of lading is signed an appropriate part of the freight becomes payable in respect of the goods covered by such bill.

In support of the former construction, stress was rightly laid on the following consideration. *Primâ facie*, no doubt, the freight is fixed by reference to the actual weight of the cargo, and it would be simple enough to weigh the goods put on board and to arrive at the proper proportion of the advance freight payable in respect of the goods covered by each bill of lading by taking 225*s.* per ton of the actual weight of such goods. But the possibility of measurement (as opposed to weight) cargo is clearly contemplated, and if measurement cargo so predominates that the vessel is not down to her marks, the freight is to be calculated not on the actual weight of the cargo but on the dead weight capacity of the vessel. Obviously, it is impossible to say whether a vessel will be loaded down to her marks until the whole or a large portion of the cargo is on board or otherwise ascertained. When, therefore, the first bill of lading comes to be signed the parties would not know whether the advance freight was to be calculated on the actual weight of the cargo to be shipped or on the dead weight capacity of the vessel. They could not therefore arrive at the proper sum to be paid by way of advance freight on the goods covered by the bill. This, it is argued, points strongly in favour of a construction which would not make any advance freight payable until the loading was complete and all the bills of lading signed.

On the other hand, the following considerations appear to be material. It is contemplated that the bills of lading will be in the form usually adopted by the charterers, according to which the bill of lading freight will be payable on shipment. The master is by the charter-party bound to sign bills of lading as and when presented at any rate of freight. In doing so he will enter into a separate contract of carriage with the individual shipper and will lose any lien he would have under the charter-party for the chartered freight without obtaining any substituted lien for the bill of lading freights which have been paid on shipment. It is therefore reasonable to expect that on the signing of each bill he will at any rate get the advance chartered freight attributable to the goods covered by the bill. This freight may possibly be increased by events which happen subsequently, but

it must in any event amount to 225*s.* on the actual weight of the goods covered by the bill. If it turns out afterwards that the chartered freight falls to be calculated on the dead weight capacity of the vessel the owners must, it is true, look to the charterers for the difference; but this is a small matter compared with having to rely on their personal remedy against the charterers for the whole advance freight.

It appears to me that the solution of these difficulties lies in the course of business which is evidently contemplated. The charter-party contains a provision that if the bill of lading freights do not amount in the aggregate to the chartered rate of freight the difference is to be paid on clearing in cash. This contemplates that the bill of lading freights will in the first instance be received on behalf of the ship and accounted for before the ship sails, any balance being paid by or to the charterers to or by the shipowners as the case may require. If this course of business were followed, the difficulty of ascertaining the advance freight payable as each bill of lading was signed would be unimportant, nor would it be very material that in signing the bill the master was abandoning his lien on the goods comprised in the bill. He would get the security of the bill of lading freights instead. The fact that under the charter-party the master might have been required to sign bills even when the freights were purely nominal does not really affect this point, for it is quite clear that no one was contemplating the ship being loaded with charterers' own merchandise or carrying the merchandise of third parties otherwise than at full freights.

I agree, therefore, with Bailhache, J. and the Court of Appeal in thinking that as and when each bill of lading was signed a proportional part of the advance freight became payable and can, notwithstanding the vessel was sunk in dock, be now recovered by the shipowners from the charterers.

There still remains the difficulty of arriving at the exact amount which the respondents are entitled to recover on this footing. When the vessel sank 1430 tons of cargo had been shipped, of which 1300 tons were covered by bills of lading then or subsequently signed. There were 130 tons on board for which no bills of lading were signed because the shippers never paid the bill of lading freights. No point as to this was made in argument. It was assumed that the appellants, as agents for the master, might have signed bills for all the cargo on board, and that their failure to do so ought not to prejudice the respondents. The remaining cargo, consisting of 94 tons, was ascertained and ready for shipment. It was already clear that the chartered freight fell to be calculated on the dead weight capacity of the vessel. The chartered freight was therefore, in the events which had happened, 1950 times 225*s.* This amounts to 21,037*l.* 10*s.* The advance freight would be this sum less 3 per cent., *i.e.*, 21,279*l.* 7*s.* 7*d.* The problem is to apportion this sum between the goods for which bills of lading were or might have been signed and the remaining cargo. The first question is as to the basis on which the apportionment is to be made. There appear to be only two possible bases. The first and most obvious basis is that of actual tonnage. On this basis the 21,279*l.* 7*s.* 7*d.* must be divided in the proportion which the 1430 tons on board bears to the remaining 94 tons, and the respondents would be entitled to recover the amount attributable to the 1430 tons less the 10,000*l.* they have paid on account.

The second possible basis of apportionment is what I may call the conventional tonnage basis. The freight being calculated on the dead weight capacity of the vessel, it would appear reasonable to carry out the apportionment on the basis suggested by Bailhache, J. He appears to have taken weight cargo at the actual weight and reduced measurement cargo to tons at the conventional rate of 1 ton to 40 cubic feet, a rate which was accepted as appropriate to the circumstances of the case. Unfortunately, he did not, as he ought to have done, reduce the 94 tons to conventional tonnage in the same way and then apportion the actual advance freight of 21,279*l.* 7*s.* 7*d.* on that basis. He gave judgment for 225*s.* on the conventional tonnage of the goods on board less 3 per cent., the result being that the respondents recovered considerably more than they could have recovered if the total advance freight of 21,279*l.* 7*s.* 7*d.* had been actually due and there were no case for apportionment at all. The Court of Appeal recognised this error and endeavoured to correct it, but apparently on the footing of an apportionment by reference to actual and not conventional tonnage. They first reduced the amount for which judgment had been given to the amount which could have been recoverable if the whole advance freight had become actually due, and then made a further deduction of 225*s.* per ton on the 94 tons not yet shipped, less 3 per cent. But why a deduction of 225*s.* per ton instead of the proper proportion of the total advance freight attributable to these 94 tons?

I have come to the conclusion that the apportionment ought to be made on the actual and not on the conventional tonnage. On this footing, as I work out the figures, the respondents are entitled to the 21,279*l.* 7*s.* 7*d.* less 1312*l.* 9*s.* 6*d.* The Court of Appeal gave them this sum less 1025*l.* 16*s.* only. They have therefore obtained judgment for 286*l.* 13*s.* 6*d.* more than was due to them. This must be set right, but ought not to affect the costs of the appeal, which has substantially failed, and should be dismissed with costs.

Lord PARMOOR.—On the 19th Nov. 1915 the appellants chartered from the respondents the steamship *Coonagh* for a voyage from Liverpool to Archangel. Before the loading was completed the *Coonagh* caught fire in the dock at Liverpool and sank in the dock, sustaining such damage that the cargo had to be discharged and the vessel had to undergo extensive repairs. The voyage was treated as abandoned, and none of the cargo has been carried by the respondents to Archangel. At the time of the accident about 1430 tons of cargo were on board the steamer and there were 40 tons on the quay and 54 tons in railway waggons alongside the quay remaining for shipment to complete the cargo. No bills of lading had been signed by the master of the ship before the accident, but 163 bills of lading had been signed "for the master, J. J. Peters," J. J. Peters being a director of the appellants' company. The ship was chartered for use as a general ship, and the question for

debate in the appeal depends upon the construction of the charter-party.

The charter-party provides that "Should cargo not be of a nature to load steamer to draught required, charterers to pay freight on guaranteed dead weight." The cargo was, in fact, not of a nature to load steamer to the draught required, and consequently this provision becomes operative. The guaranteed dead weight was 1950 tons. The first question which arises is whether the freight had become payable at the time of the accident, and this depends upon a term of the charter-party, "the freight to be payable on signed bills of lading, less 3 per cent. in Liverpool in cash before sailing." It was argued on behalf of the appellants that freight had not become payable until all the bills of lading had been signed, and that, as this event had not happened, the liability of the respondents to pay freight had not arisen at the time of the accident. This argument was founded on the statement that estimated freight or advance freight implied a lump sum, and that such sum could not be ascertained until after all the bills of lading had been signed. I am not prepared to assent to this general proposition. In my opinion the natural meaning of the charter-party is that the freight is payable distributively as bills of lading are signed. There is no maritime law or custom which imports into this term of the contract between the charterer and the shipowner any generally understood specialised interpretation other than that which the words naturally bear. There was a suggestion of difficulty in carrying out the bargain owing to a considerable portion of the cargo being shipped on the basis of measurement, but it does not appear that any difficulty did in fact arise, and in any case it would be a matter of business adjustment. Whether this be so or not, the nature of the bargain must be determined by the terms of the charter-party.

Assuming that freight has become due, I agree that the amount should be calculated on the principle expressed by Swinfen Eady, L.J. and approved by other members of the Court of Appeal. In my opinion, however, in the application of this principle, a sufficient deduction has not been made in respect of the 40 tons on the quay and the 54 tons on the railway waggons, which had not been loaded. If this tonnage had been loaded, the total amount which the ship could have carried would have been 1524 tons. The freight payable would then have been 1950 tons × 11*l.* 5*s.* less 3 per cent., or 21,279*l.* 7*s.* 7*d.* On this basis the actual payment for freight per ton would be 21,279*l.* 7s. 7d. divided by 1524, which works out at a figure of 13*l.* 19*s.* 3*d.* per ton, and the deduction to be made in respect of 94 tons on the quay and railway waggons should be made at this rate, and not at the rate of 11*l.* 5*s.* per ton. The result is that the amount for which judgment has been entered is in excess to the amount by 286*l.* 13*s.* 6*d.*, and that it should be reduced by this amount.

Subject to this correction in the amount of the judgment, the appeal should be dismissed with costs.

Solicitors: for the appellants, *Lightbound, Owen, and Co.*; for the respondents, *Alfred Bright and Sons*, for *Bateson, Warr, and Wimshurst*, Liverpool.

March 19, 21, 25, *and April* 25, 1918.

(Before the LORD CHANCELLOR (Lord Finlay), Lords ATKINSON, SHAW, and WRENBURY.)

NEW ZEALAND SHIPPING COMPANY LIMITED *v.* SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Contract—Shipbuilding—Contract to become "void" if builder unable to deliver—War—Non-delivery of ship—Action to enforce contract by purchaser.

The defendants agreed by a contract of the 6th March 1913 to build a steamer for the plaintiffs. By clause 5: "The said steamer, unless the construction thereof shall be delayed by fire, strike, or lock-out, or any other unpreventable cause . . . shall be completed ready for trial by the 30th Oct. 1914." By agreement the date of completion was subsequently extended to the 30th Jan. 1915. By clause 12: "In case the builders become bankrupt or insolvent or fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon the contract shall become void, and all moneys paid by the purchasers shall be repaid to them with interest at 5 per cent. . . . except only in the event of France becoming engaged in a European war, when the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all."

The builders contended that in the events which had happened the clause became operative on the 30th July 1916, and the contract then became void. The purchasers claimed the ship or damages for non-delivery, and contended (inter alia) *that the builders were not entitled to say the contract was void, but that it was only voidable at the purchasers' option.*

Held, that clause 12 became operative on the 30th July 1916, and as the inability to perform the contract was not due to any default of the defendants, the contract was void except for the repayment of the money already paid by the plaintiffs, and was not merely voidable at their option.

Decision of the Court of Appeal (14 *Asp. Mar. Law Cas.* 108; 117 *L. T. Rep.* 71; (1917) 2 *K. B.* 717) *affirmed.*

APPEAL by the appellants, the claimants in an arbitration, from an order of the Court of Appeal (reported 14 Asp. Mar. Law Cas. 108; 117 L. T. Rep. 71; (1917) 2 K. B 717) affirming the decision of Bailhache, J., by which certain questions submitted for the opinion of the court in an award in the form of a special case were answered in favour of the respondents.

The disputes between the parties arose under a contract made between the appellants as purchasers and the respondents as builders, whereby the latter agreed to construct for the appellants a steamer on the terms and conditions therein mentioned.

Leck, K.C. and *Simey* for the appellants.

Douglas Hogg, K.C., *Barrington-Ward*, and Captain *Jacques Quartier*, E.M.A., French army, for the respondents.

The House, having taken time, dismissed the appeal.

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

The LORD CHANCELLOR (Lord Finlay).—This is an appeal from the decision of Bailhache, J. upon an award stated in the form of a special case for the opinion of the court.

The appellants agreed to purchase from the respondents a steamship to be constructed for them by the respondents in terms of a contract dated the 6th March 1913. The price was to be £98,450, payable by instalments. The clauses material for the purpose of this appeal are set out in the special case, and are as follows :—

5. The said steamer, unless the construction thereof shall be delayed by fire, strike, or lock-out of workmen, or any other unpreventable cause beyond the control of the builders (in which case a fair proportionate extension of time shall be allowed), shall be completed ready for trial by the 30th Oct. 1914 and delivered afloat as usual in the port of Dunkirk free of dock and other dues as soon as such trial has been completed to the satisfaction of the purchasers or their representatives.

7. In the event of the said vessel not being completed and ready for trial on or before the 30th Oct. 1914 . . . the builders undertake to pay the purchasers as liquidated damages the sum of 10*l.* per working day for each working day during which such delivery may be delayed beyond the 30th Oct. 1914 unless such delay is due to any of the causes specified in clause 5 hereof. . . .

12. In case the builders become bankrupt or insolvent, or shall fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void, and all money paid by the purchasers shall be repaid to them with interest accrued thereupon at 5 per cent., and that without being necessary for the purchasers to take any legal action for the recovery of this money. The builders will hand to the purchasers the guarantee of a bank, who will undertake to repay this money in the event of its becoming due, as stated above. Except only in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all.

The date 30th Jan. 1915 was subsequently substituted in the contract for the 30th Oct. 1914 as the date by which the vessel was to be completed ready for trial.

The vessel was in course of construction when on the 2nd Aug. 1914 France became engaged in the present European war. It is found as a fact in the special case that the builders were prevented by unpreventable causes beyond their control within the meaning of clause 5 from completing the vessel ready for trial by the 30th Jan. 1915, and had ever since been prevented by the same causes.

It was contended by the respondents (the builders) that the eighteen months mentioned in clause 12 began to run on the 30th Jan. 1915, and therefore expired on the 30th July 1916, while the appellants (the building owners) contended that the eighteen months would not begin to run until the builders were in default on the expiry of the extension of time allowed by clause 5 in case of delay caused by unpreventable causes.

It was further contended by the respondents that in the events which have happened the contract became void on the 30th July, 1916, while the appellants contended that on the true construction of clause 12 it was voidable at their option only.

The umpire decided by his award that the eighteen months expired on the 30th July 1916, and that the builders, in the events which have happened, are entitled to treat the contract as null and void. The questions for the opinion of the court are whether his decision on these two points was right. Bailhache, J. held that the umpire was right upon both points, and the Court of Appeal took the same view. I agree with the courts below in thinking that the umpire was right on both points.

The first point appears to me to be very clear. The words, "the date agreed by this contract," in clause 12 (or as in the French version, "la date de livraison fixée par ce contrat"), denote in my opinion the 30th Jan. 1915. That is the only date specified for completion in the contract. It is true that an extension of time beyond that date is provided for by clause 5 in the case of delay due to fire, strikes, or lock-outs of workmen, or any other unpreventable cause beyond the control of the builders, in which case a fair proportionate extension of time was to be allowed. But neither in the English nor in the French version do the words of clause 12 appear to be apt to denote the expiration of the extension to be allowed in respect of such unavoidable delay. Clause 5 fixes no date for the expiry of the extension, but provides that the extension is to end when the cause of delay ceases to operate. The date mentioned in clause 12 as that for which the eight months or eighteen months were to run is obviously that specified in clause 5, namely, the 30th Jan. 1915.

Upon the second point I also agree with the umpire and with the courts below.

It appears from the facts found on the special case that the builder was in no degree responsible for the delay which took place in completion, and that it was due entirely to causes beyond his control covered by clause 5 in the contract. Under these circumstances I think that the builder is entitled to say that under clause 12 the contract became void when the eighteen months expired. Clause 12 deals with four different cases: (*a*) bankruptcy of the builder; (*b*) insolvency of the builder; (*c*) failure of the builder to deliver; (*d*) inability of the builder to deliver. It seems to me clear that the builder could not claim that the contract was void in consequence of his own bankruptcy or insolvency, as for this he would be, as between himself and the building owners, responsible, even if the bankruptcy or insolvency were entirely due to unavoidable misfortune. Nor could the builder claim to treat the contract as void in case of his failure to deliver (the word used in the French version is "*refus*"), and a breach of contract, whether by actual refusal or omission to perform, cannot confer any right upon the person in default. The fourth case provided for in inability (in the French the word used is "*impossibilité*"), and might be due to failure on the part of the builder to proceed with the construction with due diligence, in which case the builder could not claim release from the contract under this clause. On the other hand, the inability may have been the result of causes beyond the control of the builder, for which he is not, under the terms of the contract, to be held liable.

It is a principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced. This is illustrated by the case of *Roberts* v. *Wyatt* (2. Taunt. 268). There the plaintiff had purchased an estate and it was provided in the contract that the vendor

should make out a good title and on or before the 21st December 1808, on receiving from the plaintiff the purchase-money, execute a legal conveyance of the fee simple. There was a proviso that "in case the vendors could not deduce a good and marketable title such as the purchaser or his counsel should approve or if the purchaser should not pay the purchase money on the appointed day, the agreement should be entirely void." An abstract was sent to the plaintiff by the defendant, who was the vendor's solicitor. The abstract was sent back to the defendant for the purpose of having the title cleared up. The defendant said that the objections to the title could not be met and refused to return the abstract, claiming that the contract was void under the proviso. Sir James Mansfield, Chief Justice, in the course of his judgment said: "Something has been argued on the construction of the proviso that in case the vendor could not make a title, the contract should be void. But in order to adapt that defence to the present case, the argument must be, that if the defendant says he cannot answer the objections, it shall be absolutely void at the choice of either party. But that is not so; the meaning is, that if the seller cannot make a good title by the time mentioned, the contract shall be void as against him, and the plaintiff has a right to be off his bargain. So *e contra* if the plaintiff does not pay the money, the defendant may avoid the contract; but the plaintiff cannot say, I am not ready with my money, therefore I will avoid the contract; nor can the seller say, my title is not good, therefore, I shall be off. And the word is 'if they *cannot* make,' so it must appear by sufficient proof, that they cannot make a title."

Lord Ellenborough in *Rede* v. *Farr* (6 M. & S. 121, at p. 124) applied the same principle to a case in which it was alleged that a lease became void by the failure of the lessee to pay the rent. I may quote the following sentences from his judgment: "In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong. If we were to hold that a lease which in terms is a lease for twelve years should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were not borne out so strongly as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor. In Co. Litt. 206*b* it is laid down: 'If a man make a feoffment in fee, upon condition that the feoffee shall re-infeoff him before such a day, and before the day the feoffor disseise the feoffee and hold him out by force until the day be past, the estate of the feoffee is absolute; for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the means that the condition could never be performed.' And this is regularly true in all cases. If that be a principal of law, that a party shall not take advantage of his own wrong, then a lessee shall not avail himself of his own act to vacate his lease."

If it has been the case here that the builder was (to use Lord Coke's language) "himself the mean" that the vessel was not completed within the eighteen months, he could not claim that the contract had thereby become void. But, as the umpire has found, the non-completion was not in any way brought about by the builder, but was the result of causes for which under the contract he is not responsible.

Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform and are really illustrations of the very old principle laid down by Lord Coke, that a man shall not be allowed to take advantage of a condition which he himself brought about. In the present case the builder was in no way responsible for the non-completion within eighteen months, and there is no reason why clause 12 should not be interpreted according to the natural meaning of the words so as to render the contract void.

For these reasons I agree with the decision of the Court of Appeal and think that this appeal should be dismissed with costs.

Lord ATKINSON.—I cannot but think that the contest in this case is, upon the main point, very much a contest about names.

It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance they may stipulate that if rain should fall on the 30th day after the date of the contract, the contract should be void. Then if rain did fall on that date the contract would be put an end to by this event, whether the parties so desire or not. Of course they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract.

But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings about that event, cannot be permitted either to insist upon the stipulation himself, or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a round-about way, but in either way putting an end to the contract.

The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party it is said that the contract is voidable, but that is only another way of saying

that the blameable party cannot have the contract made void himself, cannot force the other party to do so, and cannot deprive the latter of his right to do so.

Of course the parties may expressly or impliedly stipulate that this contract shall be voidable at the option of any party to it. I am not dealing with such a case as that. It may well be that the question whether the particular event upon the happening of which the contract is to be void was brought about by the act or omission of either party to it may involve a determination of a question of fact.

On the first point, I think that the words "date agreed to by the contract" in Art. 12 of the agreement meant originally for all practical purposes the 30th Oct. 1914, and now, by the addition which has been made to the contract, means the 30th July 1916, when the further eighteen months given for the completion of it expired.

I do not think it can mean the termination of the further period allowed as a fair proportionate extension for completion under art. 5 of the agreement. That is a quite indefinite period. The parties might disagree as to its duration, and, if so, the dispute would be a matter for arbitration within the 13th article of the agreement, since it would be a dispute "touching the completion of the steamer" and the construction of the meaning of the contract. This delay might be very prolonged.

Under art. 12 several of the events, the happening of which are to render the contract void, are clearly events for which the builders are responsible or over which they have control—namely, the event of their bankruptcy, the event of their insolvency, or the event of their refusal (*refus*) to deliver the steamer. The event of their inability (*impossibilité*) to deliver her, might be the result of the neglect of the builders to commence to build her soon enough, or to keep a sufficient staff at work upon her. In such a case the event, the happening of which is to make the contract void, would be brought about by their act or omission, and they could not avail themselves of it. But the umpire has found as a fact that the builders were prevented by unavoidable causes beyond their control from completing the vessel ready for trial on the 30th of Jan. 1915. The two parties, therefore, are equally blameless. By the act or omission of neither was the event brought about on the happening of which the contract was to become void. The principle that a man shall not take advantage of his own wrong does not apply, and the contract becomes null and void absolutely as its words in their natural meaning provide that it should. In my opinion the order appealed from was right and this appeal should be dismissed with costs here and below.

Lord SHAW.—By contract and supplementary agreement of parties the respondents undertook to build a steamship for the appellants and to have her ready for trial by the 30th Jan. 1915.

By the fifth clause of the contract it was agreed that if the stipulation as to time for completion could not be complied with, by reason of causes beyond the control of the builders, the time should be extended in proportion to the delay so caused.

By the twelfth clause of the contract it was provided as follows: "In case the builders become bankrupt or insolvent, or shall fail or be unable to deliver the steamer" (these words in the French version are *Ou de leur refus ou impossibilité delivrer le vapeur*) within eight months from the date agreed by this contract, thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them with interest." In this clause the following interpolation was inserted, "except only (in the French version *cependant*) "in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all."

As to the running of time under these clauses it appears to me to be clear that both the eight months and the eighteen months ran from a fixed point—namely, the 30th Jan. 1915. And I am further of opinion that, with reference to the extended period of eighteen months, the contract has definitely stated that period as the maximum of prolongation.

By reason, however, of the outbreak of the European war the building of the ship has been still further delayed, and the ship is still incomplete. A state of affairs has accordingly arisen for which neither party is responsible, and which is covered by clause 12 of the contract. "Thereupon," says clause 12, "this contract shall become void."

The learned arbitrator decided "that the builders in the events which have happened are entitled to take the contract as null and void (except for the repayment with interest of 5 per cent. of all moneys already paid to the builders by the purchasers"). In my opinion this judgment was right and has been properly upheld by the courts below.

The attack upon these judgments was centred upon this, that the terms employed—namely, that the contract "shall become void"—must be taken to mean only that the contract was voidable at the instance of the building owner. According to the agreement that owner might say: "Although the stipulated time for delivery is and may be long exceeded, I am willing to suffer the delay, and I do not choose to found upon the stipulation; accordingly you, the builder, must, along with us, remain bound so long as I choose."

The answer to the whole of this is clearly put by Bailhache, J., that the stipulation as to the contract becoming "void" is a stipulation in favour of both parties. This is subject only to this, that the party treating the contract as void shall not himself have brought about the event which gives rise to the condition. What I have ventured last to express appears to me to be sound in principle and to be a better and broader expression of the principle than a reference to either a party's own wrong or a party's own default. For without either definite wrong or default the action or even the situation of one of the parties may be sufficient to produce the condition. I prefer more than any other as an expression of the principle that which occurs in Coke upon Littleton, 206*b*, and is quoted with approval by Lord Ellenborough in *Rede* v. *Farr* (6 M. & S. 121) "for that he himself is the mean that the condition could never be performed."

As to authority, I refer in particular to Lord Ellenborough's judgment in *Rede* v. *Farr* (*supra*),

to *Bryan* v. *Bancks* (4 B. & C. 401), and to *Hughes* v. *Palmer* (19 C. B. N. S. 393).

When a contract describes an event or events which may happen, and declares that on the occurrence of any of these the contract shall become void, the results may be tabulated thus:—(1) Such a contract is voidable, as said, at the instance of that party who has not by his own wrong or default brought about the event, or in Coke's words has not been the mean that the condition could not be performed. (2) Therefore such a contract is voidable by (*a*) sometimes one party, for instance a builder who has not been able to proceed on account of the default of the building owner say by failure to pay the stipulated instalments of price, and (*b*) sometimes by the other party, for instance the building owner, where the bankruptcy of the builder has prevented timeous completion or delivery. (3) And such contracts are voidable by both or either when the impossibility to complete or deliver was something for which neither was responsible. Each party is innocent, neither is in default: the conduct of neither has brought about the event. And in such a case the contract is interpreted with even and equal justice to both sides; and the law does not allow one party only to avoid while the other is held bound. If both parties go on, that is another and their own affair. But either can claim that the contract is void and then both are free. In my opinion such an overruling and equally applicable case was brought about by the present European war, an event by reason of which the respondents are entitled to treat this ship-building contract as void. I agree that the appeal should be disallowed.

Lord WRENBURY.—Art. 5 of this contract provides that the steamer shall be completed for trial by a calendar date (which as varied is the 30th Jan. 1915) "unless" something happens which has happened. In the event, therefore, that calendar date is not fixed for completion. The article goes on to provide that in the event named "a fair proportionate extension of time shall be allowed." It is not provided in express terms that—but upon a true construction I think it results that—in the event the completion is to be achieved by the expiration of that extended time.

The question then is as to the meaning of art. 12. That article is not artistic. There is, in fact, no date for delivery fixed by the contract. The calendar date is a date for completion: delivery is to follow. But nothing really turns upon this difference. By calendar date I subsequently mean the date after the calendar date when having regard to art. 5 delivery is to be made.

The appellant says that "the date agreed by this contract" in art. 12 is in the event which has happened, not the calendar date but the expiration of the "fair proportionate extension of time." I am not of this opinion. If this were so there would be eight months (or eighteen months as the case may be) from the expiration of the "fair proportionate extension of time." Art. 12 has, I think, explained art. 5 by naming a period at the expiration of which both the fair proportionate extension of time and also a further allowance before the contract "shall become void" will have elapsed. For this purpose "the date agreed by this contract" is the calendar date from which the former commences to run, that is to say, the calendar date—viz., the 30th Jan. 1915. Upon this point, in my judgment, the decision under appeal is right.

The next question is as to the meaning of "shall become void" in art. 12. Does this include "shall be voidable at the option of the builder"? In my opinion it does. The article begins by naming certain events, four in number: In case the builders shall (1) become bankrupt, or (2) insolvent, or (3) shall fail, or (4) be unable to deliver. Of these the first three are events which may be said to be the fault of the builder; the fourth is not or may not be his fault at all. He may be unable from an unpreventable cause beyond his control. If the word "void" is to be read "voidable," it results in the fourth case that, upon principles well settled, the meaning is that the contract is to be voidable at the option of the builder. For an event is named in which through no fault of his own a contract expressed to be voidable has become impossible or commercially impossible. If the contract be voidable at the builder's option, he has by defending this case elected to avoid it, and this appeal must fail. If, on the other hand, the word means "void" and not "voidable," it equally results that the appeal fails. Whether the word be read "void" or be read "voidable," therefore, the appeal fails unless the appellant can maintain that it means voidable at the option of the building owner, but not at the option of the builder. He has argued that this is the effect. In my opinion this is not so.

The rule is that in a contract "void" is to be read "voidable" if the result of reading it as "void" would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is "void as against him," or that if one party is in default it is "voidable at the option of the other party." The two amount to the same thing. But the contract is not "void" in favour of or "voidable at the option of" the party in default. He cannot say that it is void, and has no option to avoid it in his own wrong. Here the contract is, in my opinion, voidable at the option of either party, provided always that he is not seeking to avoid it in his own wrong. The contingency of war lasting more than eighteen months is a contingency not within the control of either party. The contract is void as against each, or, if you like so to express it, is voidable at the option of either if the contingency occurs.

I notice that the award found that the eighteen months expired on the 30th July 1916. This is not strictly accurate. But nothing turns upon the fact that an allowance should have been made for time for trial trip.

The appeal must, in my judgment, be dismissed with costs.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Calder, Woods, and Pethick.*

Judicial Committee of the Privy Council.

Feb. 1 *and* 4, 1918.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, PARMOOR, WRENBURY, and Sir ARTHUR CHANNELL.)

THE PRINZ ADALBERT; THE KRONPRINZESSIN CECILE (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE) ENGLAND

Prize Court—Enemy merchant ships—Status at outbreak of war—Hague Convention 1907, *No.* 6, *Preamble, arts.* 1, 2—*Form of order.*

Between the 23*rd and* 25*th July* 1914 *two German steamships, the P. A. and the K. C., left the United States with passengers for European ports. While at sea they received news by wireless of the outbreak of war between France and Germany, and on the* 3*rd Aug.* 1914 *they put into Falmouth as a port of refuge and were there detained. The Crown claimed their condemnation as lawful prize, and the owners contended they were entitled to an order similar to that made in the case of* The Chile (112 *L. T. Rep.* 248; (1914) *P.* 212) *or the release of the vessels under the Hague Convention* 1907, *arts.* 1 *and* 2.

The President condemned both vessels.

Held, that the vessels must be detained under what was now known as "the Chile *order," the effect of which would be to reserve all rights of belligerents under the Hague Convention intact for decision after the war.*

The Gutenfels (13 *Asp. Mar. Law Cas.* 346; 114 *L. T. Rep.* 953; (1916) 2 *A. C.* 112) *followed.*

Decision of Evans, P. (13 *Asp. Mar. Law Cas.* 307; 114 *L. T. Rep.* 567; (1916) *P.* 81) *reversed.*

APPEALS from decrees of the Prize Court, England, reported 13 Asp. Mar. Law Cas. 307; 114 L. T. Rep. 567; (1916) P. 81.

The Hamburg-Amerika Line steamships *Prinz Adalbert* and *Kronprinzessin Cecilie* left Philadelphia with passengers for European ports at the end of July 1914. On the voyage to England the officers learnt by wireless that war had broken out between France and Germany, and in consequence the vessels, on the 3rd Aug. 1914, put into Falmouth as a port of refuge. The owners claimed the release of the vessels on the ground that they were detained or seized before the outbreak of the war, and that they ought to have been allowed to depart in accordance with the preamble to the Hague Convention 1907, No. 6, arts. 1 and 2, "relative to the status of enemy merchant ships at the outbreak of hostilities."

The President was of opinion that, assuming the Hague Convention was binding upon Great Britain as far as Germany was concerned, the vessels had not entered the port in pursuance of a commercial enterprise, and he held that the convention did not apply to the circumstances under which they had put into Falmouth, and did not protect them from condemnation as prize.

Against that decision the shipowners appealed.

Aspinall, K.C. and *Dunlop* for the appellants.

Sir *Gordon Hewart*, K.C., *H. H. Joy* (for *H. L. Murphy*, serving with His Majesty's forces), and *Pearce Higgins* for the Crown.

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

The judgment of the board was given by

Lord PARKER OF WADDINGTON.—In their Lordships' opinion, the effect of the preamble of the Sixth Hague Convention, on arts. 1 and 2 thereof, is a point which admits of considerable doubt. Following, therefore, the precedent of *The Gutenfels* (13 Asp. Mar. Law Cas. 346; 114 L. T. Rep. 953; (1916) 2 A. C. 112) (a decision pronounced after the decisions appealed from), their Lordships do not propose to decide it at the present time. The proper order should, in their opinion, be what is known as the *Chile* order (12 Asp. Mar. Law Cas. 589; 112 L. T. Rep. 248; (1914) P. 212). The effect of making this order will be to reserve all rights intact for decision when the war is over, and the views of the German Government as to the true construction of the convention can be ascertained.

As the order their Lordships propose to make is that which the appellants ask for in these appeals, and as they have had to come here to get it, the Crown should, in their Lordships' opinion, pay the costs.

Their Lordships will humbly advise His Majesty accordingly.

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

Feb. 4 *and March* 15, 1918.

(Present: The Right Hons. Lords PARKER OF WADDINGTON, SUMNER, and Sir ARTHUR CHANNELL.)

YANGTSZE INSURANCE ASSOCIATION LIMITED *v.* LUKMANJEE. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Insurance (Marine)—Goods sold ex ship—Risk of craft—Sellers effecting policy—"Payment cash against documents"—Whether purchaser could claim under policy—Intention.

The owners of 382 *pieces of teak-wood sold* 200 *tons of it* (144 *pieces*) *ex ship to the respondent, "shipment November-December at the rate of* 100 *tons monthly. . . . Payment cash against documents." They shipped from Bangkok to Colombo* 382 *logs, of which* 144 *were shipped in part fulfilment of the contract, and they effected at their own expense with the appellants a marine insurance on the whole of the* 382 *logs for themselves and every person to whom it might appertain, the policy containing a clause covering "all risk of craft and* (*or*) *raft from land to land." At Columbo the respondent took delivery of the* 144 *logs and paid for them, and they were afterwards discharged over the side ex ship and formed into rafts. While in rafts some of the logs were driven out to sea by a gale and were lost.*

The respondent sued upon the policy, and, apart from the transaction of insurance and the documents effecting it, there was no evidence whether it was the intention of the sellers to insure the goods on behalf of the purchaser.

Held, that there was no inference to be drawn from the use of the word "documents" in the expression "payment cash against documents" in the contract

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

of sale ex ship that the policy was effected on behalf of the purchaser or to cover his interest. The policy itself was no evidence that it was so effected, and consequently the purchaser could not maintain the action he had brought on the policy.
Decisions of the Ceylon Courts reversed.

APPEAL from a judgment of the Supreme Court of Ceylon, dated the 6th Sept. 1916, affirming a decision of the District Judge of Colombo.

R. A. Wright, K.C. and *Stuart Bevan* for the appellants.

MacKinnon, K.C. and *Douglas Hogg*, K.C. for the respondent.

The considered judgment of their Lordships was delivered by

Lord SUMNER.—In this case Mr. Adamjee Lukmanjee sued upon a policy of marine insurance to recover a loss in respect of 144 logs of teak-wood, which, after being discharged over side ex steamship *Hild* at Colombo, were lost in a gale while still in raft. He succeeded, though on somewhat different grounds, both in the District Court of Colombo and in the Supreme Court of Ceylon. The insurance company now appeals.

The policy was effected at their own expense by the Bombay, Burmah Trading Corporation Limited, "as well in his or their own name as for and in the name and names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all," following the company's usual form of policy; and under these words Mr. Lukmanjee claims to have been assured under the policy from the beginning, and entitled to sue as a party to it, subject to his having an insurable interest at the time of loss. There is no question here of any assignment of the policy. In fact he had such an interest, for the logs, when lost, were his, so the question is whether he was a party insured under this policy in respect of that interest, or, in other words, whether the Bombay, Burmah Trading Corporation effected it in any measure on his behalf.

The Bombay, Burmah Trading Corporation, by its agents at Colombo, had sold to Mr. Lukmanjee, who was also at Colombo, "200 tons of Indian first-class teak squares at 175 rupees per ton ex ship. Shipment November-December at the rate of 100 tons monthly. . . . Payment cash against documents." The 144 logs constituted the first instalment under this contract, and it is common ground that, when they were discharged ex ship into the water, they had been paid for, and had become the property of the respondent.

Except in so far as it can be inferred from the transaction itself and the documents by which it was effected and carried out, there is no evidence to show with what intention the Bombay, Burmah Trading Corporation effected the insurance, nor was there any evidence of any course of business or of any customary understanding of any of the terms employed. What is significant about the policy itself is that it covered 382 pieces of teak, all particularly marked, of which only 144 were for Mr. Lukmanjee and the remainder were for the account of the Bombay, Burmah Trading Corporation. There was a separate bill of lading made out to the order of the shippers, the Bombay, Burmah Trading Corporation, for the 144 logs, and in it they were identified by the same marks as in the policy. Among the marginal clauses in the policy was one covering the ancillary risk between ship and shore, viz, "all risk of craft and (or) raft from land to land," but it was admitted that such a clause would be included almost as a matter of course, and that, although it was only under this clause that Mr. Lukmanjee could recover, the fact of its insertion in the policy threw little or no light on the question whether the policy was effected on his behalf as one of the original assured.

The trial judge was of opinion that the property in the goods passed to the buyer before shipment, and that in shipping them the sellers had acted as his agents. Hence he inferred that the insurance was effected for him. The Supreme Court apparently treated the contract as if it contained an implied obligation on the seller's part to insure the buyer in respect of such contingent interest in the goods as he might have while they were at sea. Neither view was, or indeed could be, sustained on appeal, nor had the attention of either court been directed to the true question, whether the evidence showed that the insurance was effected on the buyer's behalf.

It is clear that the policy itself evidences no such intention. The sellers and the sellers alone were throughout interested in the major part of the cargo. Even as to the 144 logs, until the ship arrived and came to deliver over side they and they alone had the interest properly describable by the words used in the policy—viz, "upon goods." If the buyer were to fail to pay for the timber in accordance with the contract, their interest in it would continue after discharge overside, for it would remain their property. Even if these logs were paid for against documents, as was the case, the inclusion in the policy of cover against raft and craft risk was necessary as to the residue, and was of no significance in the present connection.

Two suggestions were made in argument: one was that "against documents" means in the language of commerce against a policy of insurance and sundry other documents; the other, that an obligation, binding the sellers to insure on the buyer's behalf, might be inferred because the effect of the contract was to require payment not merely against goods delivered ex ship in a state corresponding to the contract description, but also against documents representing the goods, even though, through sea perils, they were no longer in a state corresponding to the contract description.

The first point fails because there is no evidence to show that the word "documents" in such a connection includes a policy of insurance. A contract of sale, at a price c.f. and i., is so well understood that no proof is needed that one of the documents which it contemplates is a policy. It may be that, detached from any context, the mere expression "shipping documents" would suggest that one of them is a policy. When, however, the expression is found in a contract, and there is nothing but the language of the contract to determine its meaning, it must be construed as meaning such documents as are appropriate to the contract. In the case of a sale "ex ship," the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein, which is usual for the delivery of goods of the kind in question The

seller has therefore to pay the freight, or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods. Till this is done he may have an insurable interest in profits, but none that can correctly be described as an interest "upon goods," nor any interest which the seller, as seller, is bound to insure for him. If the seller insures, he does so for his own purposes and of his own motion.

Again the mere documents do not take the place of the goods under such a contract. They are not the subject-matter of the sale. If an indorsed bill of lading is delivered to the buyer it is given as a delivery order and not with any intention of making him a party liable upon it, or of vesting him with the property in the goods by the mere delivery of the document. As the goods are not at the buyer's risk during the voyage, there is nothing from which to infer an obligation on the seller, and therefore an intention on his part, to effect an insurance on the buyer's behalf.

It was said that "cash against documents," first of all, implied some document other than a delivery order, because of the use of the plural, and, secondly, must have reference to the risks of the voyage, so as to make the contract analogous to a c.f. and i. sale, since if "documents" only meant "delivery of the goods," this would be implied by law. The answer seems to be, on the first point, that the plural "documents" would be satisfied either by two delivery orders, one for each shipment, or by two documents, a delivery order and a receipt for the freight, in the case of each shipment. On the second point there is nothing surprising if such a contract is found to express something which the law would imply, and certainly there is nothing in it to compel a court to give simple and well-known words a meaning which does not belong to them, and which does belong to other words or letters equally well known though not so simple. In truth, however, "cash against documents" does carry the matter beyond "cash on delivery," that is, delivery of the goods, for it imports a convenient mercantile way of effecting the same object without the inconvenience of a payment at or contemporaneous with the discharge overside. It was admitted that payment could not be demanded, even "against documents," till the ship had arrived with the goods. The provision enables payment to be made in a counting-house and in the ordinary course of business, without reference to the precise stage which the process of tumbling the logs into the water may happen to have reached.

Their Lordships are therefore of opinion that there was no evidence on which it could be found that the policy was effected on behalf of the respondent, or to cover his interest in the goods, and that he could not sue on it. They will therefore humbly advise His Majesty that the appeal should be allowed, and that both judgments should be set aside with costs here and below.

Solicitors for the appellants, *Waltons* and *Co.*

Solicitors for the respondent, *Stephenson, Harwood,* and *Co.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Jan. 31, *Feb.* 1 *and* 6, 1918.

(Before ROCHE, J.)

COMPANIA MARITIMIA OF BARCELONA *v.* WISHART. (*a*)

Marine insurance—Marine risks—War risks—Free of capture and seizure clause—Onus of proof.

The steamship] P., *of which the plaintiffs were the owners, was insured by a time policy effected in May* 1916 *for twelve months. The policy was against the usual perils, but it contained an exceptions clause as follows: "Warranted free from 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 the declaration of war."*

On the 17*th Nov.* 1916 *the* P. *left the Tyne for Barcelona, laden with a cargo of coal, and was never seen or heard of again Evidence was given that when the vessel started from the Tyne on her last voyage she was well found in every respect, but that the weather which the* P. *went out to face was extremely severe. There were storms of the utmost violence. It was weather which was calculated to bring about and did bring about marine casualties of a serious character. On the other hand, there was evidence of a vessel having struck a floating mine about the same time, far north of the* P.'s *course, and the British Admiralty had given information of another vessel which had struck a mine through not adhering to instructions, but this was far south of any spot reached by the* P. *There were no submarine casualties in the* P.'s *route between the* 17*th and* 21*st Nov.* 1916, *and there was no evidence of floating mines in the area in question or of a mined area which the* P. *was likely to have approached or to have approached and suffered from unobserved.*

Held, that, although demonstration and certainty were unattainable, the law allowed and demanded that inference should be drawn from such facts as pointed to a conclusion, and the facts pointed and led to the conclusion that the P. *was lost by foundering caused by the action of wind and sea and not brought about by any perils excluded by the exceptions clause; and that accordingly the plaintiffs were entitled to judgment.*

Observations per Roche, J. on the question of the onus of proof.

ACTION in the Commercial List.

The plaintiffs claimed payment under a policy of insurance as for a total loss by the perils insured against—namely, perils of the seas.

The defence was that no loss by marine perils had been proved, but that the proper inference was that the loss was caused by a torpedo or mine and was therefore expressly excluded by the free of capture and seizure clause in the policy.

The clause in question was as follows:

Warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat,

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

piracy excepted, and also from all the consequences of hostilities, or warlike operations, whether before or after the declaration of war.

The facts of the case are summarised in the judgment.

R. A. Wright, K.C. and *Noad* for the plaintiffs.

Leck, K.C. and *Raeburn* for the defendants.

Cur. adv. vult.

ROCHE, J. read the following judgment:—The plaintiffs are a Spanish company which in Nov. 1916 owned the *Pelayo*, a steamship of 1641 tons gross and 1008 tons net register, flying the Spanish flag, and at the material time manned by a Spanish crew. The *Pelayo* was insured by a time policy effected in May 1916 for twelve months and underwritten by the defendant amongst other Lloyd's underwriters. The policy was against the usual perils, but contained the well-known f.c. and s. clause and therefore excluded war risks, and is compendiously described as a policy against marine risks only. On the 17th Nov. 1916 the *Pelayo* left the Tyne for Barcelona, laden with a cargo of coal, and was never seen or heard of again. The plaintiff company claims payment as for a total loss by the perils insured against—that is to say, by perils of the seas. The defendant's case is that no loss by marine perils is made out, but that, on the contrary, the proper inference is that the loss was occasioned by torpedo or mine, and was therefore excluded by the free of capture and seizure clause. Questions of importance and difficulty were raised as to the onus of proof, and I shall refer to this matter at a later stage; but the parties most properly placed all the available materials before the court, not merely by the calling of witnesses, but by agreeing to admit and by producing on both sides the documentary evidence of weather reports, of logs and protests emanating from other vessels, of information from British, German, and Spanish official sources, and of newspaper reports published in this country, in Germany, and in Spain.

From these materials I have arrived at certain conclusions which are as follows: Though there was in the circumstances no warranty that the *Pelayo* was seaworthy upon sailing for this particular voyage, yet there is no reason to suppose that she was otherwise than seaworthy and every reason to suppose that she was. She was, however, a ship with well decks and having but a little over 3ft. of freeboard when laden as on this voyage. She was not a vessel of high speed or power, and she was so constructed as to have one long hold forward of her engine space and one long hold aft of it. There were two hatches to each of these holds. Though she was loaded down to her marks there was a good deal of space left in her 'tween decks, particularly in the way of the forehold. In these circumstances, if a volume of water entered through any one hatch being burst in it would be capable of exerting a most serious influence on the buoyancy and stability of the vessel. The weather which the *Pelayo* went out to face was extremely severe, particularly on the 18th and 19th Nov. The weather reports from shore stations show it to have blown a whole gale for lengthy periods, with frequent gusts of an even more violent character. The evidence from the sea, both documentary and oral, convinced me that the storm was one of the utmost violence. With wind squalls of almost, if not quite, hurricane force, and high, steep, confused seas; in short, weather calculated to bring about, and in fact bringing about, marine casualties of a serious character. No other vessel is known to have foundered, but I have evidence of the shifting of cargo, the bursting in of hatches, the breaking of steering gears, and of ships narrowly reaching harbour or of being blown ashore. I am satisfied that even with the best of seamanship, and with even greater power available than the *Pelayo* possessed, a vessel might easily be lost, and that the weather alone would be sufficient to account for her disappearance. To say with certainty by what process or action of the wind and sea she perished would, of course, be difficult and indeed impossible, but nautical witnesses of experience and credibility explained what happened to the other vessels whose records are available, and why it happened to them, and why, in their judgment, the same causes were not merely possible but the highly probable causes of the loss of the *Pelayo*. I was particularly impressed by Captain Spinks' evidence and the manner in which he gave it, and the balance of the nautical evidence seemed to me very greatly in favour of the plaintiffs' case. I have to consider the other possibilities. As to mines, the defendant adduced evidence of a vessel which struck a floating mine at about this period, far north of the *Pelayo's* route, and the British Admiralty have furnished information of another vessel which struck a mine because, through not adhering to instructions, she strayed into a dangerous area, which need not be more particularly specified, but which was a very long distance south of any spot reached by the *Pelayo*. In this connection I should say that I find that the *Pelayo* never was south of Flamborough, and I doubt whether she ever succeeded in getting as far south as Whitby. It is significant, but, of course, not conclusive, that the British Admiralty treats this vessel which strayed into a mined area as above stated as the only casualty due to mines between the Tyne and the Downs in the period from the 17th Nov. to the 21st Nov. 1916. There is no evidence of floating mines in the area at the time in question or of a mined area which the *Pelayo* was likely to have approached or to have approached and suffered from unobserved. It is to be noted that the defendant relied upon the fact that the *Pelayo* disappeared so completely and without trace as negativing a loss by sea perils and as pointing to a sudden catastrophe more likely to be due to enemy action than to a marine casualty. It seems to me that this argument, which is, no doubt, of weight in considering submarine action, particularly at some distance from land, is of little or no weight in considering the probability of destruction by a mine in waters at no great distance from the English coast. The two mined vessels to which I have referred did come under observation. The case, therefore, as to mines seems to me to be unsupported either by direct evidence or by probability.

With regard to submarines, the inference has often and naturally been drawn that where submarines are found operating in a given area they are the cause of a loss which would otherwise be unexplained. The converse is the case here. The loss is, as I have found, otherwise quite

explicable — probable — and the information afforded by the British Admiralty is clearly in opposition to the view that submarines were operating successfully or at all on the *Pelayo's* route between the 17th and 21st Nov. 1916. But, quite apart from this official information, I was satisfied by the evidence of the witnesses, who either explained this weather or knew what it was, and who also had experience of navigation under existing circumstances of the conditions under which they have to fear damage from submarines, that the weather at the material times and in the material region was far too bad to admit of effective submarine action. I should add, in passing, that the very complete statistics presented by Mr. Wilmot, of Lloyd's, though they no doubt show that in time of war war losses are more common than marine losses, also seem to show that quite a different ratio and proportion are to be found prevailing if attention is concentrated upon the limited period and area of bad weather which is under discussion in the present case. But one considerationof importance remains to be dealt with. There is no doubt that reports of the torpedoing of the *Pelayo* by a German submarine were widely published both in Germany and Spain, and obtained in both countries both notoriety and credence. Why was this, and what were the grounds of the report and the belief? The answer is not uninstructive, and seems to me to be very plain on the materials at my disposal. Early in Jan. 1917, after the *Pelayo* had been missing for five or six weeks, she was posted as missing at Lloyd's. Within a few days there were sent out from the German wireless station at Nauen, and particularly to Spain, radiograms stating that the *Pelayo* had been sunk by a German submarine. Also within a few days there appeared in the current issue of *Hansa*, an old-established and prominent, if not the most prominent, shipping newspaper in Germany, the following announcement: "Unterboat Cruiser War.—During last week the following merchantmen and enemy war vessels have been announced as probable or actual victims of this war." Then followed a long list of merchant vessels of many nationalities, both enemy and neutral, and of certain enemy war vessels and troop ships. The merchant vessels included the *Pelayo*, and stated that she was sunk. With regard to the general claim which is asserted by this list, the unimpeachable statistics furnished from Lloyd's show the numbers of the claim to be exaggerated out of all relation to the matter. With regard to the *Pelayo*, the matter progressed as no doubt the official authors of the report from Nauen and in the *Hansa* intended it should proceed. The matter became one of the most intense interest and of hot debates in Spain. The Press agitated for this or the other action by the Government of that country. Letters purporting to emanate from distressed relatives of the crew appeared in the newspapers, and either desire of notoriety, or possibly subornation, induced two seamen to pose as survivors from the *Pelayo*, which, according to their version, was torpedoed off the Canaries, a locality many hundreds of miles from the true scene of the loss. The reason for all this is not difficult to appreciate. To pretend to success in brutality, even if the facts did not support the pretence, might serve an end if the seamen and merchants of Spain could be frightened from traffic upon the seas. As I have had occasion to refer to these reports, their origin, and their aims in reference to the country whose flag was flown by the *Pelayo*, I may perhaps be permitted to observe with satisfaction that the authors of these reports seem to have signally failed in their aim, as one might naturally expect they would fail when dealing with a proud and brave people. As to the validity of the claim asserted in these reports, this only has to be added. When the German Foreign Office was applied to by the Spanish Ambassador at Berlin for information which was, as I gather, desired by the plaintiff company in this investigation for the purposes of the present case, the reply of the German Foreign Office was to the effect that nothing could be ascertained about the matter, and that the publication by the English Lloyd's of the information of the *Pelayo* being missing was the sole source of information available. The Foreign Office also stated quite untruly, as appears from several sources, that the radiograms had only repeated the news published by Lloyd's. On the contrary, they had also stated that the *Pelayo* had been torpedoed. In the circumstances I hope I am not placing undue reliance upon the disclaimer of the German Government when I say that the myth of the destruction of the *Pelayo* by submarine finally disappears.

At all events, my own conclusion upon the facts is that the *Pelayo* was not torpedoed, was not mined, and that the facts and probabilities strongly point to the loss being a loss by foundering caused by the action of wind and sea. The line between surmise and legitimate inference is not easy to draw. But, although in this case demonstration and certainty is unattainable, the law allows, and even demands, that inferences should be drawn from such facts as point to a conclusion, and in this case the facts which I have sought to summarise in my judgment point and lead to the conclusion that the *Pelayo* was lost by foundering not brought about by any perils excluded by the f.c. and s. clause, and that accordingly the plaintiff company is entitled to judgment.

I must, however, before parting with this case refer to the question of the onus of proof. It arises in the following manner: Mr. Wright, for the plaintiff company, submitted that it was enough for the plaintiffs in this action to establish that the ship was lost by perils covered in the body of the policy; that this was *primâ facie* established when it was shown that the ship had sunk; that thereupon it was for the defendant to prove affirmatively that the sinking was due to causes within the f.c. and s. clause; and that the defendant in the present case had manifestly failed to discharge this burden of proof. In support of this contention Mr. Wright relied upon two decisions of Bailhache, J. in *Macbeth* v. *King* (115 L. T. Rep. 221) and *British and Burmese Steam Navigation Company Limited and others* v. *Liverpool and London War Risks Insurance Association Limited and others* (34 Times L. Rep. 140), reported *in extenso* in Lloyd's List for the 13th Dec. 1917. In his judgments in these two cases Bailhache, J. clearly adopted and enunciated the view as to the onus of proof for which the plaintiff company in this case contends. Mr. Leck argued that the expressions of opinion of the learned judge in these two cases

were dicta unnecessary for the determination of the matters for decision. In a sense that is true. Bailhache, J. arrived at his conclusion of fact in each of those cases in spite and not because of his opinion as to the law. But nevertheless that opinion was deliberately expressed after an argument in *Macbeth* v. *King* (*sup.*) addressed directly to the point, and it proceeded from a judge peculiarly conversant with matters of insurance. I should therefore hesitate long before I differed from an opinion so expressed. At the same time, I am free to confess that Mr. Leck's able argument, at any rate, created doubts in my mind as to what the true view is. The crucial point, as it seems to me, really is whether the construction of those policies adopted by Bailhache, J. in *Macbeth* v. *King* (*sup.*) is correct, or whether in respect of the f.c. and s. clause the true construction is the same as it was held to be by the Court of Exchequer in *Dawson* v. *Winch* (3 Ex. 359) in respect of the f.p.a. warranty or memorandum: (see also Bullen and Leake, 3rd edit., p. 140, and the decision of Lush, J. in the case of *Hurst* v. *Evans*, 116 L. T. Rep. 252; (1917) 1 K. B. 352). This being the state of the authorities and of my mind with regard to this question, I am clear as to one thing—namely, that it would be as inadvisable as it is unnecessary for me to attempt to give a decision upon the point in the present case where, having regard to my conclusions on the facts, it does not arise for my decision.

It is hardly necessary to add that, if the view of Bailhache, J. as to the onus be adopted, it would follow that, in my opinion, on its facts this case becomes an *à fortiori* case in favour of the plaintiff company. As I am satisfied that, wherever the onus lies, it has been established that the loss was not brought about in consequence of hostilities, it follows that, in my judgment, the defendant has failed to establish affirmatively that it was so brought about. There will be judgment for the plaintiff company for 121*l.* 14*s.* 4*d.* with costs.

Judgment for plaintiffs.

Solicitors: *William A. Crump* and *Son*; *Parker, Garrett*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Nov. 22 *and* 23, 1917, *and Jan.* 11, 1918.

(Before Sir S. T. EVANS, President.)

THE ANNIE JOHNSON; THE KRONPRINSESSAN MARGARETA (*a*)

Prize Court—Cargoes—Shipments made after outbreak of war—C. and f. contracts—Mode of payment—Opening of credits—Passing of property in goods—Rules governing the same—Municipal law—Prize law—Bona fides—*Sale of Goods Act* 1893 (56 & 57 *Vict. c.* 71) *ss.* 18, 19.

A Swedish firm, carrying on business at Gothenburg, purchased a quantity of coffee from a German firm, which had a branch house at Santos, in Brazil. The purchase was made under contracts "cost and freight, Gothenburg," and the terms as to payment were "net cash against documents on their arrival at Gothenburg to be telegraphically confirmed by a local bank through a bank at Santos," the port of shipment. The coffee was in bags, the bags were marked with the initials of the buyers, and they were shipped on two Swedish vessels sailing from Santos to Gothenburg. The bills of lading, in accordance with which the coffee was to be delivered at Gothenburg, were in the buyers' names. The insurances were effected by the buyers. The letter confirming credit, covering the goods laden on both vessels, was sent by the Swedish bank for Gothenburg direct to the nominal shippers at Santos, and the credits were to be available on the shippers' sight drafts on the bank accompanied by the bills of lading and the invoices. The drafts and invoices were forwarded from Santos, and presented for payment to the Swedish bank, and in each case payment was made on the presentation of the documents at Gothenburg, but in the meantime the goods had been seized as prize. The Swedish firm claimed that the property in the goods had passed to them on shipment, and that they were not therefore liable to be condemned as prize.

Held, that, even if the principles of municipal law were applicable, the property in the coffee had not passed to the buyers, and that according to prize law the coffee remained the property of enemy traders during the period of transit and was liable to seizure and condemnation.

THIS was an action in which the Procurator-General asked for the condemnation of certain cargoes seized on the *Annie Johnson* and the *Kronprinsessan Margareta*, which were claimed by a firm of Swedish merchants.

Messrs. Peterssen and Nilsson, the claimants, were a firm carrying on business at Gothenburg, and were the purchasers of two consignments of coffee, each consisting of 500 bags. The coffee was shipped at Santos, in Brazil, by Messrs. G. Trinks and Co., in two Swedish vessels, the *Annie Johnson* and the *Kronprinsessan Margareta*, and the bags were marked with the initials of the buyers. Messrs. Trinks and Co. were a German firm whose headquarters were at Hamburg, with a branch establishment at Santos. This firm made use of various names as aliases, and the name used in the case of the consignments in question was that of the Companhia Nacional de Café. The purchase of the coffee was made pursuant to contracts of sale c. and f. Gothenburg, net cash on arrival of documents in Gothenburg, and subject to a confirmed credit, and bills of lading were issued in the names of the buyers, Messrs. Peterssen and Nilsson, dated the 3rd April 1916 and the 10th May 1916 respectively. The goods were insured by the claimants and payment was duly made for the same when the documents arrived at Gothenburg. Before payment was made, however, the coffee in question had been seized as prize, when the *Annie Johnson* and the *Kronprinsessan Margareta* put into Stornoway for examination, along with certain other cargoes of coffee consigned by Messrs. Trinks and Co. to other consignees. These other consignments were condemned as prize on various dates in 1917, as were also a number of consignments shipped by Messrs. Trinks and Co. in other vessels.

The claimants contended, *inter alia*, (*a*) that they were a neutral firm which had bought the coffee *bonâ fide* for consumption in Sweden

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

(*b*) that the property in the coffee had passed to them as such purchasers, and that they had become the owners thereof for all purposes before the date of seizure; and (*c*) that, accordingly, the coffee seized was neither subject to condemnation nor was it contaminated or rendered confiscable by reason of the presence of other goods in the ships which were contraband and liable to confiscation according to the Prize Law doctrine of infection. The Crown challenged each of the contentions of the claimants.

R. A. Wright, K.C. for the claimants.—All the circumstances of the case pointed to the fact that the property in the coffee passed to the claimants upon shipment. The nature of the contract showed that the property was at the claimants' risk as soon as it was put on board, and that was clearly the intention of the parties. The marking with the claimants' initials was moreover further evidence of complete appropriation, and, however one regarded the terms of payment, there was no reservation of the *jus disponendi* by the sellers. As the property had passed to the claimants, the fact that there had been a condemnation of other goods shipped by Messrs. Trinks and Co. had no application, as the doctrine of infection was inapplicable. He cited

Fragano v. *Long*, 4 B. & C. 219;
The Sorfareren, 13 Asp. Mar. Law Cas. 223; 114 L. T. Rep. 46; affirmed 14 Asp. Mar. Law Cas. 195; 117 L. T. Rep. 259;
The Parchim, 14 Asp. Mar. Law Cas. 196; 117 L. T. Rep. 738; (1918) A. C. 157;
Sale of Goods Act 1893, ss. 18, 19.

The *Attorney-General* (Sir F. E. Smith, K.C.), *Greer*, K.C., *Stuart Bevan*, and *Hull* for the Procurator-General.—According to prize law the property in the coffee remained in the sellers and the goods were subject to condemnation. When the whole transaction was contemplated it was clear that there was no intention that the property should pass until actual delivery. The present case was not at all like that of *The Parchim* (*ubi sup.*). There it was the case of a shipment under a contract made before the war. Moreover, the coffee was subject to the doctrine of infection immediately it was put on board. The other goods of Messrs. Trinks and Co. had been condemned, and therefore the claimants could not make out a case for exemption as far as these two consignments were concerned. They cited

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;
Saks v. *Tilley*, 32 Times L. Rep. 148.

Cur. adv. vult.

Jan. 11.—THE PRESIDENT.—These are the two remaining claims last argued in the large batch of coffee cases, known as the "Trinks cases." About thirty-five different consignments have already been the subject of adjudication.

Messrs. G. Trinks and Co., of Santos, were the shippers in every instance, although they used various other names as aliases. The name they used for the two consignments now to be considered was Companhia Nacional de Café. It was not disputed that the real shippers were Messrs. G. Trinks and Co. The consignees were Messrs. Peterssen and Nilsson, of Gothenburg.

The two cargoes consisted of 500 bags of coffee and one case of samples each, laden on the Swedish steamships *Annie Johnson* and *Kronprinsessan Margareta*. Five hundred bags was the quantity usually sent to consignees, according to the practice arranged and adopted between Messrs. G. Trinks and Co. in Hamburg and Santos. This appears from a letter from Messrs. G. Trinks and Co., of Hamburg, to Messrs. G. Trinks and Co., of Santos, of the 1st Nov. 1915. That gave the names of some firms to whom consignments might be sent, together with the following general instructions:

> We should like to remind you once more to observe the following points in consignments: To send if possible contracts with each consignment; to avoid everything that has reference to our firm; to advise shipments as early as ever is possible, so that we may cover the insurances in time; to dispatch marine samples also as early as is possible. You may then, of course, send consignments to the five aforesaid firms in rotation, in each steamer; however, not more than 500 bags for each individual firm.

Several other firms or nominees besides those named in that letter were used from time to time for the same purpose. Messrs. Peterssen and Nilsson's name appears in such cablegrams as were intercepted as early as the 29th Jan. 1915, when the work of interception had not been done with strictness or regularity. It was a cablegram from Messrs. G. Trinks and Co., of Hamburg, to the Santos house, part of which reads:

> Accept *Kronprinsessan Margareta* cash one (*sic*) Peterssen and Nilsson Otto Gewalt, Göteborg.

A transaction (it may be the same or a different one) between Messrs. G. Trinks and Co., of Hamburg, and Messrs. Peterssen and Nilsson, through Otto Gewalt, is referred to also in a letter of the 11th March 1915 from Otto Gewalt to Messrs. G. Trinks and Co., of Santos.

The claimants did not undertake any explanation of these earlier matters.

I dealt fairly fully with the general position of the Trinks firms and their nominees, and with their general schemes of operations in relation to extensive shipments of coffee, in judgments delivered on the 28th Aug. and the 22nd and 23rd Nov. 1917. In those judgments I also considered features which were common to all the cases, such as the comparative importation of coffee to Germany and to Scandinavian countries before and after the war, and also pronounced my views upon various questions of law which had been argued, or might arise, in connection with the various claims. It is therefore unnecessary to repeat what was then said, although the conclusions should be borne in mind.

Two main contentions were put forward by the claimants: (*a*) that they were a neutral firm which had honestly bought the coffee for Swedish consumption; and (*b*) that the property in it had passed to them as such, and that they had become the owners for all purposes before seizure; and accordingly that the coffee seized was neither subject to condemnation nor contaminated or rendered confiscable by the presence of other contraband goods in the ship according to the

Prize Law doctrine of infection. The Crown challenged both these contentions.

The contracts put forward in the two cases are similar in terms, and the cases as presented run on parallel lines. The contracts were made pursuant to negotiations carried on by "conversations, personally or by telephone" with Otto Gewalt, described as the local agent of the Companhia Nacional de Café of Santos. As shown by the evidence, the so-called agency of Gewalt was a completely polluted channel. Confirmation sale notes from Gewalt were produced. The contracts were "cost and freight Gothenburg"; the goods were described as "uninsured, to be covered by purchasers," and the terms as to payment were "Net cash against documents on their arrival at Gothenburg to be telegraphically confirmed by a local bank through a bank in Santos." (There were slight differences in the translation of the two—but these were not material, and no distinction between them was made in argument.)

Having stated the general character of the contracts alleged and relied on, some further particulars relating to them must now be given. The first in date was that relating to the coffee on the *Kronprinsessan Margareta*. It bore date the 1st Feb. The *Annie Johnson* contract was dated the 9th Feb. But as the *Annie Johnson* sailed first, and the seizure of the goods upon her was also the earlier, I shall take first in order the claim to the goods laden on that vessel.

The "delivery period" stated in the contract note was, "shipment per steamship *Annie Johnson*, to load beginning of March." The goods were not in fact loaded till the next month. The bill of lading is dated the 3rd April, the invoice the 4th April. The letter confirming credit covered the goods to be laden on both vessels. It was sent by the Skandinaviska Bank from Gothenburg on the 14th Feb. direct to the nominal shippers—Companhia Nacional de Café, Santos. The credits were to be available on the latter's sight drafts on the bank, accompanied by bill of lading and invoice. Under each credit payment was to be effected against the first bill of lading presented to the Skandinaviska Bank, the remaining bills of lading to be furnished later. The credits were to be in force up to the 1st May 1916 inclusive. The dates of the loading —namely, the beginning of March and the latter part of March—were both specified in the letter of credit. The insurances were effected by Messrs. Petterssen and Nilsson in February.

The drafts and documents were not sent to the Skandinaviska Bank, but (as was said) to the Enskilda Bank of Stockholm, as agents for the shippers or their Santos bankers. They did not reach the latter until the 16th May—that is, after the seizure—which was effected at Stornoway on the 12th May. They were presented to the Skandinaviska Bank on the 18th May, and payment was said to have been made on that date.

The corresponding particulars in the case of the *Kronprinsessan Margareta* were as follows: The contract was dated the 1st Feb., the delivery period being "expected to load in the latter half of March." The loading did not in fact take place till May. The bill of lading was dated the 10th May; the invoice the 11th May. The goods were seized at Stornoway on the 15th June. The drafts were not received by the shippers' bank till the 29th June, a fortnight after the seizure; and payment was alleged to have been made through the Skandinaviska Bank on the 3rd July.

The evidence as to the dealings with the bills of lading and invoices, and as to payment, was by no means satisfactory. No evidence was given on behalf of the shippers on either of these important matters. Nor was any (apart from so-called certificates of the Swedish banks) given by or for the bankers at Santos, Stockholm, or Gothenburg.

It would appear that there were two original bills of lading, with certain copies, in each case. Copies of letters from the Companhia Nacional de Café to the Skandinaviska Bank (dated respectively the 4th April and the 11th May) were produced, in which it was stated that a bill of lading for the goods was inclosed. But it was said by the claimants' counsel, and sworn on their behalf by their solicitor, that the bills of lading were not inclosed in those letters; and that the passages which indicated the contrary were part of a printed form left in by mistake.

The claimants' case was that the documents were sent to the Enskilda Bank, with the drafts or bills of exchange. But in no document was there any reference specifically to the original bills of lading or invoices, which showed clearly that they were sent to the Enskilda Bank or handed over to the Skandinaviska Bank (cf. the letters from the Enskilda Bank to the Santos Bank of the 20th May and the 5th July respectively). Mr. Nilsson in his affidavits merely deposed formally that he was "the holder of the bill of lading."

As late as Sept. 1917 some letters passed between the two Swedish banks. The Skandinaviska Bank appears to have made some inquiries of the Enskilda Bank by a letter of the 12th Sept. No evidence was given as to the contents of that letter. The reply of the 14th Sept.—headed with particulars of the bills of exchange only—was that the latter bank had only received "the above documentary remittances" from the Santos Bank with the letters of the 5th April and the 12th May 1916.

It was again said for the claimants and deposed by their London solicitor that the phrase "documentary remittances" in that letter meant in common usage the draft and all shipping documents; but that in this case the documents consisted only of the draft, the bill of lading, and the invoice. Before leaving this subject, I may mention that the "bills of lading" referred to by the claimants' cashier in the so-called certificate of the 24th Sept. 1917 should probably be bills of exchange or drafts. There was no bill of lading of the 11th May 1916, although the draft was dated that day. The draft for the *Annie Johnson* shipment was never produced. It was said that the bank could not find it. But, although the evidence upon this head does not leave the matter free from doubt, I am willing to assume in favour of the claimants that one of the bills of lading and the invoice, as well as the draft, in each case came into the hands of the Enskilda Bank, and were presented to and taken up by the Skandinaviska Bank about the 18th May and the 3rd July 1916. But no information of any kind was given as to what was done with the second bill of lading in either case, as to the persons to whom it was sent, or whether it ever reached the claimants.

With regard to payment of the drafts, there was evidence that they were paid by the Skandinaviska Bank to the Enskilda Bank, and by the latter to the credit of the Santos Bank, about the 20th May and the 5th July respectively. But the alleged payment by the claimants is not properly supported. Nor is it satisfactorily shown what was the source of the money.

I have frequently had occasion to comment upon the form of "certificates" often put forward at late dates by Swedish banks to explain monetary transactions. In the present case, as in so many others, I should like to have seen a properly certified extract from the bank books contemporaneous with the transactions.

As to the claimants' accounts, it was said, to my surprise, that they had nothing equivalent to a bank pass-book in Sweden except for savings banks. How merchants or customers of banks are to check their accounts I do not know.

For the *Annie Johnson* shipment the amount paid to the Enskilda Bank was 21,990kr. Mr. Nilsson deposed on the 23rd Feb. 1917 that he paid it by a cheque drawn by him against a credit balance at the Skandinaviska Bank. He appealed in corroboration to a so-called certificate from the bank dated the 21st Nov. 1916 that Messrs. Peterssen and Nilsson had on the 18th May paid them by means of a cheque drawn against their credit balance with the bank for 22,080kr.

Later on (just before the hearing) there was exhibited to an affidavit of the claimants' solicitor a cheque of Messrs. Peterssen and Nilsson for 19,500kr. made payable to themselves with note, "for which debit current a/c"—I find nothing corresponding with this in any of the accounts.

As to the payment for the *Kronprinsessan Margareta* shipment, Mr. Nilsson's affidavit varies slightly. He simply says he made the payment himself to the bank on the 3rd July. On the 2nd June 1917 a certificate was given by the bank that Messrs. Peterssen and Nilsson had on the 3rd July 1916 paid them the equivalents against documents for this shipment. Finally the claimants' cashier, on the 24th Sept. 1917, gave a certificate under oath that the two payments were made by cheques, ready money, and bank post bills; and later a cheque of the 3rd July 1916 was produced for 16,000kr. drawn by Messrs. Peterssen and Nilsson on themselves with directions to debit letter of credit.

These discrepancies upon matters on record about which there should be no mistakes make the evidence unsatisfactory.

Great stress was laid by counsel for the claimants upon the opening of irrevocable credit by the letter of the 14th Feb. It is, therefore, desirable to look into the circumstances somewhat closely. In the first place, whatever the meaning and effect of the credit opening may be, it must be noted that, according to the evidence, payment was not made by the claimants' bank to the banking agents of the shippers in Europe until after the seizure in either case; but the payment was consistent with the express terms of the letter. The credit also was only to be in force until the 1st May inclusive. It was argued for the claimants that the legal and business interpretation of this was that if shipment of the goods at Santos was made at any time up to or on the 1st May, the credit was irrevocable up to the presentation of the bill of lading, whenever that might be. Their counsel said that some evidence would be given about the commercial interpretation or usage in such cases, but none was adduced. Moreover, even if the letter of credit had the effect contended for, the shipment of the goods on the *Kronprinsessan Margareta* was entirely outside it, as it was not made till the 10th May. It was admitted that no application was made to have the credit extended. Apart from voluntary action on the part of the Skandinaviska Bank or their customer, this shipment, therefore, received no protection from the credit which had been opened.

If the goods had been loaded within the time specified in the contracts and letter of credit, the bills of lading and the goods would have reached Gothenburg in the ordinary course in good time before the 1st May. The voyage of the *Annie Johnson* to Stornoway took thirty-six days, and that of the *Kronprinsessan Margareta* (a faster ship) twenty-eight days. The voyage of four other vessels carrying the coffee of Messrs. G. Trinks and Co. from Brazil to ports in Scotland, like Kirkwall, Lerwick, and Leith, averaged about thirty-six days. It would rather seem that the time of loading for the *Annie Johnson* and the *Kronprinsessan Margareta* had been arranged roughly for their arrival at Gothenburg before the 1st May; and the bills of lading might, of course, have arrived earlier by mail steamers.

A few other facts are to be noted with regard to the transactions. Although the loading was effected from a month to six weeks later than the periods stipulated, the shippers rendered no explanation; nor did the alleged purchasers or Otto Gewalt make any complaint of the delay, or, indeed, any inquiry at all about the goods. Was it tacitly or otherwise understood that whenever the coffee arrived it would be acceptable and accepted by those for whom it was destined? Again, to each shipment was added a case of samples, about which nothing had been said in the negotiations or contracts, or has been said in these proceedings by the claimants. In this connection reference should be made to the general directions from Messrs. G. Trinks and Co., of Hamburg, to Santos in the letter of the 1st Nov. 1915 already cited. Similarly, and in accordance with such directions, a case of samples was sent with various shipments after this date to intermediaries for the enemy whose consignments have been condemned.

Lastly, it is to be borne in mind that before the contracts now in question were made many consignments of Trinks' coffee (about fifteen or more in number) to such notorious nominal consignees and enemy intermediaries as Hyllen and Kock, the Transocean Import Company, Groth Hansen, K. A. Schalz, Ed. Laurent, Serle, and others had been seized in the preceding two months of December and January. This indicated that further consignments to these names would probably have precarious passages. When or how Messrs. Peterssen and Nilsson first had business transactions with Messrs. G. Trinks and Co. was not stated.

I have set out the circumstances with some fulness; but in similar cases experience in this court shows that the investigation of transactions like these requires to be made with close scrutiny

if masks ingeniously and elaborately constructed are to be torn off and the real substance reached and exposed.

In support of the contention that the property had passed to the claimants on shipment four points were urged—viz.: (1) The insurance by the claimants; (2) the confirmed credits; (3) the issuing of the bills of lading to Messrs. Peterssen and Nilsson as consignees; and (4) the alleged appropriation of the goods by their being marked on shipment.

The fact has been noted—but I want to emphasise it—that these were *post-bellum* transactions. It is hardly necessary to say that the cases of *The Miramichi* (13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; (1915) P. 71) and *The Parchim* (*ubi sup.*) related to *ante-bellum* contracts.

I propose to deal with the claimants' contentions first as if they related simply to the passing of the property under our municipal law. As has been pointed out in many earlier cases, and so recently as in *The Parchim* (*ubi sup.*), the questions of fact relating to the intention of the parties, which is the determining factor, often raise points of the finest distinction. The judgment delivered in the Privy Council in *The Parchim* (*ubi sup.*) shows that the facts upon which the decision was founded were of a very special kind.

As to the first point relied upon for the claimants—namely, that the goods were at the risk of and were insured by them—this, although a material consideration, is not decisive. *The Parchim* (*ubi sup.*) and other authorities establish that. In the present case a reason for this provision exists. It has often been observed in this court that shippers on the other side of the Atlantic found difficulties in insuring goods which might be contraband, and therefore stipulated that the insurances should be effected by Scandinavian consignees, partly or in the whole, with German companies or underwriters. In other cases we have seen that while marine risks policies were to be effected by the shippers, war risks were left to be insured by the consignees.

As to the second point, the opening of the credit, I have stated the facts, and commented upon them. It is not necessary to decide the point, but on the whole, as a matter of construction, I am of opinion that the credit lapsed before the documents were presented, and this was after the seizures. I may say that I gather from many other similar cases that this is in accordance with the commercial interpretation. However that may be, it is clear, at any rate, that the shippers did not and could not rely upon a credit in relation to the *Kronprinsessan Margareta* shipment on the 10th May (unless they were very remiss in their business) because, on any construction, the period of credit had expired. I do not consider that the letter of credit was anything more than a guarantee given that the price of the goods would be paid on presentation of a bill of lading and invoice at Gothenburg. This circumstance does not, in my view, determine that the shippers abandoned the *jus disponendi*, or intended that the property in the goods should pass before or immediately upon shipment to the consignees named in the bills of lading. The instructions to the bank were express and specific that the documents should only be given up against payment at Gothenburg; and this, in fact, was what the claimants said was done.

As to the third point, I am of opinion that the issuing of the bills of lading to the claimants themselves did not effect a transfer of the property. The bills of lading were given on the 3rd April and the 10th May. The invoices were dated next day. The documents were said to have been sent to the sellers' bankers at Gothenburg on the 5th April and the 12th May; but upon what dates the mails were dispatched was not proved.

Fourthly, it was contended that the goods were unconditionally appropriated by being marked for shipment. In my view that contention is unsound. The claimants were not aware of, and certainly did not assent to, such an appropriation by the sellers. It was not proved that any notification whatever was given to the claimants of the appropriation or shipment. No evidence was adduced to show that the claimants had any knowledge that the goods were afloat or had been loaded until after the seizure. As to notification of appropriation see the observations of Lord Parker in *The Parchim* (*ubi sup.*).

Moreover, as the contracts were for coffee of specified description and quality to be shipped in specified periods in March, and the shipments were only made in April and May, it may well be that the claimants might have refused to accept them.

The conclusion to which I have come is that there was not an unconditional appropriation with the assent of the buyers, and that sect. 18 (rule 5) and sect. 19 (1) and (5) of the Sale of Goods Act 1893 apply. It is well known that these portions of the Act were founded on the judgment of Cotton, L.J. in *Marabita* v. *Imperial Ottoman Bank* (*ubi sup.*). I will quote one part of the judgment: "So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (6 Ex. 543); *Shepherd* v. *Harrison* (*ubi sup.*); *Ogg* v. *Shuter* (33 L. T. Rep. 492; 1 C. P. Div. 47). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and, in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser."

I do not forget that the bill of lading in that case was made out to the shippers' order. But the paragraph just quoted does not appear to me to be confined to, or indeed to deal with, bills of lading so made out. The passage in the judgment which immediately precedes this dealt with the

class of case where they are made out to the order of the shippers.

If, as was contended, delivery of the goods on the *Annie Johnson* and the *Kronprinsessan Margareta* to the masters of the vessels was a delivery to the consignees named in the bills of lading, then the shippers would on shipment lose their lien upon the goods. That being so, is it reasonable to suppose that they did not intend to reserve a *jus disponendi?* Without such a reservation, at any rate clearly in the case of the *Kronprinsessan Margareta*, they would have no security at all in respect of the goods other than the obligation of the alleged purchasers in Gothenburg under the contract.

Upon these grounds, even if the right inference from the facts should be that the contract was made *bonâ fide* between two neutral firms, and the law to be applied is the municipal law (which I do not accept), I should hold that the property had not passed to Messrs. Petersen and Nilsson before the seizure.

But there is another aspect of this case, and an important one from the point of view of the rights of belligerents. In the judgment pronounced in some of Messrs. G. Trinks and Co.'s cases on the 28th Aug. 1917 I stated some principles of Prize Law as to the transfer of property during a state of war; and the same subject was dealt with in the judgment given upon claims to various cargoes on the *Kronprinsessan Margareta* in March last (14 Asp. Mar. Law Cas. 31; 116 L. T. Rep. 508; (1917) P. 114). Without repeating them, I will quite shortly give the effect of their application to the present case. If Messrs. G. Trinks and Co., of Santos (shipping under the name of Companhia Nacional de Café), are to be regarded as enemy traders, the goods would be treated as enemy goods during transit, and claimants would not be regarded as the owners while the transit continued, or until the goods were actually delivered into their possession. Further, if the shippers are to be regarded as neutrals, and the goods were destined for the use of or to be at the disposition of Messrs. G. Trinks and Co., of Hamburg, on arrival they would be treated as enemy goods, whether the legal property according to municipal law remained in the shippers or not.

I have already in these cases stated the close connection and relationship between Messrs. Trinks and Co. of Hamburg and Messrs. Trinks and Co. of Santos, according to the evidence, but without any assistance from either. They have interests in common even if they are not identical. My view is that the Santos house was only a buying branch of the Hamburg house. The sole proprietor who subscribed the whole of the capital for the Santos house or branch was a partner in the Hamburg firm. Otto Gewalt, who purported to arrange the contract with Messrs. Petersen and Nilsson, was the agent of the Hamburg firm. He was the instrument through which the bogus company, called Transocean Import Company, came into existence to act as a name for Messrs. G. Trinks and Co., of Hamburg.

On this voyage of the *Annie Johnson* twenty-five barrels of tea, shipped by Messrs. Arning and Co. from Buenos Ayres, were sent through Messrs. Trinks and Co. of Santos to the address of Gewalt, "to be forwarded to Hamburg," and in the letter informing him of this they said: "We have advised our Hamburg house of this, and would ask you to get in touch with them."

It was through or with him acting as agent for Messrs. Trinks and Co., of Hamburg, that Messrs. Petersen and Nilsson engaged in the transactions referred to in the before-mentioned cablegram and letter of the 29th Jan. and the 11th March 1915.

It is also well to note that Messrs. Petersen and Nilsson say they bought 500 other bags of coffee, also laden on the *Kronprinsessan Margareta*, from a Rio Janeiro firm through one Theodore Sack—a well-known intermediary for Hamburg firms—whose real name was Christopher Pyk, of Stockholm.

Messrs. Petersen and Nilsson have not disclosed any circumstance about Messrs. Trinks and Co., of Hamburg, or of Santos. But they have not denied acquaintance or connection with them. They have been silent also about their knowledge of or acquaintance with the so called Companhia Nacional de Café. They have refrained from explaining how they came to be purchasers of coffee from such a company, and they have failed to deal with any of the allegations put forward relating to their alleged vendors.

I cannot doubt that the claimants knew that the real shippers of the goods were Messrs. Trinks and Co., of Santos. I cannot doubt either that they knew that Gewalt was acting through the Santos house of Trinks for Messrs. Trinks and Co., of Hamburg.

The wholesome rule of the court is that if any doubt exists as to the character of goods claimed to be the property of a neutral being still property belonging to an enemy, the claimant is put to strict proof of ownership, and any circumstances of fraud, or connivance, or attempt at imposition on the court—whether by making wrong statements, or by withholding information, or by self-imposed silence—will react unfavourably upon his claim: (see *Batten* v. *The Queen*, 11 Moo. P. C. 271).

In this case the goods at the time of shipment were the property either of the Santos house or of the Hamburg house of Messrs. Trinks and Co. In dealing with the position in the other cases, I said that "where a person has interest in both an enemy and a neutral house of trade, and the transactions between the two are so mixed up as they are in these cases, the court will not undertake itself to unravel the tangle. That is the duty of claimants; and if they fail in it they must suffer the consequences."

I think there is enough evidence in this case upon which to find that the Santos business was a mere agency or branch of the Hamburg house, and that before shipment the goods were the property of an enemy firm. The result then would be, according to the ruling of Prize Courts, that they would remain enemy property during transit, and be enemy property at the date of the seizure.

But if they were the property of the Santos house as an entity distinct from the Hamburg firm I should find that, having regard to the intimate connection between them, and to the share held by Peter Trinks in both, and to the whole evidence, that the Santos firm and Gewalt were acting in concert and in the interests of the Hamburg firm in the purchase and shipment of the coffee, and I should without hesitation apply

the rule referred to, or extend it if need be, and decide that what was done was in fraud of the rights of belligerents, and that the property could not pass *in transitu* and therefore remained in the shippers. They have made no claim. And in any event the goods would suffer under the doctrine of contagion from the presence on the ships of other condemned goods belonging to the same owners.

My conclusion is that the claimants have failed to establish that the goods were their property at the time of seizure, or that the alleged contracts were genuine contracts, or that their claim is made in good faith. I am satisfied that they, like so many of the other consignees, were intermediaries for Hamburg. Moreover, the real owners of the goods, whether the Santos house or the Hamburg firm, have put forward no claim and the time for claiming has long run out.

Accordingly the claim is not only disallowed, but I condemn the goods or their proceeds as good and lawful prize.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Feb. 27, 1918.

(Before Lush and Sankey, JJ.)

Parsons *v.* Brixham Fishing Smack Insurance Company Limited (*a*)

Arbitration—Submission of questions in dispute—Award bad in law upon its face—Whether court could set aside.

Certain trawlers were insured as to three-quarters of their value in the B. F. S. Insurance Company Limited. To save their vessels from destruction by enemy submarine, the owners cut away the trawls, which were not insured, and claimed a general average contribution against the company, of which the owners were members. The rules provided that all disputes should be settled in the first instance by a general meeting of the company, or, on appeal, by two arbitrators and an umpire, none of whom should be lawyers. The general meeting having refused the claim, the owners proceeded to arbitration under a submission which provided that "all matters in difference in reference to the said claim for a general average contribution are referred," &c. The umpire by his award ignored the claim for general average. On a motion to set aside the award:

Held, that it was bad as disclosing an error in law on the face of it; that, having regard to the general terms of the submission, it was not open to the respondents to say that a definite point of law had been submitted to arbitration, as to which the decision of the arbitrator was final, and that the award must be set aside.

King *v.* Duveen (108 *L. T. Rep.* 844; (1903) 2 *K. B.* 32) *distinguished.*

Motion to set aside an award in the following circumstances:—

The claimants were insured with the society with respect to respective fishing smacks—eight in number—in the respective sums set out in the policies of insurance issued by the society to the assured in respect of the said ships. The policies of insurance were subject to the rules of the society, rule 30 of which provides that should any question arise between the society and the assured as to the rights or liabilities or claims or obligations of the assured towards or against the society or *vice versâ* no legal proceedings should be taken by or against the society, but in lieu thereof the assured might give notice to the secretary stating particulars. The secretary was then to convene a special general meeting of the members to consider and decide the matter. Should the assured be dissatisfied with the decision of the meeting all matters in dispute, including costs of reference and award, should be referred to the arbitration of two arbitrators and an umpire (neither of whom should belong to the Legal Profession), one arbitrator to be chosen by the person or persons claiming arbitration, and the other by the society, and the umpire to be chosen by the two arbitrators before they proceeded to the arbitration.

Both arbitrators and umpire were to be men of Devon, and the arbitration was to be subject in all respects to the Arbitration Act 1889 or any Act amending the same. On the 28th Nov. 1916, whilst the boats above mentioned belonging to the assured were fishing on the high seas, they were in danger of total destruction at the hands of the King's enemies by reason of a German submarine appearing and firing on them. In order to escape destruction, the trawling warps belonging to the ships of the assured were cut and the trawling gear belonging to the assured was lost. The trawling gear was not insured with any office or company against such loss. The assured claimed that the facts and circumstances of the occurrence which occasioned the loss of the trawling gear amounted to and constituted a general average loss. On the 1st Dec. 1916 the assured requested that a general meeting of the society should be called in accordance with rule 30 to consider and decide the matter. A meeting was duly held on the 16th Dec. 1916, when it was decided that the claim made by the assured could not be admitted. The assured being dissatisfied with the decision come to at the meeting, desired that the matters in dispute, including costs of reference and award, should be referred to the arbitration of two arbitrators and an umpire in accordance with rule 30. It was then agreed that all such matters in dispute should be referred to arbitration accordingly. The agreement to refer, after reciting the above facts, continued:

1. All matters in difference between the parties hereto in reference to the said claim for a general average contribution by the assured against the society are hereby referred to the final award and final decision of Captain F. Manley, of Berry Head-road, Brixham, aforesaid, appointed by the assured, and Alfred H. Lanfear, o

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

Paignton, in the county of Devon, smack owner, appointed by the society or in case of their disagreement to their umpire to be appointed by writing under their hands before they enter upon the consideration of the matters referred so that the award of the said arbitrator or umpire concerning the same be made and published in writing ready to be delivered to the said parties or either of them, or, if either of them shall be dead before the making of the same, to their respective personal representatives requiring the same on or before the 25th March next or any later day to which the said arbitrators or their umpire may by writing under their or his hand indorsed on these presents from time to time enlarge the time for making their or his said award.

2. The parties hereto and their respective representatives shall and will in all respects abide by, observe, perform, and obey the said award so to be made and published as aforesaid.

3. The arbitrators or their umpire shall have general authority to require from either of the said parties such evidence, statements, explanations, information, and materials as they or he may deem expedient for determining the matters in difference.

4. In case either party refuse or fail after reasonable notice to attend personally or by a non-professional agent before the arbitrators or their umpire at any meeting which they or he may appoint it shall be lawful for them or him to proceed *ex parte* as effectually as if such party were present.

5. This submission to arbitration shall not be defeated or affected by the death of either of the said parties.

The award of the umpire was in the following terms:

I, the undersigned, George Nowell Philip, of Hillcrest, Dartmouth, in the county of Devon, shipbuilder and engineer, on the 28th day of Feb. did act as an umpire on an arbitration between the Brixham Fishing Smack Insurance Society Limited and the owners of eight smacks, members of the same society, with reference to the cutting away of certain trawling gear from eight smacks on or about the 28th Nov. 1916 when fishing in the Channel, to enable them to get away from submarines, which were firing on them.

I carefully listened to the discussion between the arbitrators at the meeting and the witnesses on both sides. I have also read through the society's book of rules and the two arbitrators' written report sent me.

In Mr. F. Manley's (arbitrator for the smack owners) report I gather that he considers the owners of the eight smacks are entitled to compensation under a general average contribution from the society.

Mr. W. H. Lanfear, arbitrator for the society, takes a different view, and states that the rules of the society distinctly state in several clauses that trawling gear is not covered in any way by the society, neither is this mentioned in the form of policy issued by them; touching on general average and under the circumstances he considered the society are not liable to any contribution for the loss of trawl gear.

I have carefully considered this and the difference of opinion on both sides, and have come to the conclusion that the smack owners have no claim for compensation whatever, and I base my decision on the following grounds, viz:

In the first place, the rules distinctly state that fishing gear is not covered in any way by the society, and is at the sole risk of the owners.

Secondly, there is no mention of any general average clause in the policy; if a general average clause had been intended it should have been inserted similarly to Lloyd's policies, where they distinctly mention this.

Further, this society is a mutually agreed insurance among a body of smack owners, who drew up rules to meet their own particular requirements, and is therefore not in the same category as Lloyds. Also, at an extraordinary general meeting, the members, numbering eighty-one, were against contributing to the loss of this gear, and seventeen were in favour—eight of these were owners of the smacks which cut away their gear. This decision of the members in itself should have been sufficient evidence that the society was not liable for any claim made on them for cutting away the gear. Again, the owners of the smacks must not forget that, by cutting away, if it saved their vessels from being sunk, they benefited by 25 per cent. of their share not insured by the society, and I might mention that I presume all owners have to do their utmost at any time to save the property insured. However, seeing that the members of the society on other occasions of cutting away gear have made concessions by assisting smack owners in their loss, might I suggest (but without making any precedent in any other case that might or would happen hereafter) that they consider the merits of what was done to all concerned and voluntarily vote something towards the loss sustained by them. Of course this suggestion in no way prejudices my award and must be carried by a fair majority of members.

Signed, &c.

Rule 6 of the society's rules provides as follows:

No vessel or share or interest in any vessel shall be insured with the society for more than 25 per cent. of its value, such value to be estimated and determined by the directors in accordance with these rules. Such value shall include the hull, tackle, apparel, and furniture of the said vessel and all stores on board of every description, both at the date of the insurance and at the date of the loss; but shall not include the mooring, steam capstan, ballast of any description, or fishing or trawling gear and fishing appliances. The member shall be deemed to warrant the society that he is his own insurer as to 20 per cent. of such value, and the articles excluded as above from the value shall be deemed to be the property of the member insured, and he shall contribute towards any salvage expenses incurred in respect of such articles (excepting the fishing gear), together with the other property, in the proportion which the value of such articles shall bear to the value of the whole of the property salved, except as regards the quarter part of the value of the hull, tackle, apparel, and furniture of the said vessel.

Rule 30 (*a*). Should any question arise between this society and any member or members . . . no legal proceedings shall be taken by or against the society, but in lieu thereof the said member . . . may give notice to the secretary stating particulars thereof, who shall convene a special general meeting of the members to consider and decide the matter. Should such member be dissatisfied with the decision of the said meeting, all matters in dispute, including costs of reference and award, shall be referred to arbitration of two arbitrators and an umpire (neither of whom shall belong to the legal profession) . . . subject in all respects to the Arbitration Act 1889 or any Act or Acts amending or in substitution for the same. Provided always that no member of the society shall be eligible to act as arbitrator or umpire. (*b*) In the event of any member commencing legal proceedings . . . such member shall be taken to have forfeited all claims whatever upon the society . . . and the said member . . . shall be excluded from the society. (*c*) Neither of the parties to the arbitration shall be represented thereat by a solicitor, but each of them state and conduct their own case or appoint a non-professional agent to do so.

By the Marine Insurance Act 1906 (6 Edw. 7, c. 41):

Sect. 66. A general average loss is a loss caused by a loss directly consequential on a general average act. It includes a general average expenditure.

Sect. 85. (1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance. (2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee or such other arrangement as may be agreed upon may be substituted for the premium. (3) The provisions of this Act in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association or by the rules and regulations of the association. (4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

J. B. Matthews, K.C. (*Dunlop* with him) for the owners.—The award is bad on its face. The umpire was clearly wrong in ignoring the claim for general average: and the fact that the respondents are a mutual society makes no difference. He referred to

Marine Insurance Act 1906, ss. 66, 85 (*sup.*).
Montgomery v. *Indemnity Mutual Marine Insurance Company Limited*, 9 Asp. Mar. Law Cas. 289; 86 L. T. Rep. 462; (1902) 1 K. B. 734.

No specific question of law was here referred to arbitration as in *King* v. *Duveen* (108 L. T. Rep. 844; (1913) 2 K. B. 32).

R. A. Wright, K.C. (*Van Breda* with him) for the society, the respondents.—Assuming for the purposes of argument that the award is bad on its face, it is nevertheless final. The whole intention of the rules is that a domestic forum shall be substituted for the law courts. The interests of the members are common, and there is every reason why the decisions of the members should be respected and upheld. Their intention is the gear should be left outside the scope of the insurance. If a specific question is submitted to an arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the answer bad on its face so as to permit of its being set aside. *King* v. *Duveen* (*sup.*) governs this case. [Lush, J.—Must it not appear, for that principle to apply, that the parties agree to submit a specific question?] Yes. Here there was only one question: Did the loss of fishing gear involve a general average loss? [Lush, J.—In the present case all matters in difference were referred; in *King* v. *Duveen* (*sup*) specific questions were mentioned.] There is a clear intention expressed in the rules to refer all questions in a particular way, and a rule is analogous to an agreement. Rule 30 clearly implies a submission of points of law. With regard to the submission itself it begins by reciting the facts, as to which there is no dispute. [Lush, J.—It is not clear that all the facts were admitted; witnesses were called.] In effect they were admitted. The submission also recites that a meeting was convened to decide the matter which is the question of general average. [Lush, J.—The fact—if it is the fact—that lawyers were to be excluded, and the fact that they were coerced into arbitration, do not appear to be relevant. The question is: is this case covered by *King* v. *Duveen* (*sup*)? As to whether it was a case for general average, the view taken by the society was that the gear was outside.

Matthews, K.C. in reply.—Clause 3 of the submission is important. If the point of law had been decided the other way many other questions would have arisen. Rule 30 bound the owners to submit every question to arbitration. If it is held that the award cannot be set aside here, it is manifest that no award founded upon a general submission can ever hereafter be set aside because it is bad on its face. In *King* v. *Duveen* (*sup.*) Channell, J. said: "In holding this award cannot be set aside we are in no way entrenching on the principle that an award which is bad on its face may be set aside . . ." [Lush, J.—In *King* v. *Duveen* (*sup.*) the construction of the agreement was a specific point submitted to the arbitrator.]

Lush, J.—This is a motion on behalf of the owners of eight fishing smacks to set aside the award of an umpire. It appears that a fleet of fishing boats was attacked in the North Sea at the latter end of 1916. To escape from the peril eight of the smacks cut away their trawling gear. Being members of the defendant society they preferred a claim for general average contribution. They were insured up to 75 per cent. of the value of the vessels, but the fishing gear was excluded from the insurance. The claim being resisted was referred under the rules to a general meeting. The general meeting having decided against them they appealed to a court of arbitration, as provided by the rules, but before doing so they entered into a submission agreement. It is important to refer to the terms of that submission. [His Lordship referred to the terms of the submission, and in particular to the operative part as above set out, and continued:] The arbitration was held and the award made. In the course of it the umpire said: "I have carefully considered this and the difference of opinion on both sides, and have come to the conclusion that the smack-owners have no claim for compensation." Now it is sought to impeach the award on the ground that, on the face of it, it is bad in law. I think it is clear that it is bad on the face of it, and on that ground it could *primâ facie* be set aside. But it is said that there is no jurisdiction to set it aside because the parties, having agreed to refer what was really a question of law to an arbitrator, are bound by his decision whatever it is. They say that in such a case the reference would be futile if the court could interfere. There is no doubt as to the principle which is sought to be invoked. The headnote in *King* v. *Duveen* (*sup*) is quite accurate: but it is important to see what it had been agreed to refer in that case. The parties had entered into a building agreement, which contained an arbitration clause. A dispute arose on a question of fact, and also on a question of law—namely, whether on the true construction of an agreement a party was liable to pay damages. By an agreement to refer, the question of construction was in terms referred to the decision of an arbitrator. The arbitrator answered the question and expressed his opinion as to the meaning of the agreement, and the court held that it was not competent to the dissatisfied party to come to have the award set aside on the ground that it was bad on the face of it. Channell, J. said: "It is clear that if a specific question of law is submitted to an arbitrator for decision, and he does

decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator." Bray, J. said: "The case is rather a peculiar one, because it is not often the case that parties refer a specific question of law to a lay arbitrator. Here they have done so, and the rule as to setting aside an award which is bad on its face does not apply. The parties agreed to be bound by the decision of the arbitrator, and they are bound by it, although it may be erroneous in law. . . . In holding that this award cannot be set aside we are in no way entrenching on the principle that an award which is bad on its face may be set aside."

The question is, have these parties agreed within the meaning of that decision to refer a specific question of law? I have come to the conclusion that they did not. The operative part of the submission does not go so far. It seems to me that we should be unduly stretching the decision in *King* v. *Duveen* (*sup.*) if we were to hold that it applies when all matters in dispute are referred. The principle of that case does not apply where the submission takes that form, and in making his award the arbitrator pays no attention to recognised rules of law. I think the award should be set aside.

SANKEY, J.—We are invited to set aside an award on the ground that it is wrong in law upon its face, but it is said on the other side that we have no right to interfere in the circumstances of the present case. The respondents rely on *King* v. *Duveen* (*sup.*). In order to see whether the present case is governed by the law as therein laid down it is important to examine the specific questions put to the arbitrator there and his answers. He was asked to say (*inter alia*): "Whether under the agreement of the 25th Oct. 1905 the executors of Sir J. Duveen are liable to pay damages in respect thereof. . . ." To this he replied in his award: "I am of opinion that under the agreement the executors are not liable to pay damages." There it will be observed that a specific question is answered in terms. Even if the arbitrator had been wrong in law his finding could not be impeached. Can it be said that a specific question was submitted in the present case? What was in fact submitted? The operative part of the agreement expressly refers to "all matters in difference between the parties hereto in reference to the said claim for a general average contribution by the assurer against the society." That is not only not a specific question, but a question of the most general character. Nor can I see in the award of the umpire any answer to any specific question. I agree that the award must be set aside with costs.

Award set aside.

Solicitors for the owners, *Mann* and *Crimp*, for *Kitsons, Hutchings, Easterbrook*, and *Co.*

Solicitors for the company, *Crump* and *Sons*.

Friday, June 15, 1917.

(Before ROWLATT, J.)

ARGONAUT *v.* HANI. (*a*)

Charter-party—Persons named "as charterers"—Undisclosed principal—Rights.

A charter-party provided that the charterers were to give the owners not less than ten days' written notice at which port and on about which day the steamer would be redelivered. It also provided that if the charterers should have reason to be dissatisfied with the conduct of the master they were to be entitled to ask the owners to investigate it. There was also a provision that if the steamer could not be delivered by the cancelling date, the charterers should, if required, declare whether they would cancel or take delivery. The arbitration clause provided that any dispute arising under the charter-party should be referred to arbitration, one arbitrator to be nominated by the owners and another by the charterers. In the charter-party certain persons were named "as charterers."

Held, that when the name of a person was inserted in a charter-party of that kind "as charterer" the statement that the person named was the charterer was a term of the contract, and not a mere description of the person of the same character as the description "of the one part" or "of the other part."

ACTION in the Commercial List tried before Rowlatt, J.

The plaintiffs claimed a declaration that the defendant had no interest or right as against the plaintiffs under a charter-party dated the 18th Feb. 1916 and made between the plaintiffs, as owners of the steamship *Frixos*, and Messrs. Hansen Brothers, of Cardiff, "as charterers," or right as against the plaintiffs to claim to arbitrate thereunder, or to claim to be recognised as charterers. They further claimed an injunction to restrain the defendant from claiming to nominate an arbitrator under the arbitration clause of the charter-party. The charter-party, by clause 7, provided that the charterers were to give the owners not less than ten days' written notice at which port and on about which day the steamer would be redelivered. Clause 10 provided that if the charterers should have reason to be dissatisfied with the conduct of the master they would be entitled to ask the owners to investigate it, and, if necessary and practicable, the owners were to make a change in the appointment. Clause 26 provided that if the vessel could not be delivered by the cancelling date the charterers should, if required, after receiving notice thereof, declare whether they would cancel or accept delivery. By clause 27 it was provided that any dispute arising under the charter party should be referred to arbitration in London; one arbitrator was to be nominated by the owners and the other by the charterers.

The defendant said that he was the charterer within the meaning of the arbitration clause because he was entitled to come forward and assume the position and all the obligations of charterer for the purposes of the charter-party, inasmuch as he was the undisclosed principal of Messrs. Hansen Brothers, who made the charter-party "as charterers," and as such instituted

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

arbitration under clause 27 of the charter-party.

R. A. Wright for the plaintiffs.

Alex. Neilson for the defendant.

ROWLATT, J.—This action is brought by the owners of the steamship *Frixos* to restrain an arbitration instituted by the appointment of an arbitrator by M. Jean Hani, a Frenchman, such arbitration purporting to be held under the charter-party of the ship. The charter-party was made between the plaintiffs, as owners of the steamship *Frixos*, and Messrs. Hansen Brothers, of Cardiff, "as charterers." The arbitration clause, which is now invoked, provides that one arbitrator is to be nominated by the owners and the other by the charterers. Now, this action must succeed unless M. Hani, the defendant, can show that he is the charterer within the meaning of the arbitration clause. He says that he is the charterer within the meaning of that clause because he is entitled to come forward and assume the position and all the obligations of charterer for the purposes of the charter-party, inasmuch as he was the undisclosed principal of Messrs. Hansen Brothers, who made the charter-party as charterers. It is a well-known principle that an undisclosed principal may come in and sue on a contract, or be brought in by the other party to the contract, although the contract is made with a person who is in fact acting as his agent. That principle, however, is subject to this limitation—namely, that an undisclosed principal cannot come in and sue on a contract, and cannot be brought in and be sued on the contract if to do so would violate the terms of the written contract. That point was considered and decided in *Higgins* v. *Senior* (1841, 8 M. & W. 834) and in *Humble* v. *Hunter* (1848, 12 Q. B. 310). The decision in the latter of the two cases just mentioned was recently approved as good law by the Court of Appeal in *Formby Brothers* v. *Formby* (102 L. T. Rep. 116), notwithstanding that some doubt had been cast upon that decision by Lord Russell of Killowen, C.J. in *Killick* v. *Price* (1896, 12 Times L. Rep. 263). It was held in *Humble* v. *Hunter* (*sup.*) that the real owner of a ship could not come forward and sue on the charter-party, another person being described in the charter-party as owner, although in fact such person was the agent of the person who sought to sue on the charter-party. It seems to me that it is always necessary to look at the document as a whole in order to see whether words such as "charterers," after the names of the persons who enter into the contract to secure the benefit of the services of the ship, are words of description of the parties to the contract in the same way as "of the first part" or "of the second part," describing the position the party plays in the contract as opposed to the essential position which he is to occupy.

It seems to me that, having regard to the whole of this charter party, the words "as charterers" are not merely equivalent to such words as "of the one part," or "of the other part," but that they make it a term of the contract that the people who are to fill the position of charterers and to have the rights of charterers are to be Hansen Brothers and Hansen Brothers only. If it was merely a question of receiving money or of taking delivery of goods under a contract, there would be no reason for saying that the identity of the person named is a term of the contract, and that the parties named in the contract should be held to be the parties to the exclusion of the actual parties. In this case, however, it is clear that different considerations apply. There are several clauses in this charter-party which bear out this view. Clause 7 provides that the charterers are to give owners not less than ten days' written notice at which port and on about which day the steamer will be redelivered. It is obvious that it is of the essence of the business that the owners of the ship should know from whom they are to receive that notice as to the day and port of redelivery. They cannot be in the position of having to accept a notice from anyone who may say that he is an undisclosed principal of the charterers. Clause 10 provides that if the charterers shall have reason to be dissatisfied with the conduct of the master they are entitled to ask the owners to investigate it. The owners, however, cannot be called upon to investigate complaints unless the complaints are made by someone designated in the charter-party to make complaints. The owners could not be called upon to receive complaints from anybody who said that he was an undisclosed principal of the charterers. It must be the intention of the charter-party that the owners should know from whom they are to receive complaints. Another clause provides that the charterers should furnish the master with instructions. The people whose instructions the master is bound to obey must be definite people.

Clause 26 deals with the cancelling date, and provides that if the steamer cannot be delivered by the cancelling date, the charterers shall, if required, after receiving notice thereof, declare whether they cancel or will take delivery. The owners must know for certain at a very early date the persons to whom they have to send that notice. Otherwise they might send a notice to a person whom they had been told was an undisclosed principal, and then subsequently the real charterers might say that the owners had acted upon a notice which was not authorised. Lastly, there is the arbitration clause itself, a clause which may involve the owners, as it is said it does here, in an arbitration being conducted by an arbitrator appointed by the charterers. It is necessary that the owners should know with whom they are dealing for that purpose. If it is wanted to keep the name of the person who is to have the use of the vessel and who is the real charterer in the background, and the owner does not object, the charter may be signed by some person as agent for the charterers. But when the name of a person is inserted in a charter-party of this kind as charterer, the statement that the person named is the charterer is, in my opinion, a term of the contract, and is not a mere description of the person of the same character as the description "of the one part" or "of the other part." In these circumstances I think the plaintiffs are entitled to the declaration asked for.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Stokes* and *Stokes*.

Solicitors for the defendant, *Pritchard* and *Sons*.

March 20, 21, *and* 25, 1918.

(Before BAILHACHE, J.)

MUNRO BRICE AND CO. *v.* WAR RISKS ASSOCIATION LIMITED AND ANCHOR MARINE MUTUAL UNDERWRITING ASSOCIATION LIMITED. (*a*)

Marine insurance—War risks—Perils of the sea—Exception—Free of capture and seizure clause—Loss—Onus of proof.

The sailing vessel I. *left G. bound for F. with a cargo of timber, including a deck load, on the* 21*st March* 1917, *and was never afterwards heard of. She was not overloaded. The normal length of such voyage as she was on for a sailing ship was forty days, sometimes prolonged to sixty days, rarely longer. It was conceded that she had sunk at sea. It was known that submarines were active on the route to be taken by this vessel, and that a number of timber carrying ships which left the same port on a similar voyage were sunk by submarines. From meteorological charts it appeared that there was no wind above force* 9*—a strong gale—in any locality in which the* I. *was, and that only on a few occasions and for short periods. There was nothing in the recorded weather to account for the foundering of a well-found ship as the* I. *was. It was impossible to say with any degree of certainty what the actual course of a sailing vessel was upon a voyage of that length. In nearly all the cases in which timber vessels had been torpedoed on about the route taken by the* I., *the fact of their having been torpedoed was definitely known. The plaintiffs, who were the owners of the sailing vessel* I., *sued the underwriters upon a policy which covered perils of the sea and contained the warranted free from capture and seizure clause. They also sued the war risks underwriters upon a policy covering risks excluded from the marine policy by a free of capture and seizure clause.*

Held, (1) *that the claim upon the war risks policy failed, inasmuch as the plaintiffs had not discharged the onus of proving that the vessel was torpedoed;* (2) *that the claim upon the marine risks policy must succeed because, when in an action upon a policy of marine insurance the assured has proved that the ship has sunk at sea, he has made out a prima facie case against the underwriters, and it is for them to set up the exception clause, and the onus lies upon them to bring themselves within that exception if they can, and the underwriters had not satisfied that onus in the present case.*

Rules applicable for determining the burden of proof stated per Bailhache, J.

ACTION in the Commercial List.

The plaintiffs, who were the owners of the sailing vessel *Inveramsay*, claimed to recover from one or other of two sets of underwriters in respect of the loss of the vessel at sea.

By a policy dated the 20th Jan. 1917 the War Risks Associatisn agreed to insure the vessel for 5450*l.* from the 1st Jan. 1917 to the 1st Jan. 1918 against risks excluded from the marine policy by the free of capture and seizure clause.

By a policy dated the 26th Jan. 1917 the Anchor Marine Mutual Underwriting Association Limited agreed to insure the vessel for 1500*l.* from the 1st Jan. 1917 to the 1st Jan. 1918 against perils of the sea. The policy contained the warranted free of capture and seizure clause.

On the 21st March 1917 the *Inveramsay* left Gulf Port, bound for Fleetwood, with a cargo of timber. The vessel was not overloaded; she carried a deck cargo; and she has never since been heard of. It was conceded that she had sunk at sea; but it was not known whether she was lost owing to a war risk or a marine risk. The circumstances of the case are stated in detail in the judgment.

Greer, K.C. and *Hyslop Maxwell* for the plaintiffs.

Leck, K.C., *MacKinnon*, K.C., and *Greaves Lord* for the defendants the War Risks Association.

R. A. Wright, K.C. and *Simey* for the defendants the Anchor Marine Mutual Underwriters Association Limited.

Cur. adv. vult.

March 25.—BAILHACHE, J.—In this case, the plaintiffs, the owners of the sailing vessel *Inveramsay*, sue two sets of underwriters in order to recover from one or the other of them in respect of the loss of the vessel at sea. The marine risk underwriters are sued upon a policy dated the 26th Jan. 1917 covering perils of the sea in the usual form and containing, as is also usual, the warrantad free of capture and seizure clause. The war risks underwriters are sued upon a policy dated the 20th Jan. 1917 against risks excluded from the marine policy by the free of capture and seizure clause.

So far as the *Inveramsay* is concerned all that is known of her is that she left Gulf Port, bound for Fleetwood, with a cargo of timber on the 21st March 1917; she was not overloaded; she carried a deck cargo, and she has never since been heard of. It is conceded that she has sunk at sea. The normal length of such a voyage as she was upon for a sailing ship is forty days, sometimes prolonged to sixty days, but rarely longer.

Three extraneous facts are also known—namely, one, that submarines were active off the Irish coast for a distance of 250 to 300 miles, and that a number of timber-carrying ships which left Gulf Port on a similar voyage were sunk by submarines. It is perhaps inadvisable to give the precise figures, although they were proved in evidence and I have them in mind.

Another fact, proved from meteorological charts prepared from log-books and from actual log-books of vessels sailing on similar voyages, is the weather likely to have been met with by the *Inveramsay* on her voyage. From the meteorological charts it appears that there was no wind above force 9, which indicates a strong gale, in any locality in which the *Inveramsay* was likely to be, and that only on a few occasions and for short periods, and I am informed by seamen of experience that there is nothing in the recorded weather to account for the foundering of a well-found ship as the *Inveramsay* appears to have been. One of these witnesses, arguing from the meteorological charts, thought there would not have been heavy seas, a view which is not borne out by the log of the *Ancenis*. On the other hand, it is impossible to say with any degree of certainty what the actual course of a sailing vessel is upon a voyage of that length, and the log of the *Olive-*

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

bank, which left Gulf Port on the 17th March, records a strong gale with squalls on the 9th April and a freshening gale, whole gale, and strong gale (the two latter accompanied with heavy squalls) on the 12th, 13th, and 14th of April. The *Ancenis* which left Mobile on the 18th March and proceeded to sea on the 25th March, met with an easterly storm on the 30th, and made very heavy weather of it on the 4th and 5th of April, and from the 6th to the 10th of that month. The sea especially seems to have been running very high, and it must be remembered that the *Inveramsay* carried a deck cargo.

The third fact is that in nearly all the cases in which timber vessels were torpedoed off the Irish coast the fact seems to have been definitely known. This of itself would not be of great moment, as I know from experience in this court that vessels may be sunk by submarines near the coast without any positive evidence of the fact being procurable. It has, however, a bearing upon the problem presented by this case.

In order that the plaintiffs should succeed upon the war risks policy, which is a policy against loss due to specific causes, I have to be satisfied beyond reasonable doubt that the *Inveramsay* was torpedoed. There is no suggestion that she struck a mine, or, if that is a possibility, no suggestion that she did so outside the danger area in which submarines were active. The difficulty in the case is to get the *Inveramsay* within the danger area. If that difficulty were overcome I should have no hesitation in finding that she was there sunk by a war peril, although nothing is definitely known. Ought I then to be satisfied that she did reach the danger area in safety? Most sailing vessels undoubtedly do so, and I must bear the evidence of the experienced masters in mind. As against this there are sea perils besides the force of the winds and waves. The known weather was at times bad and the seas high. I gather that the *Anconis* was for a time in some danger. The course of the *Inveramsay* cannot be laid with anything like precision. She carried a deck cargo which, though not unduly large, was an added source of danger. There were gales and heavy squalls. Taking all these factors into account, and remembering the length of the voyage, and bearing in mind that in nearly all the cases of vessels torpedoed off the Irish coast the fact was definitely ascertained, I am unable to say that the probabilities of the torpedoeing of the *Inveramsay* are so great that I ought to hold as a matter of fact that she was torpedoed. I think that she may have been, but I cannot say she was. Equally I cannot say she was not.

The result is that the action upon the war risks policy fails.

What is the result so far as the marine risks writers are concerned? I have on two former occasions expressed the opinion that in cases of this sort, where all that can be proved is that a vessel is lost at sea, no one knows how, the loss falls upon the marine policy. The assured having proved that his vessel foundered at sea has proved a loss by a peril of the sea. The loss is then within the terms of the promise, and the question is, must the assured go further and show that the sea peril was not induced by a cause excepted by the free of capture and seizure clause? If so, an assured, as in this case, being insured by two policies, one against marine and the other against war risks, may fail on both; on the latter because he cannot show that the loss was due to a war risk, on the former because he cannot show that it was not. The free of capture and seizure clause is an exception clause, and my view was expressed without referring to the authorities, upon what I understand to be the ordinary principles applicable to contracts containing promises qualified by exceptions. This opinion of mine has, I find, been doubted by Roche, J in *Compania Maritima of Barcelona* v. *Wishart* (*ante*, p. 705). It has been challenged by the marine underwriters in this case, and the point has been fully argued and the authorities cited. In these circumstances, and having regard to the large sums of money involved in these disputes and their frequent occurrence, I have reconsidered the matter and looked into the cases, with what result I will now state. Great stress was laid upon a passage in the third edition of Bullen and Leake on Pleading, p. 182 The passage deals with actions upon marine insurance policies and is as follows: "Care must be taken to state the contract accurately, with all the exceptions and qualifications of the defendants' liability (see *Dawson* v. *Wrench*, 1849, 3 Ex. 359), and the declaration must negative that the defendant comes within the exceptions. (*Ib*; but see *Wheeler* v. *Bavidge*, 1854, 9 Ex. 668; *Crow* v. *Falk*, 1846, 8 Q. B. 467). It was suggested that the learned authors intended that not only must the exceptions be negatived but that the plaintiff must prove the negative. I think that is a misunderstanding. In this passage it is to be observed that the authors rely upon *Dawson* v. *Wrench* (*sup.*), but refer to two cases as seeming to point the other way—*Wheeler* v. *Bavidge* (*sup.*) and *Crow* v. *Falk* (*sup.*). *Dawson* v. *Wrench* (*sup.*) was an action in which the plaintiff sued to recover a particular average loss upon a policy containing the 3 per cent. franchise, and in his declaration had set out the sum claimed but had not averred that it exceeded the franchise. On demurrer the court held the declaration was bad, and that the averment was necessary. That case was, if I may respectfully say so, rightly decided, and if demurrers were in vogue would, I think, be so decided to-day, for reasons which will be given hereafter, but it does not, I think, for the same reasons support the wide general statement that all exceptions in a marine policy must be set out and negatived, still less that the plaintiff must prove the negative. The passage, even when understood as dealing with the form of the declaration and not with the burden of proof, is inconsistent with another passage on p. 60 of the same book, which I will read presently. *Crow* v. *Falk* (*sup.*) is not very instructive, but the case of *Wheeler* v. *Bavidge* (*sup.*) is interesting as showing that what is now settled law was then arguable. That was an action by charterers against shipowners for failing to make six successive voyages with their ship. The declaration set out the charter-party fully, including a clause containing a number of the usual exceptions and it was held on demurrer that the declaration was good, and that if the defendant relied upon the exceptions, he must plead them. This decision is entirely in accord with modern practice and, as I hope to show, is not in conflict with *Dawson* v. *Wrench* (3 Ex 359).

The passage on p. 60 dealing with the general rules applicable to contracts with exceptions is as follows; "If the covenant or clause in an agreement is absolute in itself, without any exception or proviso or any reference to any, it may be declared on as an absolute contract, although in a distinct part of the deed or instrument there is a proviso defeating or qualifying it under certain circumstances; such a proviso is in the nature of a defeasance and must be set up, if the facts permit it, by the other side. Sometimes the covenant or clause, although it does not contain the exception or proviso, refers to it by such words as 'except as hereinafter excepted,' and in this case the exception or proviso must be stated in the declaration, for *verba relata inesse videntur*: (*Vavasour* v. *Ormrod*, 6 B. & C. 430). There seems at one time to have been a distinction between a proviso and an exception, but this distinction was regarded, as early as 1823, as too subtle even for the acute minds of those days (see *Latham* v. *Rutley*, 1823, 2 B & C. 20), and I gather that by 1868, at any rate, it had fallen into disrepute. What strikes one about this statement of the rules of pleading is its artificial character. One would think that the duty of the plaintiff to set up and negative exceptions ought to depend upon the construction of the contract as a whole, taking the promise and exceptions together, and not upon the relative positions in the contract of the promise and the exceptions. Again, the rule as stated does not seem to be reliable, for if so, the free of capture and seizure exception and the particular average franchise clause, which is in the nature of an exception, need not be set out and negatived, and yet we find it stated, on page 182, that they must be so treated, and, as to the particular average franchise, there is the express decision of *Dawson* v. *Wrench* (3 Ex. 359) to that effect. I have looked at a great many relevant declarations, and I find that the practice was to set out policies almost at full length, including the exceptions, and to negative those at any rate that bore upon the nature of the particular action. To mention only one instance, it was so done in the well known case of *Ionides* v. *Universal Marine Insurance Company* (8 L T. Rep. 705); 14 C. B. (U.S.) 259). The alternative possible practice of stating the legal effect of the contract without setting it out seems hardly ever to have been followed. The reason, no doubt, was the risk that, unless the legal effect was stated with precise accuracy, there might be a variance between the effect so stated and the contract as proved. If that happened the action failed, although the contract as proved would have supported the claim if the contract sued upon had been set out in full: (see *Latham* v. *Rutley* (2 B. & C. 20).

That was a risk which few pleaders would run, and it may be that the common practice of setting out the contract in full with all its exceptions led to the practice of negativing the exceptions as a matter of precaution, and whether it was necessary to do so or not. The practice of negativing exceptions, even when the whole contract was set out in the declaration, was not universal, at any rate, after the Common Law Procedure Act 1852, as appears from the declaration in *Powell* v. *Hyde* (1855, 5 E & B. 607). In that case a British ship was fired at and sunk by a Russian fort. The policy was against the usual perils, with the free of capture and seizure clause. The declaration set out the policy including the clause, and averred that the vessel was by the accidents and certain of the perils insured against sunk and foundered and the goods lost to the plaintiff. The declaration set out the policy including the clause, and averred that the vessel was by the accidents and certain of the perils insured against sunk and foundered and the goods lost to the plaintiff. The declaration did not negative the exceptions and I find that in giving judgment one of the judges, Wightman, J., said: "The declaration here does not state the precise nature of the peril causing the loss, as would have been necessary under the former laws of pleading" —no doubt a reference to the alterations made by the Common Law Procedure Act 1852. The case is interesting, because if ever there was a case in which one would think it necessary to negative the free of capture and seizure exceptions that would seem to be the case.

I noticed, in looking at the forms of declaration for actions for loss or damage to goods during carriage by sea, that of the three given two refer in general terms to the bill of lading exceptions and negative them, while one does not. It was, of course, at all times the practice for the defendant to set up in his plea any exceptions upon which he relied. Upon the whole, I have come to the conclusion that before the Judicature Acts it was considered the safer course to set out the exceptions and to negative them in the declaration, and that, too, whether they were contained in a separate clause or not. Some bolder spirits seem to have omitted them after the Act of 1852, and I doubt whether it was necessary to refer to them after that Act and the decision in *Wheeler* v. *Bavidge* (9 Ex. 668) except in such cases as *Dawson* v. *Wrench* (3 Ex. 359). It by no means follows that because the practice was to negative exceptions in the declaration the plaintiff thereby undertook the burden of proving the negative. It is difficult to suppose that in an action for damage to cargo a shipper of goods under a bill of lading containing the common exceptions to act of God, King's enemies, and perils of the seas, called witnesses to prove that none of these exceptions became operative; while to turn to a different class of case—namely, libel upon a person—the declaration always alleged that the publication was false and malicious, yet I think no plaintiff, at any rate since the beginning of the last century, was called upon to prove either of these adjectives.

When one turns from the old form of pleading to the modern the change is striking. A form of statement of claim on a policy of marine insurance is given. It is quite short. The terms of the policy are not set out, still less are the exceptions. If a total loss is claimed, all one need say is "loss total"; while it is noteworthy that if a particular average loss is claimed and the policy contains the 3 per cent. franchise, it is necessary to say "loss partial, exceeding 3 per cent." These forms are, I think, in accordance with the law as laid down in both the decisions of *Dawson* v. *Wrench* (*sup*) and *Wheeler* v. *Bavidge* (*sup.*). I may further remark that when the form of total loss is used no particulars will be ordered of how the peril relied on arose. A plaintiff who alleges that his vessel was lost by a peril of the sea or by sinking cannot be ordered to state how the

sinking came about. These forms were prepared at a time when the older rules of pleading were well known and when it was desired to simplify them. The fact that the form for a total loss does not make any provision for setting out or negativing exceptions, and merely describes the loss as due to a peril insured against, would seem to show that its framers well knew what averments were necessary. If the question under discussion is to be decided upon forms of pleading, I have come to the conclusion that the free of capture and seizure exception need not be set out and need not be negatived.

I now turn to consider a few decisions upon the burden of proof in a case like the present. The only authority I have found upon the question in the precise form in which it presents itself in this case is *Green* v. *Brown* (2 Stra. 1199). That case was decided in 1744 by Lee, C.J., but it arose in 1739 when we were at war with Spain. I will read the whole report. It is very short. "The ship *Charming Peggy* was insured in 1739, from North Carolina to London, with a warranty against captures and seizures. And in an action the loss was laid to be by sinking at sea. All the evidence given was that she sailed out of port on her intended voyage and has never since been heard of. And several witnesses proved that in such a case the presumption is that she foundered at sea, all other sort of losses being generally heard of. The underwriter insisted that as captures and seizures were excepted it lay upon the assured to prove that the loss happened in the particular manner declared on. But the Chief Justice said it would be unreasonable to expect certain evidence of such a loss as where everybody on board is presumed to be drowned and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given; he therefore left it to the jury who found the loss according to the plaintiff's declaration." An analogous question came before the Irish courts in 1877 in *Gorman* v. *Hand-in-Hand Insurance Company* (Ir. Rep. 11 C. L. 224). The action was upon a fire insurance policy, and Palles, C.B. thus deals with the matter: "The policy is not in its terms limited to damage by accidental fire; 'the society agrees (subject to the conditions indorsed which are to be taken as part of the policy), that if the property described shall be destroyed or damaged by fire . . . they will . . . pay or make good all such loss and damage.' The third indorsed condition provides that the policy shall not cover, *inter alia*, loss or damage caused by the act of an incendiary; and reading this condition, as we are bound to do, as part of the policy, the contract is that the defendants shall be liable for loss by fire, provided it be not the act of an incendiary. When, therefore, it is once shown that the loss resulted from fire, the plaintiff has established a *primâ facie* case, and the onus is thrown upon the defendants to prove that the act which caused the fire was within the proviso. The defence is not in any sense a traverse of an allegation comprised within the general averments of the plaint; it is a plea in confession and avoidance, and the proof of it is upon the defendants." I will only give the reference to *The Glendavroch* (7 Asp. Mar. Law Cas. 420; 70 L. T. Rep. 344; (1894) P. 226), but the case is well worth reading.

The last case to which I need refer is a recent decision of Lush, J., *Hurst* v *Evans* (116 L. T. Rep. 252; (1917) 1 K. B. 352). That was an action upon a policy against loss or damage to jewellery from any cause whatever save and except loss by theft or dishonesty of any servant in the exclusive employment of the assured. Lush, J. held that it was incumbent upon the assured to prove a theft by some person other than a servant in his exclusive employment This judgment and that of Palles, C.B. in *Gorman* v. *Hand-in-Hand Insurance Company* (Ir. R-p. 11 C. L. 224) are in conflict, unless the distinction is to be found in the fact that in the case before Palles, C.B. the exception was contained in a separate clause, while in the case before Lush, J. the promise and the exception are in the same clause, a distinction upon which, as already stated, I am not inclined to rely. I own it would not have occurred to me, had I been advising the plaintiff on evidence in *Hurst* v. *Evans* (116 L. T. Rep. 252; (1917) 1 K. B. 352) to advise that he must call all his servants and put them into the witness-box one after the other to deny that he or she stole the jewels. The procession would be a long one if Messrs. Whiteley were the plaintiffs. With all respect I venture to prefer the decision of Palles, C.B.

This review of the authorities confirms me in my view that, as the law now stands, when in an action upon a policy of marine insurance the assured has proved that his ship was sunk at sea, he has made out a *primâ facie* case against his underwriters on that policy, and that it is for them to set up the free of capture and seizure exception and to bring themselves within it if they can. The rules now applicable for determining the burden of proof in such a case as the present may, I think, be stated as follows:—

1. The plaintiff must prove such facts as bring him *primâ facie* within the terms of the promise.

2. When the promise is qualified by exceptions, the question whether the plaintiff need prove facts which negative their application does not depend upon whether the exceptions are to be found in a separate clause or not. The question depends upon an entirely different consideration —namely, whether the exception is as wide as the promise, and thus qualifies the whole of the promises, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified. If so, it is sufficient for the plaintiff to bring himself *primâ facie* within the terms of the promise, leaving it to the defendant to prove that, although *primâ facie* within its terms, the plaintiff's case is in fact within the excluded exceptional class. Illustrations of this rule are actions against common carriers and the analogous cases in which a promisor undertakes to perform a given act unless excused by certain excepted events, as, for example, a vendor to deliver, strikes excepted; a charterer to load a ship in a given number of lay days, subject to the usual exceptions now found in charter-parties.

3. When a promise is qualified by an exception which covers the whole scope of the promise, a plaintiff cannot make out a *primâ facie* case unless he brings himself within the promise as

qualified. There is *ex hypothesi* no unqualified part of the promise for the sole of his foot to stand upon. As an instance I take a marine policy with the particular average franchise. There, reading the promise and the exception together, the promise is not a promise to pay particular average or to pay particular average except in certain events. It is a promise to pay particular average exceeding 3 per cent. To bring himself within that promise a plaintiff must show more than a particular average loss; he must show a particular average loss exceeding 3 per cent. This is the explanation, I think, of *Dawson* v. *Wrench* (3 Ex. 359), and why that case is no authority for the wide general statement on p. 182 of Bullen and Leake on Pleading, and why that case does not conflict with *Wheeler* v. *Bavidge* (9 Ex. 668) or with my suggested rule 2.

4. Whether a promise is a promise with exceptions or whether it is a qualified promise is in every case a question of construction of the instrument as a whole: (see per Palles, C.B. in *Gorman* v. *Hand-in-Hand Insurance Company*, Ir. Rep. 11 C. L. 224).

5. In construing a contract with exceptions it must be borne in mind that a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. The form in which the contract is expressed is therefore material.

Applying these rules to the present case, I adhere to the opinion I have expressed in former cases and give judgment against the marine underwriters with costs. I should add that I have not forgotten that the particular average franchise exception generally contains an exception to itself—namely, unless stranded. I have not referred to this fact as it has no bearing upon the matters under discussion.

Judgment for first-named defendants on the war risks policy.

Judgment for plaintiffs against second defendants the marine risks underwriters.

Solicitors for plaintiffs, *Pritchard, Englefield,* and *Co.*, for *Simpson, North, Hurley,* and *Co.*, Liverpool.

Solicitors for defendants the War Risks Association, *G. G. H. Walker* and *Tree*, for *Weightman, Pedder,* and *Co.*, Liverpool.

Solicitors for defendant the Anchor Marine Mutual Underwriting Association, *William A. Crump* and *Son.*

March 26, *April* 11 *and* 17, 1918.

(Before Bailhache, J.)

Russian Bank for Foreign Trade *v.* Excess Insurance Company Limited (*a*)

Marine insurance—War risks—Restraint of princes —"Excluding all claims due to delay"—Frustration of adventure—Closing of Dardanelles—Ultra vires requisition—Compliance—No a restraint—Royal Prerogative—Proclamation of the 3rd Aug. 1914

The R. Bank in Sept. and Oct. 1914 *shipped on board the steamship W at N. a parcel of barley for F. for orders. They insured the barley upon the intended voyage with the defendants by a policy dated the 7th Oct.* 1914 *against the usual perils, including restraints of princes, and against the risks excluded by the free of capture and seizure clause, but the policy excluded all claims due to delay. The W. had not sailed when the Turkish Government closed the Dardanelles, a step which was followed by the declaration of war on the 5th Nov.* 1914. *From that date the commercial object of the adventure was frustrated, and the insured voyage became impossible. The W. with the barley on board remained at N. until the barley began to heat. Between Dec.* 1914 *and Feb.* 1915 *the barley was discharged into warehouse and there reconditioned. It could have remained there unhurt for a year or more. The position as regards both ship and cargo remained unaltered up to the 5th March* 1915, *when the shipowners were directed by the Lords of the Admiralty to place their steamship at the disposal of the Russian Government. This was done, but the Russian Government made no use of the vessel. Upon this requisition the plaintiffs, the R. Bank, telegraphed to their insurance brokers as follows: "W. requisitioned by British Government. Impossible reload barley. Consider case covered by war risk. Agreeable release underwriters from all risks if underwriters will pay difference between present value in N. and insured value." The defendants on the 15th March declined liability. On the 8th of July the plaintiffs, through their brokers, gave formal notice of abandonment. This notice was refused by the underwriters, whereupon the action was brought to recover as for a constructive total loss of the barley by restraint of princes.*

Held, (1) *that the plaintiffs' claim based on the closing of the Dardanelles was a claim due to delay, and* (*applying* Bensaude *v.* Thames and Mersey Marine Insurance Company, 8 *Asp. Mar. Law Cas.* 315; 77 *L. T. Rep.* 282; (1897) *A. C.* 609) *was expressly excluded by the policy.* (2) *That the cablegram of the 5th March* 1915 *might, in the circumstances, be held to be a sufficient notice of abandonment if the Admiralty requisition of the steamship for the Russian Government was a restraint of princes within the meaning of the policy; but that cablegram could not be regarded as a notice of abandonment in respect of the closing of the Dardanelles, and the notice of abandonment given on the 8th July* 1915 *was too late.* (3) *That the requisitioning of the steamship W. by the Admiralty was ultra vires, and, as disobedience to such an order would not be illegal, obedience to such an order unless compelled by force, or threats of force, was a voluntary act and not a restraint of princes, and therefore the loss due to compliance with such an order was not a loss due to restraint of princes, and there must be judgment for the defendants.*

Trial of action in the Commercial List by Bailhache, J.

The plaintiffs claimed to recover under a policy of marine insurance for a constructive total loss of a cargo of barley by restraint of princes.

The facts are stated in the judgment.

R. A. Wright, K.C. and *Le Quesne* for the plaintiffs.—The closing of the Dardanelles by the Turkish Government was a restraint of princes within the meaning of the policy. That action by the Turkish Government completely frustrated the adventure. There was therefore a constructive total loss by restraint of princes within the

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

meaning of the policy, and the plaintiffs are entitled to recover. See

British and Foreign Marine Insurance Company v. *Sanday and Co.*, 13 Asp. Mar. Law Cas. 289; 114 L. T. Rep 521; (1916) 1 A. C. 650.

Further, the requisition by the British Admiralty for account of the Russian Government was also a restraint of princes and covered by the policy. The plaintiffs rely on the cablegram of the 5th March 1915 as notice of abandonment.

MacKinnon, K.C. and *Simey* for the defendants. —The plaintiffs' claim, in so far as it is based on the closing of the Dardanelles, is a claim due to delay, and the policy contained a clause which excluded "all claims due to delay." Therefore the claim failed. See

Bensaude v. *Thames and Mersey Marine Insurance Company*, 8 Asp. Mar. Law Cas. 315; 77 L. T. Rep. 282; (1897) A. C. 609;
Turnbull, Martin, and Co. v. *Hull Underwriters' Association*, 9 Asp. Mar. Law Cas. 93; 82 L. T. Rep. 818; (1900) 2 Q. B. 402.

The closing of the Dardanelles was not the cause of the loss either directly or proximately; and it did not amount to a restraint of princes within the meaning of the policy. See

Becker, Gray, and Co. v. *London Assurance Corporation*, 14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101;
Hadkinson v. *Robinson*, 1803, 3 Bos. & P. 388;
Geipel and others v. *Smith and another*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B 404.

Moreover, no proper notice of abandonment has been given by the plaintiffs. The plaintiffs rely on the cablegram of the 5th March 1915 as a notice of abandonment. But that cablegram, even if it were a sufficient notice of abandoment, was not based on the closing of the Dardanelles at all, but on the requisitioning of the steamship *Wolverton*. The cablegram of the 5th March 1915 could not be treated as a notice of abandonment at all apart from the reference in it to the requisitioning of the *Wolverton*. The requisitioning of the steamship was *ultra vires* the British Admiralty, and the plaintiffs cannot rely upon their voluntary compliance with an *ultra vires* direction as a restraint of princes.

R. A. Wright, K.C., in reply, referred to

Watts, Watts, and Co. v. *Mitsui and Co.*, 13 Asp. Mar Law Cas. 580; 116 L. T. Rep. 353; (1917) A. C. 227;
Rodocanochi and others v. *Elliott*, 2 Asp. Mar. Law Cas. 399; 31 L. T. Rep. 239; L. Rep. 9 C. P. 518.

Cur. adv. vult.

Bailhache, J. read the following judgment: —The plaintiffs, the Russian Bank for Foreign Trade, shipped on board the steamship *Wolverton* at Novorossisk, a parcel of barley in Sept. and Oct. 1914 for carriage to Falmouth for orders. They insured the barley upon the intended voyage with defendants, by a policy dated the 7th Oct. 1914, against the usual perils, including restraints of princes, and against the risks excluded by the free of capture and seizure clause, but the policy excluded "all claims due to delay."

The *Wolverton* had not sailed when the Turkish Government closed the Dardanelles. This step was followed by the declaration of war on the 5th Nov. 1914. From that date the commercial object of the adventure was frustrated, and the insured voyage became impossible. The *Wolverton*, with the barley on board, remained at Novorossisk till the barley began to heat, when, between Dec. 1914 and Feb. 1915, it was discharged into warehouse there and reconditioned. It could have remained unhurt in warehouse for a year or so.

The position as regards both ship and cargo was unaltered when on the 5th March 1915 the shipowners were directed by the Lords of the Admiralty to place their steamship at the disposal of the Russian Government, and this they did, but I gather the Russians made no use of her. Upon this requisition the plaintiffs cabled to their insurance brokers here as follows: "*Wolverton* requisitioned by British Government account Russian Government. Impossible reload barley. Consider case covered by war risk. Agreeable release underwriters from all risks if underwriters will pay difference between present prices at Novorossisk and insured value."

This cable was shown to the defendants, who, with the other underwriters concerned, took legal advice upon their position, and on the 15th March 1915 they declined liability. This decision was communicated to the plaintiffs, who in their turn took legal advice. Their lawyer's opinion was sent to them on or about the 10th April 1915. On its receipt the plaintiffs, with a view to concerted action, consulted with the other shippers on the same steamship, and on the 5th July cabled their brokers to give notice of abandonment. This was done on the 8th July in these terms: "Steamship *Wolverton*, Novorossisk to United Kingdom (Admiralty approved). We are informed by the assured of the following consignments of barley insured per the above steamship that the interests have been discharged at Novorossisk, and, owing to the inability of the vessel to perform her voyage in consequence of the warlike operations, they instruct us to abandon to you, and we hereby abandon to you their interests in such shipments and claim from you a total loss of the sums insured." This notice was refused by the underwriters, whereupon this action was brought to recover as for a constructive total loss of the barley by "restraint by princes."

The case made for the plaintiffs at the trial differed materially from their case as pleaded. In the points of claim, the restraint relied upon was the requisitioning of the *Wolverton*; in argument the restraint relied upon was the closing of the Dardanelles. In the points of claim, the notice of abandonment pleaded was the formal notice of the 8th July 1915; in argument, the notice relied upon was the cablegram of the 5th March 1915. I will deal first with the case as presented to me in argument.

There is no doubt that the action of the Turkish Government in closing the Dardanelles frustrated the adventure, and, if this were a charter-party case, the decision in *Geipel and others* v. *Smith and another* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B 404) would be in point, and decisive in the plaintiff's favour. This is not a charter-party but a marine insurance case, and, although the words "restraint of princes" mean the same whether in charter-parties or in policies, it is clear from a comparison of *Hadkinson* v.

Robinson (3 Bos. & P. 388) with *Geipel and others* v. *Smith and another* (*sup.*) that an adventure may be frustrated by restraints of princes so as to excuse performance of a charter-party by a shipper or shipowner, and yet not give any right of action against underwriters for a constructive total loss. The reason for the distinction is not to be sought in any difference in the meaning of the phrase, but in the strictness with which the *proxima causa* is applied in insurance cases. It is clear upon the authorities that the closing of the Dardanelles was a restraint of princes, and the only doubt is whether that act was the proximate or, as Lord Sumner prefers, the direct cause of the destruction of the adventure, in the sense required by insurance law. Stated in terms of decided cases, the question is whether this is a case of the *Hadkinson* v. *Robinson* (3 Bos. & P. 388) class, or of the *Rodocanachi* v. *Elliott* (2 Asp. Mar. Law Cas. 399; 31 L. T. Rep. 239; L Rep. 9 C. P. 518) class. I think it is of the latter class, and I am the less concerned to discuss the point, because in *Watts, Watts, and Co. Limited* v. *Mitsui and Co Limited* (13 Asp. Mar. Law Cas. 580; 116 L. T. Rep 353; (1917) A. C. 227) the judgments in all the courts, including the House of Lords, proceed upon the footing that circumstances such as those in the present case would give rise to a claim for constructive total loss. I think, therefore, the closing of the Dardanelles was such a restraint of princes as would on due notice of abandonment constitute a constructive total loss of the barley.

The defendants have two answers to this. First, they refer me to the written clause in the policy reading "excluding all claims due to delay," and they say the claim based upon the closing of the Dardanelles is a claim due to delay. I must deal with this answer a little closely, because I confess that I thought, during the argument, there was very little in the point. I have since read the decision of the House of Lords in *Bensaude and others* v. *Thames and Mersey Marine Insurance Company Limited* (8 Asp. Mar, Law Cas. 315; 77 L. T. Rep. 282; (1897) A. C. 609) two or three times, and I am now satisfied that the point is one that deserves very careful consideration.

The policy in this case contains three written clauses as thus: "This insurance also to cover the risks excluded by the free of capture and seizure clause"; "excluding all claims due to delay"; "excluding deterioration and loss of market."

The *Bensaude* case (8 Asp. Mar. Law Cas. 315; 77 L. T. Rep. 282; (1897) A. C. 609) was one of insurance on freight, and the material clause ran: "Warranted freefrom any claim consequent on loss of time, whether arising from a peril of the sea or otherwise."

I cannot distinguish these words from the second written clause in this policy. The words "whether arising from a peril of the sea or otherwise" are surplusage, for every claim upon a policy must arise from a peril insured against.

The words "any claim consequent on loss of time" must mean any claim for losses due to delay, and the words in this policy, "claims due to delay," obviously mean the same thing.

In the *Bensaude* case (*sup.*) the main shaft of the steamship *Peninsular* broke owing to a peril of the sea. It was impossible to repair it within any reasonable time. The voyage was thus frustrated, and the freight lost. Upon those facts, the House of Lords held that the claim against the underwriters for a total loss of freight failed, upon the ground that such a claim was "consequent on loss of time" within the warranty in the policy.

Lord Herschell says in 8 Asp. Mar. Law Cas. 315; 77 L T. Rep. 282, at p. 284; (1897) A. C, at p. 668: "That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent on loss of time? It must mean that, although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage, so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability."

I confess I cannot distinguish the two cases. In the *Bensaude* case (*sup.*) there was a peril insured against—namely, of the sea; the propeller shaft broke. Here, there was a peril insured against—namely, restraint of princes. The Dardanelles was closed. In the *Bensaude* case (*sup.*), the broken propeller shaft necessitated such delay in the prosecution of the voyage, that the adventure was frustrated.

Here, the restraint of princes was the same thing. In both cases, it was delay due to a peril insured against, which caused in the one case the total loss of the freight, and in the other the constructive total loss of the cargo. The fact that the subject matter was in the one case freight and in the other case barley seems to me immaterial.

I do not forget that in this case there are three written clauses, which must all have a meaning given to them, if possible, and I think this can be done without doing violence to any one of them.

The words "excluding deterioration or loss of market," in the third clause, show that the words "excluding all claims due to delay," in the second clause, are not restricted to such classes of loss as deterioration or loss of market. They may cover the same ground, but they are certainly of wider import. Nor do the words in the second clause nullify the first clause, which restores the free of capture and seizure clause, or wholly exclude the printed words "restraints of princes," for there may well be forms of restraint which involve capture or physical detention or confiscation of the goods. I own I am surprised at the result thus arrived at, but I think the defendants' first answer is a good one.

The defendants' second answer to the plaintiffs' claim based on the closing of the Dardanelles is that they gave no notice of abandonment. In this the defendants are right, for, assuming for the moment that the cablegram of the 5th March 1915 was a sufficient notice of abandonment, it was not based upon the closing of the Dardanelles, but upon the requisitioning of the *Wolverton*. I am not saying that a clear and unqualified notice of abandonment would be bad if based upon the wrong grounds when good ground existed, but this cablegram cannot be treated as a notice of

abandonment at all apart from the reference to the requisitioning of the *Wolverton*.

The plaintiffs for some reason or other, probably because they had a better appreciation than myself of the *Bensaude* case (*sup.*), never treated the frustration of the adventure by the closing of the Dardanelles as giving them a right to claim as for a constructive total loss. Even, therefore, if the loss would otherwise fall upon the policy, the failure to give notice of abandonment is fatal. I may add that I should in any case have held a notice given on the 5th March too late. There was no pretence for supposing after the declaration of war against Turkey on the 5th Nov. 1914 that the Dardanelles would be opened within any reasonable time, and to have waited four months before giving notice of amendment would have been too long. The result is that the closing of the Dardanelles does not avail the plaintiffs.

I now address myself to the restraint of princes relied upon in the points of claim—namely, the requisitioning of the steamship *Wolverton* by the Lords of the Admiralty for the Russian service.

The fact that the plaintiffs did not choose to give notice of abandonment to their underwriters upon the closing of the Dardanelles, even assuming that they could have done so, does not preclude them from claiming for a constructive total loss if, while the goods are still in specie, some subsequent restraint of princes has happened which justifies such a claim: (see *Woodside and Co.* v. *Globe Marine Insurance Company Limited*, 8 Asp. Mar. Law Cas. 118; 73 L. T. Rep. 626; (1896) 1 Q. B. 105).

An order or requisition by the Lords of the Admiralty, if within their powers, is binding upon a British owner; and if he, as a loyal subject, obeys it, and by his obedience the goods which he has engaged to carry cannot be carried at all, or cannot be carried to their destination, the insured adventure is destroyed by restraint of princes as the proximate cause of the destruction, and the owner of the goods, upon giving timely notice of abandonment, can recover against his underwriters as for a constructive total loss: (see *British and Foreign Marine Insurance Company* v. *Sanday and Co.*, 13 Asp. Mar. Law Cas. 289; 114 L. T. Rep. 521; (1916) 1 A. C. 650). The defendants, however, say that the requisition in this case was *ultra vires*, and that an *ultra vires* command is not a restraint of princes. I have searched in vain for authority upon the point. None was cited to me, and I can find none. There are suggestions here and there from which inferences may be drawn, but nothing more. I must therefore deal with the matter as best I can, without the assistance from authority which I should have been glad to have had. The point is of importance.

The requisition was, in my opinion, *ultra vires*. On the 5th March 1915 the only authority the Admiralty had to requisition ships was given to them by the Proclamation of the 3rd Aug. 1914, and was confined to the requisitioning for His Majesty's service of vessels of British owners within the British Isles or the waters adjacent thereto. It is suggested by the plaintiffs that the requisition in this case is within the Royal Prerogative. It is not necessary for me to express any opinion upon that point. It was not pressed. So far as I know, the Royal Prerogative can only be exercised through Proclamation or Order in Council. I was not referred to any Proclamation or Order in Council, and I know of no such prerogative. Where restraint takes the form of an order and nothing more, that order must, in my opinion, be one which has behind it the forces of the State, which can, if necessary, be lawfully employed to compel obedience, if obedience is refused. Now, an order *ultra vires* the Admiralty could not be lawfully enforced either by seizure, detention, or confiscation of the ship, the subject-matter of the order, or by fine or imprisonment of her owner. Obedience to such an order, however praiseworthy in a loyal citizen, is in my opinion, a voluntary act on his part and not a restraint of princes.

It is quite otherwise if the order is accompanied by threats of force or followed by the use of force. In such a case, disobedience not being illegal, the use of force to compel obedience is illegal and is a restraint of princes upon which a claim against the underwriters for loss by restraint of princes may be founded: (see *Lozans* v. *Janson*, 1859, 2 E. & E. 160).

Pursuing the matter further at the expense of reiteration, the *intra vires* order of the British Admiralty to a British owner is a restraint of princes, and loss due to obedience to such an order is recoverable from underwriters.

Disobedience to such an order is an illegal act and renders the policies void. Force used to compel obedience is a restraint of princes, but, loss due to such resistance, cannot be recovered from the underwriters. When the order is *ultra vires*, the opposite is the case. Disobedience to such an order is not illegal, but the employment of force to compel obedience is. Its employment is a restraint of princes, the polices are not avoided, and losses due to the restraint are recoverable.

It seems to me to follow that, as disobedience to an *ultra vires* order is not illegal, obedience to such an order, unless compelled by force or threats of force, is a voluntary act and not a restraint of princes.

If so, the destruction of the adventure due to compliance of the owners with the requisition of the *Wolverton* was not a loss due to restraint of princes, and I so hold.

The decision at which I have arrived renders it unnecessary to consider when due notice of abandonment was given, but I will state my opinion upon the point in case my views upon the requisitioning of the *Wolverton* are held to be wrong. The notice pleaded of the 8th July 1915 was, I think, clearly too late, even if it is not objectionable for the grounds it gives.

The cable of the 5th March 1915 was in time, and it gives the right ground, if it ought to be treated as a notice of abandonment at all.

It is not necessary to give notice in any particular form or to use the word "abandon," in spite of Lord Ellenborough's observations in *Parmeter* v. *Todhunter* (1808, 1 Camp 541). It is now sufficient that the notice should be in such terms as conveyed the insured's intention to the underwriters: (see *Currie and Co.* v. *Bombay Native Insurance Company*, 22 L. T. Rep. 317; L. Rep., 3 P. C. 72).

I have had the advantage of the views of the defendants' underwriter upon the cablegram, and he tells me that although he does not remember

seeing it, yet upon reading it he regards it as notice of abandonment, followed by a suggestion of compromise. That it was so understood by the underwriters at the time is fairly plain, as they took legal advice upon it and upon the position generally, and declined liability. I am satisfied that the defendants' underwriter saw the cablegram, and entirely accept his statement that he has forgotten the fact.

The defendants very naturally refer me to two letters of the brokers of the 10th April and the 22nd July 1915, in which they inform the plaintiffs that they have not given notice of abandonment. The brokers' clerk was called, and he stated that in writing those two letters he had in mind the formal notice in set terms which brokers are in the habit of giving. In any case, as the plaintiffs themselves desired notice to be given, and as the brokers showed the cable to the underwriters, and the latter understood it as notice of abandonment, the view of the brokers is not very material.

I should be disposed, if necessary, to hold, though with some hesitation, that the cablegram of the 5th March 1915 was, in the circumstances a sufficient notice of abandonment.

The net result is that there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *William A. Crump* and *Son*.

Tuesday, May 14.

(Before SANKEY, J.)

HARRIES *v.* SHIPPING CONTROLLER. (*a*)

Requisition — Ship under charter at time of requisition—Admiralty taking war risk—Value at time of loss—Effect of requisition on value.

A ship was requisitioned by the Admiralty under a charter-party, which provided that the Admiralty should take war risks "on the ascertained value of the steamer, if she be totally lost, at the time of such loss" The effect of the requisition was to reduce the value of the vessel as compared with the value she would have had if she had not been under requisition. The vessel was totally lost by enemy action.

Held, that the proper value to put upon her was the reduced value consequent upon the requisition.

AWARD of arbitrators as stated in the form of a special case stated for the opinion of the court.

The question was whether in valuing a vessel which had been totally lost by enemy action the fact that the vessel was under requisition at the date of the loss should be taken into consideration.

The material facts are as follows :—

The steamer *Longbenton* was requisitioned in Dec. 1914 under the terms of the official charter-party known as T99. She was lost by enemy action on the 27th June 1917.

By clause 19 of the charter-party :

The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following but not more extensive clause : Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury. Should a dispute arise as to the value of the steamer, the same shall be settled as laid down in clause 31.

By clause 31 :

Any dispute arising under this charter shall be referred under the provisions of the Arbitration Act 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and, should such arbitrators be unable to agree, the decision of an umpire whom they elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law.

The award stated that :

It was proved before us, and was not disputed by the owners, and I find that in June 1917 the value of a British ship, or the price at which she could be sold, varied according as at the date of the sale she was or was not under requisition (with a possible chance of being released from requisition). She would command a smaller price, which I will call £*x*, than the price, which I will call £*y*, which she would command if she was then not under requisition (but with the possible chance of being requisitioned). I further find that if, as occurred in regard to certain ships in certain exceptional circumstances, she was then sold both free from requisition and subject to a guarantee or promise by the Controller that she would not be requisitioned, she would command a price still higher than £*y*.

The umpire found that the value of the *Longbenton* on the 27th June 1917, when she was under requisition, was 28 500*l*.—*i.e.*, 3500*l*. more than the 25 000*l*. paid already by the Controller on account. If on the 27th June she had not been under requisition her value would have been 44,500*l* — *i.e.*, 19,500*l*. more than the sum so paid on account.

It was contended on behalf of the owners that in the circumstances they were entitled to claim what the umpire called £*y*, and what he found to be 44 500*l*. They argued that it was the action of the Admiralty or of the Controller in placing and keeping the ship under requisition which had at the time of her loss reduced her value from £*y* to £*x*, and that the Controller was not entitled to take advantage of this action of himself or of his predecessors in so reducing her value at the date of the loss.

It was contended on behalf of the Controller that in the circumstances the owners were entitled to claim only £*x*, which the umpire found to be 28,500*l*.

The umpire held that the contention of the owners was wrong, and that the contention of the Controller was right.

The umpire therefore awarded that the Controller should pay to the owners the further sum of 3500*l*. beyond the sum of 25,000*l*. already paid by him on account.

The owners appealed.

R. A. Wright, K.C. and *Le Quesne* for the owners.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Dunlop* for the Admiralty.

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

SANKEY, J.—The question is what is the proper value to be placed in the circumstances upon a vessel requisitioned by the Government which was totally lost by enemy action on the 27th June 1917. The owners in effect say that the Government cannot rely on the fact that the vessel was under requisition at the time of her loss, and that that fact must not be taken into consideration in assessing the value to be placed upon her. The Admiralty, on the other hand, contend that that fact must be taken into consideration. [His Lordship referred to the facts, and continued:] It appears to me what the arbitrator had to find is the value of the vessel at the time of her loss. For the purpose of assessing the value of the vessel he must take into consideration all the facts of the case, and one of the most material of those facts is that the vessel was at the time of her loss under requisition. The owners' contention is in effect that this material fact must be omitted. They argue that the arbitrator must shut his eyes to the fact that the vessel was under requisition at the time of her loss.

There is another way of looking at the matter. Par. 19 of the charter-party amounts to an indemnity against the vessel being lost by war risks. The owners say that that paragraph must be construed as an indemnity against any requisition. I am of opinion that the contentions of the owners are wrong, and that those of the Admiralty are right. The award must be upheld.

Solicitors: *Botterell* and *Roche*, for *Vaughan* and *Roche*, Cardiff; *Treasury Solicitor*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

June 21, 22, *and July* 31, 1917.

(Before HILL, J. and Elder Brethren.)

THE CARRIE. (a)

Admiralty—Salvage—Services rendered by British patrol boats—Salvage of neutral vessel abandoned by her crew—Cargo salved owned by allied Government—Claim by officers and crews of patrol boats—War and marine risks—Protection against submarines.

A neutral vessel laden with a cargo of munitions belonging to an allied Government was stopped on the high sea by a German submarine. The crew of the vessel were ordered to the boats, and those on the submarine made preparations to sink the vessel, but before they accomplished this they became alarmed at the approach of two British patrol boats and left the vessel. The crew were then in their boats some way off. The patrol boats then came up, but the crew of the neutral vessel refused to return to her, and the patrol boats stood by and ultimately towed the vessel into Falmouth. The officers and crews of the patrol boats then instituted proceedings for salvage against the neutral ship and her cargo, but did not prosecute the claim against the cargo on ascertaining its ownership. On the hearing of the salvage action the defendants alleged that it was part of the duty of the patrol boats to save the allied cargo from a war risk, and that, as the saving of the ship was only incidental to the saving of the cargo, no salvage was payable.

Held, that assuming the plaintiffs were under a duty to salve the cargo, they were under no duty to salve the vessel. That being volunteers and having saved the ship from both a maritime and war peril, they were entitled to salvage, and that both the maritime and war risk should be considered in arriving at the amount to be awarded.

SALVAGE SUIT.

The plaintiffs were the commanders, officers, and crews of His Majesty's steam trawlers *Fusilier* and *Kinaldie*. Both vessels were on patrol duty in the English Channel.

The defendants were the owners of the Swedish steamship *Carrie*. The salvage suit was instituted against the ship and cargo, but when it was alleged that the cargo, which consisted of shells, steel plates, and military stores, was owned by the French Government, the plaintiffs did not proceed with their claim against the cargo.

The value of the *Carrie* was agreed at 39,000*l*. The facts are fully stated in the judgment of Hill, J.

The suit was heard on the 21st and 22nd June 1917.

Bateson, K.C. and *Stephens* for the plaintiffs.—The *Carrie* was saved from total loss. She would have been sunk by the submarine if the salvors had not come up. Her crew having abandoned her she was also in danger of being lost by sea perils. The fact that the *Carrie* was also saved from a war peril should be taken into account:

The F. D. Lambert, *ante*, p. 278; 119 L. T. Rep. 119;
The Francis and Eliza, 2 Dods. 115.

The plaintiffs were volunteers; there was no duty on them to save the *Carrie*. The men who boarded the *Carrie* ran considerable risk which should also be taken into account.

Laing, K.C. and *H. C. S. Dumas* (for *C. P. Langton*, serving in His Majesty's forces).—The plaintiffs are not entitled to salvage. The salving of the cargo, which was owned by an allied Government, was part of their public duty:

The Cargo ex Ulysses, 6 Asp. Mar. Law Cas. 354; 60 L. T. Rep. 111; 13 Prob. Div. 205.

The salving of the ship was only incidental to salving the cargo. It is the duty of His Majesty's navy to rescue vessels from dangers which are not maritime dangers:

The Francis and Eliza (*ubi sup.*).
Kennedy on Civil Salvage, 2nd edit., pp. 112, 113.

In the *F. D. Lambert* (*ubi sup.*) salvage was admitted, but a very small award was given in that case and it shows that patrol vessels ought to render such a service as this as part of their duty without reward. The plaintiffs only saved the *Carrie* from a war peril. There was no real risk of loss by a maritime peril.

Stephens in reply.—The plaintiffs may owe a duty to a British ship in circumstances such as these, but, even if that is so, there is no ground for saying that a British vessel owes such a duty

(a) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

to a neutral vessel. No claim is now made against the cargo.

Judgment was reserved and was delivered on the 31st July.

July 31.—HILL, J.—This is a claim for salvage services rendered on 1st and 2nd Jan. 1917, by the commanders, officers, and crews of His Majesty's patrol boats *Fusilier* and *Kinaldie* to the Swedish steamship *Carrie*. There is no claim against her cargo, which was stated to have been consigned to the French Government, and nothing was said about any freight at risk.

The *Carrie* is a steamship of 892 tons gross, and carried a crew of sixteen hands. She was on a voyage from Glasgow to Nantes. Her value is 39,000*l*.

The *Fusilier* is an armed steam trawler of 276 tons gross, with engines of 510 horse-power indicated, and has a complement of seventeen hands. The *Kinaldie* is an armed steam trawler of 197 tons gross, with engines of 450 horse-power indicated, and a complement of thirteen hands all told. Both vessels were in the service of His Majesty, and therefore the services of the ships as instruments of salvage were gratuitous.

The only question is, what were the personal services of the plaintiffs, and were they salvage services, and, if they were, what is a proper award? Undoubtedly the trawlers saved the *Carrie* from a position of peril and brought her in safety into Falmouth, but the circumstances have to be considered.

Soon after 3 p.m. on the 1st Jan. 1917 the *Carrie* was stopped by a German submarine; her master and crew were ordered into the boats (two in number), and the submarine was preparing to sink the *Carrie* when it became alarmed or sighted some other prey. At any rate, it submerged and disappeared, leaving the *Carrie* with no one on board, and the crew of the *Carrie* in their boats, some half-mile away from their ship. Her position was about twenty miles south of the Wolf. The weather was fine, there was a fresh north-westerly wind, and there was considerable swell.

In these circumstances, between 4 and 5 p.m., the *Carrie* was sighted by the trawlers, and they came to her assistance. The plaintiffs say the submarine submerged on sighting the trawlers. The trawlers claim no merit in this. They had had a report of a submarine, and were searching for it when they sighted the *Carrie*. On coming up, the lieutenant in command told the master to return to the *Carrie*, and said that the trawlers would escort him to Ushant. The crew were unwilling, and the master refused to return. The *Kinaldie* took the crew out of the boats, and throughout the night the two trawlers patrolled about the *Carrie*. So far there is no dispute.

As to what happened on the following morning there is a complete contradiction of evidence. The evidence of the master and others of the *Carrie's* crew is that they asked to be allowed to return to the ship and continue their voyage, and that permission was refused. The evidence from the trawlers is that the master of the *Carrie* was asked and urged to return to his ship with his crew, and that he refused. Had the defendant's evidence been true it would have reflected very greatly upon those in charge of the trawlers, but it is not true. Having heard and seen the witnesses and considered the documents, I have no hesitation at all in arriving at the conclusion that the master and crew of the *Carrie* absolutely refused to return to the ship. I do not blame them. They had been ordered by the enemy to quit the ship, they had a cargo on board which made them peculiarly liable to attack, and if the submarine again found them on board and on their way to France they would have got very short shrift. I am satisfied that these considerations and their experiences of the day before had unnerved the master and made him only too glad to leave himself and the *Carrie* to the care of the trawlers.

The *Fusilier* then put out her boat and sent the second hand and three men on board the *Carrie*—in the swell, with no one on board the *Carrie*, it was naturally a work of some risk to get on board—and it was found that the fires had burnt out and there was no steam on the *Carrie's* engines. A hawser was passed and the *Fusilier* made fast. About eight o'clock the *Fusilier* began to tow, with the *Kinaldie* accompanying as an escort. About nine o'clock the hawser parted, and the *Kinaldie* made fast and began to tow about 9.45 with the *Fusilier* accompanying as escort. At five o'clock the *Carrie* was brought to a safe anchorage in Falmouth Harbour.

This was a very useful service. The *Carrie* was intact, but, without anyone on board, she must have remained open to submarine attack, and at the mercy of any bad weather which might come on, and she would be unlit at night. It may be the crew would in time have plucked up courage to return, but in their then state of feeling it is much more likely they would have taken refuge on the first vessel which came up. No doubt some vessel would have come along in time, but whoever came up and assisted he would have rendered a salvage service, and, if the salvor had not been a King's ship, the award would have been the greater.

As to the risk to the salvors, that was not very different from the risks which the officers and crews of armed trawlers are employed to encounter; there is, however, a substantial difference between the risk when towing or escorting a disabled ship at a necessarily slow speed and the risk when the trawler is on its proper patrol duties. There was also some risk in the boat work.

Such being the facts, the case would be a very simple one but for the contention of the defendants that the plaintiffs, being the commanders, officers, and crews of King's ships, are not entitled to any salvage as against the Swedish ship because it was carrying cargo for the French Government. The contention is that the plaintiffs were under a duty to save the property of an allied Government, and that the saving of the ship was a mere incident in the saving of the cargo. It is further said that the saving was not from maritime but from war perils.

I have already found that the crew refused to return to their ship. It is clear, therefore, that the saving was not only from attack by the enemy, but also from maritime perils. But for the assistance of the plaintiffs the *Carrie* would have been left in the open sea with no one on board. The plaintiffs brought her into port. No doubt the ship in being saved from maritime

perils was also saved from enemy attack, but it was not saved only from enemy attack.

I have not here to consider whether the plaintiffs would have been entitled to salvage if the crew had returned to the *Carrie* and the plaintiffs had escorted her to Ushant. For such protection I understand the plaintiffs would have no claim. What does arise for decision is whether the plaintiffs are entitled to salvage for saving the ship from maritime perils, and perhaps also, whether the court ought to take into account the saving from war perils.

Now, the point argued—namely, that there was no salvage, because the service was to French Government property, is not clearly raised by the defence, and while it was stated that the cargo was consigned to the French Government, it was not proved that it was the property of the French Government. Had the point been specially pleaded, the plaintiffs would have been able to investigate the question of the property. But assuming that the cargo was the property of the French Government, and assuming also, as I think I must assume, that it is the duty of the officers and crews of the King's ships to protect the property of allied Governments, I do not think that that makes the service *quâ* the neutral ship any less a salvage service. As was said by Dr. Lushington in *The Iodine* (3 Notes of Cases, 140): "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."

The foremost of those principles is that the salvors must be volunteers, and the salvor is not a volunteer when he is bound by his contractual or official duty to do that which he does. But duty here means duty to the owner of the salved property. As was said by Pickford, L J. in *The Sarpen* (114 L. T. Rep. 1011; 13 Asp. Mar. Law Cas. 370; (1916) P. 306): "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 some one who has control of his movements to render them."

I think the principle underlying this decision involves this further, that if the services be voluntary in relation to part of the salved property, i.e., not rendered by reason of any obligation to the owner of it, it is quite immaterial that the salvor is under a duty to some one else to render service to another part of the salved property.

Assuming, therefore, that the plaintiffs were under a duty to the cargo, I think that does not prevent their being salvors of the ship. They have, in fact, saved the ship for the Swedish owners. Whatever was their duty to their own country or to France, they were under no duty to the Swedish owners to save the Swedish ship. They are therefore entitled to claim as salvors in respect of the ship, and I have not to consider whether they are entitled to claim as salvors in respect of the cargo.

The saving of the Swedish ship being by the plaintiffs a salvage service, I see no reason in principle why the whole risks of the salved property, war risks as well as maritime, are not to be taken into account in estimating the value of the services to the salved property. In this case I shall take the whole risk into account. At the same time no salvage by a King's ship can be treated on the same footing as salvage by a private ship.

To begin with, nothing can be claimed (except in cases affected by the Merchant Shipping (Salvage) Act of 1916) for the services of the ship as the instrument of salvage. Further, the officers and crew can claim only with the sanction of the Admiralty, a sanction which is intended to enforce the rule laid down by Sir John Nicoll in *The Rapid* (3 Haggard Adm. 419) and Dr. Lushington in *The Iodine* (*ubi sup.*), that to entitle His Majesty's ships to claim salvage remuneration the services must be of an important character. Further, it must be remembered that the officers and crew "lose no time and run no risk of property; both are at the expense of the public: (see *The Rapid*, 3 Haggard Adm. 419, at 421), and the remarks of the President in *The Gorliz* (*ante*, p. 282; 119 L. T. Rep. 123) and *The F. D. Lambert* (*ubi sup.*); and the work done in connection with the salvage service may be no harder and no more risky than work in which they would be ordinarily engaged.

I apply all these considerations in the present case, and desire to repeat what I said in *The Athamas* (*ante*, p. 276; 119 L. T. Rep. 117)—namely, that where more than one King's ship is engaged the service must be regarded as a whole, without drawing too nice distinctions between the work of one and another, provided always that no crew must be rewarded unless its contribution was substantial.

The award which I think ought to be made in this case is an award of 750*l.* If it is desired that I should apportion that sum, then I give 375*l.* to the officers and crews of each of the plaintiffs' ships.

Solicitors for plaintiffs, *Thomas Cooper* and *Co.*, agents for *Reginald Rogers* and *Son*, Falmouth.

Solicitors for defendants, *Botterell* and *Roche*.

Nov. 1 *and* 15, 1917.

(Before HILL, J. and Elder Brethren.)

THE ALGOL. (*a*)

Admiralty — Collision — Neutral vessels navigating without lights—Directions of British Admiralty as to navigating without lights—Dangers of navigation and collision—Dangers from German submarines—Special circumstances rendering departure from Collision Regulations necessary—Collision Regulations, arts. 1, 2, 27.

A Norwegian steamship and a Russian steamship were navigating in the English Channel at night. Both steamships had received instructions from the British Admiralty not to exhibit under way lights but to show them only in case of emergency in order to avoid collision. Those on the vessels sighted each other between quarter and half a mile

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

apart and exhibited their side lights without delay, but a collision occurred with the result that the Norwegian steamship was sunk. The owners of the cargo on the Norwegian steamship brought an action against the owners of the Russian steamship alleging (inter alia) *that those on board her were negligent in not exhibiting their under way lights.*

Held, that arts. 1 *and* 2 *of the Collision Regulations were to be read with art.* 27*; that the disregard by the Germans of all rules of international law, and of the practice of civilised peoples in the conduct of war, had created at the time and in the locality in question a danger of navigation within the meaning of art.* 27 *of the Collision Regulations, and that the steamship was not to blame for not exhibiting under way lights, as a danger of navigation justified her in not doing so.*

DAMAGE ACTION.

The plaintiffs were the owners of a cargo of coal laden on the Norwegian steamship *Embla*.

The defendants were the owners of the Russian steamship *Algol*.

The case was heard *in camerâ*. The facts and arguments, so far as they can be published, are stated in the judgment.

The following Collision Regulations were referred to:

The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere.

1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

2. A steam vessel when under way shall carry—

(*a*) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than 20ft., and if the breadth of the vessel exceeds 20ft., then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than 40ft., a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(*b*) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(*c*) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

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.

Reference was also made to an order issued by the Admiralty on the 9th June 1917 (Admiralty Notice to Mariners No 581), which provided that the orders contained in Admiralty War Instructions for British Merchant Ships, or in any instructions or advice given to masters of vessels by British or allied naval officers as to certain matters, were to be observed even when they were in conflict with the provisions of the Regulations for Preventing Collisions at Sea, and every vessel observing such regulations, instructions, or advice should be deemed to be taking measures to meet "special circumstances" within the meaning of art. 27 of the Regulations for Preventing Collisions at Sea.

Laing, K.C. and *Stephens* for the plaintiffs.

Bateson, K.C. and *Dumas* for the defendants.

HILL, J.—I heard this case *in camerâ*, but I see no objection to the publication of the judgment. As the cases raises a question of general importance, it would be unfortunate if the mere result were reported without the reasons. I think the reasons ought to be published, and I see no reason why they should not be. But this permission applies only to the judgment.

This is a claim by the owners of cargo lately laden on board the steamship *Embla* against the owners of the steamship *Algol*. The *Embla* and the *Algol* were in collision in the English Channel (outside territorial jurisdiction) on the night of the 16th March 1917, and the *Embla* in consequence sank with her cargo. The *Embla* was a Norwegian ship and the *Algol* a Russian ship.

The *Embla* was a wooden screw steamship of 497 tons gross, 162ft. long, and was laden; the *Algol*, a steel screw steamship of 2222 tons gross, 280ft. long, was light. The night was fine and clear, but dark. The *Embla*, at the time she sighted the *Algol*, was on a course of S.E. by S. magnetic, making about seven knots. The *Algol*, at the time she sighted the *Embla*, was on a course of N. ½ W. magnetic, making about nine and a half knots. In fact, the ships were crossing ships, and the *Embla* had the *Algol* on her starboard side. The vessels came into collision, the stem of the *Embla* striking the port side of the *Algol* about abreast of No. 1 hatch, the angle of the blow leading somewhat aft on the *Algol*.

There is no very great conflict as to the facts except as to the distance at which the vessels were sighted and the order in which each displayed its side light. Neither ship had her masthead or sidelights exhibited, and neither at any time showed her masthead light. The *Embla* had her sidelights in position, but screened with a canvas covering, which could be readily torn away. The *Algol* had her sidelights lit and placed on the bridge, hidden by the wind screens, and ready to be lifted into the screens, an operation which could be as promptly done as the tearing away of the canvas covering from the *Embla's* lights. Each ship had received directions by the Admiralty authorities not to carry the masthead and sidelights exhibited, but to show them only in case of emergency to avoid collision. The precise terms of the directions to the *Algol* were not proved, but I have no doubt that that was their effect.

The story as told by the mate of the *Embla*, who was in charge, was that he saw the *Algol* as a dark object two or three points on the starboard bow and some two or three lengths—*i.e.*, 160 to 220 yards away—and the *Algol* was apparently proceeding in an opposite direction; that he hard-a-starboarded and tore away the covering of his green light; that immediately afterwards he saw the red light of the *Algol* one or two lengths away; that he reversed full speed astern and gave three blasts, and the collision

happened. The engineer said the engines were just beginning to go astern at the moment of the collision. The look-out saw the loom of the *Algol*, but did not report it, waiting to make out what it was, and a few seconds after seeing the loom he saw the red light of the *Algol*. When he saw the loom the ships appeared to be crossing ships.

The story as told by the second mate of the *Algol*, who was in charge, was that he saw the loom of the *Embla* about three-quarters of a mile away, two to three points on the port bow, and received a report from the look-out; that he looked with his glasses, and, making out the ship, placed his red light in the screen, and shortly afterwards saw the *Embla's* green light at a distance which he reckons at half a mile; that he kept course and speed, but very shortly afterwards, seeing that a collision was inevitable, he reversed full speed astern and hard-a-ported. The engineer says the engines were just working astern at the collision.

The conclusions of fact I have arrived at are that the distance at which the *Algol* saw the *Embla* was not so great as three-quarters of a mile, but it was considerably more than the 220 yards or so at which the *Embla* says she saw the *Algol*. I think, on the evidence as a whole, it was probably something between a quarter and half a mile, a distance which the joint speeds would cover in one or two minutes. I think, also, that it is probable that the *Algol* exhibited her red light before the *Embla* exhibited her green, but that the two lights were exhibited very much about the same time; and the collision happened very shortly afterwards.

I do not think that either ship can be found guilty of delay in exhibiting her sidelight after she became aware of the other ship.

The plaintiffs have to establish that the loss of their cargo was due to the negligence of the defendants' servants on board the *Algol*, and if that were established it would still have to be considered whether it was not also caused by the negligence of those on board the *Embla*, and, if so, what the proportions of blame were.

The conclusion I have arrived at is that, unless the failure to carry lights by the *Algol* was negligence, and negligence contributing to the collision, this collision was solely caused by the fault of the *Embla*. In the first place, the officer in charge of the *Embla* was not aware of the *Algol* so soon as he ought to have been, owing to the neglect of the look out to report the loom of the *Algol* immediately he saw it. In the next place, his helm action was wholly wrong. It would have been hazardous, even if he had been entirely ignorant as to the direction in which the *Algol* was travelling, but it was altogether wrong when he knew that the *Algol* was approaching, even if he did not appreciate, as the look-out appreciated, that the courses were crossing, with the *Algol* on his starboard hand. If he appreciated it, it was doubly wrong. In the next place, if helm action is taken to a vessel in such circumstances as these, it is imperative that that action should be indicated by the proper sound signal, and none was given. And, lastly, the *Embla* had another vessel on the starboard bow, and that vessel approaching. Even if there was nothing to show definitely that the courses were crossing, yet there was a probability that they might be crossing, in which case the *Embla* was the give-way ship. In such circumstances the engines ought to have been reversed and way taken off at once.

These conclusions are in accordance with the views of the Elder Brethren, whose assistance I have had, and with whose advice I entirely agree. I find that the *Embla* was undoubtedly to blame for the collision.

The question remains whether the *Algol* was also to blame. Four charges were made. The first is that there was a bad look-out. I find that the look-out on board the *Algol* was good. Secondly, that the *Algol* ought to have seen the *Embla* was part of a convoy, and have either shown lights to the convoy or signalled to it, or taken steps to keep clear of it. No duty in this respect can be upon the *Algol* unless those on board knew, or ought to have known, that the *Embla* was part of a convoy. I find that they did not know, and that there was nothing to tell them, that the *Embla* was part of a convoy. They had seen ships on their starboard hand and starboard bow.

The *Embla* had, in fact, started in convoy with those ships, but she was the slowest ship of the convoy, and had evidently dropped behind, and was in fact not seen till twenty or twenty five minutes after the other ships of the convoy. I find no duty upon the *Algol* to anticipate that after the convoy had passed there was a straggler following at such an interval. The third charge was of not reversing soon enough. The *Algol* was the stand-on ship. I find that she reversed in proper time.

This leaves the fourth point, which under war conditions is of very general importance—namely, whether the *Algol* is to blame for navigating without lights. Of course, if the *Algol* is to blame for navigating without lights, the *Embla* must be to blame on the same ground.

The conclusion at which I have arrived is that, in the circumstances of the time and place of this collision, neither vessel was negligent in carrying her lights as they were carried—that is to say, not exhibited, but ready to be exhibited.

By an Order in Council, made under sect. 424 of the Merchant Shipping Act 1894, the Collision Regulations have been applied to the ships of Norway and Russia. That Order in Council directs that the regulations shall apply to the ships of Norway and of Russia, whether within British jurisdiction or not, and that such ships shall, for the purpose of such regulations, be treated as if they were British ships. This court must therefore treat them as applicable to each of the ships at the time of the collision.

The collision happened before the 9th June 1917, and it would therefore be immaterial to consider the effect of the order of the Lords Commissioners of the Admiralty made on that date under the Defence of the Realm Regulations, even if that order be applicable to foreign ships outside the jurisdiction.

Primâ facie the *Algol*, like the *Embla*, was not complying with the regulations. She was not carrying lights as required by arts. 1 and 2. But the articles must be read as a whole, and they include art. 27. In obeying arts. 1 and 2 the *Algol* was by art. 27 bound to have due regard "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."

Now, the war, and the complete disregard by the Germans of all rules of international law and the practice of civilised peoples in the conduct of war, had brought into existence at the time of, and before, this collision a new danger of navigation in an area of the high seas which certainly included the area in which the *Algol* and *Embla* were navigating, and to that danger all ships, not merely of the allies, but of neutrals, the *Embla* no less than the *Algol*, were exposed. Having regard to that danger, the Admiralty authorities, who were most concerned in securing the safety of ships passing between England and France from all dangers, whether of submarine attack or of collision, had recommended that lights should be carried only as they were in fact carried. The *Embla*, which was sailing under convoy, would have been permitted to join the convoy under no other conditions. The *Algol* was not under convoy, but was one of a number of ships which were crossing the Channel that night, and she was acting under that advice. The advice was applicable to the locality in which the ships were navigating, as clearly appears from the fact that the *Embla* was under convoy and received the advice.

The experience of this court has taught me that this advice has been very generally followed by seamen. If it be a question for the Elder Brethren, they tell me that to act in accordance with that advice at the time and place in question was to act as a prudent seaman would act, and I entirely agree. I hold that in carrying their lights as they did at the time and place in question both ships were doing that which was justified, and, indeed, called for by a due regard to the dangers of navigation, and that they were not negligent. The present is not a case in which the masters were setting up their own judgment against a positive direction of the regulations, but one in which a decision as to the best way of avoiding the dangers of the voyages in question had been arrived at by those best qualified to judge, and acted upon by navigators very generally. It is said that in carrying no lights the ships were only seeking their own safety, and ought not to be permitted to do so at the risk of others. But, in truth, if the *Algol* had been carrying her lights exhibited she might have acted as a beacon to a submarine, and have endangered not only herself, but all others in her neighbourhood. It is too narrow a view to say that she carried no lights for her own safety only.

I have so far based my decision on the words "due regard shall be had to all dangers of navigation." I prefer to rest it there, without deciding whether at the time and place in question the risk of submarine attack was a circumstance which rendered a departure from arts 1 and 2 necessary in order to avoid immediate danger. I incline, however, to the opinion that at the time and place in question the risk of submarine attack ought to be regarded as so immediate as to constitute immediate danger and a special circumstance within the second branch of art. 27; and, if so, I think that the departure from arts. 1 and 2, being recommended by the Admiralty authorities and generally adopted, ought to be treated as a departure necessary in order to avoid immediate danger.

In view of what I have said, it is unnecessary to decide the further point urged for the defendants —namely, that even if it was negligent of the *Algol* to be navigating without lights, yet, even so, those on board the *Embla* could by the exercise of reasonable skill and care have avoided the *Algol*, and that, therefore, the failure to carry lights was not in any degree a cause of the collision.

It is equally unnecessary to say what, if the *Algol's* failure to carry lights was negligence contributing to the collision, would be the proper proportions of blame, though it will be obvious from what I have said that I should, in that event, have held the *Embla* very much more to blame than the *Algol*.

The result is that there will be judgment for the defendants with costs.

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

Solicitors for the defendants, *Pritchard and Sons.*

Nov. 20 *and* 22, 1917.

(Before HILL, J. and Elder Brethren.)

THE ANDONI. (*a*)

Admiralty—Collision—Compulsory pilotage—Lines of communication—Shatt-ul-Arab river—Order issued by army commander in Mesopotamia—Pilot in charge of vessel—Burden of proof.

A steamship in charge of a pilot when proceeding up the Shatt-ul-Arab river came into collision with another steamship at anchor. The pilot was in charge in consequence of an order made by the officer commanding the British troops in Mesopotamia. The troops controlled both banks of the river to above the place at which the collision happened. In an action for damage brought by the owners of the steamship at anchor against the owners of the steamship under way, the latter admitted that the collision was caused by the negligence of the pilot who was in fact in charge and was navigating their vessel, but alleged that he was compulsorily in charge, and that they were not liable for the damage.

Held, that the officer in command of the troops had authority to issue orders to ensure the safe navigation of the river, which served as one of the chief lines of communication for the army; and that, as the defendants had proved that the pilot was in charge in consequence of that order and the plaintiffs had not shown that, though the pilot was compulsorily on board his duty was merely to give advice as to the navigation, the plea of compulsory pilotage succeeded, and the defendants were not liable for the damage done.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Seistan.*

The defendants were the owners of the steamship *Andoni.*

The *Seistan* was at anchor in the Shatt-ul-Arab on the 7th Nov. 1916, when she was run into by the steamship *Andoni* proceeding up the river.

The owners of the *Andoni* admitted in their defence that the collision was caused by the negli-

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

gent navigation of the *Andoni*, but they alleged that the negligence was that of the pilot who was compulsorily in charge.

The plaintiffs in their reply denied that the pilot was compulsorily in charge.

The case was tried on certain admissions which are set out in the judgment.

Aspinall, K.C. and *H. C. S. Dumas* for the defendants.—The pilot was not selected by the defendants and was not their servant; they are not responsible for his negligence:

The Penrith Castle, (1917) P. 209.

A pilot is taken on board to conduct the ship:

Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 742.

If he is conducting the ship the defendants are not liable for his negligence:

The Nord, 13 Asp. Mar. Law Cas. 606; 116 L. T. Rep. 351; (1916) P. 53.

Both these vessels are British vessels. The defendants have proved that the pilot was in charge as a consequence of an order given by the officer commanding the troops; the plaintiffs are therefore bound to show that the pilot was only on board in an advisory capacity if they wish to recover this damage. The pilot in this case does not occupy the position the pilot occupied in the cases of

The Augusta, 6 Asp. Mar. Law Cas. 161; 57 L. T. Rep. 326;
The Guy Mannering, 4 Asp. Mar. Law Cas. 553; 46 L. T. Rep. 905; 7 Prob. Div. 52, 152;
The Agnes Otto, 6 Asp. Mar. Law Cas. 119; 56 L. T. Rep. 746; 12 Prob. Div. 56.

Laing, K.C. and *Stephens* for the plaintiffs.—There is nothing in the orders to show that the order is *intra vires*. The Defence of the Realm Regulations do not empower the commander of an army to make such an order as this. It does not follow that a pilot is compulsorily in charge because he is compulsorily on board:

Steamship Beachgrove Company v. *Aktieselskabet Fjord of Kristiania*, 13 Asp. Mar. Law Cas. 188; 113 L. T. Rep. 1124; (1916) 1 A. C. 364.

Those who set up the defence of compulsory pilotage must prove it:

Clyde Navigation Company v. *Barclay*, 3 Asp. Mar. Law Cas. 390; 36 L. T. Rep. 379; 1 App. Cas. 790.

HILL, J.—In this case the *Andoni*, under way, was in collision with the *Seistan*, at anchor, on the 7th Nov. 1916, in the Shatt-ul-Arab, below Bussorah, about off Abu Kassib. It is admitted that the collision was caused by the negligent navigation of the *Andoni*. The defendants say that, notwithstanding that, they are not liable, because the fault was the fault solely of a pilot who was compulsorily in charge of the navigation. The onus is upon the defendants. The case was tried on admissions. The following facts are admitted: (1) That the collision was solely caused by the negligence of the pilot on board the *Andoni*. (2) That the said pilot was duly licensed for the waters in which and where the collision occurred. (3) That the said pilot was directing the navigation at all material times. (4) That the Lords Commissioners of the Admiralty on the 19th Sept. 1916 issued a Notice to Mariners, No. 1042 of 1916, which contains the following:

Persian Gulf.—Shatt-ul-Arab (Basra River).—Compulsory Pilotage.—Details: Mariners are warned that pilotage in the Shatt-ul-Arab is compulsory. Pilots are at present stationed on the Shatt-ul-Arab Light Vessel off the river entrance, from which the pilot flag is flown on the approach of any vessel. The following cautionary note is to be inserted on the charts: "No vessel is allowed to cross the outer bar without a pilot."—Authority: Bombay Notice, No. 116 M. of 1916.

(5) That the Director of the Royal Indian Marine on the 24th July 1916 issued the following notice, No. 116 M. of 1916:

Persian Gulf.—Shatt-ul-Arab River.—Compulsory Pilotage.—Shipping is hereby warned that pilotage in the Shatt ul-Arab or Basra river is compulsory, and that no vessel is to attempt to cross the out r bar without a pilot except by special order.—Authority: The Director of the Royal Indian Marine, Bombay.

The notice is signed by the Director of the Royal Indian Marine. (6) That the pilot was on board by reason of such notices.

A copy of a letter of the 24th May 1917 from the Director, Royal Indian Marine, to the Secretary to the Government of India, Marine Department, is also admitted. The letter is as follows:

In reply to your letter No. 6904, dated the 11th May 1917, relative to an action pending in the Admiralty Division between the owners of the steamship *Andoni* and the owners of the steamship *Seistan*, I have the honour to inform you that the Director of the Royal Indian Marine is the issuing authority for all notices to mariners in Indian waters. The order notifying compulsory pilotage for the Shatt-ul-Arab river was made by the army commander in Mesopotamia, and, the same being communicated to me by the senior maritime transport officer, Basra, I issued the Notice to Mariners for the general information of the maritime community.

On the evidence of this letter I find that the army commander in Mesopotamia had made an order notifying compulsory pilotage for the Shatt-ul-Arab river.

Those are all the facts. Two points have been argued. First, it is said for the plaintiffs that the defendants have not proved that there was any compulsion to put the pilot in charge of the navigation; that it is quite consistent with the admitted facts that he was to be taken on board in an advisory capacity; and that it is for the defendants to prove that the master at the time and place in question was compelled to allow the pilot to direct the navigation. Secondly, it was argued that there is no evidence on which the court can find that the army commander in Mesopotamia had authority to make an order compelling shipmasters to hand over the navigation to the pilots.

As to the second point, I think the court must take notice that at the time in question Turkish territory on the bank of the Shatt-ul-Arab, from the mouth to a point further up than Bussorah, was in the military occupation of the British troops, and was therefore under the military administration of the commander of the British troops. And, whatever the limits of the authority of the military commander of an army of occupation, this at least must be included, that he has authority to make orders for the safety of his means of communication. His principal means of communication was the Shatt-ul-Arab. I

entertain no doubt that he had authority to make orders relating to the navigation of ships proceeding up the Shatt-ul-Arab, and, if he thought fit, to order the masters of such ships to put the navigation into the charge of pilots, and that obedience to such orders had for sanction the penalties which the military commander of an army of occupation can inflict.

I hold that the pilot was on board the *Andoni* by compulsion of the army commander which was, in my view, compulsion of law. But in any case it was a compulsion in fact.

As to the first question, as to whether the pilot was by compulsion not merely on board, but in charge of the navigation, it is not very satisfactory that the court has to try this case without having before it the precise terms of the order of the army commander. The parties, however, have chosen to try the case upon the admitted facts and documents, and I must make the best of them. The question, I think, is one of fact, namely, was this pilot, who was by compulsion on board and who was actually directing the navigation, as admitted—was he in fact entitled to supersede the master and take charge of the navigation, and was the master bound to permit him so to do?

In my opinion a pilot, in the mouths of British authorities, *primâ facie* means, to use Lord Tenterden's words, "A person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port."

And where you find that pilotage is compulsory, that, *primâ facie*, means, in the mouths of British authorities, that the pilot is entitled, and the master is bound to permit him, to conduct the ship—that is, to take charge of the navigation of the ship. That is the *primâ facie* meaning, and when it is shown by defendants that pilotage is declared to be compulsory, at any rate in waters under British control, the burden of proof is shifted, and it is for the plaintiffs to show that, though compulsory, yet the pilot's function is not to take charge, but to advise. In cases like *The Augusta* (*ubi sup.*) and *The Guy Mannering* (*ubi sup.*) evidence was given upon which the plaintiffs discharged the onus so shifted upon them. In the present case there is nothing beyond the fact that a competent British authority has declared pilotage to be compulsory in waters over which that authority had control, unless it be the fact (which at any rate does not help the plaintiffs) that the pilot was actually directing the navigation. I hold, upon the evidence before me, that the pilot was by compulsion in charge of the navigation.

The defence of compulsory pilotage therefore succeeds, and, as there was no other issue on the pleadings, there must be judgment for the defendants with costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Lawrence, Jones*, and *Co.*, agents for *Forwood, Williams*, and *Grindrod*, Liverpool.

Dec. 12 *and* 14, 1917.

(Before HILL, J. and Elder Brethren.)

THE CARDIFF HALL. (*a*)

Admiralty — Collision — Steamships navigating without lights—Finding of no negligence on either vessel—Costs.

Two steamships were steaming at night, in accordance with orders received from the Admiralty, without lights. They came into collision and both sustained damage. The owners of one of them, eighteen months after the collision, issued a writ, whereupon the owners of the other took proceedings to recover their damage. The court held that neither vessel had been guilty of negligence. On the question of costs:

Held, that in the circumstances, as it appeared that the litigation had been caused by the plaintiffs issuing their writ, the claim would be dismissed with costs to the defendants, and the counter-claim would be dismissed with costs to the plaintiffs.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Mauretania*.

The defendants were the owners of the steamship *Cardiff Hall*.

The *Mauretania* was a steamship of 30 704 tons gross register, and was on a voyage from Madras to Naples in the service of the Admiralty.

The *Cardiff Hall* was a steamship of 3994 tons gross register, and was on a voyage, under sealed orders, from Malta with a cargo of coal and general goods.

The collision took place in the early morning in July 1915 in the Greek Archipelago.

In accordance with orders given by the Admiralty neither vessel was carrying lights. The court found that the night was dark and that the steamships were so close when they saw and acted for each other that nothing they did or could have done could have prevented a collision, and that, even if they had done something which contributed to the collision, or had omitted to do something which might have prevented it, the failure to adopt the right manœuvre could not be said to be negligence.

Judgment was entered for the defendants on the claim, and for the plaintiffs on the counter-claim.

Laing, K.C. and *Raeburn* for the plaintiffs.—The result of the case is that the collision was caused by inevitable accident, and each side should pay their own costs:

The Marpesia, 1 Asp. Mar. Law Cas. 261; 26 L. T. Rep. 333; L. Rep. 4 P. C. 212.

It would be inequitable if the plaintiffs had to pay the bulk of the costs merely because they were plaintiffs, which would be the result if there was judgment for the defendants on the claim with costs and judgment for the plaintiffs on the counter-claim with costs.

Bateson, K.C. and *Dumas* for the defendants.—There should be judgment for the defendants on

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

the claim; the claim fails, and it should be dismissed with costs to the defendants:

The Batavier, 6 Asp. Mar. Law Cas, 500; 62 L. T. Rep. 406; 15 Prob. Div. 37.

If that is done and the counter-claim is also dismissed with costs, the defendants will be better off than the plaintiffs, as the costs of the counter-claim are trifling; but there is nothing inequitable in that, for, if the plaintiffs had not started the proceedings, the defendants would have allowed the loss to lie where it fell. The plaintiffs caused the litigation.

HILL, J.—I have made orders of both kinds, and have purposely drawn distinctions in cases of this sort. Where both sides have voluntarily gone into litigation I have ordered each side to pay their own costs, it being a mere accident that the one party is plaintiff and the other defendant. In this case, however, there would have been no litigation if the plaintiffs had not issued their writ. There will be judgment for the defendants on the claim with costs, and for the plaintiffs on the counter-claim with costs. I think that is the general rule unless there is some reason for departing from it, and I do not see any reason in this case.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the defendants, *Holman, Fenwick*, and *Willan*, agents for *Lean* and *Lean*, Cardiff.

Jan. 21 *and* 22, 1918.

(Before HILL, J. and Elder Brethren.)

THE EMLYN. (*a*)

Admiralty—Collision—Steamships in convoy in fog—Orders from French naval authorities—Failure to stop on hearing fog signals—Art. 16 *of the Collision Regulations.*

The steamship S. *was proceeding on her voyage, following her escort, at a speed of about three knots in a dense fog. Both the* S. *and her escort were sounding signals for the fog. The* S. *heard the fog signal of other vessels ahead, but kept her speed, following the escort, and sighted the* E. *about* 300*ft. off. The* E. *was proceeding in convoy and was following her escort, making eight knots though she had been in a fog for an hour and was sounding her whistle for the fog. Those on board her alleged that they heard no fog signals from the* S. *or the escort of the* S.*; they saw the* S. *about* 300*ft. off and a collision happened, the stem of the* E. *striking the port side of the* S. *On the hearing it was argued that, if the* S. *and the* E. *were guilty of a breach of art.* 16 *of the Collision Regulations, the breach of the regulations was excused by orders received from the French naval authorities, and that the submarine menace justified a departure from the regulations. Those on the* E. *also alleged that, even if she had heard fog signals ahead, she could not have stopped because there were other vessels in the convoy following her.*

Held, that the order received could not be construed as a direction to depart from art. 16; *that on the evidence there was no such menace from submarines as to justify the* E. *proceeding at such a speed in the fog; that the presence of vessels astern of her did not justify the* E. *in not stopping; and that both vessels were to blame—the* S. *being held one-third and the* E. *two-thirds to blame.*

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Sheila*.

The defendants and counter-claimants were the owners of the steamship *Emlyn*.

The action was heard *in camerâ*.

Such of the facts and arguments which admit of publication are stated in the judgment of Hill, J.

Art. 16 of the Collision Regulations is as follows:

16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Laing, K.C. and *J. B. Aspinall* for the plaintiffs.

Bateson, K.C. and *Lewis Noad* for the defendants.

HILL, J.—The collision in this case took place on the 14th June 1917, in fog so thick that each ship saw the other at a distance which is pleaded at about 300ft., but according to the evidence was less than that. The *Sheila* was passing up the coast following her escort. The *Emlyn* was proceeding down the coast, and formed part of a convoy. She was immediately following her escort, and there were other vessels of the convoy behind her.

The case for the plaintiffs is that the *Sheila* was following her escort; that fog had come on half an hour before, and during that half-hour she had not had the escort in sight, but was following her at a speed of two knots, and sounding for fog, as was the escort. For some twenty minutes the *Sheila* heard the fog whistles of several steamers on the port bow, and still continued at two to three knots. She passed the escort of the *Emlyn*, and then saw the *Emlyn* with her starboard side open four points on the port bow and distant, according to the pleadings, 300ft. to 400ft., but according to the evidence 155ft. to 230ft. The engines were immediately put full speed astern, but the collision happened, the stem of the *Emlyn* striking the port side of the *Sheila* abreast of No 1 hold.

The case for the defendants is that the *Emlyn* was making about eight knots and sounding her whistle for fog; that she had entered the fog about an hour before the collision, and had continued to follow her leading escort by the wake and the sound of her whistle. No whistles were heard from either the *Sheila* or her escort, and the *Sheila* was sighted about 300ft. away on the starboard bow, on a bearing which, according to the evidence, was about two points. She was seen to be swinging under a port helm, showing her port side, and the engines of the *Emlyn* were immediately put full speed astern.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

Witnesses from each side in placing the models made the angle of the blow some six or seven points. In their evidence they spoke of three to four or four to five points. I doubt if it was as broad as shown by the models, but it was certainly, on all the evidence, not a fine angle, but one of at least four points, and that involves either that one or both ships were on a very different course from that alleged by them, or that one or both altered considerably from that course. This raises questions of fact which upon the evidence are very difficult to determine. I have only seen in court two witnesses from the *Emlyn*; the rest of her evidence is on paper, and so is all the evidence of the *Sheila*. I have not had the advantage of having any evidence from either of the escorts.

Apart, however, from these difficult questions, I have no doubt upon the admitted facts that each ship is to blame for breach of art. 16. The speed of the *Emlyn* was admittedly eight knots. As to the speed of the *Sheila*, having regard to the time she left port, to the tide, and to the place of collision, I see no reason for doubting that she was making during that period of fog two or three knots, a moderate speed. Admittedly, hearing whistles forward of the beam, the *Sheila* did not stop her engines, but continued at her moderate speed until she sighted the *Emlyn*. As to the *Emlyn*, she never stopped her engines before she sighted the *Sheila*, but her evidence is that she never heard any whistles forward of the beam except the whistles of her own escort.

On these admitted facts the *Emlyn* is clearly to blame for excessive speed, and the *Sheila* for not stopping her engines, unless there were special circumstances justifying the speed of the one and the failure to stop the engines of the other. I think also that the *Emlyn* is to blame for insufficient look out if she did not hear the whistles of the *Sheila* and her escort, which I have no doubt were being sounded, or for not stopping her engines if she did. She says she did not hear them. No doubt there were many whistles blowing, but, apart from the *Emlyn's* escort, only the *Sheila* and the *Sheila's* escort were sounding ahead at the material time. I expect the *Emlyn* was so intent on following the wake of her escort that she neglected to keep alert to the chance of approaching vessels.

Was the speed or was the non-stopping of the engines justified? It is said that they were, first, because of orders received from the French Admiralty authorities; and, secondly, because the circumstances of the war and the risk of submarines justified a departure from the rules. I cannot agree.

First, as to orders. They were, to the *Sheila*, "Follow the escort; obey all his orders"; and to the *Emlyn*, "Follow escort—speed will be regulated by the patrol ahead—at eight knots." These orders were not directed to speed in fog, and, even assuming they were compulsory upon the ships, as to which there is no evidence, they cannot be construed as orders to disobey art. 16. Nor can the facts that the escort continued at eight knots and did not stop her engines excuse the convoyed ship from obeying art. 16. It was negligence in the escort and no less negligence in the convoyed ship.

As to the second point, there is no evidence on which I can find that dangers of submarines in the locality in question made it necessary to go full speed in a fog or not to stop the engines and navigate with caution. I can in the present case see no necessity in either the escorting or the escorted ship for such conduct.

It is further contended for the *Sheila* that the non-stopping of the engines did not contribute to the collision. I cannot agree. If it had been done, the position would have been quite different and the ships would not have been in this collision.

It is further contended for the *Emlyn* that her not stopping (if she had heard whistles ahead) was justified by the presence of the rest of the convoy astern. The question does not really arise, for she says she did not hear whistles ahead. But, if it does arise, I have asked the Elder Brethren whether in the circumstances there was anything to prevent the *Emlyn* stopping, and whether it was cautious and prudent navigation to continue on without stopping. They advise me that it was not. In this connection I will quote the observations of Gorell Barnes, J. in *The Star of New Zealand* (1899, *Shipping Gazette*, Nov. 6): "If the vessel stopped, it does not follow that she was to remain stationary in the place where she stopped her engines. She would naturally have some way on, and as soon as she heard whistles approaching astern, if they got too close, she could move on again; and also the other vessels which might be astern would be equally bound to stop, as she was, for the vessels which they found ahead of them. Therefore the Elder Brethren are of opinion that there was no danger for the vessels astern which would, at any rate, justify the master in neglecting to stop in due and proper navigation for a vessel ahead." Both vessels, therefore, are to blame for a breach of art. 16. But so far the fault of the *Emlyn* going at eight knots is much greater than the fault of the *Sheila* going at two to three knots and not stopping. It is said, however, that the *Sheila* must have ported across the line of the approaching convoy whose whistles she had heard, and therefore that she must be to blame for taking helm action. The burden of establishing this is on the *Emlyn*. It is not to my satisfaction established. The evidence is in direct conflict, and, having examined all the probabilities, they seem to me to be equal on both sides. I dislike deciding a case on onus, but, where the facts and probabilities really leave the matter in complete doubt, I ought not to decide the question in the absence of convincing evidence. The case is therefore left on the breach of art. 16.

I find both vessels to blame in the proportion of two-thirds to the *Emlyn* and one-third to the *Sheila*.

Solicitors for the plaintiffs, *Bolam, Middleton, and Co.*, Sunderland.

Solicitors for the defendants, *Botterell and Roche*, agents for *Downing* and *Handcock*, Cardiff.

Nov. 7, 1917, *Jan.* 25 *and Feb.* 1, 1918.

(Before HILL, J. and Elder Brethren.)

THE PURFLEET BELLE. (*a*)

Admiralty—Collision—Steamship under way during prohibited hours—Thames and Medway Traffic Regulations—Defence of the Realm (Consolidation) Regulations 1914*—Steamship at anchor without lights—Duty to warn approaching vessels.*

A steamship proceeding down the Black Deep on a dark night when, according to the traffic regulations for the Thames and Medway, she ought not to have been under way, collided with a vessel at anchor which, in accordance with the above regulations, was showing no light. Those on the vessel under way alleged that she had received orders to be at a certain place at a certain time, which necessitated her being under way. Those on the vessel at anchor alleged that they showed a light to the vessel under way and hailed her in sufficient time to enable her to keep clear.

Held, that both vessels were equally to blame—the vessel under way for being under way, for the orders received by her did not necessitate her getting under way when she did, and did not necessitate her going down the Black Deep; and the vessel at anchor was to blame for bad look-out and that, even if she could not show a light, she could have rung her bell or given some other warning of her presence when she saw the vessel under way approaching.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Sir Francis*.

The defendants were the owners of the steamship *Purfleet Belle*.

The collision between the two steamships occurred about 4.15 a.m. on the 20th March 1917, in the Black Deep, in the Thames Estuary.

The *Sir Francis*, in accordance with the traffic regulations, had come to anchor about sunset the night before, not far from the Sunk Head Buoy. In accordance with the traffic regulations, she was showing no light, but those on board her alleged that, when the *Purfleet Belle* approached, a strong light was shown to the approaching vessel, and she was also hailed.

Those on the *Purfleet Belle* alleged that they had received certain orders from the Admiralty to be at a certain place at a certain time, which necessitated their vessel being under way; that no light was shown on the *Sir Francis*, and that the loom of that vessel was only seen about a ship's length off, when it was impossible to avoid her.

The action was heard *in camerâ*.

Such facts and the arguments on the points raised under the traffic regulations that can be published are stated in the judgment.

Aspinall, K.C. and *Balloch* for the plaintiffs.

Bateson, K.C. and *D. Stephens* for the defendants.

HILL, J.—The collision in this case happened early on the morning of the 20th March 1917 in the Black Deep. The *Sir Francis*, a steamship of 1991 tons gross and 280ft. long, laden, was at anchor, heading about N. The *Purfleet Belle*, a steamship of 1401 tons gross and 269ft. long, laden, had been at anchor, and was under way, proceeding down the Black Deep towards the Sunk Head. She was one of several vessels which were so proceeding during that early morning, and of these the *Amulet* was the one nearest ahead of her. The collision happened more than one hour before sunrise. The *Sir Francis* was not exhibiting any anchor lights. The *Purfleet Belle* was exhibiting her navigation lights—two masthead lights, side lights, and stern lights. There was some question whether she had two or one masthead lights, but I accept the evidence that she had two masthead lights.

The wind was strong from the N.W., and the tide flood, setting to the S.W., with a force of one knot. There was some conflict of evidence as to the weather. It was undoubtedly a night of heavy showers, but, on the evidence as a whole, I find that it was not actually raining at the material time. It was, however, overcast, and there was no moon, and I do not doubt that it is properly described as very dark.

The case for the *Sir Francis* was that the lights of the *Purfleet Belle* were sighted approaching and heading for the *Sir Francis*; that an electric torch was shown from the bridge in ample time for the *Purfleet Belle* to take action, and that the *Purfleet Belle* was hailed, also in time for her to take action; but the *Purfleet Belle* did not keep clear, and, though she ported and twice sounded a short blast, did it too late, and, having considerable speed, struck with her stem the port quarter of the *Sir Francis*.

The case for the *Purfleet Belle* was that she was proceeding on a heading of N.E. ½ N., following the stern light of the *Amulet*, and making about five knots; that the loom of the *Sir Francis* was seen ahead, distant, as pleaded, about one length—*i.e.*, about 280ft., or, according to the evidence, less than two lengths; that the *Purfleet Belle* hard-a-ported, without giving any whistle signal, and went full speed astern, but had not time to clear the *Sir Francis*. According to the defendants, no light at all was shown by the *Sir Francis*.

The allegations of negligence made against the *Purfleet Belle* are that she ought not to have been under way at all; that, if she was justified in being under way, she ought to have been proceeding with the utmost caution, and that her speed was excessive and her look-out deficient; that ample warning was given her by the showing of the electric torch, and that, even if no torch had been shown, she ought to have seen the ship herself in ample time to avoid her.

On the other hand, it is charged against the *Sir Francis* that she ought to have seen the *Purfleet Belle* approaching, and, being unlighted, that she ought to have given the *Purfleet Belle* warning in ample time by showing an adequate light; that she gave no warning at all, and that the reason of that was that she had a bad look-out. Alternatively, it is said that the *Purfleet Belle* was justifiably under way and was proceeding at a proper speed, and that, if the *Sir Francis* was justified in showing no light, the collision occurred without negligence on the part of the *Purfleet Belle*.

Before considering the difficult questions which arise under the Traffic Regulations made under reg. 37 of the Defence of the Realm Regulations, it is necessary to decide certain questions of fact. [His Lordship then dealt with the evidence, and

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

held that the *Purfleet Belle* was proceeding at a speed of seven knots at least, and that those on the *Sir Francis* had not shown a torch so as to be visible to the *Purfleet Belle*, and proceeded:]

So far, the facts as I find them are: First, the *Purfleet Belle* was proceeding down at a speed of at least seven knots. Secondly, the *Sir Francis*, at anchor, unlighted, and with the *Purfleet Belle* approaching her and showing all her lights, showed no light and gave no warning to the *Purfleet Belle*, except by hailing her when it was too late for the *Purfleet Belle* to avoid collision. Thirdly, I find that the *Purfleet Belle*, as soon as she did see the loom of the *Sir Francis*, took all the action possible—she hard-a-ported and went full speed astern. I do not believe she sounded any whistle, but that is important only as it affects questions of credibility. Her action very nearly avoided the collision, for the *Sir Francis* was struck 16ft. from the stern.

But the question remains, as a question apart from the Traffic Regulations, whether the *Purfleet Belle* ought to have seen the *Sir Francis* sooner. If she had, she would have taken action sooner, and a very short time would have made all the difference. The master of the *Purfleet Belle* says he made out the loom at not more than two lengths, and that the chief officer on the look-out forward reported it at the same time; and it is said that, on such a night as it was, it could not be visible at a greater distance. Further, as justification for not seeing her sooner, it is said that the *Amulet* was between the *Sir Francis* and the *Purfleet Belle*, and that the glare of the stern light of the *Amulet* would obscure the loom of the *Sir Francis*.

I accept the evidence that the *Purfleet Belle* was following the *Amulet*, and that the *Amulet* had the *Sir Francis* right ahead before she ported, and, therefore, that, until the *Amulet* hard-a-ported for the *Sir Francis*, she was between the *Purfleet Belle* and the *Sir Francis*. But upon the evidence as a whole I do not think the *Purfleet Belle* was as close behind the *Amulet* as she says, or anything like it, but, for all that, a light interposed between the *Purfleet Belle* and the *Sir Francis* would make it more difficult to see the *Sir Francis*.

The question is, in these circumstances, Ought the *Purfleet Belle*, with a good look-out, to have seen the loom of the *Sir Francis* in time to avoid her? I have asked the Elder Brethren whether, with a good look-out, the loom of the *Sir Francis* ought to have been seen in time to avoid her, and they advise me that it is doubtful. And, if doubtful, I cannot hold that the *Purfleet Belle* was negligent in not seeing the loom sooner.

These being the facts, questions of some difficulty arise upon the traffic regulations under the Defence of the Realm Regulations, which were applicable to these vessels at the date of the collision. They are to be found in the volume of Notices to Mariners, which was put in. By these regulations, during hours which included the time of the collision, vessels were forbidden to "remain under way" in that part of the Black Deep where the collision happened, and vessels at anchor there were forbidden to "exhibit any lights." The *Purfleet Belle* was under way in direct disobedience of that regulation.

It is said that she was entitled to be under way because she had received specific orders from the Admiralty authorities which obliged her to be under way. No doubt, if it had been established that the order was one which could only be obeyed by being under way in that channel at a time forbidden by the regulation, there would be ground for saying, both being under the powers given by the Defence of the Realm Act, that the specific order overrode the general regulation. But it has not been established that the specific orders—which, so far as proved, were that the *Purfleet Belle* was to be at a particular place at an appointed time—necessarily involved that the *Purfleet Belle* should anchor where she did or get under way when she did, or travel by the channel she did. She probably chose the best and safest way of carrying out her orders. But, unless her being under way in prohibited hours was either explicitly or by necessary implication sanctioned by the orders she received, she cannot, in my opinion, justify her disobedience to the regulation. It has not been proved that she was so sanctioned, and I must hold that she was improperly under way.

Being improperly under way, and knowing that vessels might be at anchor, and, if at anchor, then without lights, a very high degree of care and skill was required of her—care in speed and vigilance, skill and promptitude in action. In these circumstances I am advised, and I agree, that to proceed at a speed of seven knots in a channel like this, where it was known that some ships were and others might be at anchor, unlighted, was a wholly wrong proceeding. That speed was a contributing cause of the collision, and certainly of damage, and for it the *Purfleet Belle* must be held to blame.

The *Sir Francis* was justifiably at anchor without anchor lights. The regulation forbade her to "exhibit any lights." This does not, I think, refer to lights other than the sea regulation lights, for such other lights are forbidden by another regulation which will be found at p. 24 of the book. But the two regulations together did forbid her to exhibit any light.

Does that mean that she might not show a warning light even to a vessel which is approaching her so as to involve risk of collision? Good seamanship would certainly require that she should do so. But, much as I should like to, I do not see how I can read into the regulations an exception such as "unless it is necessary to avoid immediate danger." The Traffic Regulations contain nothing like art. 27 of the Sea Regulations.

At the same time, I am very strongly of opinion that a ship which is lying at anchor without lights, especially in a channel like the Black Deep, and at a time when she knows that, with permission, vessels may be under way and that, in fact, at least one vessel is under way, has a very special duty of keeping a most vigilant lookout, and of giving such warning as is possible on the approach of any vessel which is under way.

This duty is recognised in the regulations relating to a different area at pp. 44 and 45 of the book, where the following statement appears: "(1) This order (with regard to the non-exhibition of lights) does not absolve the masters of craft at anchor from keeping a sharp look-out and giving warning on the approach of any craft under way, and the duty exists whether the regulation calls

attention to it or not. It is recognised by the case put forward by the plaintiffs, who say they discharged it by the exhibition of the torch. Did the *Sir Francis* fulfil that duty? She did nothing except hail at the very last. Was there anything she could do? If there was objection to her sounding her whistle on the ground that it might be mistaken for one of the authorised signals of a vessel under way, there was no such objection to her ringing her bell. She did nothing, because her look-out was deficient.

In such circumstances as those which existed an officer ought to have been on the bridge. The chief officer had left the bridge to call the second officer, who was late in turning out for his watch. It was left to the A.B. on the bridge to keep a look-out, and, what is more important, to decide whether the time had come to give any warning to an approaching vessel and to give the warning. The chief officer had just returned to the poop. But, as I have found, the hailing was at the very last. Before the collision several ships had passed down, but those on board the *Sir Francis* were aware of only one.

I hold the *Sir Francis* to blame for bad look-out and consequent failure to give warning of her presence to the *Purfleet Belle*. I hold that this fault was a cause contributing to the collision. I pronounce both vessels to blame and in equal degree.

Solicitors for the plaintiffs, *C. E. Harvey*.

Solicitors for the defendants, *Holman, Fenwick, and Willan*.

Feb. 1 *and* 2, 1918.

(Before HILL, J. and Elder Brethren.)

H.M.S. HYDRA. (*a*)

Admiralty—Collision—Steamship navigating without lights — Vessel seen approaching — Duty to exhibit lights — Time at which lights should be exhibited.

A Danish steamship was proceeding on a voyage at night. In accordance with instructions and to avoid the danger of submarines, she was not exhibiting under-way lights. She had her side lights lit, but they were not exhibited, and her masthead light was not exhibited or lit. Those on board her sighted the green light of a British warship on their port hand on a crossing course. They then held their red light level with the bridge rail, but did not exhibit their masthead light, with the result that those on the British warship thought the Danish steamship was a sailing ship, and, as there was very little wind, attempted to cross ahead of her and a collision occurred.

Held, that a vessel proceeding without lights to avoid the danger of submarines was only bound to exhibit lights in time for the give-way vessel to take proper action to avoid collision; that, though those on the Danish steamship were negligent in not showing her masthead light, that was not a fault which contributed to the collision, as those on the British warship should have appreciated from the non-alteration of the bearing of the red light that the vessel exhibiting it was a steamship, and that it was their duty to go astern of her.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

DAMAGE ACTION.

The plaintiffs were the owners of the Danish steamship *Nelly*.

The defendant was Lieutenant Colin S. Thomson, R.N., commander of His Majesty's torpedo boat destroyer *Hydra*.

The action was heard *in camerâ*.

The facts and arguments, so far as they can be published, are stated in the judgment.

Laing, K.C. and *Stephens* for the plaintiff.

Aspinall, K.C. and *Dunlop* for the defendant.

HILL, J.—This is an action by the owners of the Danish steamship *Nelly* in respect of a collision between the *Nelly* and His Majesty's ship *Hydra*, which happened on the evening of the 11th Feb. 1917 in the English Channel. The *Nelly* is a steamship of 1514 tons gross and 250ft. long, and was laden. The night was dark, the weather clear, and there was practically no wind. The *Nelly* and the *Hydra* were on converging courses, which are correctly stated in their pleadings, the difference between the courses being almost exactly seven points, and the *Hydra* had the *Nelly* on her starboard side, and the *Nelly* had the *Hydra* on her port side. The speed of the *Hydra* was more than twice the speed of the *Nelly*. The *Nelly* was not carrying any lights exhibited. She had her side lights but not her masthead light lit and ready to be shown. The *Hydra* had her regulation lights exhibited.

The case made for the *Nelly* was that she saw, two or three miles distant and about two points before the beam, the masthead and green lights of the *Hydra*; that she kept course and speed; that after an interval, but still several minutes before the collision, she showed her red light, the chief officer lifting up the lamp and holding it on the bridge rail; that when about five or six lengths away she sounded a warning signal of two short and one long blasts, and that at the last she went full speed astern and sounded three short blasts.

The case for the defendant is that the *Nelly's* red light was seen two or three points on the starboard bow at a time which Lieutenant Thomson says was three or four minutes before the collision; the light was watched, and finally, as no masthead light was seen, was judged to be the port light of a sailing ship; that, as there was no wind, it was rightly assumed to be safe to pass ahead of her, and the *Hydra* accordingly continued to keep her course and speed until, when close to, the *Nelly* was made out to be a steamer; that the helm was then put hard-a-starboard, two short blasts were sounded, and both engines were ordered full speed astern with the intention of turning away from the *Nelly* in a circle, but the collision happened before the engines were got working astern; that just before the collision an indistinguishable sound signal was heard from the *Nelly*.

The charges made against the *Hydra* were not keeping out of the way and attempting to pass ahead. The charges against the *Nelly* were failing to show the masthead light, showing the red light too late and in an improper manner, and reversing too late.

In the circumstances of the time and place the *Nelly* was justified in not carrying lights. If the red light, without the masthead light, was suffi-

cient, I find that the *Nelly* showed the red light in ample time to enable the *Hydra* to take such action as would avoid collision. I think the *Nelly* was not bound to show the light sooner than that. It would go far to defeat the object for which lights are not carried exhibited if they have to be shown to an approaching ship at whatever distance she may be sighted. But they must be shown in ample time to enable the other ship to take action, if the duty of action lies on her, or to warn the other ship of the presence of the showing ship, if the duty of action lies on her.

I think the evidence of the *Nelly* exaggerates the distance at which the red light was shown, but it was shown in ample time to inform the *Hydra*—to give the *Hydra* time to act. I find the red light was displayed in a proper manner, so far as the *Hydra* was concerned. It mattered not to the *Hydra* whether the lamp was put in the screen or rested on the rail and held steadily, as I find it was, by the mate of the *Nelly*. I find that the *Nelly* reversed in proper time. It is true the master says that he reversed when the collision was inevitable. But the ships were crossing, and the *Nelly* was not entitled to reverse so long as the *Hydra*, unaided, could still avoid the collision; and, having regard to the speed of the *Hydra*, the time between the moment when the *Hydra* ceased to be able to avoid the collision by her own action alone and the moment when the collision became inevitable was so short that it is impossible to say that the *Nelly* negligently delayed her reversing.

The fault, if fault there were, of the *Nelly* was the failure to show the masthead light. In my opinion, whatever ought to be the view of the duty to-day, there was at the time and place of the collision nothing, either in the instructions which the *Nelly* had received or in any generally recognised rule of prudent conduct, to justify a steamship in not carrying her masthead as well as her side lights ready to be shown, and, if time permitted, after becoming aware of the other steamer, in not showing the masthead light as well as the side light. There was time for the *Nelly* to show her masthead light, but she had not got it ready, and did not show it. I think this was a fault. But did it contribute as a cause to the collision? The red light was displayed, according to the plaintiffs' evidence, some five minutes before the collision, and according to Lieutenant Thomson, who gave his evidence with conspicuous fairness, some three or four minutes before the collision. And, as substantially the bearing of the *Nelly* did not change, it ought to have been obvious that the red light was the light of a vessel under way approaching the *Hydra's* course. If there was no wind it ought to have been obvious that the approaching vessel must be a steamship; but, whether steamship or sailing vessel, it must be a vessel approaching the *Hydra's* course. Therefore it ought to have been obvious that it was the duty of the *Hydra* to give way and to pass under the stern of the vessel so approaching All this ought to have been obvious long before the time when the hull of the *Nelly* was made out and action was taken, and long before that the *Hydra* ought to have taken steps to keep clear. Instead, nothing was done until it was impossible to do anything effective.

In my judgment the cause of this collision was the failure of Lieutenant Thomson to appreciate, as he ought to have done, that the *Nelly* was approaching on a crossing course, and his consequent failure to keep clear; and I find that the failure of the *Nelly* to show a masthead light was not a fault contributing as a cause to the collision. Notwithstanding that failure, the *Hydra*, with the indications she had, could, with ordinary care, have avoided the collision.

I therefore pronounce the *Hydra* alone to blame.

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

Solicitor for the defendant, *Treasury Solicitor.*

House of Lords.

June 13, 14, *and July* 8, 1918.

(Before the LORD CHANCELLOR (Lord Finlay), Viscount HALDANE, Lords ATKINSON, SUMNER, and PARMOOR.)

ATTORNEY-GENERAL (on behalf of His Majesty) *v.* BENJAMIN SMITH AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Shipping—Carriage of goods—Traders' goods on transport ship—Bill of lading—Exemption of King's enemies—Deviation from voyage—Main intent and object of the contract—User of vessel for military purposes.

A petition of right was presented by the owners of goods shipped at Melbourne for London by a steamship bound for London viâ ports subject to Government requirements, the ship having been requisitioned for the Government service. The bill of lading contained an exception that the Crown was not to be liable if the cargo was lost owing to the act of the King's enemies.

After having left Melbourne with troops for the Australian Expeditionary Force, which was then operating in the Gallipoli peninsula, and with other traders' goods, the ship was used for about three months as a store or warehouse at Imbros and Mudros for supplies of meat required for the troops, the same being doled out to them as rations when needed. When the ship was ultimately on her way from Mudros to London she was torpedoed by a German submarine and the whole of her cargo lost.

Held, that the suppliants were entitled to recover damages, the bill of lading, having regard to the main object and intent of the contract, not giving the Government the right to detain the ship as a store or warehouse, a purpose foreign to her employment as a means for carriage of goods, and therefore the exception clause did not apply.

Decision of the Court of Appeal (ante, *p.* 53; 116 *L. T. Rep.* 515) *upheld.*

APPEAL by the Crown from an order of the Court of Appeal (Lord Reading, C.J., Bankes and Warrington, L.JJ.), reported *ante*, p. 53; 116 L. T. Rep. 515, setting aside a judgment of Sankey, J. in favour of the Crown on a petition of right

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

which had been presented by the now respondents.

The question was whether the benefit of the exception from liability on the part of the Crown for any loss caused by acts of the King's enemies had been lost owing to a deviation and change in the character of the adventure alleged to have taken place while the vessel, which had been requisitioned, was on the voyage from Australia to London.

Sir *Gordon Hewart* (S.-G.) and *Ricketts* for the Crown.

R. A. Wright, K.C. and *Raeburn* for the respondents.

Glynn v. *Margetson*, 7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351;

James Morrison and Co. Limited v. *Shaw, Savill, and Albion Company Limited*, 13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 508; (1916) 2 K. B. 783;

Hartley v. *Buggin*, 3 Dougl. 39;

African Merchants v. *British and Foreign Marine Insurance Company*, 28 L. T. Rep. 233; L. Rep. 8 Ex. 154;

Scaramanga v. *Stamp*, 4 Asp. Mar. Law Cas. 295; 42 L. T. Rep. 840; L. Rep. 5 C. P. Div. 295;

Carriage of Goods Act 1904, s. 4.

After consideration, their Lordships delivered the following judgments dismissing the appeal:—

The LORD CHANLELLOR (Lord Finlay).—This appeal arises out of a petitition of right filed by Benjamin Smith and Co. (now the respondents) against the Attorney-General (on behalf of His Majesty) to recover damages for the loss of fifty bales of sheepskins carried on board the steamship *Marere* under a bill of lading signed on behalf of His Majesty by agents of the Commonwealth Government of Australia. The *Marere* was sunk in the Mediterranean by a German submarine, and the sheepskins were lost. The bill of lading contained an exception from liability on the part of the Crown for any loss caused by acts of the King's enemies. The question on the appeal is whether, as contended by the petitioners, the benefit of this exception has been lost owing to a deviation and change in the character of the adventure alleged to have taken place before the *Marere* was torpedoed.

The *Marere* had been requisitioned by the Crown at the beginning of the war in Aug. 1914, and was being worked for the Crown under this requisition when the petitioners' goods were shipped. The shipment took place at Melbourne under a bill of lading dated the 14th July 1915, signed by authority of the Commonwealth Government of Australia, and held by the petitioners. The bill of lading expressed that there had been shipped on board A 21 *Marere*, bound for London

Vid ports subject to Government requirements with liberty to receive and to discharge goods and passengers, and to take in coal, cargo, supplies, and for any other purpose, and to call at any port or ports in any order, and to sail with or without pilots, and to tow and assist vessels in all situations, and to deviate for the purpose of saving life and property, the following goods—namely, fifty bales sheepskins—being marked and numbered as in the margin, and to be delivered (subject to the exceptions and conditions hereinafter mentioned) in the like good order and condition from the ship's deck at her anchorage (where the ship's responsibility shall cease) at the aforesaid port of London (or so near thereto as she may safely get) unto order or to his or their assigns.

Condition 1 contained an exception from liability for the Act of God or the King's enemies, and a number of other perils. Condition 4 was in the following terms:—

4. With liberty to proceed to and stay at any port or ports, place or places, in any order or rotation backwards and (or) forwards, and notwithstanding that such ports or places are out or away from the customary or geographical route, to the port of discharge hereinbefore mentioned, for the purpose of receiving and (or) discharging goods, coals, supplies, or passengers or for any other purpose whatsoever, whether *ejusdem generis* or not, and to return once or oftener to any port or ports, place or places, without any liability whatsoever resting on the shipowners on the ground of deviation by reason of any route taken as above, and with liberty on the way to call and stay at an intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies, and to sail with or without pilots, and to tow and assist vessels in all situations. Steamer to be at liberty to leave ports to assist vessels in distress, and (or) for the purpose of saving life and (or) property.

Stamped in the margin in purple ink was the following clause:

The insulated space on the ship having been taken by His Majesty's Government, the ship in addition to any liberties expressed or implied in this B/lading shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, or otherwise howsoever given by His Majesty's Government or any department thereof, any person acting or purporting to act with the authority of His Majesty or of His Majesty's Government or of any department thereof, and anything done or not done by reason of any such orders or directions shall not be deemed a deviation ship free to carry contraband war and like risks.

The terms of this clause have reference to the fact that on the 13th April 1915 an Order in Council had been made by which all the cold storage space in all British steamships plying between Australia and Great Britain had been requisitioned for the use of the Crown. There was also stamped in the margin of the B L a clause in red ink:

If and so long as the ship is insured against war risks with a War Risks Insurance Association under or in connecation with a War Risks Insurance Scheme of His Majesty's Government the ship in addition to any liberties expressed or implied in this bill of lading shall have the liberty to comply with any orders or direction as to departure, arrival, routes, ports of call, stoppages, or otherwise howsoever given by His Majesty's Government or any department thereof or any person acting or purporting to act with the authority of His Majesty or of His Majesty's Government or of any department thereof or by any committee or person having under the terms of the War Risks Insurance on the ship the right to give such orders or directions and nothing done or not done by reason of any such orders or directions shall be deemed a deviation.

The *Marere* left Melbourne on the 20th Aug. 1915, carrying troops and horses and a large quantity of Government stores, guns, ammunition and wagons. Among the Government stores on board were 4000 tons of frozen

meat. There were also on board certain amounts of ordinary traders' goods, including the petitioners'. Troops, guns, stores, and ammunition were landed at Suez and Alexandria, and on the 20th Sept. the vessel was sent on to Mudros, carrying (*inter alia*) the 4000 tons of frozen meat. She remained at Mudros for two days, and was then sent on to Imbros, where she remained from the 7th Oct. till the 4th Dec. discharging meat for the use of the troops engaged on the Gallipoli Expedition. The rate of discharge was slower than the commercial rate as it was conditioned by the requirements of the troops. After the 4th Dec. the *Marere* returned to Mudros with 150 tons of the frozen meat on board, and there she took on board 500 tons more meat from two other vessels. The whole of these 650 tons were discharged at Mudros as required. All the movements of the *Marere* were carried out under the orders of the naval transport authorities. On the 16th Jan. she sailed for Gibraltar under orders, and in course of her voyage she was torpedoed in the Mediterranean by a German submarine.

Sankey, J. decided in favour of the Crown, but his decision was reversed by the Court of Appeal, who gave judgment in favour of the petitioners (now respondents). This appeal is brought by the appellant asking that the judgment of Sankey, J. in his favour should be restored.

Mudros and Imbros are between 600 and 700 miles steaming from Alexandria and are off the course of a vessel bound for London from the Suez Canal. It was contended for the respondents that the employment of the vessel from the 20th Sept. 1915 to the 16th Jan. 1916 was not in accordance with the contract contained in the bill of lading, and amounted to a deviation and alteration of the adventure, so that the Crown cannot take advantage of the exception of risks from the King's enemies contained in the first condition of the bill of lading.

Attention was directed to the conditions under which the vessel was requisitioned by the Government in Aug. 1914, and was being worked by the Government at the time of the shipment of the petitioners' goods. These requisitions are, however, in no way referred to in the bill of lading, and are not material for the purposes of the question before the House, which must depend on the terms of the bill of lading itself, together with what was done.

The bill of lading provided for the carriage of the petitioners' goods from Melbourne to London "*viâ* ports subject to Government requirements," and the marginal clause in purple ink referring to the fact that the insulated space on board had been taken by the Government reserved liberty to the ship to comply with any orders or directions as to departure, arrival, route, ports of call, stoppages, or otherwise howsoever given by His Majesty's Government or any department thereof, and provided that anything done by reason of any such orders of directions should not be deemed a deviation. There was a good deal of argument about the fourth condition and the red ink marginal clause, but they are both in my opinion not material for the purposes of this appeal, which falls to be decided on the terms contained in the body of the bill of lading and in the marginal clause in purple ink.

There is no doubt that if there takes place any deviation in the course of a voyage not warranted by the terms of the contract, or any material variation in the nature of the employment of the vessel or character of the adventure contemplated by the bill of lading, the benefit of any exception contained in the bill of lading will be lost. It was hardly argued that the mere sending of the vessel to Mudros and Imbros was a deviation not authorised by the bill of lading, and no such contention would have succeeded. This no doubt involved a detour far out of the ordinary course of a voyage between Melbourne and London, but in my opinion it was authorised by the bill of lading and particularly by the marginal clause in purple ink. It was adopted under a direction of His Majesty's Government as to the route to be followed and the ports of call and cannot be deemed a deviation, having regard to the terms of the marginal clause to which I have adverted.

But other and more difficult questions are raised by the use made of the vessel at Imbros and at Mudros. At Imbros the meat was not unloaded in the ordinary commercial course, but was delivered as it was required for the purposes of the troops engaged on the Gallipoli Expedition. It is said that this amounted to the employment of the vessel as a hulk or storeship, and not for the purposes of the voyage, which would comprise unloading in the ordinary way and rates at ports of discharge. Some seven weeks were spent in this way at Imbros, and it is said that this was quite an unreasonable time and amounted to a departure from the terms of the contract of carriage of the petitioners' goods. It is, however, to be observed that during the whole of this time the vessel was discharging frozen meat which she had brought from Australia, and in ascertaining what is a reasonable rate of discharge all the circumstances must be looked at. The meat had been brought for supply to the troops, and it was, in my opinion, not an unreasonable course to discharge it as it was wanted by them. It does not appear that the whole of the meat could have been landed in the ordinary course of commercial discharge and stored at Imbros, and I agree with the majority of the Court of Appeal in thinking that the delay, owing to the mode of discharge adopted there, cannot be regarded as having the effect which an unauthorised deviation would have on the liability of the shipowners.

Other considerations, however, arise with regard to the stay at Mudros from the 4th Dec. to the 16th Jan. The discharge of the 150 tons of meat which the *Marere* had brought from Melbourne can have occupied only a small part of the time of the vessel's second stay at Mudros, having regard to the small quantity which remained. She took on board 500 tons more from other ships, and in respect of these 500 tons she was certainly used as a hulk or storeship and not in the discharge of the cargo which she had carried on her voyage. The evidence is meagre, but I doubt whether the discharge of the 150 tons already on board plus the 500 tons taken on board at Mudros from other vessels would account for the whole of the stay made on this occasion at Mudros. Whatever the cause, there was such an amount of delay at Mudros on this second occasion as to amount to a material variation in the employment contemplated by the contract, and this on the

authorities would have the effect of an unauthorised deviation, and, indeed, would be commonly spoken of as a "deviation," which in its current though inaccurate use includes unauthorised delay upon the voyage.

I therefore agree with the majority of the Court of Appeal in thinking that this appeal should be dismissed with costs, on account of the unauthorised delay at Mudros upon this second occasion.

Viscount HALDANE.—The steamship *Marere* left Melbourne on the 20th Aug. 1915, bound for London "*viâ* ports subject to Government requirements." She proceeded first of all to Suez, then to Port Said, then to Alexandria, and later to Mudros and Imbros. On a subsequent part of her voyage, and while on the way from Mudros, whither she had returned, to Gibraltar, she was sunk not far from Malta by an enemy ship of war. From Melbourne she had conveyed troops, horses, guns, and Government stores, including a large quantity, amounting to 4000 tons, of frozen meat. The *Marere* had been requisitioned by the Government both for her insulated, or refrigerated, spaces, and for transport of troops; but, as she was a cargo steamer available for general purposes, the agents of the Government determined to allow ordinary traders' goods to be shipped in the spare cargo space. As the result, the respondents arranged with the Government to ship on board her, destined for London, fifty bales of sheepskins, which in the event were lost when the steamer was sunk. The question on the appeal is whether, under circumstances to which I shall refer, the terms of the bill of lading protect the Government, against whom the respondents have proceeded by Petition of Rights, from a claim for loss occasioned by non-delivery of the goods so shipped. The Court of Appeal, reversing judgment of Sankey, J., have held that in the circumstances of the actual voyage, these terms do not protect the Government.

The bill of lading provided initially that as the Government had taken the insulated space, the ship should be at liberty to comply with any orders of the Government as to "departure, arrival, ports of call, stoppages, or otherwise howsoever." It then stated that fifty bales of sheepskins had been shipped on the *Marere*, bound for London "*viâ* ports subject to Government requirements," with liberty to receive and discharge goods and passengers and to take in coal, cargo, supplies, and for any other purpose, and to call at any port or ports in any order. But, by subsequent provisions of the contract, loss arising from, among other causes, the acts of the king's enemies was excepted, and the vessel was given liberty "to proceed to and stay at any port or place in any order, backwards and forwards, and notwithstanding that such ports or places are out of the customary or geographical route, for the purpose of receiving and for discharging goods, coal, supplies, or passengers, or any other purpose whatever, whether *ejusdem generis* or not."

After leaving Alexandria, which she did at the very beginning of Oct. 1915, the steamer would, if she had proceeded straight to London, have reached that port in ordinary course just before the middle of the month. But, as she was entitled under the terms of the bill of lading to do, she proceeded under Government orders to Mudros, and arrived there on the 3rd Oct. The military authorities then took over the 4000 tons of frozen meat, and began to discharge it into lighters for consumption by the troops. But the rate of discharge was slow, only about 10 or 15 tons a day. The steamer remained at Mudros only two days on this occasion, and proceeded under further orders to Imbros. This port she reached on the 7th Oct., and remained there till about the 4th Dec. On arrival she began to discharge more of the frozen meat at the rate of 50 to 90 tons a day, finally leaving only 150 to 200 tons out of the original 4000 in the end undischarged. The rate of discharge appears to have been slower than would ordinarily have been the case, because there was no accommodation at Imbros for storage, and the meat is proved to have been taken out merely as the troops required it. On the 4th Dec. the steamer, by order of the naval transport officer, returned to Mudros. She was there taken alongside another vessel, also laden with frozen meat, and 150 or 200 tons from this vessel were put on the *Marere*, which so had about 350 tons in all on board. She appears then to have been used as a store ship for supply of the local needs, discharging for this purpose 25 to 50 tons a day. It seems that later on about another 300 tons were put on board the *Marere* from another vessel for gradual discharge, and the *Marere* was thus used, in language accepted by the master in his evidence, "as a hulk in order to put the stuff on board, and thus relieve the other steamer." The *Marere*, under these circumstances, kept on discharging 25 to 50 tons of frozen meat a day for the supply of the local needs, and she remained at Imbros thus engaged until the 16th Jan., when she sailed for Gibraltar. The view taken by the Court of Appeal was that under these circumstances, the steamer must be taken to have been detained by the Government and used as a storehouse for the preservation and issue of supplies during some weeks in which the voyage was interrupted for this purpose.

I think that the Court of Appeal was right in this view of the facts, and the remaining question is whether the terms of the bill of lading protect the Government as owners of the ship from loss by a peril which would have been excepted had there not been such a deviation from normal employment. Now, no doubt, the words which I have quoted from the bill of lading do, if taken by themselves, give a very wide liberty of deviation and uses. But they cannot be properly read in isolation as if they stood alone. They occur in a contract which must be read as a whole. The Government agreed use of the ship with the respondents was to make a voyage which was specified as the main purpose of the contract. The sheepskins were to be conveyed on board the steamer from Melbourne to London. The language conferring liberties on the vessel must, I think, be read as signifying that, although these liberties are expressed to be wide, they are not to be such as to destroy the character of what was bargained for, carriage by steamer of cargo from Melbourne to London. It was said by Sankey, J. that the Government were to be free to use the vessel for military purposes. No doubt they were. But then this liberty was reserved in a contract the dominant purpose of which was the

undertaking of the Government to carry the goods to London. Some limit must be set on the right to employ a vessel made the subject of such a contract for military purposes. Obviously, for instance, she could not be deliberately diverted and used for an indefinite time in order to block a harbour for military ends. That would be to destroy the main object for which the respondents had bargained, the carriage of their goods, and the general words, which would, if read as standing by themselves, give an apparently unlimited discretion to the Government, must be read with such restriction of their import as will keep it consistent with the general obligation undertaken by the contract for carriage.

It seems to me that this view is the only one that is consistent with the principles of interpretation laid down in this House when *Glynn* v. *Margetson* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351) was decided. What Lord Herschell then said about the limitation of the construction which ought to be put on general words used in a printed form appears to me, *mutatis mutandis*, to be applicable to the document before us. The main object and intent which is the dominant reason of the contract must not be left out of sight when the question is, how general words, which are certainly capable of a construction which preserves this object and intent, ought to be read, on consideration, in their context. Neither the "insulated space" clause in this contract, nor the printed conditions No. 4 seem to me to afford any further reaching justification for an unrestricted interpretation than the printed form in the document construed in *Glynn* v. *Margetson*. I find myself, therefore, unable to come to any other conclusion than that the decision of the Court of Appeal in the present case was correct.

Lord ATKINSON.—I concur. In my view of the case it is not necessary to repeat the facts.

I think the main object and intention of the parties to the mercantile contract contained in the bill of lading in this case was that the goods shipped should be carried from Melbourne to London in a vessel equipped and used for the carriage of goods or passengers, or perhaps both, by sea. That was the fundamental conception on which the contract was based, and the general words of the fourth clause and of the insulation space clause already referred to, cannot, I think, be construed so as to destroy the foundation upon which the contract rested. Wide and various as are the rights conferred by those two clauses upon the Crown, they do not enable the Crown to alter entirely the nature of the use to which the ship is to be devoted from that of a ship for carrying goods from one place to another by sea to that of a ship upon which goods are loaded not to be carried anywhere, but merely to be discharged at the place at which they have been loaded in such quantities as might be required by those having control over them. The function which a ship so used discharges is in all essentials the same as those discharged by an ordinary warehouse built on shore—namely, to protect and keep within it the goods placed there until they are removed by one having authority to remove them, the only difference between the ship and the warehouse being that the ship is afloat. But all that portion of her equipment designed to enable her to voyage from port to port is as unneeded in her case for the use she is thus devoted to as it would be in the case of the warehouse built on land. It may well be that a ship can be, in effect, thus turned into a warehouse by prohibiting her from discharging her cargo at other than an extremely slow rate—as, for instance, if this ship *Marere* were prohibited from discharging her cargo of 4000 tons of beef at a greater rate than 20 tons per day, thus detaining her at a port for 200 working days. Taking the view of the case which I do, however, I do not deal with that point. I prefer to rest my judgment as Bankes and Warrington, L.JJ., as I understand them, have rested theirs—namely, on the fact that after the *Marere* had discharged all but 150 tons of her cargo of 4000 tons of beef, an additional 500 tons was transferred from other ships to her, not to be carried by her anywhere from the place at which she lay at the time, but to be there discharged from her as and when and at the rate required, for consumption in the camps. I think the devotion of the ship to such a purpose was not treating her at all as a thing to be used for the carriage of goods from port to port by sea, and was prohibited by the implied term which formed the basis of the contract contained in the bill of lading. This reloading and slow discharge accounts for the detention of the ship at Mudros for the greater part of the time, from the 5th Dec. till the 16th Jan.

I, therefore, think the decision appealed from was right, and should be affirmed, and the appeal be dismissed with costs.

Lord SUMNER.—On her way from Melbourne to London the steamship *Marere* after leaving Alexandria went to Imbros and Lemnos, staying about sixty days at the first island and about forty days at the second. Without good cause shown or liberty given this was on the face of it a deviation from the bill of lading voyage. She had prosecuted it neither by the accustomed route nor with the accustomed dispatch.

It is true that the Government had the right to call upon her to do what she did, nor do I question that all that she had to do was in the public interest. No one would have had her do otherwise, but the question is whether or not the Government is bound by contract to pay for the legal consequences of it. Possibly it might have been foreseen that all that she did she would have to do, but how can that affect the shippers of the cargo? The bill of lading does not incorporate or even refer to the terms and conditions for hiring transports, nor, if notice would have mattered, is it proved that they had notice of them. The question arises on a contract for the carriage of goods, on a bill of lading, signed on the Government's behalf and issued to shippers of cargo, not on a contract for the use of a ship between shipowners and charterers. One has not to ask whether the action relied on as a deviation was incidental to a voyage which the ship could be required to make, but whether it was consistent with the voyage which it had been promised to the shipper that she should make, and if it was not, whether he had agreed to allow it and had promised not to object to it.

The terms of the bill of lading must therefore be construed and applied to the facts. The document is on the ordinary printed form of the Commonwealth and Dominion Line, essentially

a mercantile contract for a mercantile object, but adapted to Government needs and the exigencies of war by added clauses to a certain extent. On their true construction how far do those additions extend?

Not merely by the description of the ship as "A.21," but by the wording of the clauses, one sees that the *Marere* was requisitioned. The words "bound for London *viâ* ports subject to Government requirements" only mean "*viâ* such ports as the Government may see fit to require." It is the ports that are "subject to" this qualification—the words do not condition the whole contract. Otherwise the greater part of the instrument is otiose and the juxtaposition of the words, too, is wrong. Clearly the liberty of route thus conceded by the shipper in order to make the agreed voyage more elastic is sufficient to justify the actual departure from the usual route by going from Alexandria to Lemnos and Imbros, nor was this questioned.

The delay was not involuntary or simply occasioned by the mode in which the bill of lading voyage had to be performed under the circumstances. It was no question of weather or strikes interfering with the discharge of cargo; the delay was due to the voluntary act of the carriers, parties to the bill of lading, in making use of the ship as they did. To say that the ship was simply engaged in delivering her meat cargo to its consignees at its destination, and that bad weather and lack of unloading facilities—namely, cold storage ashore—protracted this operation, is to misunderstand the facts. According to the only evidence on the point, the meat was consigned to and was deliverable at London, nor was it in fact in process of being discharged as part of the commercial use of the ship at a somewhat ill-equipped port, but as food brought, so to speak, to the consumers' doors and delivered to them as and when they were ready to eat it. The ship became a floating butcher's shop for the British Army. She took in fresh stocks from other ships and disposed of it on the spot in the supply of local consumption, in the same way as her own. For the time being, and that a substantial time, she ceased to be engaged in the mercantile transport of cargo.

Such a use of a ship has been held to be outside any of the ordinary liberties, by which the implied obligation not to deviate is commonly qualified, at least since the time of Lord Mansfield: (*Hartley* v. *Buggin*, 3 Dougl. 39). Usage might bring such a thing within the ordinary course of a trading voyage, as, for example, in the voyages out and home to the West Coast of Africa to stay and trade, or in the Pacific in the case of a schooner sailing in the Island trade, but there is nothing of that sort here. Blackburn, J. points this distinction out in the company of *African Merchants* v. *British and Foreign Marine Insurance Company* (28 L. T. Rep. 233; L. Rep. 8 Ex. 154). It is true that these are insurance cases, but still they are in point. A departure from the regular prosecution of the agreed voyage, without leave or lawful excuse, varies the risk, which the underwriter covers, just as it varies the risks, which the cargo owner agrees to run, when he agrees to a category of excepted perils in the bill of lading. If a given deviation is permitted by the liberties in the bill of lading, the cargo owner runs the risk of loss by excepted perils; if not, that risk is run by the carrier. The facts constituting deviation are the same in each case, and, alike in a bill of lading and in a voyage policy the voyage, which is material, is the agreed voyage according to the construction and tenor of the instrument.

Two clauses in this bill of lading provide for liberties to do what would otherwise be a deviation—clause 4 and the purple rubber stamp clause, which begins "the insulated space on the ship." The former does not avail the carrier; it overlaps and is inconsistent with the latter, and is more in his favour. The conflict results in an ambiguity, and he cannot rely on it. The latter is the material clause. Of this there is a somewhat similar version in a red-ink clause, which begins "if so long as the ship is insured," but this again may be disregarded. Nothing turns on the colour scheme or the typography of this somewhat varigated bill of lading. Rubber stamps, print and typewriting, red, blue, black and purple, must all depend on construction, but the red-ink clause deals with insurance, while the purple clause gives the carrier liberties to deviate, and accordingly the latter is the crucial matter.

The clause specifies the subject-matter of various Government orders, and says, "anything done or not done by reason of any such orders or directions shall not be deemed a deviation." Those subjects are "departures, arrivals, routes, ports of call, stoppages or otherwise." The use to which she was put cannot be justified by any of these words unless by "or otherwise." In my opinion the ordinary canons of construction apply. All the named subjects are species of common genus—namely, incidents attaching to a mercantile voyage—and the words "or otherwise" sweep in the residue of such incidents. The use made of the ship was not such an incident. The question may be put in another way. The problem is, as in *Glyn* v. *Margetson* (69 L. T. Rep. 1; (1903) A. C., at p. 355), to harmonise general words applicable to all the voyages for which bills of lading in this term may be issued with the particular voyage for which the particular bill of lading was issued. The words "or otherwise," however wide they be, must still be limited to something which is not inconsistent with the main object of the contract—that is, the mercantile operation of transporting cargo to London on the voyage described in the contract. I think, therefore, that the terms of the bill of lading do not cover this deviation, and the fact that the purpose of the delay and the use of the ship were laudable is no more a justification than was salving and towing the ship in distress in *Scaramanga* v. *Stamp* (42 L. T. Rep. 840; L. Rep. 5 C. P. Div. 295). The result is that the exception of "King's enemies" is no longer an answer to the claim for non-delivery of the goods and the appeal fails.

Lord PARMOOR.—His Majesty's Government, having spare room to carry traders' goods on the ship *Marere*, contracted to carry for the respondents fifty bales of sheepskins from Melbourne to London on the terms of a bill of lading dated Melbourne, the 14th July 1915. The bill of lading was in commercial form with a special cause, stamped on the margin, allowing the ship in addition to any liberties expressed or implied in the bill of lading to have liberty to comply with

any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by His Majesty's Government or any department thereof, and anything done or not done by reason of any such orders or directions is not to be deemed a deviation, ship being free to carry contraband, war, and like risks. The question has arisen whether the special provisions contained in this clause would justify the deviation of the ship to the port of Mudros in Lemnos and Imbros, and the retention of the ship there, not for the discharging of the cargo of frozen meat in the ordinary way from a cargo-carrying vessel, but as a store to unload such frozen meat as from time to time was required for local use and consumption by the troops, not only from her own cargo but transhipped from other vessels. The respondents do not complain of the deviation of the ship to the port of Mudros and Imbros, but to the use made of the ship as a storage vessel, from which the frozen meat was unloaded for the purpose of local consumption.

The facts may be shortly stated. Fifty bales of sheepskins were shipped on board the steamship *Marere*, which left Melbourne on the 20th Aug. 1915 for Suez, having on board troops, horses, guns, ammunition, waggons, and Government stores, including frozen meat and also a certain amount of ordinary trading goods, including the above-mentioned bales of sheepskins. The troops, stores, guns and ammunition were landed at Suez and Alexandria, and on the 30th Sept. the ship left for Mudros with about 4000 tons of frozen meat. The *Marere* stayed at Mudros, and later at Imbros, from about the 7th Oct. to about the 4th Dec. The cargo of frozen meat was unloaded as required for local consumption by the troops at a rate of discharge lower than the ordinary commercial rate. On the 4th Dec. the ship returned to Mudros with about 150 or 200 tons of meat on board and there took on board from other vessels about 500 tons more meat, which was unloaded at a rate from 25 to 50 tons a day for local consumption. The ship remained at Mudros till the 16th Jan. 1916, and after leaving Mudros was sunk on the same day by German submarines, and the whole of her cargo was lost.

In my opinion His Majesty's Government did assume the ordinary liabilities of carrying goods by sea, according to commercial law, save so far as was otherwise agreed in the bill of lading. It was argued on behalf of the Crown that the main intent and object of the voyage was a military one, and that the carriage of goods for the respondents and other traders was of secondary importance. There is no reason to doubt this statement, but the intention to use the ship for military purposes is not inconsistent with the carriage of the respondents' goods on commercial terms, in space not required for their own purposes by the Government. The question is not what was the general intention of the Government, but what is the contract made between the parties. The main intent and object of this contract was the carriage of the goods on the adventure of a voyage by a cargo-carrying vessel from Melbourne to London. The liberties of deviation given by the bill of lading should be construed to include such deviations as are consistent with the main intent and object of the commercial adventure. In my opinion the use of a ship as a store, from which the frozen meat was unloaded for purposes of local consumption, was inconsistent with the prosecution of a commercial adventure which was based on the use of the ship as a cargo-carrying vessel to carry the bales of sheepskins from Melbourne to London. If this is so, such use was not covered by the liberties given in the bill of lading. As a consequence the Crown is precluded from relying on the exception of "King's enemies," and the respondents have a good claim for the loss of their goods.

In two of the judgments in the Court of Appeal a distinction was drawn between the use of the ship in distributing her own cargo for local purposes and distributing the additional 500 tons received from other vessels. It appears to me that this distinction is not justified, and that the use of a ship in either case for such purpose is inconsistent with its use as a cargo-carrying vessel in the adventure of carrying bales of sheepskins from Melbourne to London. The appeal should be dismissed with costs.

Solicitor for the Crown, *Solicitor to the Treasury.*

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

June 27, 28, *July* 2, 4, *and* 29, 1918.

(Before the LORD CHANCELLOR (Lord Finlay), Viscount HALDANE, Lords SUMNER, PARMOOR, and WRENBURY.)

BRADLEY AND OTHERS *v.* NEWSUM, SONS, AND CO. LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Bill of lading—Contract of affreightment—Ship torpedoed on voyage—"Abandonment" of ship by crew under stress of enemy violence—Shipowners give notice to charterers that ship has been sunk—Ship salved—Resumption of possession by cargo owners—Liability to pay freight.

The plaintiffs were the indorsees of a bill of lading signed on behalf of the defendants, the owners of the ship J., for the carriage of a cargo of wood to be delivered at Hull on payment of freight as per charter-party. The J., while off the coast of Scotland, was on the 7th Oct. 1916 *torpedoed by a German submarine, and the crew were compelled to take to their boats under threat of being shot. The enemy placed bombs on board the J., and the last the crew saw of the vessel led them to believe that she was sinking. The crew were picked up and landed at Aberdeen on the 8th Oct., and the master at once telegraphed to the owners: "Ship sunk yesterday. Submarine." On the 9th Oct. the owner's agents wrote to the plaintiffs, quoting the following letter from the owner: ". . . I advise you of the loss of my steamship Jupiter, which steamer was sunk by enemy submarine on Saturday last. . . ." The vessel was subsequently found a waterlogged derelict and towed into Leith, where she was on the 11th Oct. taken possession of by the Receiver of Wrecks. On the same day the plaintiffs claimed to elect to take possession of their cargo where the steamer was,*

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

and thereafter brought an action for a declaration that they were entitled to delivery without payment of freight.

Held (Lord Sumner dissenting), that the master and crew had not abandoned the ship in such circumstances as to indicate an intention not to perform the contract, and that the owner's agents' letter of the 9th Oct. was not a notice of the abandonment of the contract such as entitled the cargo owners to receive the cargo free of freight.

Decision of the Court of Appeal (Sargant, J. dissenting) (ante, *p.* 180; 118 *L. T. Rep.* 78; (1918) 1 *K. B.* 217) *reversed.*

APPEAL by the shipowners from a judgment of the majority of the Court of Appeal (Pickford and Bankes, L JJ., Sargant, J. dissenting) which affirmed a judgment) of Sankey, J., reported *ante*, p. 79; 116 L. T. Rep. 669; (1917) 2 K. B. 112.

The facts sufficiently appear from the headnote.

MacKinnon, K.C. and *Lewis Noad* for the appellants.

Leck, K.C., *R. A. Wright*, K.C and *Le Quesne* for the defendants.

The following cases were referred to:

The Cito, 4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 P. Div. 5;

The Arno, 8 Asp. Mar. Law Cas. 5; 72 L. T. Rep. 621;

W. S. Caine v. *Owners of the Bellglade*, Lloyd's List, 3rd Aug. 1915.

Freeth v. *Burr*, 29 L. T. Rep. 773; L. Rep. 9 C. P. 208;

General Bill Posting Company Limited v. *Atkinson*, 99 L. T. Rep. 943; (1909) A.C. 118;

Mersey Steel and Iron Company v. *Naylor, Benzon, and Co.*, 51 L. T. Rep. 637; 9 App. Cas. 434;

Johnstone v. *Milling*, 54 L. T. Rep. 629; 16 Q.B. Div. 474;

The Kathleen, 2 Asp. Mar. Law Cas. 367; 31 L. T. Rep. 204; L. Rep. 4 A. & E. 269;

The Zeta, 3 Asp. Mar. Law Cas. 73; 33 L. T. Rep. 477; L. Rep. 5 A. & E. 466;

Cossman v. *West*, 6 Asp. Mar. Law Cas. 233; 58 L. T. Rep. 122; 13 App. Cas. 160;

The Fenix, 1855, Swabey, 13;

The Sarah Bell, 1845, 4 Notes of Cases, 144;

The Cosmopolitan, 1848 6 Notes of Cases, Suppl. 17

The Florence, 16 Jur. N. S. 572;

The Dantzic Packet, 1837, 3 Hagg. Ad. Rep. 383;

Hochster v. *De la Tour*, 2 Ell. & Bl. 678;

Hunter v. *Prinsep*, 10 East, 374;

Shipton v. *Thornton*, 1 P. & D. 216; 9 A. & E. 314;

Vlierboom v. *Chapman*, 13 M. & W. 230; 8 Jur. 811;

Scott v. *Shepherd*, 2 Wm. Bl. 892;

The Janet Court, 8 Asp. Mar. Law Cas. 223; 76 L. T. Rep. 172; (1897) P. 59;

The Leptir, 5 Asp. Mar. Law. Cas. 411; 52 L. T. Rep. 768.

The LORD CHANCELLOR (Lord Finlay): This case relates to a contract for the carriage of cargo of timber from Archangel to Hull on the steamship *Jupiter*, and the question is whether the cargo owner, the plaintiff of the action and now respondent, was entitled without payment of freight to demand delivery of the timber at Leith, to which place the vessel had been brought by salvors. The claim rested on the contention that the vessel was "derelict" when she was picked up by salvors, and that this amounted to an abandonment by the appellant of the contract of carriage which entitled the cargo owner to take possession of the goods at Leith.

The cargo owner brought the action by writ dated 25th Oct. 1916, claiming a Declaration that he was entitled to such delivery. The points of claim alleged that the *Jupiter* while proceeding on the voyage was attacked on the 7th Oct. by enemy submarines and that the master and crew abandoned the vessel which was picked up by vessels of H.M. Patrol Flotilla and brought into Leith, where she was beached and placed in the hands of the Receiver of Wrecks. In the Points of Defence the defendants denied the abandonment and pleaded that the crew was compelled to leave the vessel by an enemy submarine, and the defendants counter claimed for the freight.

The respondents had chartered the *Jupiter*, which belongs to the appellant, by the Charter Party of the 18th July 1916, for the carriage from Archangel to Hull of a cargo of deal battens and other timber at agreed rates. By the 7th clause the Act of God, the King's enemies, restraints of princes and rulers, and the perils of the seas were excepted. Bills of lading were given, and these are held by the respondents.

What happened is best stated in the words of the protest by the master of the *Jupiter* and others, dated the 11th Oct. 1916:

That after discharging the pilot and tug the vessel proceeded without the occurrence of anything worthy of note until 3.40 p.m. on the 7th Oct. instant, when appearer's vessel was crossing the Firth of Forth, with the Longstone Lighthouse bearing S. by W. about forty miles distant. Whilst following the route laid down by the Admiralty, appearer, the master, suddenly saw a submarine rise out of the water on his vessel's starboard side, and about a quarter of a mile distant. The submarine at once fired a blank shot over appearer's vessel, followed immediately afterwards by two more live shots forward and aft of the appearer's vessel. The submarine then signalled to appearer's to abandon their ship. Seeing no possible chance of escape, appearer, the master at once ordered the crew to take to the boats, and the submarine signalled for these to go on her. On getting near, the commander of the submarine asked appearer, the master, for the ship's papers, but was told they were still on board the vessel. The commander also demanded from the master the name of the vessel, to where she belonged, her registered tonnage, and what their position then was—which information was given by the master. Appearer's second boat, which contained the mate and second engineer, was then ordered alongside the submarine and the engineer was taken on board. Four of the Germans then proceeded to appearer's vessel in the mate's boat, taking the mate with them, and remained aboard about ten minutes, where they took possession of the ship's papers, forcing the mate to show them these with threats of loaded revolvers, and they then returned to the submarine. Shortly afterwards appearer, the master, heard an explosion aboard his vessel, which had previously had a strong list to port, and which, after the explosion, took a strong list to starboard. The submarine subsequently took appearer's two boats to tow, and towed them in a westerly direction for about five miles, when they were cast adrift, and during the towage appearers heard further explosions aboard their vessel, of which they lost sight in the gathering darkness. At 7 30 p.m. appearers were picked up by

the trawler *Ayacanora*, of North Shields (No. 72), which vessel took appearers to Aberdeen, where they arrived at 10.30 a.m. on Sunday morning the 8th Oct., and where appearer, the master, at once reported the matter to the Naval authorities; and appearer, the master, saith that as soon as he sighted the submarine he destroyed his secret instructions by tearing them up and throwing the pieces overboard. And appearers lastly say that they have subsequently heard that the vessel, floating on her cargo, has been picked up, and beached near Newhaven.

The master was under the impression that the steamship had sunk, and on his arrival at Aberdeen, on the morning of the 8th Oct., telegraphed to Mr. Bradley, "Ship sunk yesterday—submarine," and repeated this in his letter of that day to Mr. Bradley. By Mr. Bradley's instructions his agents, Messrs. Bordewich, sent on the 9th Oct. the following letter:

Messrs N. Newsum, Sons, and Co. Limited, Hull.—Dear Sirs,—S.S. *Jupiter*.—We have the following letter from owner of this steamer to-day, which kindly note:—"It is with very great regret I advise you of the loss of my ss. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew are all landed safely. Will you kindly advise charterers and oblige."—Yours faithfully, (Signed) P. R. BORDEWICH and Co.

At 2 a.m. on Wednesday, the 11th Oct., the *Jupiter*, which had been picked up by a Government patrol boat, was beached at Newhaven, a village within the limits of the port of Leith. The appellants were informed of this by a telephonic message from their agents at Leith, Messrs. Furness, Withy, and Co., which he received at 10.35 a.m. on the morning of the same day (11th Oct.). Mr. Bradley requested Messrs. Furness to protect his interests at Leith, and informed them that he would arrive that night. He left Hull by train at 5.5 p.m., and arrived at Leith after 11 p.m. Before he left Hull he had received from the respondents' solicitors the following telegram, dated 11th Oct. 1916:

Jupiter we represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please note.

The respondents' solicitors, on the same day, also sent to the receiver of wreck at Leith the following telegram:

Steamer *Jupiter* we represent cargo understand she is now lying at Newhaven please note our clients claim elect take possession their property where steamer now is please do not allow cargo to be dealt with except with our sanction please do anything necessary protect property for our clients.

The shipowner asserted that he was entitled to take the cargo on to Hull, thus earning his freight, which would amount to more than 14,000*l*., while the cargo owners insisted on their right to take possession at Leith without payment of any freight as the voyage had not been completed. On the 26th Oct., the day after the writ in the action was issued, an agreement was entered into by a memorandum of that date arranging for the carriage to Hull of the cargo, reserving the question of liability for payment of freight to be decided in the action. The cargo was accordingly carried to Hull and delivered there.

The question now is whether freight was payable. Sankey, J. held that the case came within the authority of *The Cito* (4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 P. Div. 5) and *The Arno* (8 Asp. Mar. Law Cas. 5; 72 L. T. Rep. 621). He said that the abandonment of a vessel by its crew during a voyage without any intention to retake possession gives the owner of the cargo the right to treat the contract of affreightment as at an end, and that the cargo owners had exercised this right before the shipowner resumed possession. He summed up his view of the case thus: "In my view there was in fact an abandonment of the vessel, and there was on the part of the servants of the owner an act done clearly indicating their intention not to carry out the contract, in other words, there was the predicament mentioned by Smith, L.J. in *The Arno* (*sup.*) of a ship left derelict in mid-ocean and abandoned by its master and crew." His Lordship, therefore, gave judgment for the plaintiff for the relief claimed. In view of a possible appeal, he found that the amount of freight, if payable, would be 14,050*l*. 2*s*. 9*d*.

The shipowner appealed. The Court of Appeal were divided in opinion. The majority, Pickford, L. J. and Bankes, L. J. affirmed the judgment of Sankey, J., but on a different ground. They held that the letter of the 9th Oct. 1916, from the shipowners' agent to the cargo owners, advising them of the loss of the steamship *Jupiter* amounted to an intimation that the shipowner was not in a position to carry out the contract, and jusitfied the cargo owners in treating the contract of affreightment as at an end and in claiming the delivery of the cargo at Leith without payment of any freight. Sargant, J. differed. He held that the crew did not "abandon" the ship by quitting it under the compulsion of the enemy submarine, and that the communication of the supposed fact of the loss of the vessel did not amount to an intimation of the shipowner's intention not to carry out the contract. In accordance with the opinion of the majority, the appeal was dismissed with costs. It is from this decision that the present appeal has been brought to your Lordship's House by the shipowners.

The effect of the decisions by Sir Robert Phillimore in *The Kathleen* (2 Asp. Mar. Law Cas. 367; 31 L. T. Rep. 477; L. Rep. 4 A. & E. 269) and of the Court of Appeal in *The Cito* and *The Arno* (*ubi sup.*) is that if a ship be abandoned by her master and crew during a voyage, the cargo owner may elect to treat the contract of affreightment as at an end, and claim delivery of his goods without payment of any freight. I agree with the principle of law laid down in these cases. This principle would apply to the present case if quitting the vessel under the circumstances amounted to an abandonment within the meaning of the rule as laid down in these cases. For this purpose there must be an abandonment without any intention to retake possession, and it must be the act of the master and crew. The test is sometimes said to be whether the vessel has become a derelict. This is merely another way of stating the same question. The word "derelict" is sometimes loosely used as denoting a vessel drifting about at sea without any crew on board, but the legal sense of the term is that this state of things must have been brought about by the abandonment of the vessel by the master and crew. A vessel would not be a derelict if the master and all the crew

had been swept off the deck by a heavy sea and drowned, or if all on board were dead of the plague. Sir W. Scott laid it down in *The Aquila* (1798, 1 C.P. 40) that it is sufficient to constitute a derelict if there has been abandonment at sea by the master and crew without hope of recovery. There must be no *spes recuperandi* and no *animus revertendi* (see *The Zeta*, 3 Asp. Mar. Law Cas. 73; 33 L. T. Rep. 477; L. Rep. 4 A. & E. 466), and this, as was said by Dr. Lushington in *The Sarah Bell* (1845, 4 Notes of Cases, 144, at p. 146) depends on the state of mind of the master and crew at the time when they quitted the vessel. If this be once ascertained a subsequent change of intention on their part and effort to save the vessel are immaterial. The *animus derelinquendi* is essential to constitute a derelict: (*The John and Jane*, 1802, 4 C. R. 216). As was said by Sir Barnes Peacock in delivering the judgment of the Judicial Committee in *Cossman* v. *West* (6 Asp. Mar. Law Cas. 233; 58 L. T. Rep. 122; 13 App. Cas. 160, at p. 180) the term "derelict" is legally applicable to a ship which is abandoned and deserted at sea by the master and crew without any intention of returning to her.

In *The Fenix* (1855, Swabey, 13) the crew of one of two vessels in collision jumped on to the other, and Dr. Lushington pointed out that the salvors were not entitled to such a proportion as is usually given in cases of derelicts, because the vessel was not abandoned in consequence "of being improperly navigated, or because she was not seaworthy. It was merely from a sense of imminent danger, not knowing what the consequence of the collision might be. It was an abandonment for the security of the person, accompanied with an intention of returning provided that life should no longer be in danger. I cannot, therefore," he said, "consider this case to be placed in the degree of ordinary cases of derelict." The whole of this subject was considered in the High Court of Admiralty in Ireland, in *The Cosmopolitan* (1848, 6 Notes of Cases, Supplement XVII.). The circumstances of that case were similar to those of the *Fenix*, and the learned judge—Dr. Stock—made an elaborate review of the authorities, and said, "The issue is *quo animo*, the act of quitting was done." On the question of derelict or not derelict, everything depends on the state of mind of the master and crew when they quit the vessel, and their state of mind may, of course, be inferred from the surrounding circumstances.

Dr. Lushington remarked in *The Florence* (1852, 16 Jur. N. S. 572) that the abandonment for the purpose of constituting a case of derelict must be by order of the master in consequence of danger by reason of damage to the ship and the state of the elements, and went on to say the master is, as I conceive, the proper person to form a judgment whether abandonment is absolutely necessary or not. He is the person whom the owners have voluntarily intrusted with the command of their vessel and the crew and the property embarked in it. They must be taken to have deemed him competent for the discharge of the duties committed to him, and especially that he would not without adequate cause leave to destruction their property." The question is not of the intention of the owner personally. In the immense majority of cases he does not and cannot know anything of the abandonment until after it has been effected, but he acts in this matter through the master as his agent. The effect upon the contract of affreightment of the final abandonment of a vessel at sea is only an example of the general law of contract by which, if one contracting party puts it out of his power to carry out the contract, the other may treat the contract as at an end.

The question of what constitutes a derelict has very commonly arisen when the scale of salvage was under consideration, as more liberal remuneration was usually given if the vessel was a derelict, but it has also arisen when the point was whether the crew of the vessel were entitled to salvage remuneration in afterwards saving her, on the ground that their contract of service was brought to an end when the vessel became derelict: (see *The Florence*, *ubi sup.*).

The fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control. In *The Dantzic Packet* (1837, 3 Hagg. Ad. Rep. 383, at p. 385) Sir John Nicholl, in dealing with the misconduct of salvors, who had attempted to exclude other salvors, said, "it is different in the case of a derelict. There the first occupant has a vested interest and a right to exclude possession if alone he can save the property. He takes possession indeed for the benefit of the Crown in the first instance, but subject to a liberal remuneration." In the marginal note to this passage there are inserted after the words "of the Crown," the words "or owners." The question of property in a derelict was discussed in *The Cito* (*ubi sup.*), and Brett, L.J. said that he was not prepared to accept the proposition that abandonment constituting a derelict, together with a subsequent seizure by anyone who found it, would make the ship a droit of Admiralty, and alter the property. It was stated by the King's Advocate in 1 Hag. Ad. Rep., at p. 884, in the case of *Rex* v. *Property Derelict* that the owner would be entitled if he came in in time, otherwise the Crown, but this topic is, of course, quite immaterial for the purposes of the present case.

The crucial question is this. Was this vessel when she was picked up by salvors a derelict in the legal sense of the term, or in other words, had the master and crew *abandoned* her without any intention of returning to her, and without hope of recovery? It appears to me to be quite impossible to answer this question in the affirmative. In quitting the vessel the master and crew simply yielded to force. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine. It would be extravagant to impute to them the intention of leaving the ship finally and for good. They simply bowed to the pressure of irresistible physical force. If a British destroyer had appeared on the scene and had driven off or sunk the submarine, they would gladly have returned to their vessel. All they intended was to save their lives by obeying the orders of the German captain. I entirely agree with Sargant, J.'s observations on this part of the case. The physical act of leaving the vessel is only one feature in such a case; another and essential feature in order to make it a case of derelict is

the state of mind of the captain and crew when they left. The question *quo animo* is decisive, and the facts seem to me to shew clearly that the quitting of the ship was not under such circumstances as to make it a case of derelict. The *Kathleen*, *Cito* and *Arno* (*sup.*) appear to me to have no application. The case is merely one of temporary interruption of the voyage by the action of an enemy submarine, and this afforded no ground for the claim of the cargo owners to resume possession of the goods at Leith when the greater part of the voyage had been completed. The shipowner was ready and willing to carry the goods on to Hull and was entitled to do so.

The contention that the communication to the cargo owner of the erroneous information that the loss of the ship amounted to abandonment of the contract of carriage is not sustainable. It was a very proper thing to convey this information to the cargo owners in order that they might take any action which the fact, if it really had occurred, would render expedient in their interests. I cannot see how it can possibly be considered as an intimation that the shipowner abandoned the contract of carriage whether the information was true or not.

For these reasons I think that the appeal should be allowed, and judgment entered for the appellant with costs here and below.

Viscount HALDANE.—This is an appeal from a judgment of the Court of Appeal (Pickford and Bankes, L.JJ., Sargant, J. dissenting) which affirmed a judgment of Sankey, J. The question raised was whether the respondents, the chartererers of the steamship *Jupiter*, were entitled to claim delivery of the cargo (which consisted of timber) at Leith, not being the port of destination, free of freight. The voyage contracted for with the appellants, the owners of the steamer, was to be from Archangel to Hull, where the cargo should have been delivered, and the matter of dispute was as to whether the Appellants through their master had abandoned possession in the open sea of the steamer and cargo, in such a way that the respondents were entitled to resume possession of their cargo at Leith where they found it, free of the freight, which would have amounted to 14,050*l.* 2*s.*

The charter-party was dated 18th July 1916. It contained an exceptions clause, which included in its terms the acts of the King's enemies, restraints of princes, perils of the seas, and other matters, even when occasioned by the negligence or error of the master. The cargo of timber was loaded at Archangel, under several bills of lading, all in the same form and with the same exceptions as in the charter-party. The steamer started from Archangel on 25th Sept. 1916 on the voyage. All went well until Saturday, 7th Oct., when she was crossing the Firth of Forth on her way to Hull. As she was crossing the Firth a German submarine attacked her. The submarine fired on the *Jupiter* and signalled to her crew to quit her. The master, seeing no chance of escape, ordered the crew into the boats. The submarine then signalled for the boats to come to her, and finally the mate's boat was ordered to lie alongside the submarine. Four armed Germans got into her and went back, taking the mate with them, to the *Jupiter*, and, there by threatening him with loaded revolvers, compelled the mate to find and hand them the ship's papers. The Germans then went below, and placed bombs in her and opened the sea connections. They then returned to the submarine. A little later an explosion on board the *Jupiter* was heard, and she was seen to take a list to starboard. The submarine then took the steamer's boats in tow, and towed them towards the coast of Scotland for about five miles. During this towage further explosions were heard by the Master to take place on board the *Jupiter*, but it became so dark that he could not see her any more. The submarine, after towing the boat for five miles, finally cast them off, and the master and crew were later on picked up by a trawler and taken to Aberdeen, where they arrived at 10.30 on Sunday morning the 8th Oct., and at once reported what had happened to the naval authorities. The master was under the impression that the *Jupiter* had been sunk, and telegraphed to the owners to that effect about noon on the Sunday. In the evening he heard that the *Jupiter* was afloat and in tow, but he appears to have been doubtful whether she could actually be saved.

On receipt of the telegram from the master the appellants instructed their brokers to inform the respondents of their news, and the latter, on Monday, the 9th Oct., sent to the respondents a copy of a letter which they had that day received from the appellants: "It is with very great regret that I advise you of the loss of my s.s. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been safely landed. Will you kindly advise charterers and oblige."

In fact the *Jupiter* had not been sunk. Her cargo was a buoyant one, and she remained afloat. Salvors got hold of her, and she was brought into Newhaven, close to Leith, on the night of the Tuesday or in the early morning of the Wednesday. On the Wednesday, at 10.35 a.m., Mr. Bradley, who is one of the appellant owners, was informed by telephone by his agents at Leith that the *Jupiter* was afloat and had been brought in, and he asked them to protect his interests and said that he would come to Leith that evening. This he did. Just before starting, at 5 p.m., he received a telegram from the respondents' solicitors in these terms:—"*Jupiter*, we represent cargo of this steamer recently brought into Leith derelict. Our clients elect take possession their property where now lying." The respondents' solicitors also telegraphed in similar terms to the Receiver of Wrecks at Leith, requesting him further to do what was necessary to protect their clients' property.

It will be observed that the telegram from the respondents' solicitors to the appellant Bradley is based on the assertion that the steamer had been derelict. The real question is whether she was so. For the appellant Bradley went to Leith at once, and finally on the footing that it was to be without prejudice to any of his rights, got hold of the steamer and navigated her to Hull, where the cargo of timber was landed.

What we have to consider is whether the steamer was really abandoned so as to become derelict and no longer possessed or owned by the appellants. If this was so the contract was abandoned with the vessel, and the cargo owners were entitled to take possession of the cargo if they could, and free of freight. If the steamer had

sunk and the cargo had somehow floated independently of her the result would have been the same. The physical fact of the actual loss of the steamer which was to have made the voyage would have imported the loss of all title to claim on the footing that the contract had been carried out. But the steamer was in fact not lost, and the question therefore is whether she was abandoned so that the same result followed from her having ceased to be in point of law any longer the possession or the property of the appellants. It will be convenient to consider this question in the first place as one of principle, before referring to authorities. I think that the letter of the 9th Oct. 1916, sent by the appellants' brokers to the respondents, did not convey any intimation of intention on the part of the appellants to abandon their steamer if it had not been sunk. The intimation was merely one of their belief that she was sunk, and this belief was founded on what proved in the result to have been a mistake of fact. There was nothing in the letter which warranted the statement made by the respondents through their solicitors in their telegram of the 11th when they had ascertained the truth, that the steamer not having been sunk but having been brought into Leith, the owners had abandoned her. If this be so it follows that the foundation of the reasoning of Sankey, J. in his judgment is unsound. He held that there was an abandonment and that there was therefore a repudiation of the contract. But I am unable to find in the circumstances any evidence disclosing the element of intention in cases as essential to the application of the doctrine of abandonment in cases where there has been no actual loss. The master and crew left the steamer not of their own volition but under duress, being forced to do so. As the result they cannot be taken to have chosen to repudiate their obligation to carry any more than they can be taken to have chosen to abandon the vessel. The fact of having been forced away from her is one thing. An intention to leave her derelict is quite a different thing. They did not leave the vessel. It was really taken from them. I think there is a confusion in the judgment of the courts below, between a being parted from the vessel by force of arms, and a quitting of it as an act of free will. No doubt if they had quitted it because they desired to make sure of saving themselves from being drowned if she went down, that would have been an act to the performance of which they would have been moved by a motive none the less that it was one of the most potent. It would have been an act of volition, just as on the other hand it is plainly an act of volition when men elect to perish with a war vessel instead of being taken prisoners and saved. But in this case I am of opinion that there was no act on the part of the master and crew which the law can treat as one of free choice. They were not bound to choose to resist in vain, and they did not do so.

Once reached this conclusion appears to me to be fatal to the similar reasoning which prevails with the majority in the Court of Appeal. I agree with Sargant, J. in thinking that the vessel was neither lost in fact nor was the subject of any intention indicated to abandon her if she should not prove to be lost. There was no such intention indicated either by the owners or by the master and crew. All of them were for a time under the mistaken belief of facts that the vessel had been lost, but there was no more than this belief with the bare implications dependent on it.

Apart from the possible result of authority I should have thought that these considerations were fatal to the conclusions reached by Pickford and Bankes, L JJ. But those learned judges were of opinion that they were bound to hold as they did because of the decided cases, and particularly by the decisions in *The Cito* (*ubi sup*) and *The Arno* (*ubi sup.*). Now when I look at these cases I find in them mere exemplifications of a wider principle which seems to me not to apply here, the general principle laid down by Lord Campbell, L C.J. in *Hochester* v. *De la Tour* (2 Ell. & Bl. 678). There the defendant had bound himself to employ the plaintiff as courier from a date subsequent to that of the writ. The breach alleged was that, before the day for the commencement of the employment, the defendant had intimated a refusal to carry out the agreement. The jury found for the plaintiff, and there was a motion in arrest of judgment or for a non-suit. The defendant contended that there could be no breach until the day for performance, which had not arrived when the action was commenced, and that both parties remained bound. But the Court of Queen's Bench held that, both on principle and on authority, the parties were from the time of making the agreement engaged each with the other, and that it was a breach of an implied contract if either of them renounced the engagement. Otherwise, if the plaintiff had no remedy unless he continued to treat this contract as a force he could not enter into any other employment which would prevent him from being bound to performance when the due date should arrive, and this would merely tend to increase the damages. He ought therefore to be held as at liberty to rely on the defendant's assertion of intention to treat their obligation as altogether at an end, and the defendant should not be permitted to take this assertion back. The repudiation in advance therefore entitled the plaintiff to say that there had been a breach of contract. The principle laid down in this judgment has often been followed, and is undoubtedly right. I think it explains and is the foundation of the decisions on abandonment of contracts to carry at sea when there has been no actual loss of the vessel.

In the case of *The Kathleen* (2 Asp. Mar. Law Cas. 367; 31 L. T. Rep. 204; L. Rep. 4 A. & E. 269) a barque laden with cargo shipped in America for Bremen as the port of destination was run into in the Channel, and in consequence abandoned. It was held that the abandonment put an end to the contract to pay freight, notwithstanding that the barque and cargo were ultimately salved and properly sold by order of the Court, reserving question of freight. Sir Robert Phillimore in giving judgment said that even if a new implied contract in the course of the salvage operations might have given the shipowner a title to *pro rata* freight, no such claim could be established in the face of what had happened. By abandoning the ship was rendered derelict and put into the possession of the salvors, and it was clear that the original contract no longer subsisted, and that the title to the pos-

session of the cargo became as from the time of the abandonment one in the cargo owners, so far as they could assert at all, only through the salvors and the salvage court, and not through the shipowners.

In *The Cito* (*sup.*) the Court of Appeal gave a similar decision. Brett, L.J. explained the law as being that "by an abandonment of a ship without any intention to retake possession of it the shipowner has, so far as he can, abandoned the contract so as to allow the other party to it, the cargo owner, to treat it as abandoned." Cotton, L.J. added that it was true "that the shipowners could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to the cargo owners to elect to treat the contract as at an end, and the shipowners could not . . . after their abandonment have objected if the cargo owners had found another vessel and taken the cargo on in it to the port of destination." Lindley, L.J. concurred.

The Arno (*sup.*) was also a decision of the Court of Appeal. The vessel had been justifiably abandoned, owing to perils of the sea, on the 31st March 1895. She drifted with her cargo until the 3rd April, when salvors found her, and brought both ship and cargo to Liverpool, the port of destination and discharge, where they arrived on the 25th April. On the 11th April the owner, having heard of the towage of the ship by salvors, but not knowing to what port in England they might bring her, got the salvors to agree on that date to hold for him, subject to their claim for salvage. On the 18th April the cargo owners claimed to be entitled to the possession of their cargo free of freight. It was held that the salvors were not the agents of the shipowner so as to make their possession of the cargo his. He did not get possession of it until arrival at Liverpool, and then, before he could claim, had to pay salvage on the cargo. Thus a new burden had been put on the cargo owner inconsistent with the original contract of affreightment, and he was entitled to elect, as he had done while this state of things existed, to treat the contract as repudiated. The judgments, in my opinion, merely exemplify the principle of *Hochster* v. *De la Tour*.

In the case before us, if the vessel had been in point of fact lost, that would have put an end to the very basis of the contract of carriage, and not the less if, the ship having been lost, the cargo had floated and the cargo owner had rescued it. But that did not happen here. Nor did the owners, through the master and crew or otherwise, express or imply an intention to abandon. All that really happened was that, in the erroneous belief that the former alternative, an actual loss of the *Jupiter*, had taken place, the owners of the steamer informed the cargo owners of what they believed to have happened. They were wrong in this, but their mistaken statement of the facts disclosed no intention that I can discover to repudiate if the facts were otherwise and the vessel was actually still in existence.

I agree with the view of Sargant, J., who dissented from the majority in the Court of Appeal, and I think that we ought to reverse the judgment.

Lord SUMNER. — Two questions have been raised in this case—the first, as to the effect of the communications between the parties on shore; the second, as to the nature and effect of the events which took place at sea. I think that the shipowners' letter, passed on to the cargo owners at Hull, did not intimate an intention no longer to be bound by the contract of carriage. It stated a fact, and it stated it wrong. The cargo owners could not have taken it as a statement of such an intention, for they must have seen that, if he had known as much as they knew, his intention would have been the very opposite. The episode seems to me irrelevant. There is nothing on the record to show that the solicitors, who first put forward the cargo owners' claim to take the cargo at Leith, knew anything about this letter when they did so. Their clients may have been underwriters; they may have acted on news of the ship not obtained from the cargo owners at all. They have never laid stress on this letter as the foundation of substantive rights, and the prominence given to it in the Court of Appeal was excessive.

The real point of the case is the fact that the *Jupiter* was left for good at sea to fare as she might, and that the master and crew came ashore. The word "abandonment," though unavoidable, is apt to be ambiguous. It introduces special considerations of marine insurance law not now in question. As little is it a question of abandoning a contract. The effect upon the contract is a conclusion of law. The fact was that all the shipowners' servants abandoned ship and cargo on the high seas, to sink or swim, and believed she had sunk, although the ship just floated on her cargo till she was salved next day.

It is common enough for a laden ship to be left derelict at sea, and many decisions have settled the legal consequence. Several sets of rights are affected. A salvor's possessory right is different where the ship is derelict and where it is not. The crew of a derelict may claim that their contract of employment has terminated, and may be awarded remuneration as salvors for services rendered. The rights of assured and underwriters may be in question, or, as here, the right of a cargo owner to claim that the performance of the contract of carriage has come to an end and cannot be renewed. It is highly desirable, since so many interests may be affected by it, that existing views about what makes a derelict should not be unsettled, and that the test of a ship's being derelict should be such as can be readily applied, and will not be dependent on inquiry into the state of mind of men who, unfortunately, may not have survived the marine disaster. As to the rights of the cargo owner, the authorities, extending over about forty years, are all one way. *The Kathleen* (2 Asp. Mar. Law Cas. 367; 31 L. T. Rep. 204; L. Rep. 4 A. & E. 269), *The Cito* (4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 Prob. Div. 5), and *The Arno* (8 Asp. Mar. Law Cas. 5; 72 L. T. Rep. 621) are all decisions on motions in salvage actions for delivery of cargo to the cargo owners freight free. They have often been applied in cases not formally reported, and have been followed in the Supreme Court of the United States: (*The Eliza Lines*, 199 U.S. 119).

The proposition there laid down was that by the general principle of contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from future

performance on his side. No contrary decision has been found. Judge Carver states their effect thus: "Where a ship has been definitely abandoned at sea by the master and crew without any intention of coming back to her, the freighter is entitled to treat the contract of carriage as abandoned; so that, if the ship or cargo be afterwards brought into port by salvors, the cargo owners may claim to have their goods without paying any freight, even though the shipowner is ready and demands to be allowed to take them on to their destination"; and the learned authors of Scrutton on Charter Parties (I quote from the edition of 1914, p. 318) say: "Where the shipowner has no longer a right to carry on, or where he abandons the ship and cargo, or where he delays repair or transhipment beyond a reasonable time, the goods owner, who receives the goods, will not thereby give the shipowner any claim for freight *pro rata*. Obviously, it is *a fortiori* to say that there will be no claim for ordinary bill of lading freight. Lord Justice Kennedy's work on Civil Salvage is to the like effect.

I think that the argument disclosed a misapprehension of the principle on which these decisions rest, for the suggestion was that, except that it is done by an agent, a master's act in leaving ship and cargo derelict at sea is identical in principle with an intimation by one of the parties to an executory contract made to the other, that he does not intend to perform his part of the contract or to be bound by his obligations under it when the time for performance or observance may arrive. Hence it was argued that in such a case (1) the actual intention of the captain as a mental state is crucial, (2) that the actual intention of the shipowner is also material, since his mind is deemed to have gone to the making of the contract and must therefore play its part in the unmaking of it, and that any breach by leaving the ship derelict cannot be final so long as it is possible that he may repair the consequences of the master's conduct; and (3) that the act of quitting the ship cannot have effect on the rights of the contracting party until it has been intimated to him by the shipowner or on his behalf. I think this argument was fallacious.

As the judgments in *The Cito* and *The Arno* (*sup.*) show, there is an analogy between those cases and *Mersey Steel and Iron Company* v. *Naylor, Benzon, and Co.* (51 L. T. Rep. 637; 9 App. Cas. 434), but the distinctions between them must be kept in mind. The master is the shipowner's agent to perform the voyage and to take such decisions and do such acts in the course of it as must be taken then and there by the person in command, but his employment does not of itself ordinarily authorise him to vary a contract made by his employer. His actions may have far-reaching consequences, but he is not authorised to form or express his employer's intentions, as such, in a matter of his employer's contract. If the shipowner, by his authorised agent, has definitely ended the performance of the voyage *in medio*, and quitted possession of the cargo, which is the effect of leaving the derelict, the cargo owner is free to do what he will with his own. Thus only the result is the same, and not the question, as in the *Mersey Steel Company's* case, which turns not on the significance of an act, but on the intimation of an intention, not on performance entirely brought to a premature end, but on anticipatory refusal to perform at all.

If this is right, the master's frame of mind is not the question; his acts are. If the master and crew perished the result would be the same. Whether he was moved to quit the vessel by one kind of peril or another cannot matter when he does quit it, provided he does so for good and not for the purpose of procuring the means of prosecuting the voyage in the course of a temporary absence. In some ways, indeed, the matter is most conclusive when least is known of the captain's actual mental processes. The shipowner's intention is not material, nor is even his knowledge, for if the voyage is at an end and the cargo owner has availed himself of his liberty, the shipowner cannot revive it by acquiring knowledge and thereupon forming an intention. Equally little can intimation to the cargo owner matter, for if the master's action has in truth put an end to the voyage and the cargo owner knows it, he is free to avail himself of his legal rights without more.

The effect on the contract of carriage of maritime disaster occurring in the course of a voyage was originally always discussed in connection with claims for freight *pro rata itineris peracti*. It was not until the middle of the last century that the shipowner's right to tranship at a port of refuge and earn original bill of lading freight by carrying on in another bottom was fully recognised in this country, and it has never been formally decided, that he has the same right when the ship is abandoned at sea and possession of the cargo has been abandoned with it instead of being retained at the port of refuge as in earlier cases. Yet the language used in the earlier cases is significant, though the circumstances of the two types of cases differ so widely. In *Hunter* v. *Prinsep* (10 East, 394) where the cargo had been sold at the master's instance by order of a court in a port of distress, Lord Ellenborough says: "If no freight be earned and he declines proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods and selling them accordingly, which was unnecessary and which disabled him from forwarding the goods, was in effect declining to proceed to earn freight." I ask myself why the captain's conduct in leaving the goods to their fate at sea is not also in effect a "declining to proceed to earn freight," which gives the freighter a similar right to possession. If stress be laid on the words "which was unnecessary," I recall that the salvors were held to have got possession in *Cossman* v. *West* (6 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 122; 9 App. Cas. 434), though the abandonment was only necessary because the captain had first scuttled the ship. Again, in *Shipton* v. *Thornton* (9 A. & E. 335), which established the right to tranship in order to complete the earning of the bill of lading freight, Lord Denman says: "In the case supposed" (that is, the case of a ship disabled in a port of refuge without fault of the master) "let the owner of the goods arrive and insist, as he undoubtedly may, that the goods shall not proceed but be delivered to him at the intermediate port, there is then no question that the whole freight at the original rate must be paid,

and that because the freighter prevents the master, who was able and willing and has the right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract." Whatever other criticisms may arise on this language, I think it is clear that this passage, which states the principles on which the right to tranship or carry on was upheld, rests on the proposition that the master is able and willing to fulfil the contract, which, though a contract for carriage in a named ship, is deemed to be validly performable in another, where carriage in the original ship to the destination is both impossible and excusable. This prevents it from being a mere claim to take the benefit of a contract arising out of a breach of the contract: it becomes the next best performance that maritime perils allow. If, however, the Captain is neither able nor willing to complete the voyage, but by every act open to a seaman has thrown it up for good, what is there to prevent the owner of the goods from insisting that he may take possession of his own goods, possession of which the master has abandoned? I think it ought be remembered that these cases lie, logically as well as historically, behind *The Cito* and *The Arno*, and that the current of authority ought to be surveyed as a whole.

The matter may be tested in two other ways. The shipowner has a possessory lien on goods shipped on board his vessel to secure the earning and payment of his freight. If he loses possession, what term in the bill of lading contract prevents the cargo owner from taking possession of his own property, or constrains him to ship it over again or to redeliver it to the shipowner for his benefit? No term in fact assuredly, and no authority whatever is forthcoming to support the implication of such a term in law. Now, it is clear that, if a ship and cargo are left derelict at sea, the shipowner loses possession and with it his lien: the ship and cargo are at large to be taken into the possession of the first salvor. "In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession or control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but, in the ordinary case of disaster, when the master remains in command he retains the possession of the ship. . . . Unless a vessel is derelict, the salvors have not the right, as against the master, to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him": (see *Cossman* v. *West*, 6 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 122; 13 App. Cas., at p. 181). Again, when a ship is in distress, under certain circumstances the master, though in general only the servant of the shipowner, becomes agent of necessity for the cargo owner to dispose of his cargo, independently of the ship, the voyage, and the bill of lading contract. When does this happen? "The agency of the master from necessity," says Parke B. in *Vlierboom* v. *Chapman* (13 M. & W. 235) "arises from his total inability to carry the goods to the place of destination." How are these authorities to be reconciled with the view that although the master is so little able to prosecute the voyage or to carry the goods in any way to their destination that he leaves them and the ship out at sea for good, still the cargo owner cannot act as his own agent of necessity and cannot do what the first salvor can do, namely take and keep possession of his own goods, but if he meddles at all, becomes an agent of necessity for the shipowner and must assist him to earn a freight which he cannot earn for himself.

Cases of derelicts are common enough, but no single decision was produced in which, under circumstances similar to these, a ship has not been treated as derelict with all the consequences that follow thereupon. Sankey, J. found that the ship and cargo were left derelict. I think he was right. Pickford, L.J. agreed with him. Bankes. L.J. expressed no opinion on the point. Evans, P. so found in the salvage action. The judgment of Sargant, J. alone holds that the ship was not abandoned, because the master and crew acted involuntarily, and that the facts show no intention on their part to abandon the contract of affreightment on behalf of the shipowners. Even he does not see any ground for supposing that there was any intention of returning to the *Jupiter* or hope of recovering her. Before your Lordships it has also been argued that the ship was not left derelict, because it has not been shown that the master had not some hope or intention of returning to the ship, if the enemy left him the chance of doing so. Now as Brett, L.J. says in *The Cito*, the abandonment of the ship does not put an end to the contract. It is certainly kept alive for the purpose of enforcing causes of action already accrued upon it; possibly it is kept alive for the purpose of enabling the shipowner to carry on the goods and earn the bill of lading freight, if he can recover possession before the cargo owner has done so, or has intimated his election to take his cargo where it lies, and not at the port of delivery. This point, expressly reserved in *The Cito* and *The Arno*, need not be decided now. I have endeavoured to show that the supposed intention of the master to abandon his owner's contract for him is not material, and it is clear that the cargo owners elected to take their goods at Leith, subject only to the salvor's claim, at a time when the shipowner had taken no steps to prosecute the voyage, or even ascertain that it was possible to do so. What he did was far less than was done by the shipowners in *The Arno*, and yet was held by the Court of Appeal to be ineffectual to prevent the cargo owner from claiming his cargo freight free.

After all, what is the evidence about the abandonment of the vessel? It is all contained in the protest—and it is the master's own tale, in his own words, not cross-examined to, and not contradicted. The pleadings and judgment in the salvage action add some significant details as to the ship's state next day, but none as to her condition on the 7th Oct. The story cannot now be carried by inference or by speculation beyond where it was left by the master. The ship was fired on by an enemy submarine but was not hit. Signals were made to the captain to abandon ship. He deciphered the signals; he presumably considered the matter, though probably very rapidly. He saw no possible chance of escape. He decided to obey and at once gave orders to take to the boats.

In all this I assume that he displayed neither lack of courage nor lack of wisdom. He did not try to run; perhaps he did not think of it. He did not try to fight; probably the attempt would have been foolhardy. He decided to do what he thought was the only thing to be done, and I take it that he was right. Still he decided. He decided under duress, but pressure, which would have released him from a contract thereby induced or have negatived any *consensus ad idem*, is very different from that mechanical action which is illustrated by *Scott* v. *Shepherd* (2 Wm. Bl. 892), or the *Cosmopolitan* (6 Notes of Cases, Supp. XVII.) or *The Fenix* (Swabey, 15). His act was neither unintentional nor involuntary.

At this time it was not dark, but before the submarine cast off the boats it had become dark enough for the vessel to be lost sight of. After the boats were left free by the enemy—which was before 7.30 p.m.—the master might have put back to look for the vessel; after he was picked up by the *Ayacanora* he might have prevailed on her commander to go back. He believed she had sunk, and did neither; but the fact that he wrongly thought she had foundered does not prevent his action from being voluntarily, deliberate, and unconstrained. Whether there was a mistake or not on the part of the master, says Dr. Lushington in the *Sarah Bell* (4 Notes of Cases, 144), is not of the slightest importance, for, assuming it to have been a mistake, his mind was actuated thereby, and the *spes recuperandi* must be governed by the feelings of the individual's own mind at the time. So in *The Janet Court* (8 Asp. Mar. Law Cas. 223; (76 L. T. Rep. 172; (1897) P. 59), Jeune, P. took it as obvious that, if a master believed his ship had been sunk after he quitted her, he could have had no intention of returning, although he was in fact wrong, as in that respect the captain always is in salvage cases where the ship is saved. What is clear about the whole story is that, in fact, he then had neither animus nor *spes revertendi*, and if he left the ship to her fate for good and all he did so all the more decidedly because he did actually think that she was no longer on the surface but was at the bottom. If a master and crew quit ship and cargo at sea they commit a very grave dereliction of duty unless the grave peril in which they find themselves justifies their action. Ships are sometimes left without justification, but I feel sure not often, and in my opinion the inference from such an abandonment *de facto* is that the voyage cannot be further prosecuted. If this is to be rebutted it must be by positive evidence. There is no such evidence here. If all that is proved is that there was an abandonment *de facto* the presumption is that the master intended to do what he did in fact. He acted as if he had no hope of return, and unless it is proved that he had such a hope it must be taken that he had none. It is not as though salvors were standing by and the captain had remained with them (*The Leptir*, 5 Asp. Mar. Law Cas. 411; 52 L. T. Rep. 768), or as if the ship was aground or near the shore and the crew had gone ashore for their personal safety, but took steps to recover the vessel: (*The Clarisse*, Swabey, 129). Even when a ship is left at sea there is often so far a hope of return that the captain says to himself, "If I do fall in with possible salvors, I will send them back," but as Dr. Lushington says in *The Coromandel* (Swa. at p. 208), "It may be that they intended, if possible, to employ steamers to go and rescue the vessel, but is not that the case every day?" This does not prevent the ship from being a derelict, when no salvors are sent back. Surely the rights of first salvors to possession and control, the right of the crew to salvage remuneration for salvage services, the right of cargo owners to take charge of their own goods cannot be left *in dubio* till the interior of the captain's mind is explored, if death has not for ever closed that inquiry. Would the ship have been no derelict, if all the crew had been drowned, and evidence was, therefore unprocurable about their hope or despair of return? Whatever objections there are to the *argumentum ab inconvenienti*, at least it should dissuade us from applying novel tests to familiar incidents and disturbing the ordinary legal conclusions drawn from well-known nautical conduct. The casualty may take place in one hemisphere and within reach of the shipper; must he stay his hand till the fate of the crew is known and the master's liberty of judgment can be investigated, or till the shipowner, perhaps a foreigner resident in the other hemisphere, hears of the accident and has a chance to intimate one intention or another? A shipowner's first step in such a case is nearly always to abandon his ship to underwriters and thereby to abandon to them such right as he may have to carry on and earn freight; if so, in ninety-nine cases out of a hundred his election will thus virtually be not to abandon further performance of the contract, and the ship underwriter's position will be permanently superior to that of the cargo underwriter. Cargo underwriters insure against loss of cargo by marine perils but not against liability to pay freight. In such a predicament the cargo owner will naturally leave the derelict alone.

Again, when a ship has proceeded but a short distance on her voyage and is abandoned, the shipowner has the minimum of interest in recovering the cargo, while the shipper may still be near at hand. Towards the end of the voyage the shipowner may be able to earn a great reward by recovering and delivering at its destination a cargo, so damaged as to be valueless, though being still in specie, it may be good enough to earn freight. If so, the cargo owner's interest probably is to rescue the cargo from further transit, while there is still time to arrest the damage and pluck something from the disaster. I think it would be lamentable, if in these cases the cargo owner were compelled to stay his hand and do nothing to save the cargo, lest having done so he should only saddle himself with a liability for freight which the shipowner himself might never have earned, instead of letting well alone and claiming a total loss on his insurance policy. It is to the advantage of all parties, and of the public too, that when a ship is known to have been left to her fate at sea, no uncertainty about the rights should stand in the way of an energetic attempt to save the cargo.

It is said that every case of marine disaster is legally a question of fact. Be it so. Let it be too that the captain and crew had to go. No one blames them, but is the prosecution of the voyage terminated or only suspended according as the captain's motive or his judgment is good or bad?

A ship may be a derelict with all the consequences that follow in law, though she was corruptly abandoned and equally a derelict, though the captain did it for the best. The owner may be liable in damages to the cargo owner according as he has or has not exceptions of barratry or negligence of the captain in the bill of lading to protect him, but if the mere *de facto* termination of the voyage produces legal results, they follow equally, no matter what the captain's motives may have been. Though the question is one of fact, it is one which in typical states of fact can only be answered one way. Negligence in a running-down case is a question of fact for a jury, but there is an abundance of ordinary conjunctures connected with such accidents in which a jury's verdict must recognise the ordinary views taken of such facts, or it will be set aside. The fact that the captain and crew had little choice here and virtually had to leave their ship to save their lives is an ordinary incident of derelicts; whether this is caused by fire or by the King's enemies or perils of the sea cannot distinguish the cases from one another. They have to leave the ship and they go and the ship is left derelict, and the clearer the compulsion the clearer is the termination of the voyage, unless special circumstances show a *spes* (not a speculation) *revertendi*, a plan, not a bare possibility of leaving the ship the better to procure help and to continue the voyage. For myself, I do not see how the judgment of the majority in the Court of Appeal can be reversed without disregarding *The Cito* and *The Arno*, and without taking a view of maritime disaster which will introduce new considerations into all these cases, and I should dismiss the appeal.

Lord PARMOOR.—The relevant facts for consideration in this appeal are as follows:—The respondents are endorsees of bills of lading, dated Archangel, Sept. 1916, and signed on behalf of the appellants, the owners of the *Jupiter*, for the carriage of a cargo of wood to Hull at freight to be paid as per charter-party. When off the coast of Scotland on the 7th Oct. the *Jupiter* was captured by a German submarine. The master and crew were compelled to take to their boats under threats from loaded revolvers, and bombs were exploded on board the ship. When last seen by the crew the ship was believed to be sinking, and the captain telegraphed from Aberdeen to the owner on the 6th Oct.: "Ship sunk yesterday submarine arrived all well Sailors' Home." The ship in fact was not sunk, but was picked up by salvors, beached at Newhaven, near Leith, on the 11th Oct., and there taken possession of by the Receiver of Wrecks, to whom she was handed over by the salvors. Subsequently there were certain messages and letters to which frequent reference was made during the argument, but it will be convenient in the first place to consider what would have been the respective rights of the parties if there had been no such messages or letters.

The main argument put forward on behalf of the respondents in the statement and points of claim was that the *Jupiter* was abandoned by the master and crew during the voyage to which the contract of affreightment attached, and that such abandonment without any intention to retake possession gave the cargo owner the right to treat the contract of affreightment as at an end, and that he so treated it. In support of this contention the counsel for the respondents relied on *The Cito* (4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 Prob. Div. 5), *The Arno* (8 Asp. Mar. Law Cas. 5; 72 L. T. Rep. 621), and *The Kathleen* (2 Asp. Mar. Law Cas. 367; 31 L. T. Rep. 204; L. Rep. 4 A. & E. 269).

I think that the term "abandonment" of a vessel in the ordinary sense denotes some discretion or volition on behalf of the master, and that it is not applicable to a capture followed by the forcible removal of the master and crew under enemy threats. The vessel was abandoned, not by the master and crew, but by the captors, who intended to sink her, but in fact left her a derelict. If this is the right view of the incidents which took place on the 7th day of Oct., it cannot be said that there was in any sense an act done on the part of the shipowner or his representatives indicating an intention to repudiate the contract of affreightment such as would entitle the freighter to infer that the shipowner did not intend to carry out the contract and give him a right to treat it as at an end. I agree with Sargant, J. that the conditions of this case are *toto cælo* different from the case of abandonment of the *Cito* or the *Arno*, where the master and crew exercised a discretion to abandon the vessel under stress of the violence of the weather.

In the second place, the counsel for the respondents relied on the fact that the vessel was left as a derelict, and the consequent inability of the appellants to carry on without interruption the contract of affreightment put an end to that contract. I think that it is impossible to maintain this proposition in general terms. The circumstances of the present case are an apt illustration to the contrary. Assuming for this purpose that no subsequent communications had passed between the shipowner and the cargo owner, but that the vessel, in spite of being for a time without a crew, did successfully perform the voyage to Hull for delivery of the cargo to that port, I see no ground on which the cargo owner could have disputed his liability to pay freight under the terms of the contract. The same argument would apply to carriers by land as to carriers by sea. If carriers who had done no act evincing an intention to abandon the contract of affreightment in fact deliver goods intrusted to them in accordance with the terms of a contract of carriage, freight is not the less payable under the contract if, during the conveyance, the carriers have for a time lost control of the vehicle in which the goods were packed. Mr. Wright, however, used the additional argument that it was not only a case of temporary inability to perform the contract, but that there was evidence of an intention on the part of the shipowner not to return to the vessel, or take any steps to perform his obligations under the contract.

I find no evidence of any such intention. The subsequent action of the appellants appears to have been based not on any intention to abandon a floating vessel, but on the mistaken view that the captors had succeeded in sinking the ship after taking off the master and crew, and that the vessel had gone to the bottom of the sea.

A further point made on behalf of the respondents was that if a carrier or his representatives had been removed from the vehicle of carriage, whether ship or cart or train, and the freighter finds his goods on such ship or other vehicle, the freighter is then entitled to take possession of his goods and to deal with them in such way as he may think fit, not being under any liability to pay freight to the carrier, since the contract of affreightment had not at such time been completed. I think that before a freighter is entitled to take possession of goods which he has intrusted to a carrier for carriage under a contract of affreightment he must show either that he is exercising a right which the contract has given him or that the contract itself has in some way been terminated. For reasons already stated I think that the contract of affreightment had not terminated either through repudiation by the shipowner accepted by the freighter or by the fact that the vessel in which the goods were being carried was for a time without a crew, and in the terms of the contract the freighter was certainly not entitled to take delivery on the open sea or at any other port than the port of delivery. No doubt if the shipowner had abandoned the ship and cargo so as to put an end to the contract of affreightment he could not, by gaining possession of his ship from salvors, revive the contract or establish a right to freight, but these conditions do not apply to the capture of the *Jupiter* and the forcible removal of the master and crew.

The last point raised on behalf of the respondents depends on the messages and correspondence which passed subsequently to the capture of the vessel. The majority of the Court of Appeal held that these messages and correspondence amount to a statement by the shipowner that he is not in a position to carry out the contract of affreightment, and that, as the freighter acted on this communication, the shipowner, who made it, is bound to observe it. A letter was sent by the shipowner to be communicated to the charterers in the following terms: "It is with very great regret I advise you of the loss of my steamship *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. Will you kindly advise charterers and oblige."

At the time when the shipowner made this communication he was under the mistaken impression that the *Jupiter* had been sunk. I cannot find anything more in the letter than a communication from the shipowner giving the information which he had received as to the conditions of the vessel and crew. I am unable to construe this communication as an intimation of the intention of the shipowner not to carry out the obligation of his contract, or that it was written in such form as to prevent the shipowner stating later that it was sent under a mistake of fact. On the 11th Oct. the following telegram was sent on behalf of the respondents: "*Jupiter* we represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please take note."

This telegram shows that the respondents or their representatives very early ascertained that the shipowner had made a mistake in stating that the vessel had been sunk. On the same day a further telegram was sent to Leith: "Steamer *Jupiter* we represent owners cargo understand she is now lyingat Newhaven please note our clients claim elect take possession their property where steamer now is please do not allow cargo to be dealt with except with our sanction please do anything necessary protect property for our clients."

The advisers to the respondents were properly astute to protect the interests of their client, but on the assumption that, apart from these communications, the contract for affreightment was still in force, I cannot draw the inference that the message sent by the shipowner under a mistake of fact, read in connection with the subsequent telegrams, is sufficient evidence of an act done by the shipowner indicating his intention to repudiate the contract of affreightment such as would entitle the freighter to put an end to the contract and to place him in a position to take possession of his goods without payment of freight.

In my opinion the appeal should be allowed with costs.

Lord WRENBURY.—The decision is in this case, in my judgment, to be reached by the application to the facts of certain principles of the law of contract. The application of the principles may not be easy, but the principles themselves are not difficult of statement, and, but for the arguments which we have heard, are not, I should have thought, capable of serious dispute.

A contract between two persons results from the consensus of the two minds agreeing *animo contrahendi* to terms which each accepts and which create obligations between them. The contract having been entered into may be determined in any one of three ways. First—consensus created the contract and consensus may determine it. If the two parties agree to determine the contract it is determined. Secondly—some contracts though expressed in absolute terms are by the nature of the matter so obviously dependent upon the possibility of performing the promise that a term is implied excepting the events which render performance according to the promise impossible. In the case of such events happening the contract ceases to be operative. Thus in a contract for personal service for a term of years will be implied a condition if the party shall so long live. Thirdly—if the one party to the contract by words or by conduct expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, "I take you at your word; I accept your repudiation of your promise and will sue you for breach." This is really no addition to but a particular application of the principle first above stated. The first party has, in fact, made an offer. This offer is: "I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal." The other may accept or may decline that offer. If he accepts them by consensus the contract is determined, but with a right to damages against the party who has refused to perform. In each of these cases it is the consensus of the parties which brings the contract to an end. In the first and third cases it is consensus *dehors* the contract. In the second it is the consensus to the implied term contained in the contract.

But it is said in argument there is a fourth way in which a contract of affreightment may be determined, and in this case consensus is not necessary. I hope I state the contention accurately when I say it is this. If the performance of the contract of carriage has ceased by the shipowner abandoning his ship, whether *sine animo revertendi* or *sine spe revertendi*, the cargo-owner may, if he can while the ship is derelict or in the hands of salvors, retake possession of his cargo. If he can be first in the field and forestall the shipowner in resuming possession he may take his cargo and refuse to allow the shipowner to resume the voyage and may escape payment of any freight even if the goods in fact reach the contractual port of discharge. Let me assume, in the first place, that the shipowner has abandoned his ship *sine animo revertendi*, that his intention in that respect has by words or by conduct been communicated to the cargo owner and that before any change of intention has been communicated the cargo owner has acted upon the expressed intention and accepted it. In that state of facts it seems to me that upon the principles already stated there is a consensus which terminates the contract. But the contention is carried much beyond that. The contention is rested not upon any animus—not upon any intention—but upon a certain fact. "My case," said Mr. Wright, in summarising his argument, "is abandonment in fact and possession claimed by the cargo owner before possession is taken by the shipowner." The contention is that if the shipowner's possession has ceased—if the ship is out of the owner's possession—is afloat, but not in the possession of her owner, then, whether the owner's possession has been determined by violence or has been abandoned voluntarily—whether with or without sufficient cause—the cargo owner may take possession if he can, and if he does so will not be liable for freight. The ground upon which the contention is rested is that there has occurred a complete interruption of the contract of carriage, and that, therefore, it results, not that the contract is at an end, but that at the option of the cargo owner it can be brought to an end. I cannot accept that proposition.

In order to make clear what my view is of the law applicable to such a case, I must say something of what is commonly called "anticipatory breach" of contract. The expression is, I think, unfortunate. In *Hochster* v. *De la Tour* (2 Ell. & Bl. 278), the leading case upon this subject, Lord Campbell made no use of the expression in his judgments. It is used several times by Lord Esher in *Johnstone* v. *Milling* (54 L. T. Rep. 629; 16 Q. B. Div. 460), but not by either of his colleagues. The words used are, of course, immaterial unless they lead in course of time to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promiser before that time arrives says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen, L.J.'s words in *Johnstone* v. *Milling*, it is "a wrongful renunciation of the contractual relation into which he has entered." It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter, it is still by consensus of the parties and not by some superior force that the contract is determined. I cannot see that the doctrine of what is generally called "anticipatory breach" lends any support to the contention of the respondents in this case. It is no authority for the proposition that anything other than the intention of the contracting parties can either tie or untie the bonds of a contract.

I ask myself this question. What consequence results from the following facts without more:—(1) The ship has been abandoned at sea; (2) neither shipowner nor cargo owner is in possession; the ship has no one on board; (3) the shipowner and cargo owner arrive together at the place where, in fact, the ship is found to be. Which of the two has prior right to take possession? The answer, to my mind, is that contractually the shipowner is entitled as against the cargo owner to take possession of the ship and complete the voyage. It is a wrongful act on the part of the cargo owner to prevent his doing so, unless the contract has been determined. He cannot say I will take possession of my cargo so as to determine it. He can only say, I will take possession of my cargo because the contract has been determined. But the very question is whether it has been determined or not.

Further, upon authority, what is the result of abandonment at sea in itself and without more? Does it put an end to the contract of affreightment? Lord Esher in *The Cito* (4 Asp. Mar. Law Cas. 468; 45 L. T. Rep. 663; 7 P. Div. 5) says it does not. "Suppose," he says, "a wrongful abandonment without its being occasioned by the perils of the sea, it is clear that in that case the owner of the cargo might sue the shipowner for his breach of contract, soit cannot be said that it puts an end to the contract of affreightment." The ground of the decision in *The Cito* seems to me to be clear from Lord Esher's next words. "It is sufficient," he says, "I think for the determination of the present case to say that by an abandonment of a ship without any intention to retake possession of it the shipowner has so far as he can abandoned the contract so as to allow the other party to it, the cargo owner, to treat it as abandoned." If the ship is abandoned *sine animo revertendi* and the cargo owner has accepted that intention I feel no difficulty in arriving at the conclusion at which the Court of Appeal arrived in *The Cito*. In *The Arno* (8 Asp. Mar. Law Cas. 5; 72 L. T. Rep. 621) both Gainsford Bruce, J. and Lord Esher rest the case upon the intention of the ship owner.

If I am right in these views there is no fourth way in which a contract of affreightment as distinguished from all other contracts is capable of being determined. If it were alleged and shown that every contract of affreightment contains an implied term that the contract of carriage shall be performed continuously and without any interruption of the shipowner's

possession, then I could understand that the respondents might succeed—that would be the second case above stated; but that is not alleged or shown. The respondents did not agree on that point. If they had done so I cannot tell whether the appellants might not successfully have contended the contrary. Under these circumstances I cannot but preserve my opinion upon the question. I cannot resolve it in favour of the respondents, who did not raise it and give his opponents an opportunity of answering it. It is under these circumstances that I have to apply to the facts of this case the principles applicable to all contracts with which I started.

The facts are that there was a contract of affreightment from Archangel to Hull, and that in point of fact the goods were in the result and as the result of arrangement carried in the vessel to the contractual port of discharge. During the voyage—namely, on the 7th Oct.—the master and crew were removed *vi et armis* from the vessel by a German submarine, which endeavoured to sink and, as everyone thought, had succeeded in sinking, the ship. The submarine towed the master and crew five miles from the spot and there cast them adrift. Night was coming on, and everyone thought the ship was at the bottom of the sea. The crew were picked up, and from Aberdeen they telegraphed on the 8th Oct. to their owner that the ship had been sunk by a submarine. Later in the same day the master wrote to his owner that he had heard in the evening that the ship was in tow, but that it was doubtful whether they (the salvors) would salve her. That letter will have reached the owner presumably on the 10th Oct. On the 8th Oct. after receipt of the telegram (but of course before receipt of the letter) the owner wrote to the brokers who had effected the charter advising them of the loss of the ship (which he of course then believed, but erroneously, to have been sunk) and asking them to advise the charterers of the fact.

On the 9th Oct. the brokers wrote to the charterers accordingly. On the 11th Oct. about 10·35 a.m., the owner was informed that the ship had been taken to Leith. In fact she was at Newhaven, near Leith. At 5.5 p.m. he started by train for Leith. In the interval—namely, about 2.47 p.m.—he received a telegram from the solicitor of the charterers. The charterers having learned somehow that in point of fact the ship had not been sunk telegraphed by their solicitors to the shipowner that the ship had been brought in and that they elected to take possession of the cargo. The shipowner by letter the same evening wrote that he was going to bring the cargo forward to its destination. The position therefore is as follows: The shipowner tells the charterers the ship is sunk; the charterers reply, "She is not sunk, but we avail ourselves of your erroneous belief that she is sunk and determine the contract." The shipowner replies, "You cannot do that. I find she is not sunk. I am going to perform." There is not much consensus about that. It comes to this: The owner says, "I was always ready and willing to perform. I thought performance had become impossible and I said so. That is all." Unless the case turns, not upon intention, but on the fact that the owners were out of possession, it seems to me that the respondents cannot succeed.

There is another ground upon which the contention was sought to be rested, and that was inability to perform. Intention not to perform or inability to perform raises, it is said, the right of the cargo owner to treat the contract as at an end. If there was inability to perform, if the contractual act had become impossible, then upon the second ground above stated the contract would, no doubt, determine by the operation of the implied term that if the act proved to be impossible the contracting parties were not bound. But the point is not open upon the facts of the present case. The contractual act had not become impossible and the cargo owner when he acted knew that it had not become impossible. The shipowner's letter of the 8th October was not I think an expression of intention at all, but assuming that it was, it results only in this. The shipowner I will assume says, "My contract has become impossible; I am not going to perform it." The cargo owner replies, "Your expression of intention not to perform is made in ignorance of the real facts; the contract has not become impossible, but I will accept your expression of intention and will elect to determine the contract." To say that that is a consensus to determine the contract seems to me impossible.

In my view abandonment at sea is not an operative cause but only evidence, although it may no doubt be strong evidence of intention. If the owner voluntarily abandons at sea it may well be that the onus is on him to show the *animus revertendi*. If he abandons only in the sense that he is compulsorily dispossessed by violence, the abandonment, or as I prefer to call it, the dispossession does not in itself effect anything in affecting the contract. If the owner having been dispossessed by violence does by words or by conduct express an intention not to seek to regain possession no doubt the option arises in the cargo owner to treat the contract at an end. Nothing of that kind arose here. The owner did not abandon in any way as an act of volition: having been dispossessed by violence he did no act to express an intention not to seek to regain possession. He did in fact seek to regain possession and subject to the prior rights of the salvors I think he was entitled to take it. For these reasons I think that the appeal must be allowed and judgment entered for the appellants upon the claim for 14,050*l.* 2*s.* 9*d.* and upon the counter-claim, with costs of both claim and counter-claim.

Appeal allowed.

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

Solicitors for the respondents, *William A Crump* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 8 and 9, 1918.

(Before Pickford, Bankes, and Scrutton, L.JJ.)

Leopold Walford (London) Limited v. Les Affreteurs Reunis Societe Anonyme. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Brokers' commission — Custom — Inconsistency with contract.

A custom can only bind parties in the absence of a special agreement inconsistent with it.

A time charter-party provided by a clause that "a commission of 3 per cent. on the estimated gross amount of hire is due to" the brokers "on signing this charter (ship lost or not lost)." The ship was requisitioned by the French Government, and no hire was earned under the charter-party. The shipowners claimed to set up a custom by which commission was not payable unless hire was earned under the charter-party.

Held, that the custom was inconsistent with the clause of the charter-party, and could not be set up as an answer to the brokers' claim to commission.

Held, also, that the charterers could sue as trustees for the brokers.

Robertson *v.* Wait (1853, 3 *Ex.* 229) *approved.*
Harley *v.* Nagata (23 *Com. Cas.* 121) *distinguished.*
Decision of Bailhache, J. reversed.

Appeal by the brokers from a decision of Bailhache, J.

The plaintiffs, who were brokers, claimed commission from the shipowners, the defendants, for effecting a time charter-party, dated the 28th Sept. 1916, and made between the defendants and the Lubricating and Fuel Oils Company Limited, the charterers. Clause 29 of the charter-party was as set out in the headnote.

The defendants, among other things, contended that, as the ship was requisitioned before hire was earned, no commission was payable, and they relied upon and gave evidence of a custom of the trade to that effect. By consent the action, which was brought by the brokers, was treated as if it had been brought by the charterers as trustees for the brokers.

Bailhache, J. decided in favour of the shipowners, making the following observations in the course of his judgment: "A custom was proved before me in *Harley* v. *Nagata* (*sup.*) that it is the invariable practice in time charter-parties that brokers' commission is payable out of hire that is earned; the charterer sends the hire money to the broker, the broker deducts his commission from the hire, and sends the balance to the shipowner; and, further, that it is the invariable practice that, unless hire is earned, no commission is payable at all; and that that practice is entirely irrespective of the form in which the commission clause finds its way into the charter-party; that the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire. That custom was proved by very satisfactory evidence in *Harley* v. *Nagata* (*sup.*), and has been proved again in this case. The custom must prevail."

The plaintiffs appealed.

MacKinnon, K.C. and *Raeburn* for the plaintiffs.

R. A. Wright, K.C. and *Neilson* for the defendants.

The following authorities were referred to:

Robertson v. *Wait* (*sup.*);
Humfrey v. *Dale*, 7 E. & B. 266, 275;
Harley v. *Nagata* (*sup.*):
White v. *Turnbull, Martin, and Co.*, 8 Asp. Mar. Law Cas. 406; 78 L. T. Rep. 726; 3 Com. Cas. 183;
Carver on Carriage by Sea, 8th edit., sect. 122;
Scrutton on Charter-parties, 8th edit., p. 40.

Pickford, L.J.—I think this appeal must succeed. I feel that the judgment given by Bailhache, J. may be more in accordance with the practice of business men than mine. The reason is that the parties have pursued a very common practice of putting their names to documents and signing agreements without considering whether those agreements conflict with their ordinary method of business. The learned judge pointed out that that course of conduct leads to great difficulty. Commercial gentlemen never pay any attention to those remarks; they think, no doubt rightly, that they know better how to conduct their business than lawyers and judges do; but if they will go on doing that and putting their names to agreements without considering what they mean, they must expect difficulties when contested questions arise upon those documents. One of the gentlemen who is entitled to participate in this commission has said that this is not a just claim. I suppose he means by that that it is a claim which is in opposition to what he thinks the plaintiffs should consider the proper method of business, and a proper claim to be made in this case. It may be so or not. All I have to do is to decide this as best I can according to recognised principles of law.

This is an action brought by the charterers—I exclude the brokers for this purpose—upon a clause in the charter-party providing for payment of commission to the charterers' brokers who negotiated and concluded the charter. It was originally brought in the name of the brokers. There was no contract made direct between the brokers and shipowners. For a purpose which I will mention soon, I asked if counsel for the respondents could point to any evidence showing any contract made between the brokers direct with the shipowners or any contract, direct or indirect, with the brokers except that in the charter, and he was unable to point to any such evidence, and for the very good reason that there was never any such agreement made. The payment of commission was regulated by the clause in the charter, and by that only. That was an agreement upon which the brokers cannot sue because they did not make it in their own name, and consequently an application was made to join the charterers as plaintiffs, but they were not formally joined because the defendants undertook not to take objection to their not having been joined in the first instance, and to allow the case to proceed as though they were the plaintiffs. And that is the way in which I propose to look at

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

the case, that there was a contract between the charterers and the shipowners by which the shipowners undertook with the charterers to pay a certain sum as commission for the charter of boats.

If there was such an agreement, then I think it has been settled a long time ago (in 1853), by *Robertson* v. *Wait* (1 W. Rep. 132; 3 Exch 299) that the charterer can sue upon an agreement of that description as trustee for the broker. *Robertson* v. *Wait* has never been disapproved, and was cited with approval in *West* v. *Houghton* by Phillimore, J. in L. Rep. 3 Ad. & Ecc. Cas. 364, and it may have been cited with approval in other cases, but I have not pursued it any farther and it seems to me that, having been so held, it is right. If A. agrees with B. that he will pay a certain sum of money to B. for the benefit of C., B. can sue upon that contract as trustee for C.

The clause in this charter was this: "A commission of 3 per cent. on the estimated gross amount of hire is due to Leopold Walford (London) Limited on signing this charter (ship lost or not lost)."

That, on the face of it, is quite clear; it is to be paid on signing the charter; it is to be paid on the estimated gross amount of hire; and whether the ship is lost or not. The ship was lost, the charter was not carried out, and no hire was earned. The clause is perfectly clear.

But in answer to that the defendants pleaded amongst other things that there was a custom of the trade "that chartering brokers' commission is payable only in respect of hire duly earned under the said charter-party"; and Bailhache, J. found that that custom was established, and I take his finding of fact as correct,

Whether I should have found such a custom on the evidence before him is a matter on which I say nothing, for two reasons: first, that it was for him to find it, as he had the evidence before him; and, secondly, I cannot help seeing that without any express consent the case proceeded upon this basis, that the judge was allowed to import into this case a quantity of evidence that he had heard in another case which established this same custom, and in which he held it to be established.

I shall therefore certainly not quarrel with the judge's finding of fact as to the custom.

Then there arises this serious question: Can such a custom exist? There is no sanctity about a custom in the shipbroking trade that I know of; it must conform with the ordinary conditions of and requisites for a mercantile custom general in other trades as well, and one very important condition is that it must not be inconsistent with any special agreement made between the parties. In this case I think it is clear beyond argument that it is absolutely inconsistent with the twenty-ninth clause of this charter, assuming that to be an agreement between the charterers and the shipowners, because, if you read it out at length, it would read in this way: "A commission of 3 per cent. on the estimated gross amount of hire is due to Leopold Walford (London) Limited on signing this charter (ship lost or not lost), but such commission shall only be payable under the hire as it accrues, and if there be no hire it shall not be payable at all." It is only necessary to state that to show that the custom as pleaded is absolutely inconsistent with the clause in the charter, and if that clause was a contract then the custom cannot prevail.

Was this a contract or not? I have listened to the arguments and I cannot see why it is not a contract. There is a charter which has thirty or more clauses in it. It is sent by the charterers' brokers to the shipowners or to their brokers and it is read and considered by them, and at some time or another, either before it was sent to the shipowners or afterwards, an alteration is made in this very clause—namely, an alteration from 5 per cent. to 3 per cent. It is then signed and returned by the shipowners to the charterers as the contract under which the ship is hired. It seems to me absolutely impossible to allow mercantile men to put their names to and sign a document containing a clause which is on the face of it an agreement, and then say, "I never meant that to be an agreement; that was nothing at all"; and therefore I think it is quite clear that this was a contract between the charterers and the shipowners that this sum should be paid to the brokers.

But there are objections taken to that. One is that the charterers cannot sue on this as trustees for the brokers, because the brokers are precluded from claiming that amount either by custom or by some agreement of their own with the shipowners. I think that if that second part were well founded the defendants in some form or another would be able to avail themselves of it, and they might claim to rectify the document, but I do not know. If there were an agreement between the brokers and the shipowners by which the brokers had agreed to take something different from what there is in this charter, then I think the defendants would be entitled to say, "You cannot by suing through trustees get more than what you and we have agreed." The answer is that no such agreement has been made; there is no agreement between the brokers and shipowners, and no agreement for the payment of the brokers' commission unless it is under clause 29. As I have said, when that point was taken I asked both the learned counsel to point out to me where any such contract was made by the shipowners about brokerage, and they were not able to point it out because there was not one. The only thing which may throw any light on the negotiations outside the charter, and it certainly does not throw a light in favour of the defendants, is a document in French which, I think, consists of instructions sent by the shipowners' agent to the charterers' agent. There had been a previous charter, and this charter with which we are dealing was to be a modification to a certain extent of that, and this document is also referred to in clause 33 of the charter. What I find in this French document is that the brokers will continue to give their services to the two parties, but their brokerage, which was fixed by the charter-party at 5 per cent., will be reduced on the extension of the charter to 3 per cent., and for all other detailed conditions the respective brokers of the parties will have to establish in an agreement definite clauses. As I have said, after that the brokers and the two parties met and agreed on definite clauses, and they agreed definite clauses in the charter-party. Therefore it is demonstrated again clearly that that clause in the charter was intended to be and was the only agreement with regard to the brokers' remunera-

tion. It seems to me, therefore, that that point, that *cestuis que trusts* have agreed that they shall have something other than their trustees have agreed, fails in fact.

Then there is a still more remarkable contention which succeeded before the judge—namely, that the custom is not only a custom by which, in the absence of express agreement to the contrary, the brokerage is to be paid out of hire agreed, and only out of hire agreed, but a custom to disregard any other special agreements that there may be, whether written and signed by the parties or not, if they disagree with that custom. That is a custom I have never heard set up before, and I think absolutely bad. A custom can only bind the parties in the absence of a special agreement inconsistent with it. I have never heard of a custom that the parties may make any special agreement they like, but, if it disagrees with the custom, the special agreement is to be disregarded. I do not think that such a custom could exist in law as a custom which excludes the power of contracting parties to contract themselves out of the custom. The defendants are reduced, I think, to that, and that is the custom which the judge has found to exist. I think it is a bad custom, and therefore that the charterers suing as trustees for the brokers are entitled to recover the amount which is stated in clause 29 of this charter. It is a contract to that effect, and there is no legal custom proved which excludes it.

I should like to say that it is absolutely clear on the evidence that there are numbers of charters in which the terms of the payment of commission are defined exactly—namely, that it is to be paid out of hire, and out of hire only. I think the witnesses either in this case or the other case which the judge tried produced numbers of charters in which that was expressed, and the only cause of this trouble is that the gentlemen who signed this charter would not take the trouble to look and see what the form of the charter was that they were signing. If they had done so I dare say they would have put the charter in the form of those other charters and made the commission payable only out of hire. But it is an impossible position for a gentleman who signs a charter to say with respect to any agreement come to, "I did not bother my head to look at what the terms were; it did not matter to me; I knew there was a custom to pay in a certain way, and I was going to disregard the agreement I had signed and attend to the custom." This case to a certain extent followed another case before the same judge, but it does not seem to me to rest on the same basis at all. In that case of *Harley* v. *Nagata* (*sup.*) the charterers, as far as I can see, were not parties to the action at all. The action was brought by the brokers themselves, and the judge, of course, could not deal with the action there upon the clause in the charter because the brokers were not parties to that contract, and the charterers were not parties to the action. He dealt with it upon some agreement with the brokers which I suppose he found in that case which does not exist in this and which was outside the charter altogether. If the brokers had made simply an agreement to be paid commission it might well be that the custom would come in and regulate it, and that the commission would be only payable out of hire. This case is upon a very different basis. Being an action by the charterers, I think, for the reasons I have given, it ought to succeed.

I think, therefore, the appeal should be allowed and judgment entered for the plaintiffs. The amount can be settled between the parties.

Bankes, L.J.—I agree. This is an action brought by Leopold Walford (London) Limited, brokers, to recover commission which they allege to be due to them under the terms of a charter, dated the 28th Sept. 1916, negotiated between a member of the plaintiff company and a member of Messrs. Moss' firm, who were brokers acting for the shipowners. The action was brought upon a contract alleged to be contained in the charter, and to that contract the plaintiffs were not parties.

Before the action came on for trial, in order to avoid any amendment and to bring themselves within *Robertson* v. *Wait* (*sup.*), the plaintiffs applied to the defendants to know whether it was necessary to amend, or whether the action might be treated as an action brought by the charterers against the shipowners claiming the commission for the benefit of the plaintiffs' brokers. That was assented to, and therefore the action must be treated as an action by the chartererers against the shipowners claiming commission for the benefit of the brokers. That that is possible, and that the contract inserted in a charter-party between the charterers and shipowners can be treated as a contract made by the charterers in the interests of the brokers and on which they are entitled to sue as trustees for the brokers, must be taken to be established and to be recognised law since *Robertson* v. *Wait*—a very old decision never since questioned. If the contract which the plaintiffs were entitled to recover upon is one contained in the charter-party, I think Bailhache, J. expressed his opinion very clearly that the defence could not succeed, and could not succeed upon the ground that the custom which the defendants pleaded, that commission was payable only upon freight earned, was quite inconsistent with the terms of the written contract, and therefore could not prevail. In giving judgment Bailhache, J., after setting out the language of clause 29 of the charter, goes on to say: "Now, if that clause represents the contract between the shipowner and the broker, there is no possible answer to this claim." Bailhache, J. has found upon this evidence, and upon evidence that he had before him in the previous case of *Harley* v. *Nagata* (*sup.*), that brokerage is only payable on time charters upon freight which is earned. I think the learned judge was probably quite right upon the evidence before him in finding that such a custom existed, and of course it would operate in cases in which it could operate without enlarging any of the well-established rules of law which apply to the application of customs to contracts made between parties. The custom as established is said to extend a step beyond what the custom would appear to mean by the precise terms of it, and it was said by one of the witnesses, who was the only one called on this point in this action, that the custom was one which applied whatever the terms of the written contract contained in the charter-party were. In my opinion any such custom as that must be bad, and under the circumstances could not be upheld as a custom

which could possibly be incorporated in the contract. I do not understand that Bailhache, J. in the decision which he has given has really accepted the custom in that sense. What I understand the judge really to have done was this—that, having regard to the existence of the custom, he has come to the conclusion that there was in this and in the previous case a contract between the shipowners and the brokers which was entirely outside and independent of the contract between the shipowners and the charterers which was contained in the document. Of course, if there was evidence of it, or if the judge was justified in coming to that conclusion because of the existence of the custom to which I have referred, it seems to me that his judgment might be supported on that ground. But, looking into the matter as carefully as I can and considering the evidence that has been given, I cannot find, and I do not think learned counsel have been able to find, a trace of any contract between any of the parties except the one which is contained in the charter-party itself. The two persons who negotiated the charter-party were Mr. Moller, representing Messrs. Walford, and the other was Mr. Stoeger, representing Messrs. Moss, and they neither of them suggest anywhere that there was any contract between the shipowners and Messrs. Walford direct which was a contract which would admit of the custom being embodied in it, or a contract which was in the terms of the custom. The judge has assumed the existence of such a contract and come to the conclusion that that contract was not inconsistent with the one in the charter-party because it is made between different parties, as I understand. But where can you find evidence of any such contract? Mr. Moller, when speaking of the arrangement, says this in his evidence: "Then there was, in regard to the second charter-party, apparently, some arrangement by which it was reduced from 5 per cent. to 3?—A.: Exactly; that is so. Q.: Who was that discussed with?—A.: That emanated from the owners of the steamer and was agreed in consultation with H. E. Moss and Co., in the eventual conclusion of the charter." Then, when you come to Mr. Stoeger's evidence, he says: "In the second charter-party the brokerage was reduced from 5 to 3?—A.: Yes. Q. That was arranged, I think, through you with Messrs. Walford?—A.: Quite so. They said that, if we insisted on the full hire we had been receiving before, this arrangement could not be entered into. We had to take half a loaf rather than no loaf at all. Q.: The shipowners said they would not pay the 5 per cent.?—A.: Yes. Q.: There was nothing new otherwise except that reduction?—A.: Instead of getting 1¼ we had to be content with ¾ per cent. Q.: Otherwise the terms about brokerage remained the same?—A.: Yes. We expected to go on collecting it in the same manner as we had been on the previous charter, on the original charter." Then he is asked: "Whatever words appear in the printed charter-party?—A.: I take it they were only a printed form which was passed by the owners when they signed it."

We have to consider this matter from the point of view of the owners. It is said that these owners made a contract which does not appear in the charter-party, and which is inconsistent with the contract contained in the charter-party. The answer is: "We made but one contract, and our agent had authority to make but one contract, and the one contract is the contract we signed—the charter-party." It seems to me, when you look at the evidence of these two gentlemen, they accept that fact, and that is their case with regard to what occurred, and, in addition to what I have already read, you find that before the contract was completed the 5 per cent. commission, which had been the amount in the previous charter-party, was erased and 3 per cent. was put in. Under those circumstances it does seem to me impossible to find any contract binding the owners to pay any commission to anybody except the contract which is embodied in clause 29 of the charter-party, and, if that is the right view, the judge and I are in agreement, because in the passage which I have already read he said, to use his own words, "there is no possible answer to this claim." Upon those grounds, in my opinion, this appeal succeeds.

Scrutton, L.J.—I have come to the same conclusion, but, as it is suggested that our judgment will come as a surprise and a shock to a number of eminent business men, and as I am quite certain that unless those eminent business men will pay some attention to what we are saying in this judgment they will have some more surprises and shocks in the future, I desire to state the way in which I have arrived at our conclusion.

The charterers' brokers claim commission from the shipowners because the shipowners have signed a charter dated the 28th Sept. 1916 which provides in clause 29: "A commission of 3 per cent."—the 'three' is written in instead of the printed 'five'—"on the estimated gross amount of hire is due to Leopold Walford (London) Limited"—they are the charterers' brokers—"on signing this charter (ship lost or not lost)." Now, there would be one answer to an action so framed, that Leopold Walford (London) Limited were not parties to the charter, and therefore could not sue. That objection has existed since I went to the Bar, and has always been avoided on the authority of the case, decided in 1853, of *Robertson* v. *Wait*, either by the charterers suing as parties to the contract, as trustees for the brokers who are named in the clause, or by the shipowners not taking the objection that the brokers are not parties in order to avoid the necessity of joining the charterers, and so when this action was started the defendants were asked whether they wished to have the charterers joined, and the learned judge said that by agreement between the parties the action was to be treated as though the charterers when the charter-party was made were parties to this action.

Robertson v. *Wait* (*sup.*), on which that course of procedure is founded, has never, so far as I know, been questioned. It is a decision of a court which included Parke and Martin, BB., and it has been acted upon during the whole of my experience without question, and there is no reason whatever to doubt that the decision is perfectly good.

That difficulty being got over, the defence to the action then appears, and the shipowners say that there is a custom in the chartering business that the charterers' brokers' commission is payable only in respect of hire duly earned under the said charter, and that no hire has been earned under

this charter. The first answer which strikes one is, that evidence of custom is not admissible if it contradicts the terms of the written contract between the parties. The custom that is pleaded that commission is payable only in respect of hire duly earned is directly contrary to a clause in the charter, which provides that "a commission of 3 per cent. on the estimated gross amount of hire is due to Leopold Walford (London) Limited on signing this charter (ship lost or not lost)." To meet that objection evidence was given of a more extended custom, and I think that has been found by the judge, because his words are: "It is the invariable practice that, unless hire is earned, no commission is payable at all; and that that practice is entirely irrespective of the form in which the commission clause finds its way into the charter-party; that the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire." That amounts to this, that under ordinary circumstances any custom can be excluded by agreement between the parties, and if you make an agreement contradictory to the custom you exclude the custom. This as I read it is a custom that an agreement between the parties excluding the custom cannot exist if it is expressed in the form of a clause in a charter, or that you cannot find in the clause of the charter-party an agreement which excludes the custom which applies to the brokers' remuneration. I will assume that such a custom was proved. I think the circumstances relating to it are very unsatisfactory. It cannot be said to be a custom of which the courts take judicial notice without proof.

There are such customs, and the best recognised instance of those customs in England is that domestic servants are entitled to have from the ladies engaging them a month's notice. No proof of that custom is needed, and the courts take judicial notice of it. Nobody can say that the custom here, in the terms which I have stated, is a custom of which the courts must take judicial notice. Within the last two years the judge himself has decided exactly the opposite of the custom suggested. The parties, the learned judge, and the Court of Appeal know nothing of it, and therefore it cannot be said to be a custom of which the court should take judicial notice. In this particular case the evidence is extremely slight, but the judge has found that there is a custom, because in some previous case which is not before us, and on a mass of evidence in that case which is not before us, he was satisfied that in that case, the parties not being the same and the evidence not being before the parties in the second case, and that evidence not being before this court, there was such a custom. But I will assume there is such a custom. A custom to be applicable must be reasonable, and it appears to me to be an absolutely unreasonable custom to say that parties who sign their name to a document containing the terms of a contract should be permitted to say that the parts of that contract to which they have signed their names and the parts of the contract which they have actually altered are not part of the contract because there is a custom that they cannot be part of the contract. Such a custom appears to me to be absolutely unreasonable.

The custom if it existed in the terms pleaded can be excluded by an agreement between the parties. The parties may, in my view, express their agreement in a clause in the charter. The shipowners who are to pay the commission are parties to the charter. The charterers whose brokers are to receive the commission are also parties to the charter, and these two parties make an agreement as to the commission which the charterers' brokers shall receive.

It appears to me to be obvious, unless you can say a thing I am coming to in a moment, that such a contract may be a special agreement excluding the custom if such a custom exists. If it were the case that you could say to the charterers bringing the action upon the charter, "You are only suing for the benefit of another person, your *cestui que trust*, and that other person has made an agreement with me on the subject-matter in respect of which you are suing contrary to the terms of the contract on which you are suing," that might be a good defence, but I cannot find in this case a trace of any agreement between the shipowners and the charterers' brokers. There are two charters. In the first charter the parties took a printed clause and altered it in one respect. That is to say, whereas it made the commission payable to Leopold Walford, they struck out "Leopold Walford" and put in "H. E. Moss and Co.," the shipowners' brokers, and then H. E. Moss and Co. and the charterers' brokers made an agreement between themselves by which Messrs. Walford were to be entitled to a particular share of the commission that H. E. Moss and Co. got, the same to be deducted from the hire as paid. Such an agreement appears to me to have no bearing on the present case, because what happened in the second case was that the parties made and signed a fresh agreement that the brokers should continue to give their services and that the brokerage should be reduced to 3 per cent. on the conditions detailed. Having to do that, a second charter was drawn up, which differed from the first one. They did not strike out the name "Leopold Walford (London) Limited," but they struck out the five and substituted three, and there remained in the term "the estimated gross amount of hire is due to Leopold Walford (London) Limited on signing this charter (ship lost or not lost)." That is the only agreement that the charterers' brokers or the shipowners have made, and, that being so, one is face to face with a clause in an agreement signed by the shipowners, a clause altered by them, a clause which it is not attempted to rectify as having been inserted by mistake, nor is it attempted to strike out on the ground that it has been put in by mistake, or induced by fraud. It is a clause in the charter, and I think it would be absolutely fatal to all commercial business in the City of London if parties who have signed a contract containing printed clauses, some of which they have altered, were to be able to say, "There is a custom, and this is not binding on us," although there is no agreement on the subject except what the parties have put in the agreement they have signed. It is quite simple. If this decision is opposed to the practice in the City of London, let the City of London take some trouble to read the contracts it signs. When they find a commission clause which does not express what they mean, let them take the trouble to alter it. So long as they will not take the trouble to do that, and so

long as business men in the City of London sign contracts without seeing whether they express what they mean, so long must they expect the courts to pay attention to their signatures to contracts rather than to alleged customs which appear to be quite unreasonable.

For these reasons I agree that the judgment should be reversed.

Appeal allowed.

Solicitors for the plaintiffs, *Lawrence Jones* and *Co.*

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

July 25 and 26, 1918.

(Before BANKES and SCRUTTON, L.JJ. and EVE, J.)

STEWART (C. A.) AND Co. *v.* PHS. VAN OMMEREN (LONDON) LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Payment of hire per calendar month in advance—Provision for cesser of hire—Ship off hire during portion of month — Repayment of hire for period when ship off hire—Construction of charter-party.

A clause of a time charter-party provided that the charterers should pay hire "per calendar month, commencing from the time the steamer is placed at the disposal of the charterers, and pro rata *for any fractional part of a month . . . until her redelivery. . . . That the payment of the hire should be made . . . in cash . . . monthly in advance." Another clause provided that in the event of loss of time from certain named causes preventing the working of the steamer, and lasting more than twenty-four consecutive hours, the hire should cease until the steamer should be again in an efficient state to resume her service. One month's hire was paid in advance on the 7th Nov.* 1915. *The ship went off hire from one of the specified causes on the 20th Nov.* 1915, *and was not in an efficient state to resume her service until the 6th Jan.* 1916. *The charterers claimed to recover the amount of hire attributable to the period the 20th Nov. to the 7th Dec.*

Held, that each payment of hire was for the ensuing calendar month, and not for the next thirty or thirty-one days on which the ship should be on hire; that there had therefore been a failure of consideration in respect of the period, the 20th Nov. to 7th Dec., when the ship was off hire, and that the charterers were entitled to recover the amount claimed.

Decision of Bailhache, J. affirmed.

APPEAL by the shipowners from a decision of Bailhache, J.

By a charter-party dated the 23rd July 1915 the defendants sub-chartered the steamer *Friscos* for six calendar months to the plaintiffs (who sub-chartered her).

Clause 5 of the charter-party provided as follows:

That the said charterers shall pay as hire for the said steamer 3472*l.* per calendar month, commencing from the time the steamer is placed at the disposal of charterers, and *pro rata* for any fractional part of a month (the days to be taken as fractions of a month of thirty days) until her redelivery. . . . That the payment of the hire shall be made as follows: In London in cash, without discount, monthly in advance. . . .

Clause 12. That in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer, and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service. . . .

Clause 18. That should the steamer be lost or missing, the hire shall cease from the date when she was lost or last spoken, or, if not spoken, then from the date when last seen, and hire paid in advance and not earned shall be returned to the charterers.

Clause 21. That the owners have a lien upon all cargoes and all sub-freights for hire and general average contribution, and for all expenses and damages due under or for breach of this charter, and charterers to have a lien on the steamer for all moneys paid in advance and not earned.

On the 7th Nov. 1915 the plaintiffs, at whose disposal the ship had been since the 7th Aug., paid to the defendants in advance one month's hire. The ship went off hire on the 20th Nov. from a specified cause, and was not fit to resume her service until the 6th Jan. 1916. The plaintiffs contended that there had been a failure of consideration in respect of the period the 20th Nov. to the 7th Dec. 1915, and they claimed to recover the hire attributable to that period. The defendants contended that there had been no failure of consideration.

Bailhache, J. gave judgment for the plaintiffs.

The defendants appealed.

Inskip, K.C. and *A. Neilson* for the appellants.—By clause 5 of the charter-party the hire in advance is in respect of the ensuing thirty or thirty-one days, and not in respect of the ensuing calendar month of consecutive days. The hire, therefore, in respect of days on which the ship was off hire is not repayable, but allowance was to be made for it in the next monthly payment in advance. There was an express provision in clause 18 for repayment of hire in certain events, of which this is not one, showing that the parties knew how to provide for the repayment of hire when they were so minded.

R. A. Wright, K.C. and *C. T. Le Quesne* for the respondents.—The proper construction of clause 5 of the charter-party is that the hire in advance was in respect of the ensuing calendar month of consecutive days—that is, for example, from the 7th Nov. to the 7th Dec. The ship being off hire for some of those days, the consideration failed for those days and is repayable to the charterers. Payments in advance are provisional only: (per Lord Esher, M.R. and Rigby, L.J. in *Tonnelier* v. *Smith*, 8 Asp. Mar. Law Cas. 327; 77 L. T. Rep. 277; 2 Com. Cas. 258). Further, clause 21, which gives a lien to the charterers for hire paid in advance and not earned, supports this view.

Inskip, K.C. replied.

BANKES, L.J.—In my view this appeal fails. The question depends upon the construction of clause 5 of the charter-party. Counsel for the plaintiffs contends that by the charter-party payment is to be made of a fixed sum on a fixed date in each month in advance for the opportunity of using the ship for every day in that

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

month, but upon the terms that in certain events, which are named, if the charterers are deprived of that opportunity for any of those days, the owners are liable to repay the amount attributable to those days. On the other hand, counsel for the defendants argues that the payment is a fixed sum on a fixed date in advance, but that it is a payment for the actual use of the ship on any thirty or thirty-one days as the case may be, in whatever months those days should occur. This action is brought claiming the return of hire overpaid—that is, in respect of the days when the vessel was off hire. Counsel for the defendants answers that there was in fact no overpayment, because although the hire was paid on the 7th Nov. for a complete month down to the 7th Dec., and although during that month the vessel was off hire for a considerable number of days, yet by the terms of the contract the charterers were entitled, for the payment already made, to use the ship for a corresponding number of days commencing on the 6th Jan. when she came on hire again. That contention is, I think, not sound. The language used in the charter-party is plain. The contract is for the letting of the steamer for a period of about six calendar months from a time named. Hire is payable, not at the rate of so much per day, but as a fixed sum per calendar month; there is then a provision, which would not be required if the defendants' argument is correct, for a *pro rata* payment for fractional parts of a month. I agree that neither of the authorities cited in the course of the argument is directly in point, but in *Tonnelier* v. *Smith* (77 L. T. Rep. 277; 2 Com. Cas. 258) the inconvenience that would result if a construction substantially that which is now contended for by Mr. Inskip were applied was pointed out. In my view the plaintiffs were entitled as a matter of law to go to the defendants on the 6th Jan. with an amount representing a month's hire in respect of the month then commencing, and the defendants could not have refused it, although, if the defendants' counsel is right, they could have said that that amount was not yet due because there were several days in respect of which the plaintiffs were entitled to the use of the vessel for the hire paid in November. The plaintiffs could reply that they were under an obligation to pay on the 6th Jan., but that the defendants were bound to repay them a certain sum as representing the days in November when the vessel was off hire. That view is in my opinion correct. There having thus, in my view, been an overpayment of hire for November, the defendants are under an obligation to repay to the plaintiffs that amount, and the fact that the vessel came on hire again and was available in January does not affect the rights of the parties in this regard. The appeal must be dismissed.

SCRUTTON, L.J.—The point is simple. The plaintiffs say to the defendants, "We have paid you money the consideration for which has failed," and the question whether they are right or wrong depends upon the construction of a very common clause in a time charter as to which I am surprised to find that it has existed so long without its meaning having been considered by the courts. By the charter-party the vessel was let for about six calendar months, and hire was to be paid per calendar month, each payment to be made monthly in advance. The question now is whether when a payment was made in advance it was a payment for the ensuing calendar month or was a payment for the next thirty or thirty-one days on which the steamer might in fact be on hire, which thirty or thirty-one days might be spread over the next two or three months according as the vessel was or was not on hire. I think that the language of clause 5 makes it fairly clear that the payment is for the next calendar month, and not for the next thirty or thirty-one days on which the ship is on hire. If that is so, then, if during that calendar month the ship is off hire for a number of days, there is a failure of consideration for the payment, and the sum paid in respect of those days can be recovered by action. In practice this sum of course may be set off against the next month's hire, but that very convenient course of practice does not alter the legal rights of the parties when it becomes necessary to determine them. The view I have expressed accords with that taken by the majority of the court in *Tonnelier* v. *Smith* (*ubi sup.*). Lord Esher M.R. and Rigby L.J. there said that "at no time during the term of the charter-party could it be ascertained with certainty on one of the days fixed for monthly payments how much freight would actually be earned during the month," and they pointed out that the shipowners were not bound to accept the amount which the charterers estimated might be earned during the month, for "if the estimated amount turned out to be too little the owners might be driven to an action for recovery of the deficiency, instead of having the surer and simpler remedy of payment in advance, subject to a liability to account or enforcement of their lien." I agree that this appeal should be dismissed.

EVE J.—I agree. Clause 5 of this charter-party provides for a specific payment for a specific period, and in my opinion the language is not open to the construction which the defendants' counsel has endeavoured to put upon it.

Appeal dismissed.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton,* and *Lewis.*

Solicitors for the defendants, *William A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 29 and 30, 1918.

(Before BAILHACHE, J.)

ADMIRALTY COMMISSIONERS *v.* PAGE AND OTHERS. (*a*)

Salvage — Requisitioned tug — Tug demised to Crown—Time charter—Services rendered—Right to salvage earned—"Ship belonging to His Majesty"—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping (Salvage) Act* 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.

The defendants' tug was requisitioned by the Admiralty on the terms of the charter-party known as T. 99, whereby the owners undertook to pay for all wages, provisions, and all expenses, except for coal and

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

other fuel, which were to be borne by the Admiralty. The owners were to insure against all marine risks, but the Admiralty were to be liable for all war risks All salvage was to be for the owners' benefit. Subsequently, as the result of correspondence, the basis of hire was altered from gross to net terms. The new terms of requisition amounted to a demise of the tug to the Admiralty. The tug was to be at the absolute disposal and under the complete control of the Admiralty, who were to bear all risks —both war and marine—as well as all the expenses of the tug, crew, and stores. If the tug was off work for any reason, the hire was to be paid just the same. The tug was commissioned as one of His Majesty's ships, the master became a lieutenant in the R.N.V.R., and he and the other members of the crew wore uniforms (provided by the Admiralty) according to their rank, and were paid by the Admiralty. While the defendants' tug was thus in the possession of the Admiralty she earned 4500l. as remuneration for salvage services rendered by her. The Admiralty Commissioners claimed a declaration that they were entitled to the remuneration so earned.

Held, that the effect of the change of basis of hire was to transfer the right to any salvage award from the owners to the Admiralty, who held the tug on demise. A tug which is on time charter to the Admiralty when the charter-party is by way of demise is a tug which belongs to the Admiralty for the purpose of the Merchant Shipping Act 1894 *and of the Merchant Shipping (Salvage) Act* 1916 *and therefore the Admiralty are entitled to the amount awarded for salvage services rendered by such tug.*

ACTION in the Commercial List tried by Bailhache, J.

The plaintiffs' claim was for a declaration that they were entitled to the sum of 4500*l.* awarded by the arbitrator as remuneration earned by reason of salvage services rendered by a tug, the *Conqueror*, to the ss. *Sussex* and her cargo in Jan. 1917.

The Admiralty, acting under the powers conferred by the Proclamation of the 3rd Aug. 1914, requisitioned the tug, the *Conqueror*, on 4th Oct. 1914, from the defendants who were the owners, on terms of the charter-party known as T. 99, under which the owners had to provide and pay for all wages, provisions, and all other expenses in connection with the officers and crew, and for the insurance of the vessel, while the Admiralty were liable for the expenses of all coal and other fuel. The owners were to be liable for all marine risks, but the Admiralty were to be liable for all war risks. All salvage was to be for the owner's benefit. The tug was to be deemed off hire during the time occupied in salvage operations.

In Sept. 1916 correspondence took place between the parties which resulted in the basis of hire being altered from gross to net basis. The defendants on the 13th Sept. consented to those terms, but a charter-party providing for that basis of payment was never signed. The form of charter-party providing for the new basis of payment was headed "Charter-party . . . with demise to the Crown." It provided that the vessel was to be at the absolute disposal and under the complete control of the Admiralty. The master and crew were to be appointed by the Admiralty instead of the owners. All risks—war and marine—as well as all expenses of the tug, crew, and stores, and of all repairs beyond ordinary wear and tear would be borne by the Admiralty, who undertook to restore the vessel to the owners at the termination of the hire in the same condition as she was in when taken up, fair wear and tear excepted. If the tug was off work for any reason the hire was to be paid just the same. The tug was afterwards commissioned as one of His Majesty's ships, with master and crew who were servants of the Crown, and was employed at the sole risk and expense of the Admiralty. The master obtained a commission as lieutenant in the R.N.V.R, and he and other members of the crew wore uniforms (provided by the Admiralty) according to their rank, and were paid by the Admiralty.

In Jan. 1917, the tug *The Conqueror*, while in the possession and control of the Admiralty, rendered salvage services to the s.s. *Sussex*, and a claim for remuneration for such salvage services was made by the defendants as owners of the tug. The parties agreed to go to arbitration, but while this was pending the Admiralty intervened and claimed to be entitled to the salvage paid for the services of the tug. It was decided that the arbitrator should decide the amount payable as remuneration for the salvage services rendered by the tug without prejudice to the claim of the Admiralty. The amount of the remuneration payable in respect of the services of the tug was assessed by the arbitrator, Mr. Laing, K.C., at the sum of 4500*l.*

The action was brought by the Admiralty Commissioners for a declaration that they were entitled to the sum of 4500*l.* so awarded in respect of the services rendered by the tug *The Conqueror*.

Sect. 557, sub-sect. 1, of the Merchant Shipping Act 1894 provides that:

> 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. . . .

Sect. 1 of the Merchant Shipping (Salvage) Act 1916, provides that

> Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in sect. 557 of the Merchant Shipping Act 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty.

MacKinnon, K.C. and *C. R. Dunlop*, for the plaintiffs, cited

The Sarpen, 13 Asp. Mar. Law Cas. 370; 114 L. T. Rep. 1011; (1916) P. 306;
Master of the Trinity House v. *Clark*, 4 M. & S. 288;
The Maria Jane, 14 Jurist, 857;
The Collier, 16 L. T. Rep. 155; L. Rep., 1 A. & E. 33;
Weir v. *Union Steamship Company*, 9 Asp. Mar. Law Cas. 111; 83 L. T. Rep. 91; (1900) A. C. 525;

The Broadmayne, 13 Asp. Mar. Law Cas. 356; 114 L. T. Rep. 891; (1916) P. 64;
The Scout, 26 L. T. Rep. 371; L. Rep. 3 A. & E. 512.

R. A. Wright, K.C. and *Stuart Bevan* for the defendants.

Bailhache, J.—It is material to consider the meaning and effect of the alteration of the terms upon which the tug was requisitioned from gross to net basis. The tug was originally requisitioned on the terms of the Expeditionary Force Charter-party whereby the master and crew were appointed by the owners, and all the wages of the crew as well as the expenses of running the ship were borne by the owners. The owners were responsible for repairs, and if the tug was laid up during repairs, she came off hire during such period. The owners were responsible for marine risks, but the liability for war risks was undertaken by the Admiralty. Under the new arrangement, whereby the terms of the requisition of the tug were altered from gross to net basis, the master and the crew were appointed and paid by the Admiralty instead of by the owners, and all the expenses of running the tug were borne by the Admiralty. The Admiralty undertook marine as well as war risks, and they were also responsible for all repairs other than ordinary wear and tear; and if the tug was laid up during repairs there was to be no cessor of hire during such period. The difference between the two arrangements was that the earlier charter-party was the ordinary form of charter-party, not by way of demise, while the new arrangement turned the charter-party into a charter-party by demise. The Admiralty have a special form of charter-party which provides for payment on a net basis. The form is headed, "Charter-party with Demise to the Crown." That form was never signed in this case. Under the earlier form of charter-party the owners of the tug the *Conqueror* had the right to salve vessels in distress and to receive any salvage award that might be made for those services. But time lost during the salvage operations was for the account of the owner. There is nothing about salvage operations in the special form of charter-party by demise to the Crown. The legal effect, however, of a charter-party by way of demise is that if salvage services are rendered by a vessel under such a charter-party, and an award is made for those services, the amount awarded is payable, not to the owners, but to the charterers of the vessel, and the legal effect of the alteration of the basis of hire of the tug from gross to net basis in the present case is that the right to any salvage award has been transferred from the owners to the Admiralty, who are the charterers of the tug and who hold it on demise.

But it has been contended that the Admiralty are not entitled to succeed because sect. 557 of the Merchant Shipping Act 1894 precludes them from claiming salvage awards: "Where salvage services are rendered by any ship belonging to Her Majesty." It is, however, provided by sect. 1 of the Merchant Shipping (Salvage) Act 1916 that: "Where salvage services are rendered by any ship belonging to His Majesty, and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in sect. 557 of the Merchant Shipping Act 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty." That section only refers to ships which belong to His Majesty, and it was argued by Mr. Wright that a tug which is on time charter to the Admiralty does not belong to the Admiralty in the sense in which the term is used in that section, although the time charter is by way of demise. In *The Sarpen* (*sup.*), a case which was decided in the Court of Appeal before the Act of 1916 was passed, all the Lords Justices expressed the opinion that a ship which is on time charter to the Admiralty when the time charter operates as a demise may be rightly said to belong to the Admiralty within the meaning of the word "belonging," as used in the Merchant Shipping Act 1894. It is true that that was not the actual point decided in that case, but the matter was discussed, and was dealt with fully in the judgments, and I should follow those expressions of opinion, even if they were *obiter dicta* in that particular case and even though I did not agree with them. But I agree with the opinions expressed by the Lords Justices. In my opinion a tug which is on time charter to the Admiralty when the charter-party is by way of demise is a tug which belongs to the Admiralty for the purposes both of the Merchant Shipping Act 1894 and also of the Merchant Shipping (Salvage) Act 1916, and I am of opinion that the sum awarded in this case as remuneration for salvage services rendered belongs to the Admiralty as charterers and not to the owners of the *Conqueror*. There will therefore be judgment for the plaintiffs. The Admiralty are entitled to costs under sect. 5 of the Admiralty Suits Act 1868 (31 & 32 Vict. c. 78).

Judgment for plaintiffs.

Solicitor for plaintiffs, *Treasury Solicitor.*
Solicitors for defendants, *Thomas Cooper and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Oct. 28, 1918.
(Before Pickford, Warrington, and Scrutton, L.JJ.)

Russian Bank for Foreign Trade *v.* Excess Insurance Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — War risks — Restraint of princes—"Excluding all claims due to delay"—Frustration of adventure—Closing of Dardanelles—Notice of abandonment — Requisition — Ultra vires—Royal Prerogative.

The Court of Appeal dismissed the appeal in this case on the ground that the shipowners gave the insurers no valid notice of abandonment. The court did not decide the other points raised before Bailhache, J.

The facts of this case are set out at length in the report of the case below (14 Asp. Mar.

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law

Law Cas. 316; 118 L. T. Rep. 645; (1918) 2 K. B. 123), and it is sufficient to state them very briefly here.

The Russian Bank for Foreign Trade, the plaintiffs, in Sept. and Oct. 1914 shipped on board the steamship *Wolverton* at Novorrosisk a parcel of barley for Falmouth for orders. They insured the barley upon the intended voyage with the defendants by a policy dated the 7th Oct. 1915 against the usual perils, including restraints of princes, and against the risks excluded by the free of capture and seizure clause, but the policy excluded all claims due to delay. The *Wolverton* had not sailed when the Turkish Government closed the Dardanelles, a step which was followed by a declaration of war between Great Britain and Turkey on the 5th Nov. 1914. From that date the commercial object of the adventure was frustrated and the insured voyage became impossible. The *Wolverton* with the barley on board remained at Novorrosisk until the barley began to heat. Between Dec. 1914 and Feb. 1915 the barley was discharged into warehouse and there reconditioned. It could have remained there unhurt for a year or more. The position as regards both ship and cargo remained unaltered up to the 5th March 1915, when the shipowners were directed by the Lords of the Admiralty to place their steamship at the disposal of the Russian Government. This was done, but the Russian Government made no use of the vessel. Upon this requisition the plaintiffs cabled to their insurance brokers as follows: "*Wolverton* requisitioned by British Government, account Russian Government. Impossible reload barley. Consider case covered by war risk. Agreeable, release underwriters from all risks if underwriters will pay difference between present value in Novorrosisk and insured value." This cable was shown to the defendants, who on the 15th March declined liability. On the 8th July the plaintiffs, through their brokers, gave formal notice of abandonment. This notice was refused by the underwriters, whereupon the action was brought to recover as for a constructive total loss of the barley by restraint of princes.

Bailhache, J. held (1) that although the closing of the Dardanelles was a restraint of princes, the claim based thereon was a claim due to delay within the exception of the policy; (2) that the order requisitioning the ship was not within the Royal Prerogative, and was *ultra vires* the Admiralty, and that the compliance of the shipowners with the order, not having been brought about by threats or use of force, was therefore not due to any restraint of princes; and (3) that the notice of abandonment which the agent of the cargo owners had sent in the form of a cable, dated the 5th March 1915, was a good notice of abandonment in respect of the requisition.

The plaintiffs appealed.

R. A. Wright, K.C. and *C. T. Le Quesne* for the appellants.

F. D. MacKinnon, K.C. and *R. I. Simey* for the respondents.

Sir *Frederick Smith* (A.-G.), Sir *Gordon Hewart* (S.-G.), *G. W. Ricketts*, and *C. R. Dunlop* were present on behalf of the Crown.

Pickford, L.J.—In this court a number of points were put forward on the one side and on the other. Mr. Wright, for the shipowners, said that he did not intend to rely on the judgment below on any question relating to the closing of the Dardanelles; he did not intend to have made that part of his case; and he certainly expressly disclaimed making it any part of his case in this court. Therefore, it is not necessary to make any reference to what the effect of the closing of the Dardanelles may have been.

So far as their case is concerned, the points made for the appellants in this court were, first of all, that a good notice of abandonment had been given; secondly, that the requisition of the 5th March 1915, which was served by the Admiralty on the owners of the vessel, whether it was *ultra vires* or not, operated as a restraint of princes within the meaning of the policy; and as a third point they contended that such an interruption of the adventure, such a putting an end to the adventure, could not be said to be a delay within the meaning of the exception clause in the policy, which expressly excluded all claims due to delay.

On the other hand, for respondents it was contended, first of all, that the notice of abandonment was not a good or sufficient notice, or, as Mr. MacKinnon phrased it, there was no timely notice of abandonment; secondly, it was contended that it was not possible for the assured to contend that the requisition brought about a constructive total loss of the goods, because in fact the goods had been previously lost, and the previous loss was said to arise as the result of the closing of the Dardanelles, and it was contended that there cannot be a loss of goods which have been already completely lost; the third point taken was that the case fell within the exception in the policy, to which I have already referred, excluding all claims due to delay; and, lastly, it was said that, whatever view is taken about the authority of the Admiralty to issue the requisition, when the form and effect of the requisition is considered, it does not amount to a restraint of princes, that it is really nothing more than a request to the particular shipowner to enter into a form of contract under which his vessel would be placed at the disposal of the authorities; and I think it was also contended, as a branch of that point, that the requisition was in fact *ultra vires* and of no binding force.

Bailhache, J. did decide that the requisition by the Admiralty was *ultra vires*, and the Attorney-General attended and expressed a wish to be allowed to argue the question of the prerogative, and the validity of the requisition, if the court felt itself bound to come to any decision on that particular point. But, after hearing the arguments, we intimated to the Attorney-General that in our opinion it would not be necessary to come to any decision on that particular point, and he thereupon indicated that he did not think it would be necessary for him to address the court, or for the court to express any opinion on the point.

The points I have summarised in this way are in themselves points of great interest and very considerable difficulty, and they were presented to the court by counsel on both sides with admirable clearness and commendable brevity. They, however, depend on the particular facts of this case, and a decision on them would not necessarily, or at all, be of any general utility.

All the members of the court are agreed on one point, which goes to the root of the dispute between these parties; and that is the point having reference to the question as to whether the notice of abandonment was or was not a good and effective and timely notice of abandonment; and in my opinion, and in this the other members of the court agree, the notice of abandonment was not a good notice of abandonment. That being so, it disposes of the case, and, in the circumstances I have mentioned, it does not seem to me necessary to give any decision on the other points.

[The Lord Justice proceeded to review the evidence, and to give reasons why the cable of the 5th March was not a good notice of abandonment, but was of the nature of a proposed compromise.]

WARRINGTON and SCRUTTON, L.JJ. concurred in holding that there had been no abandonment.

SCRUTTON, L.J. said with reference to the question of "restraint of princes" and the Royal Prerogative: With regard to the claim for loss by requisitioning, Bailhache, J. held that the requisitioning, such as it was, was not a restraint of princes because it was *ultra vires*, and any compliance by the ship with it was not by restraint, but by a desire to help one's country and, incidentally, to do a good thing for one's own pocket. On the question whether it was *ultra vires*, whether it was or was not within the Royal Prerogative to requisition ships out of territorial waters, the learned judge did not hear any arguments by those representing the Crown. The law officers appeared before us, and were prepared to argue that it was within the Royal Prerogative. I desire to express no opinion, one way or the other, as to whether the learned judge was right in his view, and I have heard no arguments on the subject. Assuming that it was *ultra vires*, the learned judge held that it was not a restraint of princes. Again I do not desire to express any final opinion on that point. I doubt very much whether the learned judge was right, but I do not desire to express any final opinion on that point, in view of the conclusive answer to the plaintiffs' claim which exists on the notice of abandonment.

For these reasons I arrive at the same result as the learned judge, and for the reasons I have indicated, and not for the reasons by which he arrived at it.

Appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche.*

Solicitors for the respondents, *W. A. Crump* and *Son.*

Solicitor for the Crown, *Treasury Solicitor.*

Thursday, Oct. 31, 1918.

(Before BANKES, WARRINGTON, and SCRUTTON, L.JJ.)

PYMAN STEAMSHIP COMPANY LIMITED v. LORDS COMMISSIONERS OF THE ADMIRALTY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Requisition — Charter-party — Owners liable for perils of the sea—Admiralty liable for war risks — Salvage — Apportionment of salvage where war risk imminent.

On the 17th Feb. 1915 *the steamship* R., *which had been requisitioned by the Admiralty and was held by them under a time charter, broke her propeller in the North Sea on a voyage between Rotterdam and the Tyne. A gale was blowing and a high sea running, and there was imminent risk of the vessel running on to a German minefield. Another vessel took the* R. *in tow and brought her safely to Rotterdam. As a result of salvage proceedings, the sum of* 3000*l.* *was agreed to be paid to the salvors, it being left to an arbitrator to decide the incidence of liability as between the owners of the ship and the Admiralty. By the charter-party the Admiralty were not to be liable for sea risks, but took the ordinary war risks. The arbitrator found that while the vessel was disabled she was exposed to the danger of driving on to the minefield and to added risk from submarines, and that the Admiralty were liable to pay* 750*l.*, *part of the said sum of* 3000*l.*

Held, that, the ship having been saved from war risks as well as from marine risks, the arbitrator was right in law in finding the Admiralty liable to pay for a portion of the salvage services.

Decision of Bailhache, J. (14 *Asp. Mar. Law Cas.* 171; 118 *L. T. Rep.* 30; (1918)1 *K. B.* 480) *affirmed.*

APPEAL by the Admiralty from a decision of Bailhache, J. on an award stated in the form of a special case for the opinion of the court.

The special case is set out at length at 118 L. T. Rep. 30.

Sir *Gordon Hewart* (S.-G.) and *Dunlop* for the Admiralty.

R. A. Wright, K.C. and *Balloch*, for the shipowners, were not called upon.

BANKES, L.J.—In this case I entirely agree with the conclusion at which Bailhache, J. arrived, and with the grounds upon which he reached it; but, having regard to the arguments which have been addressed to us on behalf of the appellant, I will only add my own opinion in very few words.

Mr. Dunlop has argued that the true test to apply is to treat the matter as though it were an action by ship against underwriters. I do not agree for a reason which I will mention directly. His second point is that the salvage award is indivisible in law; with that I do not agree, and I will state the reasons quite shortly.

The matter for consideration is the amount awarded for salvage services, and that ought to depend to some extent upon the degree of danger to which the property was exposed. If the danger was single, it may well be that the salvage award would be indivisible; but if the danger was double, I see no reason in law why the amount awarded should not be divisible, nor

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

why the person whose duty it was to fix the amount of the salvage should not, if he had been asked to do so, say: "I find that this vessel was exposed to two different classes of danger, one from the sea, the action of wind, wave, and storm—a sea peril; the other, a danger from a minefield—a war peril; and I say that if this vessel had been exposed to the danger from the seas merely, I should have awarded blank pounds, but, as the fact is, as I find, that she was exposed also to the war peril, I award, in addition to blank pounds, *x* pounds." I see no reason in law why the person who has to award the salvage should not do that if the parties agree to give him such jurisdiction.

Although these parties themselves had not split the amount of salvage, upon which they agreed, into two separate sums, when the parties agreed to arbitration, it seems to me that they in substance asked the arbitrator to do what they might have done themselves; and he finds that in his view the amount of salvage, the 3000*l.*, was enhanced to the extent of 750*l.* by the war peril to which the vessel was exposed in addition to the sea peril to which she had been originally exposed. Under those circumstances it seems to me quite immaterial to consider the question of *causa proxima*. If that view of the matter is one which can be properly taken in law, it seems to me that the question as to the liability of the Admiralty under the charter, T. 99, is clear; it is not even a question of an implied contract, because, accepting the view that the amount of the salvage occasioned by a peril has always been recovered without dispute under an averment that there was a loss by the peril, it seems to me that the language of clause 19 itself covers the particular case which we have to consider.

On those grounds I think that the judgment of Bailhache, J. was right.

Warrington, L.J.—I agree.

The question, to my mind, is simply one of the construction of this contract. I am quite conscious that, in expressing my views on the construction, I may be expressing those of one who looks at the contract without much experience of the technicalities relating to the law of marine insurance; but I receive some comfort from the admission of the Solicitor-General that this is not an insurance policy, but is a contract of another nature.

I turn to the contract to see how the meaning strikes one without reference to any technicalities. Clause 18 provides that the Admiralty is not to be held liable if the steamer be, amongst other things, "injured in consequence of dangers of the sea." Clause 19 provides that the "risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the "warranted free of capture, seizure, and detention" clause. In other words, the Admiralty took upon themselves those risks which are so described as risks of war.

This ship was exposed after the breaking of her propeller shaft, which arose from sea risks, to risk of injury from two causes; she might have been injured further by more sea risks from being at sea in bad weather with a propeller shaft broken. But she was exposed to a special and particular risk constituting a war risk arising from the position in which she happened to be at the time—namely, the risk of drifting upon the German minefield. Under clause 19 it seems clear, putting aside technicalities, that the Admiralty undertook the risk of injury arising from those circumstances.

The ship was salved; she was thereby withdrawn not only from the sea risks to which she was exposed, but also from this special and particular war risk; and not only that, but the difficulties of the salvage were obviously increased by the presence of these particular war risks, because, if it had not been for them, apparently she might have been towed away at once and taken, as was originally intended, to this country instead of being taken to Rotterdam. Further, I understand it is admitted that payments made to avert an injury may be recovered under such a clause as the present in the same way as loss occasioned by the injury itself. The arbitrator has, in my opinion, been invited by the parties to say in effect whether some and what part of the gross 3000*l.* awarded for salvage was awarded in respect of averting injury from the war risk He has said that the 750*l.* was so incurred. If it was so incurred, and if that is equivalent, for the purpose of determining liability under this contract, as I think it is, to actual injury having been sustained, then it seems to me clear that, on the true construction of clause 19, that was one of the risks undertaken by the Admiralty, and, consequently, the award and the judgment of Bailhache, J. were correct in determining that that sum ought to be paid by the Admiralty.

Scrutton, L.J.—I have listened with attention to the arguments presented on behalf of the Crown. I think, however, this is a very clear case.

It is necessary to see what it is not. It is not a question whether a salvage action *in personam* could be brought against the Admiralty under these circumstances. If it were, the case of *Cargo ex Port Victor* (9 Asp. Mar. Law Cas. 182; 84 L. T. Rep. 677; (1901) P. 243), following the well-known passage of Sir James Hannen in *The Five Steel Barges* (63 L. T. Rep. 499; 15 Prob. Div. 142), would require very careful consideration. Nor is it the case of a claim by the shipowner against his marine or his war risk underwriters for the whole amount of the salvage with a defence by the underwriters that they are only liable for part. I can see that great difficulties might arise in proving the facts necessary to support such a defence by the underwriters. I am not finally deciding the question, but, if sufficient facts are proved, I do not see any difficulty whatever in such a defence by underwriters.

This is, as Bailhache, J. said, a claim on the contract between the parties, and I agree with my Lord that it is not a question of implied but of express contract which the parties have made, read in the light of a mercantile document: The Admiralty shall not be held liable for certain losses of the ship, which, looking at them, appear to be sea risks. "The risks of war which are taken by the Admiralty," which I read as being that "the Admiralty shall be held liable for certain losses and risks," are those "which would be excluded from an ordinary English policy of marine insurance" by the f.c.s. clause; such risks are taken by the Admiralty, if the ship be

injured, "on the ascertained value of such injury." Since and earlier than *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 App. Cas. 755) it has been a commonplace of English mercantile law that you can recover sums incurred to avert the peril as if they were losses incurred by the peril itself; and, once you can get a proof that the sum paid by the shipowner was partly paid to avert the risk of marine loss and partly paid to avert the risk of loss by enemy mines, you have a case where there has been a loss by sea perils and a loss by war perils; and under those circumstances it appears to me that the parties have clearly contracted that the Admiralty shall not be liable for the loss by sea perils, and that they shall be liable for the loss by war perils.

I am interested personally in Bailhache, J.'s judgment because it is just the line of argument which he successfully addressed to the House of Lords in *Kruger* v. *Moel Tryvan Ship Company* (97 L. T. Rep. 143; (1907) A. C. 272), where the House of Lords held that he was right and that I was wrong. For these reasons I am of opinion that the decision of Bailhache, J. was right.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Botterell, Roche,* and *Temperley.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Thursday, June 6, 1918.

(Before Sir S. T. EVANS, President.)

THE ALFRED NOBEL; THE BJÖRNSTJERNE BJÖRNSON; THE FRIDLAND. (a)

Prize Court—Seizure of goods—Claim of neutrals—Admission of claim — Release of goods—Decree —Decree obtained by misrepresentation and fraud —False affidavits—Rescission of decree.

Where a decree has been obtained by misrepresentation and fraud, the court has an inherent right to rescind the same upon the discovery of circumstances which if they had been known in the first instance would have prevented the decree being made.

IN this action the Procurator-General on behalf of the Crown claimed a declaration that an order made by the President, dated the 16th Sept. 1915, in so far as it directed the release of certain goods claimed by Messrs. Christensen and Thögersen, or the proceeds of the same, should be rescinded on the ground that the order was obtained by fraud, by fraudulent evidence, and by the fraudulent suppression of facts. The Crown further claimed that the goods or the proceeds thereof should now be condemned as prize.

The goods in question consisted of large quantities of lard and beef casings. These goods were shipped by three packing houses of Chicago namely, Morris and Co., the Cudahy Packing Company, and Armour and Co., in the *Alfred Nobel*, the *Björnstjerne Björnson*, and the *Fridland*, three neutral vessels running between the United States and Denmark. The goods were shipped in Oct. 1914, some two months after the outbreak of war, and the port of destination was stated to be Copenhagen; but whilst on their voyage these ships and others were seized by the British navy and claimed as prize. Proceedings followed in the Prize Court, and the whole matter was adjudicated upon in the case of *The Kim* (113 L. T. Rep. 1064; (1915) P. 215), when some goods were condemned and other goods were released. Amongst the goods released were portions of the cargoes of the above named three vessels, a claim having been put in as to the same by Messrs. Christensen and Thögersen. The claim was supported by an affidavit of Mr. Thögersen, the sole proprietor of the firm, in which he swore, *inter alia*, that the goods were bought for their own customers in Scandinavia, and that "they were purchased for the purpose of taking a place in our ordinary stock, so that we might be in a position to comply with the orders of our customers when received. They were not purchased by my firm for the purpose of selling to the Government or the armed forces of any Power at war with Great Britain or her allies, or to any contractor of any such Government, or any person trading with such persons. I say that my firm have not either before or since the outbreak of the present war sold any goods to any such Government or persons." As above stated, the learned President, upon the evidence adduced, made an order for the release of the goods. The Procurator-General entered an appeal, but before the appeal was heard it appeared that Mr. Thögersen had been convicted of fraud in Denmark, and in the course of the proceedings there it was proved that the statements made by Mr. Thögersen in the above mentioned affidavit were absolutely false, and that the goods which had been released had been intended for Germany. Thereupon the Procurator-General issued the writ in the present action.

There was no appearance to the writ, and Messrs. Christensen and Thögersen were not represented at the hearing.

The *Solicitor-General* (Sir Gordon Hewart, K.C.) and *B. A. Wright*, K.C. for the Procurator-General.—The order for release should be set aside. It had been obtained by fraud, and there was an inherent jurisdiction in every court to rescind a judgment which was obtained by fraud. The affidavit of Mr. Thögersen was obviously false, and the statements made therein were such that an indictment for perjury would lie. The court had given its decision upon the evidence contained in the affidavit, whereas, if the true facts had been known, the order would most certainly not have been made. Fraud vitiated everything, and under the circumstances the court should not only rescind the order for release which had been made, but declare the goods lawful prize. They cited

Cammell v. *Sewell*, 3, H. & N. 617;
Castrique v. *Imrie*, 23 L. T. Rep. 48; L. Rep. 4 H. L. 414;
Abouloff v. *Oppenheimer*, 47 L. T. Rep. 325; 10 Q. B. Div. 295;
Birch v. *Birch*, 86 L. T. Rep. 364; (1902) P. 130
Bright v. *Sellar*, 89 L. T. Rep. 431; (1904) 1 K. B. 6.

THE PRESIDENT.—The Crown is making an application in this case for an order to set aside an order for the release of goods or their proceeds, which I made in reference to the claims of

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

Messrs. Christensen and Thögersen in the case of *The Kim* (*ubi sup.*). They make that application upon facts which have come to the knowledge of the Crown and the Crown's advisers since the judgment which I delivered and the order which I made on the 16th Sept. 1915. The conclusion to which I reluctantly came, as I have shown by the expressions used in the judgment, was upon the evidence as then laid before me. The goods claimed by them were shipped to them as *bonâ fide* purchasers, and not as people who acted as agents for some of the American packers in order to get goods into Germany. The new facts ascertained by the Procurator-General and now placed before the court show that at this particular time goods of this description which had been shipped by the Cudahy Company were either transferred by them into Germany direct, or that terms were made in defiance of the declaration they made to get the goods sent to an enemy country. The real question which I have to decide is whether or not, if the whole truth had been put before me—which I now know to be the case—when I dealt with their claim in *The Kim* (*ubi sup.*), I should have come to the conclusion I then did.

It is said by the Crown that the whole truth was not put before me, and clearly it was not. There was clearly a *suppressio veri*, and there was more than a *suggestio falsi* — there was an *expressio falsi*. The statement made by Mr. Thögersen, the proprietor of this firm, was that he had all his customers in Scandinavia, that some of the goods had been sold already to such customers, and that those goods which had not been sold were intended also for Scandinavian customers, and to be imported in that way into the common stock of Scandinavia and were not intended to be sent into Germany.

Every court has an inherent right to set aside an order which it has made, and which is procured by fraud, and that applies to the Prize Court certainly as strongly as to any other court. It cannot be too well known that claimants who desire to establish their claims must put their case honestly, fairly, candidly, and fully before the court. That has been said in the course of the last three years over and over again. So far from having done so, the deponent in this particular case deliberately stated what was untrue and implied what was false, suppressed material facts which could have been laid before the court, and, just as he has suffered punishment for conduct of that kind in his own country, and very severe punishment by imprisonment and fine, so he suffers such punishment as this court can impose on him by losing the goods, or the proceeds of the goods, which I released to him by the original order which I made in his favour.

I rescind the order which I made, and I declare that these goods were goods which were confiscable as prize, and I condemn the proceeds as such.

Solicitor for the Procurator-General, *Treasury Solicitor*.

June 5 and 14, 1918.

(Before Sir S. T. EVANS, President.)

THE ZAANLAND. (*a*)

Prize Court—Conditional contraband—Neutral consignees — Insurance by consignees with neutral underwriters—Seizure of goods—Payment by underwriters after seizure — Remittance of price of goods by consignees to shippers—Claimant shippers no longer owners of goods--Claim of shippers dismissed.

The claimants of certain goods shipped the same from a neutral port in South America and consigned them to a firm in Holland on a Dutch steamship towards the end of 1915. *The goods were declared to be conditional contraband in Jan.* 1916 *whilst the steamship was on its voyage, and were seized in March* 1916. *The Dutch firm put in a claim to the goods in June* 1916, *but this was abandoned. Fifteen months later the shippers put in a claim alleging that they were the owners of the goods and that the same had not an enemy destination. It appeared that the Dutch consignees had, in pursuance of an agreement for that purpose, insured the goods with Dutch underwriters against risk of capture, and that the latter had paid over the insurance money. The consignees had afterwards remitted the price of the goods to the shippers, the claimants.*

Held, that under the circumstances of the case the claimants had parted with their rights in the goods, and that where claimants have after seizure parted with their rights to goods, which are liable to condemnation, to other persons, whether insurers or not, and have so ceased by their own acts to be the owners of the goods, no order will be made for the release of the goods to them.

THIS was a case in which the Procurator-General, on behalf of the Crown, sought the condemnation of the proceeds of certain consignments of sausage casings seized on board the Dutch steamship *Zaanland*. At the same time condemnation was asked as to consignments of a similar character on board a Norwegian steamship, the *Bra Kar*, and a Swedish steamship, the *Urna*. No claim had been made as to the cargo of the *Bra Kar*, and the claim as to the *Urna* had been abandoned. Consequently, only the claim as to the cargo of the *Zaanland* remained to be adjudicated upon.

The consignment on board the *Zaanland* which was in question consisted of 150 casks of sausage casings, which were shipped at Buenos Ayres by Penelas Morini and Grosso, under bills of lading dated the 31st Dec. 1915. The goods were consigned to the Netherlands Oversea Trust for Gustav J. Witt and Co., of Amsterdam. Sausage skins were declared to be conditional contraband on the 27th Jan. 1916. The *Zaanland* sailed from Buenos Ayres about the end of 1915 or the beginning of 1916, and arrived at the port of London in March 1916. The goods were seized in the port of London on the 8th March 1916, and the writ was issued on the 20th April 1916. A claim to the goods was put in by Gustav J. Witt and Co., filed the 29th June 1916, as neutral owners, but this was afterwards abandoned. Subsequently, on the 2nd Oct. 1917, another claim was put in, this time on behalf of Penelas Morini and Grosso, who alleged that the property

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

in the goods had remained in them; that they were intended for consumption in Holland, and that they had no enemy destination. Except for the change in the name of the claimants, the claims in each case were identical.

According to the affidavits filed in the case, which are sufficiently referred to in the judgment, the goods were insured by Gustav J. Witt and Co. against risk of capture, and after the seizure the underwriters paid the insurance money to Gustav J. Witt and Co., who in turn paid the value of the goods to the present claimants, Penelas Morini and Grosso. It was further shown that the claimants had been in the habit of sending goods to Europe consigned to Gustav J. Witt and Co.—the head of which firm was a German and also interested in a firm of the same name at Hamburg—and other consignees in Europe with the object of forwarding them to Germany.

On behalf of the Crown it was contended that Gustav J. Witt and Co. were merely agents for forwarding the goods to Germany, and that the real destination of the sausage casings was an enemy country. Moreover, it was urged that the claimants had been paid in full for the goods, and that they had thereby ceased to be the owners of the same. The claimants joined issue on both these grounds.

The *Solicitor-General* (Sir Gordon Hewart, K.C.) and *Trickett* for the Procurator-General.

Balloch and *Darby* for the claimants.

Inskip, K.C. and *Hansell* for the Netherlands Oversea Trust.

Cur. adv. vult.

June 14.—THE PRESIDENT.—The Crown asks for condemnation of the proceeds of certain consignments of casings seized on board the *Zaanland*, *Bra Kar*, and *Urna*. The consignments were: (1) 150 casks of casings shipped on the Dutch vessel *Zaanland*, by Penelas Morini and Grosso, of Buenos Ayres, under bills of lading made out to the Netherlands Oversea Trust, for Gustav J. Witt and Co., of Amsterdam; (2) sixty-five casks and nine casks of salted tripe shipped respectively on the *Bra Kar*, a Norwegian vessel, by Penelas Morini and Grosso and A. Brazelli respectively, under bills of lading made out to the Norsk Farmindustrie, of Christiania; and (3) seventy tierces of casings shipped on the *Urna*, a Swedish vessel, by H. Krull, of New York, to his order at Copenhagen.

The shipments were made at the end of 1915 and the beginning of 1916. No appearance was entered, nor was any claim made to consignments (2). Krull entered an appearance in respect of consignment (3), but no claim was filed; and the solicitors who had caused the appearance to be entered informed the Procurator-General before the hearing that they were not instructed to proceed any further in the matter. Having regard to the facts disclosed in the evidence, it is clear that the goods comprised in consignments (2) and (3) were subject to condemnation as conditional contrabrand destined for Hamburg.

The claim to the goods seized on the *Zaanland* remains to be dealt with. The first claim to these was made by Gustav J. Witt and Co. on the 29th June 1916, on the ground that they were the "neutral owners." This claim was abandoned. For it was substituted one by the said Penelas Morini and Grosso, filed on the 2nd Oct. 1917. It was contended that the property had remained in them; and it was alleged that the goods were destined for Holland for consumption in that country, and had no enemy destination.

The evidence adduced in the present proceedings does not require to be dissected and explained in as great detail as has often been the case when shipments captured on voyages to Holland and Scandinavia have come before this court. For it was admitted—as, indeed, the documents amply showed—that the claimants had been in the habit of consigning goods to agents in Europe, including Gustav J. Witt and Co., to neutral ports, with the object of disposing of them in the profitable markets of Germany; and that they desired to continue to do so, notwithstanding the increase of the risk of capture.

But the contention was that the particular goods now in question were sent *bonâ fide* to agents in Rotterdam to carry out a contract with neutral purchasers in Holland, who declared, and honestly intended, that the goods should form part of the common stock of Holland, and be consumed in that country. These purchasers were said to be the General Provision Company, of Amsterdam. Reliance was placed on the fact that the goods were consigned to the Netherlands Oversea Trust for Gustav J. Witt and Co., the agents.

At the end of 1915 it was inconveniently difficult to ship such articles as these to Holland unless it was done through the trust. But even where the sanction of the trust had been obtained, it is notorious that persons engaged in trade of a contraband nature attempted to circumvent the obstacles, and to escape the consequences of the breaches of obligations entered into with the trust. Some succeeded; others were detected, and suffered. One main question of fact, therefore, to be investigated in this case is whether it was honestly intended by Gustav J. Witt and Co. and the General Provision Company to carry out the ostensible object of the consignment made through the trust, by adherence to the word and spirit of the obligations involved.

The case was founded first upon the affidavit of Theodor Thomsen, the only director of Gustav J. Witt and Co. He was a German, but he said he had for years resided at Rotterdam. According to Mr. Greenwood's evidence, on behalf of the Crown, Gustav J. Witt himself, the proprietor of the firm of the same name at Hamburg, was a German, resident in Hamburg, and this has not been denied. It was said that the goods seized formed part of a quantity sold to the General Provision Company on the 8th Dec. 1915. A letter of that date, purporting to confirm the sale, was relied upon. That document did not specify any price, or any terms as to payment, insurance or delivery, or any of the particulars usual and necessary in such a contract. A letter written by Gustav J. Witt and Co. to Penelas Morini and Grosso a fortnight later is inconsistent with a sale having already taken place. The bills of lading were dated the 31st Dec. 1915, and on the same date a consignment invoice was sent to Gustav J. Witt and Co. amounting to 20,950 fl. gross, and 16,946.5 fl. net, with a note at the foot, "Goods c.i.f. Amsterdam."

On the 26th Jan. 1916, when the goods were afloat, it was said that the General Provision Company wrote to Gustav J. Witt and Co. that

they were willing to take the goods at the invoice price "under known conditions, payment against bill of lading after it has been indorsed by the Netherlands Oversea Trust."

Thomsen, in his affidavit, said that the goods were insured with three Dutch underwriters for 26,000 fl., and that the insurance was covered on behalf of Gustav J. Witt and Co. by the General Provision Company. The policy contains no reference to the General Provision Company. The insurance was for a fixed value, and that sum was paid, but no evidence was given as to how and by whom payment was made. Gustav J. Witt and Co. afterwards paid the claimants (Penelas Morini and Grosso) for the goods in an account sale of 22,000 fl. on or about the 19th Sept. 1916. An aspect of the case arising from this payment will be referred to hereafter. No communication passing between Gustav J. Witt and Co. and the General Provision Company was produced or spoken of from the 26th Jan. 1916 until a letter of the 27th Oct. 1916; no exchange of views about the seizure, or about the insurance which, it was said, had been covered by the General Provision Company, or about anything else touching the goods.

The letter of the 27th Oct. 1916 was a statement made at the request of Gustav J. Witt and Co. It appears to be a statement made in order to justify a refusal, or which did in fact refuse to disclose the company's books. The only evidence supplied by the General Provision Company was an affidavit (sworn in Sept. 1917) made by one Eilers, their manager. It alleges the purchase, and contains the statement that the goods were to be dealt with as other casings imported into Holland by the said General Provision Company, namely, to be unfatted, cleaned, and sold to butchers and wholesale dealers in Holland. It is silent as to any insurance effected by or through the company. It is not a helpful piece of evidence.

The only affidavit made for Penelas Morini and Grosso was that of Angel Grosso, sworn on the 14th March 1918. It is so meagre as to be worthless. It says nothing of the alleged sale to the General Provision Company, or about the insurance of the goods, or about the fact that Penelas Morini and Grosso had been paid for them a year and a half before.

In the investigation and the testing of the claim, obvious questions like the following arise: Who were the General Provision Company? What is their history since the war? Ought the court upon the evidence adduced to rely upon the allegations that they bought the goods for consumption in Holland? Or, if not, what are the reasonable and proper inferences from the facts?

This company has already been before this court. Thirty tierces of casings consigned to it at Rotterdam through a firm carrying on business in Chicago and Hamburg towards the end of 1915 were condemned by this court last year. The company entered a claim to those goods, but its counsel said that he was instructed not to proceed with the claim.

On the 28th Jan. 1916 the company seems to have written a letter to a Mr. Laurence, a merchant in the United States, who replied in an intercepted letter, dated the 3rd March 1916, exhibited to Mr. Greenwood's affidavit. The company's letter was written a couple of days after the alleged final acceptance by the company of the goods now claimed by the claimants, so that it reveals the attitude and conduct of the company at a material time. The reply shows that the company had said that it could and would receive casings in Holland for transmission into Germany. No officer of the company has given an answer upon this matter, but a letter from the claimants' legal adviser in Holland was read by counsel. This admitted the receipt of the letter from Mr. Laurence, but denied that the company had written the letter to which it purported to be a reply. A feeble explanation was put forward that the letter written in the name of the company was the clandestine work of a German clerk in the company's office. I cannot accept this story. This company also, according to the evidence of Mr. Greenwood, exported to Mannheim about 40 tons of meat in Aug. 1916. This has not been denied. Again, an intercepted letter of the 14th March 1916, exhibited by Mr. Greenwood, shows the relationship of the company—which is there indicated as "G.P.C."—with Brecht, of St. Louis, and Brecht, of Hamburg, in dealings with goods of the same description as those now in question. It is not necessary to go into further particulars about the activities of the company with Brecht; Schaub and Co.; Leube; the Algemeene Commissie Vennootschap, and other persons and firms carrying on trade in contraband goods with Germany.

The conclusion to which the evidence has led the court is that Gustav J. Witt and Co. procured the consent of the Netherlands Oversea Trust to the consignment of the goods through the trust to Gustav J. Witt and Co., on the pretence that the goods were sold to the General Provision Company for consumption in Holland, whereas in truth and in fact Gustav J. Witt and Co. and the General Provision Company acted only as channels through which the goods were intended by all parties concerned to be sent to Germany; and the ship's papers did not disclose the real consignees and purchasers.

I, therefore, disallow the claim. I declare that the goods were destined to the enemy at Hamburg, a base of supply and of warlike operations, and, being conditional contraband, they were subject to seizure and confiscation. For the reasons stated the judgment of the court is that the goods seized on this ship, as well as on the other two ship above named or their proceeds, be condemned as good and lawful prize.

When I set out some of the facts relating to the insurance of the goods laden in the *Zaanland*, and the payment of the insurance moneys to Gustav J. Witt and Co., and the payment by Gustav J. Witt and Co. to the claimants for the goods, I stated that these circumstances would be further referred to, as they raised an aspect of the case which requires consideration. It came out in the evidence that a full year before the claimants filed their claim they had been paid in full for the goods. Accordingly, if the goods or their proceeds were released to them, they would be paid twice over. The letters relating to the payment of the insurances indicate that the payment was made upon the transfer of the documents and all rights of the consignees to the goods. I note, in passing, that after the payment was made to the claimants, Gustav J. Witt and Co. wrote to them that it would be advisable that they

should write to the solicitors that the goods were not paid for by Gustav J. Witt and Co. The insurers appear to have been three separate underwriters. The letters referred to speak of "the insurance company." No evidence was given as to who paid the insurance moneys. There may have been reinsurances, and in all probability there were. It has often been found in this court that insurances and reinsurances have been effected by German companies or underwriters in respect of goods consigned in the names of neutrals, and insured in the first instance in neutral countries.

Where the claimants have after seizure parted with their rights to the goods to other persons, whether insurers or not, and have so ceased by their own acts to be the owners of the goods, no order will be made for release of the goods to them. Such an order might enure to the benefit of the enemy as insurers, or reinsurers, or in some other capacity. If goods claimed have ceased to belong to claimants before they came into court to prove their title as owners, their claim must fail: (see *The Prinz Adalbert*, 14 Asp. Mar Law Cas. 81; 116 L. T. Rep. 802; (1917) A. C. 586).

I should add, however, that although the court will not undertake to inquire into the interests of insurers, underwriters, or transferees sought to be protected under cover of a claim in the names of claimants who were owners at the time of seizure, nevertheless, if it transpires in the course of the proceedings that an order for the release of goods or proceeds to the nominal claimants would in fact enure to the benefit of enemy subjects, the court will decline to make an order which would have that effect: (see *The Palm Branch*, 13 Asp. Mar. Law Cas. 512; 115 L. T. Rep. 557; (1916) P. 230).

Upon the evidence on this part of the case my conclusion is that, assuming the claimants were the owners of the goods at the time of seizure, they had ceased to be the owners at the time of their claim and of the hearing; and upon this ground also their claim must be disallowed.

Solicitors: for the Procurator-General, *Treasury Solicitor*; for the claimants, *Pritchard* and *Sons*; for the Netherlands Oversea Trust, *A. M. Oppenheimer*.

House of Lords.

Nov. 15, 16, *and Dec.* 12, 1918.

(Before the LORD CHANCELLOR (Lord Finlay), Viscount HALDANE, Lords SHAW OF DUNFERMLINE, SUMNER, and WRENBURY)

BANK LINE LIMITED *v.* ARTHUR CAPEL AND CO (*a*)

APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Time charter—Requisition of ship—Frustration of adventure.

The doctrine of frustration applies to a time charter as well as to a voyage charter.

The appellants were the owners of the steamship Q., *which had been chartered by the respondents under a time charter-party, dated the 16th Feb.* 1915, *for a period of twelve months from the time the vessel should be placed at the disposal of the charterers. The charter-party included the usual exceptions of arrests and restraint of princes, rulers, and people. The question was whether, as the result of the general requisition of the* Q. *by the Government after the date of the charter party, but before the vessel had entered on her service under the contract, the adventure contemplated by the charter-party became frustrated and the contract thenceforth inoperative. The vessel was released after some months to the appellants on their undertaking to supply the Government with another vessel in her stead. On the vessel being released the appellants sold her to a third party.*

In an action by the charterers claiming damages for breach of the charter-party:

Held, (1) *by all their Lordships, that the doctrine of frustration was not excluded by the terms of the charter-party; and* (2) (*Viscount Haldane dissenting*) *that the requisition of the vessel for an indefinite period so destroyed the identity of the chartered service as to entitle the shipowners to treat the charter-party as at an end from the date of the requisition.*

APPEAL from an order of the Court of Appeal reversing a judgment of Rowlatt, J.

The appellants were the owners of the steamship *Quito* and the respondents were the charterers of that vessel under a time charter-party dated the 16th Feb. 1915. The question for decision on this appeal was whether, as the result of the requisitioning of the *Quito* by His Majesty's Government after the date of the charter-party, but before the vessel had actually entered on her service thereunder, the adventure contemplated by the charter-party became frustrated and the contract terminated.

The action was brought by the charterers for a declaration that the charter-party was not dissolved by the ship having been requisitioned, and that the owners were bound to deliver her to the charterers.

Rowlatt, J. held that the shipowners were entitled to treat the charter as at an end, but on appeal that decision was by a majority reversed (Pickford and Warrington, L.JJ., Scrutton, L.J. *dissentiente*) and judgment was entered for the respondents for 13,344*l.*, the agreed amount of the damages.

The facts fully appear from the judgment of the Lord Chancellor (Lord Finlay).

MacKinnon, K.C. and *Raeburn* for the appellants.

Leck, K.C., *Dunlop*, and Sir *Robert Aske* for the respondents.

The following judgments were read:—

The LORD CHANCELLOR (Lord Finlay).—In this case an action was brought by Messrs. Capel and Co., the respondents, against the Bank Line Limited, the appellants, to recover damages for failure by the defendants to put at the disposal of the plaintiffs the steamship *Quito*, which the plaintiffs had chartered from the defendants for a period of twelve months. The points of defence allege that the vessel had been requisitioned by the British Government and that the charter was

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

put an end to by such requisitioning from its date (the 11th May 1915).

The case was tried by Rowlatt, J., who held in favour of the defendants that the requisition had put an end to the contract.

On appeal the majority of the Court of Appeal (Pickford and Warrington, L.JJ.) reversed this decision. Scrutton, L.J. dissented and expressed his agreement with the conclusion arrived at by Rowlatt, J.

The Bank Line Limited now appeal to this House, and ask that the judgment of Rowlatt, J. should be restored.

The charter is dated the 16th Feb. 1915, and was entered into between the appellants, owners of the *Quito*, and the respondents, the charterers. By the first clause the owners agreed to let, and the charterers to hire, the steamer for a term of twelve calendar months from the time the vessel should be delivered and placed at the disposal of the charterers ready to load at a coal port in the United Kingdom as ordered by the charterers, to be employed in trade between safe ports and places within the limits of the United Kingdom, France, the Bay of Biscay, Portugal, Spain, and the Mediterranean not east of Sicily during the war.

By the fifth clause the charterers were to pay as hire 291*9l.* per calendar month, commencing from the time the steamer was placed at their disposal. By the fourteenth clause it was provided that throughout the charter losses or damages, whether in respect of goods carried or to be carried, or in other respects, should be absolutely excepted if they arose from certain causes enumerated, among which were the act of God, perils of the sea, and arrests and restraint of princes, rulers, and peoples.

The two most important clauses for the purposes of the present appeal are the twenty-sixth and the thirty first, which run as follows:

26. That the steamer shall be delivered under this charter not before the 1st April 1915, and, should the steamer not have been delivered latest on the 30th day of April 1915, charterers to have the option of cancelling this charter.

That, should it be proved that the steamer through unforeseen circumstances cannot be delivered by the cancelling date, charterers, if required, shall within forty-eight hours after receiving notice thereof declare whether they cancel or will take delivery of the steamer.

31. Charterers to have option of cancelling this charter-party should steamer be commandeered by Government during this charter.

The vessel was not ready by the cancelling date (the 30th April 1915), but the respondents did not exercise their option of cancelling, nor were they invited to say whether they would cancel or not. The *Quito* went into dry dock at Hull to prepare for entering upon service under the charter-party, and while there she was, on the 11th May, requisitioned by the British Government. Efforts were made by the charterers and owners to get her released, but without success. On the 17th May the charterers wrote that they had informed the owners that they would take the steamer on her original charter on the same conditions for twelve months, if tendered to the charterers any time within the next three months, but no agreement was arrived at as to this suggestion. The efforts to get the vessel released ceased early in June 1915, and there was no further communication between the parties on the subject until the 2nd Sept. 1915. On this last day the charterers, who had heard that the owners were selling the *Quito*, having got the Government to release her, called upon them to deliver the steamer under the charter. The owners replied on the same day that in their view the charter had long since become inoperative, as the owners were prevented from tendering the steamer within the exceptions in the charter, and added that the request that the owners should tender the steamer seemed to ask them to enter into an entirely new agreement, and not such as was contemplated by the charter of the 16th Feb.

The facts were that in July 1915 the appellants had received from third parties an offer to purchase the *Quito*, which on the 11th Aug. they accepted, subject to their being able to procure her release from the requisition. On the 17th Aug. the Government intimated that they would release the *Quito*, provided the owners replaced her by another vessel of theirs—the *Mansuri*—which was free of engagements, and on the 2nd Sept. this was carried out and the *Quito* was released.

The appellants contend that they were not liable in the action, on the ground that they were entitled to treat the charter-party as at an end owing to the requisition by the Government, and the detention under it, as this amounted to a frustration of the adventure by circumstances beyond the appellants' control. The respondents urged that on the construction of the charter-party all application of the doctrine of frustration was excluded, and denied that there was in fact any frustration of the adventure. Rowlatt, J. and Scrutton, L.J. held that the charter-party was at an end, the adventure having been frustrated, while Pickford and Warrington, L.JJ. held that the charter-party was still in existence and awarded the plaintiffs damages on a scale which worked out at £13,000.

The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed in this House, and most recently in the case of the *Metropolitan Water Board* v. *Dick, Kerr, and Co.* (117 L. T. Rep. 766; (1918) A. C. 119), in which a great number of cases were reviewed. I do not propose to repeat what has been said in these cases on the law of the subject, which is well settled, and proceed at once to consider the application of the doctrine to the circumstances of the present case.

The first question that falls to be determined is whether, as contended by the respondents, the doctrine of frustration of the adventure as terminating the contract is excluded by the terms of the charter-party. The clauses relied on as having this effect are clauses 26 and 31. In my opinion neither of these clauses can have the effect of preventing the termination of the charter-party by the requisition in the present case and the detention under it.

Clause 26 provides that if the steamship should not have been delivered by the end of April 1915 the charterers were to have the option of cancelling the charter. This option would apply if there were any delay beyond the 30th April, and if the delay was through unforeseen circumstances (in other words, if it was not due to the default of the owners) it was provided by the second paragraph

that the charterers might be called on to declare within forty-eight hours whether they cancelled or would take delivery of the steamship. It was urged for the respondents that this clause meant that only the charterers could cancel in case of non-delivery, and that however long the owners might have been prevented from delivering by unforeseen circumstances beyond their control, they were bound to hold the vessel at the disposal of the charterers. I cannot read this clause as having any such effect. The charter was to be for twelve months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances it became impossible for the owners to deliver under the charter-party until many months after the end of April, the whole character of the adventure would be changed. A charter for twelve months from April is clearly very different from a charter for twelve months from September. In such a case the adventure contemplated by the charter is entirely frustrated and the owner when required to enter into a charter so different from that for which he had contracted, is entitled to say *non hæc in fœdera veni*. In other words, the owner is entitled to say that the contract is at an end on the doctrine of the frustration of the adventure as explained in *Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company* (13 Asp. Mar. Law Cas. 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397). It would be quite unreasonable to construe clause 26 as meaning that the owners are in such a case to hold the vessel at the disposal of the charterers for an unlimited period.

In the *Tamplin Steamship* case (*sup.*) the House of Lords was divided three to two, Lord Loreburn, Lord Parker, and Lord Buckmaster, L.C. (who concurred with Lord Parker's judgment) forming the majority, while Lord Haldane and Lord Atkinson dissented. But it will be found that the principles of law enunciated by Lord Loreburn and by the two dissentients are identical; the difference between them being as to the application of these principles to the particular circumstances of the case. The concurrence of Lord Parker and of Lord Buckmaster, L.C. with Lord Loreburn, was to some extent rested on the ground that a clause in the charter providing for the case of restraint of princes would exclude the doctrine of frustration of the adventure as terminating the contract. This proposition should not, in my opinion, be regarded as forming part of the judgment of the House, and the judgment of Lord Parker when scrutinised will be found to treat this as only one of the circumstances which led him to the conclusion that in the case of the time charter which was in question the doctrine of frustration was excluded.

Clause 31 cannot be relied on on behalf of the respondents any more than clause 26. Clause 31 merely means that in case of the vessel being commandeered, the charterers might cancel at once without having to show that the detention was likely to last so long as to put an end to the contract within the meaning of the authorities.

The second question must, therefore, be determined—namely, did the requisition of the vessel and the detention under it constitute a change of circumstances such as to entitle the owners to treat the charter as at an end? As events show, the release of the vessel could be procured by providing another instead, but there was no obligation on the owners to do this for the purpose of carrying out the charter. It was only after they had entered into the contract to sell the *Quito* conditionally on procuring her release that the owners provided a substitute to enable them to carry out their contract of sale. The entering into the contract of sale was an act showing that the owners treated the contract of charter as at an end. Were they justified in this? In my opinion they were. They had concurred with the charterers in endeavouring to procure the release by the Admiralty of the vessel. These efforts failed and were not continued after the 8th June. On the 3rd Sept. the charterers learned of the release which had been obtained by the substitution of the *Mansuri* in order to carry out the sale of the *Quito* and demanded delivery. In my opinion, the owners were entitled to reply, as they did, that the contract had come to an end, as the detention had lasted so long that if the vessel were delivered in September it would be on a contract differing most materially from that provided for by the original charter.

For these reasons I agree with the conclusion arrived at by Rowlatt, J. and Scrutton, L.J., and think that the appeal should be allowed with costs here and below.

Viscount HALDANE—In this case there are two questions: Is the doctrine of what is called frustration excluded under the circumstances by the effect of the special stipulations in the charter-party? The stipulations I refer to particularly are that in clause 14, excepting loss or damage by restraint of princes; that in clause 26, providing for delivery under the charter-party by a certain date, and giving the charterers an option to cancel in the case of such delivery not taking place, and also in the case of being notified of unforeseen circumstances making delivery impossible; and clause 31, giving the charterers an option to cancel should the steamer be commandeered during the currency of the charter-party. If this question be answered in the negative, and it is held that the doctrine of frustration is applicable, was there in point of fact what amounted to frustration?

I do not think that there is anything in the charter-party which excludes the doctrine of frustration if the circumstances proved at the trial amount in law to so much. As to the meaning of the principle I have considered what was said by Lord Atkinson and myself in *Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (*sup.*). I see no reason to depart from what he and I agreed in stating to be the principle, and I do not think that Lord Loreburn said anything really different. Whether, in accordance with the modern tendency, the question is treated as one of construction, and an exception is formulated as implied, or whether, as appears to have been the real ground of the judgments in *Baily* v. *De Crespigny* (19 L. T. Rep. 681; L. Rep. 4 Q. B. 180), the question is regarded rather as one of a common mistake, consisting in the present instance in the assumption that the steamer was one which could be made available, does not matter. What is clear is that where people enter into a contract which is dependent

for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so. And such cases as *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; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125) show that the application of the principle to a charter-party is not excluded by the circumstance that the contract contains an express exemption clause covering what is matter not fundamental in the same sense, loss or damage from restraint of princes.

The second question is whether in this case what happened amounted to a complete frustration of the adventure. The contract, which was dated the 16th Feb. 1915, was for the use of the steamer for twelve months, not from any particular date, but from the time when she should be delivered to and placed at the disposal of the charterers at a coal port to be designated by them under clause 26, already referred to. The delivery was to take place not before the 1st April, and if it did not take place at latest on the 30th of that month the charterers were to have the right to cancel the charter-party. By clause 31 the charterers were expressly given the option to cancel if the steamer should be commandeered by the Government during the charter. I think that this shows that such commandeering was contemplated by the parties as an event which would not necessarily put an end to the basis of their contract, but might merely delay or interrupt the employment of the vessel.

In April the steamer was on a voyage from New York to Rotterdam, and was delayed beyond the 30th April, the date at which the charterers had an option to cancel. It was not until the 7th May that she reached Hull, the port designated by the charterers under the contract, and she had to be dry docked for repairs until the 17th May. On the 10th of that month the Admiralty intimated that they would requisition one out of several ships belonging to the appellants. The latter indicated that the *Quito*, the steamer in question, was most readily available, but that she was under charter to the respondents. The Admiralty thereupon, on the 11th May, requisitioned her. The respondents then urged the Admiralty to release the *Quito* on the ground that she was to be used for supplying France with coal, and the appellants appear to have supported the application. Both parties seem to have contemplated that the requisition might not prove a prolonged one, and that the charter-party might still be capable of being put into operation.

I have read the correspondence between the parties which followed on the requisition. In accordance with a well-known rule of construction which lays down that a series of letters must be read as an entirety when it is desired to ascertain whether there was a final *consensus*, it is not right to pause over phrases subsequently superseded with a view to picking out an agreement while the matter is continuing in the stage of negotiation. Reading the letters with this rule in mind I think that their outcome, taken in conjunction with the oral evidence, was that although on the 17th May 1915 Mr. Scott, as representing the respondents, writes to his brokers that he had informed the appellants that he would only take the steamer on her original charter on the same conditions for twelve months if she was tendered at any time within the next three months, nothing came of the suggestion. It is clear that in the subsequent correspondence the parties had in their minds that the requisition had not so far put an end to the charter. Mr. Niven, who represented the appellants, appears from his evidence, given in cross-examination, to have thought that he could have got the *Quito* released at any time by offering the Admiralty another steamer. Ultimately, in August, he succeeded in this, but he did not make a definite attempt until he found that he could sell the *Quito* to a stranger. I agree with the opinion of Pickford, L.J. that the parties never did take the view that the requisition had either been so long or would necessarily be so long as to put an end to the charter. It must be borne in mind that the term was twelve months, not from a definite date, but from the date when the steamer was delivered to the charterers, and that they intended to use her for the carriage of coal across the Channel, a use which they could put her to at any period that was likely to call for it. It appears that the owners never asked the charterers to say whether they would cancel under the clause in the charter-party, or would take delivery of the steamer after release by the Admiralty. Nor did they intimate that the charter was in their opinion at an end, but they left the charterers to await advice from them as to the prospect of the vessel being released. When, on the 2nd Sept., the *Quito* was released by the Admiralty to her owners, who had nearly a month previously sold her to an outside purchaser, the release was, it was quite true, obtained only for the purpose of the sale, and on condition of substituting another steamer to go under requisition. The appellant owners were not bound to offer such a substitution in order to carry out their bargain with the respondent charterers, but I think the character of the new transaction is relevant to the question whether at this period, or earlier, the appellants considered the requisition to be a necessarily enduring one. If not, I think that, under the terms of the charter-party, it was for the respondents to decide whether the transaction was one which they would wholly abandon or go on with.

Whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations. I think that this is illustrated by what was decided in this House in the recent case of *Metropolitan Water Board* v. *Dick, Kerr, and Co.* (*sup.*) and in the other authorities then examined. On the facts before us I am unable to come to the conclusion that the appellants have succeeded in showing that the steamer was in point of fact, or was contemplated as being, under permanent requisition of such a character as to make the terms of the charter-party wholly inapplicable. She was required by the charterers for a cross-channel coal traffic, in which she could apparently have been employed at any date, and, although the charter was a time charter, the date of its commencement was not precise. The use to which the vessel was to be put was not in point of fact a use of such a

nature that it was frustrated by what happened, and I do not think that the parties at any time came to the conclusion that the prospect of such use was gone. There was therefore, in my opinion, no frustration in fact, and, having regard to the nature of the contract, no frustration in law either. I agree with the conclusions arrived at by Pickford and Warrington, L.JJ., and I think that the appeal ought to fail.

Lord SHAW.—The facts of this case have been fully placed before the House in the address of the Lord Chancellor.

The *Quito* was on the 11th May 1915, requisitioned by the Government, and was thus by departmental action the legality of which was not challenged taken from the services of the parties and placed in the service of the State. This action arose in consequence of the exigencies of war. The vessel was then the subject of the charter-party quoted, and that contract I view entirely from the standpoint taken by Scrutton, L.J. In substance she was chartered for twelve months—April 1915 to April 1916. When the commandeering by the Government took place the charterers could there and then have cancelled the contract under sect. 31, and this even although the commandeering had only been for a month.

But it was a general requisition, that is to say, the ship might under it be put into the service of the Government for years, and remain in it until to-day. In those circumstances the parties, nonplussed as to the effect of the action of the Crown upon their own business arrangements with regard to the ship, would naturally be desirous to pause for a little before definitely treating the contract of affreightment as at an end. In my opinion this was exactly what they did. They agreed to wait for three months. That three months expired on the 11th Aug. By that time the vessel had not been released and on that date it appears to me that both parties were free from their temporary arrangement and that their rights are to be determined on the footing that the transfer of the ship to the service of the Government was for an indefinite period. In those circumstances I will venture to cite *Horlock* v. *Beal* (13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) A. C. 486). In that case the disablement (from carrying on a contract of service by the seamen) arose from the declaration of war and the consequent detention of the ship in a foreign port. But it was strongly contended that this did not release the parties from their contract, because nobody could predict whether the interruption would be for anything more than such a short period as might allow the contract to be resumed.

On that topic—the topic of frustration—if I may quote my own address, I said 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." And I added: "I do not think 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."

The majority of the House took this view. The case had reference to the contract of service during the performance of the contract of affreightment; *a fortiori* the same doctrine would apply to that contract itself, and I cite it because it appears to me that the rule of principle there set forth applies in identical terms as well to the case of a declaration of war as to the requisition of the ship by reason of the exigencies of war for an indefinite time, as in the present case.

In the recent cases I have observed that several learned judges have expressed an opinion to the effect that, notwithstanding the indefinite suspense to which I have referred, yet, nevertheless, the contract shall continue binding unless both the parties shall consent to the contrary. I can give no assent to such a doctrine. There are many cases in which it would be greatly to the benefit of one of the parties that he should have an indefinite and it may be a prolonged hold over the other until performance shall become possible. In my opinion it would be contrary to all sound principles to overlay the effect of the suspense referred to by the majority without the necessity of having a consent on both sides to cancellation. I desire further to add that the fact whether the contract of affreightment is a voyage charter or a time charter makes no difference in the application of the principle, and that I attach my special assent to the judgment of my noble friend Lord Sumner upon that topic.

With these observations I beg to express my entire concurrence in the opinion and judgment just delivered from the Woolsack.

Lord SUMNER.—I think that whichever way this case is decided it is certainly a very near thing.

From the time when the *Quito* was requisitioned her owners never were in a position to put her at the charterers' disposal for any purpose, until after they had sold her. By finding a substitute for her they might possibly have induced the Admiralty to set her free, for such things had been done, but it was uncertain if such an attempt would succeed, and mere importunity proved unavailing. They had not contracted to make this special effort for the benefit of the charterers. It is true that, when they did so for their own benefit, they succeeded, and, having got possession of her, they might have been bound to place her at the charterers' disposal under the charter, if that still subsisted, the sale notwithstanding; but the question is whether the charter had previously come to an end by frustration. If it had, they were not bound to give the charterers a first chance of a new contract.

What then was the nature of the charter? It was not in form an April to April charter, but it was sufficiently so in substance. If the ship had been placed at the disposal of the charterers when released by the Admiralty, she would virtually have been in their hands for a September to September hiring. The mere change in the initial month of the actual hiring is not quite the point, for this is not the old comparison of a summer with a winter voyage. In either case she would have been on hire for each month of the twelve, and the exact cycle of the seasons would make little difference to her. What is important is this: During all the months of the *Quito's* service for the Admiralty

the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an indubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business is one that requires that they should look ahead, and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce are very serious. Scrutton, L J. asked himself if the September to September employment would be in substance the same employment as that from April to April. I agree with him that it would not, and I think that the uncertainties of the intervening period in time of war both emphasise the difference between the two and add to the gravity of the lapse of time taken by itself.

We find the parties themselves apparently impressed with the idea that any long suspense was intolerable and that, if the ship could not be promptly released, the engagement must be considered as at an end. Their communications with one another ceased early in June; apparently each was waiting to see if something would turn up. So I read their correspondence. The charterers' agent actually spoke to the owners' representative in the sense that, if the *Quito* was to be released, he would be prepared to consider a new charter, and, although the brokers deprecated what he had done, it was not so much that they differed from him in thinking that the old charter was dead, as that they thought it better not to say so except without prejudice. The owners left the matter there, but presently they sold the *Quito*. They did so without communication with the charterers. It is more reatonable to infer that they also thought the old charter was dissolved than that, thinking it to be alive, they hoped to escape disputes with the charterers by trying to keep secret what they were doing.

One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one, and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated. Nothing, however, was made of this in the courts below, and I will not now pursue it.

What, then, is the legal bearing of these facts? The charter is a time charter, and the principle of frustration was originally decided on a voyage charter. For some time it was thought that the frustration rule had no application to time charters upon the ground that, if the shipowner's object is to receive chartered hire, as probably it is, he does not care how much the charterer's adventures are frustrated so long as he is able to pay. This was the view both of Bailhache, J. in the case of the *Auldmuir's* charter (13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. at p. 174; (1916) 1 K. B, at p. 436) and of Sankey, J. in that of *The Dunoily* (13 Asp. Mar. Law Cas. 539; 115 L. T. Rep., at p. 813; (1916) 1 K. B., at p. 681), and, though the Court of Appeal reversed their decision, some colour was given to their view by the fact that the references in those charters to a "Baltic round" were treated as giving them the characteristics of a voyage charter, although they were charters for time. Sankey, J. in terms said that the principle "is confined to cases when it can be inferred from the charter-party itself that it is a contract for a definite voyage or a definite object, contemplated at first by both parties." His notion was that both must have had a common interest in an adventure and one and the same object in view when contracting. "The only object which both must have known each had in view" and "the object of common contemplation" are the expressions of Bailhache, J. Atkin, J. expresses the same opinion in *Lloyd Royale Belge Société Anonyme* v. *Stathatos* (33 Times L Rep. 390). This way of looking at the contract fixes attention on its subjective aspect and asks what was actually in two hard bargainers' minds. Objectively the question is what does the law impute to them as fair dealers and deem to have been their meaning, which, as we constantly see in questions of construction, may be a very different thing. Again, Bailhache, J. says (p. 438): "It is impossible to apply the doctrine of frustration to a case where one of the parties in fulfilling his part of the contract according to its terms," either in the owner's case by letting the charterer have the ship and leaving him to find a use for her or, in the charterer's, by paying his hire punctually. To this I think Swinfen Eady, M.R, in *Scottish Navigation Company Limited* (13 Asp. Mar. Law Cas. 539; 115 L. T. Rep. 812; (1917) 1 K. B. 227), gives the sufficient answer: "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." Lawrence, J., at p. 250, also says that in a time charter the owners' object is not only to get hire, but to afford the services which the charterer pays for, although money is their common motive. Lord Parker of Waddington in *Tamplin's* case drew attention to the difficulties attending on the adaptation of the doctrine to a time charter of long duration, which all must recognise, but did not express the opinion that it was inapplicable to the charters as such, and it is now settled that, although the doctrine may have to be somewhat specially applied, time charters do not fall outside the rule. *Scottish Navigation Company* v. *Souter* and *Admiral Shipping Company* v. *Weidner and Hopkins* (both reported in the Court of Appeal, 13 Asp. Mar. Law Cas. 539; 115 L T. Rep. 812; (1917) 1 K. B. 222), *Anglo Northern Trading Company* v. *Emlyn Jones and Williams* (reported 14 Asp. Mar. Law Cas. 18; 116 L. T. Rep. 414; (1917) 2 K. B. 78; and on appeal, 14 Asp. Mar. Law Cas. 242; 118 L. T. Rep. 196, (1918) 1 K. B. 372), *Countess of Warwick Steamship Company* v. *Le Nickel Société Anonyme*

(reported *idem*), and, finally, *Metropolitan Water Board* v. *Dick, Kerr, and Co.* (*sup.*) are the authorities for this.

All these are cases of delay arising out of the exigencies of the present war, and the length of the delay was especially dwelt on by Bailhache, J. in *Anglo-Northern Trading Company Limited* v. *Emlyn Jones and Williams* (*sup.*). In the particular circumstances of *Tamplin's* case the main thing to be considered was the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charter party, and I agree in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered. The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance, and, if the charter ought be held to be dissolved, it cannot be revived without a new contract. The parties are free.

Again, it does not seem to be in itself a matter of crucial importance whether the performance of the charter has begun or not. The charter in *Jackson's* case (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125) has often been wrongly referred to as purely executory (*e.g.*, per Lord Watson in *Nelson* v. *Dahl* (4 Asp. Mar. Law Cas. 372; 44 L. T. Rep. 381; 6 App. Cas., at p. 62), but the ship was on her way to load and had begun the chartered voyage, which did not begin merely at the port of loading. Lord Blackburn's remarks in *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B., at p. 413) raised a doubt which was also present to the mind of Lord Parker of Waddington in *Tamplin's* case (1916) 2 A. C., p. 428), but I think that *Bensaude* v *Thames and Mersey Marine Insurance Company* (8 Asp. Mar. Law Cas. 315; 77 L. T. Rep. 282; (1897) A. C. 609) disposes of it: (see *Embericos* v. *Sydney Reid and Co.* (12 Asp. Mar. Law Cas. 513; 111 L. T. Rep. 291; (1914) 3 K. B. 45). Of course it may be very material in considering the prospect of delay to know whether the ship is light or loaded. If loaded, delay is likely to be longer and more serious; but, on the other hand, the prospect of ultimate fruition from the adventure, which is at any rate begun, is thus increased. The present charter I treat as wholly executory, for although the charterers had definitely named Hull as the loading port, the hiring was not to commence till the *Quito* was placed at their disposal there, which never took place. The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties. "When the contract makes provision" (that is full and complete provision, so intended) '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": (per Bailhache, J., *Admiral Shipping Company Limited* v. *Weidner, Hopkins, and Co.* (13 Asp. Mar. Law Cas. 246; 114 L. T. Rep. 171; (1916) 1 K. B., at p. 438). This is a matter of construction according to the usual rule. A contingency may be provided for, but not in such terms as to show that the provision is meant to be all the provision for it. A contingency may be provided for but in such a way as shows that it is provided for only for the purpose of dealing with one of its effects and not with all. In the present case three clauses are relied on as express provisions for the event and consequences of an Admiralty requisition, delaying or preventing the placing of the *Quito* at the charterers' disposal, Nos. 14, 26, and 31. When the Admiralty requisitioned her she became subject to a restraint of princes, one of the causes mentioned in clause 14, which says "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." In the first place I think this claim is not for "loss or damage" within that clause, but in the second the meaning of such an ordinary clause of exception is well settled. It excuses breaches of the contract caused by matters which fall within its terms; it suspends the liability to pay hire without finally determining it; but relief from the liability to pay damages or hire and complete discharge from further obligation to perform the contract are different things. "Restraint of princes throughout this charter-party always excepted" and "the contract to be no longer binding if a restraint of princes frustrates its commercial object" are neither, in my opinion, mutually inconsistent clauses, nor such that the expression of the first intimates an intention that restraint of princes is not to be dealt with further and otherwise, so as to preclude any implication on the subject.

The same may be said of clause 31. It means that, if the Admiralty should requisition the ship, the charter may be forthwith cancelled by the charterers, without waiting to see or having to show that its object is thereby frustrated. This is a separate provision from that which the appellants seek to imply, and is not inconsistent with it. As to clause 26, the cancelling clause, I am unable to accept the construction of it, which makes it mean that after the 30th of April, and until the ship is delivered for the chartered service, however long the interval may be, the charterers can at any moment spring on the shipowners a cancellation of the contract and can hold them bound so long as they choose to hold their own tongues. The shipowners' option given by the second part of the clause was expressly devised to prevent a much less arbitrary use of the right to cancel, and I cannot believe that the clause, if understood as the respondents read it, could ever have become the subject of a *consensus ad idem*. After all it is a stipulation in the charterers' favour and cannot be given so extreme a meaning, unless that meaning is clearly

expressed. The parties never meant that the shipowners should remain indefinitely at the charterers' mercy.

The principle of frustration is rendered difficult by some uncertainty as to the tests to be used. In what terms ought the circumstances to be defined, which lead to the dissolution of the contract, and who is to apply them, the judge or the jury? There has been an unfortunate diversity in the terms used in different cases. The expression "frustrate the commercial object of the contract" is taken from *Jackson* v. *Union Marine Insurance Company* (*sup.*). In *Poussard* v. *Spiers* (34 L. T. Rep. 572; 1 Q. B. Div., at p. 414) Blackburn, J. transferring the rule in *Jackson's* case from a steamship to a *prima donna*, says "if the delay is so great as to go to the root of the matter, it frees the charterers from the obligation to furnish a cargo." In *Bensaude's* case (*sup.*) Lord Esher, M.R. speaks of delay "so long as to render the adventure, which the charter-party was intended to cover, absolutely nugatory." In the same case in your Lordships' House each noble and learned Lord in turn employed a new and different expression for the same well-recognised thing. Lord Halsbury speaks of an "impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it"; Lord Watson of "such delay in the prosecution of the voyage as entitled the charterers to determine the adventure" (which, surely wrongly, treats the case like *Mersey Steel Company* v. *Naylor* as a case of the determination of a contract depending on the choice of one party instead of resulting automatically from the event); while Lord Herschell says "so that the adventure cannot be completed within the time contemplated," which would make mere unexpected delay sufficient. In *Bush* v. *Port of Whitehaven Trustees* (Hudson on Building Contracts II, 122) Lord Lindley, then a member of the Court of Appeal, relies on "delay so great as not to be fairly within the terms of the contract at all; that is to say, that the delay was so great that the contract cannot apply to the state of things, to which the contractor and the defendants had imagined it did." It would not be difficult to find other passages in more recent cases where the events which cause dissolution of the contract are diversely described. "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted" (per Lord Dunedin (1918) A. C., at p. 129). "An interruption so great and long as to make it unreasonable to require the parties to go on" is Lord Atkinson's phrase (*ibidem*, p. 131). The fact that delay occurs, the duration of which at the outset is uncertain, obviously is not enough to dissolve the contract (*Braemount Steamship Company* v. *Weir*, 11 Asp. Mar. Law Cas. 345; 102 L. T. Rep 73; 15 Com. Cas. 101). For the time being the performance of the contract must have become altogether impossible, for the consequence is dissolution of the contract altogether, and in this I agree with what Bailhache, J. says in *Emlyn Jones's* case (*sup.*).

Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure which is clearly within the contemplation of the parties, such as delay caused by ice or neaping, so much so as to be often the subject of express provision. Delays such as these may very seriously affect the commercial object of the adventure for the ship's expenses and overhead charges are running on, and, even with the benefit of protecting and indemnity club policies, the margin of profit is quickly run off. None the less this is not frustration; the delay is ordinary in character, and in most cases the charterer is getting the use of the chartered ship, even though it is unprofitable to him. I think, also, that the doctrine is one which ought not to be extended, though to cases that really fall within the decided rule it must be applied as a matter of course even under novel circumstances. The matter is the more important because of the part which a jury may be called on to play in deciding the question. Ultimately the frustration of an adventure depends on the facts of each case, but it is no easy matter so to direct a jury as that they will neither ask themselves what the actual parties thought of at the date of the contract, nor dispose of the case by saying that it would be unreasonable to find a verdict for the claimant, nor be governed only by their action of what is fair between man and man nor be left in impenetrable doubt as to what the legal direction means.

Lord Watson says, in *Nelson* v. *Dahl* (4 Asp. Mar. Law Cas. 392; 44 L. T. Rep. 381; 6 App. Cas., at p. 59), that "there may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and when one or other of these possibilities becomes a fact the meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties as fair and reasonable men would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence." This is an authoritative explanation of the legal theory on which the doctrine rests, but to use it as a direction to a jury is to tell them to do as they like. The phrase "goes to the root of the contract," like most metaphors, is not nearly so clear as it seems. In *Jackson's* case (*sup.*) the jury was asked "whether the time necessary for getting the ship off and repairing her so as to be a cargo carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers" and in *Bush* v. *Whitehaven Trustees* (*sup.*) whether "the conditions of the contract were so completely changed in consequence of the defendant's inability to hand over the site of the work, as required, as to make the special provisions of the contract inapplicable." The danger in each case so put is that the jury will think that the contract is as wax in their hands. A. T. Lawrence, J. puts the matter very usefully thus in *Souter's* case (13 Asp. Mar. Law Cas. 539; 115 L. T. Rep. 812; (1917) 1 K. B., at p. 249): "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." For my own part I incline to prefer the expression already quoted from my noble and learned friend Lord Dunedin, and substantially

adopted by Scrutton, L.J. in the Court of Appeal.

Applying these considerations I am of opinion that the requisitioning of the *Quito* destroyed the identity of the chartered service and made the charter as a matter of business a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party. Both thought its result was to terminate their contractual relation, and, as they must have known much more about it than I do, there is no reason why I should not think so too. I should allow the appeal.

Lord WRENBURY.—I am unable to find in the charter-party the contractual year from April to April which Scrutton, L.J. found, and which forms the basis of his judgment. The contract, I think, was a follows: The owners agreed to let and the charterers to hire the steamer for twelve months, to commence at a date not fixed so far as clause 1 is concerned, except that it was to be the date when she was placed at the disposal of the charterers at a coal port as ordered by them. The effect of art. 26 is that that date may be any date not before the 1st April, subject to the right of the charterers to refuse her and to cancel the charter if she is tendered after the 30th April. During a reasonable time the owners owed to the charterers the contractual duty of tendering the vessel. If they were for reasons beyond their control unable to tender her within a reasonable time, their contractual duty in this respect I think would cease. During May and June no doubt they owed this duty. It does not follow that they owed it in September. The question to be answered, I think, is this: Did this contractual duty still rest upon the owners in September?

As regards clause 31, it seems to me that the words "during this charter" mean "during the subsistence of this contract" and not "during the time the vessel is employed under this contract"—but nothing turns upon the article, for even if the facts would have justified the charterers in cancelling the charter by reason of the commandeering of the vessel they did not exercise their option in this respect.

The principle of *Jackson* v. *Union Marine Insurance Company* (*sup.*) as reviewed in *Horlock* v. *Beal* (*sup.*) and *Tamplin* v. *Anglo-Mexican, &c., Company* (*sup.*) I understand to be that there may, under the circumstances of any particular case, be added to a contract by implication—so long as the addition is not inconsistent with any expressed term of the contract—a term that a delay for which neither party is responsible so great and so long as to make it unreasonable to require the contracting parties to go on with an adventure shall entitle either of them, at least while the contract is executory, to consider it as at an end. If in the present case such a delay had occurred, the owners were entitled to consider the whole contract, including clause 26, as at an end, and in such case their contractual duty under clause 26 to tender the vessel no longer existed.

I doubt whether down to the 9th June, when the correspondence between the parties fell into silence the owners' duty in this respect had lapsed. The interview of the 14th May and the letter of the 17th May no doubt support an inference that the charterers' view was that a delay of more than three months from that date would so affect the adventure that they would not be bound. However this may be, the facts are that the parties were not able to obtain the release of the vessel at that time, and the matter drops into silence until the 3rd September. Was the owner still bound to tender the vessel at that date? Or if the contract had not given the charterers an option to cancel could the owners have compelled them to take her at that date? I think not.

A term cannot be implied which is inconsistent with an express term of the contract but it is no objection that it enlarges or adds to the express terms; every implied term does that. The express terms of this contract, relevant in this respect are only arts. 26 and 31. They are terms which entitle the charterers to cancel in certain events. There is no inconsistency in an implied term which entitles either party to treat the contract as at an end if the date of commencement of the contractual year is by reasons beyond their control postponed beyond a reasonable time. Upon the question of fact I agree that before September that reasonable time had expired, and there no longer rested upon the owners the contractual duty to tender her. This, I think, is what Scrutton, L.J. intended by his judgment to convey—and if so understood I agree with him. The appeal, I think, succeeds.

Appeal allowed with costs.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan.*

Solicitors for the respondents, *William C. Dawson* and *Lancaster.*

Judicial Committee of the Privy Council.

Tuesday, Oct. 15, 1918.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, Sir WILLIAM PICKFORD, and Sir ARTHUR CHANNELL)

PART EX CARGO THE ANTILLA AND OTHER STEAMSHIPS. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION, ENGLAND, IN PRIZE

Prize Court—Practice—Claim struck out—Condemnation—Final or interlocutory order—Right of appeal—Naval Prize Act 1864 (27 & 28 *Vict. c.* 25), *s.* 5.

By sect. 5 *of the Naval Prize Act* 1864 "*An appeal shall lie to Her Majesty in Council from any order or decree of a Prize Court, as of right in case of a final decree, and in other cases with the leave of the court making the order or decree.*"

The claim of certain claimants in the Prize Court was struck out on the ground that they had failed within the time prescribed to comply with an order for discovery, and the goods were thereupon condemned as prize. The order as finally drawn up stated both the striking out of the claim and the condemnation of the goods. The claimants petitioned for leave to appeal.

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

Held, (1) *that the order striking out the claim was not a final order when made, and did not become so by reason of what had happened; and* (2) *that the claimants could not appeal from the order condemning the goods because at the time it was made they had been dismissed from the proceedings.*

PETITION to admit appeals from an order of the President of the Prize Court in this case.

In April and May 1915 writs were issued claiming the condemnation of goods consigned in the *Antilla* and nine other Swedish steamships. The petitioners appeared and made claims to the goods

Orders for discovery of documents on the form in *The Consul Conflizon (Cargo ex)* (14 Asp. Mar. Law Cas. 66; 116 L. T. Rep. 674; (1917) A. C. 550) were made. The petitioners failed to comply with these orders. On the 13th May 1918 the President (Sir Samuel Evans), on the application of the Crown, struck out the claims to the goods on the ground that the order for discovery had not been complied with. It was thereupon submitted for the Crown that as there were then no claimants before the court, and as six months had elapsed since the writs had been issued, the goods should be condemned as good and lawful prize in accordance with Order XV., r. 7. The President made the order as asked, and refused applications by the petitioners for leave to enter appeals against his orders, expressing the opinion that the petitioners had no *locus standi* because their right as litigants in the proceedings fell with the order which dismissed them therefrom.

Sir *Erle Richards*, K.C. and *Balloch* for the claimants.—The question here is whether the President's order was final. It disposed of the claimants' rights to the goods adversely to them once and for all so long as it stands, and in effect nothing could be more final than that. The order, therefore falls within sect. 5 of the Naval Prize Act 1864, and the appellants have a right of appeal subject only to compliance with the condition as to the amount of security to be fixed by the board. The claimants desired to appeal in order to give evidence that there had been sufficient discovery to comply with the order.

Sir *Gordon Hewart* (S.-G.), *R. A. Wright*, K.C. and *Burrows*.—The order for discovery was certainly an interlocutory order. The claimants now say that they do not admit that it was not complied with by them. The President decided that point against them, and on that ground struck out the claim. Subsequent disobedience to an interlocutory order cannot change its character and so give a right of appeal to the party in default by turning a mere order of procedure into a final order.

The opinion of the board was delivered by

Lord SUMNER.—In this case the late President condemned certain cargo on board of a number of vessels, of which the *Antilla* is the first. The appellants Peder Melin and Co. were claimants to a portion of the goods and they now appeal, or desire to appeal, to His Majesty in Council against the condemnation and also against an order, which was made by the learned President on the same occasion, dismissing them from the proceedings as claimants upon the ground that they had not complied with an order previously made against them for discovery. The form in which the learned President's order was finally drawn up stated, first, that the claimants, the now appellants, had refused to obey the order of the court for discovery of documents, and that thereupon the claim of the said claimants was struck out, and then it recited that the President had further considered the evidence, and, having heard counsel for the Crown, condemned the cargo in question,

The contention of the appellants is that under sect. 5 of the Naval Prize Act of 1864 an appeal lies to His Majesty in Council from that order as of right, as being a final decree, but, inasmuch as the President upon a separate application declined to make any order with regard to security for appeal and otherwise, the appellants ask that their Lordships should supply that deficiency. It is plain that the question whether this appeal is competent or not, in any shape or form, and on any ground, depends upon the answer to a question, which arises *in limine*—namely, whether or not there is here a final decree against the appellants, from which they can claim under sect. 5 to appeal as of right, because the President who made the order or decree, whichever it be, refused to grant any leave to appeal.

Their Lordships accordingly have taken this preliminary question now in order to save expense. There are two ways of looking at this question on behalf of the appellants. One is that the order that was made, and the proceedings which took place, ought to be regarded as one, so that, although the appellants' mouths were closed at the beginning, and they were dismissed from the proceedings because they did not give discovery, in substance their rights were finally determined at the end, and they were then entirely barred from any possibility of asserting their claim to the goods. It is said, if that be so, this may be regarded as a final decree, although in form it began by dismissing them, and then proceeded to dispose of the case technically in their absence. The other way of putting it is that the order, which in the more limited sense was made against them, that their claim be struck out, was itself a final decree within the meaning of sect. 5, because it finally disposed of their chance of being heard, and, therefore, of their chance of success.

The board, therefore, has simply to construe a section in an Act of Parliament and to do so according to its language, neither liberally nor illiberally, but according to what it says, and the question of the rights of neutrals and public policy, which has been alluded to, really does not arise.

What, then, does the section mean? To begin with there is a clear distinction drawn between decrees, and particularly final decrees, and other cases—that is to say, mere orders, or decrees which are not final; and unless this is a decree, and a final decree, then upon the construction of the section the appeal fails. Now, first, the finality is clearly something which is a property of the decree when made, and if it is not final when made, there is nothing in the section which enables it to be made final for the purposes of the statute by the subsequent conduct of the party in disobeying it. Secondly, it is something which, being a final decree, determines the issue in the cause and adjudicates upon the rights of the

claimants to the goods which are the subject of the cause.

To interpret this section in such a way that the claimants could turn that which was in itself a mere order of procedure into a final decree by disregarding it would be construing it so as to defeat the section and not to enforce it. As to the other point, it may be admitted that the matter is one very susceptible of argument, but their Lordships think that the true view of what passed is that there were two steps taken by the court. This does not depend on the fact that the two steps were taken at a short interval or at a long interval of time, but on the nature of the steps taken. There was, first of all, the step taken by the court of punitively striking out the claim, so that the claimants could no longer be heard, and then the subsequent step of considering the cause and adjudicating it upon the merits, and although it be the case that the effect of the adjudication, which was ultimately arrived at, was to bar the further chance of the claimants obtaining the goods, apart from the bar imposed by the fact that the appellants were silenced by being struck out of the case, their Lordships think upon the true view that they cannot be heard to question on appeal a final decree for condemnation, which, however it may affect their interests, was made after they had been validly dismissed from the proceedings and were no longer before the court.

The result, therefore, is that their Lordships will humbly advise His Majesty that upon the preliminary point the appellants fail and that any appeal would be incompetent. The petition will be dismissed with costs.

Solicitors for the appellants, *Kearsey, Hawes, and Wilkinson.*

Solicitors for the respondent, *Treasury Solicitor.*

Oct. 16, 17, *and Dec.* 3, 1918.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL.)

THE HELLIG OLAV. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION IN PRIZE.

Prize Court — Cargo — Conditional contraband— Neutral port—Bill of lading—Delivery to shippers or assigns — Onus — Failure to make full disclosure—Declaration of London—Order in Council No. 2, 1914, *par.* 1 (iii.).

A Danish company carried on business in fresh and pickled salmon at Copenhagen, and sold in other countries, including Germany, where they had branch establishments. They shipped a consignment of salmon from New York to Copenhagen under a bill of lading for delivery to themselves or assigns, there being under the terms of the bill of lading no consignee as distinct from the consignors, who had the control of the goods. At the time of the shipment the salmon had not been declared as goods for neutral consumption, nor had a guarantee been obtained from the Danish Merchant Guild. The goods were seized as prize, and their insured value paid into the Prize Court pending a decision as to the legality of the seizure.

Held, that the appellants to whom the bills of lading made the salmon deliverable were not "the consignees of the goods" within the meaning of par. 1 (iii.) *of the Order in Council of the* 29*th Oct.* 1914, *and that the order appealed from condemning the goods was right.*

The Louisiana (14 *Asp. Mar. Law Cas.* 233; 118 *L. T. Rep.* 274; (1918) *A. C.* 461) *considered and applied.*

APPEAL from a decree of the President (Sir Samuel Evans) condemning a consignment of salmon ex steamship *Hellig Olav* claimed by the appellants.

The appellants were a Danish company carrying on business at Copenhagen with branches in America, though they bought at Berlin and at Schlutup, near Lübeck. They shipped the salmon, which was conditional contraband, on board the *Hellig Olav* at New York under a bill of lading for delivery at Copenhagen to themselves or assigns. The salmon was seized at Kirkwall and a writ issued by the Procurator claiming its condemnation.

The President found that the destination of the goods was the appellants' business house at Berlin or Schlutup, and he held the basis of supply to be enemy. Assuming therefore that the goods were not consigned "to order," they were for named consignees in territory belonging to the enemy, and therefore within par. 1 (iii) of the Order in Council of the 29th Oct. 1914.

Balloch and *Le Quesne* for the appellants.—The salmon was not consigned "to order," for the bill of lading was for delivery to the appellants' Copenhagen branch. The consignees were named, and they were not consignees in enemy territory, nor were they merely agents for the enemy. The case is therefore distinguishable from *The Louisiana* (14 Asp. Mar. Law Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 461) and *The Kim* (13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215; on appeal, 14 Asp. Mar. Law Cas. 65; 115 L. T. Rep. 577). [Pratt's Story, pp. 45, 46, was also referred to.]

R. A. Wright, K.C. (Sir *Frederick Smith* (A.-G.) with him) for the Crown.—The case is covered by the decision in *The Louisiana* (*sup.*). The shippers had the entire control of the disposal of the goods, and the consignment was therefore one "to order." The words in par. 1 (iii.) of the Order in Council of the 29th Oct. 1914, "the consignee of the goods," have been held by this board to mean some person "other than the consignor to whom the consignor parts with the real control of the goods"; and here the bill of lading did not name a consignee other than the consignor. The onus of proof is therefore not on the Crown.

The considered opinion of the board was delivered by

Lord PARMOOR.—The appellants are a Danish company carrying on business at Copenhagen in fresh and pickled salmon. They have branches in America which, in the ordinary course of business, buy the salmon direct from the fisheries. It is only in exceptional cases that they buy from other firms. The salmon is sent to New York and shipped thence to Copenhagen, for sale mainly in Denmark, but also in other countries, including

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

Germany. In Germany the sales were generally, though not entirely, made through branches of the appellants' firm in Berlin and Schlutup, near Lübeck. The branch in Berlin was established in 1907. The last lot of salmon, comprising eight barrels, was sent to Berlin on the 19th Jan. 1916. The branch at Schlutup, near Lübeck, was established in 1909. The last lot of salmon, comprising eight barrels, was sent to Schlutup on the 19th Dec. 1915. The appellants on the 22nd Dec. 1915 wired to Hansen, their representative at Seattle, to ship a carload of Columbia River salmon, and, on the 8th Jan. 1916, sent a further message, to ask whether the salmon had been shipped. On the 21st Jan. 1916 they sent a wireless message in the name of Rollo Export Company to Tyee Fisheries, asking whether the Columbia River and Alaska salmon had been shipped, and received a reply that it had been shipped by steamer on the 3rd Feb. It is clear, therefore, that, when the first message was sent in reference to the shipment of the salmon in question, the last lot of salmon had only two days previously been sent to Schlutup, and that the last lot of salmon was not sent to Berlin until nearly a month later.

A consignment of fifty-two tierces of pickled salmon for refrigerator was shipped on the steamship *Hellig Olav*, to be carried under the terms of a bill of lading dated the 4th Feb. 1916. The appellants were the shippers and consignors, and the goods were to be delivered at Copenhagen to the appellants or their assigns. Under the terms, therefore, of the bill of lading there was no consignee as distinct from the consignor, the control of the goods remained at the disposal of the shipper and consignor, and there was no independent outside interest in any other party. In effect the bill of lading left the disposal of the goods at the order of the consignors, and the ultimate destination in their discretion. At the time of shipment the tierces of salmon had not been declared as goods for neutral consumption, and no guarantee had been obtained from the Danish Merchant Guild.

The steamship *Hellig Olav* called at Kirkwall on or about the 15th Feb. 1916, when the tierces of salmon were ordered to be detained, but allowed to proceed upon an undertaking given to His Majesty's Government to store the goods in Copenhagen until the close of the present war, or to return them to England for the purpose of Prize proceedings It was not until they had become aware that the seizure had been made that the appellants obtained a guarantee in the usual form from the Merchants' Guild of Copenhagen. A correspondence followed between the appellants and the British Legation at Copenhagen and the British Foreign Office, and, finally, on the 25th Nov. 1916 the sum of 2019*l.*, representing the insured value of the tierces of salmon, was paid into the Prize Court for the purpose of obtaining a judicial decision on the legality of the seizure. Evidence was filed on behalf of the claimants, but the respondent, the Procurator-General, filed no evidence, relying on the admissions contained in, and deductions to be drawn from, the appellants' affidavit and documents and the correspondence between the appellants and the Procurator-General, the British Legation at Copenhagen, and the British Foreign Office. The case was heard by the learned President, who, on the 23rd Feb. 1917, pronounced the tierces of salmon to be contraband of war liable to confiscation, and he condemned the same for the sum of 2019*l.* then in court. It was argued on behalf of the appellants that it was not competent for the Prize Court to condemn the goods for the sum of 2019*l.* in place of the condemnation of the goods themselves. Their Lordships are of opinion that, having regard to the terms of the agreement made on the 25 h Nov. 1916, namely, that the sum of £2,019 should be disposed of in accordance with the order of the Prize Court, this objection cannot be maintained.

The main argument urged on behalf of the appellants was that the doctrine of continuous voyage did not apply, and that the shipment of salmon was not within the terms of the modification contained in par. 1 (iii.) of the Declaration of London Order in Council No. 2, 1914. This modification provides that: "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, or if they show a consignee of the goods in territory belonging to or occupied by the enemy." The construction of this modification was considered in the case of *The Louisiana* (*sup.*), and the judgment of their Lordships covers the present case. The question arose, in that case, whether the ship's papers show who is the consignee of the goods, if the shipper retains control, and can alter the destination of the goods according to his interest, and at his own discretion. It was pointed out that under these conditions the shipper would retain as full control of the goods as if the consignment had been to order, and that conditional contraband could be supplied to the enemy Government, through neutral ports, as freely as if art. 35 of the Declaration of London had been adopted without modification. The judgment proceeds: "In their Lordships' opinion the words 'the consignee of the goods,' must mean some person other than the consignor to whom the consignor parts with the real control of the goods." In the present case there is no person other than the consignor to whom the consignor parts with the real control of the goods, and it follows that the tierces of salmon are liable to capture as conditional contraband, although on board a vessel bound for a neutral port. It is not necessary to consider the further provisions of par. 1 (iii), but their Lordships do not desire to throw any doubt on the finding of the President that the ship's papers did show a consignee of the goods in territory belonging to or occupied by the enemy. The next modification (iv.) provides: "That in the cases covered by the preceding par. (iii.) it shall lie upon the owners of the goods to prove that their destination was innocent." The effect of this provision is that in cases covered by par. (iii) the neutral trader has brought himself under suspicion, and that it is incumbent upon him to displace such suspicion by sufficient proof of the innocency of the destination of the goods which have been seized. The question therefore arises whether the appellants have discharged the obligation which this provision throws upon them. At the date of shipment,

the tierces of salmon had not been declared as goods for neutral consumption, and no guarantee had been obtained from the Danish Merchant Guild. This omission is in itself a ground for grave suspicion. Their Lordships are not satisfied that any sufficient explanation has been given consistent with the innocency of the destination of the tierces of salmon. There appears to be no valid reason why this declaration should not have been made and the guarantee given in the usual course of business. On the other hand, the appellants had undoubtedly an inducement to endeavour to import salmon which could be sent forward to Berlin or Schlutup without the risk that they would be placed on the black list. When the first message was sent to Hansen at Seattle to ship a carload of Columbia River salmon, the last lot of salmon had not been sent to Berlin, and the last lot had only been sent, a few days earlier, to Schlutup. There is no direct evidence when the branches at Berlin and Schlutup were actually closed, and the inference is that they had not been closed at the date of the shipment in the *Hellig Olav*. At one time the appellants were placed on the black list, but subsequently removed on the explanation that the salmon sent to Germany had not been imported subject to declaration or guarantee. Their Lordships fully accept the accuracy of the explanation given by the appellants, but it shows the existence of a business under which salmon was imported for enemy destination when not subject to the restrictions which a declaration and guarantee would impose. Under these circumstances, it was clearly the duty of the appellants to make a full and free disclosure of all the conditions under which they were carrying on their business as importers of salmon. As a matter of fact, the only reference to Germany in the first statement made by the appellants is that, for a short time after the war, some imported goods had been sent to that destination, whereas it appears on further inquiry and in the second report of the accountants on the 3rd July 1916 that eight barrels of salmon had been sent to Schlutup on the 19th Dec. 1915, and eight barrels to Berlin so late as the 19th Jan. 1916. Their Lordships are unable to come to the conclusion that the appellants did at the outset make a full disclosure of all the relevant factors attaching to their business, and it has been pointed out in previous cases that it is incumbent upon neutral traders to make such a disclosure in cases where the liability is upon them to remove elements of suspicion which affect the destination of the seized cargo.

Their Lordships therefore find that in the present case the appellants have not discharged their obligation of proving that the destination of the salmon was innocent. During the hearing of the appeal a petition was presented to their Lordships on behalf of the appellants to admit fresh evidence not before the President at the hearing, but their Lordships were unable to entertain this petition for reasons stated during the hearing of the appeal. The appeal must be dismissed with costs, including the costs of the petition to admit fresh evidence. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: for the appellants, *Botterell* and *Roche* for the Crown, *Treasury Solicitor*.

Oct. 17, 18, *and Dec.* 13, 1918.

(Present: The Right Hons. Lords SUMNER, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL.)

THE PALM BRANCH. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize court—Cargo—Neutral goods—Seizure—Insurance—Loss paid by German underwriters.

A neutral firm, carrying on business in Ecuador, claimed a quantity of cocoa shipped on board a British steamship for delivery at Hamburg, which had been seized as prize at Liverpool. The goods at the date of the seizure were the property of the claimants and were insured against war risks with underwriters who were nearly all Germans. The goods were sold by order of the Prize Court and after payment by the enemy underwriters as for a total loss the appellants claimed the proceeds of the sale.

The President found that the property had passed to the underwriters, that the appellants were claiming as trustees for them, and he disallowed the claim and condemned the proceeds of the sale as good and lawful prize.

Held, that the claim was properly disallowed but without deciding that the condemnation was wrong. With the consent of the Crown the defence of condemnation was set aside, the proceeds of the goods to remain in the Prize Court until further order.

Decision of the Prize Court (13 *Asp. Mar. Law Cas.* 512; 115 *L. T. Rep.* 557; (1916) *P.* 230) *varied by consent.*

APPEAL by the claimants from a decree of the Prize Court, England, reported 13 Asp. Mar. Law Cas. 512; 115 L. T. Rep. 557; (1916) P. 230) condemning 4000 bags of cocoa on board the British steamer *Palm Branch* at Liverpool as belonging to enemies and liable to condemnation and confiscation.

MacKinnon, K.C. and *C. R. Dunlop* for the appellants.

Sir *Gordon Hewart* (S.-G.) and *Hubert Hull*, for the Crown, were called on only upon the question whether condemnation was properly decreed. After argument, by consent on behalf of the Crown their Lordships set aside the decree for condemnation, the proceeds to abide further order.

The considered opinion of their Lordships was delivered by

Sir ARTHUR CHANNELL.—This appeal raises some questions of prize law and practice which appear never to have been expressly decided.

The appellants are a neutral firm or company carrying on business in Ecuador, and they claimed 4000 bags of cocoa which were seized as prize or droits of the Admiralty, on board the British steamship *Palm Branch*, in the port of Liverpool on the 18th Sept. 1914, and were alleged on the writ to be enemy property. The appellants had shipped the cocoa at Guayaquil under bills of lading which made it deliverable to a German firm, Schlubach Thiemer and Co., of Hamburg, but it was proved to the satisfaction of the late President, and is not now disputed by the Crown, that the German firm were merely agents of the appellants for sale and that no property passed

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

to them, and the President expressly found that the goods at the date of their actual seizure at Liverpool were the property of the neutral claimants. The German agents had, however, insured the goods against war risks through a German insurance agent with underwriters, about 97½ per cent. of the risk being underwritten by Germans. After seizure and before the claim of the appellants had been filed (which was not done until Oct. 1915) the German underwriters had paid as for a total loss. The cocoa had been sold under an order of the Prize Court, and in consequence of the rise in price caused by the war the proceeds of the sale largely exceeded the sum for which the cocoa had been insured. A desire to get this profit may have had something to do with the subsequent course of procedure. The underwriters who paid claimed from the assured the property in the goods, and considerable correspondence took place which is set out in the record. The learned President thought that this correspondence showed that the appellants had admitted the right of property to have passed to the underwriters who had paid, and that they had constituted themselves express trustees for those underwriters and had made the claim as such trustees and were being indemnified as to the costs. On this view of the facts the question certainly arose which the learned President considered it necessary to deal with—that is to say, what order should be made by the Prize Court when goods which were the property of a neutral when seized had become, before the neutrals' claim to them was made, the property of an enemy. He based his judgment on his answer to this question. It appears to be novel, and the late learned President dealt with it, in the way in which he has in his too short career dealt with other novel questions of Prize law, by developing and applying to new facts the principles to be found in previously well-established law. He referred in detail to the ancient forms of affidavits, claims, and interrogatories directed to be used in the Prize Court as showing that the court always required to be satisfied before ordering goods or their proceeds to be delivered up to claimants that no enemy had any interest in them. The allowance of a claim is obviously followed in ordinary cases by an order for delivery up of the subject-matter claimed. Their Lordships entirely agree with the late President as to what is the right rule in such a matter and do not desire to add anything to the reasons given in his judgment on this point. The decision of this Board in *The Prinz Adalbert* (3 Asp. Mar. Law Cas. 307; 116 L. T. Rep. 802; (1917) A. C. 586) as to the 290 barrels, part of the cargo there in dispute, is in accordance with this view of the rule. On the view of the facts taken by the learned President, and particularly in the view that the claim was in fact made by the appellants for and on behalf of enemies, it became unnecessary to discuss any of the difficult questions which would commonly arise on claims made by underwriters, such as the question whether in the particular case a right of property had passed of a character which the Prize Court would recognise, or merely a contractual right which it would not recognise: (see Marine Insurance Act 1906, s. 63; *The Ariel*, 11 Moore P. C. 119; *The Miramichi*, 13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; (1915) P. 71; *The Odessa*, 13 Asp. Mar. Law Cas. 27; 114 L. T. Rep. 10; (1916) 1 A. C. 145; *The Parchim*, 14 Asp. Mar. Law Cas. 196; 117 L. T. Rep. 738; (1918) A. C. 157; and the older cases referred to in those cases).

Their Lordships agree in the view of the facts taken by the learned President, except so far as it may be affected by his having overlooked the fact that a small percentage of the underwriters were not enemies, and that those underwriters had not paid. This, however, has no bearing on the disallowance of the appellants' claim, as it was clearly shown that the claim was in fact the claim of German enemies. This seems to their Lordships, as it did to the President, to be clear ground for disallowing the claim. The fact that a small portion of the underwriting was by neutral or British subjects had been mentioned in the argument below, but had not been seriously pressed, being of course somewhat inconsistent with, and at any rate not supporting, the then main argument of the appellants. He does not deal with it in his judgment, and it was not again mentioned to him when the judgment was delivered. If his attention had then been drawn to it he might have altered the form of the order he made, still of course disallowing the claim.

Their Lordships therefore think that the appellants' appeal against the disallowance of the claim fails, and should be dismissed with the usual consequences.

The President, having disallowed the claim, went on to condemn the goods, and this appears on consideration to give rise to some difficulty. It is said that the judgment in *The Prinz Adalbert* (*sup.*) (290 barrels) already referred to supports the condemnation, as well as the disallowance of the claim. The particular point does not appear by the judgment in that case to have been considered, and when the facts have been looked at, it will be seen that the difficulty which arises here did not arise there. The *Prinz Adalbert* was an enemy ship, and the cargo on board of her when she was captured would be presumed, if no claim to it was substantiated, to be enemy property. The *Palm Branch* is a British ship. So in *The Remonstrant* (3 Br. & Col. P. C. 14), which was also referred to, the judgment really was based on the fact that the claim made in the appeal was a different one from that made below. The reasons of the President for condemning the goods are very shortly given. He merely says: "The claim is 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." This appears to mean that he treated the case as though the goods had been seized after they became enemy property and so condemned them. This seems to require rather careful consideration. Counsel for the Crown suggested that on its appearing that the goods, although not enemy property at the time of the seizure, had become enemy property whilst they were in the hands of the court, a fresh writ could have been issued and that condemnation would have followed as of course. For this *The Schlesien* (13 Asp. Mar. Law Cas. 26; 115 L T. Rep. 555; (1916) P. 225) was quoted. Here, however, there was no fresh writ. It must be remembered that there is no general right to forfeit enemy

goods, and that the right of a belligerent to capture enemy property and ask for its condemnation by a Prize Court as lawful prize is a maritime right and is confined to property actually or constructively at sea. Their Lordships having regard to the difficulty of the various points which arose, and doubting whether the material facts for the decision of all the points were fully before them, asked counsel for the Crown before their argument was concluded whether they would consent to have the condemnation set aside and the money directed to remain in court until further order, and this consent was given. That being so their Lordships are of opinion that such an order should be made.

Their Lordships do not decide that the condemnation was wrong as the argument in support of it was not concluded, and moreover it is far from clear that the appellants whose claim was rightly dismissed have any *locus standi* to question the condemnation (see *The Antilla*, 14 Asp. Mar. Law Cas. 379; 119 L. T. Rep. 746; (1919) A. C. 250), but it was in their Lordships' opinion right that the Crown should give the consent which it did having regard to the doubts which had been raised. In any further proceedings as to the money in court, it will be open to the Crown to make such application as they think fit either after issuing a fresh writ against the proceeds in court or otherwise in order to get payment of all or such part as they may be advised of the money in court. It also will be open to any underwriters who are neutrals or British subjects, or any reinsurers who are not enemies (for it was suggested that some at any rate of the underwriters who had paid had reinsured) to put in such claim as they may be advised. Further, the dismissal of the appellants' claim, made as it was on behalf of the enemy underwriters, is not intended by the board to prevent the appellants from putting in any claim they think they can establish, either on their own behalf or for any neutral beneficially interested, to that part of the money which in no case would have gone to the enemy underwriters. In any such further proceeding the facts will have to be brought before the Prize Court more fully than they have been before this board, and it will be more convenient that they should be dealt with by that court. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that by consent of the Procurator-General on behalf of the Crown that part of the decree which condemns the proceeds of the goods as lawful prize should be set aside and that the money should remain in court until further order of the Prize Court.

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

Oct. 21, 22, *and Dec.* 13, 1918.

(Present: The Right Hons. Lords Sumner, Parmoor, and Wrenbury.)

His Majesty's Procurator in Egypt *v.* Deutsches Kohlen Depôt Gesellschaft, and Cross Appeal. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR EGYPT IN PRIZE.

*Prize Court—Egypt—Seizure—Constructive seizure—Tugs and lighters engaged in local trade—*Navires de commerce—*Suez Canal Convention* 1888, *art.* 4—*Sixth Hague Convention, arts.* 1, 2—*Eleventh Hague Convention, art* 3.

Before the outbreak of war a German company carried on at Port Said the business of coaling steamers passing through the canal. For this purpose they owned a fleet of lighters of considerable burden, and tugs and motor-boats. The tugs were capable of open sea voyages, but in fact all the craft were exclusively used in the harbour. Early in 1916 *a receiver was appointed with the powers of a liquidator to hold possession of such of the craft as were not then being used by the naval and military authorities and to supply thereby the requirements of a British coaling company. Subsequently in the same year the Procurator-General, intending to take proceedings in prize, arranged with the receiver that the latter should hold such of the vessels as were in his possession at the disposal of the Crown and of the Prize Court. The craft were all in the Suez Canal or its ports, and the writ claiming condemnation was served on the receiver and no objection was raised at the trial or upon the respondent's case upon the appeal that there had not been a seizure.*

The trial judge held that the vessels were not exempt from capture under art. 3 *of the eleventh Hague Convention as being "small boats engaged in local trade," but holding that they were merchant vessels within art.* 2 *of the sixth Hague Convention decreed them to be detained only and not confiscated.*

Held that there had been sufficient seizure arranged for by consent to give the Prize Court jurisdiction; that, as there was no exercise of any right of war in the Suez Canal or its ports of access, the seizure was not a breach of art. 4 *of the Suez Canal Convention* 1888; *and that, had it been so, the seizure would not have been bad; that such craft as those in question were not exempted from capture under art.* 3 *of the eleventh Hague Convention as "bateaux exclusivement affectées à des services de petite navigation locale"; and therefore that the vessels must be condemned and confiscated.*

Appeal of the Crown allowed and cross-appeal dismissed with costs.

Appeal and cross-appeal from a decree of the Prize Court, Egypt, by which a large number of lighters and tugs, the property of the Deutsche Kohlen Company, employed by them for their business for coaling steamers at Port Said, were declared to have belonged at the time of seizure to enemies of the Crown, and to have been properly seized as good and lawful prize, and were directed to be detained until further orders.

The Procurator appealed, claiming condemnation, and there was a cross-appeal claiming a release.

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

The appeal was first argued in Jan. 1918, (a) when in the course of the hearing the question was raised whether there had been a seizure of the craft, and the hearing was adjourned in order that further evidence on that point might be obtained from Egypt.

The Deutsches Kohlen Company of Hamburg had a branch at Port Said, where it supplied coal to passing steamers. It employed for this purpose a large fleet of tugs, motor-boats, and lighters, none of which were registered in the German Mercantile Marine. After the outbreak of war it carried on its operations under a limited licence granted by the Egyptian Government until April 1916, when the officer commanding the Forces in Egypt revoked the licence and appointed an official as liquidator of the business.

In June 1916 the Procurator claimed the condemnation of the craft as belonging to enemies, and stated that owing to the difficulties of serving separate units of the fleet he should ask for an order for substituted service on the liquidator. It was agreed between them that on proceedings being taken the liquidator should continue to hold the craft at the disposal of the Crown and of the Prize Court.

A writ in prize was thereupon issued by the Procurator, claiming condemnation of the craft, which were described as four tugs, seventy-four lighters, and seven motor-boats. The lighters were of an average tonnage of 130 tons, but without alteration could not take the sea. The tugs were of about 27 tons and could be used at sea, but in fact were exclusively used in the harbour. The motor-boats were used solely in the harbour.

Grain, J. decided that the craft were not exempted from capture under art. 3 of the Eleventh Hague Convention as being "vessels employed exclusively in coast fisheries, or small boats engaged in local trade." But he held against the submission of the Crown that the craft were *navires de commerce* (merchant ships) within the meaning of art. 2 of the Sixth Hague Convention, and were therefore liable only to be detained, not condemned or confiscated.

The Crown appealed, and contended that the order of the Prize Court should have been for the condemnation and not merely for the detention of the vessels.

Sir *Gordon Hewart* (S.-G.) and *G. T. Simonds* for the Crown.

Sir *Erle Richards*, K.C. and *Balloch* for the liquidator.

G. T. Simonds in reply.

The considered opinion of their Lordships was delivered by

Lord Sumner.—The Vice-Admiralty Court at Alexandria decided this case on the application of the Hague Convention, Nos. VI. (arts. 1 and 2) and XI. (art. 3). The learned judge held that the craft in question were not immune from seizure, but only made a detention order against them. Accordingly there are cross-appeals. One party claims condemnation, the other immediate release. Each prepared his case on the assumption that there had been a valid seizure and only sought to inquire which Convention, if either, applied, for if neither was applicable condemnation followed.

During the hearing it appeared that the record contained no account of the circumstances of the seizure nor indeed expressly alleged any seizure at all, and although it might have been enough to have relied upon the recital in the decree under review, that the various craft were "lawfully seized as good and lawful prize," on such a point their Lordships were reluctant to refuse examination into the facts, when a doubt was brought to their notice. Accordingly they directed that further information should be obtained from Egypt. The material now forthcoming is neither as explicit nor as simple as might have been expected

Before the war the business of the Deutsches Kohlen Depôt Gesellschaft in Egypt was to coal steamers passing through the Suez Canal. They owned a large fleet of lighters with the tugs required to tow them. Most of them were of steel, but a few were of wood. Four were water tank boats and the rest chiefly coal barges. There were also for general communication between ship and shore and for harbour business three fast launches. The tugs were about 57ft. by 14ft.: their tonnage was about 27 tons, and their engines must have been of high power. The lighters, seventy-seven in number, ranged from 82ft. by 20ft. to 46ft. by 10ft. Their average tonnage was nearly 130 tons. Where they were built is not stated, though it is reasonable to suppose that all of them, except perhaps the wooden barges, had come out from Germany, but whether afloat or not is unknown. The tugs were capable of making open sea voyages, but in fact were only employed in Port Said harbour. The lighters were boxes only, with hardly any decks or freeboard, and as they stood were incapable of taking the open sea.

When war broke out the company's business was for some time allowed to proceed as before. About the end of 1914 some of the lighters were requisitioned, and in Oct. 1915 a licence was granted to the company to continue supplying the rest to the British Coaling Company Limited. At the end of April 1916 this licence was revoked, and an official was appointed by the General Officer commanding in Egypt as Receiver of the business "with instructions to liquidate the same." He is styled the "liquidator," and, in the name of the Deutsches Kohlen Depôt Gesellschaft, is respondent to this appeal. The proclamation under which he was appointed appeared in the *Journal Officiel Extraordinaire* of the 25th Jan. 1915, and provided that "every receiver shall have such powers as shall be prescribed in his instructions for managing the property entrusted to him," but he appears to have been simply placed under the control of the licensing officer, to whose order he was bound to conform. His position was thus very different from that of a liquidator appointed in legal proceedings. His principal function appears to have been to hold possession of such of the craft as were not from time to time in the use and possession of the naval and military authorities, and with them to supply the requirements of the British Coaling Company Limited as far as he could. Though variously employed and in various places the several craft have throughout been treated as one

(a) Lord Parker of Waddington and Sir Samuel Evans, who were members of the board in January, died before the further hearing.

coaling fleet and as an installation for a single business, physically divisible into units, but managed as a whole.

During the early part of the war the Procurator in Egypt, the present appellant, had been fully occupied in taking proceedings against numerous ships and cargoes in the Vice-Admiralty Court of Alexandria, but at length in the spring of 1916 he decided to seek the condemnation of the fleet of the Deutsches Kohlen Depôt Gesellschaft. He did not wish actually to lay hands on the individual units. They were numerous; they often had no one on board; some were here, some there; most of them were no doubt in the harbours of Port Said or Suez, but some were up the canal and all were being usefully and indeed indispensably employed for military, naval, or commercial purposes. He had also to consider, no doubt, the terms of the Suez Canal Conventions, since the course pursued in the case of *The Pindos* (13 Asp. Mar. Law Cas, 353; 114 L. T. 960; (1916) 2 A. C. 193) was inapplicable to a fleet of such a size and character. Such of the craft as were not already in the hands of the naval and military authorities were in the possession of the liquidator, though physically scattered up and down.

In May 1916 the Procurator instructed the marshal of the Prize Court to report to him on the company's floating craft, and asked the liquidator to furnish a list of them in June. In July he saw the liquidator and intimated, to quote his affidavit: "That I proposed to take proceedings against the craft, and owing to the difficulty in serving on the particular craft, I would ask for an order for substituted service on him. It was then agreed between us that, as liquidator, he should, on proceedings being taken, continue to hold such of the tugs and lighters as were in his possession at the disposal of the Crown and the Prize Court. I also arranged with Mr. Bristow, manager of the British Coaling Depots, and with Mr. Lloyd Jones that the manipulation contract, which was being carried on by the liquidator, should continue to be so carried on as between the Crown and the Coaling Depots." He further informed the licensing officer what he desired to do, and with him "came to an understanding that the liquidator should hold the craft and continue to act on behalf of the Crown from the time the proceedings were instituted against the craft."

What, then, is the fair conclusion from all this? It is clear that the Procurator-General meant to bring this fleet before the Prize Court with a view to its condemnation, and his general intention must have been to do whatever was necessary to give the Court jurisdiction. He desired to avoid taking physical possession of the craft *seriatim*, yet he equally desired that all should be validly seized. The liquidator, Mr. Lloyd Jones, had them under his control, and those which were not already in the hands of the naval and military officers of the Crown were being used by Mr. Bristow, above mentioned. The liquidator does not contradict the Procurator's evidence, and in prosecuting his cross-appeal did not question that the Vice-Admiralty Court had jurisdiction.

Their Lordships take the possession respectively of the naval and military authorities and of the liquidator to have been, by agreement, the possession of the marshal of the Prize Court until proceedings were taken, and thereafter to have been "continued" on behalf of the court, the actual requirements of the Forces and of the British Coaling Company being satisfied in the meantime and till further order. It is as though the Procurator had pointed to the fleet, assembled in the harbour under the liquidator's eyes, and had said: "Submit to treat this fleet as seized and undertake to do with the vessels as the court and its marshal may direct, or I will at once use force, which I have at hand."

Their Lordships do not overlook the facts, that both the Procurator and the liquidator elsewhere seem to suggest, that the question was rather one of service of proceedings *in rem* than of capture, for they give the 8th Aug. 1916 as the date of the seizure, which was actually the date when substituted service was effected on the liquidator. The liquidator, however, was chiefly concerned with his disbursements, and it was in this connection that the date of seizure was given to and accepted by the court as the 8th Aug. on an interlocutory application. Their Lordships do not think this sufficient to negative the inference to be drawn from the Procurator's account of his agreement with the liquidator, and, as their Lordships are not asked to suppose that the Procurator completely overlooked the importance of seizure, they conclude that a sufficient seizure having been arranged by consent, the matter subsequently received no further attention.

This view of the facts disposes of two other matters. In spite of a general statement, made on the application for leave to effect substituted service, that the craft to the number of 85 were in various places along the canal and constantly changing their position, no evidence is forthcoming to enable any one lighter to be discriminated from the rest, and the coal barges must for the most part have been kept in the harbours of Port Said and Suez. Sir Erle Richards for the liquidator stated to their Lordships that on the present materials he could not ask for a decision, that the craft were seized in inland waters, and were not the subjects of maritime prize at all, and, indeed, such a contention would have precluded the liquidator from obtaining a judicial decision on the effect of the Hague Convention, which is the true issue in the case and in strictness the only issue, which can be presented as of right in the interest of an enemy company. As no point of this kind was made at the hearing, their Lordships will deal with the whole fleet as having been enemy property seized in port, and as such liable to be condemned in a Court of Prize.

The liquidator further contended that the seizure in any case was bad as being a breach of the Suez Canal Convention, 1888, art. 4. It does not, however, follow that a seizure, otherwise good, must be invalid for all purposes merely because it contravenes some term in an international instrument cognisable in a Prize Court. It is legitimate to consider the object with which the convention was entered into, the scope of its provisions, and the mischief which it was intended to prevent. As was pointed out in *The Sudmark* (14 Asp. Mar. Law Cas. 82; 116 L. T. Rep. 804; (1917) A. C. 620, at p. 623), this Convention does not stipulate any penalty for its infraction, and a Court of Prize is not warranted in creating a penalty where the Con-

vention creates none, or in declaring a seizure to be bad because in no other form could it effectively create a penalty at all. Again, their Lordships cannot forget that, long before the seizure in the present case took place, the canal generally had been made a field of battle by the armies of the Sublime Porte, acting in alliance with those of the German Emperor, and for want of mutuality alone the Convention could not be used to protect the property of an enemy, whose Sovereign had already fundamentally disregarded it. There is, however, on the facts a simpler means of disposing of the point under the terms of art. 4, "Aucun droit de guerre ne pourra être exercé dans le canal et dans ses ports d'accès." In the present case the exercise of any right of war in the canal was carefully avoided. What was done, though constituting a seizure for the purposes of prize jurisdiction, was done ashore by word of mouth, and involved no belligerent conduct in the canal or its ports of access contrary to the Convention. The *de facto* tranquillity, which in the interest of neutrals the Convention secures, was fully respected. The interests of neutrals do not demand that acts done in Egyptian territory, which do not affect the canal or its ports of access, should be invalidated on the mere ground that they took place in its neighbourhood.

To turn to the Hague Conventions, can these tugs and lighters be covered by the words of Convention XI., "Bateaux exclusivement affectés à des services de petite navigation locale"? For some reason, which is not apparent, the French text makes the element of size a quality of the service in which the craft are engaged: in the English it is a quality of the craft themselves. In the present case it is difficult to describe either the craft or the navigation in which they engage as small. As applied to the navigation the words evidently predicate of it a petty, local character. These craft are an integral and indispensable adjunct of most important ocean voyages, and without them voyages through the Suez Canal would be impracticable. Their service is the reverse of petty or local. Nor are the craft themselves truly small. The tugs must be of high power, and their mere tonnage and dimensions are therefore not decisive. Few of the barges are even of modest size; none are insignificant, and most of them are of ample burden. Their Lordships will not imitate the learned judge below in treating the penury or the opulence of those engaged in the traffic as determining the claim of the craft to protection, though this feature may not be without its importance, but they are satisfied that whatever be the precise limits of this article, it was never contemplated that such craft as these should fall within them, and they think the same of the argument that they can be assimilated to fishing boats, so as to entitle them to the tenderness which has often been extended to fishermen under international law.

The application of the Sixth Convention does not depend merely on the question whether these can or cannot be styled *navires de commerce* with tolerable propriety. The construction of the article which would bring under that term all floating structures not *navires d'Etat* was rejected by their Lordships in *The Germania* (15 Asp. Mar Law Cas. 588; 116 L. T. Rep. 362; (1917) A. C. 375), and in delivering the opinion of the board, Lord Parmoor observed: "There is nothing in the context of art. 2 which would suggest that the expression, *un navire de commerce* includes every class of private vessel." It would be a mistake to seek in the Hague Conventions or in the terms there employed, exhaustive categories of every kind of *bâtiment* afloat, or to suppose that, taken collectively, the *bateaux*, *bâtiments*, and *navires* there mentioned cover the whole field of possible means of carriage by water so as to make provision somewhere or other for each and all of them. Conventions concluded between nations so diversely interested rest principally on compromise, and cannot be expected to exhibit the comprehensiveness of a code.

The language of the general preamble to Convention 6 is of importance, but the actual text must come first. The articles contemplate ships —*navires de commerce*—which in the course of a voyage from a port of departure or to a port of destination enter a port and there find themselves entangled in hostilities of which they were unaware, or ships, also commercially engaged upon a voyage, finding themselves in a port, whether of loading, of call, or of discharge, which by the outbreak of war becomes an enemy port, and they provide days of grace, in order that such ships may have their chance to go in peace, and deal specifically with the case in which *force majeure* prevents them from availing themselves of this opportunity. The picture so drawn is plain, and, if there are vessels entitled to the designation of *navires de commerce* which lie outside of this picture, then the scope of the article affords them no assistance, be their designation or their classification what it will. Neither collectively nor individually was the fleet of the Deutsches Kohlen Depôt engaged in or between ports of departure and discharge. It did not find itself in Port Said in the course of a voyage. Port Said was its home, nor had it any other. No *force majeure* affected it. In point of fact, after the outbreak of war it went on with its regular employment in its permanent home as before, and no opportunity for departure was desired, for there was neither the intention nor the means of taking it elsewhere. This fleet was the very opposite of the *navires de commerce* referred to, and was as fixed in its habitat and in its orbit as trains of coal trucks from which steamers take their coal under a tip. If so, it is unnecessary to express an opinion whether they could be called *navires*, and, if so, whether they were also *navires de commerce*. To them Convention VI. had no application at all.

In the alternative, but only in the alternative, the question arises whether any benefit could be claimed under the Convention for craft which did not avail themselves of the days of grace and were not prevented by *force majeure* from doing so. The "Décision" of the Egyptian Government dated the 5th Aug. 1914, gave permission to German ships which found themselves in Egyptian ports at the outbreak of hostilities to quit the port up to sunset of the 14th Aug. Let it be that some of these craft could not go, because they were not built for sea, though no doubt with some alterations they could have been made fairly seaworthy; let it be that none of the members of the fleet had any business or occupation elsewhere

This does not secure to them the benefit of the Convention without complying with its terms; it is only ground for saying that they are not within the scope of the Convention at all. They remained in the port and continued their usual employment and took the risk involved in the fact that by art. 13 of the same *Décision* "les forces navales et militaires de Sa Majesté Britannique pourront exercer tout droit de guerre" in Egyptian waters, apart, of course, from the terms of the Suez Canal Convention. Remaining where they were conferred on them no irrevocable permission to stay and trade, no permanent immunity from the belligerent rights of the Crown. Later on a licence was applied for and obtained, but before the seizure that licence had been duly revoked. Thereafter at any rate the liquidator could not invoke for their protection the principle that "when persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies for such time as they in fact stay" (*Princess Thurn and Taxis* v. *Moffit* (112 L. T. Rep. 114; (1915) 1 Ch. 58), even if such a principle is applicable to personal property only, when no enemy person is actually present or in charge of it.

In the result the appeal succeeds and should be allowed, and the cross-appeal fails, and should be dismissed in each case with costs. The decree of condemnation must be amended by omitting the words "and that the said tugs, lighters, motor boats and floating craft be detained until further order of the court" as well as the subsequent words "and detention," and the subjects seized must be forthwith condemned and confiscated.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitors for the respondents, *Botterell* and *Roche.*

Oct. 15, 16, *and Dec.* 16, 1918.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL).

THE STIGSTAD. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Neutral ship—Cargo not contraband, with enemy destination—Detention—Claim for detention and expenses—"Retaliatory" Order in Council of the 11th March 1915—Validity.

Under art. 3 of the Order in Council of the 11th March 1915 "for restricting further the commerce of Germany" the owner of a neutral vessel which is detained in a British or an allied port, having been ordered thither for the purpose of discharging cargo other than contraband which was the property of the enemy or intended for an enemy destination, has no legal right for damages for detention of the ship through such discharge.

Held, that the Order in Council was valid since it did not inflict excessive hardship on neutral commerce.

Semble: *To deny to the belligerent, under the head of retaliation, any right to interfere with the trade of neutrals beyond that which he already enjoyed under the head of contraband, blockade, and unneutral service, would be to render his admitted right under certain circumstances of retaliation one without practical application or effect.*

Decision of Evans, P. (13 *Asp. Mar. Law Cas.* 310; 114 *L. T. Rep.* 705; (1916) *p.* 123) *affirmed.*

APPEAL from an order of Evans, P., reported 114 L. T. Rep. 705; (1916) P. 123.

R. A. Wright, K.C. and *Balloch* for the appellants.

Sir *F. E. Smith* (A.-G.), Sir *Gordon Hewart* (S.-G.), *MacKinnon*, K.C., and *Hubert Hull* for the Crown.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—The appellants in this case were claimants below. They are a Norwegian company which manages the steamship *Stigstad* for her owners, the Klaveness Dampskibsaktieselskab, a Norwegian corporation. While on a voyage begun on the 10th April 1915 from Kirkenes, Sydvaranger, in Norway, to Rotterdam with iron ore briquettes, the property of neutrals, she was stopped in lat. 56° 9′ N. and long. 6° 6′ E. about a day's sail from Rotterdam, by H.M.S. *Inconstant*, and was ordered to Leith and thence to Middlesbrough to discharge. Their claim was for "(1) freight, (2) detention, and (3) expenses consequent upon" this seizure and the discharge at Middlesbrough afterwards. The detention was measured by the number of days which elapsed between the expected date of completing discharge at Rotterdam and the actual date of completing discharge at Middlesbrough, calculated at the chartered rate for detention—namely 130*l.* per day; and as to the expenses, while willing to treat port dues and expenses at Middlesbrough as the equivalent of those which would have been incurred at Rotterdam, the owners claimed some port dues and expenses at Leith and a few guineas for special agency expenses at Middlesbrough. Eventually the cargo was sold by consent, and a sum, the amount of which was agreed between the parties, was ordered to be paid out of the proceeds to the claimants for freight; but the President (Sir Samuel Evans) dismissed the claims for detention and for the special expenses. It is against his decree that the claimants have now appealed. They have admitted throughout that, in fact, the cargo of iron-ore briquettes was to be discharged into Rhine barges at Rotterdam in order to be conveyed into Germany.

The cargo was shipped by the Aktieselskabet Sydvaranger of Kirkenes, and was to be delivered to V. V. W. Van Drich, Stoomboot en Transport on der Nemingen, both neutrals, but it is contended that sect. 3 of the Order in Council, dated the 11th March 1915, warranted interference with the ship and her cargo by His Majesty's Navy on the voyage to Rotterdam. The President's directions as to freight were that "the fair freight must be paid to them, having regard to the work which they did," the principle which he had laid down in *The Juno* (13 Asp. Mar. Law Cas. 15; 112 L. T. Rep. 471; 1 Trehern 151) being in his opinion applicable. The claim for detention is in truth a claim for damages for interfering with the completion

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

of the chartered voyage, for it is admitted that delivery was taken at Middlesbrough with reasonable dispatch. That part of the claim which relates to the ship's being ordered to call at Leith, and the claim for expenses incurred there, are claims for damages for putting in force the above-named Order in Council, for it is not suggested that the order to call at Leith and thence to proceed to Middlesbrough was in itself an unreasonable way of exercising the powers given by the order. The small claim for fees at Middlesbrough seems to relate to an outlay incident to the earning of the freight which has been paid, and was covered by it, but, if it is anything else, it also is a claim for damages of the same kind. "Damages" is the word used by the President in his judgment, and, although it was avoided and deprecated in argument before their Lordships, there can be no doubt that it and no other is the right word to describe the nature of the claims under appeal.

It is impossible to find in the express words of the order any language which directs that such damages should be allowed, nor are the principles applicable which have been followed in *The Anna Catharina* (6 C. Rob. 10) and elsewhere, as to allowance of freight and expenses to neutral ships, whatever be the exact scope and application of those cases. Again, with the fullest recognition of the rights of neutral ships, it is impossible to say that owners of such ships can claim damages from a belligerent for putting into force such an Order in Council as that of the 11th March 1915, if the order be valid. The neutral exercising his trading rights on the high seas and the belligerent exercising on the high seas rights given him by Order in Council or equivalent procedure, are each in the enjoyment and exercise of equal rights, and, without an express provision in the order to that effect, the belligerent does not exercise his rights subject to any overriding right in the neutral. The claimants' real contention is, and is only, that the Order in Council is contrary to international law and is invalid.

Upon this subject two passages in *The Zamora* (13 Asp. Mar. Law Cas. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77) are in point. The first is at p. 95 of L. Rep. and relates to Sir William Scott's decision in *The Fox* (Edw. 311): "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 act 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)."

Further, at p. 98, are the words: "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."

It is true that in *The Zamora* (*sup.*) the validity of a retaliatory Order in Council was not directly in question, but these passages were carefully considered and advisedly introduced as cogent illustrations of the principle, which was the matter then in hand. Without ascribing to them the binding force of a prior decision on the same point, their Lordships must attach to them the greatest weight and, before thinking it right to depart from them, or even necessary to criticise them at any great length, they would at least expect it to be shown either that there are authoritative decisions to the contrary, or that they conflict with general principles of prize law or with the rules of common right in international affairs.

What is here in question is not the right of the belligerent to retaliate upon his enemy the same measure as has been meted out to him, or the propriety of justifying in one belligerent some departure from the regular rules of war on the ground of necessity arising from prior departures on the part of the other, but it is the claim of neutrals to be saved harmless under such circumstances from inconvenience or damage thereout arising. If the statement above quoted from *The Zamora* (*sup.*) be correct, the recitals in the Order in Council sufficiently establish the existence of such breaches of law on the part of the German Government as justify retaliatory measures on the part of His Majesty, and, if so, the only question open to the neutral claimant for the purpose of invalidating the order is whether or not it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances.

Their Lordships think that such a rule is sound and indeed inevitable. From the nature of the case the party who knows best whether or not there has been misconduct calling such a principle into operation, is a party who is not before the court, namely, the enemy himself. The neutral claimant can hardly have much information about it, and certainly cannot be expected to prove or disprove it. His Majesty's Government, also well aware of the facts, has already by the fact as well as by the recitals of the Order in Council solemnly declared the substance and effect of that knowledge, and an independent inquiry into the course of contemporary events, both naval and military, is one which a Court of Prize is but ill-qualified to undertake for itself. Still less would it be proper for such a court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retaliation for that misconduct. Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted in fact, and to inquire whether they are in their nature or extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked at as a whole, inconvenience greater than is reasonable under all the circumstances. It follows that a Court of Prize, while bound to ascertain from the terms of the Order itself, the origin and the occasion of the retaliatory measures for the purpose of weighing those measures with justice as they affect neutrals, nevertheless ought not to question, still less to dispute, that the warrant for passing the order, which is set out in its recitals, has in truth arisen in the manner therein stated. Although the scope of this inquiry is thus limited in law, in fact their

Lordships cannot be blind to what is notorious to all the world and is in the recollection of all men, the outrage namely committed by the enemy, upon law, humanity, and the rights, alike of belligerents and neutrals, which led to and indeed compelled the adoption of some such policy as is embodied in this Order in Council. In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by and obtained relief from retaliatory measures, if effective to restrain, to punish, and to bring to an end such injurious conduct. Neutrals whose principles or policy lead them to refrain from punitory or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses, which are fatal to the freedom of all who use the seas.

The argument principally urged at the bar ignored these considerations and assumed at absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service, and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective or his only defence against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender. For this contention no authority at all was forthcoming. Reference was made to the Orders in Council of 1806 to 1812, which were framed by way of retaliation for the Berlin and Milan decrees. There has been much discussion of these celebrated instruments on one side or the other, though singularly little in decided cases or in treatises of repute, and, according to their nationality or their partisanship, writers have denounced the one policy or the other, or have asserted their own superiority by an impartial censure of both. The present order, however, does not involve for its justification a defence of the very terms of those Orders in Council. It must be judged on its merits, and, if the principle is advanced against it that such retaliation is wrong in kind, no foundation in authority has been found on which to rest it. Nor is the principle itself sound. The seas are the highway of all, and it is incidental to the very nature of maritime war that neutrals in using that highway may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade, and unneutral service are branches of international law which have their own history, their own illustrations, and their own development. Their growth has been unsystematic and the assertion of right under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics or as being the subject of rights and liabilities which have no common connection. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade, and unneutral service, would be to take away with one hand what has formally been conceded with the other. As between belligerents acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not immediately falling under the cognisance of a Court of Prize. Little of this subject is left to prize law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.

Apart from the *Zamora* the decided cases on this subject, if not many, are at least not ambiguous. Of *The Leonora* (14 Asp. Mar. Law Cas. 209; 118 L T. Rep. 362; (1918) P. 182), decided on the later Order in Council, their Lordships say nothing now, since they are informed that it is under appeal to their Lordships' board, and they desire on the present occasion to say no more, which might affect the determination of that case, than is indispensable to the disposal of the present one.

Sir William Scott's decisions on the retaliatory orders in council were many, and many of them were affirmed on appeal. He repeatedly and in reasoned terms declared the nature of the right of retaliation and its entire consistency with the principles of international law. Since then discussion has turned on the measures by which effect was then given to that right, not on the foundation of the principle itself, and their Lordships regard it as being now too firmly established to be open to doubt.

Turning to the question which was little argued, if at all, though it is the real question in the case, whether the Order in Council of the 11th March 1915 inflicts hardship excessive either in kind or in degree upon neutral commerce, their Lordships think that no such hardship was shown. It might well be said that neutral commerce under this order is treated with all practicable tenderness, but it is enough to negative the contention that there is avoidable hardship. Of the later Order in Council they say nothing now. If the neutral shipowner is paid a proper price for the service rendered by his ship, and the neutral cargo-owner a proper price according to the value of his goods, substantial cause of complaint can only arise if considerations are put forward which go beyond the

ordinary motives of commerce and partake of a political character, from a desire either to embarass the one belligerent or to support the other. In the present case the agreement of the parties as to the amount to be allowed for freight disposes of all question as to the claimants' rights to compensation for mere inconvenience caused by inforcing the Order in Council. Presumably that sum took into account the actual course and duration of the voyage and constituted a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service. The further claims are in the nature of claims for damages for unlawful interference with the performance of the Rotterdam charter-party. They can be maintained only by supposing that a wrong was done to the claimants, because they were prevented from performing it, for in their nature these claims assume that the shipowners are to be put in the same position as if they had completed the voyage under that contract, and are not merely to be remunerated on proper terms for the performance of the voyage, which was in fact accomplished. In other words, they are a claim for damages, as for wrong done by the mere fact of putting in force the Order in Council. Such a claim cannot be sustained. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitor for the Crown, *Treasury Solicitor*.

July 25, 26, *and Nov.* 13, 1918.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, Sir WILLIAM PICKFORD, and Sir ARTHUR CHANNELL.)

THE KRONPRINZESSIN VICTORIA. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Conditional contraband—Consignment to neutral port—Named consignee—Enemy destination—Orders in Council—Declaration of London 1909, *art.* 35.

The Declaration of London 1909, *which was not ratified by Great Britain, by art.* 35 *purported to abrogate the doctrine of continuous voyage in the case of conditional contraband and to make the ship's papers conclusive as to the port of discharge.*

An Order in Council of the 29*th Oct.* 1914, *by clause* 1 *provided that the Declaration of London should be thenceforth adopted, subject to certain modifications. Modification* (*iii.*) *provided that, "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, or if they show a consignee of the goods in territory belonging to or occupied by the enemy."*

The appellants, a Swedish company, purchased coffee at Rio Janeiro and paid for it through bankers in Aug. 1915. *The coffee was shipped under two bills of lading by the Swedish steamship K. V. for delivery to the appellants at Sundsvall as the consignees. On the voyage the vessel put into Kirkwall, where the coffee was seized as conditional contraband.*

Sir Samuel Evans, P. found that the coffee was intended to be supplied to Germany and condemned it.

Held, that the statistical evidence given by the Crown, and not challenged, was sufficient to warrant the finding that the coffee was intended to be supplied to Germany. In their Lordships' opinion the President did not intend to find that the appellants were colourable or sham consignees, and therefore the modification in clause 1 (*iii.*) *of the Order in Council of the* 29*th Oct.* 1914, *which was not in this particular affected by the Order in Council of the* 11*th March* 1915, *applied, and the coffee was immune from condemnation. The case was accordingly remitted to the Prize Court in accordance with art.* 3 *of the Order in Council of the* 11*th March* 1915 *to settle the terms of the restoration.*

APPEAL by claimants from a decree of the Prize Court, England. The respondent was His Majesty's Procurator-General.

Sir *Erle Richards*, K.C. and *Balloch* for the appellants.

Sir *Gordon Hewart* (S. G.), *Stuart Bevan*, and *Clement Davis* for the respondent.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—In this case the late Sir Samuel Evans condemned 250 bags of coffee, conditional contraband on war, shipped by Nordskog and Co. on the Swedish steamship *Kronprinzessin Victoria* at Rio de Janeiro for delivery at Sundsvall, in Sweden, to the appellants, who were claimants below, an incorporated Swedish company trading as wholesale grocers under the name of Aktiebolaget Dahlen and Wahlstedt. The appellants swore that this coffee was part of a large quantity which they had previously bought of Nordskog and Co.; that they had declared before shipment that none of it was imported from or would be sent to an ulterior enemy destination, and that this declaration was true. The purchase contract and documentary evidence of payment for the coffee were forthcoming and their genuineness was not denied. The Crown put in evidence of a statistical character of the changes both in the general imports of coffee into Sweden and in the exports of coffee from Sweden since the beginning of the war. This showed changes both in quantity and in destination, and also an increase in the appellants' imports in particular. There was also evidence, the sufficiency of which was admitted, that if the ulterior destination of this coffee was Germany, it would be imported into Germany for the use of the German Government and forces. No evidence was put in to contradict that of the Crown.

The appellants, whose declaration before shipment had stated that the coffee was intended for internal consumption in Sweden, made it part of their case at the trial, that they were considerable exporters of coffee to Finland, as well as dealers in coffee in the Swedish province of Norrland, and in support of this vouched two certificates by M. Censta Ohrn, and M. Ernst Yssarsson, signin

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

respectively as "British Pro-Consul" and as "Acting British Pro-Consul" at Sundsvall, purporting to give the result of an examination of the appellants' sale notes and books. The learned President, justly impressed with the unquestioned fact, among others, that the appellants had multiplied their imports of coffee at least six times over since the war began, that the town, in which they traded, with only 17,000 inhabitants contained a score of other coffee importers, five of whom alone imported over 70,000 bags, while the appellants were importing 30,000, and that the two provinces of Jemtland and Vesternorrland, whose "commercial centre," Sundsvall, only contains 375,000 inhabitants in all, thought that the nature of the appellants' export trade required further evidence. The bags are 60 kilog. bags, and an import of a quantity into Sundsvall sufficient to supply every man, woman, and child within its internal trading area with a third of a hundredweight of coffee for the year suggested a large export trade, nor was the proximity of Sundsvall to Finland inconsistent with that town's partaking in the extensive and lucrative trade with Germany, which undoubtedly went on. Accordingly he offered to adjourn the hearing, in order that the claimants might have the opportunity of sending over for examination in court the books relating to their export trade, some entries in which had been submitted to the inspection of the British Vice-Consulate at Sundsvall. Their counsel accepted the adjournment, in order that his clients might consider what course they should take, but upon consideration they refused to avail themselves of the opportunity. Thereupon the learned President condemned the coffee, concluding his judgment with these words; "They have failed to satisfy me of the truth of their case. From the evidence adduced and from all the circumstances of the case, including the conduct of the claimants, I draw the inference that the coffee seized was not bought by them for the purpose of consumption in Sweden or in order to become part of the common stock of that country or for the purpose of re-sale to any neutral country, but was shipped to and received by them to be forwarded through Sundsvall to Hamburg."

Three questions have been raised before their Lordships: (1) Whether this was a finding that the appellants were not really the consignees of the coffee but only figured as such fictitiously in order to disguise the importation of the coffee into Germany by a Hamburg firm *viâ* Sundsvall; (2) whether, if so, or if it was a finding that the appellants were the true consignees importing the coffee but with an ulterior destination in Germany beyond Sundsvall, it was competent to the learned President so to find on the materials before him; and (3) if the finding was to the latter effect, whether it was material or warranted the condemnation of the goods in view of the destination of the ship, the tenor of the ship's papers, and the language of the Declaration of London, No. 2, Order in Council, dated the 29th Oct. 1914.

Their Lordships are of opinion that the learned President did not find that the claimants were only colourable and sham consignees of this coffee. There are circumstances in the case suggesting such a conclusion, connected with the banking transactions by means of which payment was made for the coffee, and with the part played in it by Nordskog and Co., of Rio de Janeiro, and Santos in Brazil, and of 1/3 Readhusgatan, Christiania, by Carl B. Prosch, also of Christiania, and by Eugen Urban and Co., coffee importers, of Hamburg. There are also observations made during the hearing and passages in the judgment of the learned President which seem to refer to such a suggested conclusion, but their Lordships are satisfied that this was not the case presented by the Crown in the Prize Court, and they think that this was not the finding at which he arrived. Even if the materials would have warranted such a conclusion, as to which no opinion need be expressed, their Lordships would not be prepared to allow the captors to succeed on appeal by raising a case on the facts, which they never presented for the determination of the court below.

Their Lordships are of opinion that the materials before him warranted the learned President in finding the ulterior German destination, which they conceive to be the true effect of his judgment. The admissibility of what is called a statistical case has already been recognised. Not only was this case pointed to the general contrast between the overseas trade of Swedish merchants before and after the outbreak of war, but particular and precise evidence was given of the remarkable expansion of the appellants' own operations; and this was reinforced by evidence of their credit and associations. Their Lordships do not say that less might not have sufficed: the question is one of the evidence actually given. There is further the fact that the appellants declined to produce their books in court. Here again, be it observed, the President did not order them to embark on an inquiry, which they had not opened, or order that proof of a particular branch of the case should be given in one way only. The appellants had vouched in their own favour on one aspect of the case their own record of certain selected transactions; they had the opportunity of completing that aspect of the case from materials of the same class in their own possession by way of rebuttal of the captors' evidence, and to make that opportunity fruitful were informed how best, in view of the President's great experience of these cases, they could present such evidence so as to bring conviction to his mind. It is nothing to the point to urge that they had engaged in a trade, which to them was lawful though pursued at their peril, or to say, as they did say, that their trading books were required in Sweden, and that Swedish law placed a limit on the extent to which they could give "discovery throwing light upon our case." They claimed the coffee in the Prize Court here, and if the evidence, by which their case might have been cogently supported, was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage. Their Lordships fully appreciate the learned President's view, that an offer of inspection of the books in Sweden "by a notary public or otherwise" was in the circumstances almost illusory. As to the reference to the law of Sweden, the matter has been dealt with in other cases. Though loath to credit that Swedish law, truly understood, does restrict the right of a Swedish subject to support a case, which he is concerned to prove, by the best evidence of his own transactions, and while

recognising that, if it be so, this is not a matter for their criticism or animadversion, but solely one for the judgment of the Government and Legislature of the Kingdom of Sweden, their Lordships must observe, as they have observed before, that it is impossible for a Court of Prize, an international tribunal, to allow its investigation of the truth of the matters brought before it to be limited by the restrictions of the municipal law affecting one of the parties to the proceedings before it. Their Lordships cannot hold that a captor's evidence is not to prove, whatever it is capable of proving, merely because the claimant is not permitted by the laws of his country to produce the evidence appropriate to rebut it.

The remaining question turns upon the construction of par. 1 (iii) of the Declaration of London, No. 2, Order in Council. This order, which declares, *inter alia*, under what modifications His Majesty will recognise art. 35 of the Declaration of London, so long as the Order is in force, operates, as has been already decided, as a waiver of the belligerent rights of the Crown in favour of neutrals, to which a Court of Prize will give effect as against captors. His Majesty, who was pleased to announce such a waiver, is entitled to modify or to recall it, as he may be advised, and in fact the Order in Council of the 7th July 1916 did in terms revoke the Order in Council of the 29th Oct. 1914, and proceeded to deal with the same matters otherwise. It was, however, argued by the Solicitor-General that there had been a prior restriction or revocation of that waiver—namely, by the Order in Council of the 11th March 1915—and the date of the shipment of the coffee and voyage of the *Kronprinzessin Victoria* was in fact such that the latter order would cover that period, though the order of the 7th July 1916 would not. The argument shortly was that the object of the Order in Council of the 11th March 1915 being, in the words of the recital, "to prevent commodities of any kind from reaching or leaving Germany," and the substantive provision of par. (iii.) being that goods with an enemy destination carried in a ship bound for a port other than a German port shall be discharged in a British or allied port, and subsequently be restored on terms, "unless they are contraband of war," it would be unreasonable to hold that, if they are contraband of war, they may be released unconditionally, for that would expressly defeat the object of the Order in Council itself. Hence, it was said, that to avoid so unsatisfactory a result, the Order in Council of 1915 must be deemed to have revoked by implication the concessions made under the Order in Council of the 29th Oct. 1914. The point is novel. It might have been taken, but was not, in *The Louisiana* (14 Asp. Mar. Law Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 461). The contrary was assumed to be the case, though it is true there had been no argument, by their Lordships' board in *The Proton* (14 Asp. Mar. Law Cas. 268; 118 L. T. Rep. 519; (1918) 1 A. C. 578, p. 580). It was not taken by the Crown before the learned President in the present case, nor is a contention plausible which involves the proposition that an order directing goods to be restored, "unless they are contraband," is an order condemning them if they are, all other Orders in Council notwithstanding. The words "unless they are contraband of war" naturally mean that the order in question does not apply to such goods for which there are other legal provisions.

Their Lordships, however, hold, for two reasons of a somewhat more general character, that the Order in Council of the 29th Oct. 1914 was not in this particular affected by the Order in Council of the 11th March 1915. The whole tenor of the order of the 7th July 1916, the recitals, the repeal, and the re-enactment, are consistent only with the view that the order of the 29th Oct. 1914 had up to that date remained in full force and unaffected. Further, though no form of words and no formal instrument can be prescribed to the Crown by which to revoke its former grant or to resume the full belligerent rights, which had previously been waived, it is at least necessary that the intention to revoke and the intimation of the resumption should be unambiguous and clear. It would ill become the dignity of the Crown and be little congruous with its responsibility, alike towards its subjects and to neutrals in exercising or forbearing to exercise belligerent rights, if concessions publicly and advisedly made were to be recalled by words of doubtful import or by nice implications from language unquestionably employed *alio intuitu*. If this contention were to prevail it would follow that the decision of the board in the *Louisiana* was a decision on the true construction of an order, which was inapplicable because it had been revoked. It is true that there is nothing in that decision which would preclude the board by authority from considering the contention, for the construction of an instrument and its applicability are different matters, but their Lordships cannot but feel confirmed in the opinion which they have formed by the fact that on the former occasion the law officers of the Crown either did not think of the point or deemed it better not to raise it.

The construction of the Declaration of London, No. 2, Order in Council, p. 1, sub s. iii, remains to be considered. Here again the judgment in *The Louisiania* (*sup.*) does not conclude the matter, for the language there used dealt with the position of a neutral shipper anxious to know how far his shipment would be covered, when consigned to some actual named consignee in a country adjacent to Germany. It was there said that the neutral shipper would not suffer merely by reason of the intentions of that consignee. The claimants were the shippers, they claimed to be owners of the goods, and alleged that the consignees named in the bills of lading were so named for convenience only, and that no property passed to them. Here the claimants are the named consignees, and, upon the case made in the Prize Court, they were consignees to whom the property had passed before seizure, in fact the day before. Not only so, but they were consignees to whom the consignors had parted with the real control of the goods. Their intention, however, was to give the goods an ulterior enemy destination. Does this intention prevent them from being persons, the insertion of whose names in the bills of lading cause the ship's papers to "show who is the consignee of the goods?" On principle their Lordships think not. If the seizure had been two days earlier and the claims had been made by Nordskog and Co., the language employed in the *Louisiania* would have applied.

The present is a different case, and whether the date of the passing of the property be or be not crucial, it cannot be said on the present facts that the appellants were not the consignees. It is not even shown that they had an arrangement with Nordskog and Co. or with some other parties under which they had engaged to forward the coffee to Germany, though what difference that would have made, being a personal obligation only, need not be decided. All that is shown is that they had an intention. This appears to be precisely the case or one of the cases in which, under the Order in Council in question, the ship's destination and the form of the ship's papers covered the goods. To extend the qualities which may be predicated of the consignee, whom the ship's papers are to show, to qualities connected with his general trade or with particular contracts, independent of the contract of carriage, would be to protect the goods only when the ship's papers show something which in maritime practice they never do and rarely could show. The coffee was accordingly in this case immune from condemnation, its ulterior enemy destination notwithstanding.

The Order in Council of the 11th March 1915, art. 3, provided for the discharge of the goods in the present case and proceeded: "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."

These words determine the mode in which these goods are to be dealt with after having been placed in the custody of the marshal. It is for the President in his discretion to decide upon what terms they shall be restored. Presumably they have been requisitioned or sold and are no longer in specie; if so, the proceeds or their money value will represent the goods and be the subject of his order. The decree of condemnation must be set aside and the case must be remitted to the Prize Court, to settle the terms of restoration, but as the point on which the appeal succeeds is one which was never properly urged upon Sir Samuel Evans, there can be no costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Travers Smith, Braithwaite, and Co.*

Solicitor for the Crown, *Treasury Solicitor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 2 and 3, 1918.

(Before SWINFEN EADY, M.R., DUKE, L.J., and EVE, J.)

ADMIRALTY COMMISSIONERS *v.* PAGE; THE CONQUEROR. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Salvage — Requisitioned tug — Tug demised to Crown—Time charter—Services rendered—Right to salvage earned — "Ship belonging to His Majesty"—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping (Salvage) Act* 1916 (6 & 7 *Geo* 5, c. 41), *s.* 1.

The defendants' tug was requisitioned by the Admiralty on the terms of the charter-party known as T. 99, whereby the owners undertook to pay for all wages, provisions and all expenses, except for coal and other fuel, which were to be borne by the Admiralty. The owners were to insure against all marine risks, but the Admiralty were to be liable for all war risks. All salvage was to be for the owners' benefit.

Subsequently, as the result of correspondence, the basis of hire was altered from gross to net terms. The tug was requisitioned upon terms which amounted to a demise of the tug to the Admiralty. It was to be at the absolute disposal and under the complete control of the Admiralty, who were to bear all risks—both war and marine—as well as all the expenses of the tug, crew, and stores. If the tug was off work for any reason, the hire was to be paid just the same.

The tug was commissioned as one of His Majesty's ships, the master became a lieutenant in the R.N.V.R., and he and the other members of the crew wore uniforms (provided by the Admiralty) according to their rank, and were paid by the Admiralty.

While the defendants' tug was thus in the possession of the Admiralty she earned 4500l. as remuneration for salvage services rendered by her.

The Admiralty Commissioners claimed a declaration that they were entitled to the remuneration so earned.

Held, that the tug was for the time being a vessel "belonging to His Majesty" within the meaning of sect. 1 of the Merchant Shipping (Salvage) Act 1916; *that a ship taken on the above mentioned terms was effectually demised to the Crown; and that the Admiralty Commissioners were therefore entitled to the amount awarded for the salvage services rendered by the vessel, the defendants as the owners thereof having no claim to any part of the salvage moneys.*

The Sarpen (13 *Asp. Mar. Law Cas.* 370; 114 *L. T. Rep.* 1011; (1916) *P.* 306) *considered and applied. Decision of Bailhache, J.* (119 *L. T. Rep.* 338) *affirmed.*

THE Admiralty, acting under the powers conferred by the Proclamation of the 3rd Aug. 1914 requisitioned the tug *The Conqueror* on the 4th Oct. 1914 from the defendants, who were the owners,

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

on terms of the charter-party known as T. 99, under which the owners had to provide and pay for all wages, provisions, and all other expenses in connection with the officers and crew, and for the insurance of the vessel, while the Admiralty were liable for the expenses of all coal and other fuel.

The owners were to be liable for all marine risks, but the Admiralty were to be liable for all war risks. All salvage was to be for the owner's benefit. The tug was to be deemed off hire during the time occupied in salvage operations.

In Sept. 1916 correspondence took place between the parties which resulted in the basis of hire being altered from gross to net basis. The defendants on the 13th Sept. consented to those terms, but a charter-party providing for that basis of payment was never signed.

The form of charter-party providing for the new basis of payment was headed "Charter-party . . . with demise to the Crown." It provided that the vessel was to be at the absolute disposal and under the complete control of the Admiralty. The master and crew were to be appointed by the Admiralty instead of the owners. All risks—war and marine—as well as all expenses of the tug, crew, and stores, and of all repairs beyond ordinary wear and tear would be borne by the Admiralty who undertook to restore the vessel to the owners at the termination of the hire in the same condition as she was in when taken up, fair wear and tear excepted. If the tug was off work for any reason the hire was to be paid just the same.

The tug was afterwards commissioned as one of His Majesty's ships, with master and crew who were servants of the Crown, and was employed at the sole risk and expense of the Admiralty. The master obtained a commission as lieutenant of the R.N.V.R., and he and other members of the crew wore uniforms (provided by the Admiralty) according to their rank, and were paid by the Admiralty.

In Jan. 1917, the tug *The Conqueror*, while in the possession and control of the Admiralty, rendered salvage services to the steamship *Sussex*, and a claim for remuneration for such salvage services was made by the defendants as owners of the tug.

The parties agreed to go to arbitration, but while this was pending the Admiralty intervened and claimed to be entitled to the salvage paid for the services of the tug.

It was determined that the arbitrator should decide the amount payable as remuneration for the salvage services rendered by the tug without prejudice to the claim of the Admiralty.

The amount of the remuneration payable in respect of the services of the tug was assessed by the arbitrator, Mr. Laing, K.C., at the sum of 4500*l.*

This action was brought by the Admiralty Commissioners for a declaration that they were entitled to the sum of 4500*l.* so awarded in respect of the services rendered by the tug *The Conqueror* to the steamship *Sussex* and her cargo.

Sect. 557, sub-sect. 1, of the Merchant Shipping Act 1894 provides that:

> 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. . . .

Sect. 1 of the Merchant Shipping (Salvage) Act 1916 provides that:

> Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in sect. 557 of the Merchant Shipping Act 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty.

The action came on for trial in the Commercial Court before Bailhache, J., who decided (14 Asp. Mar. Law Cas. 360; 119 L. T. Rep. 338) that the effect of the change of basis of hire was to transfer the right to any salvage award from the owners to the Admiralty, who held the tug on demise; that a tug which was on time charter to the Admiralty when the charter-party was by way of demise was a tug which belonged to the Admiralty for the purpose of the Merchant Shipping Act 1894 and of the Merchant Shipping (Salvage) Act 1916; and that therefore the Admiralty were entitled to the amount awarded for salvage services rendered by such tug.

From that decision the defendants appealed.

The appeal now came on to be heard, together with an appeal involving the same question by the plaintiffs, the Elliott Steam Tug Company Limited, from the decision of Hill, J. sitting in the Admiralty Division in the salvage case of *Admiralty Commissioners and others* v. *Owners of Steamship Messina, her Cargo and Freight.*

Wright, K.C., *Stuart Bevan*, and *G. A. Scott* for the appellants.

MacKinnon, K.C. and *C. R. Dunlop* for the respondents.

SWINFEN EADY, M.R.—In this case there is an appeal from Bailhache, J., the question being whether in respect of salvage services rendered by the tug *The Conqueror*, the amount payable in respect of those services belongs to the Admiralty or is payable to the company who were the owners of the tug which was under charter to the Admiralty.

With regard to the tug, it was originally taken up upon terms known as the terms of "T. 99," a form of charter-party under which many vessels were taken up for Goverment service, and under which the owners engaged and paid the crew, and found the stores—stores other than coal—worked the ship, and ran the marine risks, the owners insuring against those risks, but, on the other hand, the Admiralty bearing the war risk and finding coal.

In respect of the vessels so taken up, a clause in the charter-party "T. 99" provided that the steamer has liberty to assist vessels in distress, and all salvage to be for owner's benefit, but ship to be deemed off pay during the time occupied by salvage operations, and cost of coal consumed in such operations and port charges and expenses to be for owner's account.

Claims have been made for salvage by ships taken up under "T. 99," and in one case that came before this court, *The Sarpen* (*sup.*) it was held

that the owners of the ship were entitled to the salvage and to prosecute a claim for it, and that the master and crew were entitled to prosecute a claim without the consent of the Admiralty. In that case it was pointed out that where a ship was a requisitioned ship, no claim to salvage could 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, and it was a claim which required the consent of the Admiralty for its prosecution in the case of a vessel belonging to His Majesty.

After the decision there was pronounced the Act of 6 & 7 Geo. 5, c. 41—the Merchant Shipping (Salvage) Act 1916—was passed on the 23rd Aug. 1916, which provides that where salvage services are rendered by any ship belonging to His Majesty, and that ship is a ship specially equipped with salvage plant or is a tug, the Admiralty shall, notwithstanding anything contained in sect. 557 of the Merchant Shipping Act 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty.

It appears that before the passing of that Act, and when ships belonging to His Majesty were unable to put forward a claim for salvage, the tug belonging to the owners in the present case, the Elliott Steam Tug Company Limited, did in fact render services to a vessel, and was allowed to obtain and retain the salvage. In that case the ship was taken up on a net basis; and the question arising on the present appeal with regard to the tug *The Conqueror* is this: that having been originally taken up on "T. 99," which was a gross basis, owners paying the charges which I have already mentioned, at a subsequent date, and before the salvage services in question here were rendered, the ship was converted into a taking upon a net basis. By letters passing on the 12th and 13th Sept. 1916 an alteration was made with regard to *The Conqueror*, and the alteration was that she was taken up from a gross to a net basis.

The reason for the change is quite obvious. The change led to the ship being a ship commissioned by His Majesty to the commander holding His Majesty's commission and belonging to the Royal Naval Volunteer Reserve; to His Majesty's uniform being worn; to the Admiralty bearing all expenses of running the ship, engaging the crew, entering into articles with the crew and engaging the crew, paying their wages, paying ship's stores, bearing all risk, marine risk as well as war risk; in fact, taking over the entire ship as a ship commissioned by His Majesty, and bearing all the expenses of running the ship, and incurring all the risk which the ship was to incur; the only question being that subject to fair wear and tear all risk was the risk of the Admiralty.

Under those circumstances, the ship taken on those terms, is effectually demised to the Crown and the ship is necessarily held on that demise to the Crown. The owners are no longer the managers of the ship, but it is managed by the Admiralty. How is it possible therefore to hold that the owners can have any claim whatever for the salvage moneys? They incur no expense and they run no risk. The whole of that is for the Admiralty.

It was pointed out in the case of *The Sarpen* (*ubi sup.*), where the earlier decisions were referred to, that where a ship is under an actual demise to the Admiralty, it is for the time being a ship belonging to His Majesty within the meaning of the sections in the Merchant Shipping Act 1894 where that expression is used.

That being so, I am of opinion that the grounds upon which Bailhache, J. proceeded in holding that in the present case the Admiralty Commissioners were entitled to the salvage moneys, are indisputable. It is a claim in respect of a ship on demise to the Admiralty where the salvage services are rendered at the expense of the Admiralty—crew, stores, coal, all expenses—where all risk of injury to the ship and apparel is for the Admiralty, and where the owners have neither risk nor expense. In each case the services were rendered after the passing of the Act to which I have referred; so that in each case the Admiralty come within the provisions of the Act and are entitled to claim the salvage.

It was urged that in respect of other tugs of the Elliott Steam Tug Company Limited, *The Vanquisher* and *The Revenger*, which also were on a net basis at a time when salvage services were rendered, the owners were enabled to claim and retain the amount. But as between themselves and the ship to which services were rendered, whether the owners were entitled to salvage does not now arise. They obtained the salvage, and their claim to retain it is not disputed. So far as the Admiralty are concerned, they would have no claim, because those services were rendered at a time when no claim could be made on behalf of the King's ship. Therefore no claim is put forward by the Admiralty Commissioners in respect of salvage earned and obtained by those two vessels.

But with regard to the tug with which we have to deal on this appeal, *The Conqueror*, as it was upon a net basis at the time when the services were rendered, and as it was held on demise to the Crown I am satisfied that the judgment appealed from was perfectly correct, and that the defendants as the owners of the vessel have no claim to any part of the salvage moneys.

For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

DUKE, L.J.—I agree.

The effect of the transactions in this case on the part of the Crown have been to vest the vessels—at any rate for the period when the vesting and divesting occurred—absolutely and indisputably in the Crown as a King's ship, with a King's officer in command, a King's crew in charge, the whole of the expenses at the public charge through the Admiralty, and the whole of the risk at the cost of the public.

I cannot conceive how in that state of facts it could be contended successfully that the company which is to be ultimately entitled to have the ship revested in them can be regarded as having rendered the salvage services which were here rendered. They were rendered by His Majesty's servants and his ship, which was at the risk of the State.

That being so, it seems to me clear that the owners could not be entitled to salvage here. The Merchant Shipping (Salvage) Act 1916 has made it possible that the public Exchequer should derive benefit from salvage services rendered by

vessels which are especially adapted for the rendering of such services, and I do think that it would be a very mischievous consequence if the right of the Crown in respect of such transactions as have occurred in the present case should be divested out of the Crown upon the kind of casual and ambiguous incidents which were relied upon to support this appeal, and to set up something of the nature of a brokerage to the appellants of moneys which in law and in fact had been earned on behalf of the Crown.

I therefore think that this appeal ought to be dismissed.

EVE, J.—I agree.

The answer to Mr. Wright's concluding submission on the construction of the Act of 1916 seems to me to have been supplied by Mr. MacKinnon when he pointed out that if the tug is not a ship "belonging to His Majesty" within the meaning of sect. 1 of the Act of 1916, they are obviously not under the disability imposed by sect. 557 of the Act of 1894, where the words of description are identical.

I think, therefore, that this appeal fails and ought to be dismissed.

Appeal dismissed.

Solicitors: for the appellants, *Thomas Cooper and Co.*; for the respondents, *Solicitor to the Treasury.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Oct. 29, 30, *and Nov.* 14, 1918.

(Before ROCHE, J.)

ROURA AND FORGAS *v.* TOWNEND AND OTHERS (*a*)

Marine insurance — Voyage policy—Marine risk —War risk—Capture by enemies—Constructive total loss of vessel—Loss of profit on charter—Vessel restored before action brought—Notice of abandonment—Probability of loss—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60 *and* 61.

The plaintiffs chartered a steamship and, by a voyage policy dated the 7th Nov. 1917, *underwritten by the defendants, insured their profit on the charter. The insurance was against marine and war risks, and included capture of the vessel by the enemies of Great Britain, and was against total and (or) constructive total loss of steamer only, and excluded all claims arising from delay and (or) deterioration and (or) loss of market in respect of war only. On the 10th Nov.* 1917, *while on the insured voyage, the steamer was captured in the Indian Ocean by the German raider or auxiliary cruiser* W. *The cargo on board the steamer was contraband. A prize crew from the* W. *was placed on board, as well as a large number of passengers from other prizes which the* W *had taken and sunk. Some bombs were also placed by the Germans on board the steamer to be used if necessary to destroy her. The insured steamer was used by the* W *as a collier consort and as a relief carrier of prisoners collected by the* W. *from her sunk prizes. She was therefore disguised, and the two vessels voyaged, sometimes together and sometimes separately, towards Germany. At one point some vessels were sighted, which gave rise to some expectation of recapture. Ultimately, on the 24th Feb.* 1918, *the insured steamer grounded in Danish territorial waters and the intervention of the Danish authorities secured the release of the passengers, and on the 27th Feb. the German prize crew left her. A salvage company was employed by the shipowners and succeeded in refloating the vessel on the 8th March. She was then considerably damaged and was under repair until Sept.* 1918. *Notice of abandonment had been given by the shipowners, who were not insured. In an action on the policy claiming that the vessel was, owing to her capture by the Germans, a constructive total loss, and that the plaintiffs had thereby lost their profit on the charter party:*

Held, that it was not merely uncertain whether the owners of the steamer would recover her within a reasonable time, but that the balance of probability was that they would never recover her at all; that the giving of a notice of abandonment by the shipowners was not an integral element of a constructive total loss; that there was a constructive total loss of the vessel within sect. 60 *of the Marine Insurance Act* 1906 *on her capture and before she was restored to her owners, and that such capture resulted in a total loss to the plaintiffs of their rights and profits under the charter; therefore the restoration of the vessel did nothing to extinguish or minimise the plaintiffs' loss and could not operate to extinguish or bar the plaintiffs' claim, and that the claim to recover the loss of profit on the charter-party was not a claim arising from delay. The vessel was not merely delayed, but was captured. The plaintiffs were therefore entitled to recover.*

Polurrian Steamship Company *v.* Young (12 *Asp. Mar. Law Cas.* 449; 112 *L. T. Rep.* 1053; (1915) 1 *K. B.* 922) *applied.*

Russian Bank for Foreign Trade *v.* Excess Profits Insurance Company (14 *Asp. Mar. Law Cas.* 316; 119 *L. T. Rep.* 645; (1918) 2 *K. B.* 123) *distinguished.*

ACTION in the Commercial List.

The plaintiffs' claim was for a loss under a policy of marine insurance on the profit on the charter of the steamer *Igotz Mendi*, which was captured by a German raider.

The plaintiffs were interested in a policy of marine insurance dated the 7th Nov. 1917, underwritten by the defendant, for 30,000*l.* on the profit on the charter against total loss and (or) constructive total loss of steamer only.

The policy provided against the usual perils of the seas, including "Enemies, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, and quality soever, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship or any part thereof, including war risks, mines, &c., and warranted free of any claim arising from capture, seizure, arrest, restraint, or detainment except by the enemies of Great Britain."

The insured voyage was from Delagoa Bay to Calcutta and until sailed, and while the vessel was on that voyage she was captured by a German raider on the 10th Nov. 1917.

The plaintiffs alleged that the profit on the charter had become a total or constructive tota

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

loss by insured perils. In the alternative they alleged that the commercial adventure contemplated by the charter had become frustrated and impossible of performance, and was abandoned.

The defendants denied that there had been either actual or constructive total loss, and alleged that the vessel had come back into the hands of the owners before action brought. They further alleged that no notice of abandonment had been given.

The further facts of the case are stated in the judgment.

MacKinnon, K.C. and *Le Quesne* for the plaintiffs.

R. A. Wright, K.C. and *Simey* for the defendants.

The following authorities were cited :

Marine Insurance Act 1906, ss. 60, 61, and 62 ;
Andersen v. *Marten*, 10 Asp. Mar. Law Cas. 494 ; 99 L. T. Rep. 254 ; (1908) A. C. 334 ;
Bondrett v. *Hentigg*, Holt, N. P. 149 ;
Farnworth v. *Hyde*, 15 L. T. Rep. N. S. 395 ; L. Rep. 2 C. P. 204 ;
Goss v. *Withers*, 2 Burr 683 ;
Hamilton v. *Mendes*, 2 Burr. 1198 ;
Kaltenbach v. *Mackenzie*, 4 Asp. Mar. Law Cas. 39 ; 39 L. T. Rep. 215 ; 3 C. P. Div. 467 ;
Mellish v. *Andrews*, 15 East 13 ;
Moore v. *Evans*, 117 L. T. Rep. 761 ; (1918) A. C. 185 ;
Mullett v. *Shedden*, 13 East, 304 ;
Rankin v. *Potter*, 2 Asp. Mar. Law Cas. 65 ; 29 L. T. Rep N. S. 142 ; L. Rep. 6 H. L. 83 ;
Roux v. *Salvador*, 3 Bing. N. C. 266 ;
Russian Bank for Foreign Trade v. *Excess Profits Insurance*, 14 Asp. Mar. Law Cas. 316 ; 118 L. T. 645 ; (1918) 2 K. B. 123 ;
Ruys v. *Royal Exchange Insurance Company*, 8 Asp. Mar. Law Cas. 294 ; 77 L. T. Rep. 23 ; (1897) 2 Q. B. 135 ;
Tunno v. *Edwards*, 12 East, 488 ;
Western Assurance Company of Toronto v. *Poole*, 9 Asp. Mar. Law Cas. 390 ; 88 L. T. Rep. 362 ; (1903) 1 K. B. 376 ;
Woodside v. *Globe Marine Insurance Company Limited*, 8 Asp. Mar. Law Cas. 118 ; 73 L. T. Rep. 626 ; (1896) 1 Q. B, 105 ;
Phillips on Insurance, sects. 1530 and 1531.

Cur. adv. vult.

Nov 14.—ROCHE, J. read the following judgment :—The plaintiffs were the assured under a voyage policy of marine insurance dated the 7th Nov. 1917, underwritten by the defendants. The assurance so effected was in respect of the steamship *Igotz Mendi*, and was against marine and war risks, including in the latter risks capture by the enemies of Great Britain. The voyage was at and from Delagoa Bay, *viâ* Colombo, to Calcutta and until sailed. The interest of the plaintiffs was valued at 30,000*l.* on profit on charter so valued. The policy also provided that the insurance was against total and (or) constructive loss of steamer only, and excluded all claims arising from delay and (or) deterioration, and (or) loss of market in respect of war only.

The facts as to the plaintiffs' interest and as to the charter referred to in the policy were as follows : The plaintiffs are merchants. They bought or held in Calcutta some 6000 tons of jute. These goods they sold to Spanish buyers under contracts which involved shipment of the goods at Calcutta for Valencia. and also involved as an essential term that the latest time for performance was the month of Jan. 1918. To implement these contracts the plaintiffs on the 18th Sept. 1917, chartered the Spanish steamship *Igotz Mendi*, then trading, and about to arrive at Delagoa Bay, to proceed to Calcutta to load the jute in question and to proceed thence to Valencia to deliver her cargo. The cancelling date in the charter was the 31st Dec. 1917. The plaintiffs anticipated a profit from the venture exceeding 30,000*l.*, and effected the insurance accordingly. The *Igotz Mendi* herself was not insured by her owners against either marine or war risks. On the 4th Nov. 1917, the *Igotz Mendi* sailed from Delagoa Bay with a cargo of coal for Colombo, and after discharging at Colombo should have arrived in Calcutta during the first week of December. But December and January passed without any news of the vessel, and it was naturally supposed that she had met with some fatal mishap. On the 23rd Feb. 1918, application was made to Lloyds by the plaintiffs to secure the vessel being posted as missing, but on the 27th Feb. 1918 before she was so posted, news arrived that she had stranded on the coast of Denmark in a fog whilst in charge of a German prize crew. The shipowners being uninsured had, naturally, neither right nor duty to give any notice of abandonment or to take any such steps as would have been appropriate had they been insured.

The facts as to the disappearance and reappearance of the vessel were these : On the 10th Nov. 1917, the *Igotz Mendi* was captured in the Indian Ocean by the German raider, or auxiliary cruiser, *Wolf*. If excuse for the capture had been required by the captors, the cargo was, in fact, by its nature and destination contraband. A prize crew from the *Wolf* was placed on board the *Igotz Mendi*, as well as a large number of persons, passengers from other prizes which the *Wolf* had taken and sunk. The adventures of captor and prize in the Indian, Atlantic, and Arctic Oceans were told before me by one of these passengers, Mr. Trayes, and are also set out in a record of a maritime inquiry which was admitted in evidence. The narrative was of considerable interest, but for the present purpose only a few facts need be stated. The *Igotz Mendi* was of obvious use to the *Wolf* as a collier consort and as a relief carrier of the numerous passengers or prisoners, 700 in number, collected by the *Wolf* from her sunk prizes. She was therefore disguised by a new coat of paint of the Allies' grey colour, and the two vessels voyaged to various places, sometimes in company and sometimes separate. At one point in the voyage, which was now directed towards the coast of Norway and thence to Germany through the North Atlantic, vessels were sighted which gave rise to some expectation of recapture. The Spanish mate was thereupon emboldened to throw overboard the bombs which had been put on board of the *Igotz Mendi* by the Germans, to be used if required for the destruction of the prize. The mate was sentenced to a long term of imprisonment in Germany and to a fine. The prize crew was strengthened and a new supply of bombs was placed on board. The fog and ice of the Arctic circle were braved to avoid the blockading squadrons and patrols ; and internment in Germany, which was now announced as the destination of captives on board the *Igotz Mendi*, seemed their imminent fate, when, on the

24th Feb., fog and a grounding in Danish territorial waters, and the intervention of the Danish authorities, secured the release of the passengers. The *Wolf* herself had by this time arrived at Kiel, and on the 27th Feb., as it would rather seem in the expectation that salvage could not be effected owing to the prevailing bad weather, the German prize crew left the *Igotz Mendi*, as, indeed, did the Spanish crew, after rehoisting the Spanish flag. A salvage company was employed by the shipowners, and succeeded in refloating the vessel on the 9th March. She was considerably damaged, and was under temporary and permanent repair in Denmark and Spain until the month of Sept. 1918.

In these circumstances the plaintiffs claimed to be paid as on the amount insured, and on the 14th March 1918 issued their writ in this action. The case for the plaintiffs, shortly stated, was that the *Igotz Mendi* was, by reason of the capture, a constructive total loss, and that by reason of such capture and constructive total loss they had suffered a total loss of their profit on the charter-party. They did not suggest that they had given any notice of abandonment, but said that as regards their interest there was nothing to abandon and no notice was required. The defendants agreed that this was so, and did not rely upon the absence of a notice of abandonment by the plaintiffs.

The defence was in substance rested on three grounds: (1) That there never was a constructive total loss of the ship; (2) that if there was, restoration before action precluded a claim; (3) that the claim arose from delay and was excluded by the express terms of the policy.

As to the first point, it was said that to constitute constructive total loss of the ship two constituent elements were necessary: (*a*) A state of facts external to the shipowner such as to warrant an election by him to treat the loss as total; and (*b*) an election by the shipowner to so treat the loss expressed by a timely notice of abandonment.

The defendants' case was that neither element was present in this case. With regard to the external facts the matter is now regulated by sect. 60 of the Marine Insurance Act 1906, which provides, amongst other things, that there is a constructive total loss where the assured is deprived of his ship or goods by a peril insured against, and it is unlikely that he can recover the ship or goods. In *Polurrian Steamship Company v. Young* (*sup.*) the Court of Appeal decided that this provision imposed a more onerous proof upon the assured than the case law on the subject had imposed, and that the test of unlikelihood of recovery had now been substituted for uncertainty of recovery. I, of course, act upon that decision. It was conceded that in this case the ship was out of the owners' possession for three and a half months, but it was contended that it was never securely in the possession of the Germans.

It was asserted, I hope and believe with truth, that the squadrons and patrols of the navies of Great Britain, her Allies, and associates were numerous and vigilant, and that recapture was probable or not unlikely. On the other hand, it is to be remembered that the seas are wide and the nights were dark and long during the initial stages of the voyage, and, apart from any knowledge which may be permitted to a court with regard to German practices in the destruction of merchant shipping, the evidence as to the sinking of all other prizes by the *Wolf* and as to the placing of bombs on board of the *Igotz Mendi* convinces me that the *Igotz Mendi* would not, save by some unexpected accident, have survived to be recaptured. I regard her actual recovery as due to a somewhat surprising combination of circumstances, and I find that the test laid down by Kennedy, L.J. in *Polurrian* v. *Young* (*sup.*), is satisfied, and I hold that it was not merely uncertain whether her owners would recover her in a reasonable time, but that the balance of probability was that they would never recover her at all.

With regard to notice of abandonment by the shipowner, there was no dispute that in general such a notice is necessary; the point of debate was whether the giving of such notice is an integral element of a constructive total loss, or is rather a condition precedent to a claim by the owner of ship or goods based upon such a loss. There are expressions in the Marine Insurance Act, sects. 60 and 61, which support, some one view, some the other.

A large number of cases were cited to me containing sentences of a like variable import, but it was contended by the defendants that the balance of authority was in their favour. I agree that modes of expression have been used by judges which support the defendants' argument, but other, and often the same, judges elsewhere use expressions of the contrary import. In truth, it is not satisfactory or useful to treat as definitions mere modes of expression adopted by judges whose minds were not directed to definition or to the distinction now in question. As to real authority, in my judgment it is against the defendants. In particular the *ratio decidendi* in *Rankin* v. *Potter* (*sup.*) is opposed to their contention—see especially the judgment of Lord Chelmsford, and the cases cited by him at pp. 156 158 of the report in that case. A condition precedent to a right of action may well be dispensed with in a proper case, but such dispensation would seem to be a nugatory and indeed impossible process to apply to an essential element of a thing itself. As regards the present action the scope of the defendants' argument is curious and far-reaching. Their counsel when pressed on the point did not shrink (and in this they were entirely logical) from the conclusion that here, since the shipowner was uninsured and since in that state of facts no notice of abandonment by him was possible, there never could be a constructive total loss of this ship and the risk never attached. I do not find myself in agreement with the defendants' reasoning or their conclusions, and I accordingly decide against their contention on this part of the case.

The next point taken on behalf of the defendants—namely, that the restoration of the ship to the shipowner before this action was brought renders the claim unmaintainable—really depends upon much the same line of reasoning as that which I have dealt with in connection with notice of abandonment. This action is not by the shipowners, but the defendants' contention really involved a view that under this policy the real agreement between the parties was that the plaintiffs' right to indemnity was measured by the shipowners' right and ability to recover as for

a constructive total loss. If this were the agreement the plaintiffs would fail, since it is well established that, at all events where there has been no acceptance by underwriters of an antecedent notice of abandonment, restoration of a captured ship before action brought disentitles a shipowner from bringing or succeeding in an action to receive payment as for a constructive total loss: (see *Ruys* v. *Royal Exchange Assurance Corporation* (*sup.*), and the cases there discussed. But although there are dicta in reported cases—*e.g.*, those made by the judges during the argument in *Tunno* v. *Edwards* (*sup.*), upon the strength of which it can be contended that the reason of this rule is that there is no constructive total loss until the eventual fate of a ship is determined, yet I think that this argument is contrary to a large body of decisions: (see in particular *Andersen* v. *Marten*, *sup.*, and the exhaustive review of the earlier decisions by Kennedy, L.J. in *Polurrian Steamship Company* v. *Young*, *sup.*); see also Phillips on Insurance, vol. 2, ss. 1530 and 1531). What is perhaps more important is that the argument is contrary to the Marine Insurance Act 1906, s. 60 (*sup.*), which makes probability and not the event the test. The true view, in my judgment, is that restoration precludes recovery, not because in such a case there never was a constructive total loss, but because an assured cannot under a contract of indemnity, although he may at one time have suffered a loss, recover in respect of such loss if before action it has already been made good to him. Here no such objection to recovery can be opposed to the plaintiffs' claim. I have already held that there was a constructive total loss of the *Igotz Mendi* by her capture, and before the ship was restored to the owners such capture resulted in a total loss to the plaintiffs of their rights and profit under the charter. In short, the event agreed upon as necessary to give a right to indemnity had happened, and had irrevocably caused the loss of the subject-matter of the insurance. In these circumstances, as the restoration of the vessel itself to its owners did nothing to extinguish or minimise the plaintiffs' loss, so also it cannot, in my judgment, operate to extinguish or to bar the plaintiffs' claim.

There remains the defence based upon the fact that claims arising from delay were excluded by the express terms of the policy. It was said that it was the lapse of the time during which the *Igotz Mendi* was in German hands that caused the loss, and that such lapse of time was delay within the meaning of the exceptions. The reasoning of Bailhache, J. in *Russian Bank for Foreign Trade* v. *Excess Insurance Company* (*sup.*) was relied upon in support of this part of the defendants' case. The decision of Bailhache, J. in that case has been affirmed by the Court of Appeal (119 L. T. Rep. 733; (1919) 1 K. B. 39) on a ground which has no bearing on the present case. I understand that the Court of Appeal did not consider, or, at any rate, did not express any opinion, whether they adhered to the view of Bailhache, J. on this point of the delay due. It is certainly, therefore, undesirable and, in my view, it is also unnecessary that I should express any opinion on that matter. It is sufficient to say that, in my judgment, this is a very different case. In that case, the adventure or voyage upon which certain goods were to be despatched and on which they were insured was frustrated. The cause of frustration was not a capture or loss of the ship as it was here, but a requisition of the ship amounting at most to a restraint. Moreover, in that case the subject matter of insurance and the thing for which a loss was claimed was a quantity of goods. In this case it is in substance the venture itself which is insured. In that case it was decided that in the circumstances indicated the exception of claims arising from delay barred the claim for the loss of the goods based on the loss of the particular adventure which was in progress. Here I have decided that the *Igotz Mendi* was not merely delayed, but was captured and lost, although she was afterwards found and recovered, and I have decided that, in consequence, the venture, being the profit on charter, was lost, and I also decide that the claim to recover for that loss is not a claim arising from delay. I give judgment for the plaintiffs for the amount claimed, with costs.

Judgment for the plaintiffs.

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

Solicitors for the defendants, *William A. Crump and Son.*

House of Lords.

Nov. 11 *and* 12, 1918.

(Before Viscount Haldane, Lords Shaw, Sumner, and Wrenbury.)

Fred Drughorn Limited v. Rederi Aktiebolaget Transatlantic. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Principal and agent—Charter-party entered into by person in his own name and described as "the charterer"—Undisclosed principal's right to sue—Evidence contradicting written contract—Admissibility.

By a charter-party dated the 8th Feb. 1910 *it was agreed between the appellants, who were described as the owners of a named ship, and L. as "the charterer" thereof that there should be a charter of the ship for a specified period.*

In Dec. 1912 *an action to recover damages for alleged breach of the charter-party was brought against the appellants, L. being named as plaintiff. While the action was pending L. died and an order was obtained substituting as plaintiffs the present respondents, who were a Swedish company. By the amended points of claim the company alleged that L. effected the charter-party as their agent and that they were his undisclosed principals. They proposed to adduce oral evidence to establish this assertion.*

The point was taken that such evidence was inadmissible because it would be evidence to contradict the written contract between L. and the appellants wherein L. was described as "the charterer."

Held, that the description in a charter-party of a person as "the charterer" did not necessarily denote, as did the description "owner" in like circumstances, a position which alone that person

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

could fill. There was nothing in the case which excluded the general rule that parol evidence might be adduced to show that a person who had entered into a contract without mentioning that he did so as agent was in fact agent for undisclosed principals. It followed that the evidence was admissible.

Humble *v.* Hunter (12 *Q. B.* 310) *and* Formby Brothers *v.* Formby (102 *L. T. Rep.* 116) *distinguished.*

Decision of the Court of Appeal (118 *L. T. Rep.* 424; (1918) 1 *K. B.* 394) *affirmed.*

APPEAL from an order of the Court of Appeal, reported 118 L. T. Rep. 424; (1918) 1 K.B. 394, which affirmed, an interlocutory order made by Lush, J. The material portion of the order which was appealed against, and which the Court of Appeal affirmed, consisted of a ruling by the learned judge during the progress of the hearing of the action that it was competent for the plaintiffs (the present respondents) to adduce certain oral evidence in support of their claim to be undisclosed principals and entitled in the circumstances to maintain the action.

Compston, K.C. and *Jowitt* for the appellants.

MacKinnon, K.C. and *Simey* for the respondents.

The House, without hearing counsel for the respondents, dismissed the appeal.

Viscount HALDANE.—This is an appeal from a judgment of the Court of Appeal which affirmed a judgment of Lush, J. The only question before us is whether evidence was admissible on a certain point. The wording of the order might, if unexplained, give some countenance to the proposition that the courts had intended to pronounce upon the effect of the evidence so admitted whether rightly admitted or not; but it is agreed between counsel, and it is plain from what was said by Lush, J. himself subsequently, that that was not the intention. Therefore the only question before the House upon which the House has to pronounce is whether the evidence sought to be admitted was evidence which was in law admissible.

By the law of England, if B. contracts with C., *primâ facie* that is a contract between these two only; but if at the time B. entered into the contract he was really acting as agent for A., then evidence is generally admissible to show that A. was the principal, and A. can take advantage of the contract as if it had been actually made between himself and C. That is what is meant by ratification.

The limits within which that doctrine is applicable were fully examined in this House in the case of *Keighley, Maxted, and Co.* v. *Durant* (7 Asp. Mar. Law Cas. 418; 84 L. T. Rep. 777; (1901) A. C. 240). No question arises with regard to the applicability of the doctrine in this case, because what is said is that the respondents can prove that as a matter of fact B. was acting as agent for them in the case before us at the time when he entered into the contract.

But the principle is limited by another consideration, about which again there is no doubt, and which is a principle the applicability of which to the present case is beyond question. In *Humble* v. *Hunter* (*sup.*) it was approved, although it was not necessary to give a decision on the point, and also in *Formby Brothers* v. *Formby* (*sup.*) and in other cases. These are authorities for the proposition that evidence of authority of an outside principal is not admissible if to give such evidence would be to contradict some term in the contract itself. It was held in *Humble* v. *Hunter* (*sup.*) that where a charterer dealt with somebody described as "the owner," evidence was not admissible to show that somebody else was the owner. That is perfectly intelligible. The question is not before us now, but I see no reason to question that where you have the description of a person as the owner of property, and it is a term of the contract that he should contract as owner of that property, you cannot show that another person is the real owner. That is not a question of agency—that is a question of property.

In the same way in *Formby Brothers* v. *Formby* (*sup.*) the term was "proprietor," and "proprietor" was treated, in the opinion of the Court of Appeal, as on the same footing as the expression "owner." But we are not dealing with that case here. The principle remains, but the question is whether the principle applies to a charter-party where the person who says that he signed only as agent describes himself as the owner.

There may be something to be said from the heading of the charter-party in this case, and the reference to the company, which claims to have been his principal, for the proposition that, reading the document as a whole, there is evidence that he intended to convey that he was acting as agent for somebody else; but, whether that is so or not, the term "charterer" is a very different term from the term "owner" or the term "proprietor." A charterer may be and *primâ facie* is merely entering into a contract. A charter-party is not a lease—it is a chattel that is being dealt with, a chattel that is essentially a mere subject of contract, and, although rights of ownership may be given under it, *primâ facie* it is a contract for the hiring or use of the vessel. Under these circumstances it is in accordance with ordinary business common-sense and custom that charterers should be able to contract as agents for undisclosed principals who may come in and take the benefit of the charter-party.

But it is said that in this charter-party the terms are such as to exclude that notion. Why is that said to be so? Because the term "charterer" is used. I have already commented upon that. It is said that the term "charterer" was meant simply to describe a particular person who is to carry out the nomination of arbitrators and everything else which is contained in the charter-party—to give orders which can only be given by one person, and that for the working out of the charter-party it is essential to treat the person so contracting as designated as a person whose identity cannot be varied or contradicted.

The answer to that is that the principal may take that place, and that the company, in this case acting through its agent, whatever that agent may be, will be in the same position as the charterer contracting originally. There is nothing in that proposition inconsistent with the stipulations of this charter-party, and therefore it appears to me that the qualifying principle of *Humble* v. *Hunter* (*sup.*), that you shall not contradict the instrument by giving evidence of agency, has no application in this case.

The way in which the point arose was this: The owners of the ship, the appellants, dissatisfied with the way in which the ship was being handled by the charterers, withdrew it from his service, with the result that the original charterer, Lundgren, began an action in the King's Bench Division to recover damages. In that action the respondents, alleging that they were the principals and had been throughout, were substituted as plaintiffs, and apparently no question was raised at the moment of their substitution, which would have been the natural time to raise the point, but later on it was proposed to give evidence, and evidence was tendered to show that the respondent company were at the time of the charter-party being entered into the undisclosed principals of Lundgren, and it was upon that application that the question now before the House arose.

For the reasons I have already given I think the view taken in the Court of Appeal was right, and that it was properly held, both by Lush, J. and by that court, that evidence could be properly tendered to prove the agency of Lundgren when he originally entered into this charter-party.

I therefore move your Lordships that the appeal be dismissed, and dismissed with costs.

Lord SHAW.—I agree with what your Lordship on the Woolsack has said, subject to these two observations: I do not think that in this case I am called upon to express any opinion as to the decision that was reached in *Humble* v. *Hunter* (*sup.*) or in the case of *Formby Brothers* v. *Formby* (*sup.*). The time may arise when the principles of those two cases may have to be reviewed in this House.

My second observation is that I am not prepared to be held as in any sense agreeing with the decision arrived at by Rowlatt, J. in *Rederi Aktiebolaget Argonaut* v. *Hani* (14 Asp. Mar. Law Cas. 310; 118 L. T. Rep. 176; (1918) 2 K. B. 247).

With these observations, I agree in the course proposed by your Lordships.

Lord SUMNER.—I concur. In my opinion this charter cannot be considered as containing a stipulation that no one but Lundgren shall have the rights and liabilities of the charterer under it. I cannot see that the words "Wilh. R. Lundgren, of Gothenburg, charterer," designate Lundgren as the real and only principal, and as the only person who is to have the charterer's rights and obligations under the charter. The contract is on the ordinary printed form. There is a notice on the face of the document that Lundgren is manager of the line which the Rederi Aktiebolaget carry on. Though this forms no part of the contract, the charterers' rights and obligations are in no instance inconsistent with their exercise or performance by Lundgren on behalf of undisclosed principals, especially as the principals, an incorporated company, must in any case act by some officer. Unless his contract is read as stipulating that Lundgren charters for himself only, the appellants fail. I think it cannot be so read. It states that Lundgren charters, and so he does; but it does not say that he is not chartering for others, and, if that is what he has done in fact, the law allows them to prove it.

Rederi Aktiebolaget Argonaut v. *Hani* (*sup.*) was a case in which the charter-party contained different words—namely, "as charterers"—on which rightly or wrongly great stress was laid in the judgment, and I think it is distinguishable. *Humble* v. *Hunter* (*sup.*) and *Formby* v. *Formby* (*sup.*) were expressly decided as cases in which the contract itself truly construed excluded the application of the rule as to undisclosed principals. There is a clear distinction between words in a contract which can be construed as saying, "A. B., who prior to this contract, was and who under it is and will be the single owner," and words which can only mean "A. B., who by this contract becomes liable to the obligations and entitled to the rights which this contract allots to the charterers." I think these cases are not in point.

That being so, I express no opinion at present about them. Accordingly I do not see how the evidence objected to contradicts the contract. Lundgren as charterer, albeit on behalf of others, was personally liable to perform the obligations which the contract imposed on the charterers. The fact that he contracted for others was consistent with the contract, and evidence to prove it was admissible.

Lord WRENBURY.—I agree that the evidence is admissible. I think that Lush, J. and the Court of Appeal were right, and that this appeal should be dismissed with costs.

Solicitors for the appellants, *J. A.* and *H. E. Farnfield.*

Solicitors for the respondent, *William A. Crump* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Feb. 17, 1919.

(Before BANKES, WARRINGTON, and DUKE, L.JJ.)

OMNIUM D'ENTERPRISES AND OTHERS *v.* SUTHERLAND. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Chartered ship requisitioned when built—Charter-party suspended during requisition—Sale of ship—Repudiation of charter-party by owner—Inability to perform charter-party.

The defendant chartered a steamer to the plaintiffs for three years from the time she was built and fit to sail, provided that "If the steamer should be requisitioned by the Admiralty, owners and charterers are to be held harmless, and any time during which the steamer is so requisitioned shall be for owners' account, and hire under this contract shall cease for the period. The contract, however, shall be prolonged by such period." The ship was built and requisitioned. During the requisition, and while the charter-party was suspended during the requisition, the defendant sold the ship. No arrangement was made with the buyers that the charter-party should be performed.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Held, that the defendant had put it out of his power to hand over as of right the ship to the charterers at the end of the requisition, and that he had repudiated the contract.

Fratelli Sorrentino *v.* Buerger (13 *Asp. Mar. Law Cas.* 164; 113 *L. T. Rep.* 840; (1915) 3 *K. B.* 367) *distinguished.*

Decision of Rowlatt, J. affirmed.

APPEAL by the defendant from a judgment of Rowlatt, J.

By a charter-party, on the Baltic and White Sea Conference form dated the 10th July, 1916, and made between the defendant, the owner, and the Omnium d'Enterprises, the charterers, the defendant agreed to let the steamer *Robert Bruce*, then building at Middlesbrough, to the Omnium d'Enterprises for the term of thirty-six months. By clause 5, the charterers were to pay as hire for the steamer twenty-one shillings on ascertained dead weight per calendar month, commencing from the time the steamer was fit to sail, and *pro rata* for any fractional part of a month, payment to be made in London monthly in advance. By clause 25 "should the steamer be lost either before or during the fulfilment of the charter, the owner was to provide another similar size class and description steamer on the same terms and conditions. By clause 26 the steamer was to be delivered when completed and fit to sail at Middlesbrough. By clause 30A, commission of 5 per cent. on the hire paid and earned under the charter was payable to Messrs. Grisar and Marsely, London (the second plaintiffs).

On the 21st April 1917 it was agreed between the parties in writing that "should the steamer be requisitioned by the British Admiralty, owners and charterers are to be held harmless, and any time from the date of this agreement which the steamer may be used by the British Admiralty during the existence of this contract shall cease for such period, the contract however shall be prolonged by such period or periods as the steamer may be under requisition so that the full three years' contract between owners and charterers shall be carried out."

It was also agreed that the above clause was to be applicable to the charter instead of a clause in the charter whereby the Omnium d'Enterprises was to pay hire whether the steamer was requisitioned or not.

By their points of claim the plaintiffs said that in breach of the charter-party the defendant, in April 1918, and whilst the vessel was under requisition to the Admiralty, sold the vessel to the Palace Shipping Company Limited, and (or) so sold the vessel without informing that company of the charter-party or providing with them for the due fulfilment of the charter-party, and the defendant thereby wrongfully repudiated and determined the charter-party and put it out of his power to perform the same, and the first plaintiffs had lost the benefit of the charter-party, and the second plaintiffs their right to commission.

By his points of defence the defendant denied (*inter alia*) that he had committed any breach of the charter-party.

Rowlatt, J. held that the defendant had repudiated the contract.

The defendant appealed.

Neilson for the appellant.

R. A. Wright, K.C. and *Le Quesne* for the Omnium d'Enterprises and Sir *R. Aske* for Messrs. Grisar and Marsely were not called upon.

BANKES, L.J.—Mr. Neilson has done his best, but it is quite a hopeless appeal. The claim by the two plaintiffs to recover damages is firstly, damages for breach of a charter-party, and, secondly, damages because by reason of the defendant's action they have been deprived of their commission.

The facts are in a very short compass. The defendant was in a position to dispose of a steamer, then in building, and on the 10th July 1916 he chartered that vessel to Omnium d'Enterprises for three years from the time the steamer has "completed building and fit to sail" at a certain chartered rate per month. The charter-party contained a clause: "Should the steamer be requisitioned by the British Admiralty, owners and charterers are to be held harmless, and any time from the date of this agreement which the steamer may be used by the British Admiralty during the existence of this contract. The contract, however, shall be prolonged by such period or periods, as the steamer may be under requisition so that the full three years' contract between owners and charterers shall be carried out." The ship was completed, and she was requisitioned, and it is plain that by the terms of the charter-party she remained under charter to these plaintiffs, in spite of the requisition, but the operation of the charter-party, in the sense of the giving possession of the vessel to the plaintiffs, during the period of the requisition was suspended.

During the requisition, and while the charter-party was thus suspended, the defendant sold the vessel, and when the plaintiffs found that out they got into correspondence with the defendant's representatives with a view to ascertaining whether the purchasers would undertake to stand in the defendant's shoes and allow the charter-party to be performed, but no arrangement could be made at that time, and the writ was issued.

The question which the learned judge had to decide was whether the defendant's action in selling the steamer—if I may use the expression—"out and out" was a repudiation by him of the contract, and the learned judge held that it was. With that view I entirely agree. The defendant put it out of his power to perform his part of the contract in this sense, that from the moment he sold the steamer it was no longer within his power as of right to hand the steamer over at the completion of the requisition to the charterers. He says now: "When the time comes I daresay I shall get hold of her; in fact, I feel sure I shall get hold of her"; but that is a very different thing from saying: "She is mine; when the time comes you shall have her." As I said in the course of the argument, that is substituting a chance for a certainty.

We have been referred to *Fratelli Sorrentino* v. *Buerger* before Atkin, J. (13 Asp. Mar. Law Cas. 164; 112 L. T. Rep. 294; (1915) 1 K. B. 307), and, in my opinion, that tells strongly against Mr. Neilson's argument. Certainly in the Court of Appeal it does, because in the Court of Appeal (113 L. T. Rep. 840; (1915) 3 K. B. 367) the decision proceeded, and proceeded only, on

the ground that the owners of the vessel in that case, although they had sold the vessel, had reserved to themselves the power of performing the contract personally. It may be it is a difficult thing to understand how they had done it, but the umpire found that as a fact, and it was on that finding that every member of the Court of Appeal proceeded. I have already called attention to what Swinfen Eady, L.J. said, and attention has been called to what Phillimore, L.J. said. When I was dealing with that very point I tried to imagine cases in which a sale would not operate as a repudiation of the contract. I said: "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 obligations 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." And I think it appears plainly from all three judgments in the Court of Appeal that all three members of the court were of opinion that a sale by the owner, even if he placed the purchaser under an obligation to perform the charter party, would have amounted to a repudiation. And in this case the vendor did not even do that. He sold the vessel out and out. Under these circumstances, in my opinion, the judgment of the learned judge was quite right, and this appeal fails.

WARRINGTON, L.J.—I agree, and I have nothing to add.

DUKE, L.J.—I agree.

Solicitors for the appellant, *Williamson, Hill, and Co.*, for *Ingledew and Sons*, Cardiff.

Solicitors for the respondents, *William A. Crump and Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 17 *and* 21, 1919.

(Before BAILHACHE, J.)

BRITAIN STEAMSHIP COMPANY LIMITED *v.* THE KING; THE PETERSHAM. (*a*)

Shipping — Admiralty Charter-party T. 99 — *Requisitioned vessel—Navigating without lights—Admiralty Regulations—Collision—Loss of vessel—Marine risk—F.c. and s. clause—"Hostilities or warlike operations"—Liability of Admiralty.*

The steamship P. *was requisitioned by the Admiralty on the terms of the charter-party known as T.* 99, *clause* 19 *of which provided that the risks of war "taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive clause: warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."*

While the vessel was under requisition, she was being navigated without lights at night in accordance with Admiralty regulations and came into collision with another vessel which was also being navigated without lights under the same regulations and was lost. There was no negligence on the part of either vessel.

Held, that the Admiralty regulation that vessels should navigate at night without lights greatly increased the risk of collision, but it was still a marine risk, and loss due to compliance with that regulation by a vessel not otherwise engaged in a warlike operation is not a loss due to a warlike operation and is not excluded by the clause 19 *of the charter-party from an ordinary policy of marine insurance.*

PETITION OF RIGHT in the Commercial List.

The suppliants brought the petition of right to recover compensation for the loss of their steamship, the *Petersham*, while she was under requisition by the Admiralty on the terms of the charter-party known as T.99. While the vessel was in the service of the Admiralty on a voyage from Bilbao to Glasgow with a cargo of iron ore she was being navigated without lights at night in accordance with Admiralty regulations, and on the night of the 6th May 1918 she was run into and was sunk by another steamer which was also being navigated without lights under the same Admiralty regulations. It was admitted that in the circumstances the collision could not have been avoided by the exercise of reasonable care and skill on the part of either steamer.

Clause 18 of the charter-party exempted the Admiralty from liability for sea risks, including collision.

Clause 19 was as follows:

The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after the declaration of war.

The suppliants claimed that the loss of the steamship *Petersham* was a consequence of hostilities or warlike operations, and that the Admiralty were therefore liable for the loss, under clause 19 of charter-party T. 99.

MacKinnon, K.C., *R. A. Wright*, K.C., and *Dunlop* for the suppliants.

The *Attorney-General* (Sir Gordon Hewart, K.C.) and *Raeburn* for the Crown.

The following cases were cited:

Becker Gray and Co. v. *London Assurance Corporation*, 14 Asp. Mar. Law Cas. 165; 117 L. T. Rep. 609; (1918) A. C. 101;

British and Foreign Steamship Company v. *The King*, 14 Asp. Mar. Law Cas. 121, 270; 117 L. T. Rep. 94; 118 L. T. Rep. 640; (1917) 2 K. B. 769; (1918) 2 K. B. 879;

(*a*) Reported by T. W MORGAN, Esq., Barrister-at-Law.

Ionides v. *Universal Marine Insurance Company*, 1 Mar. Law Cas. (O. S.) 353; 8 L. T. Rep. 705; 14 C. B. N. S. 259.

Cur. adv. vult.

Feb. 21.—BAILHACHE, J. read the following judgment:—This is a petition of right by the suppliants, the owners of the steamship *Petersham*, praying that they may be compensated for her loss under the following circumstances.

The *Petersham*, while under requisition by the Admiralty was on the 6th May 1918, on a voyage from Bilbao to Glasgow with a cargo of iron ore, She was navigating without lights under Admiralty regulations, and when off Trevose Head she came into collision with the steamship *Serra* which was on a voyage from Swansea to Bilbao with a cargo of patent fuel and was also navigating without lights under the same regulations. The *Petersham* was sunk by the collision which was due proximately and directly to the fact that neither vessel was showing her lights.

The *Petersham* was requisitioned on the terms of charter-party T. 99, which contains a clause, 18, exempting the Admiralty from liability for sea risks, including collision, and a clause, 19, which is in these terms: "The risks of war which are taken by the Admiralty are those risks which must be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

The owners of the *Petersham* contend, and the Crown denies, that the navigation of the *Petersham* without lights was a warlike operation, and that the Admiralty are liable under clause 19. I have therefore to decide whether a collision caused in the way stated would be excluded from an ordinary English policy of marine insurance by the exceptions enumerated in clause 19. The words "warlike operations" were, I think, first introduced into the f.c. and s. clause in 1898, or thereabouts, and were intended to protect marine underwriters against warlike operations carried on, not by the vessel insured, but by other persons *dehors* the ship.

When, however, those words are adopted, as they are in this case, they must be taken to cover warlike operations, not only of princes and peoples outside the ship, but of the ship itself. Primarily, I think they refer to the uses to which the ship is, for the time being, put. The Admiralty requisitioned ships for use as they thought proper, and have constantly employed them in operations of a distinctly warlike character, as, for example, for coaling the navy at sea, or, as in the *St. Oswald* case, for evacuating troops from Gallipoli. In such cases a loss due directly to the warlike operations is covered by the words in question, although the actual last cause of the loss is some sea peril, such as collision. In such a case, too, it is plain that everything done by the ship for the better effecting the warlike operation in which she is engaged is part of that operation, whether it be steaming full speed ahead without lights, or whatever other steps are deemed necessary for the purpose.

Although this is, I think, their primary meaning, yet they may go beyond that, and however peaceful the immediate business upon which a ship is engaged—*e.g.*, if she is sailing as one of a convoy—she is engaged, in my opinion, in a warlike operation. There the assembling, presence, protection, and movements of the King's ships protecting the convoy are a warlike operation, and both convoyed and convoying ships are taking part in it, and its character attaches to the whole flotilla, and covers the whole operation. Cases such as I have indicated appear to me to give rise to no difficulty. They are plainly covered. In some cases it might be difficult but unnecessary to decide whether the warlike operation is that of the ship herself or of an outside agency—*e.g.*, where two ships chased by a submarine pursue zigzag courses and collide. There it might be said that the zigzag courses taken are warlike operations. It would not be necessary so to decide, because such a collision as I have supposed would be clearly due to warlike operations either of the ships in collision or of the chasing submarine, and for insurance purposes the result would be the same.

None of these cases is like the present, and I must try to get to closer quarters with it. During the war it has been the practice of the Admiralty to direct vessels sailing upon peaceful ventures to take devious and unaccustomed routes to avoid submarine infested areas. Suppose a dangerous route to be prescribed, from which lights had been removed by the Admiralty to deceive the enemy, and a ship taking such a route without negligence runs ashore and is lost as the direct result of the removal of the lights, would such a loss be covered by the words "warlike operations"? I think it would, but not because the ship was carrying out a warlike operation. The warlike operation in that case would be the removal of the lights.

Take another case—a vessel, taking an unusual and Admiralty prescribed course, runs without negligence upon floating wreckage or an uncharted rock and is lost: would that loss be covered by the words "warlike operation"? I think not, for the reason that, in my opinion, the mere taking of the prescribed route by a vessel engaged upon a peaceful errand is not a warlike operation. This last illustration brings me close to the question in this case. It is not suggested that the Petersham's occupation at the time of her loss was other than peaceful. In following that occupation she was obeying Admiralty regulations to sail at night without lights. These regulations were of a perfectly general character, and not issued to her specifically, or with reference to the voyage which she was on. Sailing without lights at night was a precautionary measure to avoid submarine attacks, imposed by the Admiralty upon all ships, just as was the taking an unusual course. There is no evidence of the presence of submarines at the time of collision, no suggestion that any had been sighted, still less that she was being chased by one; and the question I have to answer, in all its naked simplicity, is this: Does the mere fact that, in order to avoid the common danger of attack by submarines, a vessel upon a non-warlike errand in obedience to Admiralty regulations sails without lights, constitute a warlike operation? In my opinion it does not.

I am very sensible that in arriving at this conclusion, I am differing from expressions of opinion by other judges whose opinions are entitled to at least as much weight as my own. Rowlatt, J. thought otherwise in the *St. Oswald* case. In that case, however, he had not the point before him in its present form. In that case, the *St. Oswald* was actually engaged in a warlike operation, and if that case had been before me I should, I hope, have decided it as he did.

Roche, J. had the very point before him, in the case of *Inui Gomei Kaisha* v. *Artolico* reported in Lloyds List of the 20th July 1918, and considered that the sailing without lights at night in defiance of the rules of navigation was a warlike operation but his observations, in view of his actual decision were *obiter*.

There remains the *St. Oswald* case in the Court of Appeal (*British and Foreign Steamship Company* v. *The King*, 14 Asp. Mar. Law Cas. 121, 270; 118 L. T. Rep. 640; (1918) K. B. 879), where the court affirmed Rowlatt's, J. decision. I have read that decision with anxious care and I have come to the conclusion, to use the words of Scrutton, L.J., that that case does not decide that every collision where the vessels are steaming without lights is a war risk, or that steaming without lights by Admiralty orders is always a warlike operation.

I naturally feel great doubts as to whether I am right, but I think it my duty to give effect to the view I hold.

In my judgment the Admiralty regulation that vessels should navigate at night without lights greatly increased the risk of collision, but left it a marine risk, and loss due to compliance with that regulation by a vessel not otherwise engaged in a warlike operation is not a warlike operation and is not excluded by clause 19 of charter-party T. 99 from an ordinary English policy of marine insurance.

Judgment for the Crown.

Solicitors for suppliants, *Holman, Fenwick*, and *Willan*.

Solicitor for Crown, *Treasury Solicitor*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Dec. 3 *and* 20, 1918.

(Before Lord STERNDALE, President.)

THE NOORDAM. (*a*)

Prize Court—Contraband—"Innocent shippers"—Neutral consignees—Ultimate enemy destination—Seizure of goods on voyage — Refusal of consignees to accept shipping documents — Claim by shippers—Continuous voyage—Condemnation as prize.

Whilst on a voyage from America to Holland a Dutch steamship was seized and detained at F., a British port. Part of her cargo consisted of absolute contraband, which had been shipped by an American firm and consigned to the Netherlands Oversea Trust Company, who were acting on behalf of the real purchasers, a Dutch firm carrying on business in Holland. After the seizure of the vessel the real purchasers refused to take up the shipping documents and the property in the goods remained in the American shippers, who advanced a claim to the goods and resisted the application of the Crown for condemnation as prize, on the ground that they were innocent shippers. On behalf of the Crown it was contended that the real purchasers had had large dealings with the enemy in goods of the same character as the contraband goods which formed a part of the cargo of the vessel, and that their transactions were not of a bonâ fide character. It was given in evidence that these purchasers had put forward false books of account during the inquiries, and it was further alleged that if the goods had not been intercepted by the British authorities but had got into the possession of the purchasers, the vigilance of the Netherlands Oversea Trust Company would probably have been evaded and the goods would have been sent into Germany.

Held, that, under the circumstances of the case, there was an ultimate enemy destination intended for the contraband goods, and that, as the doctrine of continuous voyage applied—the innocence of the shippers making no difference—the goods must be condemned as prize.

THIS was a suit for the condemnation of a portion of the cargo of the *Noordam*, a Dutch steamship, on the ground that the same, which consisted of nine bales of cotton piece goods, were contraband.

The nine bales of cotton piece goods were shipped by Messrs. Amory, Browne, and Co., a firm of wholesale exporters of cotton goods carrying on business in New York. The bills of lading were dated the 16th March, 1916, and the goods were consigned to the Netherlands Oversea Trust Co., the destination being Amsterdam. The Netherlands Oversea Trust Co. were acting on behalf of a Dutch firm, Messrs. S. I. de Vries and Co., of Amsterdam, to whom Messrs. Amory, Browne and Co. had sold the cotton goods through a Dutch agent in the ordinary course of business. Cotton piece goods were declared absolute contraband on the 14th Oct. 1915.

Whilst on her voyage from New York to Amsterdam the *Noordam* called at Falmouth. She was detained there for the examination of her cargo, and although she was afterwards allowed to proceed on her voyage this permission was only granted on condition that the cotton goods which were in question should be returned to a British port to be placed in prize. In consequence of these proceedings the buyers refused to take up the shipping documents, so that the property in the same remained in Messrs. Amory, Browne, and Co., who put in a claim for them in the Prize Court, after a prior claim put in on behalf of Messrs. S. J. de Vries and Co., had been abandoned.

The claimants resisted the condemnation of the cotton goods, although absolute contraband, on the ground that there was no evidence that the goods were ever intended for an enemy destination. They were consigned to the Netherlands Oversea Trust Company, and this association undertook to demand guarantees from people with whom they had business connections that goods supplied through them as intermediaries should be used exclusively for consumption in

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

neutral countries and should not be forwarded to an enemy destination.

The Crown, on the other hand, contended that the real consignees, Messrs. S. I. de Vries and Co., had had large dealings in cotton goods with Germany, that they had endeavoured to conceal their trading transactions when their books were examined on behalf of the Cotton Export Committee, and that if they once had obtained possession of the goods the vigilance of the Netherlands Oversea Trust Company would have been evaded, so that Germany would have benefited by receiving the cotton. It was therefore submitted that the doctrine of "continuous voyage" applied.

Simonds for the Procurator-General.

Barrington-Ward for the claimants.

Inskip, K.C. and *Artemus Jones* for the Netherlands Oversea Trust Company.

The following cases were cited during the course of the arguments and the judgment:

The Kim, 13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215;
The Axel Johnson, 14 Asp. Mar. Law Cas. 150; 117 L. T. Rep. 412; (1917) P. 234;
The Kronprinzessin Victoria, 14 Asp. Mar. Law Cas. 391; 120 L. T. Rep. 75; (1919) A. C. 261.

Cur. adv. vult.

Dec. 20, 1918.—THE PRESIDENT.—In this case the Crown asks for the condemnation of certain cotton goods which were shipped from America to the Netherlands Oversea Trust Company who were acting on behalf of a firm called S. I. de Vries and Co. No doubt the Netherlands Oversea Trust Company took precautions to obtain the guarantees from S. I. de Vries and Co. to the effect that the goods should not be used in any improper way. But these precautions, as we know, do not always succeed, and it seems to me that the fact that the Netherlands Oversea Trust Company would have taken certain precautions before the delivery of the goods does not really affect the question in this case, and I think that I must consider it as if the consignments had been to S. I. de Vries and Co. If the consignments had been direct to S. I. de Vries and Co. it might have been that they would have had to give guarantees to the shipowners before they could get the goods, just in the same manner as they would have had to give guarantees to the Netherlands Oversea Trust Company.

The goods were shipped on behalf of a firm called Amory Browne and Co. in America. There is nothing said, and, indeed, as far as I can see, there is nothing that could be said against Messrs. Amory, Browne and Co. They sold the goods in the ordinary way of business, and they had not any intention of sending the same to an enemy destination. I take them to be what is called in this court "innocent parties"—that is to say, persons who were not attempting in any way to send goods to the enemy. The goods were intercepted. The way in which they were intercepted does not matter, and the result was that the bills of lading, which were in the hands of the shippers' bankers, were not taken up by the purchasers, and, therefore the property never passed from the shippers to the purchasers. The present claim, therefore, is made on behalf of the shippers, who have the property in the goods, and the question that has to be considered is whether these goods are subject to condemnation as being absolute contraband intended for an enemy destination.

It seems to me that this question has to be considered according to the circumstances as they would have been if the British authorities had not interfered and intercepted the consignment. Of course, when the goods had once been intercepted they had no longer an enemy destination, and could not get through. What I have to look at is: What was the destination, supposing nothing had happened to interfere with them? It seems to me pretty clear, under those circumstances, that if nothing had been done to interfere with the original destination what would have happened was this. The goods would have arrived and they would have been given up to S. I. de Vries and Co. by the Netherlands Oversea Trust Company after the Trust had taken such precautions as they thought fit with regard to the consumption of them. The price would have been paid, the documents would have been taken up, and the goods would have been delivered to S. I. de Vries and Co. That is the state of things which I have to consider.

I have said that there is nothing alleged in any way against the shippers in respect of any intention on their part to send goods to an enemy country. With regard to the real consignees and purchasers, S. I. de Vries and Co., the matter is different. I see that in one of the affidavits filed on behalf of the Crown it is stated: "S. I. de Vries and Co. are a large firm of wholesale and retail milliners. Their head office and showrooms are at Warmoesstraat 142-6, Amsterdam. They have also a number of branches in Amsterdam and other places in Holland. From the intercepted wireless messages exhibited hereto the firm appears to have business dealing with Brasch and Rothenstein, of Berlin, in connection with the import of American goods into Germany. The firm have also been transacting business through Simon S. Polak, a commission and textile manufacturers' agent of Amsterdam, who has acted as an intermediary for the delivery of Manchester goods through Dutch firms to Fishbein and Mendel, of Berlin. British merchants were subsequently advised to sever their connection with Polak. On the 30th March 1917, S. I. de Vries and Co. were proclaimed an enemy firm under the Trading with the Enemy (Extension of Powers) Act, 1915."

The wireless messages that were intercepted—which I need not read—show, or, rather, mention, S. I de Vries and Co. in connection with that firm mentioned, Brasch and Rothenstein, Berlin. But that is not by any means the most serious matter with regard to the firm, because I have an affidavit made by Mr. Maurice Charles Spencer, who is a chief clerk with Messrs. Price, Waterhouse, and Co., the well-known accountants, in which he states that he has examined this firm's books. The firm presented to him fabricated books and documents in order to conceal the fact that a large proportion of their transactions were with enemy countries and of the nature of sendgoods to enemy countries—getting them through when the British Government intended to stop them.

According to that affidavit those gentlemen produced to Mr. Spencer a large number of

entries showing transactions with a Dutch firm. He ascertained from inquiries which he made that such transactions had never taken place. On a subsequent examination of the books S. I. de Vries and Co. admitted that what they had placed before Mr. Spencer were absolutely fabricated and false accounts, and the real accounts, which he did see afterwards, showed that those transactions which they, by those fabricated accounts, had represented to be with a Dutch firm, were really transactions with enemy firms. S. I. de Vries and Co. also put in a claim in this case, in the first instance, but afterwards withdrew it. They may have withdrawn it because they knew perfectly well that nobody, in the face of these facts, would believe any evidence which they adduced in support of their claim; or they may have withdrawn it because they did not have the property in the goods. I do not know what the reason was, but the fact remains that the claim was withdrawn.

I have no hesitation in saying upon these facts that if these goods had got into S. I. de Vries and Co.'s hands they would, if that firm could possibly have managed it, have got into Germany.

It was the undoubted intention of S. I. de Vries and Co. in getting the goods to send them into Germany if they could. It may be that the Netherlands Oversea Trust Company, might have been able to prevent that. It may be that all their precautions might have failed, and that S. 1. de Vries and Co. might have got them into Germany. As I have said, I have no doubt that their intention was that they should go into Germany, but it was argued on behalf of the claimants that that was immaterial, because, in order to bring in the doctrine or what is known as "continuous voyage," and, therefore, the fact that those goods had an enemy destination, it must be shown that the shippers were parties to it; and that if the shippers were innocent, this doctrine could not be applied, and these goods could not be condemned, because as I understand the argument, a "continuous voyage" must be considered as that which the shipper sets in motion, and which he intends should have one destination or another.

That contention does not seem to me to be right. I do not think that enemy destination is a fact which can be made to depend on the intention of the shipper who only put the goods on board. The doctrine as stated in the case of the *Axel Johnson* (*ubi sup.*) by the late learned President, in the words of the Declaration of London, and the comment of Monsieur L. Renault upon it, which the late learned President said he accepted. may be noted: "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." Monsieur Renault's comment upon this is: "The articles included in the list in art. 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port. As soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by art. 30. The journey made by the goods is regarded as a whole." In his judgment in *The Kim* (*ubi sup.*), in stating that doctrine also, the late learned President said: "I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage or transportation, both in relation to carriage by sea and to carriage 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 consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to make 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 the cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country."

Then the late learned President discusses the cases on that point. I think that the same conclusion is really involved in the decision of the Privy Council which was delivered lately in the case of *The Kronprinzessin Victoria* (*ubi sup.*). In that case it was held that the consignees were not "dummy" consignees, that they were not acting under the control of the shipper at all, but were persons who had bought the goods for the purpose of getting them into an enemy country. It was held that the transaction was protected by the Declaration of London, as modified by the Order in Council of the 29th Oct. 1914. If the argument before me had been sound, it seems to me that it would have been quite immaterial to consider that at all, because there would have been no continuous voyage of the goods.

The only matter which it appeared to me might raise a doubt—and I do not think that this point was really urged upon me very much—was that the consignment was to the Netherlands Oversea Trust Company. We have no doubt that the Netherlands Oversea Trust Company had the real intention of doing what they could to prevent those goods reaching Germany. But it does not seem to me that that really is material. The question is: "What is the ultimate destination intended by the person who has the control of the goods when they arrive—if they do arrive—at the neutral port?" S. I. de Vries and Co. would have had the control, subject to this, that they would have had to give undertakings to the Netherlands Oversea Trust Company that they would not send the goods into an enemy country. But they were the purchasers of the goods, and their intention, I have no doubt, was when they had obtained possession of the goods to send the goods into an enemy country. It seems to me that if that is so one cannot say that there is not an enemy destination simply because some

association such as the Netherlands Oversea Trust Company will do all they can to frustrate it, and for that reason I think these goods were intended for an enemy destination, and thus must be condemned as good and lawful prize.

It is hard, I know, upon the shippers who are innocent, but, unfortunately, the exercise of belligerent rights does from time to time inflict hardships upon others. That seems to me no reason why I should refrain from saying what is the proper conclusion to arrive at with regard to these goods. I do not know whether, under the circumstances, the Crown ask for costs in this case.

Simonds.—I am instructed not to ask for costs in this case.

The PRESIDENT.—I think that is quite right. Then there will be an order for condemnation, without costs.

Solicitor for the Procurator General.—*Treasury Solicitor.*

Solicitors for the claimants.—*Hyman, Isaacs, Lewis,* and *Mills.*

Solicitor for the Netherlands Oversea Trust.—*A. M. Oppenheimer.*

Naval Prize Tribunal.

Nov. 11 *and Dec.* 17, 1918.

(Before Lord PHILLIMORE, Admiral of the Fleet Sir GEORGE CALLAGHAN, and Sir GUY FLEETWOOD-WILSON.)

THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, AND OTHER SHIPS

THE ADJUTANT AND OTHER SHIPS (*a*)

Prize—Naval Prize Tribunal—Naval prize Fund—Payments to be made into fund under Royal Proclamation—Droits of Crown—Droits of Admiralty — Lord High Admiral — Order in Council 1665-6—*Naval Prize Act* 1918 (8 *&* 9 *Geo.* 5, *c.* 30)—*Royal Proclamation of the* 15*th Aug.* 1918.

By Royal Proclamation, made under the Naval Prize Act 1918 (8 *&* 9 *Geo.* 5, *c* 30), *His Majesty declared it to be his intention to grant to the Naval and Marine Forces of the Crown the proceeds of the prizes captured during the war which should be declared by the Naval Prize Tribunal, constituted under the above-named Act, to be droits of the Crown. Owing to the complex conditions of modern naval warfare, the application of the rules as laid down in the Order of Council of* 1665-6 *as to the distinction between droits of the Crown and droits of Admiralty—which latter now revert to the Exchequer—became an impossibility in the literal sense, and various test cases were taken, as being typical of many others, for the consideration of the tribunal as to what should be held to be droits of the Crown and what should be droits of Admiralty. From these typical cases the following rules have been evolved:*

(1) *Enemy vessels and their cargoes seized on the high seas or in enemy ports by His Majesty's ships, the share of the proceeds of ships and cargoes seized by His Majesty's ships in conjunction with His Allies and allocated to this country under Joint Capture Conventions, the proceeds of cargoes in neutral ships intercepted at sea and sent into British ports (if such cargoes are afterwards condemned as contraband or otherwise), and the proceeds of cargoes in neutral ships—if such cargoes are afterwards condemned—when the ships come into British ports under arrangements made between the owners of the neutral ships and the British Government in order to avoid examination and capture at sea, are droits of the Crown.*

(2) *The proceeds of cargoes (afterwards condemned) brought into this country in neutral vessels bound for British ports in the ordinary course of trading, or of neutral vessels voluntarily diverted by their owners to British ports, or of vessels calling for such purposes as bunkering coal are droits of Admiralty.*

(3) *The distinction above mentioned holds good when a part only of the cargo of a neutral vessel is incriminated and the vessel is allowed to proceed to her destination under an agreement between the shipowner and the British Government that the part of the cargo or its proceeds concerned shall be returned to this country for prize proceedings.*

THESE were a number of cases decided by the Naval Prize Tribunal, a special court constituted under the provisions of sect. 2 of the Naval Prize Act 1918. The cases of *The Abonema, The Hillerod, The Florida,* and *The Albania,* as well as of several other vessels were argued in court; the cases of *The Adjutant* and of some other vessels were argued in chambers. (Some of these other vessels are referred to specially in the judgment of the court). The cases of the vessels specially named were typical of a large number of cases all having reference to the same matter, namely, the application and the payment of certain moneys into the Naval Prize Fund, in accordance with the terms of a Royal Proclamation dated the 15th Aug. 1918, following the passing of the Naval Prize Act 1918. Put shortly, the question at issue was what part of the proceeds of prize, under modern conditions of naval warfare, constituted droits of the Crown and so went, under the terms of the above-mentioned Royal Proclamation, into the Naval Prize Fund, and what part were droits of Admiralty, and therefore belonged to the Exchequer.

By sect. 1 of the Naval Prize Act 1918, it is provided, *inter alia*:

(1) If His Majesty is pleased by Proclamation or Order in Council to signify his intention to make a grant of prize money out of the proceeds of prize captured in the present war, the sums which have been or may be received in respect of ships and goods captured during the present war specified in part 1 of the schedule to this Act shall (subject as respect money in any prize court to the assent of that court) be paid as and when the Treasury and Admiralty jointly direct into a separate fund to be called the Naval Prize Fund, and there shall be charged on and payable out of the Naval Prize Fund all such costs, charges, expenses, and claims as are mentioned in part 2 of the said schedule, and any question whether any sum is payable into or out of that fund shall be determined by the tribunal hereinafter constituted. (2) Subject to the payment of such costs, charges, expenses, and claims as aforesaid, such sum as may be required for the payment of prize money under this Act shall be a just charge on the Naval Prize Fund, and such prize money shall be of such amounts

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

and payable to such members of His Majesty's Naval and Marine forces as hereinafter defined, or in the case of their death their representatives, and in such manner, as His Majesty may by Proclamation or Order in Council determine. (3) The residue of the said fund may be applied towards any of the purposes for which provision may be made by Greenwich Hospital, and also, subject to regulations made by the Admiralty, may be applied for the benefit of members and dependants of members of forces raised and provided by the Governments of parts of His Majesty's dominions outside the United Kingdom. . . . (5) The Naval Prize Fund shall be under the control of the Admiralty, and payments into and out of that fund and all matters relating to the fund shall be made and regulated in such manner as the Admiralty direct, and any sum standing to the credit of the fund may be temporarily invested in such manner as the Treasury may authorise, and the accounts of the receipts and expenditure of the fund shall be made up at such times, in such form, and with such particulars as may be directed by the Treasury, and shall be audited by the Comptroller and Auditor-General as public accounts in accordance with such regulations as the Treasury may make, and shall be laid before Parliament together with the report thereon.

Part 1 of the schedule of the Act is as follows:

Payments into the Naval Prize Fund.—(1) Any money in court paid in respect of any ship or goods condemned by any Prize Court, whether in the United Kingdom or elsewhere, being droits of the Crown, together with any accumulations of interest accrued on any such money. (2) Where any ship or goods condemned by any Prize Court, being droits of the Crown, have, whether before or after the condemnation, been delivered to the Crown, with or without the payment of any money into court or any undertaking to pay any money into court, a sum equal to the value of the ship or goods at the date of delivery, together with interest from the date of such delivery, after deducting any money which has been paid into court, or which may be payable under any such undertaking in respect of the ship or goods in question. (3) Any sum paid in pursuance of any bond, agreement, or undertaking executed or given in favour of the Crown in respect of any ship or goods subject to prize jurisdiction which are droits of the Crown or which if condemned would have been droits of the Crown or in respect of the proceeds of sale or money representing any such ship or goods, or in consideration for any money paid out of the Naval Prize Fund. (4) Any sums received from any of His Majesty's Allies under any convention relating to prizes captured during the present war. (5) Any other sums received in respect of ships and goods subject to prize jurisdiction which the tribunal consider may reasonably be treated, having regard to the principles and practice heretofore observed by Prize Courts, as being sums to which, had there been a grant of prize to captors, captors would have been entitled.

On the 15th Aug. 1918, one week after the passing of the Naval Prize Act 1918, a Proclamation was issued under the Act, which, after reciting the measures adopted in 1900 by Her Majesty Queen Victoria, the cancellation of the same by an Order in Council dated the 28th Aug. 1914, and the passing of the Naval Prize Act 1918 proceeds as follows:

"We do hereby order and direct that the net produce of all such prizes captured during the present war as shall be delared by the tribunal appointed under the said Act to be droits of the Crown, and of all other sums which under that Act shall be paid into the Naval Prize Fund, shall be for the entire benefit and encouragement of the officers and men of our Naval and Marine forces as defined in the above-mentioned Act and shall be distributable in accordance with the said Act, and further, that when the Lords Commissioners of the Admiralty shall judge that there is a sufficient sum standing to the credit of the Naval Prize Fund to warrant it, a distribution shall be made in the shares and proportion and in the manner and in accordance with the regulations we may hereafter announce by our royal proclamation to such members of our Naval and Marine forces as may be qualified to share therein, or in case of their death to their representatives."

The sole right of Crown to prize was affected when the office of Lord High Admiral was created and certain grants were made to him. The original grant to the Duke of York in 1660-61 is sufficiently referred to in the judgment, but a few years after that grant had been made an Order in Council was issued declaratory of the droits passing to the Crown and to the Lord High Admiral respectively, and it was upon the terms of the order that the distinction of droits had been based. The order is as follows:

At the Council held at Worcester House, 6th March, 1665-6. Present: The King's Most Excellent Majesty, His Royal Highness the Duke of York, His Royal Highness Prince Rupert, Lord Chancellor, Duke of Albemarle, Earl of Lauderdale, Lord Fitzharding, Lord Arlington, Lord Berkley, Lord Ashley, Mr. Secretary Morice, Sir William Coventry.—Whereas, through the long intermission of any war at sea by His Majesty's authority, several doubts have arisen concerning certain rights of the Lord High Admiral in time of hostility, the determination whereof appearing very necessary for the direction as well of His Majesty's officers as well as those of the Lord High Admiral; upon full hearing and debate of the particulars hereafter mentioned, the King's Counsel learned in the common law and likewise the Judge of the High Court of Admiralty and those of His Majesty, &c., and His Royal Highness the Lord High Admiral's Counsel in the said High Court of Admiralty being present, His Majesty, present in Council, was pleased to declare: First. That all ships and goods belonging to enemies coming into any port, creek, or road of this His Majesty's Kingdom of England or of Ireland, by stress of weather or any accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral; but such as shall voluntarily come in, either men-of-war or merchantmen, upon revolt from the enemy, and such as shall be driven in, and forced into port by the King's men-of-war, and also such ships as shall be seized in any of the ports, creeks, or roads of this Kingdom, or of Ireland, before any declaration of war or reprisals by His Majesty, do belong unto his Majesty. Second. That all enemies' ships and goods casually met at sea, and seized by any vessel not commissionated, do belong to the Lord High Admiral. Third. That salvage belongs to the Lord High Admiral for all ships rescued. Fourth. That all ships forsaken by the company belonging to them are the Lord High Admiral's unless a ship commissionated have given the occasion to such dereliction, and the ship commissionated the inn the same company and in pursuit of the enemy. And the like is to be understood of any goods thrown out of any ship pursued.

Acting upon this order, Lord Stowell drew a distinction between the droits of the Crown and the droits of Admiralty in *The Maria Francoise* (Roscoe's English Prize Cases, vol. 1, 559: 6 Ch. Rob. 282) as follows: "When vessels come in, not under any notice arising out of the occasions of war, but from distress of weather or want of provisions, or from ignorance of war, and are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them,

where the impression arises from acts connected with war, from revolt of their own crews, or from being forced or driven in by the King's ships they belong to the Crown. That is the hard distinction which is laid down in the Order of Council, and which has since been invariably observed."

In order to test the application of the rules under altered conditions, the vessels named were taken, as has been stated, as being typical of varied circumstances under which it was necessary to distinguish between the droits of the Crown and droits of Admiralty, and the facts as far as necessary relating to their capture or diversion and the seizure and condemnation of their cargoes were as follows:

The *Abonema* was a British steamship which traded between Liverpool and West Africa. The vessel arrived at Liverpool in the ordinary course of trading shortly after the outbreak of war in August 1914. Part of her cargo consisted of 2733 bundles of piassava, which were discharged at Liverpool, and were seized by the collector of Customs on or about the 2nd Sept. 1914. The piassava was condemned as enemy property on the 16th Nov. 1914, and sold. A small part of the proceeds of the sale was handed over to a Liberian merchant, who put in a claim to the same. The case of *The Abenoma* was typical of a large number of cases of a similiar character, where enemy goods having arrived in this country in the ordinary course of business were discharged at British ports, without any intervention on the part of the Admiralty, and were afterwards seized and condemned as prize.

The *Hillerod* was a Scandinavian steamship, with a cargo of 700,000 gallons of lubricating oil manifested to Trondhjem and Gothenburg. This vessel was met at sea by a naval patrol on or about the 7th Nov. 1915, and was sent into Kirkwall in charge of an armed guard, where it was handed over to the Customs authorities. From information in the possession of the Government there was no doubt that the oil was intended for Germany, and that, if possible, the vessel would attempt to break the blockade. By an order of the Contraband Committee, communicated to the Customs authorities on the 16th Nov. 1915, the vessel with her cargo was seized as prize, and the cargo was condemned by the Prize Court as contraband destined for Germany on the 31st July 1916—a decision which was subsequently confirmed by the Privy Council. The question which arose in this case was whether the whole proceedings were or were not the direct result of the action of the Fleet or did they create any difference from those proceedings where there had been an active capture.

The *Florida* was a Danish steamship belonging to the United Steamship Company of Copenhagen. She traded between America and Denmark. Part of her cargo consisted of bone, glue and photographic films. On or about the 26th Oct. 1915 the vessel called at Kirkwall for examination in accordance with orders given by her owners in pursuance with agreements made with the British Government, under which neutral shipowners undertook to call at specified British ports for the purpose of having their cargoes examined by the Customs authorities. The above-mentioned part of her cargo was seized and condemned as prize in 1917 and the goods were sold.

The *Albania* was likewise a Danish steamship also belonging to the United Steamship Company of Copenhagen. On or about the 5th April 1915 she called at Ardrossan for bunker coal in the ordinary course of her voyage from Lisbon to Denmark. She had on board 967 tons of rice. Acting upon instructions from the Contraband Committee, the Customs authorities seized the rice, and the vessel was sent to Fleetwood to discharge. The rice was condemned on the 3rd July 1915.

All the other vessels concerned are sufficiently referred to in the judgment.

The *Attorney-General* (Sir F. E. Smith, K.C.), and *Pearce Higgins*, for the Exchequer.—Since the beginning of the war large sums of money had been condemned as prize, but there had been no authoritative decision as to which part of the proceeds constituted droits of the Crown and which part were droits of Admiralty. This was an all-important matter, because by reason of the terms of the Royal Proclamation, the former were payable into the Naval Prize Fund, whereas the latter belonged to the Exchequer. The Solicitor-General appeared for the Naval and Marine forces, and the object of the proceedings was ostensibly to place before the tribunal the opposing views of the Exchequer and of the Naval and Marine forces upon these droits. Four vessels had been taken as presenting typical cases. It was not pretended that they were exhaustive cases, but it was thought that the decision of the tribunal with respect to them might afford some guidance as regarded many others, and that some principles might be laid down which would enable all parties to decide for themselves what were droits of the Crown and what were droits of Admiralty. In all the specific cases presented to the tribunal there had been condemnation of the goods decreed in the Prize Court, but the tribunal was in no way bound by the decisions of the Prize Court. The real difficulty had arisen owing to the entirely novel conditions under which modern naval warfare was conducted. As far as enemy property was concerned no question arose as to any distinction being made between droits of the Crown and droits of Admiralty. The droits of the Crown were conceded by the Exchequer to include enemy ships and cargoes seized on the high seas, ships and cargoes seized in enemy ports, and ships and cargoes allocated to this country under Joint Capture Conventions. But there were then to be considered the vessels, especially neutral vessels, which were suspected of carrying contraband. Before this war between Great Britain and her Allies and the Central Powers, when a neutral vessel was suspected of carrying contraband, there was the practice of "visit and search" upon the high seas. When one considered the size and the immense carrying capacity of modern steamships, the varied nature of their cargoes, the length of time necessary for examination—omitting altogether the gravity of the submarine peril—the former practice of "visit and search" was quite impossible. There had sprung up, therefore, in its place, the demand that neutral vessels suspected of carrying contraband should put into the nearest British or allied port and there submit to a thorough examination of their cargoes. The vessels concerned were diverted by order of the navy, or came in voluntarily. It was then that

the Customs officials took charge, and if there were suspicious circumstances the Contraband Committee might order the seizure and detention of the vessels and their cargoes as well as a subsequent inquiry in the Prize Court as to what should be done with the ships or cargoes thus seized. It was thus that the whole procedure as to the examination of cargoes and the determination as to their seizure had passed from the hands of naval officers at sea to civilians ashore, and it was necessary to examine how far the old rules could be made applicable so as to say what were droits of the Crown and what were droits of Admiralty. But, although there had been this transference from naval officers at sea to civilians ashore, it had been decided in the case of *The Roumanian* (13 Asp. Mar. Law Cas. 208; 114 L. T. Rep. 3; (1916) 1 A. C. 124), that as far as the effective date of diversion was concerned, it was that date when the hand of the Crown, as captor, was first laid upon the goods. In other words, when a vessel was ordered to come into a British or allied port for the purpose of examination, the effective date was the date of the diversion. If the vessel came in voluntarily, or without effective pressure from without, the effective date appeared to be that when the seizure was made by the Customs officials. (The Attorney-General then dealt with the earlier history of the matter, as expounded in Rothery's Prize Droits, the grant of droits to the Duke of York in 1660-61, and the Order in Council of 1665-6, and the application of the principles there set down as exemplified in the quotation from the judgment of Lord Stowell in *The Marie Francoise* (*ubi sup.*). When modern conditions were taken into consideration the Exchequer contended that the four typical cases should be treated in the following manner: (*a*) When a vessel came to a port of this country without the application of any pressure whatever, as in the case of the *Abonema*, and her cargo or a portion thereof was condemned as prize, the proceeds were a droit of Admiralty; (*b*) when a neutral vessel was sent into a British port under an armed guard, even though there was no question at the time of her cargo being contraband or of there being a seizure of the same as prize as in the case of the *Hillerod*, even though the seizure was afterwards made by the civil authorities, the proceeds constituted a droit of the Crown; (c) where a neutral vessel came in, not under pressure, but under an arrangement as to examination in port instead of at sea, as in the case of the *Florida*, the proceeds of her captured and condemned cargo should be considered as droits of Admiralty; and (*d*) where a neutral vessel came into a British port in the ordinary course of trading, and a part of her cargo was subsequently seized and condemned as prize, as in the case of the *Albania*, the proceeds of her cargo should be considered as droits of Admiralty.

The *Solicitor-General* (Sir Gordon Hewart, K.C.) and Captain *Maxwell Anderson*, R.N., of the Naval and Marine forces.—It was not possible to contest the claims of the Exchequer with respect to the *Abonema* and the *Albania*, which were admitted to be droits of Admiralty. The admissions of the Attorney-General as to the *Hillerod* made it unnecessary to refer to it further. As it came in under guard the proceeds of the sale of its cargo were clearly a droit of the Crown under the principles laid down in the *Marie Francoise* (*ubi sup.*). There was only the case of the *Florida* left. The contention of the Exchequer that the condemned cargo of the vessel was a droit of the Admiralty was not correct. Although it was true that no visible compulsion was brought to bear so as to make the vessel enter a British port, this method of visitation under agreement was really a substitution for visitation at sea, and the result was to prevent delay or capture unless this was resorted to. There was an "impression arising from an act of war," and consequently the proceeds of the cargo which had been condemned as prize should be a declared a droit of the Crown, and as such payable into the Naval Prize Fund.

In addition to the cases already referred to, the following were cited:

The Rebeckah, Roscoe, vol. 1, 118; 1 Ch. Rob. 227;
The Gertruyda, 2 Ch. Rob. 211.

Cas. adv. vult.

Dec. 17, 1918.—Lord PHILLIMORE.—By the Naval Prize Act, 1918 (8 & 9 Geo. 5, c. 30. sect 1: "If His Majesty is pleased by Proclamation or Order in Council, to signify his intention to make a grant of prize money out of the proceeds of prize captured in the present war, the sums which have been or may be received in respect of ships and goods captured during the present war specified in part 1. of the schedule" are to be paid to a fund to be called the Naval Prize Fund, which fund is to provide for the payment of prize money to the members of His Majesty's Naval and Marine Forces: and any question whether any sum is payable into or out of that fund is to be determined by this tribunal, which has been constituted for the purpose.

His Majesty was pleased to make Proclamation accordingly on the 15th Aug. 1918.

Certain questions of large and far reaching importance which came before us for determination were conveniently submitted in the form of four test cases, and argued before us in open court by the law officers of the Crown, and we have now to express our determination upon them.

The first paragraph of part 1 of the schedule directs that there shall be paid into the Naval Prize Fund: "Any money in Court paid in respect of any ship or goods condemned by any Prize Court, whether in the United Kindom or elsewhere, being droits of the Crown." As Sir William Scott afterwards Lord Stowell observes in *The Marie Francoise* (*ubi sup.*). "All rights of prize belong originally to the Crown, and the beneficial interest derived to others can proceed only from the grant of the Crown." But from ancient times a certain portion of those rights were assigned to maintain the dignity of the Lord High Admiral; hence arose the distinction between droits of Crown and droits of Admiralty. At the outbreak of war it was the practice of the Crown to grant its interest in any prize taken to the captors thereof, that is, to the officers and men of the ship which effected the capture. This left a few cases, which will be referred to hereafter, of droits of the Crown which had not been granted away; but putting these aside, the practical distinction was between captures which inured for the benefit of the

officers and men of individual ships of His Majesty's Navy or commissioned privateers, on the one hand, and droits of Admiralty on the other.

When the office of Lord High Admiral ceased to be filled, and the Crown in lieu thereof appointed Lords Commissioners of the Admiralty, droits of Admiralty reverted to the Crown, and upon the surrender of the heriditary revenues of the Crown which it has been the practice for recent monarchs to make upon their accession, and which surrender by His present Majesty is embodied in the Civil List Act, 1910 (10 Edw. 7, and 1 Geo. 5, c. 28), passed to the Exchequer. Hence arose the somewhat paradoxical position that droits of the Crown went to the Navy and droits of the Admiralty to the Exchequer. Before this war the practice was, as already stated,, that each captured prize enured, subject to any rights of the flag officer, for the benefit of the officers and men of the capturing ship or ships; but at the beginning of this war the Crown did not make the usual grant; but the Naval Prize Act and the Proclamation thereunder have constituted the droits of the Crown one fund, "for the entire benefit and encouragement of the officers and men of our Naval and Marine forces." Hence it has been unnecessary for the Prize Court to determine the circumstances of any particular capture, and sufficient for it to decide that the ship or goods were lawful prize, and hence the necessity for the constitution of this tribunal to determine as between droits of the Admiralty and the droits of the Crown. In former times the distinction has been traced to an Order in Council of the 6th March 1665-66; but that decision, though rendered after great debate and of unquestioned authority, is not the actual grant to the Lord High Admiral, nor is it, nor does it purport to be, a record of the grant. It is a decision upon what passes under the grant, and in the very changed conditions of modern naval warfare it is difficult to apply it in such a way as to show on which side of the line some of the seizures during the present war are to fall.

At the close of the argument before us we intimated our opinion that we should desire to see the original grant to James, Duke of York, made shortly after the restoration of Charles II. on the 29th Jan. 1660-61. It is in the custody of the Record Office, and for safe preservation during the war has been sent out of London; but it so happens there is an authentic copy in the Exchequer Auditors' Patent Book, which was available, and which has been produced to us and carefully considered. It is a long document constituting the Duke of York Lord High Admiral of all His Majesty's Dominions, and Ruler (Praefectus) of the fleets and seas, giving him jurisdiction and duties in respect of the navy, matters civil and criminal occurring on or near the sea or the mouths of great rivers below the first bridges, conservation of lights, beacons ports and lines of coast with power to constitute a judge, lieutenants, and other officers, granting royal fish to him, and assigning a salary of 200 marks, to be paid quarterly (this is the reason why there is a copy in the Exchequer Auditors' Book), and also granting to him flotsam, jetsam lagan and other profits and perquisites, including *bona inimicorum pro derelictis habita seu casu fortuito reperta*, but silent as to any captures to be made during hostilities and any grant of prize to the Admiral.

There are, however, in the patent frequent references to the rights and duties of the admiral as existing *ab antiquo*, or according to established law and custom; and accordingly, upon the principle laid down in the case of the *Duke of Beaufort* v. *Swansea Corporation* (3 Ex. 413) and similar cases, we have to look to the way in which the grant to the admiral has been construed by tribunals and applied in practice; and for this purpose the Order in Council is the earliest and most authoritative document, though there are also subsequent decisions of the High Court of Admiralty which are of assistance.

We have also looked at the patent of George, Prince of Denmark, which is set out in the report of the Select Committee on the Board of Admiralty, 1861, p. 644, but it is of no assistance. The Commission to the Lords of Admiralty issued in 15 Geo. 3, is to be found in Marriott's Admiralty Decisions, at p. 53. It recites that all wrecks of the sea, goods and ships taken from pirates, and divers droits, rights, duties, and privileges have been by express words or otherwise heretofore granted to our said High Admiral and to former admirals for their own benefit as duties appertaining to the office or place of our High Admiral aforesaid, and directs how these should happen in case of hostilities. The Order in Council is set out in 1 Ch. Rob., at p. 230; it is also printed with immaterial omissions by the late Mr. Rothery in his valuable report on prize droits, edited by Mr. Roscoe, the present Admiralty Registrar; it is also in Marriott's Admiralty Decisions, at p. 50. The terms of it are as follow: "(1) That all ships and goods belonging to enemies coming into any port, creek, or road of His Majesty's Kingdom of England or of Ireland by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral; but such as shall voluntarily come in, either men-of-war or merchantmen, upon revolt from the enemy, and such as shall be driven in and forced into port by the King's men-of-war, and also such ships as shall be seized in any of the ports, creeks, or roads of this Kingdom or of Ireland, before any declaration of war or reprisals by His Majesty, do belong unto His Majesty. (2) That all enemies' ships and goods casually met at sea and seized by any vessel not commissionated, do belong to the Lord High Admiral." It is not a complete dichotomy, even from the first it left certain cases uncovered, and the Crown, when granting its interest in prize to the captors did not grant quite everything which was left to it to grant after the grant to the Admiral had been exhausted. There are what Mr. Rothery calls "reserved droits." The class of case to which he refers is:—"(1) Captures effected by a conjoint force of the army and navy, as on the seizure of an enemy's colony or possession; and (2) captures made before the commencement of hostilities." There is also in the books the case of *Ships taken at Genoa*, (4 Ch. Rob. 388), in which Lord Stowell condemned a sum of money exacted by the English Admiral as commutation for ships seized in the harbour, which Lord Stowell condemned not to the captors but to the Crown. It is, however, unnecessary to consider any case of reserved droits of the Crown if they

are to be treated as naval prize, because the statute under which we sit directs that all droits of the Crown are to go to the Naval Prize Fund.

One other general observation must be made, as Lord Stowell says in the case of the *Marie Francoise* (*ubi sup.*). "The rights of the Lord High Admiral, though they are to be duly supported, are not to be extended by construction; and for these reasons, that the grants of the Crown differ, in this respect, from other grants, that they are to be taken strictly, and are not to be interpreted to the benefit of the grantee; and, secondly, that the rights of the Crown, being public rights deposited there for great public purposes, are not to be alienated beyond the precise tenor of the grant."

We now address ourselves to the four typical cases which were argued before us.

The steamship *Abonema* was a British ship bound from the west coast of Africa to Liverpool, where she arrived on the 16th Aug. 1914. Among her cargo were certain bundles of piassava, which were seized by the collector of Customs and afterwards condemned as prize. This actual case does not appear to be covered in terms by the Order in Council; but the practice is well established, that in all cases where vessels come into port in the ordinary course of a voyage not upon revolt from the enemy or driven in or forced into port, or have come in before the declaration of war, they are, with their cargo, droits of Admiralty. There is no ship or set of ships which can claim to have had any hand in causing the seizure, and it is not a case of a reserved droit of the Crown. We are of opinion, and so determine, that the proceeds of the cargo taken from this ship are not to be paid into the Naval Prize Fund.

The steamship *Hillerod* was a neutral ship met at sea on or about the 7th Nov. 1915, and sent to Kirkwall in charge of an armed guard. She had a large cargo of lubricating oil, which was seized by the Collector of Customs in the port of Kirkwall, and ultimately condemned as prize. In connection with this case, reliance was placed upon the expression used by Lord Stowell in the case of *The Marie Francoise* (*ubi sup.*), that the hand of violence had been exercised upon her, and upon the judgment of the Privy Council in the case of *The Roumanian* (*ubi sup.*). We are of opinion that this cargo was a droit of the Crown, and that the proceeds are payable into the Naval Prize Fund, and we determine accordingly.

The steamship *Florida* was a Danish ship belonging to a Danish steamship company, which called at Kirkwall in virtue of a previous arrangement made by her owners with His Majesty's Government, and there submitted herself for examination. Two parcels of cargo on board were seized by the Collector of Customs, and ultimately condemned as prize. This is the most difficult case that we have had to determine. In a sense this vessel came into port voluntarily, but not upon revolt from the enemy. To this extent her case is like those of which the *Abonema* is a type; but, on the other hand, it was the fear of His Majesty's navy and of capture at sea, with all its incidents, which led the owners to direct the master to proceed, and led the master to proceed, to Kirkwall. The conditions of this war are different from those of any former war. The power of His Majesty's navy has been greater and more extensive, and the net has been drawn more closely than in any previous naval war. No doubt there is no King's ship, nor even are there any King's ships, to which precisely this capture could be attributed; and if the Crown had made the same kind of grant which was made in former wars, there would have been no captors to whom the Prize Court could have condemned this cargo; but in our view this vessel ought in good sense to be held to have been forced into port by the sum total of His Majesty's navy. Her owners were forced to direct the master to take that course, which saved him from seizure upon the high seas. It is also to be observed that there is nothing in the Order in Council, or in other judicial decisions, or in the practice hitherto observed, which introduces any case at all analogous to this into the class of droit of Admiralty, and that if it be not a droit of Admiralty, it must be a droit of the Crown. Upon the whole, we so determine.

The steamship *Albania* is a Swedish vessel, which while on a passage from Lisbon to Swedish and Danish ports, called for bunker coal at Ardrossan. While she was in port her cargo of rice was seized by the Collector of Customs, and ultimately condemned. If this vessel found herself without bunker coal upon the high seas, she would be as helpless as a dismasted sailing ship, and would have to put into port to procure it. In fact she had to put into Ardrossan. To our mind, it makes no difference that, in accordance with sound navigation, she did not load a full allowance of coal at her port of departure, but reckoned upon filling up by the way. Once started as she was, she had to replenish her stock somewhere. We think that this case falls within the principles of that part of the old Order in Council which makes for the Admiralty, that this cargo is not a droit of the Crown, and that the proceeds thereof should not be payable to the Naval Prize Fund, and we determine accordingly.

Certain cases were debated before us in chambers which, in our opinion, fall within the principles of the four typical cases with which we have just dealt, the distinctions being immaterial, and we accordingly now pronounce our judgment therein.

The steamship *Soldier Prince* is a case in principle the same as the *Abonema*. She was an English ship, bound to Hamburg, was diverted voluntarily by her owners, out of patriotic feeling, to an English port. Her cargo was not seized, but the shipowers sold it to recover their freight, and, after satisfying their own claims, submitted to having the balance brought into the Prize Court, where it was condemned. In our view these proceeds are a droit of Admiralty, and we so determine.

In the steamship *Oscar II.* the only distinction from the case of the *Hillerod* was that the parcel of cargo which was ultimately condemned was not required to be discharged at Kirkwall, a process which would have been inconvenient, but the ship was allowed to proceed to her destination on an undertaking by the owners to bring back the parcel. In compliance with this undertaking they brought it to the port of Liverpool, where it was ultimately condemned. We conceive that there is no substantial distinction between this case and the *Hillerod*, and we determine that this parcel was a droit of the Crown.

In the case of the steamship *Hellig Olav*, where the parcel of cargo consisted of perishable goods which it was not practicable to bring back to this country, their value was deposited in the Prize Court and ultimately condemned. In this case we think that there is no distinction to be made between it and the *Hillerod*.

In the case of the steamship *Arkansas*, the circumstances were the same as those in the *Florida*, with the exception that the vessel was allowed to proceed without unloading the incriminated parcel of cargo, which was afterwards brought back in compliance with an undertaking. In our opinion there is nothing to distinguish this case from that of the *Florida*, and it is a droit of the Crown.

The steamship *Lyngenfjord* is in the same position as the *Florida*, unless her case is *a fortiori*. Her owners had agreed to send her into Kirkwall, but for some reason the additional precaution was taken by the Admiralty of meeting her at sea, and putting an armed guard in charge of her. She is, in our opinion, a droit of the Crown.

The *Garonne* was in similar circumstances to the *Albania*. Certain items of her cargo were seized and unloaded at the bunkering port; another parcel was allowed to be taken on upon an undertaking to return it if demanded; a demand was made, and the parcel was returned and condemned. This case is like that of the *Albania*, and this parcel is a droit of Admiralty.

THE ADJUTANT, TINOS, AND OTHER CASES.

Lord PHILLIMORE.—These typical cases were debated before us in chambers, when we had the assistance of representatives of the Admiralty and of the Treasury. They seemed plain cases, and we did not require solemn argument to enable us to decide them, but we desire to take this opportunity of expressing our decision in open court.

The *Adjutant* was a German steam trawler captured by H.M.S. *Aurora* in the North Sea on or obout the 30th Sept. 1915, sent into Grimsby in charge of a prize crew, and condemned with her cargo. This is a case of a droit of the Crown, and the proceeds must be paid into the Naval Prize Fund.

A number of enemy vessels were seized in the ports of Piraeus, Eleusis, and Syra by a joint force of French and British ships. In respect of joint captures there is a Convention between His Majesty's Government and the French Republic, and under it a certain share falls to this country. These vessels were condemned by the French Prize Court, and the British share has been or will be handed over to the British Government. The case is one which falls under par. 4 of part 1 of the schedule which directs that there shall be paid into the Naval Prize Fund "Any sums received from any of His Majesty's allies under any Convention relating to prizes captured during the present war." And we so determine.

The *C. Ferd. Laiesz* was captured on a separate occasion by a combined squadron of French and British ships, and was condemned in the French Prize Court. The same rule applies to the British share of her proceeds.

The *Belgia* was a German ship, which was seized outside the port of Newport by the Collector of Customs of that port, assisted by some armed police, brought into port, and condemned. This is a case of seizure by a non-commissioned captor, which comes under par. 2 of the Order in Council of 1665-6, and is a droit of Admiralty.

Lord PHILLIMORE, having concluded the delivering of the judgments, said:—It might be convenient to say that the number of cases in which orders have been passed, or will be passed, to-day upon the judgments which have been pronounced amount to 165. As far as the tribunal can at present say, the principal points still left to be decided are: (1) Cases of cargoes seized on English or allied ships which put into friendly ports on receipt of communications from British or allied cruisers, instead of proceeding upon voyages to enemy ports; (2) Captures by joint expedition of land and sea forces as to which Mr. Rothery treats them as reserved droits of the Crown, but as to which there may be some difficulty. The tribunal cannot proceed at present, and has still to wait further decisions by our own Prize Courts, both at home and abroad (Vice-Admiralty Courts) and further decisions of the Prize Courts of our allies; and (3) Cases where money has been taken and where allied Governments have to render accounts and transfer balances. The tribunal and its officers have not at present gone through the various cases which have come from the Vice-Admiralty Courts, but with those reservations and observations it would seem possible to deal with the great bulk of the cases which are merely now a clerical matter. At the same time we may have to consider deductions or charges from the Naval Prize Fund.

Solicitor for the Exchequer and for the Naval and Marine Forces, *the Treasury Solicitor.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 13 *and* 14, 1919.

(Before BAILHACHE, J.)

KING-HALL *v.* STANDARD BANK OF SOUTH AFRICA LIMITED. (*a*)

Naval forces—Carriage of treasure on board H.M. ships—Right to freight—Custom—Statute 59, *Geo* 3, *c.* 25—*Order in Council, the* 10*th Aug* 1888—*Order in Council, the* 26*th Oct.* 1914.

In ancient times a practice grew up whereby merchants and others who had bullion and articles of value to transport from one place to another by sea put them on board a king's ship. The charge for their conveyance was a matter of bargain between the merchants and the captain or officer in charge of the King's ships. These officers frequently made large sums of money by entering into private bargains with merchants for the conveyance of treasure on board the King's ships. This practice was regulated by an Act of 59 *Geo.* 3, *c.* 25. *This Act prohibited the carriage of such articles without a special order; provided for the*

(*a*) Reported by T. W. MORGAN Esq., Barrister-at-Law.

payment of freight to be regulated by Order in Council; and prohibited private bargains between merchants and the captains of the King's ships without such Orders in Council. Orders in Council were from time to time made under that Act down to the 10th August 1888. The Order in Council dated the 10th Aug. 1888 was annulled by an Order in Council dated the 26th Oct. 1914. Thereafter no new Order in Council was made under the Act.

Held, that as the Order in Council of the 10th Aug. 1888 was annulled by the Order in Council of the 26th Oct. 1914, there was no Order in Council in force regulating the payment of freight for the conveyance of bullion on board H.M. ships, and a claim for such freight could not be enforced.

ACTION in the Commercial List tried by Bailhache, J.

The plaintiffs claimed a declaration that they were entitled to freight for the carriage of bullion from Cape Town to England on board H.M.S. *Albion* in or about Jan. 1915, and that, having regard to the fact that it was war time, 3 per cent. would be a reasonable rate of freight. The claim was alternatively on an alleged contract and on an alleged custom.

The plaintiffs were Admiral Sir Herbert Goodenough King-Hall, who, at all material times, was Commander-in-Chief on the Cape of Good Hope station, and Rear-Admiral Heneage, who, at all material times, was the officer in command of H.M.S. *Albion*.

The defendants were the Standard Bank of South Africa Limited, a South African bank, and the defence was (1) that the payment of freight for the carriage of bullion by H.M.'s ships had been abolished by an Order in Council, dated the 26th Oct. 1914, or alternatively, that there being no Order in Council in force, the plaintiffs were not entitled to freight; (2) that the plaintiffs were not entitled to the freight, either by the contract or by custom or usage; and (3) that the defendants were acting as custodians or agents for the Bank of England.

The South African mining companies were in the habit of sending their bullion down to the various banks at Cape Town for safe custody. The bullion on arrival at Cape Town was placed in the vaults of the various banks for safe custody, for which no charge was made by the banks. The bullion was then sold to the Bank of England, who paid 97 per cent. of its assayed value as assayed in Cape Town, reserving to themselves the remaining 3 per cent., which they did not pay until the bullion arrived in England and was tested. The mining companies paid all the incidental expenses and were responsible for having the bullion transported to this country. It was their duty to insure and to pay freight if any freight was payable, the property in the bullion was in the Bank of England.

A memorandum of agreement, dated the 14th Aug. 1914, provided as follows:

The Minister of Finance and Defence of the Union of South Africa having agreed to receive on behalf of the Bank of England deposits of gold at Johannesburg, Pretoria, and (or) Cape Town as the Union Government may decide, the bank are prepared to purchase on the basis of 3*l.* 17*s.* 9*d.* per ounce standard such gold as may be deposited to their order in the name of the Minister of Finance with any of the following banks there—namely, the African Banking Corporation Limited, the National Bank of South Africa Limited, the Standard Bank of South Africa Limited. Deposits must be made free of expense, including all telegraphic charges, and an amount representing 97 per cent. of the value certified on the basis of the reports of the official assayers of any of the banks named will be paid on account, the balance to be adjusted on the delivery of the gold in London; all expenses up to the time of its delivery at the Bank of England to be paid by the depositor; the time of shipment to be entirely at the discretion of the Bank of England. The Minister of Finance has undertaken to advise the Bank of England by cable through the High Commissioner in London of the name of the depositor, the name of the bank where the deposit has been made, the full value as certified by the assayers in South Africa, and the name of the person to whom payment is to be made in London. Payment will be made by the Bank of England only on receipt of advice from the Minister of Finance.

About the end of 1914 or the beginning of 1915 it was decided to transport a certain quantity of the bullion then lying in the vaults of various banks in Cape Town to England. The total quantity transported was about 8,000,000*l.* worth, of which about two and a half millions came from the vaults of the Standard Bank of South Africa Limited, the defendants.

The Secretary of Finance of the Union of South Africa wrote to the general manager of the Standard Bank of South Africa Limited at Cape Town a letter dated the 31st Dec. 1914:

I beg to inform you that instructions have now been received to ship a portion of the native gold held on behalf of the Bank of England to London on or about the 2nd Jan. next. I have to request, therefore, that you will be good enough to instruct your Cape Town manager to hand over on demand to the order of the naval Commander-in-Chief, Cape Station, a portion of the gold deposited at your Cape Town Branch to the value of, approximately, but not exceeding, 2,530,000*l.* Arrangements have been made by the naval Commander-in-Chief with General Thompson to send the gold from the banks to the ship under guard. It is presumed you will be satisfied with the receipt of the naval Commander-in-Chief or his representative for so many sealed boxes said to contain native gold, giving the number of each box. Should you desire that a representative of the bank should be present at the Bank of England, as I understand is the case with ordinary shipments of gold, when the boxes are being opened; this can, of course, be arranged by cablegram on my hearing from you to that effect. When the gold is handed over I shall be glad if you will be good enough to furnish me with a certificate and statement thereof in order that the High Commissioner may be duly advised for the information of the Bank of England. The certificate and statement should be submitted in triplicate."

As you are aware, the gold, in terms of the agreement, requires to be insured in transit from the banks' vaults in this country to the Bank of England at the expense of the depositors . . . I think it could safely be taken for granted that the matter of the insurance of this shipment is in order, but I have to-day cabled to the High Commissioner in London to see the Bank of England and satisfy himself on this point.

The first plaintiff, Admiral Sir Herbert Goodenough King-Hall, who was then Commander-in-Chief of the Cape of Good Hope Station, in or about Jan. 1915 received instructions from the Admiralty to send forward to England from Cape Town £4,000,000 of bullion on board H.M.S. *Albion*, and £4,000,000 on board H.M.S

Hyacinthe. On receipt of these instructions, and after communication with the Governor-General of South Africa, the first plaintiff wrote to the Standard Bank a letter dated the 1st Jan. 1915:—

I am informed by His Excellency the Governor General that you have received instructions from the Union Government to hand over on demand to my order sealed boxes containing merchandise gold, deposited with you on behalf of the Bank of England, of approximately but not exceeding the following value: 2,530,000*l*. I request, therefore, that you will hand over these boxes to Captain E. H. Harding, Prince Alfred's Guards, who is acting under the instructions of Major-General Thompson, C.B., D.S.O., with whom arrangements have been made for their safe transfer to my custody.

Altogether 4,000,000*l*. in gold was shipped on board the *Albion* and 4,000,000*l*. on the *Hyacinthe*. The first plaintiff received further instructions from the Admiralty that the whole of the gold was to be carried on board the *Albion*. Accordingly the gold from the *Hyacinthe* was transferred to the *Albion* and the *Albion* proceeded on her way to England with the whole of it on board.

Every endeavour was made to keep the transaction quiet, so that people in the locality should not know what was going on. The first plaintiff gave out that they were shipping ammunition. The *Albion* sailed from Cape Town, calling first at St. Helena where, on arrival, he found that, in spite of all the precautions that had been taken to keep the nature of the transaction secret, it was common knowledge that the *Albion* had treasure on board. This information was cabled home to the Admiralty and certain measures were taken. Eventually part of the bullion was transhipped at St. Vincent and part was placed in the vaults at Gibraltar. It was eventually brought to England by other warships.

The Standard Bank of South Africa Limited, the defendants, paid the Government 9838*l*. 7*s*. being at the rate of 7*s*. 9*d*. per cent. on 2,530,000*l*. the value of the gold transported from the defendant's Cape Town Bank to London. This sum of 9838*l*. 7*s*. was to cover freight, insurance and war risk. It was paid by the defendants in the first place, and they debited the amount against the accounts of their customers the mining companies who deposited the gold at the bank. In the result, after adjustment of the accounts with their customers nothing was paid by the defendants out of their own pockets for freight, insurance or war risk.

When the bullion arrived in England, there was some misunderstanding. The Bank of England had not been notified that the shipment was coming forward. The Bank of England were in a difficulty. Apparently the shipment had not been insured and the Bank of England refused to take delivery at Plymouth. It was stated that they would take no risk, and would only accept delivery of the bullion when it was handed to them at Lombard-street. The defendants explained to the Bank of England that they were not interested in the matter, "they merely having been custodians of the gold in South Africa on behalf of the Union Government, who, in turn, were acting as the agents of the Bank of England. Further, that as far as concerned the portion of the gold which had been in our hands, we had delivered it to the naval commander-in-chief, we had a complete discharge and saw no reason why we should accept any further responsibility in the matter."

The Bank of England, however, having made no arrangements to take delivery at Plymouth, requested the defendants to take delivery of the bullion there for the Bank of England. The defendants, while not admitting responsibility, sent their representative down to Plymouth to take delivery of the bullion there to oblige the Bank of England.

The plaintiff's claim for freight was made under the proclamation and Order in Council of the 10th Aug. 1888, issued under the Act of 59 Geo. 3, c. 25, which was an Act to fix the rate and to direct the disposal of freight money for the conveyance of specie and jewels on board His Majesty's ships and vessels.

On the 26th Oct. 1914, however, an Order in Council was issued which stated that "whereas there was this day read at the Board a memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 17th Oct. 1914, in the words sollowing, namely:—

Whereas by Order in Council, dated the 10th day of August 1888, approval was given to the terms of the proclamation annexed thereto respecting the conveyance of public and private treasure; (b) and whereas we consider it desirable that the system of payment for the conveyance of treasure in Your Majesty's ships therein prescribed should be terminated. We beg leave humbly to recommend that Your Majesty may be graciously pleased, by Your Order in Council, to annul the aforesaid Order in Council of the 10th August 1888, and the proclamation annexed thereto. His Majesty having taken the said memorial into consideration was pleased by and with the advice of His Privy Council, to approve of what is therein proposed, and the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions herein accordingly.

When the bullion in the present case was placed on board the *Albion* in Jan. 1915 at Cape Town the plaintiffs were not aware that there had been any alteration in the Order in Council or in the method of payment for the carriage of bullion. The Naval List was issued quarterly. The October Naval List dated the 1st Oct. had in it the whole Order in Council of the 10th Aug. 1888. That was the last Naval List which was received at the Cape Station before the 10th Jan. 1915. The old Order in Council and Proclamation of the 10th Aug. 1888 had by then disappeared.

After an interval, when he had returned to England, the first plaintiff applied to the Admiralty for his share of the freight money and in due course received the following reply:

I am commended by my Lords Commissioners of the Admiralty to acquaint you that freight is no longer payable in respect of the conveyance of treasure in His Majesty's ships.

Thereupon the plaintiffs brought the action in which they asked for the declaration as stated above.

Captain *Maxwell Anderson* (*Le Quesne* with him) for the plaintiffs.—It has been the immemorial custom in His Majesty's navy that when goods are received on board for carriage in a man-of-war freight money at various rates should be paid. The custom appears to have originated when the seas were infested by pirates and freebooters. In the reign of Charles II. it was a

common custom for the King to give commissions to command men-of-war to courtiers who were financially in low water in order that they might go to sea and replenish their finances in this manner. The practice grew and eventually became an abuse. Merchants were always ready to pay freight to men-of-war which constantly arrived in this country, with large amounts of bullion on board for which the captain took the freight money. Eventually an Act of Parliament was passed in 1819 (59 Geo. 3, c. 25), by which it was enacted that no merchandise was to be carried on a man-of-war except certain specified exceptions, or except special orders had been given by the Admiralty. When bullion was carried it was to be carried at a freight which was to be fixed by His Majesty by Order in Council or proclamation. The Act (59 Geo. 3, c. 25) is:

An Act to enable His Majesty to fix the rate and direct the disposal of freight money for the conveyance of specie and jewels on board His Majesty's ships and vessels. Whereas it is expedient that His Majesty should be authorised to fix the rate and direct the disposal and distribution of freight money for the conveyance of specie and jewels on board His Majesty's ships and vessels. Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice . . . that from and after the passing of this Act all freight money to be paid for the conveyance in any of the ships and vessels and for which freight shall be payable, shall be paid at such rate, and distributed and applied to such purposes, and divided to and amongst such persons in such proportions and after such manner as His Majesty, his heirs, or successors shall from time to time think fit to order and direct by any proclamation or proclamations to be issued for that purpose; and that no freight money or reward shall hereafter be demanded, paid, received, or retained by, to, or for the use or on account of any person or persons for the conveyance on board of any of the ships or vessels of His Majesty, his heirs, or successors, of any gold, silver, or jewels, or any other article, which may be by special order received on board the said ship or vessel, and for which freight shall be payable, other than for the purposes and by the person or persons, in the proportion, at the rates, and in the manner so to be paid and allowed by proclamation or proclamations; and that all bargains, contracts, covenants, and agreements, made or entered into, or hereafter to be made or entered into, for the payment of any freight money for or in the name or on account of freight for the conveyance of gold, silver, or jewels, or other articles as aforesaid, on board of any of His Majesty's ships or vessels, at any other rate, or for any other purpose, or by or to any other person or persons or in any other manner of proportions than as aforesaid, shall be and the same are hereby declared to be utterly void.

Following on that Act, Orders in Council and proclamations have been issued from time to time. In the Naval List of 1854 the proclamation then in force is set out. That proclamation gives the rates on which freights shall be paid, and shows a lower rate for the Crown than for other parties. It also shows the rates for ports, and for Simonstown, Cape Town, where the bullion in the present case was landed for England the rate would be 2½ per cent. in war time. The Order in Council of 1838 remained in force until 1888. The reason for the new Order in Council and proclamation of the 10th Aug. 1888 was that the Crown then decided not to pay freight on Crown property. It states:

We do by this our Royal Proclamation by and with the advice of our Privy Council direct that on and after the first day of October 1888, the rate at which freight shall be paid for the conveyance on board any of our ships or vessels of treasure belonging to parties other than the Crown, whether gold, silver, jewels or other articles which may by special order be received on board any of our ships or vessels shall be 1 per cent.

That proclamation fixed a flat rate of 1 per cent. for all voyages. In order to entitle a flag officer to share in this freight for the conveyance of treasure, it is necessary when he assumes command of his station, that he should sign a declaration, a copy of which he hands to all the captains or officers in command of ships serving under him, in the following terms:

I, A. B., am desirous of partaking of the advantages, with the risks attendant thereon, arising out of the conveyance of treasure under contract of affreightment in any of the ships or vessels in . . . squadron. And I hereby engage to make good to the captain or captains, officer or officers commanding such ships or vessels respecting such part of any loss or damage for which he or they may be liable in respect of the gold, silver, treasure, or other articles so carried on freight and which he or they respectively shall actually have paid and satisfied as shall be in the proportion to the share or interest in the said freight money to which I may be entitled.

Under the proclamation of the 10th Aug. 1888 which was in force at the beginning of the war, the freight was to be divided as to one quarter to the flag officer, the admiral in command of the station, two quarters to the commanding officer of the ship who should sign the receipt or bill of lading and one quarter to Greenwich Hospital. It appears from the old Orders in Council that a higher rate of freight has always been payable in war time than in peace. In the old Orders in Council the two rates are set out side by side. There is no reported case in which payment of freight has been refused. The reported cases are cases in which the naval officers or flag officers have attempted to extort from the captains a share which the courts have held the flag officers not entitled to. [BAILHACHE, J.—Since 1819 no bullion has been carried except by order, has it? Since 1819 it was not open to a man who, say in South Africa, wanted to send bullion to this country to go and make a bargain with the King's ship; he had to go and get some special permit.] That is so. When this custom became an abuse, an attempt first of all was made to stop it by forbidding men-of-war, without special order, to carry anything but gold, silver, or jewels, or salvage. But merchants were so anxious in those days to get their bullion carried by men-of-war that they induced the captains to do so, and the penalties under the Naval Discipline Act were not sufficient to deter the captains from so doing. The remedy was found in the Act of 1819. It is submitted that when one considers that Act it is relevant to consider the state of the law before the passing of that Act. [BAILHACHE, J.—Before 1819 the captain of the ship made any bargain he liked as to the rate of freight.] Yes. It was a pure matter of bargaining. The prohibition on carrying such goods is contained to-day in the Naval Discipline Act 1832. The prohibition still exists except as regards gold, silver, and jewels. Bullion has been held not to

be gold, silver, or jewels, so a special order becomes necessary to carry bullion or treasure before it can lawfully be carried. Under the King's Regulations of the Navy which were in force before the Order in Council of 1914 the captain was ordered to make a report of all treasure shipped as soon as it was received, as well as in the half-yearly returns, and upon the receipt of freight or treasure to pay the proportion due to Greenwich Hospital to the accounting officer, who had to debit himself therewith in his cash account and transmit with it the vouchers descriptive of the sums received. Under the new regulation of art. 607 of the King's Regulations and Admiralty Instructions:

Treasure is not to be embarked in His Majesty's ship except upon the receipt of definite instructions from the Admiralty or from the commander-in-chief of a foreign station. The captain will make a report of the treasure shipped as soon as it is received, and all questions in regard to charges on account of conveyance of treasure are to be submitted to the Admiralty.

It was after reading that last sentence that the first plaintiff in this case applied to the Admiralty for his share of the money and received the answer that the money was no longer payable. The transaction in this case follows the same course as the correspondence in the case of *Montagu* v. *Janverin* (3 Taunton 442), a case which shows that there was an old usage of the payment of freight for the conveyance of treasure, although, as regards the conveyance of public treasure, the usage fell into abeyance some time between 1801 and 1807; but, as regards the conveyance of private treasure, it never did fall into abeyance. The case of *Brisbane* v. *Dacres* (5 Taunton 143) decided that it was illegal for a commander of one of H.M. ships of war to carry on board her for freight the bullion of private merchants without an order from a competent authority. In *Hodgson* v. *Fullarton* (4 Taunton 787) it was decided that the commander of a ship of war who takes the bullion of a private merchant on board is liable at common law to an action for not keeping it safely and delivering it. The same point occurred in *Hatchwell* v. *Cooke* (6 Taunton 577). These cases show the state of the law at the time the Act of 1819 was passed, and the defects which the Act was intended to remedy. It was acknowledged that the custom existed and should be continued, but that it should be continued subject to regulation by the Crown, and any bargain or contract made in contravention of the regulations made by the Crown should be void. The Crown has made these regulations from time to time, and until the outbreak of the war there were regulations in force setting forth a system of payment. Then comes the Order in Council of the 26th Oct. 1914, which is relied on by the defence as an answer to the plaintiff's claim for freight. It is submitted that that order can only mean that the system then in force should be terminated. It is submitted that the Admiralty misconstrued the Order in Council of the 26th Oct. when they wrote saying that the payment of freight was abolished. The Order in Council cannot operate to alter the law as it exists under the statute of 59 Geo. 3, c. 25. Under that statute the plaintiffs are entitled to some freight, such freight to be regulated in amount and distribution by the Crown. The Order in Council of the 26th Oct. 1914 was merely a variation of the system. It did not abolish the right to freight. It is submitted that the Order in Council cannot make or unmake law except in so far as powers are conferred in the Act itself. The case of The Proclamations reported in the State Trials 723 is conclusive authority on the point that the Order in Council cannot abolish a right conferred by the statute. With regard to the point about there having been a transhipment on the voyage home, it is admitted the bullion in the present case was transhipped, but there is no dispute that all the bullion reached this country despite the transhipment. It is also admitted that only one freight is payable notwithstanding the transhipment: (see *Montague* v. *Janverin*, 3 Taunton, 443).

Leslie Scott, K.C. and *Raeburn* for the defendants.—So far as the claim is based on a custom, it is submitted that there is no evidence of any custom, and that there could not be any custom which could regulate the matter or establish any liability on the defendants under any circumstances. So far as the claim is based on an alleged contract, the plaintiffs were not parties to any contract of affreightment with the defendants, and the defendants were not parties to any contract of affreightment with the plaintiffs. There is no evidence of either plaintiffs or defendants being parties to any contract of affreightment. There is no evidence that the defendants had any interest in the bullion. They were custodians acting on the instructions of the Union Government of South Africa, who themselves were acting on the instructions of the Bank of England. The evidence is that the Bank of England was the party interested as owner in the bullion after the time the property in it apparently passed from the mining companies who had sent it to the custody of the defendants. The Union Government in writing to the Standard Bank of South Africa on the 31st Dec. 1914, was acting on instructions received in regard to native gold, held on behalf of the Bank of England. The letter referred to the agreement whereby the Minister of Finance and Defence of the Union of South Africa had agreed to receive on behalf of the Bank of England deposits of native gold at certain specified banks in Johannesburgh, Pretoria and Cape Town. Under that arrangement the mining companies were to deposit gold at certain places which the Union Government was to decide with certain named banks, of whom the defendants were one. There is no suggestion in the evidence that any request was received from the defendants to ship the bullion. So far as the question of shipment was concerned, the defendants had nothing to do with the matter, except to hand over the bullion when ordered by the Union Government to the person named by the Union Government. The Union Government gave their instructions and were obeyed by the defendants, who were in fact gratuitous bailees. The mining companies were customers of the defendants and the other banks referred to in the memorandum, and this was a special arrangement under special circumstances in connection with the war. There was a mistake made in London between the High Commisssioner and the Admiralty about instructions. The Admiralty

thought they had received definite notice from the High Commissioner that the gold was coming forward, and they ordered it forward. But there was a misunderstanding. It was not intended to come forward, and it came forward uninsured all the way and arrived uninsured in this country, and it was because it arrived unexpectedly, without instructions having been given by the Bank of England, that the defendants in London were asked to take delivery at Plymouth, because the Bank of England did not understand what had happened, and, in order to oblige the Bank of England and to facilitate the arrangement, the defendants here in London did send their officials down to take charge of the bullion at Plymouth and to make arrangements to bring it up to London. It is submitted that there is no evidence that the defendants had anything whatever to do with the requesting or instructing or ordering of the shipment or that they had undertaken any liability whatever in regard to the carriage of the bullion. They had merely given it up when ordered to do so. In England the defendants' representative in taking delivery at Plymouth merely acted at the request of the Bank of England to clear up a difficulty. With regard to the legal position, it is submitted that before the Act of 1819, it was always illegal for the captain of a naval vessel to enter into a contract of affreightment with a private shipper for the carriage of his goods for the reason that for a naval officer to do so was to put himself in a position where his interest and his duty may so easily conflict. It was said to be against public policy for them to do it. It might tempt them into taking their ships away from their proper duties. It is submitted that it must be illegal for an officer who, by his commission, has undertaken to give his whole time and services to the navy to be doing anything of the kind. No doubt the practice was winked at and openly allowed by the Crown in olden times. The practice came to be regarded as an abuse and the Act of 1819 was passed to deal with that state of things. There had been a great deal of discussion as to how it was legal for naval officers to enter into private contracts of affreightment for the carriage of gold, silver, jewels, or goods specially ordered and the controversy was closed by the Act of 1819, which stated in clear language that those contracts of naval officers for carriage for private individuals shall cease altogether except to the extent to which the King by proclamation may allow them. The Act prohibits the earning of freight. The effect of that Act was to put the naval officers in the position that it was entirely in the discretion of the Crown in the exercise of its bounty, or the Government of the day, to allow or disallow this practice of naval officers receiving reward for the carriage of gold and silver, &c., and advisedly so, in order that the Government might have complete control over the matter. The Government, in the exercise of the discretion conferred upon it by the Act of 1819, revoked the existing proclamation which licensed the practice referred to, and brought to an end altogether the right which from the passing of the Act of 1819 was entirely *ex gratia*, not a real right. It was *ex gratia* in the sense that the King in Council could at any time withdraw the proclamation. The effect of the Order in Council of the 26th Oct. 1914, annulling the Order in Council of the 10th Aug. 1888, is that there is no proclamation or Order in Council in existence which can regulate the transaction in the present case. Therefore we are thrown back on the Act of 1819 which says that there shall be no payment made to any naval officer unless it is authorised by a proclamation. The result of the Order in Council of the 26th Oct. 1914 is that the plaintiffs are not entitled to the declaration claimed.

Captain *Maxwell Anderson* in reply.—It is admitted that both before the Act of 1819 it was and at the present time it is illegal for the commander of a warship to carry for freight the bullion of a private merchant unless he receives an order so to do from a competent authority. The plaintiffs here have the order of the competent authority, therefore there is no illegality in the transaction in the present case. The Order in Council of the 26th Oct. 1914 has been misconstrued by those whose duty it is to advise His Majesty as to the next step. There is no power to compel His Majesty's advisers to give the requisite advice, and on the assumption that wherever there is a right there must be some remedy it is submitted that the only remedy here is to come to the court and to ask for a declaration. The ancient custom was legalised by the Act of 1819. While there is a proclamation in existence made under the Act any bargain, covenant or agreement outside the terms of the proclamation was utterly void, but if there is no proclamation in force, we are back in the *status quo ante* the Act. As the plaintiffs received the gold from the defendants they are entitled to look to the defendants for the payment of the freight.

BAILHACHE, J.—This is an action of a very unusual and most interesting character. It appears that in olden times when the seas were not so safe as they were before the present war and when pirates and rovers abounded, it was the practice for merchants, who had bullion and articles of great value to transport from one place to another by sea, to put those articles on board a King's ship, and the remuneration which was paid to the officer in charge, the captain of the King's ship, was in olden times a matter of bargain between the merchant who put the goods on board and the captain of the King's ship which carried those goods, and the captains of the King's ships used frequently to make very considerable sums in that way. The remuneration so paid was called, and is called throughout this case, freight and I will continue to call it by that name although that name is not perhaps very applicable to the payment.

But this practice led to great abuses. Sometimes a captain of a King's ship would, in order to make this freight, leave his station without orders and permission and carry this bullion or these articles of value to their destination. It is true he suffered penalties for so doing, but the profit he made was a sufficient inducement for him to run the risk of having to pay those penalties. Towards the end of the eighteenth century this practice was declared to be illegal; it was declared by Chief Justice Mansfield to be contrary to public policy as no doubt it was: (see *Brisbane* v. *Dacres*, 5 Taunton 143). But the practice, I should think, continued notwithstanding that, though I daresay in a modified form, until the year 1819. In the year 1819 an

Act of Parliament was passed which had the two-fold object of stopping these private bargains in the carriage of this bullion and these articles of value by private arrangement between the owner and the captains of King's ships, and regulating the traffic. The Act, which is all in one section, as a matter of fact, may be divided into three parts. The first part of it prevents the carriage of these articles without special order; the second part of it provides for the payment of this freight to be regulated by Order in Council; and the third part of it prevents any private bargain being made between the merchants and the captains of the King's ships without such Orders in Council. Orders in Council were from time to time under that Act of Parliament made, I think almost immediately after its passing, and they continued to be made at intervals down to the 10th Aug. 1888.

On the 10th Aug. 1888 an Order in Council was made which dealt with the freight which was to be paid for the carriage of these articles when they were authorised by special order, and that Order in Council provided that the rate of freight should be 1 per cent. on the value of the articles and that that 1 per cent. should be divided into three parts, one quarter of the 1 per cent. was to go to the flag officer, the admiral in charge of the station, two quarters of it were to go to the captain on whose ship the bullion and articles of value were loaded and carried, and the remaining one quarter was to go to Greenwich Hospital. Now that order remained in force and was in force at the beginning of the war in Aug. 1914, and on the 26th Oct. 1914 an Order in Council was made in these terms. It recites the order of the 10th Aug. 1888 and goes on to say that the Lords Commisioners of the Admiralty "consider it desirable that the system of payment for the conveyance of treasure in Your Majesty's ships therein prescribed should be terminated. We beg leave humbly to recommend that Your Majesty shall be graciously pleased by Your Order in Council to annul the aforesaid Order in Council of the 10th day of Aug. 1888, and the proclamation annexed thereto. His Majesty, having taken the said memorial into consideration, was pleased by and with the advice of His Privy Council to approve of what is therein proposed."

The state of affairs, therefore was, at the time with which I am concerned, and which I am coming to in a minute, that the old order of the 10th Aug. 1888 was annulled and no order had been substituted for it, and the reason was that the Lords of the Admiralty considered it desirable that the system of payment for the conveyance of treasure should be terminated. I emphasize, in reading it, the words "system of payment" because a good deal of the argument in this case has turned upon the phraseology therein used and the meaning of the words "system of payment."

That was the state of matters and the state of the law when the events with which I am immediately concerned took place. In order to explain them I must state one or two extraneous facts. It appears that the mining companies in South Africa are in the habit of sending their bullion down to the various banks at Cape Town for safe custody. The banks do not charge for the safe custody. They put it into their vaults just as they put into their vaults and their strong rooms in this country the valuables of customers of the bank who choose to deposit those valuables with them. The bullion which arrives down at Cape Town and is placed in their vaults is sold to the Bank of England. The Bank of England when they buy it pay 97 per cent. of its assayed value as assayed in Cape Town. They reserve to themselves the remaining 3 per cent., which they do not pay until the bullion arrives in this country, and that 3 per cent. is, no doubt, kept in hand in order to allow a margin for any variations in the assay that may show themselves when the gold is tested and tried on arrival in this country. The mining companies have to pay all the incidental expenses; out of the money which they receive from the Bank of England they have to get the bullion transported to this country, and it is their duty to insure and their duty to pay freight if any freight is payable. The property in the bullion is in the Bank of England.

Now, those were the circumstances when at the end of 1914 and the beginning of 1915 it was determined by the powers that be to transport a certain quantity of this bullion from Cape Town to this country. The total quantity transported at that time, I understand, was 8,000,000*l.* worth, but so far as the Standard Bank is concerned, the amount which was transported from their vaults was 2,500,000*l.* worth, and that was transported in this way. The first plaintiff in this case, who is Admiral King-Hall, was at the time the Admiral in charge of the South African Station, and he had instructions to receive from the Standard Bank of South Africa this bullion, place it on board His Majesty's Ship *Albion*, and to send it forward to this country. He communicated with the Standard Bank telling them that he understood they had instructions. His letter is dated the 1st. Jan. 1915, and perhaps it is better to read it. It is in these terms: "I am informed by His Excellency the Governor-General that you have received instructions from the Union Government to hand over on demand to my order sealed boxes containing merchandise gold, deposited with you on behalf of the Bank of England, of approximately but not exceeding the following value:—2,530,000*l.* I request, therefore, that you will hand over those boxes to Captain E. H. Harding, Prince Alfred's Guards, who is acting under the instructions of Major-General Thompson, C.B., D.S.O., with whom arrangements have been made for their safe transfer to my custody." It was obvious, of course, particularly at this time, that it was a dangerous matter to get this bullion out of these vaults of the Standard Bank and put it on board His Majesty's ship *Albion*, and that is the reason why the Standard Bank was to hand it over to Captain Harding, who was to take it from the Standard Bank to Simonstown, where it was to be placed on board the *Albion* under an armed guard. That was in fact duly done, and the *Albion* sailed. She sailed under the command of a gentleman who was then Captain Heneage, but is now Rear-Admiral Heneage. The *Albion* called at St. Helena and at Gibraltar. Part of the bullion was, I understand, transhipped at St. Helena and part at Gibraltar, and the bullion was carried to this country, not in the *Albion*, but in some other of His Majesty's ships.

Under the circumstances the admiral in charge of the station and the captain of the *Albion*, on whose vessel the bullion was shipped, claim that they are entitled to be paid the freight in respect of the carriage of the bullion. I do not trouble myself for the moment about the transhipment, because I am dealing here, and propose to deal, with the general principle which underlies their case. They put their case in this way. They refer, first of all, to the ancient practice and custom. So far as that is concerned I think that it is proved, but it must be borne in mind that that custom was in certain respects held to be illegal as long ago as the end of the eighteenth century, and, moreover, that the whole of this transport of bullion on King's ships is now regulated by the Act of Parliament of George III. 1819. In dealing with the rights of these gentlemen in this case it is not necessary, and I ought not to go further back than the Act of 1819, and see how their rights stand under that statute. Now, if the proclamation of the 10th Aug. 1888 had been in force when this bullion was received on board His Majesty's ship *Albion* it cannot be doubted that, subject to the question of transshipment and of some apportionment and division of the money, that these gentlemen, or these gentlemen together with the officers of the other ships which actually completed the voyage, would have been entitled in some way between them to have received their proportion of 1 per cent. on the value of this bullion, a very large sum of money. One-fourth of it would have gone to the admiral in charge, two-fourths to the captain or captains of His Majesty's ships, and one-fourth to Greenwich Hospital. But before the bullion was received on board there had been the Order in Council of Oct. 1914, which annulled the order of Aug. 1888.

The result is, that at the time this bullion was received on board the *Albion*, there was no Order in Council dealing with the payment which was to be received by these gentlemen. Now, I have stated what the effect of the Act of 1819 was and I do not desire to repeat myself in that respect, but, having regard to what I understand to be the effect of that Act, the position is this, that there is no Order in Council which regulates the amount which either the flag officer or the captain in charge of the transport ship is to receive for the carriage of bullion, but if there is no Order in Council, I seem to have no means at all of determining whether any payment ought to be made, and certainly no means of determining what rate of payment ought to be made. The Act provides for the regulation of that by Orders in Council and in no other way. I have no power to make an Order in Council or to supply the deficiency of there being no Order in Council, nor have I any power to direct that an Order in Council shall be made. I may say that I am inclined to agree with what Captain Anderson has argued upon the construction of the order of Oct. 1914, that that order is meant to deal with the system of payment and does deal with the system of payment, and I am inclined to think that it was in contemplation at the time that, while the system of payment was to be altered and the order was to be annulled, it was in contemplation, I should myself to be disposed to think, that some fresh Order in Council should be promulgated dealing with the remuneration that was to be paid to the flag officer and to the captains of His Majesty's ships which transported this kind of cargo, this bullion; but, unfortunately for the plaintiffs in this case, although I think that was probably the original intention, that intention has not gone further than intention, if indeed the intention ever existed, and, as it has not gone further, they are short of the necessary Order in Council without which their claim in this action cannot be sustained.

It appears that when the bullion was brought to this country and was deposited ultimately with the bank, there was some little trouble about that and some confusion. It is interesting to note that the result of the trouble and confusion, amongst other things, was that this large quantity of bullion was sent from Cape Town to this country uninsured. Fortunately, no harm happened, and the bullion duly arrived, and in respect of the carriage of the bullion the mining companies have paid something over 9000*l.*, a sum which is said to be a sum to cover freight and insurance. There was no insurance. How much of it was allocated to an insurance which did not exist I do not know, but the sum that was paid was something over 9000*l.* That sum has apparently been received by the Admiralty, and I should myself suppose that it was the intention of the Lords of the Admiralty that some Order in Council should be made dealing with the allocation of that money; but no order has been made, and, as I have already said, I cannot supply its place. It is obvious why the order of 1888 was annulled—because when the war began, and it was necessary, or contemplated that it would be necessary, to send bullion in very large quantities from South Africa to this country, it was obvious that the old rate of 1 per cent. and the old division became impossible.

Take this case, for instance, The amount of bullion transported was in all something like 8,000,000*l.* If one takes the rate of freight payable under the order of August 1888 of 1 per cent. that amounts to something like 80,000*l.*, a far too large sum of course to be allocated to the persons between whom such a sum under the Act of 1888 was to be divided. At any rate, it is sufficient for my purpose to say, and this disposes of the case, that there being no Order in Council I cannot supply the place of the Order in Council; that necessary plank in the plaintiff's case is missing, and they cannot succeed.

There is another difficulty in their way, and that is this, that they sued the Standard Bank of South Africa, and it is said that they have sued the wrong defendants. It is said that the Standard Bank of South Africa had really nothing to do with this transport, that they were merely agents, that they were acting under instructions, and that under no circumstances could they be liable for freight in this case. Moreover, it was pointed out that they were bailees, and that they were gratuitous bailees. I am not at all certain that they were gratuitous bailees. It suited them, for business reasons, to accept and take care of this bullion, because the bullion came from their customers, but assuming that they were gratuitous bailees I am not at all certain under the circumstances of this case they might not, if freight had been payable, have been liable for it. They were the persons with whom the shipment was arranged; it was from them that it came and there

is a great deal of force, I think, in the argument which Captain Anderson has adduced on that head. However I do not decide that point because it is not necessary that I should. I merely refer to it to say that I am not satisfied that if freight was due it would not have been due from the Standard Bank of South Africa.

The reason for my decision is the reason I have given, that there is no Order in Council authorising the payment of this freight, and an Order in Council is, in my judgment, absolutely necessary.

That disposes of the case, but before leaving the case, I should like to say that it has given me great pleasure to see Captain Anderson here in the uniform of His Majesty's Navy and to notice that the services that he has been rendering in that respect have in no way impaired the force and clearness of his argument.

There will be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Thompsons Quarrell* and *Jones*.

Judicial Committee of the Privy Council.

Thursday, Jan. 16, 1919.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL.)

THE TURUL. (a)

APPEAL FROM THE PRIZE COURT, NEW SOUTH WALES.

Prize—New South Wales—Merchant ship in enemy port at outbreak of war—Seizure in port—Days of grace—Force majeure—*Sixth Hague Convention* 1907, *art.* 2.

On the 7th Aug. 1914 *a Hungarian merchant ship arrived at a port in New South Wales. On the 12th Aug. war was declared between Great Britain and Austro-Hungary. On the following day the ship was seized as prize, her papers and charts being taken from her, and a detention notice served on her master. On the 15th Aug. a proclamation was made by the Governor-General of Australia granting enemy ships days of grace in which to depart. A watchman was put on board by the authorities. The days of grace expired on the 22nd Aug. The master was not informed by the proclamation or otherwise that upon his applying for a pass the ship would be put in a position to depart.*

Held, that as the terms of the proclamation did not clearly show that, notwithstanding the seizure of the ship, the vessel would be allowed to depart during the days of grace, the vessel had been unable to leave by circumstances beyond its control (force majeure) *during the days of grace within the meaning of art.* 2 *of the Sixth Hague Convention, and was therefore not liable to be condemned as prize.*

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

APPEAL by the Crown against a judgment of the Supreme Court of New South Wales (in Prize) dated the 17th Dec. 1917.

The motion by the Crown was for an order for the condemnation of the steamship *Turul*, a Hungarian ship, which was in Sydney Harbour on the outbreak of war between Great Britain and Austro-Hungary.

The facts appear from the considered judgment of their Lordships.

Sir *Ernest Pollock* (S.-G.) and Dr. *Pearce Higgins* for the appellant.

Sir *Erle Richards*, K.C. and *W. Van Breda* for the respondents (the owners).

The judgment of the board was delivered by

Lord SUMNER.—In this case His Majesty's Procurator-General moved the court below—the Supreme Court of New South Wales (in Prize)—for a decree condemning the Hungarian ship *Turul*, and that motion was refused. The Crown now appeals.

The *Turul* arrived at Port Jackson with cargo for Sydney and Newcastle on the 7th Aug. 1914. War was declared by His Majesty upon the Austro-Hungarian Empire on the 12th Aug. and the *Turul* was seized in prize on the 13th. Her ship's papers were taken away, and she was also deprived of her charts. On the 15th a proclamation was issued in order to fix those days of grace which are declared by art. 1 of the Sixth Hague Convention to be desirable, and by the terms of that proclamation, the paragraphs of it which are now material came into effect if and when one of the Ministers of State was satisfied of certain matters, and had taken certain steps, of which publication in the Commonwealth Gazette was one. Though there is no evidence upon the subject, the whole case has proceeded upon the assumption that the Minister was duly satisfied and that those formal steps were taken, and that thereupon the articles in question came into full force and effect, and their Lordships think it unnecessary to pursue this point.

By the terms of the proclamation, from and after its publication "no enemy merchant ship shall be allowed to depart, except in accordance with the provisions of this order." Then, arts. 3 to 8 having come into force, art. 3 says that: "Subject to the provisions of this order enemy merchant ships which—(i.) At the date of the outbreak of hostilities were in any port in which this order applies, . . . shall be allowed up to midnight on Saturday, the 22nd day of August 1914, for loading or unloading their cargoes and for departing from such port." As a matter of fact the *Turul* was allowed to discharge, and when her discharge finished, which was on the 20th Aug., she was directed to be moved to another part of the harbour, and there a watchman was put on board either on behalf of the marshal of the Prize Court or on behalf of the customs officers who had seized the ship; it appears to be immaterial to decide which was the case.

On the 22nd Aug. at midnight the days of grace expired. Now the question is whether this ship "Par suite de circonstances de force majeure, n'aurait pu quitter le port ennemi pendant le délai visé à l'article précédent" within the terms of art. 2 of the convention. If that was so then

she could not be confiscated, and the order made by the court below was right. It is clear that the vessel could not leave the enemy port within the period contemplated in the preceding article unless, among other things, her ship's papers and charts were returned to her, and the watchman was removed. Acts had been done in exercise of the belligerent rights of the Crown, which in themselves perforce detained the vessel and which the vessel in herself was powerless to undo, and the only ground upon which it can be said that she was not subject to *force majeure* during the period down to midnight of the 22nd Aug. is that the authorities had decided, and by virtue of the Proclamation had made known their decision, that these acts would be undone at the request of the captain of the vessel if he chose to avail himself of the opportunity given by the proclamation, and to assert the conventional rights secured by the Hague Convention.

The view their Lordships take of the proclamation is that the terms of it did not constitute an intimation to the captain that upon his choosing to avail himself of the days of grace, to apply for a pass, and to intimate what his port of destination was, so that its name might if approved be inserted in the pass, he would then without difficulty, and without risk of refusal, have his charts and his ship's papers returned to him, and have the watchman withdrawn, so that he would be free to leave by midnight of the 22nd. It is to be remembered that a proclamation of this kind may operate in favour of the belligerent who publishes it, since it may be used to diminish, by limiting them, the advantages which the convention was intended to secure to the enemy ship, for by its publication the belligerent power defined the number of the days of grace—"délai de faveur suffisant"—and determines also some at any rate of the terms upon which the exercise of the privilege is to be enjoyed. Their Lordships think that the language in which the Crown exercises the right of defining this period of grace within the article ought to be explicit and unambiguous, and explicit and unambiguous with reference to the party, whose opportunity of availing himself of the benefits of the convention is to be affected by the operation of the proclamation upon his particular case. It would ill-become a sovereign Power, and would ill-become a Court of Prize adjudicating upon the rights of others as against the officers of that sovereign Power, to seek to give effect to a proclamation which was less than clear, in order to curtail the advantages which the convention was intended to secure to a ship which finds itself in its enemy's port. There was, in their Lordships' view, nothing that sufficiently stated to the persons interested in this ship that the seizure, the removal of the papers and the charts, and the custody given to the watchman, were all matters which were intended to be covered by the general terms employed in the proclamation, and that this ship, in spite of these particular circumstances, would be allowed to depart within the limited time merely by virtue of the general terms of the proclamation. If the captain of the vessel had had the opportunity of departing and had for reasons of his own decided not to avail himself of it, as, for example, because he could not sail without coals and could get no money to procure them, or that he was not sufficiently confident that a British passport would protect him from capture by vessels belonging to His Majesty's Allies, then it has been settled that in such a case it is his own choice—it may be also his own misfortune—that detains him in the port, but the ship is liable to be confiscated, because it cannot be truly said that *force majeure* is what has prevented his taking advantage of the opportunity. There was some evidence upon which such a finding might have been arrived at, but the learned judge in the court below did not act upon that evidence, and their Lordships do not see their way to any finding of fact at which he did not arrive. They therefore think that he rightly refused to confiscate the vessel.

As to the other point, that the matter was already decided by the decree dated the 22nd Nov. 1914, their Lordships think that it is unnecessary to express any opinion, since, whatever the intention of that decree may have been, the result would only be to arrive at the same conclusion, namely, that the appeal fails.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellant, *Treasury Solicitor.*

Solicitor for the respondents, *William A. Crump* and *Son.*

Jan. 17, 20, 21, *and March* 3, 1919.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL.)

THE RIJN. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize—Conditional contraband—Named consignees — Transhipment of cargo to neutral vessel—Ultimate enemy destination — Declaration of London Order in Council (No. 2), Oct. 29, 1914, clause 1 (3).

There being evidence on which it could be inferred that the conditional contraband (food stuffs) shipped to consignees at a neutral port were in fact intended for the supply of the enemy and that the consignees named in the bill of lading were mere instruments for the carrying out of that purpose:

Held, that the goods on that ground alone were liable to seizure as good and lawful prize.

Rule laid down in The Louisiana (14 *Asp. Mar. Law Cas.* 233; 118 *L. T. Rep.* 274; (1918) *A. C.* 461) *applied.*

Judgment of the Prize Court (117 *L. T. Rep.* 347; (1917) *P.* 145) *affirmed.*

APPEAL by the claimants from a decision of Evans, P. of the Admiralty Division (in Prize), reported 117 L. T. Rep. 347; (1917) P. 145.

By the decision appealed from it was held that the goods were contraband at the time of seizure; that they were not protected by the provisions of the Declaration of London Order in Council (No. 2) 1914; that art. 43 of the Declaration of London did not apply so as to entitle the claimants to compensation; that the claimants were not the real owners of the goods, which

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

were in reality destined for Germany; and therefore the goods were good and lawful prize.

R. A. Wright, K.C. and *Le Quesne* for the appellants.

Sir *Gordon Hewart* (A.-G.), Sir *Ernest Pollock* (S.-G.), *Branson*, and *H. H. Joy* (for *Harold Murphy*, serving with His Majesty's forces) for the Crown.

The considered judgment of the board was delivered by

Lord PARMOOR.—The appellants claim as owners of part cargo ex steamship *Rijn*. Their claim has been disallowed in the Prize Court, and the goods have been condemned as conditional contraband on the ground that they were owned by enemies at the date of seizure and that they were destined for an enemy basis of supply. The goods consisted of 15,555 bags of cocoa beans shipped between the 27th May and the 17th June 1914, before the outbreak of war, on the German steamship *Assuan* by a South American firm called the Associacion de Agricultores del Ecuador. The *Assuan* was proceeding on her voyage when the war broke out, and then put into Las Palmas, remaining there for several months with her cargo on board. No bills of lading, or shipping documents of any kind, were produced to shew in whom the property in the goods was vested at the time when the *Assuan* took refuge at Las Palmas, and further there was no evidence that the South American firm at any time took any measure to obtain the release of the goods held up in the *Assuan* or any other action indicating that they had any interest in relation thereto. It is obviously a matter of crucial importance to the appellants to be able to prove that the goods, at the date of the suggested sale to them, were the property of the South American firm. There should be no difficulty either in obtaining the necessary documents or, in the event of their loss, giving evidence of their contents, and the failure to produce any such evidence constitutes an element of grave suspicion.

The appellants are a firm of Dutch merchants carrying on business in Holland. The particular business, with which the appeal is concerned, was introduced to them by a Hamburg merchant named George Otto Embden. The terms as originally proposed are contained in a letter of the 13th Jan. 1915, written from Hamburg by Embden to the appellants. In this letter it is stated that the goods could probably be purchased "from the owners here." There is no suggestion that the goods are the property of a neutral firm in South America. It was suggested in argument on behalf of the appellants that the words "from the owners here" should be read "here from the owners," but there is no reason to justify this transposition, and the words as they stand appear to accurately denote the true nature of the transaction. [His Lordship referred to the correspondence and to the evidence, and continued:]

The appellants chartered the steamship *Rijn* at Amsterdam on the 27th Jan. 1915, and intended that the cargo should be consigned to the Netherland Oversea Trust. It was, however, not practicable to carry out this intention. The Netherland Oversea Trust would not accept the consignment to them of the cocoa, for the reason that the British Government, at that date, were not treating cocoa beans as included in the definition of foodstuffs delared to be contraband. Accordingly by a supplementary agreement between the appellants and the shipowner, dated the 9th Feb. 1915, it was agreed that if cocoa beans should be declared contraband, the bills of lading should be transferred to the Netherland Oversea Trust. The *Rijn* duly proceeded to Las Palmas, loaded the cocoa beans, and sailed on the 23rd March 1915 to Amsterdam, with instructions to call at the Hook of Holland for orders in case it was decided to send her to Rotterdam. The ship was seized on the 6th April 1915 and the goods condemned as contraband on the 6th June 1917.

Various questions were raised before their Lordships on the hearing of the appeal. It was argued that at the material dates the cocoa beans were not contraband, or alternatively that they only became contraband under such circumstances as to entitle the appellants to compensation as provided in art. 43 of the Declaration of London, and further that they were protected by the Order in Council of the 29th Oct. 1914, being consigned to a named consignee at a neutral port. These questions however, do not arise for determination unless the appellants can show that the goods were their property at the time of seizure. On this point the learned President has found: (1) That the claimants have failed to establish that the property of the goods ever became vested in them. (2) That if the property had become vested in them they acted in the whole transaction merely as instruments for Embden, and subject to his directions, for the purpose of getting the goods through to Germany. (3) That the appellants acted in concert with Embden in an attempt to get the goods to Hamburg by pretending that they were neutral purchasers on their own account.

The case for the appellants, so far as it relates to the ownership of the goods, was that the goods, up to the date of the alleged sale to them through the agency of the three German firms, remained the property of the neutral shippers. If the original transaction, at the date of the shipment of the goods, was such that the goods were consigned by the steamship *Assuan* for sale in Germany, this would have appeared on the shipping documents, or, if the documents had been lost, by proof of their contents. No such proof was suggested or tendered, although no difficulty would have been involved in its production, and the first reference to ownership is contained in the letter of Embden, in which he refers to "the owners here," that is to say, the owners in Hamburg. All the surrounding factors point in the same direction. There is no evidence that the neutral shippers took any interest in the goods after their shipment in May 1914, or that any communication was addressed to or received from the neutral shippers in reference to the alleged sale of the goods to the appellants, or as to the conditions or terms on which payment should be made, or that any payment was ever made to them. In fact, after the arrival of the *Assuan* for refuge at Las Palmas there is a complete silence as to any dealing with the goods until the communication made by Embden to the appellants in Jan. 1915. Having regard to these facts their Lordships agree with the finding

of the learned President, and are unable to assume, or find, in favour of the appellants that the property in the goods remained in the neutral shippers up to the time of the alleged sale and transhipment, or that the appellants ever had transferred to them the ownership of the goods. Their Lordships are further of opinion that the extracts from the ledger of the appellants are not satisfactory evidence that the appellants in fact ever made any payment in respect of the goods either to Embden, the German agents, or any other body.

There is, however, a further element which, apart from the considerations already stated, throws a doubt on the whole case set up by the appellants, and which makes it impossible for their Lordships to dissent from the second and third findings of the learned President set out above. In the course of the proceedings a letter was discovered marked "private" and written on the 6th April 1915 from Embden to the appellants.

It is not necessary to make any further comment on this letter and the explanation offered on behalf of the appellants than that such a letter is only consistent with the position of the appellants being such that they were acting merely as instruments of Embden, and subject to his directions, and that the appellants in concert with Embden were concerned in an attempt to get the goods through to Germany, and that they were not neutral purchasers on their own account.

Their Lordships are therefore of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitor for the Crown, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

March 13, 14, *and* 17, 1919.

(Before Bankes, Warrington, and Duke, L.JJ.)

Aktieselskabet Olivebank *v.* Dansk Svovlsyre Fabrik. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Option to select one of certain named ports as port of discharge—Ship ordered by consignee to impossible port—Impossibility known to consignee—Liability for freight.

A cargo of nitrate was sold to the defendants, and it was loaded on board the plaintiffs' ship S. *The bill of lading, indorsed to the defendants, described the ship as bound for certain named ports in the United Kingdom "for orders," and did not mention any port of destination. It contained the clause, "Payment of freight and all other conditions as per charter-party." The charter-party provided that the port of discharge might be "any safe port in the United Kingdom, excluding Manchester Canal" and certain named ports in Denmark, including Aalborg. On arrival of the ship in the United Kingdom she received orders from the defendants, the consignees, to proceed to Aalborg. At that time it was impossible to take a cargo of nitrate to that port, owing to the fact that the British authorities had prohibited any further importation of nitrate into Denmark for that year. This was known to the defendants. The master accordingly refused to accept the order, and discharged the cargo in one of the named ports in the United Kingdom.*

Bailhache, J. held that in the circumstances the nomination of Aalborg as the port of discharge when it was known to the defendants that the ship could not proceed there owing to the restriction on the carriage of nitrates from the United Kingdom to Denmark was no exercise of the option at all. It was a mere nugatory nomination which could not be acted upon. It was the duty of the defendants, on the arrival of the ship in the United Kingdom, to give her orders, within the limits of the ports mentioned in the charter-party, to go to some port to which she could proceed within a reasonable time. The defendants ought to have selected some port in the United Kingdom, and the plaintiffs were therefore entitled to succeed in their claim for freight, &c.

Held, on appeal, that there was a term implied in the bill of lading that the defendants should order the ship to proceed to a possible port, and thereby give the plaintiffs an opportunity of earning freight, and that as the defendants had failed to name a possible port, the plaintiffs were entitled to discharge the cargo where they did, and to be paid freight.

Judgment of Bailhache, J. (infrâ; (1919) 1 *K. B.* 388) *affirmed.*

Action in the Commercial List.

The plaintiffs, who were Norwegian shipowners, claimed from the defendants, who were Danish importers, freight and damages for detention or demurrage.

Messrs. Andrew Weir and Co. sold a cargo of nitrate of soda to the defendants, and they chartered the plaintiffs' steamship, *Springbank*, by a charter-party dated the 24th June 1915, and loaded the cargo on it in Jan. 1916, at Caleta Coloso, in Chili. The bill of lading, dated the 18th Jan. 1916, described the vessel as "bound for Queenstown, Falmouth, or Plymouth for orders." No port of destination was mentioned in it. It contained the clause: "Payment of freight and all other conditions as per charter-party."

The charter-party provided that the steamship, having loaded her cargo, was "to proceed to Queenstown, Falmouth, or Plymouth for orders to discharge at a safe port in the United Kingdom (excluding Manchester Canal) . . . and there deliver the same on being paid freight at the rate of 60*s.* if discharged at a safe port in the United Kingdom after calling for orders, or 65*s.* if discharged at Aarhus, Aalborg, Elsinore, or Copenhagen."

The bill of lading was indorsed to the defendants. The ship sailed on the 18th Jan. and arrived at Falmouth on the 7th May 1916 and on the 10th May she received orders from the defendants to proceed to Aalborg in Denmark. At that time it was impossible to take a cargo of nitrate to that port, owing to the fact that the British authorities had resolved not to allow nitrate in excess of 33,000 tons to be shipped to

(*a*) Reported by T. W. Morgan and Edward J. M. Chaplin, Esqrs., Barristers-at-Law.

Denmark in any one year; and as the nitrate of soda already sent to Denmark for the year 1916 exceeded 33,000 tons, the *Springbank* was unable to get permission to proceed to the port ordered during that year. The defendants knew that the port to which they ordered the steamship was one at which it was impossible to discharge the cargo.

The master refused to accept the order, and proceeded to Plymouth, which was a nitrate discharging port, and there discharged the cargo in July.

R. A Wright, K.C. and *Le Quesne* for the plaintiffs.—When a chartered ship arrived at a port for orders, the consignee of the cargo must give effective orders within the limits of the ports mentioned in the charter-party to go to some port to which she could proceed within a reasonable time. See

Dahl v. *Nelson*, 4 Asp. Mar. Law Cas. 172, 392; 44 L. T. Rep. 381; L. Rep. 6 App. Cas. 38;
Ogden v. *Graham*, 5 L. T. Rep. 396; 1 B. & S. 773.

The plaintiffs are entitled to freight and to damages for detention.

Leck, K.C. and *A. Neilson* for the defendants.—Freight is only payable on the performance of the contract, or if some new arrangement has been entered into. Here the defendants have not delivered the cargo at the port named. They are therefore not entitled to freight. See

St. Enoch Shipping Company v. *Phosphate Mining Company*, (1916) 2 K. B. 624.

R. A. Wright, K.C. replied.

BAILHACHE, J.—This action is brought by Norwegian shipowners and Dutch importers, and the plaintiffs claim freight and damages for detention or demurrage. Messrs. Andrew Weir and Co. sold a cargo of nitrate to the defendants, and it was loaded on board the plaintiffs' ship *Springbank*. The bill of lading, which was dated the 18th Jan. 1916, described the vessel as "bound for Queenstown, Falmouth, or Plymouth for orders," and did not mention any port of destination. The bill of lading contained the clause "Payment of freight and all other conditions as per charter-party," and therefore the charter-party must be looked at to see what the possible ports of destination were. The charter-party was dated the 24th June 1915, and it provided that the port of discharge might be "any safe port in the United Kingdom, excluding Manchester Canal" and certain named ports in Denmark, including Aalborg. The *Springbank* sailed on the 18th Jan. 1916, and arrived at Falmouth for orders on the 8th May. She received orders to proceed to Aalborg. At that time it was impossible to take a cargo of nitrate to that port because the British authorities had decided not to allow nitrate in excess of 33,000 tons in any one year to be shipped to Denmark. The nitrate already sent to Denmark for the year 1916 exceeded that amount, consequently the *Springbank* could not get permission to proceed to the port ordered, during that year. The master accordingly refused to accept the order and proceeded to Plymouth, where her cargo was discharged in July of that year. The consignees at the time they tendered the orders for Aalborg knew quite well that it was impossible for the *Springbank* to proceed to Aalborg or to any other Danish port.

The charter-party gave them the option of declaring Aalborg as the port of discharge, but the question is whether, knowing that Aalborg was in the circumstances an impossible port, they were entitled to name it as the port of discharge. The question is almost bare of direct authority. There are, however, two cases which were cited to me, and to which I wish to refer. One is *Ogden* v. *Graham* (5 L. T. Rep. 396, 397; 1 B. & S. 773). In that case a ship was chartered to proceed "to a safe port in Chile." There was a prohibition by the Chilian Government against ships entering a certain port in Chile, and subsequently to the date of the prohibition the charterers named that port.

Blackburn, J. said: "In the absence of all authority bearing on the matter, I am of opinion that under the terms of a charter party like the present the charterer is bound to name a place which at the time he names it is one into which a ship can get: and that although the ship can physically get into it, as far as navigation and what may be called the natural incidents are concerned, yet if that would be at the certain risk of confiscation, then the place is not a safe port." So far, that does not assist us much on this matter. But then the judge goes on to say: "If at the time the place had been named the port had been open, or if that particular port had been mentioned in the contract itself, and the port had been found closed before the ship could enter, then the shipowners would have been saved from being obliged to go in by the clause of exception as to the restraint of princes and rulers; but he would have had no right of action against the charterer for being prevented from earning the freight which he could not earn.

By the words "if that particular port had been mentioned in the contract" I understand Blackburn, J. to have meant "that particular port and no other," and to have suggested that if the charterer had an option to order the ship to another port to which the prohibition did not apply, and did not avail himself of that option, he would not be relieved from his obligation to pay the freight.

The other case to which I wish to refer is *Tharsis Sulphur and Copper Company* v. *Morel Brothers and Co.* (7 Asp. Mar. Law Cas. 106; 65 L. T. Rep. 659, 661; (1891) 2 Q. B. 647, 652). There the ship was to proceed to "any safe berth as ordered on arrival in dock at Garston." Bowen, L.J., when dealing with the option to nominate a berth, said: "Then we are told that an option was given to the charterer, and that it was not properly exercised unless a berth was chosen which was empty. But I think there was a confusion in this argument also. The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but he is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock that is one that is reasonably fit for the purpose of delivery. It will not do, for instance, to choose a dock the entrance to which is blocked—that would be practically no exercise at all of the option, and I think this is what Lord Blackburn meant in *Dahl* v. *Nelson* (*sup.*)

and follows from the cases he there cited of *Ogden* v. *Graham* (*sup.*) and *Samuel* v. *Royal Exchange Assurance Company* (1828, 8 B. & C. 119). To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option. The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or likely to be so in a reasonable time." I think the proper inference from those judgments, and certainly the bent of my own mind if there were no authority on the subject at all, is that under circumstances like those in the present case the nomination of Aalborg as the port of discharge, when it was perfectly well known that the ship could not proceed there because of the restrictions on the carriage of nitrates from the United Kingdom to Denmark, was in truth and in fact no exercise of the option at all. It was a mere nugatory nomination, and one which could not possibly be acted upon. I have come to the conclusion that in the circumstances existing at the time when the *Springbank* arrived at Falmouth, and was entitled to orders, it was the duty of the defendants to give her orders, within the limits of the ports mentioned in the charter-party, to go to some port to which she could proceed within a reasonable time. What would have happened if there had been no such ports it is unnecessary to say. But in this case there were such ports, because the limits of the charter-party included "any safe port in the United Kingdom excluding Manchester Canal"; therefore it was open to the consignees to nominate some point in the United Kingdom, and that, I think, they ought to have done. That being so, the plaintiffs are entitled to succeed in respect of their claim and such damages for detention as they can show.

Judgment for plaintiffs.

The defendant appealed.

Leck, K.C. and *Neilson* for the appellants.—The charter-party gave the charterer the right to choose one of several named ports as the port of discharge, without any qualification as to safety, and when the holder of the bill of lading named Aalborg as the port of discharge, Aalborg became the port of discharge as if named on the charter-party: (*Tharsis Sulphur and Copper Company* v. *Morel* (*sup.*). In that case Bowen, L.J. said: "The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time." The words there, however, were "at any safe berth as ordered." Bowen, L.J. also said: "To limit the option of the charterer by saying that, on the choice of a berth, he is to consider that the convenience of the shipowner is to deprive him of the benefit of his option." The charter-party in the present case did contemplate Aalborg as the port of discharge, and the holder of the bill of lading ought not to be deprived of his option. The shipowner in the present case was excused by restraint of princes from proceeding to Aalborg, but that did not entitle him to freight:

Ogden v. *Graham*, 5 L. T. Rep. 396; 1 B. & S. 773; *St. Enoch Shipping Company* v. *Phosphate Mining Company*, 21 Com. Cas. 192; (1916) 2 K. B. 624.

The case of *The Teutonia* (26 L. T. Rep. 48; L. Rep. 4 P. C. 171) is distinguishable, for the ship was to proceed to any safe port within named limits, and she was ordered to an unsafe port, and the bill of lading holders refused to name a safe port.

R. A. Wright, K.C., and *Le Quesne*, for the respondents. — The appellants were bound to exercise their option *bonâ fide* by naming a port "into which admittance could be procured":

Dahl v. *Nelson*, 4 Asp. Mar. Law Cas. 172, 392; 44 L. T. Rep. 381; 6 App. Cas. 38;
Ogden v. *Graham* (*sup.*);
Tharsis Sulphur and Copper Company v. *Morel* (*sup.*);
Mitchell, Cotts, and Co. v. *Steel*, 13 Asp. Mar. Law Cas. 497; 115 L. T. Rep. 606; (1916) 2 K. B. 610.

Supposing one of the named ports had ceased to exist as a port, the appellants could not have exercised their option by naming that port. It is immaterial whether the word "safe" is used in connection with a port:

Ogden v. *Graham* (*sup.*), per Wightman, J.

As the appellants refused to name a possible port the respondents were justified in proceeding to another named port; and are entitled to their freight:

The Teutonia, 1 Asp. Mar. Law Cas. 32, 314; 26 L. T. Rep. 48; L. Rep. 4 P. C. 171.

They are therefore also entitled to demurrage and damages for detention of the ship.

Leck, K.C. replied.

Bankes, L.J.—These are two appeals from judgments of Bailhache, J. [The first appeal, which concerned the steamship *Geysir*, is not reported.]

In each case the action was brought by shipowners against the holders of a bill of lading, claiming either freight or damages in lieu of freight, and damages for the detention of the vessel.

In the *Geysir* case Bailhache, J. decided in favour of the shipper, in the *Springbank* case he decided in favour of the shipowner, and in each case the defeated party appeals.

The two cases were tried together, and the two appeals were argued before us together; but it is necessary to deal with the facts in each case separately.

The second appeal raises a question of law of general importance. It arises in this way. The material facts are quite short. The claim was for freight or damages in lieu of freight, and damages for detention in reference to a cargo of nitrate which was shipped on board a vessel called the *Springbank*. The charter-party was dated the 24th June 1915. It is not quite in the same form as the charter-party in the *Geysir* case, but it provided for the vessel proceeding to "Queenstown, Falmouth, or Plymouth for orders to discharge at a safe port in the United Kingdom . . . or so near thereunto as she may safely get." There was no further reference to ports included in that part of the printed form of the charter-party; but when it came to provide for the rates of freight rates of freight were provided not only for delivery in ports in the United Kingdom, but for ports in the Sound

and among other places a Danish port called Aalborg. The bill of lading followed the charter-party exactly, and was in these terms: "Shipped in good order and well conditioned . . . in and upon the good ship called *Springbank* . . . now riding at anchor in the port of Caleta Coloso, and bound for Queenstown, Falmouth, or Plymouth for orders." The vessel arrived at Falmouth on the 8th May 1916, and then the holders of the bill of lading, the appellants, gave orders for Aalborg. The British Government refused to allow the vessel to proceed to Aalborg, and the owners thereupon claimed the right to discharge the cargo upon the ground that the bill of lading holders had no right to give orders to a port to which the vessel was not allowed to proceed.

Bailhache, J. decided in favour of the shipowner. He said that there was no authority in point, but he referred to two cases which he said had a direct bearing upon the question, and which he considered were authorities pointing in the direction to which his own inclination led him and which he thought was the correct view. Those two authorities were *Ogden* v. *Graham* (1861, 5 L. T. Rep. 396; 1 B. & S. 773) and some observations in the judgment of Bowen, L.J. in *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (*sup.*). In the result, Bailhache, J. put the matter in this way: "I think the proper inference from those judgments, and certainly the bent of my own mind, if there were no authority on the subject at all, would be to say that, under circumstances like those which exist in the case of the *Springbank*, to nominate Aalborg as the port of discharge when it was perfectly well known she could not proceed to Aalborg because of this restriction on allowing cargoes of nitrates to proceed from the United Kingdom to Denmark was in truth and in fact no exercise of the option at all, it was a mere nugatory nomination, and one which could not possibly be acted upon, and I have come to the conclusion that under the circumstances existing at the time when the *Springbank* arrived at Falmouth, and was entitled to orders, it was the duty of the defendants to give her orders within the limits of the ports mentioned in the charter-party to go to some port to which she could proceed within a reasonable time at the time the orders were given."

In that conclusion I entirely agree, although it is possible to put the view of the law upon which the conclusion rests in different language. Having regard to the form of the charter here, a charter which provided, and bills of lading which provided, that the vessel should proceed to a port in the United Kingdom for orders, and then provided that orders might be given to a range of ports, naming them, which included ports in the United Kingdom as well as ports in various places on the continent, and provided for the rate of freights which should be paid in reference to the particular port which was named as the port to which the vessel should proceed, I think that within the well-known rule laid down by Bowen, L.J. in *The Moorcock* (60 L. T. Rep. 654; 6 Asp. Mar. Law Cas. 373; 14 Prob. Div. 64) and by Lord Esher in *Hamlyn* v. *Wood* (65 L. T. Rep. 286; (1891) 2 K. B. 488) the parties entering into such a contract must have intended that, of the range of ports to which the vessel might be ordered, orders should be given to one which would give the shipowner the opportunity of earning his freight.

The law in reference to the earning of freight is special, special in this sense, that the shipowner is not entitled to anything unless he completes the agreed transit, and, having regard to that rule of law, and to the conditions existing at the time when this contract was entered into, I think it must have been contemplated between the parties, and therefore an implied term of their bargain, that orders, as I have said, should be given to some port of those named which would give the opportunity to the shipowner of earning his freight, and I should prefer to put my judgment upon the ground that there was such an implied term, and that it was a breach of that implied term to order the vessel to a port which, to the knowledge of the persons at the time they gave the order, it was impossible for the vessel to proceed to; and I think that there was that implied contract, in spite of the general provisions in reference to exceptions and restraint of princes.

The conclusion, therefore, to which I come on the second appeal, is that it fails. I only wish to add two observations which apply to both appeals. In each case the learned judge held that the circumstances were such that the adventure was frustrated within the meaning of that conventional phrase. He also held in the second appeal that it followed from his decision that the shipowner was entitled to damages for detention of the ship, and I think that the same consequence follows in the first appeal, and that the result, therefore, is in the first appeal that the appellant succeeds, and is entitled to freight and to damages for detention, to be ascertained by some method, I shall assume, agreed upon between the parties, and in the second case the appeal will be dismissed generally.

Warrington, L.J. read the following judgment.—The plaintiffs in each of these cases are owners of a Norwegian ship called in the one case the *Geysir*, and in the other the *Springbank*. The defendants are a Danish company, indorsees of the bill of lading.

In the *Springbank* case the plaintiffs claim damages for breach by the defendants of their obligation to give effective orders as to the port of discharge, whereby the plaintiffs were prevented from earning the freight. The defendants deny the breach, and counter-claim for damages for failure to complete the contract voyage. In this case the learned judge has adopted the plaintiffs' view, and has given them judgment for 14,000*l.* damages with the costs of the action and counter-claim. The defendants in this case appeal.

In the case of the *Springbank* the charter-party is dated the 24th June 1915. The ship was to proceed to Queenstown, Falmouth, or Plymouth for orders, to discharge at certain ports, including, as is conceded on the construction of the charter-party, the port of Aalborg in Denmark. In this case also separate rates of freight are fixed for the United Kingdom and for Denmark, and the charter-party contains the usual provisions as to the demurrage and the exceptions clause including restraint of princes. The bill of lading is dated the 16th Jan. 1916, and the ship

is described as bound for Queenstown, Falmouth, or Plymouth for orders. Payment of freight and all other conditions as per charty-party.

The ship arrived at Falmouth on the 7th May 1916, and on the 10th May the defendants gave her orders to proceed to Aalborg. They had not then obtained, and they failed within a reasonable time to obtain the permission of the British Government, and the vessel was therefore unable to proceed to that port. No other orders were given, and ultimately in July the cargo was discharged at Plymouth into warehouse subject to lien for freight.

Under these circumstances the defendants contend that, having selected one of the named ports, that port becomes the port of discharge, just as if it had been named as such in the bill of lading itself. All that they ask in this court is to have the judgment set aside, and judgment entered for them on the claim, on the footing that the venture was frustrated by restraint of princes, and neither party can recover against the other.

The learned judge has held on the authority of *Ogden* v. *Graham* (*sup*.), and the remarks in the judgment of Bowen, L.J., in the *Tharsis Sulphur and Copper Company, Limited* v. *Morel Brothers and Company* (*sup.*), that by naming a port to which it was impossible for the ship to proceed, the defendants failed to exercise the option given to them by the bill of lading, and failed to fulfil their obligation of giving effective orders as to the port of discharge, thereby preventing the ship from earning the freight, and causing other injury and expense. In my opinion the view of the learned judge is correct, and in this case his judgment ought to stand. This appeal should, therefore, be dismissed.

DUKE, L.J.—With regard to the second case, in my opinion the obligation of the shipper was to nominate a port to which it was possible in the business sense that the vessel should proceed and at which she could discharge. In my opinion the nomination of Aalborg, with the knowledge that the shipper had, was an impossible nomination. The shipper knew quite well that the voyage to Aalborg from Great Britain never could begin. That being so, I think, upon the authority of the case to which my Lord has referred and of *The Teutonia* (1 Asp. Mar. Law Cas. 32, 214; 26 L. T. Rep. 48; L. Rep. 4 P. C. 171; and of *Ogden* v. *Graham* (*sup.*), the shipper has failed in his obligation to the shipowner; he had failed to nominate a port in pursuance of his duty under the charter-party and the bill of lading, and, having failed to nominate a port, he must pay damages at the rate for which the charter-party provides (there is a term in the charty-party which provides a rate of freight for the port at which discharge takes place), and I think that he must also pay compensation for such detention of the vessel as occurred.

Mr. Leck relied, in one part of his argument, upon some words which he found in the *Law Journal* report of the judgment of Blackburn, J. of *Ogden* v. *Graham*, which is in these terms: "If a particular port had been mentioned in the contract and the port had been found closed before the ship could enter, then the shipowner would have been saved from being obliged to go in by the clause of exceptious as to the restraint of princes and rulers." Mr. Leck argued that Blackburn, J.'s view had been such that upon a charter-party and a bill of lading such as are found in the present case he would have held that the nomination of Aalborg, Aalborg being put, as it is said, though not very accurately said, in the charter-party, and so being named in the contract, was a good nomination. In my opinion the observation which is attributed to Blackburn, J. does not have the meaning which Mr. Leck sought to attach to it. If Blackburn, J. had expressed an opinion to that effect, it would have been in conflict with the opinion of Wightman, J. in the same case. Blackburn, J. declared himself in agreement with Wightman. J., and upon reference to the report of the same case in 1 B. & S. 773 one finds that the passage upon which Mr. Leck relies does not occur, and that the argument by which Blackburn, J.'s judgment is sustained is in effect the same argument as that of Wightman, J. I take the meaning of the expression, if it was used, to have been that if the port, which was found impossible, had been the sole port named in the contract, then the adventure would have been frustrated by restraint of princes. I think that that has no application in the present case.

Appeal dismissed.

Solicitors for the plaintiffs, *Bottsrell* and *Roche.*

Solicitors for the defendants, *William A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 3 *and* 13, 1918.

(Before BAILHACHE, J.)

ATLANTIC MUTUAL INSURANCE COMPANY *v.* KING. (*a*)

Marine insurance — Reinsurance policy — "Warranted free from all consequences of hostilities"— Damage due to act of German—Agency for German Government—What constitutes "agency."

In Feb. 1916 *a consignment of skins and hides was shipped in the steamship* T. *for carriage from B. to N. Y. On the* 18*th Feb., during the voyage, an explosion occurred in the vessel's hold. Two other explosions followed and the vessel was set on fire, and both vessel and cargo were damaged. A parcel of the hides and skins was burnt. The explosion was due to an infernal machine, which had been placed in the hold of the vessel at B. by a German named N., aided by an accomplice. The hides were insured with the plaintiffs under a floating policy. The plaintiffs were bound to pay, and did pay, the owners of the hides for their loss, and they now claimed against the defendants, with whom, and others, they were reinsured under a policy dated the* 20*th July* 1916. *The defendant's policy contained the usual f.c. and s. clause, the material words of which were: "Warranted free from all consequences of hostilities or warlike operations, whether before or after the declaration of war." The defendant relied upon that clause as an answer to the plaintiffs' claim, and contended that the fire which burnt the hides was due to a hostile act and was a consequence of hostilities or*

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

warlike operations, and was thus within the exception clause of the policy. It was contended that the German who, with the assistance of an accomplice, placed the infernal machine on board the vessel at B. was an agent of the German Government. There was evidence that the German's house was the resort of German sailors whose ships were interned at B., and that he was the manager of an electrical works and had no personal end to gain. A circular which purported to be issued by a secret service division of the German naval staff in 1914 ordered the mobilisation of "destructive agents" in ports where munitions were being loaded for shipment to the allies.

Held, that "hostilities" meant hostile acts by persons acting as agents of sovereign Powers; that there were certain notorious facts of which a judge ought to take judicial notice, such as, e.g., Germany's spy system, and Germany's policy of destroying British ships; that the word "agent" in this connection was not limited to the strictness to which the words agent and principal were used in business transactions; it was not necessary to show that N. had any express authority to do the act in question, or that his act was subsequently ratified by the German Government; it was sufficient to make the man an agent that the man acted in accordance with what he knew to be the settled and concerted policy of the German Government. The defendant had therefore made out his case, and the claim failed.

ACTION in the Commercial List tried by Bailhache, J.

The plaintiffs' claim was for the defendant's proportion of a loss on a policy of reinsurance dated the 20th July 1916, on goods shipped by the steamship *Tennyson* from Bahia to New York. The policy was underwritten by the defendant and other underwriters.

In Feb. 1916 a consignment of skins and hides was shipped in the *Tennyson* for carriage from Bahia to New York. Before the vessel started a German subject, domiciled in Brazil, one Niewerth, and certain other persons put on board fifteen cases which were said to contain minerals, and one case which was said to contain photographic films. Those cases were represented as containing specimen minerals and photographs, obtained by a scientific exploration party which had been working in the Brazilian hinterland. The *Tennyson* left Bahia on the 15th Feb,. and three days later, while she was at sea, a violent explosion occurred. Two other explosions followed and the vessel was set on fire, and both vessel and cargo were seriously damaged, though the captain succeeded in reaching a Brazilian port and repairs were effected, so that the vessel was not totally lost.

The explosions were due to infernal machines which had been put on board by the German Niewerth and those who were acting with him. Niewerth disappeared, but he was arrested and tried in Brazil, and was sentenced to twelve years and nine months' hard labour.

The hides were insured with the plaintiffs under a floating policy. They had been duly declared and the plaintiffs had paid the owners of the hides for their loss and now claimed over against the defendant under the policy of reinsurance for his proportion of the loss.

The defendant relied on the clause, the material words of which were: "Warranted free from all consequences of hostilities or warlike operations, whether before or after the declaration of war." He contended that the fire which had destroyed the hides was due to a hostile act and was a consequence of hostilities and was thus excepted from the policy. He contended that Niewerth, in the circumstances, must be taken to have been acting as an agent of the German Government, and thus brought himself within the exception.

The plaintiffs, on the other hand, contended that Niewerth's act in placing the bomb in the hold of the *Tennyson* was a mere piece of private individual devilment for which he had been punished by the Brazilian authorities under municipal law.

R. A. Wright, K.C. and *W. N. Raeburn* for the plaintiffs.

D. C. Leck, K.C. and *R. I. Simey* for the defendants.

The following authorities were cited during the arguments:

Carver on Carriage by Sea, 6th edit., p. 131; s. 94 (definition of pirates, &c.);
Chalmers and Owen's Marine Insurance Act 1906, 2nd edit., pp. 157 and 178 (definition of pirates and piracy);
Hall on International Law, 6th edit., pp. 252, 510, 615;
Bolivia Republic v. *Indemnity Mutual Insurance Company*, 100 L. T. Rep. 503; (1909) 1 K. B. 785; 11 Asp. Mar. Law Cas. 218;
Cory v. *Burr*, 4 Asp. Mar. Law Cas. 480, 559; 5 Asp. Mar. Law Cas. 109; 47 L. T. Rep. 181; 49 L. T. Rep. 78; 9 Q. B. Div. 463; 8 App. Cas. 393;
Driefontein Consolidated Gold Mines v. *Janson*, 83 L. T. Rep. 79; 85 L. T. Rep. 104; (1900) 2 Q. B. 339, 342; (1901) 2 K. B. 420;
Ionides v. *Universal Marine Insurance Company*, 1863, 8 L. T. Rep. 705; 14 C. B. N. S. 259;
Kleinwort v. *Shephard*, 1859, 1 E. & E. 447;
Munro Brice and Co. v. *War Risks Insurance Company*, 118 L. T. Rep. 708; (1918) 2 K. B. 78;
Nesbitt v. *Lushington*, 1792, 4 T. Rep. 783;
Palmer v. *Naylor*, 1854, 10 Exch. 382;
Powell v. *Hyde*, 1855, 5 E. & B. 607;
Robinson Gold Mining Company v. *Alliance Insurance Company*, 86 L. T. Rep. 858; (1902) 2 K. B. 489.

Cur. adv. vult.

Dec. 13.—BAILHACHE, J. read the following judgment:—In the early morning of the 18th Feb. 1916, when the steamer, *Tennyson*, was five days out from Bahia, on her way to New York, an explosion occurred in her No. 4 hold. The explosion was due to an infernal machine which had been placed in the hold at Bahia by a German named Niewerth aided by an accomplice named Fordham, *alias* Van Dam, and possibly also *alias* Duquesne. The explosion killed three seamen, wrecked the afterpart of the steamer, and was followed by a fire which burned a parcel of hides and skins in the same hold. The hides were insured by the plaintiffs under a floating policy. They had been duly declared, and the plaintiffs were bound to pay, and did pay, a particular average loss. The plaintiffs were reinsured under a policy dated

20th July, 1916, underwritten by the defendant. The action is brought to recover the defendant's proportion of the loss paid by the plaintiffs. The defendant's policy contains the usual f.c. and s. clause, and the defendant relies on that clause as an answer to the plaintiff's claim. The effect of the clause is to withdraw from the protection of the policy certain of the risks which would otherwise be covered by it. The material words of the clause on which the defendant relies are: "Warranted free from all consequences of hostilities or warlike operations, whether before or after declaration of war"; and he contends that the fire which burned the hides was due to a hostile act, and was a consequence of hostilities, and is thus withdrawn from the policy and within the exception.

In one sense it is plainly true that that fire was due to a hostile act, but the plaintiffs say rightly, as I think, that the word "hostilities," as used in the clause, means hostile acts by persons acting as the agents of sovereign Powers, or of such organised and considerable forces as are entitled to the dignified name of rebels as contrasted with mobs or rioters, and does not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action may be. Having got thus far, the plaintiffs contend that Niewerth's act was a mere piece of private devilment, and that the f.c. and s. clause is thus no answer to their claim. The defendant, on the other hand, contends that Nieworth must be taken to have been acting as an agent of the German Government, and that—even upon my construction of the words "consequences of hostilities," as used in the f. c. and s. clause—he brings himself within the clause.

In considering which of these contentions is the correct one, it must be borne in mind that the plaintiffs, having proved a loss by fire, have (*primâ facie*) brought themselves within the policy, and the burden of bringing himself within the exception lies upon the defendant. The plaintiffs ought to succeed if there is no evidence to support the defendant's view, or if the evidence is so evenly balanced that I cannot say that the defendant's view is the right one.

The facts upon which I am asked to form my conclusion are, with two or three exceptions, of the most general character. Those relating directly to Niewerth are, first, one relied on by the plaintiffs. It appears that Niewerth was tried for his offence and convicted under the municipal laws of Brazil (art. 146 of the Criminal Code), and that the offence was not treated as a breach of neutrality, as it should have been if he was an agent of his Government. I do not attach much weight to this. Niewerth was brought to justice apparently with some reluctance on the part of the authorities. He was tried by a provincial judge, and I do not suppose the Brazilian Government knew of the matter; or, if they did, would wish to make it the subject of diplomatic protests.

The three other facts relating to Niewerth are these: First, his house was the resort of German sailors whose ships were interned at Bahia, a matter of some importance in view of certain instructions issued on behalf of the German Government, which I will presently read. Second, he was the manager of an electrical works. Third, Niewerth had no personal end to gain. There was no chance of loot. The other facts are those notorious facts of which the defendant contends a judge, in dealing with a case of this kind, ought to take judicial notice. They may be summarised thus: Germany has throughout the war used her civilian subjects in foreign countries, and they have served her in a way and to an extent hitherto unexampled. For instance, spying has been almost universal. Every German spy is, of course, an agent of the German Government, and many German civilians in all grades of society have acted as spies. Germany has not made war by her men in uniform alone, but by all her subjects, wherever found, who were willing to help her by doing such mischief as each in his particular circumstances was able to compass. Niewerth, as manager of an electrical works, was peculiarly well able to construct an infernal machine. British ships were the special object of German spite, as witness the unrestricted submarine warfare, and no service could be more welcome or more in accord with the German policy of frightfulness than that of blowing one up. The defendant produced a list of twenty-seven ships in respect of which similar outrages had been committed, although none, I think, except the *Tennyson*, sailed from Brazil.

A circular was issued on behalf of the German Government dated the 28th Nov. 1914, in the following terms:

> From naval general staff to the naval attachés: You are ordered to mobilise immediately all destruction agents and observers [agents-observers and agents-destroyers] in those commercial and military ports where munitions are being loaded [may be loaded] on ships going to England, France, Canada, the United States of North America, and Russia, where there are storehouses of such munitions, and where [naval] fighting units are stationed. It is necessary to hire through third parties who stand in no relationship to the official representatives of Germany, agents for arranging explosions on ships bound for enemy countries, and for arranging delays, embroilments and confusions during the loading, dispatching, and unloading of ships. For this purpose we are specially recommending your attention loaders' gangs, amongst whom there are many anarchists and escaped criminals [and that you get in touch with] German and neutral, shipping offices, and as a means of observing agents of enemy countries who are receiving and shipping the munitions. Funds required for the hiring and bribing of persons necessary for the designated purpose will be placed at your disposal at your request.—(Signed) No. 93, Secret Service Division of the Naval Staff.—KOENIG.

[Original translator's comment (as part of the document)]:

> The above document was among the documents seized during the investigation of the fire of the storehouses of the firm of Iversen, and among the documents of Consul Gering and Vice-Consul Gerold.

The admission of the circular as evidence was objected to by the plaintiff, but there is no reason to doubt its authenticity, and it has a direct bearing upon the problem I am trying to solve. It is useful, too, as showing that the facts which I am asked to treat as notorious are not the mere speculations of the club or the street.

It now remains to consider whether these facts, taken together, are sufficient to enable me to say that the balance of probability in favour of

Niewerth having acted as an agent of the German Government is so great that I ought to hold that he did so. This must largely, I think, depend upon what is meant by the word "agent" in this connection. If the word is limited to the sense in which it is used in a civil action, I should say further proof was wanted. Niewerth had no express authority. There is no evidence that he saw the instructions I have just read, although they were obviously meant to be widely circulated. Nor is there evidence of any subsequent ratification. He does not appear to have received the Iron Cross. I do not, however, think that the word "agent" in this connection is limited to the strictness in which the words "agent" and "principal" are used in business transactions, I am disposed to think that a man is acting in such a case as this as the agent of his Government when knowing that the settled and concerted policy of that Government is to avail itself of the efforts of all its subjects, whether naval, military, or civilian, to destroy enemy life and property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy. It clearly would be so if in this case Niewerth had given such information to a German submarine as enabled it to torpedo the *Tennyson*. It is not the less so, in my opinion, if, having the means, he pursues the surer and simpler course of blowing her up himself.

The result is that, in my judgment, the defendant has made out his case, and the action fails.

Judgment for defendant.

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

Solicitors for the defendants, *William A. Crump* and *Son.*

Nov. 28 *and Dec.* 29, 1918.

(Before Sankey, J.)

Holman and Sons Limited for Owner of Steamship Nefeli *v.* Merchants' Marine Insurance Company Limited. (*a*)

Insurance (Marine)—Policy on increased value—Excess liability—Indemnity—Liability of assurers to contribute.

A ship was insured by ordinary policies for, and therein valued at, 39,000*l. By another policy a sum of* 1855*l. was insured, and was expressed to be upon increased value of hull, machinery, &c., and as being "against the risk of total constructive or compromised total loss as settled on hull and machinery policies, but including as per clause attached liability for general average, salvage charges, sue and labour expenses, or claims under the running-down clause in excess of the declared value in hull and machinery policies."*

During the currency of the policies, salvage services were rendered to the ship, and owing to the fact that the value of the ship as adopted in the salvage action was in excess of 39,000*l., the proportion of the salvage award borne by the ordinary policies was less than the salvage award, and therefore an excess liability attached to the shipowner. A similar situation arose as regards certain general average expenditure.*

Held, that the policy for 1855*l. was one of the usual marine policies upon a* res *with the ordinary ancillary clauses, and that therefore the basis upon which the assurers under that policy were liable to contribute to the excess amount of salvage and general average respectively was that they should pay a part thereof in the proportion that the amount insured by them bore to the total excess contributory value of the ship.*

In Joyce *v.* Kennard (1 *Asp. Mar. Law Cas.* 194; 25 *L. T. Rep.* 932; *L. Rep.* 7 *Q. B.* 78) *and* Cunard Steamship Company *v.* Marten (9 *Asp. Mar. Law Cas.* 342, 452; 89 (*L. T. Rep.* 152; (1903) 2 *K. B.* 511) *the policies were exceptional instances of insurance against liability.*

Award stated by an arbitrator in the form of a special case.

A policy of insurance was entered into on the 20th Feb. 1915 by the assured, Messrs. John Holman and Sons Limited, as agents for the owners of the steamship *Nefeli* with the assurers, the Merchants' Marine Insurance Company Limited. The *Nefeli* was insured by ordinary policies for 39,000*l.* and was therein valued at the same sum. The total amount insured by the policy with the assurers was 1855*l.*, and was declared to be upon increased value of hull, machinery, &c. During the time covered by the policies salvage services were rendered to the *Nefeli*, and the amount of salvage and costs payable was 12,832*l.* 17*s.* 3*d.* The value of the *Nefeli* as adopted in the salvage action was 62,000*l.*, and the proportion of the salvage award borne by the ordinary policies was 8072*l.* 5*s.* 8*d.*, leaving a balance of 4760*l.* 11*s.* 7*d.* as the excess liability attaching to the owner by reason of the *Nefeli* being valued for salvage at more than the insured valuation.

A similar situation arose with regard to certain general average expenditure which was as follows: During the time covered by the policies there was general average expenditure in respect of which the contributory value of the *Nefeli* was 53,007*l.* The ship's proportion of the expenditure on his contributory value was 188*l.* 12*s.* 10*d.*, and the proportion paid by the ordinary policies was 138*l.* 15*s.*, leaving a balance of 49*l.* 17*s.* 10*d.* as the excess liability attaching to the shipowner, by reason of the contributory value of the *Nefeli* being more than the insured valuation.

The policy of the 20th Feb. 1915 was in substance as follows: After reciting that the assured had promised or otherwise obliged themselves to pay forthwith for the use of the assurers "the sum of 13*l.* 4*s.* 4*d.* as a premium at and after the rate of 14*s.* 3*d.* per cent. for such insurance," it proceeded:

Now this policy of insurance witnesseth that in consideration of the premises and of the said premium the said company promises and agrees with the assured, their executors, administrators, and assigns, that the said company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject-matter of this policy and may attach to this policy in respect of the sum of 1855*l.* hereby insured which insurance is hereby declared to be upon increased value of hull, machinery. . . .

The policy was expressed in its body as follows:

This insurance is against the risks of total constructive or compromised total loss as settled on hull and

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister at Law.

machinery policies but including as per clause attached liability for general average, salvage charges, sue and labour expenses or claims under the running-down clause in excess of the declared value in hull and machinery policies . . . for and during the space of time from the 8th day of February 1915 to the 17th day of June 1915 both days inclusive beginning and ending with Greenwich mean time.

The sue and labour clause of the policy was as follows:

And in case of any loss or misfortune it shall be lawful for the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard and recovery of the aforesaid subject-matter of this insurance or any part thereof without prejudice to this insurance, the charges whereof the company shall bear in proportion to the sum hereby insured in so far as it concerns only the company's liability for excess general average, salvage charges, and R. D. C. as herein provided.

The policy contained in the margin (*inter alia*) the following clauses:

In ascertaining whether the vessel is a constructive total loss, the insured value, say 39,000*l.*, shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

This insurance is hereby declared and agreed to be against the risks of total, constructive, or compromised total loss as may be settled on hull and machinery policies, and as to include also any liability which may attach to the shipowner in consequence of the hull and machinery being valued for contribution to general average or salvage charges at more than the insured valuation, also for any liability in excess of the valuation of 39,000*l.* in hull and machinery policies for claims under the collision clause therein.

Subject to the opinion of the court, the arbitrator awarded that the basis upon which the assurers were liable to contribute to the excess general average was that the assurers should pay a proportionate part thereof in the proportion that the amount insured by them bore to the total excess contributory value of the *Nefeli*. The question in dispute between the parties was as to the basis on which the assurers were liable to contribute to the excess.

F. D. MacKinnon, K.C. and *W. A. Jowitt* for the assured.

R. A. Wright, K.C. and *Le Quesne* for the assurers.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Dec. 9.—The following judgment was read by

SANKEY, J.—This is an award stated in the form of a special case, and raises a short point under a policy of insurance entered into by Messrs. John Holman and Sons Limited, agents for the owners of the steamship *Nefeli*, and the Merchants' Marine Insurance Company Limited. [His Lordship stated the facts, and continued:] The question in dispute between the parties is as to the basis upon which the assurers are liable to contribute to this excess.

It was contended by the assured that the policy under discussion was a contract of indemnity up to 1855*l.*, and that therefore they were entitled to recover the whole sum. It was contended by the assurers that the basis upon which they were liable to contribute to the excess was that they should pay a proportionate part thereof in the proportion that the amount insured by them bears to the total excess contributory value of the *Nefeli*. The arbitrator upheld the assurers' contention, but stated his award in the form of a special case.

The assured shipowners urged that this was not an ordinary policy of marine insurance under which the assurers would be liable to pay in proportion as the amount insured stood to the amount at risk, but that it was a policy of indemnity, or at any rate that it was partly one and partly the other, and that the clause which they prayed in aid was an indemnity clause, and they cited *Joyce* v. *Kennard* (*sup.*) and *Cunard Steamship Company* v. *Marten* (*sup.*).

In my view both those cases are exceptional instances of an insurance against liability, the ordinary rule in marine policies being that the assurer is entitled to prove that part only of the subject-matter of the policy is covered and to limit his payment proportionately. The words in the present policy are: "Now this policy of insurance witnesseth that in consideration of the premises and of the said premium the said company promises and agrees with the assured, their executors, administrators, and assigns, that the said company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject-matter of this policy and may attach to this policy in respect of the sum of 1855*l.* hereby insured which insurance is hereby declared to be upon increased value of hull, machinery, &c." It will be observed that the contract starts by being a policy upon the *res* described as "the increased value of hull, machinery, &c.," and is designated both in the body of the document and upon a slip attached as being "against the risk of total, constructive, or compromised total loss as settled on hull and machinery policies." It is true that it goes on to include liability for general average salvage charges, sue and labour expenses or claims under the running down clause in excess of the declared value in hull and machinery policies. . . ." But in my view this addition does not convert the policy on the *res* into a policy against liability nor can the addition be construed in itself as a policy against liability. It is merely ancillary to the main purpose of the policy and for the preservation of the *res* against the contemplated perils.

In the result I think that the policy is one of the usual marine policies upon a *res* with the ordinary ancillary clauses, and not one of the unusual polices against a liability, and that the award of the arbitrator was right and must be upheld.

Award confirmed.

Solicitors for the assured, *Holman, Fenwick, and Willan.*

Solicitors for the assurers, *Wallons and Co.*

March 24 *and* 25 1919.

(Before BAILHACHE, J.)

UNION CASTLE MAIL STEAMSHIP COMPANY LIMITED *v.* BORDERDALE SHIPPING COMPANY LIMITED. (*a*)

Charter-party—Stowage—Owners to be responsible—Chloride of lime in iron drums loaded below deck—Leakage of fumes during voyage—Damage to cargo—No improper stowage—Damage due to latent defect in drums—Liability.

A charter-party provided that the charterers should pay the expense of loading and discharging; that the stowage should be under the control of the master, and that the owners should be responsible for the proper stowage and correct delivery of the cargo. Part of the cargo loaded under the charter-party consisted of chloride of lime in iron drums, all of which when presented for carriage were apparently in good condition. The agents of the charterers, who saw to the loading, stowed the chloride of lime below deck, although the shippers of the chloride of lime intended it to be carried on deck, and had marked the drums accordingly. During the voyage, owing to a latent defect in the drums, the chloride of lime corroded the drums and fumes escaped, causing damage to the other cargo in the hold. Claims were brought against the charterers by the holders of the bills of lading of the cargo thus damaged, and the charterers having paid these claims, now claimed to be indemnified by the shipowners on the ground of alleged improper stowage.

Held, that the provision in the charter-party that the owners were to be responsible for proper stowage of the cargo did not amount to an absolute warranty. It only meant that the shipowners would not be in any way negligent in the matter of the stowage of the cargo. Therefore, in the absence of negligence on the part of the master in allowing the drums of chloride of lime to be carried below deck instead of on deck, the shipowners were not liable to indemnify the charterers.

ACTION in the Commercial List tried by Bailhache, J.

The plaintiffs, who were the charterers of the steamship *Border Knight*, claimed damages from the defendants, who were the shipowners, for breach of charter-party, breach of contract and breach of duty in and about the carriage of goods.

By a charter-party dated the 27th July 1915, the *Border Knight* was let to the plaintiffs for a round voyage, hire being payable at the rate of 447*l.* per calendar month.

The charter-party provided that the charterers should pay the expense of loading and discharging; that "the stowage shall be under the control of the master and the owners shall be responsible for the proper stowage and correct delivery of the cargo." It further provided that the master although appointed by the owners should be under the orders and directions of the charterers as regards employment agency and other arrangements, and should sign bills of lading as presented, but the charterers guaranteed that the bills of lading should be in accordance with the mate's receipts and cargo returns. The charterers were not to be responsible for any damage to the steamer arising from any cause whatever, but "nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage."

Under the charter-party the *Border Knight* was sent to New York in Aug. 1915, and there loaded a general cargo for Cape Town. She left New York in Sept. 1915, and arrived at Cape Town on the 9th Nov. A firm of Barber and Co. acted as the plaintiffs' general agents in New York to book cargo for the steamers, besides acting as stevedores in putting the cargo on board. There was also a Captain Marshall who acted as agent for the plaintiffs. The cargo loaded at New York included a number of drums of chloride of lime, all of which appeared to be in good condition. The shippers had intended to have the drums carried on deck, and had marked them with a cross intended to indicate this to those responsible for the loading and stowage of the drums. But the plaintiffs' agents, Barber and Co., ordered the drums to be stored below deck, and this was done with the knowledge of the plaintiffs' marine superintendent, Captain Marshall.

When the vessel arrived at Cape Town it was found that the chloride of lime had corroded through the iron drums and fumes had leaked out during the voyage and had seriously damaged the other cargo in the hold. The holders of the bills of lading for the damaged cargo brought claims against the plaintiffs. The plaintiffs, for business reasons and by arrangement with the defendants, paid these claims, leaving open the question of which of the parties, the plaintiffs or the defendants, if either, was liable. They now brought this action to recover from the defendants the amount of the claims which they had paid, and certain other expenses which they alleged they had incurred as a consequence of the chloride of lime having been, as they alleged, improperly stowed. They alleged that the drums ought not to have been stowed under deck with other cargo, and (or) that the master ought not to have stowed them there without inquiring into or investigating the fitness of the drums for carriage under deck.

The defendants denied that the drums were improperly stowed, and alleged that if there was any negligence it was that of the plaintiffs' servants or agents. They counter-claimed for damage caused to the vessel by the chloride of lime by reason of the alleged negligence of the plaintiffs or their agents.

R. A. Wright, K.C. and *Stuart Bevan* for the plaintiffs.

MacKinnon, K.C. and *C. Robertson-Dunlop* for the defendants.

The following cases were referred to:

Brass v. *Maitland*, 1856, 6 El. & Bl. 470;
Hutchinson v. *Guion*, 1858. 5 C. B. (N. S.) 149;
Ohrloff v. *Briscall*, 14 L. T. Rep. 873; L. Rep. 1 P. C. 231;
Sack v. *Ford*, 1862, 13 C. B. (N. S.) 90

BAILHACHE, J.—This is an action brought for breach of a charter-party. The charter-party, dated the 26th July 1915, by which the vessel was let to the plaintiffs, was on a time charter form but it was for a round voyage. The hire was payable at the rate of 447*l.* per calendar month. Under the charter-party the vessel loaded a general cargo at New York in Aug. 1915, and proceeded to Cape Town, arriving there on the

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

9th Nov. Part of the cargo loaded at New York was a consignment of chloride of lime in iron drums, which was loaded under deck. When the vessel arrived at Cape Town it was found that the chloride of lime had corroded and eaten through the iron drums, and as a consequence the lower hold was filled with fumes which seriously damaged the other cargo. Holders of the bills of lading for the cargo which was thus damaged brought claims against the plaintiffs for compensation. There was some doubt between the plaintiffs and defendants as to which of them, if either, was responsible to those claimants, but for business reasons it was thought proper to pay their claims, and accordingly they were paid by the plaintiffs, the question being left over for future decision which of the parties, the plaintiffs or the defendants were to be liable for the damage.

The plaintiffs run a line of steamers (the *Border Knight* being temporarily included in the line) between the United States and the Cape, and a firm of Barber and Co. acted as their general agents in New York to book cargo for the steamers. Barber and Co. also acted as stevedores in putting the cargo on board. There was also a Captain Marshall, the plaintiffs' marine superintendent at New York, and he exercised some control and supervision in the matter. The shippers of the chloride of lime in question intended that it should be shipped on deck, and the drums were marked with a cross to indicate this, at any rate to Barber and Co., and presumably also to Captain Marshall. But for some reason, connected to some extent with the stability of the steamer and because it was desired to carry a considerable quantity of coal on deck, the distinctive mark on the drums was disregarded and the chloride of lime was put below deck.

The master of the *Border Knight* took no active part in the stowage of the cargo. The chief officer superintended this and made a note of the cargo coming on board, and gave the usual mate's receipts for, among other cargo, the chloride of lime, the drums being all apparently in good condition. The chief officer, and no doubt also the master, thus knew that the chloride of lime was being put on board, and indeed some conversation took place between the master and Captain Marshall regarding it. The chloride of lime was stowed by Barber and Co. below deck with the consent and knowledge of Captain Marshall and also to the knowledge of Lloyds' surveyor at New York, who certified that the cargo was properly stowed.

The plaintiffs now say that under the charter-party they are entitled to be indemnified by the defendants in respect of the claims they have paid to the owners of the damaged cargo. Under the charter-party the stowage was to be under the control of the master and the shipowners were to be responsible for proper stowage. Under such a contract owners of cargo would have a right to claim against owners of the ship; but this is not a claim by the owners of the cargo. It must be borne in mind that the *Border Knight* was running in a line and that when she arrived at New York to be loaded, her owners had nothing to do with the booking or loading of her cargo, apart from the provisions of the charter-party. The charter-party says that the stowage "shall be under the control of the master and that the owners shall be responsible for the proper stowage and correct delivery of the cargo," and if there had been improper stowage by reason of some physical act or default in the process of stowage, such as the provision of insufficient dunnage, I think the owners would have been liable under that clause. But here there is no question with regard to the physical act of stowage. So far as the physical stowage of the drums was concerned it was unobjectionable. The damage in this case was caused by the chloride of lime corroding the drums and the fumes escaping. Chloride of lime is a substance which is likely to corrode the iron drums in which it is packed unless they are protected by an internal coating of varnish or unless they have a wooden lining at the ends. But when these drums were presented for shipment no one could tell, on looking at them, whether they had the proper internal protection or not.

The question to be decided in this case is whether, when drums of chloride of lime were presented for shipment on the *Border Knight*, the master ought to have been so far suspicious of them as to have refused to allow them to be carried except on deck, or should have made inquiries to find whether they had been properly protected.

The charter-party provides that the stowage shall be under the control of the master, and that the owners shall be responsible for the proper stowage, but I cannot read that as an absolute warranty. I think it only means that the owner will not in any case be negligent in the stowage of the cargo. It would be a strange thing if it was an absolute warranty, for, if it were, the master might have presented to him some cargo of a kind of which he had never heard before; and if it caused damage, which he had no reason to expect, his owners would be liable. That, I think, would be pressing the language of the contract too far.

The question really is whether there was negligence on the part of the master in allowing this chloride of lime to be stowed below deck. Notwithstanding that the stowage was effected by the plaintiff's agents, Messrs. Barber and Co., and under the superintendence of Captain Marshall on their behalf, I should be of opinion that the defendants would be liable if the master knew or ought to have known of the danger, and ought to have stopped the stowage and refused to carry it or to have had it stowed on deck instead of below deck.

Now there is no evidence that the master had any actual knowledge that the chloride of lime would do any harm; and can it be said that he ought to have known? Chloride of lime in drums is an article which is quite commonly carried, and generally it does no harm. Messrs. Barber and Co. had had an unfortunate experience with chloride of lime on another occasion when damage resulted from its carriage, but apparently they had no suspicion that anything was wrong with this consignment. It did not occur to them that it would do any harm if stowed below deck, and neither Captain Marshall nor the surveyor of Lloyd's underwriters had any suspicion of it either.

In these circumstances I am not prepared to impute to the master a state of knowledge which was not shared by the plaintiffs' own agents and

the other persons I have mentioned. If in fact the drums had been properly protected no harm would have been done, and in view of all the circumstances, I hold that no negligence is to be imputed to the master. As negligence is the foundation of the action the claim fails and must be dismissed with costs.

There is also a counter-claim which is based on negligence by Messrs. Barber and Co. and Captain Marshall, but I find that they were not guilty of negligence and the counterclaim also must be dismissed with costs.

There will be judgment for the defendants on the claim and for the plaintiffs on the counter-claim.

Judgment accordingly.

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

Solicitors for the defendants, *William A. Crump and Co.*

Wednesday, April 2, 1919.

(Before BRAY, A. T. LAWRENCE, and SHEARMAN, J.J.)

MORGAN (app.) *v.* CALDWELL (resp.). (*a*)

Seaman's rations — Portion unconsumed at end of voyage — Appropriation — Ownership — Larceny — Mens rea — Merchant Shipping Act 1906 (6 *Edw.* 7, *c.* 48), *s.* 25.

During the course of a certain voyage a mess of seamen in the steamship M. *agreed amongst themselves not to consume the whole of the rations served out to them in accordance with the provisions of sect.* 25 *or the Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *but to save a portion and take them home at the end of the voyage. When the ship returned to port the appellant took his share of the unconsumed rations, and on leaving the dock, when challenged by the police, denied that he had any ship's stores or contraband goods in his possession. His bag was searched and certain tins of milk and marmalade were found, which formed a part of the rations which had been served out during the voyage which had just been completed. The appellant explained that he had saved up the rations during the voyage. The appellant was charged with larceny of goods the property of his employers the steamship company.*

The learned magistrate was of opinion, upon the evidence, that there had been no claim of right on the part of the appellant, and that good faith had been negatived by the appellant's conduct. He also was of opinion that, although it had not been proved that the steamship company had given any notice that unconsumed rations were not to be taken ashore, the appellant was well aware that the practice was disapproved of by the steamship company. He convicted the appellant.

Held, that the finding of the learned magistrate as above set out was not sufficient to establish mens rea *on the part of the appellant, and that the conviction must be quashed.*

Held, by Shearman, J., that under sect. 25 *of the Merchant Shipping Act* 1906 *the food to be supplied to seamen was intended for consumption on the voyage, and that if any portion of it remained unconsumed it was the property of the shipowner and not of the seaman, even though it had been served out to him.*

CASE stated by the stipendiary magistrate for the city of Liverpool.

The appellant, a seaman, was charged before the stipendiary magistrate at Liverpool that he did, on the 19th July 1918, feloniously steal two tins of marmalade and three tins of milk, the property of his employers, the Booth Steamship Company Limited.

On the hearing of the charge the following facts were proved or admitted:—

1. The appellant was a member of the crew of the steamship *Michael*, belonging to the Booth Steamship Company Limited.

2. The steamship had been on a voyage from and to the port of Liverpool which lasted about twelve weeks, and on that voyage the appellant was one of a mess of ten of the crew to whom rations had been served in bulk weekly, in accordance with the scale of provisions required by sect. 25 of the Merchant Shipping Act 1906, to be supplied to the crew during the voyage.

3. It had been agreed between the members of the mess to which the appellant belonged that the tins of milk and marmalade so served out to them should not be opened during the voyage, but should be kept and shared equally between the members of the mess for the purpose of being taken home by them respectively after the voyage.

4. In pursuance of this arrangement the appellant carried from the ship the two tins of marmalade and the three tins of milk, the subject-matter of the charge against him.

5. The arrangement amongst the members of the mess as to the keeping of the marmalade and milk and the carrying away of the same by the members of the mess at the termination of the voyage was not sanctioned by or known to the steamship company.

On behalf of the appellant it was contended before the learned stipendiary that upon the above-mentioned facts he had committed no offence, inasmuch as he was entitled by law to his due share of the rations so served out in bulk, and that he was perfectly entitled to choose whether he would consume the same during the voyage or retain them and take them home for consumption after the conclusion of the voyage.

On behalf of the prosecution it was contended that, although it was quite true that the steamship company were bound to supply the statutory amount of rations to the seaman, such rations were served out by the company on the express understanding that they were to be consumed during the voyage and that they were supplied for that purpose only; that the property in such part of the rations as remained unconsumed at the end of the voyage was in the company; and that the appellant had no legal right to take them away from the steamship.

The learned stipendiary convicted the appellant, who agreed to be tried by a court of summary jurisdiction. The stipendiary agreed to state a case for the opinion of the High Court as to whether his decision was right in point of law. The case stated came before the Divisional Court in the first instance on the 17th Dec. 1918, when it was sent back for amplication by the learned

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

magistrate, the court desiring that he should state whether the appellant might have taken the rations under a claim of right, mistaken or otherwise, or whether he took the property feloniously. The court also desired that the learned stipendiary should state the facts upon which he based his judgment. Accordingly the following statement was added to the original case stated:—

(*a*) The appellant was stopped on leaving the gate of the Harrington Dock, where the steamship *Michael* had been berthed, by two members of the Liverpool police force. He was carrying a sailor's kit bag, which appeared to be full and heavy. In accordance with the regular practice of the police at Liverpool, the constables asked the appellant what was in the bag, and the appellant produced a ticket signed by an officer of the ship, containing the words: "Pass bearer with one bag—personal effects." The constables then asked what was meant by personal effects, and the appellant replied, "My own clothing." The police then inquired whether he had any ship's stores or contraband goods in the bag. He said "No." On searching the bag the police found two 7lb. tins of marmalade and three small tins of milk, the subject of the charge, which were of the value of about 1*l.* On being asked by the police to account for his possession of the goods, the appellant replied that they were the milk and marmalade which he had saved up on the voyage. He was then asked whether the officer who signed his pass knew that the milk and marmalade were in the bag with his clothing, and he answered "No." He was further asked whether he had obtained permission to take the milk and marmalade ashore, and whether he had "declared" the goods to the customs' officer. To each of these questions he replied in the negative, and stated that only his mates knew of the fact that the goods were being taken away. On being taken to the police station and subsequently charged with stealing the above-named articles, the property of the Booth Steamship Company, he made no reply.

(*b*) The practice which obtained on board the steamship *Michael*, with regard to serving out the rations of jam or marmalade (of which the two 7lb. tins of marmalade were part) during a voyage, was that a 7lb. tin of jam or marmalade was issued one week for the mess, of which the appellant was a member, and in the following week two 7lb. tins, thus making an issue of three 7lb. tins of jam or marmalade every fortnight.

(*c*) The general instructions (which were proved by the evidence of the chief steward of the steamship *Michael*), issued by the Booth Steamship Company to the crew of the vessel were that no member of the crew was to take any provisions ashore, which had been purchased abroad by the seaman himself, without the consent of the captain. Although it was not proved that any such instructions as just mentioned with regard to rations had been actually given, or that such instructions were posted on the ship, the appellant was well aware of the fact that the Booth Steamship Company disapproved of the seamen taking their unconsumed rations ashore, the more so as such disapproval was in accordance with the practice at the time of most of the other shipping companies in Liverpool.

(*d*) In spite of the knowledge of such disapproval as aforesaid, the appellant carried away the said marmalade and milk from the steamship *Michael* without the knowledge and consent of the captain or any person in authority on the ship.

The learned stipendiary concluded his additional statement as follows:

"It was upon the facts stated above and in the case stated by me on the 14th Oct. 1918, that I based my judgment that the appellant had taken away from the ship the said tins of marmalade and milk feloniously. I considered that as a matter of law the property in the unconsumed rations issued to the crew must be deemed to remain and be in the Booth Steamship Company. I further considered that the suggestion that the appellant had taken the property under a claim of right, made in good faith, was negatived by the fact that the appellant knew that the Booth Steamship Company expressly disapproved of such action, and the further fact that the appellant had carried away the property in a clandestine manner."

By sect. 25 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48), it is provided:

(1) The master of every ship for which an agreement with the crew is required under the Merchant Shipping Acts shall, if the agreement is made after the 1st June 1907, furnish provisions to every member of the crew (who does not furnish his own provisions) in accordance with the scale set out in the first schedule to this Act, and for the purposes of sect. 199 of the principal Act (which provides for compensation in the case of short or bad provisions) every such member of the crew of the ship shall be deemed to have stipulated by his agreement for provisions in accordance with that scale.

Abinger] for the appellant. — The learned stipendiary had convicted the seaman of larceny, but there was no evidence upon the facts as set out in the case stated that a criminal offence had been committed. Possibly there had been a breach of contract under the Merchant Shipping Act 1906, but there was nothing to bring home the offence of stealing. The seaman had to be supplied with rations on the scale directed by Act of Parliament. There was no authority on the point as to whether the rations became the absolute property of the seaman when served out at sea or whether the unconsumed portion remained the property of the shipowner. In the absence of such authority there ought not to have been a conviction. There was a complete absence of *mens rea*. The learned magistrate appeared to have been influenced by the conduct of the appellant when leaving the docks, and the facts set out in the original case stated and the supplemental statement were inconsistent. It was not sufficient to support the conviction and it ought to be quashed.

Leslie Scott K.C. and *Maxwell* for the respondent, the Chief Constable of Liverpool.—The intention of the Merchant Shipping Act 1906 was (*inter alia*) to provide that seamen should be supplied with proper and adequate food upon a voyage to keep them in good health for the purposes of the voyage. There was nothing in the Act which referred in any way to the passing of property, and, in the absence of any expressed intention to that effect, it was submitted that the property remained in the steamship company. The appellant was therefore dealing with the property of another. Moreover, he knew full well

that he had no right to take the provisions ashore, nor was there any right to divide up as he had done with the other members of his mess. There was ample evidence before the learned magistrate to enable him to find *mens rea* on the part of the appellant. His conduct when leaving the docks should be noticed. He never said to anyone that he was taking away the provisions because he claimed to be entitled to do so. The conviction should be upheld and the appeal should be dismissed.

Bray, J.—I am of opinion that in this case the appeal must be allowed, as I do not think that the appellant should have been convicted on the evidence and the facts which we have before us.

There is a question of great difficulty raised by the parties, and that is whether, under sect. 25 of the Merchant Shipping Act 1906, the rations which are served out by the master of the ship to the seamen become the absolute property of the seamen or not. However, I do not think that it is necessary to decide this point in the present instance, and if these proceedings have been brought for the purpose of testing it, I am sorry for it. It is quite possible for the steamship company to thresh the matter out in another way if they are desirous of doing so—namely, by asking for a declaration or something of that kind. That is not what is desired here, and since it is, as I have said, unnecessary to answer this particular question to-day, I shall not express any opinion whatsoever as to it.

But assuming that the property in the rations—that is, in that portion of the rations which remained unconsumed at the end of the voyage—was still in the steamship company, it would be incumbent upon the prosecution to show that there was *mens rea* on the part of the present appellant. In other words, there ought not to have been a conviction recorded against this seaman unless there was evidence to show that he knew that he was doing wrong in taking something which was the property of another. Now, do the facts in the present case go to the length of showing that the appellant knew that he was taking what he knew to be the property of the steamship company? In my opinion they do not. It is admitted that there were no instructions given to the seamen with reference to the taking of rations ashore, although I will assume, as I think was the case, that the seamen knew (and this included the appellant) that the steamship company disapproved of the practice. But this is quite consistent with the property in the rations being in the seaman. I can quite understand the desire of the steamship company that the rations which were supplied should be consumed on board ship, specially as they were supplied for the benefit of the seaman and to maintain him in good health, and no doubt they were fully entitled to stipulate that they should be so consumed. But the mere fact of their disapproval of the practice of taking away rations which remained unconsumed at the end of the voyage is not, in my opinion, a sufficient justification for the finding that there was *mens rea* on the part of the seaman, as has been found by the learned stipendiary.

For the reasons which I have stated I think that the appellant should not have been convicted, and that the appeal should be allowed.

A. T. Lawrence, J.—I am of the same opinion, and I quite agree with my Lord in feeling that there is considerable difficulty as to the interpretation of sect. 25 of the Merchant Shipping Act 1906 with regard to the property in the unconsumed rations. I think that it is possible that the property in the same passes to the seaman upon delivery to him, but still this is not altogether clear. It has been argued on behalf of the respondent that, since there are no words in the statute which expressly pass the property in the rations to the seaman, there is strong ground for considering that the property remains in the shipping company, because I fully agree that the policy of the Act is to be looked at, and that policy is undoubtedly that the seamen should be provided with proper and adequate food upon a voyage so as to enable them to remain in good health and fit to perform their ordinary duties as seamen. It is on this ground that I find the difficulty of determining in my own mind whether the property in the rations did or did not pass to the seamen when the same were delivered to them on board ship. It is not necessary, however, to decide the present case upon that point, for without it I am quite satisfied from the facts set out in the case stated that the appellant should not have been convicted. The learned stipendiary appears to me to negative the *bona fides* of the claim of the appellant to the property without any evidence whatsoever. He says, in his additional statement, "I am satisfied, and found as a fact, that although it was not proved that any such instructions"— that is, instructions with regard to the rations remaining the property of the shipping company —"with regard to rations had been actually given, or that any notices of such instructions were posted on the ship, yet the appellant was well aware of the fact that the Booth Steamship Company disapproved of the seaman taking his unconsumed rations ashore, the more so as such disapproval was in accordance with the practice at the time of most of the other shipping companies in Liverpool." Now, in my judgment there was no evidence of that whatever, and later on it appears that the ground on which he based his decision was this: "I considered that as a matter of law the property in the unconsumed rations issued to the crew must be deemed to remain and be in the Booth Steamship Company. I further considered that the suggestion that the appellant had taken the property under a claim of right, made in good faith, was negatived by the fact that the appellant knew that the Booth Steamship Company expressly disapproved of such action." It is all inference, and I am of opinion that no man ought to be convicted of the offence of larceny when it is not quite clear that he was doing an act which he knew was wrongful and with a felonious intent. I think, therefore, that this conviction ought to be quashed.

Shearman, J.—I have been in considerable doubt during the course of the argument, but my doubts are not strong enough to lead me to differ from the conclusion at which my two brothers have arrived. I think that it is quite arguable that there was some evidence upon which the learned stipendiary might have found a felonious intention on the part of the appellant, and I believe he so intended to find; but the language of his finding is so doubtful that it

would not be doing justice to the appellant if we failed to give him the benefit of the doubt and set the conviction aside. That is quite sufficient for the purpose of the present case, and from the form in which the case stated is presented to us it is not really necessary to go any further. But a point of some interest has been raised as to the meaning of sect. 25 of the Merchant Shipping Act 1906 in connection with the property in rations served out to seamen during a voyage when a portion of such rations are unconsumed. My learned brothers have felt some doubt as to this matter. I feel no doubt whatever. The section of the Act of 1906 merely gives directions as to the furnishing or supply of provisions which are intended solely for consumption on board ship during the voyage. I have not the slightest hesitation in expressing the opinion that the unconsumed rations remain the property of the shipping company. However, that point is not really necessary for the decision in the present case as the conviction cannot stand upon another ground. On that ground I am, under the circumstances, in full accord with the conclusion at which my two brothers have arrived —namely, that this appeal must be allowed and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitor for the appellant, *Alexander Smith*, for *John A. Behn*, Liverpool.

Solicitors for the respondent, *F. Venn* and *Co.*, for *E. R. Pickmere*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Oct. 22 *and Nov.* 25, 1918.

(Before Lord STERNDALE, President.)

IN THE MATTER OF CERTAIN CRAFT CAPTURED ON LAKE VICTORIA NYANZA. (a)

Prize Court—Enemy craft—Captures on high seas—Captures on inland waters—Legality—Right to prize—Principles to be applied—Extent and limitations of principles.

There is no general principle of international law excluding all captures on inland waters from the operation of the law of prize. Therefore enemy craft captured by His Majesty's armed ships on an inland lake, such as Lake Victoria Nyanza, are subject to condemnation as prize. The conditions of the locality are such as to exclude any analogy between such captures and captures on land by land warfare.

THIS was an action in which the Procurator-General asked for the condemnation of certain enemy craft and other enemy property captured by armed ships of His Majesty on Lake Victoria Nyanza during the first two years of the war.

During the naval and military operations in East Africa, the Germans employed the services of various craft on Lake Victoria Nyanza. The whole of these were captured or destroyed at different times by His Majesty's ships of war, though some of the property on board those which were sunk was afterwards recovered. A writ in prize was issued in 1918, and it was ordered that the service of the writ should be effected by advertisement and by filing the writ in the Admiralty Registry. No appearance was entered.

The sole question raised upon the hearing of the case was whether the principles of capture which were applicable in the case of enemy vessels captured on the high seas were equally applicable when the captures were effected in great inland waters.

The facts and the arguments are sufficiently indicated in the judgment.

The *Attorney-General* (Sir F. E. Smith, K.C.) and *Pearce Higgins* for the Procurator-General.

Cur. adv. vult.

Nov. 25.—The PRESIDENT.—In this case the Crown asks for condemnation as prize of the craft and other property mentioned in the schedule to the writ. The ground of condemnation alleged is that everything mentioned in the schedule was enemy property captured by His Majesty's ships of war. All the captures were made on the waters of the Lake Victoria Nyanza in East Africa. The captor ships are described as H.M.S. *Winifred*, H.M.S. *Kavirondo*, and H.M.S. *Nyanza*. I have no precise information as to the size and description of these vessels. I believe, however, that the following description is fairly accurate; The *Winifred* and *Nyanza* were twin-screw trading steamers requisitioned and commissioned by the Admiralty, of 700 and 1146 tons respectively, and armed, the former with one 4in. gun and the latter with one 4in. and other guns. The *Kavirondo* was a steam tug of 200 tons, armed with one 12-pounder and other guns. There were also three other armed vessels on Lake Victoria Nyanza, and an armed store ship, all of which had been trading steamers before being requisitioned by the Admiralty.

I have no precise information as to the vessels which the Germans had upon the lake, but at any rate they had one armed steam tug, the *Muanza*, which was sunk in the operations mentioned in this case, and no doubt other armed vessels. There was a considerable amount of fighting on the lake from time to time. According to the evidence, all the captor ships were commissioned ships of His Majesty's navy, the captured property belonging to enemies of this country. There could, therefore, be no question as to the condemnation except such as may arise from the nature of the locality where the capture took place.

Lake Victoria Nyanza is an inland lake, and there is no access to it from the sea available for any vessels. All the vessels plying upon it, except such small craft as have been built there, have been brought overland to the lake, either whole or in sections, and there put together, if necessary, and launched. The question is whether craft and other property captured upon the waters of such a lake are the subject of prize.

There is, so far as I know, no authority in point, except the case of the *Kangani* and the *Hedwig von Weissmann*, which came before this court in 1917. In that case the late President awarded prize bounty to H.M.S. *Mimi*, *Toutou*, and *Fifi*, in respect of the *Kangani* and the *Hedwig von Weissmann*. H.M.S. *Mimi* and *Toutou* were motor-launches brought from England and launched on Lake Tanganyika. They each carried

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

one gun, and very soon after their launch they attacked and captured the German vessel *Kangani*, a larger but much slower vessel. She was repaired and incorporated into His Majesty's navy under the name of *Fifi*. The three vessels after this attacked and sank the *Hedwig von Weissmann*. They were held entitled to prize bounty, and the considerations necessary for that decision are the same as those necessary for a decision as to condemnation. The conditions of Lake Tanganyika are the same as those of Lake Victoria Nyanza, and therefore this case is, so far as it goes, an authority in favour of the Crown. The late President also made an order of requisition in respect of some of the property with which the case was concerned. I was, however, told that the point was not discussed in either of these cases, and therefore I think that I am bound to consider this case independently.

To do this I think that it is necessary to consider the extent and limitations of the right to prize. I do not think that I need do so at any length, for they have been discussed in the cases of *The Roumanian* (13 Asp. Mar. Law Cas. 8; 112 L. T. Rep. 464; (1915) P. 26) and *The Miramichi* (13 Asp. Mar. Law Cas. 21; 112 L. T. Rep. 349; (1915) P. 71) by the late President, and his judgments in those cases have been approved by the Privy Council. The learned President cited a passage from Hall's International Law, 6th edit., p. 435 (7th edit., 463), and from a note in Dana's Edition of Wheaton, 8th edit., 1866, dealing with the matter. They are fully set out in the report of *The Roumanian* (*ubi sup.*).

The late President also pointed out that the commission under which this court acts in prize contains no limitation of the jurisdiction which would exclude the property then under his consideration. Nor does it, in my opinion, any more by its terms exclude the property which I have to consider. The result, therefore, is that *primâ facie* all enemy property is liable to seizure and condemnation as prize, but that the *primâ facie* liability has been limited to some extent by international law. The question that I have to consider is whether this limitation excludes the present case.

The right of prize is not limited to property on the sea. This was decided in the case of *Lindo* v. *Rodney* (2 Doug. 613), where the property in question was property taken at the surrender of the island of St. Eustatius to His Majesty's naval and military forces. It was objected that the property was not subject to the jurisdiction of the Prize Court because it was taken on land. Lord Mansfield and the Court of King's Bench, however, held that the property was subject to the law of prize, Lord Mansfield saying, in reference to the commission, which is for all purposes the same as the present: "It doesn't say upon the sea; it doesn't say goods in the ship." See also the judgments in *Le Caux* v. *Eden* (2 Doug. 594).

It appears fairly clear that there is no settled practice by which captures on inland waters are excluded from the law of prize. On the 21st Feb. 1917, the Italian Prize Court, sitting at Rome, condemned as lawful prize two river steamers employed in navigation between the port of Cervignano, on the river Aussa, some miles from its mouth to Grado, at the mouth of the river, and Trieste. The case itself is not entirely in point, as it proceeded to a certain extent upon the doctrine of reprisals, and it does not seem quite clear whether the actual seizure was at Cervignano or at Grado, which is at the mouth of the river and on the Gulf of Trieste. In the course of the judgment, however, reference is made to a decision of the German Prize Court, in which some Belgian ships moored in the port of Duisberg, many miles up the Rhine, were condemned, and also to the case of the *Primula*, a Russian vessel which was seized on the river Trave, between Lübeck and Travemünde. I do not know the particulars of the case as to the captures at Duisberg, but I think that I may accept the statement of the Italian Court that the German Court recognised the legality of the seizure.

Another instance of the same kind is to be found in the case of *The Cotton Plant* (10 Wall. 577). Although it is cited in some text-books as an authority that captures on inland waters are not legal according to prize law, it seems to me to establish the opposite. The capture was made on the Roanoke River, 130 miles from its mouth, and was held illegal because it was contrary to the provisions of a statute of the United States of 1864, which provided that no property seized or taken upon any of the inland waters of the United States by the naval forces thereof should be regarded as maritime prize. It was argued that this statute was not applicable to this case, and applied only to such inland waters as the great lakes. This seems to me to be clearly an expression of opinion that but for the statute a seizure upon this inland river would have been a good seizure.

Starting, then, from the proposition that there is no general principle excluding all captures on inland waters from the operation of the law of prize, it is necessary to consider whether a capture on Lake Victoria Nyanza falls within the class of captures excluded from the law of prize, under the principles stated in the passage from Wheaton referred to above, which has been approved by the late President and the Privy Council. In considering this, regard must be had to the nature and circumstances of the Victoria Nyanza. It is a very large lake, the chief reservoir of the Nile, and second only in size to Lake Superior among the fresh-water lakes of the world. Its greatest length is 250 miles, its greatest breadth 200 miles, and its coastline exceeds 2000 miles. Its area is over 26,000 square miles. It is, speaking roughly, about five-sixths of the size of Lake Superior, and considerably larger than any other of the great American and Canadian lakes. As long ago as 1903 a steamer of 600 tons was launched on the lake, and there are many steamers and craft engaged in trading upon it. The amount of trade done is very considerable. The Victoria Nyanza is partly in British and partly in German East Africa, and both Great Britain and Germany during the war have had armed vessels upon it.

It seems to me that the conditions of such a locality clearly come under the *primâ facie* rights of capture, and are in no way analogous and within the principle applicable to captures on land by land warfare.

I think the language of Taney, C.J. in the case of *The Genesee Chief* v. *FitzHugh* (12 Howard, 443), speaking of the great lakes, is applicable to the Victoria Nyanza: "These lakes are, in fact, inland seas. Different States border on them on one side and a foreign nation on the other. A

great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean." With the exception of the reference to different States of the Union which adjoin on one side of the great lakes, this seems to me descriptive of the conditions of the present case. On principle, therefore, I think that captures on Lake Victoria Nyanza are subject to the law of prize, and authority, so far as it exists, seems to me to be to the same effect.

The nearest analogy to the lakes of East Africa are the great lakes of America and Canada, to which I have already referred, and these have been the subject of discussion in several cases in the United States courts. I do not propose to discuss them at any length as they are concerned with a different question—that is, whether the great lakes were subject to the Admiralty jurisdiction of the United States—and for that purpose great consideration is given to the question of whether they can be called "the high seas." As I have shown before, jurisdiction in prize is not confined to captures on the high seas, and therefore a good deal of the discussion in the cases mentioned is unnecessary for this purpose. It may be mentioned, however, that Admiralty jurisdiction has been given to the High Court in Uganda by the Uganda Order in Council of 1903, art. 16 (1): "In all matters arising upon any lake or other navigable inland waters."

Two passages in the American cases are however, I think, relevant. In *The Genesee Chief* v. *FitzHugh* (*ubi sup*) Taney, C.J., speaking of the great lakes, says: "Hostile fleets have encountered on them and prizes have been made." In speaking of prizes he must have referred to incidents of the war of 1812, or earlier, because I find that Strong, J. in *The Cotton Plant* (*ubi sup.*) points out that there was no fighting upon the lakes during the war of the rebellion. In speaking of the application of the United States statute, to which I have already referred, he says: "It is obvious that other waters than those of the great lakes were contemplated and designed to be included. The Act was passed during the war of the rebellion. . . . There was no war upon the lakes, and they were not within the insurrectionary districts." I know of no events between 1812 and the war of the rebellion which would give rise to questions of prize on the great lakes.

In Mayers' Admiralty Law and Practice, p. 512, I find it stated that questions of prize on the great lakes had not arisen in the Canadian courts since 1812, and that such cases were collected in the third volume of the Canadian Reports of Appeal Cases. They seem to have been decisions of Sir Alexander Croke, a judge of high repute.

Unfortunately, I have not been able to trace the American Prize cases to which Taney, C.J. refers or to obtain the Canadian reports mentioned, but I think that I am entitled to accept the statement of the Chief Justice in the United States case, and that of the writer of Mayers' Admiralty Law and Practice, that such decisions exist. If they do, they seem to me to form a complete analogy to the Lake Victoria Nyanza case. At the time *The Genesee Chief* v. *FitzHugh* (*ubi sup.*) and the other cases as to Admiralty jurisdiction were decided, vessels of considerable size, though not the largest, could approach the great lakes directly from the sea by river and canal, and some importance is attached to this fact by the courts. There is, as I have before pointed out, no direct access to the Victoria Nyanza from the sea, and this might be considered to differentiate this case from that of the great lakes. But from a report of Sir John Hay, then Secretary of State, made to the President of the United States, cited in Moore's Digest of International Law, vol. 1, p. 698, it appears that before 1817 there was "no navigable connection between them (the great lakes) and the ocean." If this is correct, as I have no doubt that it is, the analogy between the great lakes and the Victoria Nyanza is complete.

On principle and authority, in my opinion, these captures were legal, according to the law of prize, and I agree with the decision of the late President as to Lake Tanganyika, to which the same considerations apply as to Victoria Nyanza.

I make the order of condemnation, as prayed.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Monday, March 10, 1919.

(Before Lord STERNDALE, President.)

THE FROGNER. (*a*)

Prize court — Contraband — Seizure — Claimants — Date when property passed — Right to appear.

When goods are seized as contraband and afterwards claimed as prize in a Prize Court, the date at which the position or status of the goods is to be determined is the date of the seizure. But, apart from questions which may arise as regards enemy property or as regards the doctrine of infection, there is no rule that the property in the goods which are in question should be in the claimants at the date of seizure. Claimants are entitled to appear and to assert their claims if they have the property in the goods at the date when the claim is put forward and when the prize proceedings take place.

THIS is a case in which the Procurator-General claimed the condemnation of a certain quantity of lard which was conditional contraband at the date of its seizure on board the Scandinavian steamship *Frogner.*

The *Frogner* sailed from New York for Gothenburg on the 29th Feb. 1915. Included in her cargo were 1000 tierces of lard, which was consigned by Messrs. Armour and Co., of Chicago, to Messrs. Anton C. Herskind and Co., of Copenhagen. The *Frogner*, in accordance with the instructions of her owners, called at Kirkwall on the 15th March 1915, and two days later the goods were seized by the collector of customs, acting upon instructions from London. Messrs. Anton C. Herskind and Co. paid for the goods on the 23rd March 1915—that is, six days after the seizure. There were two bills of lading relating to the goods, one for 800 tierces and one for 200 tierces, both dated the 8th Feb. 1915, and under each of them the goods were deliverable to Messrs. C. Herskind and Co. or their assignees.

The case for the Crown was that at the date of the seizure the property in the 1000 tierces was

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

in one and the same owner. No claim was put forward by anyone as to the 200 tierces, and it was contended that these were to be considered as contraband and having an enemy destination, and should, on the materials before the court, be condemned, whilst the remaining 800 tierces should be condemned also under the doctrine of infection. Alternatively it was urged by the Crown that the proper claimants were not before the court, as the claimants in the present case had not the property in the goods at the date of the seizure and had therefore no right to appear.

The writ in the case was issued on the 7th May 1915. An appearance was entered by the claimants on the 9th July 1915, as regards the 800 tierces, and a claim was filed by the claimants in Sept. 1916.

The learned President came to the conclusion that there was no evidence which made the 200 tierces confiscable, and that the doctrine of infection, therefore, did not apply. The second point, as to the right of the claimants to appear, is the only one which is noticed here.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir E. H. Pollock, K.C.), and *Bruce Thomas* for the Procurator-General.

Sir *Erle Richards*, K.C. and *Darby* for the claimants.

The PRESIDENT (after dealing with the first ground of claim). — The second ground put forward on behalf of the Crown is that, if the claim for condemnation fails, the goods must be condemned for the reason that the proper claimants are not before the court; that the property in the goods not having passed to Messrs. Herskind and Co. at the date of the seizure they have no right to claim in this court, and, therefore, there being no claimant, it ought to be presumed that the goods are contraband. This point is one of a rather technical character.

There is no doubt a dictum of the late President in an unreported case, to which I have been referred—the *Hilding*—that where the property in the goods the subject-matter of the action has not passed the claim would be disallowed. I have not had an opportunity of reading through the whole of that case, and I am not sure that, as suggested by Sir Erle Richards, it is not complicated by the question of enemy property. I think that there are also other dicta of the late President to the same effect. If that is correct, then these claimants cannot appear because they had not got the property in the goods at the date of seizure. The persons who would have the property in them under the circumstances would be Messrs. Armour and Co., the shippers, and it seems, as far as I can gather from the cases to which I have been referred, to have been clearly decided by the Privy Council that if the shipper has the property in the goods at the time of the seizure, and the property has not passed from him at that time, but he has not got it at the time of adjudication and at the time of making the claim he cannot appear—that is, he cannot assert his right to the property in the Prize Court.

The result is this, and I cannot think that it is a right conclusion—I am told the point has been raised several times, but not decided, and I think it ought to be decided by the Privy Council—that the goods may be brought into court and condemnation asked for and no ground for condemnation shown, but nobody can claim. The shipper cannot claim, because he has not got the property at the time that the claim is put before the court, and the consignee cannot claim because he had not got the property in the goods at the date of seizure.

Now, the date of seizure is undoubtedly the date at which the status of the goods must be determined; but, apart from any question of enemy property, which does not arise in this case, I cannot think that there can be such a state of things as that goods which are not liable to condemnation must remain in the hands of the Crown because the shipper cannot claim as he had not the property at the date of making the claim, and the purchaser cannot because he had not the property at the date of seizure. That is an impossible position, and, forming the best judgment that I can, I think that the person who has the property at the time the case comes into court is the person who should assert it.

I wish, however, to guard myself by saying that I only come to that conclusion apart from such questions as might arise as to enemy property or possible infection. It might very well be said that the goods were infected at the time of seizure, and you cannot disinfect them by passing the property on to them afterwards. Apart from questions of that sort, and in a simple case such as the present, in my opinion the person who has the property in the goods at the time of the making of the claim is the person entitled to assert that right, and therefore the goods in this case must be released to the claimants. As, however, the claimants have brought the whole trouble upon themselves by declining to give any account of the other 200 tierces, I do not think they ought to have any costs.

Solicitor for the Procurator-General, *Treasury Solicitor.*

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

March 31, *April* 1 *and* 2, 1919.

(Before Lord STERNDALE, President.)

THE EDNA. (*a*)

Prize Court—Vessel registered as neutral—Nominally owned by company in neutral country—Actually owned by enemy alien—Outbreak of war—Unneutral service—Transfer of ownership—Validity of transfer—Declaration of London 1909, *art.* 56.

Prior to the outbreak of the war with Germany in 1914, *a vessel which had been registered in the neutral country N., was transferred to a company in the neutral country M., and registered in M. Although the vessel had been transferred to and was nominally owned by the company in M., she was actually owned and controlled by an enemy alien who was, in fact, the company, there being but one or two other nominal shareholders in the same. At the time of the outbreak of war there was much political trouble in M., and in order to avoid being requisitioned by one or other of the contending parties in M., the vessel flew the German flag for a short period. Later on in Aug.* 1914 *she sailed*

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

with coal and other supplies from an American port, but resumed the flag of M. The coal and the supplies were transferred to a German cruiser in the Pacific Ocean. In 1915 *the vessel was requisitioned by each of the contending factions of M. in turn, but eventually she was sold to a firm carrying on business at San Francisco. In Jan.* 1916, *subsequently to the sale, the vessel was captured by the British and proceedings were taken for her condemnation on the ground that the sale was invalid and that she ought to be regarded as an enemy vessel.*

Held, that upon the evidence and the whole circumstances of the case the sale of the vessel was bonâ fide *and not carried out to evade the consequences to which she would have been exposed under art.* 56 *of the Declaration of London if she had been an enemy vessel, and the shipping of coal and other goods with their subsequent transfer to the German cruiser did not make the vessel an auxiliary of the German navy and liable to condemnation. The court thereupon ordered the vessel to be released, but made no order as to costs.*

THIS was a case in which the Procurator-General asked for the condemnation of the steamship *Edna* on the ground that she was an enemy vessel, or alternatively that she had been engaged in unneutral service. The claim of the Crown was resisted by Messrs. Sudden and Christenson, a firm carrying on business at San Francisco, by whom the vessel had been bought in Oct. 1915.

The vessel was originally a Norwegian one and known as the *Jason*. In 1910 she was sold to a Mexican firm, the Lloyd Mexicano Société Anonyme, when her name was changed to the *Mazatlan*. This Mexican firm really consisted of one man, a German named Jebsen. After the sale she was transferred from the Norwegian to the Mexican registry, and she flew the Mexican flag. Owing to the fears of being requisitioned by one or other of the parties which were fighting in Mexico, each of whom claimed to be the Government, the owners placed her under the German flag, but she was never registered as a German ship. At the time of the outbreak of war she was flying the German flag, but soon afterwards she reverted to the Mexican flag, and whilst under that flag, on one occasion in the month of Oct. 1914, she carried coal and other goods which were transferred to the German cruiser *Leipzig* in the Pacific Ocean. Subsequently she was engaged in trading on the Pacific coast, and during 1915 she was taken and requisitioned in turn by each of the contending parties in Mexico. In Oct. 1915, as already stated, the vessel was sold to the present claimants, who changed her name to the *Edna*, and it was whilst she was upon a voyage in Nov. 1915 that she was captured and taken to the Falkland Islands, where proceedings were instituted against her, but afterwards transferred to the High Court. The *Edna* was registered as an American ship immediately after her purchase by the claimants.

On behalf of the Crown it was contended that under all the circumstances of the case the vessel ought to be condemned. If she had been a neutral vessel the mere carriage of contraband to the German cruiser *Leipzig* would not have been sufficient to subject her to condemnation, as she was not taken in the act, but when the real ownership and the flag she had been flying were considered, the vessel had undoubtedly been acting as an auxiliary of the German fleet, and the sale was carried out for the purpose of evading the consequences of her act.

On behalf of the claimants it was contended that the *Edna* never was an auxiliary of the German fleet, and that at the time of supplying coal and other goods to the *Leipzig* she was flying the Mexican flag and used to be considered as a neutral vessel. The purchase was a purchase from a neutral and was made quite *bonâ fide*, and the claimants were entitled to the return of the vessel together with damages for detention and for wear and tear.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir Edward Pollock, K.C.), and *D. Stephens*, for the Procurator-General.

Sir *Erle Richards*, K.C. and *Le Quesne*, for the claimants.

The following authorities were referred to in the course of the argument:

The Vrow Elizabeth, Roscoe's English Prize Cases, vol. 1, p. 409; 5 Ch. Rob. 2;
The Minerva, Roscoe, vol. 1, 591; 6 Ch. Rob. 396;
The Baltica, Roscoe, vol. 2, 628; 11 Moo., P. C. 141;
The Georgia, 7 Wall. 32;
The St. Tudno, 13 Asp. Mar. Law Cas. 516; 115 L. T. Rep. 634; (1916) P. 291;
The Alwina, 13 Asp. Mar. Law Cas. 311; 118 L. T. Rep. 97; (1918) A. C. 444;
The Proton, 14 Asp. Mar. Law Cas. 468; 118 L. T. Rep. 519; (1918) A. C. 578.

The PRESIDENT.—The Crown in this case is asking for the condemnation of a ship which is now called the *Edna*. She was originally a Norwegian ship called the *Jason*, and then bought by a company, to which I shall have reason to refer later, and named the *Mazatlan*, under which name she continued for some time until she was bought by the present claimants, when she was named the *Edna*. She was bought some time in the early part of 1914 by a company called the Lloyd Mexicano Société Anonyme, and that company was really Mr. Jebsen. He was the company. There were one or two nominal shareholders, but he held substantially all the shares. I suppose the ship was on the Norwegian register before she was bought by that company, and she was transferred to the Mexican registry and flew the Mexican flag.

She went on a voyage which lasted from March to May 1914. She went north to San Francisco, and then to Mexican ports and back.

The next voyage lasted from May to Aug. 1914. When she got to the port of Los Angelos a curious transaction, which I do not yet understand, took place. At that time there was a good deal of trouble in Mexico. Two sections of the community were engaged in hostilities with one another, and there was a question as to whether trouble might not arise with the United States. It is said, for that reason, that the owners of the ship decided to transfer her to the German register and to put her under the German flag, the reason being that if they put her under a neutral flag neither of the contending factions in Mexico would requisition her, whereas if she

remained under the Mexican flag, as they both called themselves the Mexican Government, either of them might do so.

The owners meant first to transfer her to the United States' flag, but they were not able to do that in consequence of the American law of registration. What they did was to get a document which I have not seen, a document from the German Consul at San Pedro (the port of Los Angelos), which allowed them temporarily to put on the ship a German port of registry, and to fly the German flag. They painted out the name of the Mexican port of registry, "La Paz," and painted in "Hamburg," and put her under the German flag. Now, as I have said, I have not seen that document. It is said on the one hand that it was for one voyage only, and, on the other, it was to enable the owners to fly the German flag so long as it was convenient. I shall adopt that view as being the correct one. Undoubtedly she never was registered as a German ship, and undoubtedly on the evidence before me her Mexican registry was never taken off, and I cannot see that that transfer could have the slightest effect upon the ownership of the vessel. As a matter of fact at that time war had not broken out; but if it had, and she had been met by a British ship while flying the German flag, it might have been difficult for her to deny German nationality. But war had not broken out, and nothing of the sort happened, and in the transaction itself I can see nothing that alters the ownership of the vessel. I do not see that it altered her registry, but, at any rate, it did not alter her ownership, and she continued the property of the Mexican company—that is, of Mr. Jebsen. On the next voyage she left on the 23rd Aug. 1914, and, therefore, in the meantime war had broken out, and I will take it, and I think it is a fact that she had not restored herself to her Mexican name, and had not painted out the word "Hamburg" and hoisted the Mexican flag.

Therefore, at the outbreak of war, whether rightly or wrongly, she was flying the German flag at San Francisco. When the voyage commenced on the 23rd Aug. she sailed under the Mexican flag, and that voyage continued to the 2nd Oct. As before, she went north and got a cargo of lumber and also a general cargo, and then she shipped some coal, and shipped it in such a way that it could be got out without disturbing the rest of the cargo. She took on board a gentleman of the name of Traub, a German wireless operator, and in the course of her voyage she took on some other people, a Mr. Zur-Helle and his wife and another lady, and at one time somebody connected with the German naval service. Further, some packages which contained gunsights and perhaps other things useful for a ship of war were taken on board. I think the packages were marked "Remington typewriters." The wireless operator on board was a gentleman named Duncan Smith, and he seems to me to have behaved with great resource and great courage throughout the voyage. The chief officer was a gentleman named Walters, who appears to have done the same. He had refused to serve in the ship while she was under the German flag, but he had rejoined her, together with the cook, when she came under the Mexican flag again. Traub was shipped because it was suggested that Mr. Smith would not work the wireless installation as Mr. Jebsen wished him to do.

I have no doubt whatever that the coal was shipped, and the other goods also, for the purpose of being transferred to the German cruiser *Leipzig*. I entirely accept Mr. Duncan Smith's evidence that he was asked to communicate with the *Leipzig* and keep in touch with her from the time they came within range. What he did, however, was to put the wireless installation out of order in such a way that it would not communicate with the *Leipzig*. Only one person could be in the wireless room at a time, and so he was able to appear to produce the spark, and to appear to Jebsen and Captain Paulsen as though he was trying to get into touch with the ship, but could not get an answer. In that way he prevented complete touch being kept with the *Leipzig* as had been intended; but they did meet, and Jebsen and the German officer went on board the *Leipzig* with one of the ladies, and it is said that some of the packages were transhipped. The coal was not passed to her there. I have no doubt that the intention was that the packages which I mentioned should be put on board her, and the coal also, and I think that the story told by the master and some of the others on board the ship that this visit was merely a matter of courtesy, and that they went on board as a morning call, is all nonsense. It was not worth while to put it in an affidavit as no one could believe it. Then the ship went on to Guaymas, where the coal was discharged into lighters. and I have no doubt that what Mr. Smith says he was told on the voyage back to San Francisco—namely, that the *Leipzig* had got the coal—was true. I do not believe a word of the story told to the contrary, and I do not believe a word of the story that the coal was landed at Guaymas. Then the ship went on, and having in the meantime discharged her cargo got to San Francisco on the 2nd Oct. She went another voyage under the Mexican flag, lasting till the 8th Oct. 1915, and the reason that that voyage lasted so long was that she was requisitioned by one of the factions in Mexico, and then fell into the hands of the other party. They kept her and would not let her go until they got a consideration for doing it—15,000 dollars. In Oct. and Nov. 1915 she was on a voyage along the coast for her present owners, the claimants in this case. On the 7th Dec. 1915 she was chartered to W. R. Grace and Co., and in Jan. 1916 she was seized by the Crown, and the question now is whether she ought to be condemned. That is the history of the vessel as far as need be mentioned, apart from her passing into the hands of the present claimants, which I will now deal with.

The question of the transfer of the vessel seems to have originated early in 1915. In January of that year a Captain Rinder, who had been in the White Star service, was carrying on business at San Francisco as a marine surveyor and shipping broker. Correspondence took place between him and Mr. Jebsen, with the result that on the 15th Feb. 1915 an agreement was made by the Lloyd Mexicano S.A. with a company called the Executive Company, for the sale to them of the ship. But she was still in the hands of the Mexicans, and the owners were indebted to their bankers, who were represented by a Mr. Wilson. The owners also wanted an advance to get the

ship free. The result was that the ship was transferred to Mr. Wilson on the 5th April, really to secure the money owing by the owners to the bank, and also, if possible, to get her put under the American flag.

For reasons which it is not necessary to discuss, Mr. Wilson transferred her to a company called the Western Pacific Steamship Company, but Mr. Wilson really was that company. It only had 50 dollars of capital. It was supposed to be able to facilitate matters, perhaps, with regard to registry, and to make matters easier in case of his death. On the 23rd Sept. the ship was released and sailed to San Francisco. On the 1st Oct. the claimants bought it for 125,000 dollars, a price which left a profit of 10,000 dollars to the Executive Company, and the money was paid by three cheques — 114,000 dollars to Mr. Wilson, 10,000 dollars to the Executive Company, and 1000 dollars to the same company for some money that had been deposited. Three bills of sale were given—one from the Lloyd Mexicano S.A. to the Western Pacific Steamship Company, one from that company to the Executive Company, and one from that company to the claimants.

The first question is: was that a real transfer? I have not the least doubt that it was, and, indeed, it is not seriously contended by the Crown that it was not. I think that there is nothing whatever to cast any doubt on the fact that the claimants honestly bought this ship for their own purposes and paid for it. There were other persons who were interested, persons who took so many shares in the ship, as people carrying on such a business generally have, but it was a real genuine transaction, and the only question remaining is: was there anything to prevent their getting a title? The first point raised is this: It is said that this ship was an auxiliary vessel and not a part of the German navy, but an auxiliary, sometimes called a fleet auxiliary, and, therefore, she was in the position of a ship of war, and could not be transferred during war time.

I will assume that a ship of war cannot be transferred during war time; but was this ship anything of that kind? In my opinion there is no evidence that she was. What she did was this, and I have to take the evidence before me. We cannot get the evidence from the persons most concerned. Mr. Jebsen, it is said, went down in a German submarine. Mr. Zur-Helle went on board the *Leipzig*, and went down in her, and, therefore, I cannot get any information from them. They lost their lives serving their country, and I see nothing to be said against either of them. But on the evidence that I have, the facts are these. An ordinary merchant ship under the Mexican flag, owned at the time by Germans, although nominally by a Mexican Company, was doing her ordinary business of trading about the coast. Her owner, knowing that there was a German cruiser or cruisers about, gets an intimation that one of them requires coal. How he got the information I neither know nor care, and he also got the information that certain other things were to be put on board, and certain persons. He also got information, I should think, of the neighbourhood in which the ship was likely to be spoken, and so he loaded the coal and the other things and took the passengers on board, and gave orders to the wireless telegraphist to get in touch with the *Leipzig*, and to keep in touch until they could arrive at the place where the coal could be transferred, and that was done.

It is said that that makes her an auxiliary, and I have an affidavit from the Admiralty stating that arrangements were made by the Germans to have other auxiliaries on that coast. But that affidavit does not tell us what a "fleet auxiliary" is, and nobody can tell me. I have asked for a definition, but have not got one, and still less have I got a definition of an auxiliary. But, whatever it may be, I am certain this ship was not one, and that a mere contraband transaction of this kind, of supplying coal to the enemy as an incident of a voyage upon the vessel's own business does not constitute her a vessel of that kind.

I do not think that I should have had any doubt about the matter even if I had been left without authority; but I have distinct authority in the decision of the Privy Council in the *Alwina* case (*ubi sup.*). In that case there was no question that the ship was taking coal to a German ship, and it was argued by the then Attorney-General that that constituted her an auxiliary. If it was merely a question of contraband, she could not be captured after the conclusion of the voyage on which the act was committed; but if she was an auxiliary, possibly she might. The Privy Council decided that she could not, and that it was merely a question of contraband. It seems to me that is exactly the same case as this.

I was referred to a correspondence between our Ambassador in Washington and Mr. Lansing, Secretary of State for the United States, with regard to some vessels which were interned in America. Of course, I should pay great attention to what those gentlemen said; but they are not decisions, and all it comes to is this: that Mr. Lansing maintained that the vessel was a tender of the warship. If she was, then she comes perhaps within the meaning of an auxiliary. He may have been right or he may have been wrong in saying that she was a tender; but this ship, the *Edna*, was not a tender, and therefore that correspondence does not throw any light on the matter. Any case that is attempted to be made upon the ground of the *Edna* being a fleet auxiliary fails, as she was nothing of the sort.

But then it is said she was enemy property, and that she could not become anything else during the war. If she is a merchant ship, according to the decision in *The Baltica* (*ubi sup.*), she could be acquired by a neutral during the war so long as it is a *bonâ fide* transfer, as I have held this to be. I will assume that she was enemy property —a German vessel. I have already expressed my opinion that what took place as to the change of the flag from Mexican to German, and from German to Mexican, has nothing to do with the question of ownership. But I will assume that I am entitled to go beyond the entity of the Mexican company and to look at the persons who were really concerned; and I will assume that this vessel was a German-owned merchant vessel at the beginning of the war. I can find nothing to show that she cannot be *bonâ fide* bought by a neutral and transferred to a neutral flag as this vessel was. I find a distinct statement that she could in the case of *The Baltica* (*ubi sup.*), and the only argument to the contrary is that that cannot be done under art. 56 of the Declaration of London. Art. 56 is to this effect: "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 is exposed."

Now, as such, that must be read in conjunction with the previous art. 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 is made to evade the consequences to which an enemy vessel is exposed."

The difference between the two is that before the war *primâ facie* the transaction is good; but it may be shown to be bad if it is to avoid the consequences to which an enemy vessel is exposed. But after the war, *primâ facie* it is invalid; but it may be shown to be valid if it is proved that such a transfer was not made in order to evade the consequences to which an enemy vessel as such is exposed. Now, it was argued for the Crown that a vessel by reason of being an enemy vessel is always exposed to certain consequences, and therefore she never could be transferred validly, because she might always evade the consequences of being an enemy vessel.

I think that the Solicitor-General rather disclaimed a wish to put the argument as high as that, but, if it is not put as high as that, in my view it comes to nothing, because if the sale is made *bonâ fide*, as the purchaser wishes to get the ship for his own purposes, that, in my opinion, is not made to evade the consequences to which an enemy vessel is exposed. It does, no doubt, put an end to the consequences that follow upon her being an enemy vessel—namely, that so long as she is an enemy vessel she may be seized; but it is not made in order to evade those consequences, and I think that art. 56 is really aimed at what may be called colourable transfers, and some support to that is afforded by the words that follow: "There is therefore an absolute presumption that the transfer is void . . . (2) if the right of repurchase or recovery is reserved to the vendor."

I do not think that this article was intended to interfere with the general principle of law as laid down by the *Baltica* (*ubi sup.*), except so far as it might throw the onus of showing the *bona fides* of the transfer on the purchaser. Here the *bona fides* is shown, and I think that this transfer was valid, and there is nothing in the circumstances to prevent the Lloyd Mexicano S.A. passing a perfectly good title to the claimants. One of the claimants was called, and he was cross-examined, and certain things were put to him as being matters which ought to have aroused his suspicions, and certain suggestions were put to him to show that this was not a *bonâ fide* transaction. But they did not show anything of the kind, and after he had been so cross-examined the Solicitor-General declined to raise the point, and said that upon the evidence it must be taken as being a *bonâ fide* transaction. That being so, it is quite clear that there must be an order of release. This being a contraband transaction and nothing else, the seizure took place far too late to be justified on that ground.

Now, the only question in the case upon which I have had any doubt is whether the Crown had any reasonable grounds for seizing the ship at all. I have grave doubts whether they had; but, on the whole, considering all the circumstances, and what this vessel did, I am not prepared to say there was no reasonable ground for seizing her. That being so, it disposes of any question of damages, for what was claimed for use of the ship was really damages.

I do not think that the claimants can recover more than this—and it is not contested—deterioration, if any, which has occurred to the ship during the time it has been in the hands of the Crown. She was requisitioned under a temporary requisition by an order of the Prize Court of the Falkland Islands, and she has been in the use of the Crown ever since. If she has deteriorated in consequence of that use, or for any other reason while she has been in the hands of the Crown, that the Crown will have to make good. She does not come, in my opinion, within the words of the Prize Rules of the 30th Sept. 1914, which provide that where a ship which is requisitioned is subject to the provisions of Order 28, rule 1, relating to detention, the amount for which the Crown could be held liable in respect of such requisition is the amount of the damage, if any, which the ship has suffered during temporary detention, because that relates to enemy ships.

But I think that on principle the claimants are entitled to have the ship restored to them as she was; and if by reason of the Crown, without justification, detaining her and using her for three or four years she has deteriorated, the Crown must make that good. I cannot give the claimants any more than that without holding that the Crown had no reasonable grounds for seizing the ship; I cannot give the claimants their costs without coming to that conclusion. I do not think I ought to say there was no reasonable ground, although, as I have said, I have had some grave doubt about it. And, therefore, there will be an order of release, the Crown making good any deterioration of the vessel during the time she has been in their hands, and there will be no order as to costs.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche.*

Thursday, April 3, 1919.

(Before Lord STERNDALE, President).

THE OSCAR II. (*a*)

Prize Court—Capture of vessel—Negligence in effecting capture—Loss of cargo—Damages—Action against Procurator-General—Liability of Crown—Limitation of liability—Prize Court Rules Order II. r. 3—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict.* c. 60), *ss.* 503, 741.

As, under the Prize Court Rules 1914, *the Procurator-General has taken the place of the actual captor in matters affecting the seizure and the condemnation of ships and goods in the Prize Court, he is responsible for damages arising from any negligence for which under the old practice a captain would have been liable, and the extent of his liability is not limited as in the case of a private shipowner by reason of the provisions of sect.* 503 *of the Merchant Shipping Act* 1894 (57 *&* 58 *Vict.* c. 60).

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

THIS was an action against the Procurator-General for damages and costs, and he was sued as "His Majesty's Procurator-General or other the proper officer of the Crown."

The plaintiffs were a Danish firm and they sued for damages for the loss or destruction of 250 bags of coffee, their property, laden on board the *Oscar II.*, by reason of a collision between the *Oscar II.* and H.M.S. *Patuca* "while engaged in the capture, seizure, diversion, or detention of the *Oscar II.* and her cargo as prize," for which the *Patuca* was solely to blame. The *Oscar II.* was a Scandinavian vessel on a voyage from America to Denmark, when she was stopped off the coast of Scotland. In effecting her capture and endeavouring to bring her into port *H.M.S. Patuca* collided with the *Oscar II.* and damaged her so severely that she sank with her cargo. Although other proceedings were taken by the Procurator-General for the condemnation of some parts of the cargo of the *Oscar II.*, no question had arisen as to the 250 bags of coffee, but the Crown objected that there was no liability resting upon the Procurator-General to pay damages for negligence of any kind, and, alternatively, that if any such liability did exist it was limited to the extent of 8*l.* per ton on the registered tonnage of the *Patuca* as provided by sect. 503 of the Merchant Shipping Act 1894, which was offered by the Admiralty as compensation.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), it is provided:

Sect. 503 (1). The owners of a ship, British or foreign, shall not where all or any of the following occurrences take place without their actual fault or privity—that is to say . . . (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship . . . be liable to damages beyond the following amounts—that is to say . . . (ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage. . . .

Sect. 741. This Act shall not, except where specially provided, apply to ships belonging to Her Majesty.

By Order II., rule 3, of the Prize Court Rules 1914, it is provided:

Every cause instituted for the condemnation of a ship as prize, including causes under rule 6 (which refers to cases when a ship has been destroyed or lost or where goods have been destroyed or lost or removed from the ship) shall, except as hereinafter provided, be instituted in the name of the Crown; but the proceedings therein may, with the consent of the Crown (through the proper officer of the Crown), be conducted by the captors or any parties to whom the ship would on condemnation be condemned as prize.

Sir *Erle Richards*, K.C. and *Balloch* for the plaintiffs.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir E. H. Pollock, K.C.), and *Stuart Bevan* for the Procurator-General.

The admitted facts and the nature of the arguments are fully set out in the judgment of the President. In the course of the arguments the following cases were cited;

The Mentor, Roscoe's English Prize Cases, vol. 1, 96; 1 Ch. Rob. 179;

The Der Mohr, Roscoe, vol. 1, 271; 3 Ch. Rob. 129;

The William, 6 Ch. Rob. 316;

The Zamora, 13 Asp. Mar. Law Cas. 144, 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77;

The Sigurd, 14 Asp. Mar. Law Cas. 153; 117 L. T. Rep. 639; (1917) P. 250;

The Stigstad, 13 Asp. Mar. Law Cas. 310; 120 L. T. Rep. 106; (1919) A. C. 279.

THE PRESIDENT. — This is a claim by the owners of some goods on board the *Oscar II.*, and the claim set up is for damages for the loss of the goods by reason of a collision between the *Oscar II.* and the *Patuca*, which was solely caused by the negligent navigation of the *Patuca* while engaged in the capture of the *Oscar II.* and her cargo as prize. I am not at all sure that that is, strictly speaking, the right cause of action, because what is claimed really is the restitution of the goods totally lost in consequence of the negligence of the ship, but I do not think it matters whether it is claimed as damages or as restitution of the goods.

The claim is brought upon admissions of fact, the first four being that the goods belonged to the claimants; that no enemy of Great Britain had any right in them; that they were being carried on board a neutral ship; and that the goods were being carried from one neutral port to another. The fifth is that the goods were not liable to condemnation as contraband of war or otherwise; and the sixth, seventh, eighth, and ninth are that the ship was sunk with the goods by reason of a collision between the *Oscar II.* and the *Patuca*; that the said collision was caused solely by the negligent navigation of the *Patuca*, and at the time of the collision—and this is important—the *Patuca* was engaged in effecting the capture of the *Oscar II.* in order to bring her into port with her cargo as prize of war; that at the time in question the *Patuca* was being navigated under the command of one of His Majesty's naval officers.

It is therefore admitted that what the *Patuca* was doing was in the process of effecting the capture of the *Oscar II.* to bring her into port as prize of war. The Procurator-General made a claim against a considerable number of parcels of goods on board the *Oscar II.*, and he has obtained condemnation with regard to some of them. Some other cases are still pending. He made no claim against the goods the property of the claimants, possibly for the reason that they were at the bottom of the sea, because they were sunk in consequence of the collision. At any rate, he did not make any claim against them, and it may be also because he knew that they were not contrabrand, and no valid claim could be made. I think there has been more than one hearing of requests for condemnation of goods on board the *Oscar II.*, and in one of them, at any rate—if not in all—a claim was put in on behalf of the claimants in this case for the value of the goods now in question. However, that was not proceeded with, but this independent proceeding was taken of bringing a claim in the form in which I now have it before me.

The Procurator-General, representing the Crown, denies liability altogether, and the question is whether there is a liability in respect of these goods imposed upon him, or whether there is not.

I think that it is necessary first to see what would have been the position of an individual captor in the old days. In those times the captor brought in the ship into the Prize Court, and if he got condemnation he put the money into his pocket. On the other hand, if in effecting the capture he damaged the goods or the ship, the property of another person against whom he did not ask for any sentence of condemnation, and against whose goods he made no claim, he was liable to that person because he had done the damage in effecting the seizure of which he was taking the benefit. That seems to be clear from the case cited to me of *The Der Mohr* (*ubi sup.*). It appears from that case that a ship and cargo had been seized, and the ship was being brought into court for the purpose of proceedings being taken against the cargo, there being no intention to proceed against the ship. But the ship, by the negligence of the captor, was lost, and the holder was held entitled to maintain a claim for restitution of his ship, although no claim had been made by the captor to condemn it, and although it had only been brought in in order to bring in the cargo. That was the position of the captor before the substitution of the Crown by the Act of 1864 and the Prize Rules for the individual captor, and, to my mind, the whole question in the case is this: When the Crown chooses to come in and take advantage of a seizure, does it by doing so assume the position *in toto* of the original captor, or does it only assume the position of the captor with regard to the goods against which it actually makes a claim?

It is not very strenuously contested that if the Crown, represented by the Procurator-General, makes a claim against certain parcels of goods, what may be called a counter-claim by the owners or persons interested in those goods may be maintained; but what is denied is that by taking proceedings against certain parts of the cargo of a ship the Crown takes up the position or is put into the position of the individual captor who is liable under those circumstances to have a claim made against him by persons who were not interested in the goods he was asking the court to condemn.

That is an important question—a very important question—and I do not say it is an easy question, and if it had come before me under circumstances in which I thought I had to decide it for the first time, I should probably have taken time to consider it. But, in my opinion, it is not open to me to do so in view of the case of *The Zamora* (*ubi sup.*). I quite agree that the decision in the case of *The Zamora* (*ubi sup.*) is not based upon the same circumstances as these, and what was said may be said to be a dictum, but it seems to me there are two different kinds of dicta. One is a dictum which is uttered casually, without the point being really under the consideration of the person who is delivering the judgment, and the other is a considered judgment and part of the process of the reasoning of the person who is delivering the judgment, and I find a dictum of that kind of the Privy Council.

In my opinion it is my duty to follow it, and I consider that I do find it, as I have said, in the case of *The Zamora* (*ubi sup.*). Lord Parker delivered the judgment in that case, after examining the Prize Court Rules and dealing with the arguments founded upon them and the arguments in the case generally, and he gave judgment in a way that I shall read presently. But before I do that it will be of service to look at the arguments with which their Lordships were dealing. The question in that particular case as to whether there was a right of requisition or not was argued first, and then after that their Lordships desired to hear arguments upon the question of the right to award damages and costs. The Attorney-General argued the matter, and dealt first with the question of costs. Then, coming to the question of damages, he said: "Now that captors are no longer directly interested in the prize money, under the present Prize Court Rules the Crown has been substituted for the captors as a party to the suit." Lord Parker, according to the report, then said: "Unless the Crown has succeeded to the position of the captors and compensation can be awarded against the Crown, either in damages or in costs, a neutral claimant is deprived of a valuable right." In answer to that the Attorney-General said: "The claimant can issue a writ against the captors for damages. Damages are only awarded against the actual wrongdoer, and although in practice the Crown would not allow one of its officers to pay compensation, the Crown itself cannot be liable." The report then goes on: "Damages or costs, therefore, could be awarded against the captors, which in fact would be paid by the Crown, but the Prize Court Rules do not throw upon the Crown or the Procurator-General a liability which did not exist before, and no order can be made against the Procurator-General for damages or costs." That was the argument for the Crown. The argument on the other side was that "the Prize Court Rules should not be construed so as to alter the rights of neutrals. Neutral claimants should have a remedy in the prize proceedings and not be left to independent action against the captors. The true position is that the Crown has condescended to take over the liability of the captors through its officer, the Procurator-General." Lord Parker in the passage which I have read draws attention to the fact that if the Crown comes in and takes the benefit that the captor would have had, but does not accept the liability of the captor, or if the liability of the captor is not imposed upon the Crown, the claimant is placed in a worse position; and it does not seem to me to matter for this purpose whether it is the claimant for a part of the goods against which proceedings have been taken, or whether it is the claimant in respect of other goods which have been damaged by the Crown in making the seizure. In either case he is deprived of his right. But it is objected that the claimant has the right of proceeding against the captor. In my opinion that may work an injustice to the captor. In the old days the captor who claimed to benefit by a seizure was held liable to the owner of the goods which he did not claim to seize, and the owner might sue for damages which had been done in the course of the seizure by the captor's negligence. According to the argument of the Crown which has been addressed to me in the present case, the Crown or the Procurator-General takes the advantage that the captor got out of the seizure, but leaves to the captor the liability for any negligence of which he was guilty in effecting the seizure, and therefore both the claimant and

the captor appear to me to be left in a very much worse position

But, as I have said, I do not think that it is permissible for me to pronounce any independent opinion upon this matter at all, because, in dealing with that argument which I have read, the Privy Council, after considering these rules, came to the conclusion, in my opinion, that the Crown stood in the position of the captor for all purposes, not for the purpose only of the goods claimed in the proceedings, but for all purposes, and that as it took the advantages of the captor it took the disadvantages and liabilities of the captor also. Lord Parker in the course of his judgment said: "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 be in their Lordships' opinion, extremely inconvenient, and would entail considerable hardship on claimants." Now, it is right to say that the case before their Lordships was one in which damages were claimed in respect of the goods against which the Crown was taking proceedings. After dealing with the Prize Court rules, at length, Lord Parker said: "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."

Now, to my mind, the proceedings there are not limited to the proceedings against the particular goods, but they are proceedings to obtain the benefit of the seizure in the course of which the damage has been done. That is what the Crown is asking for here. It steps in and says that "by the seizure of goods on the *Oscar II.* we are entitled to so much prize money," and when it does that I find that the Privy Council says it takes upon itself the liability as to damages and costs to which under the old procedure, the actual captor was subject, and that is not limited to a claim to the goods in respect of which the Crown is asking for condemnation. It is admitted that the old captor was not limited to that. That would be really sufficient to bind me in this case; but I find a much more direct statement in another passage in the judgment, to this effect: "It is provided by Order II., r. 3, that every cause instituted for the condemnation of a ship or goods shall be instituted in the name of the Crown (by virtue of Order I., r. 2), although 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 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 No. 5 of the Prize Court Rules under the Order in Council dated the 11th March 1915."

I think that that should be under the Order in Council of the 23rd March, which was passed in consequence of the order of the 11th March. Lord Parker added: "It is not necessary to decide the point"—that is, the point he had been dealing with. It is, therefore, not a decision on the point, but it is a distinct expression of opinion on the part of the Privy Council as part of a train of reasoning which led up to a decision which they gave, and I do not think I am at liberty to disregard such an expression of opinion. I think that the intention to be gathered from the judgment is this—that in their Lordships' opinion, when the Crown, by the Procurator-General, takes the benefit of a seizure which has been made, and institutes proceedings against goods or the ship in respect of the seizure, instead of the proceedings which used to be taken by the actual captor, it then puts itself in the position of the captor for all purposes. That is, in my opinion, the principle for which this judgment stands, and it is not limited to the particular goods for which the Crown makes the claim. Therefore I repeat that I do not think it is open to me to consider the point, and I ought to follow the meaning of the *Zamora* decision (*ubi sup.*) and ought to hold that the Crown, if it chooses to take the advantage of a seizure, is subject to the same liability as the captor would have been if he had done the same thing. I am not quite sure whether the proceedings taken here were right, and I do not express any opinion about this matter. It seems to me that, as there was a proceeding against the goods on the *Oscar II.*, this judgment would seem to point out that the ordinary procedure would have been to have made a claim in these proceedings. But that is a mere matter of procedure, and if there is a liability it would only be a matter of transferring those proceedings to this, and then there would be the question of costs. It is an important matter, and what the parties want decided is whether the Crown is liable for this claim or not, and, as I have said, according to the judgment in the case of *The Zamora ubi sup.*), I think that this liability exists. In any event I think that this is a point which ought to be decided once and for all by the Privy Council, and the sooner it gets there the better. It is partly for this reason that I have thought it advisable not to reserve judgment.

There is only one other point—and that is, whether there is a limitation of liability. Now, it does not seem to me that the limitation of liability comes in here at all. The order used to be, and should be still, that property which has been destroyed by the wrongful act of the captor has to be restored, and that the claimant is entitled to a judgment for the restoration of the goods. Of course they cannot be restored in specie, because they are at the bottom of the sea, but they must be restored so far as is possible by the payment of their monetary value, and this value must be ascertained by the registrar.

There must, therefore, be judgment for the claimants that they are entitled to restitution of these goods against the Procurator-General, and that decree will be with costs.

Solicitors for the claimants, *Botterell* and *Roche*.

Solicitor for the Procurator-General, *Treasury Solicitor*.

House of Lords.

May 16 *and* 19, 1919.

(Before the Lord Chancellor (Lord Birkenhead), Lords Finlay, Atkinson, and Wrenbury.)

Les Affréteurs Réunis Société Anonyme v Leopold Walford (London) Limited. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Chartering brokers' commission— Custom of trade—Inconsistency with contract.

A time charter-party provided by a clause that "a commission of 3 per cent. on the estimated gross amount of the hire due to" the brokers "on signing the charter (ship lost or not lost)." The charter-party also provided that if the ship should be requisitioned by the French Government the charter party should thereby be cancelled. The ship was requisitioned by the French Government, and no hire was earned under the charter-party.

In an action by the brokers to recover commission from the shipowners, it was agreed that the question should be dealt with as if the charterers were joined as co plaintiffs, and evidence was given of a custom that unless hire was earned no commission was payable.

Held, that, assuming the custom was established, it would be inconsistent with the above clause in the charter-party, and, there being no evidence of a collateral or independent agreement varying that clause, the custom could not be set up as an answer to the brokers' claim to commission.

Held, also that the charterers could sue as trustees for the brokers.

Robertson *v.* Wait (1853 3 *Ex.* 229) *approved.*

Decision of the Court of Appeal affirmed.

Appeal by the defendants, the shipowners, from an order of the Court of Appeal, reported 119 L. T. Rep. 608; (1918) 2 K. B. 498), setting aside a judgment entered for them at the trial of the action before Bailhache, J., sitting as a judge of the Commercial Court.

The plaintiffs, the respondents in their Lordships' House, claimed commission for effecting a time charter-party, dated the 28th Sept. 1916, between the appellants (the defendants) as owners of the steamship *Flore* and the Lubricating and Fuel Oils Company as charterers.

By clause 29 of the charter-party "A commission of 3 per cent. on the estimated gross amount of hire is due to Leopold Walford (London) Limited on signing this charter (ship lost or not lost)."

This charter-party was an extension of a previous charter-party dated the 9th Dec. 1915. The respondents were no party to the charter-party, but it was agreed that the respondents should be treated as if the charterers were joined as co-plaintiffs.

No hire was in fact earned under the charter-party because during the currency of the earlier charter-party the ship had been requisitioned by the French Government.

Bailhache, J. decided that by reason of a custom of the trade the respondents' right to commission was excluded, basing his decision on a previous judgment of his given in *Harley* v. *Nagata* (23 Com. Cas. 121), in which a similar question arose.

The Court of Appeal (Pickford, Bankes, and Scrutton, L.JJ.) unanimously reversed that decision and held that the alleged custom, even if proved in fact, was inconsistent with the charter-party contract and was unreasonable, and could not prevail against the express terms of the charter-party.

The custom relied on by the appellants, as set out in par. 6 of their points of defence, was as follows: "The defendants will further or in the alternative rely upon the custom of the trade that chartering brokers' commission is payable only in respect of hire duly earned under the said charter-party."

R. A. Wright, K.C. and *Neilson*, K.C. for the appellants.

MacKinnon, K.C. and *Raeburn*, K.C. for the respondents.

The Lord Chancellor (Lord Birkenhead).—This is an appeal from a decision of the Court of Appeal, delivered on the 9th July 1918, reversing a decision of Bailhache, J., delivered on the 10th April, whereby he directed judgment to be entered for the defendants with costs; it follows from what I have said that the defendants are the appellants before your Lordships' House.

The facts are very simple. The charterers' brokers claim commission from the shipowners under a charter-party dated the 28th Sept. 1916, which was a continuation of an earlier charter-party dated the 9th Dec. 1915, by which the steamship *Flore* was demised. The owners were Les Affréteurs Réunis Société Anonyme and the charterers were the Lubricating and Fuel Oils Limited. The relevant clause in the charter-party is No. 29, and is as follows: "A commission of 5 per cent. on the estimated gross amount of hire is due to Leopold Walford (London) Limited on signing this charter (ship lost or not lost)."

Your Lordships are not troubled here with any question of amount.

The first charter-party, that of the 9th Dec. 1915, would have ended on the 5th March 1917, but its duration proved longer than the twelve months originally contemplated owing to an interruption with the details of which your Lordships are not concerned. The second charter-party would, if matters had remained normal, have commenced on the 5th March, but in the month of January the French Government requisitioned the ship. The first charter-party came to an end and the second never became effective. The second charter-party was entered into after an agreement between the owners and the charterers dated the 28th Sept. 1916, which contained the following clause: "The brokers will continue their good services to either party, but their total brokerage fixed for the charter-

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

party at 5 per cent. will be reduced for the extension period to 3 per cent. For all other conditions of detail the brokers of the respective parties will have to fix the final clauses, it being understood that the question of principle expressed above will be faithfully observed according to the good faith of the parties and in accordance with the business customs in shipping matters and the spirit of the present agreement." Clause 34 of the second charter-party incorporated clause 26 of this agreement, and, inceed, the whole of this agreement, and should, I think, for clearness be read: "This charter-party is in extension of that of the 9th Dec. 1915, and will take effect at the day and hour at which the earlier charter-party will terminate. Both charter-parties are for their due fulfilment, subject to the conditions and stipulations contained in the special agreement signed as if these conditions and stipulations were embodied in the present charter-party itself."

Under those circumstances the document must be read, in my judgment, as one whole, containing the clause of the French agreement to which I have directed your Lordships' attention. I do not, therefore, read the agreement in this matter as if your Lordships had to deal with a clause in the charter-party on the one hand and an independent agreement, known as the French agreement, on the other. Having regard to the undeniable circumstance that the French agreement is incorporated in the charter-party, it is impossible to consider that an independent agreement in relation to the second charter-party existed at all. A charter-party is, of course, a contract between owners and charterers, and it is elementary that, so far as the brokers are concerned, it is *res inter alios acta;* but the parties in the present case by an interlocutory and very sensible arrangement have agreed that the matter shall be dealt with as if the charterers were co-plaintiffs. The question, therefore, is, can the charterers succeed in such circumstances as the present in such an action against owners?

It was decided nearly seventy years ago in the case of *Robertson* v. *Wait* (1853, 8 Ex. 299) that charterers can sue under an agreement of this character as trustees for the broker. I am unable to distinguish between the decision in *Robertson* v. *Wait* (*sup.*) and the decision which in my view should be reached in the present case. It was conceded by Mr. Wright that, unless there was a special and independent agreement in this case, he was unable to distinguish the facts in this case from those which were considered in *Robertson* v. *Wait* (*sup.*). In my opinion Mr. Wright has failed to establish the existence of an independent agreement.

So far as I am aware, that case has not before engaged the attention of your Lordships' House, and I think it right to say plainly that I agree with that decision, and I agree with the reasoning, shortly as it is expressed, upon which the decision was founded. In this connection I would refer to the well-known case of *Re Empress Engineering Company* (43 L. T. Rep. 742; 16 Ch. Div. 127). In the judgment of the Master of the Rolls of that day, Sir George Jessel, on p. 129, the principle is examined which in my view underlies and is the explanation of the decision in *Robertson* v. *Wait* (*sup.*). The Master of the Rolls uses this language: "So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As James, L.J. suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract."

It appears to me plain that for convenience and under long-established practice the broker in these cases in effect nominates the charterer to contract on his behalf, influenced probably by the circumstance that there is always a contract between charterer and owner in which this stipulation, which is to enure to the benefit of the broker, may very conveniently be inserted. I take the view that in these cases the broker in effect, and on ultimate analysis, nominates the charterer to contract on his behalf. I agree, therefore, with the conclusion arrived at by all the learned judges in *Robertson* v. *Wait* (*sup.*) that in such cases the charterer can sue as trustee on behalf of the broker.

This conclusion makes it necessary to ask what is the answer to the plaintiffs' action. I confess that I feel some astonishment at the conclusion reached by Bailhache, J., and, with all respect for that learned judge, I am unable to follow the mental processes by which he reached it. The learned judge has found as a fact that two customs, or, as he prefers to call them, practices, which he thought relevant, and indeed decisive, were proved before him. In his view those customs, either severally or jointly, as found by him, are fatal to the plaintiffs' claim. Being very unwilling to do any injustice to the learned judge, I will refer to his own language for the precise elucidation of that which he has found. As to the first custom he said: "A custom was proved before me in another case of *Harley and Co.* v. *Nagata* (23 Com. Cas. 121) to this effect: that it is the invariable practice in time charter-parties that brokers' commission is payable out of hire that is earned; the charterer sends the hire money to the broker, the broker deducts his commission from the hire, and sends the balance to the shipowner. That is the way in which it is paid, and, further, that it is the invariable practice that, unless hire is earned, no commission is payable at all." I have to observe upon this, which I call the first finding, that I demur to the practice of finding facts upon evidence given in other cases, between other parties; and, in the second place, that the evidence in support of this alleged custom produced before the learned judge in this case was of the slenderest possible character. Nor does the custom gain added strength from the circumstance, apparently relied upon, that many charter-parties contain an express stipulation that no commission shall be payable unless hire is paid. If such a custom is so clear and so much relied upon in the City of London, why, one is tempted to ask, is this stipulation necessary? I am far from deciding—I am not called upon to do so in this case—that such a custom does not exist, and that it may not be proved by proper evidence. If in another case it is proved hereafter that there exists any other contract between owner and brokers proper effect will no doubt be given to it in the courts.

But a further finding of that learned judge is in my view very surprising. He does not number

his findings, but that which I now approach is distinguishable from that which I have already examined. He found that that custom, which he thinks is proved, is "entirely irrespective of the form in which the commission clause finds his way into the charter-party," and "that the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire." It is necessary to inquire somewhat closely what this finding really means. We have seen that, as the result of an authority binding upon the learned judge, charterers can sue upon a commission clause, under the circumstances which I have attempted to explain, as trustees for the broker. Whom can they sue? Obviously the shipowners. Why can they sue for the amount of the commission? Obviously because the owners have contracted to pay it. But the learned judge, apparently quite unmoved by those considerations, finds as a fact that a custom has been proved before him that a party shall not pay that which, presumably with the full knowledge of the custom, he has explicitly contracted to pay. In contrast with the extraordinary sanctity which the learned judge concedes to this custom (I am speaking now of what I call his second finding), I confess I am more attracted by the tone of his reference to the deliberate contract entered into between the parties.

The custom, the learned judge says, is "irrespective of the form in which the commission clause finds its way into the charter-party." In my experience important clauses do not fortuitously find their way into important contracts. They are, on the contrary, the fruit of negotiation and consideration. The process is by no means so fortuitous as is supposed. The learned judge, in my judgment (and here, I think, the comments of the learned Lords Justices in the Court of Appeal are perfectly well founded and in no way exaggerated), has in effect declared that a custom may be given effect to in commercial matters which is entirely inconsistent with the plain words of an agreement into which commercial men, presumably acquainted with so well-known a custom, have nevertheless thought proper to enter. Much evidence would be necessary to convince me of the existence of such a custom, and if it were forthcoming I should nevertheless hold the custom to be bad on grounds which seem to me to be both notorious and elementary.

I have only one further observation to make. The learned judge finds in the passage I have already quoted that the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire. This observation might or might not possess relevance or value in a case in which there was a scintilla of evidence of the existence of a contract between the broker and the shipowner for the payment of hire. Nothing I say to-day prejudges such a case if and when it arises; but in this case my conclusion is that there was no such contract and there was no evidence whatever of such a contract. It became necessary to reach a conclusion both in relation to the first charter-party and in relation to the second charter-party. Mr. Wright referred your Lordships to certain evidence orally given upon which he attempted to found his contention that there was here such an independent agreement between broker and shipowner as was necessary to relieve him from the doctrine in the leading case to which your Lordships have referred.

In my judgment the evidence upon which Mr. Wright relies is insufficient to support the burden which he attempted to place upon it. I find no evidence at all in the discussion which took place between the parties of any concluded agreement, or of any intention even to arrive at any agreement, except the provisional agreement as to the figure which ultimately should be inserted in the charter-party. For this reason I dismiss the charter-party in this connection by saying that there was no evidence which was brought before the learned judge which entitled him reasonably to arrive at the conclusion that in relation to that charter-party there was an independent agreement.

When attempting the same inquiry in relation to the second charter-party I come face to face at once with the French agreement, and I have already pointed out to your Lordships that clause 34 in the second charter-party by incorporating the French agreement shows that it was the intention of the parties not to treat that agreement as a substantive and independent contract, but as an instrument auxiliary and contributory to the real contract which was the second charter-party. I therefore reach the conclusion that there was no independent contract either in connection with the first charter-party or, the case which is immediately relevant, with the second charter-party.

Holding this view, I am bound to say with great respect that I am unable to follow the conclusions the learned judge has reached in this case, and upon a matter which seems to me very clear. I am of opinion that this appeal must be dismissed with costs, and I move your Lordships accordingly.

Lord Finlay.—This action is brought to recover commission said to be due under the twenty-ninth clause of the charter-party of the 28th Sept. 1916. The clause in question is this: "A commission of 3 per cent. on the estimated gross amount of hire is due to Leopold Walford (London) Limited on signing this charter (ship lost or not lost)."

The case was tried before Bailhache, J., and he found that there was a custom, which in his opinion was not excluded by the charter, to the effect that commissions to the broker should be paid upon the hire as received from time to time. One would be very slow, of course, to differ from a conclusion on a point of fact such as the existence of a custom, particularly when it is a decision of Bailhache, J. Mr. Neilson argued that there was evidence of an agreement, independent of anything in the charter-party itself, to which a custom might apply, supplied by the fact that this charter-party was in continuation of an earlier charter-party, and that the terms of dealing as between the broker and the shipowner must be taken to be the same, except as far as they were varied, namely, with regard to the amount of the commission. I do not think it is necessary to examine that question, because, whether there was such an independent agreement or not, the question really is whether such an agreement as that, and such a custom as that, which would be incorporated with the agreement,

can be reconciled with clause 29 of the charter-party, and, if it is not reconcilable, whether such a custom as that can be raised in face of the terms of the charter. That depends, of course, entirely upon the question whether clause 29 is in the nature of a contract between the brokers and the shipowners. If the contract in clause 29 was purely as between the shipowners and the charterers, it would not interfere with the terms of any independant contract under the terms of the custom, supposing that such an independant contract had been entered into between the plaintiffs and the shipowners. But it appears to me that it is elementary law that if clause 29 is to be taken to be a clause entered into by or on behalf of the brokers, they cannot set up a custom such as that contended for; the two are absolutely inconsistent.

In order to avoid the effect of that argument, Mr. Wright contended that the broker was not really a party to clause 29 at all. The difficulty in the way of that argument to my mind is this, that clause 29, in part at all events, must have been, I think, entered into by those who were parties to the charter-party on behalf of the broker, because the amount of the brokerage is specified in clause 29, and to that extent, it seems to me, that we must regard the charterer as having entered into that bargain in the interests of the broker and as a trustee for the broker.

It seems to me to be impossible to dissect the clause. If the overwhelming presumption is that in part it was entered into on behalf of the broker, it appears to me to be extremely difficult to say that it was not entered into on behalf of the broker altogether, and, if so, then the words at the conclusion of clause 29, "on signing this charter (ship lost or not lost)," are words governing the conditions on which the commission is to be paid, and which are binding upon the owner. If that is so, it is obvious that, having had the contract reduced into writing on his behalf, it is not open to the owner to set up a custom which is inconsistent with the terms of the clause which through his trustee in this matter he has entered into.

On these grounds I concur in the propcsal which has been made by my noble and learned friend on the Woolsack.

Lord Atkinson.—I have very little to add. I concur in what has been said by my noble and learned friend on the Woolsack, and also by my noble and learned friend who has preceded me.

I must admit that this appears to me to be an extremely plain and clear case. Two agents employed by their respective principals draw up a written agreement and forward it to the respective principals to be signed by them. In this agreement I find a stipulation regarding the remuneration which is to be paid to those respective agents. I should have thought that when a charterer enters into a charter-party, stipulating for payment of commission, it must be assumed, as that is the remuneration of the agent, that he does that with the full consent and concurrence of the agent. He makes that contract with regard to the agent's remuneration for and on behalf of the agent.

That being so, the principal in this case, the charterer, is added as a co-plaintiff, and what is the course of the proceeding? The two plaintiffs come into court and they put down the written agreement, the charter. The charter-party contains a clause for commission to be paid to the broker in certain events. And what is the answer to that? The answer is: "Oh, that is not an agreement at all; our agreement is a wholly independent thing—it is made by parol; it was made in reference to and practically embodied a certain custom." Well, I concur with every one of the Lords Justices that there is not a shadow of evidence of that collateral and independent agreement; and, if there was, there is this misfortune about it, that, it being directly in conflict with the written agreement, it cannot be taken advantage of to vary the written agreement. I therefore think there is no answer to the suit instituted upon the written agreement; there is nothing to show that there was any collateral independent agreement; and any independent agreement relied upon, even if proved, could not be acted upon inasmuch as it is directly in conflict with the letter of the written document into which the parties have entered. I cannot conceive that there should be in any line of business any custom which would provide that, no matter what written agreement was to be entered into, that custom is not to be excluded, but is to prevail over the terms of the written document.

Lord Wrenbury.—I find myself in entire agreement with all that has been said by your Lordships who have preceded me.

We have to do here with a contract between two parties reserving a benefit to a third. The two parties are the shipowners and the charterers, and the third party is the broker of one of them, the charterers' broker, who is to be remunerated in respect of a contract which is being made for the hire of a ship. The particular form of contract in question is, of course, prepared by or is under the eyes of the broker who is negotiating the matter. It is sent to the principals for signature, and they sign it, and there is contained in it a clause which, as I have said, reserves a benefit to the broker. Under those circumstances an action is brought by the broker against the shipowner for the commission which is expressed to be payable to him under the contract between the two parties—a contract to which he himself, I agree, was not a party. By agreement between the parties the record is amended by treating the action as if the charterers were joined as a plaintiff in the action. It is a case in which it is possible that an action can be brought on behalf of a person to whom a benefit is reserved although he is not a party to it. That is the subject of the decision in *Robertson* v. *Wait* (3 Ex. 229). Under those circumstances the shipowners, the defendants in the action, defend the action and in effect are here saying: "It is perfectly true that we attached our signature to this document; it is perfectly true that it contains in art. 29 this stipulation in favour of a third party; but, you know, that means nothing at all—that is not the bargain at all to which we are parties."

I feel myself in great difficulty in understanding a contention of that sort. It is that in this particular business there exists a custom (and I will take it for the moment that the custom is proved) by which there is a stipulation for commission to be paid by a broker, or, in the absence, of course, of some special agreement to the con-

trary, the custom is that the commission shall be paid to the broker on the hire from time to time as earned. In this contract there is a stipulation exactly to the contrary effect. The stipulation is that the commission shall be on the estimated gross amount of hire on signing the charter, ship lost or not lost. I find myself quite unable to understand how it can be set up that into a contract expressed in those terms there should be introduced a custom to an exactly contrary effect. I confess I do not understand the reasoning by which Bailhache, J. arrived at the conclusion that such a state of things was possible. To my mind a contract signed by parties is an obligation to be performed by the parties, and it is none the less a contract because it is in print and not in manuscript, and how, as against this stipulation by contract you are to introduce a custom directly inconsistent with the express terms of the contract I confess I do not understand. Directly it is conceded here that the broker, although not a party to the contract, can sue on the contract, inasmuch as he can sue by the charterer as trustee for him, it appears to me that the case really is over. You have only to read art. 29 and you find there an express stipulation—a stipulation which is accepted by the signature of the defendants—that this payment should be made, and for that payment it appears to me that the defendants are liable.

I agree that the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: for the appellants, *Thomas Cooper and Co.*; for the respondents, *Lawrence Jones and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 4 *and* 5, 1919.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

STEVEN AND CO. *v.* ADAM BROMLEY AND SON. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Carriage of goods by sea—Ship chartered to load full cargo of steel billets—Specified rate of freight—Part load only of steel billets—General cargo to make up—Chartered rate not applicable—Quantum meruit.

The steamship S. *was chartered by the plaintiffs, who were the chartered owners, to the defendants to load a full cargo of steel billets for carriage from Liverpool to Nantes at the rate of* 23*s. a ton. The defendants loaded a cargo of which* 1208 *tons only were steel billets the rest, some* 987 *tons, being general cargo. The plaintiffs were not aware that a general cargo was being loaded. The master, who had a copy of the charter party, knew it. He was in the employment of the shipowners, although he was acting, for the purposes of receiving and carrying the cargo, as the agent of the plaintiffs. The current rate of freight for general merchandise was higher than the charter-party rate. Bailhache, J. held that the charter party rate of freight did not apply to the general cargo, and for that the defendants must pay on a* quantum meruit.

Held, on appeal, that there must be implied a promise by the defendants to pay the current rate for such part of the cargo as was general merchandise, as in loading general merchandise they were acting entirely outside the original contract.

Decision of Bailhache, J. (infrà) *affirmed.*

ACTION in the Commercial List tried by Bailhache, J.

The plaintiffs' laim was for freight and demurrage.

By a charter-party dated the 10th Nov. 1915 the plaintiffs, the chartered owners of the steamship *Strathcona*, chartered her to the defendants. It was agreed that the steamship should go to Liverpool and there load from the defendants' agents a full cargo of steel billets for carriage to Nantes at the rate of 23*s.* per ton. The steamship did not load a full cargo of steel billets, but her load consisted of 1208 tons of steel billets and some 987 tons of general merchandise. The plaintiffs were unaware that general cargo was being loaded.

The plaintiffs claimed that the general cargo was loaded outside the terms of the charter-party, and they therefore claimed a *quantum meruit* rate of freight.

Leck, K.C. and *Jowitt* for the plaintiffs.

R. A. Wright, K.C. and *Cuthbertson* for the defendants.

Cur. adv vult.

March 13.—BAILHACHE, J.—By a charter-party dated the 10th Nov. 1915 the plaintiffs, the chartered owners of the steamship *Strathcona*, chartered her to the defendants to load a full cargo of steel billets for carriage from Liverpool to Nantes at the rate of 23*s.* per ton. The defendants loaded her by a third person under some arrangement with him, and she was loaded with a full cargo of which some 1208 tons only was steel billets and the rest, some 987 tons, being general cargo.

The plaintiffs were not aware that a general cargo was being loaded. The master, who had a copy of the charter-party, knew it. He was in the employment of the shipowners, although no doubt acting, for the purpose of receiving and carrying this cargo, as the agent of the plaintiffs. He does not seem to have troubled about the matter, and it is obvious from his evidence that he was rather pleased than otherwise to have some general cargo rather than all steel billets. By the charter-party the *Strathcona* was addressed to the defendants' agents at the port of loading.

One of the plaintiffs was called as a witness, and he gave reasons why they would not have chartered the ship to carry general merchandise at anything like 23*s.* a ton. This evidence is confirmed by the fact that the defendants were receiving in respect of the cargo other than steel billets an average freight of some 30*s.* a ton.

In these circumstances the plaintiffs say that the general cargo was loaded outside the charter-party altogether, and that they are entitled to a *quantum meruit* rate of freight in respect of such cargo.

(*a*) Reported by T. W. MORGAN and EDWARD J. M. CHAPLIN, Esqrs., Barristers-at-Law.

The defendants, on the other hand, contend that they loaded the whole cargo under the charter-party, although the loading of the general cargo was in breach of the charter-party; that the plaintiffs' only claim is one for damages, and that, if the plaintiffs receive as much freight as if the whole cargo loaded were steel billets, there is nothing due from them except nominal damages for the admitted breach. In support of these contentions the defendants rely upon an unreported case of *The Olanda* in the House of Lords. I have been supplied with the record in that case and with a note of the decision. In that case the cargo was to be linseed and wheat, of which not more than 50 per cent. was to be linseed. A quantity considerably in excess of 50 per cent. of linseed was loaded, and the plaintiffs, as here, claimed to be paid on a *quantum meruit* rate on that excess. It was held that they were not entitled to be so paid, but were only entitled to nominal damages for the breach of contract.

At first sight that case seems strong in the defendants' favour, but the ground of that decision is to be found in a few sentences of Pickford, L.J.'s judgment in the Court of Appeal and of the Lord Chancellor's judgment in the House of Lords. Pickford, L.J. says that the charterer's agent at the port of loading honestly thought they were entitled to ship more than 50 per cent. of linseed, and said so to the captain. The captain honestly, without looking at his charter-party, accepted that and it was loaded. Both parties were under the impression that they were loading under the charter-party.

The Lord Chancellor says: "Both parties intended that the linseed should be carried under the charter-party," and, later, "Here, by consent of both parties, the linseed was taken as under the charter-party, and at the chartered rate of freight." Later, again, he uses similar expressions. It is clear, therefore, that that case was decided on the ground that the charterers as well as the master considered that they were carrying out the charter-party contract. They were mistaken, and the charterers were liable to nominal damages for the breach of which they had been guilty unwittingly, but the charter-party contract remained, and as it remained there was no room for a *quantum meruit*.

Here the facts are quite different. It is not, and could not be pretended, that in loading general merchandise the charterers thought they were within their contractual rights. They knew they were not. They did not load under the charter-party, and as they did not, and knew they did not, it seems to me the charter-party rate for steel billets does not apply to the general merchandise cargo, and for that they must pay a *quantum meruit*. The fact that an easy-going master did not object seems to me immaterial when once I arrive at the conclusion that the defendants themselves well knew they were not entitled to load general merchandise. A master has no right to vary a charter-party.

I think that probably the true view in such a case is that the whole contract has gone and the plaintiffs are entitled to a *quantum meruit* on the whole cargo. It is not necessary so to decide because the plaintiffs do not so claim, and, moreover, I have no evidence that the current rate for steel billets exceeded the charter rate.

I assess the freight on the general merchandise at 30*s.* a ton, which comes to 350*l.* 4*s.* There is also due the sum of 315*l.* 5*s.* 9*d.*, for demurrage and money paid, making a total of 666*l.* 9*s.* 9*d.* which is due from the defendants to the plaintiffs, for which I give judgment. The defendants have a counter-claim for 269*l.* 14*s.* 1*d.*, and I give judgment for them for that amount. In the result there will be a balance payable to the plaintiffs.

Judgment for plaintiffs on the claim; for defendants on the counter-claim.

The defendants appealed.

R. A. Wright, K.C. and *T. Cuthbertson* for the defendants, the appellants.

D. C. Leck, K.C. and *W. A. Jowitt* for the plaintiffs, the respondents, were not called upon.

BANKES, L.J.—This is an appeal from a decision of Bailhache, J. which arises under the following circumstances: On the 19th Nov. 1915 a charter-party was entered into between Messrs. Steven, who are described as the time chartered owners of the steamship *Strathcona*, and Messrs. Adam Bromley and Co., under which the charterers agreed to load the vessel at Liverpool and (or) Birkenhead at charterers' option with a cargo of steel billets at a rate of 23*s.* per ton on cargo loaded as per bill of lading. The vessel proceeded to Liverpool, and the charterers tendered a quantity of steel billets amounting in all to 1208 tons, which were put on board the vessel. Apparently they either had no more steel billets, or did not desire to load any more steel billets, and they filled the ship up with a quantity of general cargo, amounting in all to 987 tons. The current rate of freight for that general cargo was considerably higher than the chartered rate for steel billets; the learned judge has found that it was 30*s.* The action was brought to recover, amongst other things, the difference between the rate for steel billets and the current rate for general cargo upon 987 tons of general cargo, and the claim was framed alternatively either as a claim for damages for breach of contract, or upon an implied agreement to pay a reasonable rate of freight in respect of the general cargo. I, personally, agree with the argument that if the action is an action for damages for breach of the charter-party the measure of damages would be the difference between the amount which was actually paid in respect of the goods loaded on board and the full chartered rate of freight for a full cargo of steel billets, and upon that footing the damages would be nominal only. But I do not think, myself, that the plaintiffs are constrained to confine their claim to a claim for damages merely. I think they are entitled to claim that the true inference from the facts is that there was a fresh contract between the parties—a term added to the original contract contained in the charter-party, under which the defendants came under an obligation to pay the current rate of freight in respect of the general cargo which was shipped in place of the steel billets. That is what I understand Bailhache, J. has found. In my opinion that inference was abundantly justified by the particular facts of this case. I think that where, as here, the charterer tenders cargo for shipment which is not the contract cargo, but is something quite different, and the current rate for which is substantially higher than the agreed rate for the

contract cargo, the inference is justified that he is, in substance, requesting the shipowner to carry the substituted cargo in lieu of the contract cargo, and upon the terms that he will pay the current rate of freight in respect of that substituted cargo. It is quite true that it does not take the form of an offer expressed in a letter, or a message accepted at once by the other party to the contract, because the offer is to be implied from the tender of the cargo. The cargo is tendered to a man who, to the knowledge of the person tendering, is not in a position to vary the contract made between the charterer and the shipowner, and therefore there is a continuing offer which it is within the right and power of the shipowner to accept as soon as he becomes aware of what, in fact, has been done by the charterer.

Under those circumstances, in my opinion there was, in this case, such an offer which was accepted by the shipowner as soon as it came to his knowledge; and upon the substituted contract so made he founded his action for the difference between the contract rate of freight and the current rate, not necessarily by way of damages, but, as he expressed it in the alternative, upon the implied contract that that amount should be paid. In my opinion Bailhache, J. was perfectly right in drawing the inference which he did draw, and in coming to the conclusion that there was that substituted or altered contract.

It is said that this case is entirely covered by the decision of the House of Lords in the case of *The Olanda* (unreported; the 29th Jan. 1917). The facts of that case were quite different from the facts in this case, and the decision, in my opinion, in that case proceeded entirely upon the special facts. The facts there were that there was a charter-party under which the charterer agreed to ship grain at a certain rate of freight, and linseed at an increased rate, with a term in the charter-party that the cargo was not to consist of more than 50 per cent. of linseed. As a matter of fact more than 50 per cent. of linseed was shipped, and the question was whether, under those circumstances, there was an implied contract to pay something in addition to the contract rate for linseed, or whether, under the circumstances, the contract rate for linseed did not cover the excess over the 50 per cent. which the parties had agreed was to be the outside quantity of linseed to be shipped. The House of Lords, who had to deal with the matter on appeal from the Court of Appeal, who had dealt with the matter upon the finding of an arbitrator, came to the conclusion that the excess quantity of linseed was shipped under a misapprehension by both the shippers and the captain as to the quantity of linseed which the shippers were entitled to ship, and, under those circumstances, as it seems to me, there was no room for the implication of a fresh contract to pay anything other than the contract rate for linseed. It appears to me that that decision depended and proceeded entirely upon those very special facts. Now the facts here are quite different. There was no contract made for general cargo. The general cargo was altogether outside the contemplation of the parties at the time they made the bargain. Their bargain was for steel billets, and for steel billets only. The only agreed rate of freight was for steel billets, and, under those circumstances, as I have said, it does appear to me that the inference is justified that when the charterers tendered, as they did here, something quite outside the contract, and something in respect of which no rate of freight had ever been discussed or agreed, they must be taken to have made the offer to the shipowner that if he would carry it they would be prepared to pay the current rate.

Under those circumstances, in my opinion, the judgment of the learned judge was quite justified, and is right.

Scrutton, L.J.—I agree. The shipowner in this case asks to be paid freight on a certain quantity of cargo under an implied agreement to be paid a reasonable rate, or, alternatively, a proper measure of damages for breach of contract. The shipowner had chartered the whole ship to carry steel billets at a named rate. In fact, nearly half of the cargo shipped was not steel billets, but was general cargo which, at the time of the shipment, was commanding a much higher rate than the chartered rate. What is the legal position on those facts? It may be impertinent curiosity on my part, and, as Mr. Wright pointed out to me, it may be that I ought not to be at all inquisitive as to the facts, but should merely direct myself to the legal problem; but I am puzzled as to what happened in this case. The charterers, before they had got any binding contract for the ship, had made a contract with sub-charterers to carry a general cargo at a named rate in this ship. Ten days afterwards they succeeded in getting a contract with the shipowners as to the ship; they could not get it for a general cargo, but only for steel billets. I confess I am puzzled, as a matter of honest business, to know what they did when they got into that position; whether they went on and chanced it, not saying anything to anybody, or whether they did say anything to the sub-charterers, or what they said. Mr. Wright says that it does not affect the legal position. I can only say I have looked through the correspondence, and I am extremely unfavourably impressed with the conduct of Messrs. Bromley on the correspondence. It may be that that has nothing to do with the legal position.

It is commonplace law that if you have an express contract covering a subject-matter, you cannot imply a contract for a matter already covered by the express contract unless in some way the express contract is got rid of. The ordinary case of that is a contract with a house agent to do work in regard to the letting of a house on the terms that he shall be paid a commission if successful, and only if successful; and that existing contract excludes a *quantum meruit* for work done which does not result in success. On the other hand, where you have work done outside the contract, and not covered by the contract, and one of the parties takes the benefit of it, you can always imply a contract to pay for the work done outside the contract at the current rate of remuneration for that work, and you may frequently add to it the other terms of the existing contract so far as they are not inconsistent with the nature of the work done. What is the proper implication in this case? The charterers tender for shipment a cargo which they know is not within their contract at all, which they had no right to require the shipowners

to carry. They tender it to a man who has no authority to vary the charter. They do not make any express statement to call his attention to the fact that they are asking him to do something outside the charter. Thereupon it is carried. What is the proper legal implication with regard to that? The price of this work is not covered by the contract; it is agreed that the goods are goods outside the contract. It appears to me that the ordinary business and legal implication from those facts is a promise to pay a proper remuneration for the work done, the goods in other respects being carried on the terms of the existing contract so far as applicable. That appears to me to be the view taken by Bailhache, J. and I entirely agree with it. It appears to me to be the only proper business and legal view. Of course, if the House of Lords had decided the opposite I should have been bound by it, but in my view the decision which has been cited to us turns on the very special facts—a charter to carry wheat and linseed at named rates; only wheat and linseed were shipped, but there was a misapprehension between the parties as to whether there was, or was not, a clause in the contract that only 50 per cent. of wheat should be shipped. There was a claim made by the shipowners for payment for the extra linseed, not at the rate of freight in the charter, but at the current rate of freight outside, and the House of Lords declined to draw the implication that there was a promise to pay for the extra quantity of linseed the current rate and not the chartered rate. That appears to me to have no application to the facts of this case, and the suggestion that it is inapplicable may be tested by assuming in this case instead of half the cargo tendered being general cargo it had all been general cargo. I think it is quite clear in that case there would be an implication to pay the current rate of remuneration for carrying such cargo, and where instead of being the whole cargo it is half the cargo the same implication arises. For these reasons I agree with the judgment of my brother and of Bailhache, J.

Atkin, L.J.—I agree. I think one of the essential facts of this case is expressed by the finding of the learned judge that it is not, and could not be, said that in loading general merchandise the charterers thought that they were within their contractual rights; they knew that they were not. They did not load under the charter-party, and knew that they did not.

Under those circumstances, what is the position in law? It seems to me that it amounts to an offer, by the charterers, of this cargo to the shipowners upon the terms of a reasonable remuneration for cargo which is not the agreed cargo, and an offer of a contract upon the terms of the old contract as far as applicable. I think that the shipowners are entitled to accept that offer, and entitled to sue for reasonable remuneration. The position does not seem to be in law any different from the position of an ordinary contract for the sale of goods. If I am fortunate enough to get a wine merchant to agree to sell me a dozen bottles of whisky, and he tenders to me in pursuance of that contract ten bottles of whisky and two bottles of brandy, and my servant takes them in and I am prepared to accept them, the contract is, as far as I know, that I am to pay for the bottles of brandy at a reasonable price; and that seems to me to be the real contract here. For the reasons which have been given by my learned brethren I agree that this appeal should be dismissed.

I, personally, should like to reserve the question as to whether or not the claim could not be put merely as a claim for damages for breach of contract, and I should like to reserve the question as to the measure of damages for breach of contract involving the misuse of the plaintiffs' goods. I can imagine a person using my goods at a rate which is agreed upon; but where there is a convenient user in breach of the contract, and he uses my goods in such a way as to expose them to danger or delay, the question then is whether the measure of damages might not include a reasonable remuneration for such convenient user. But it is unnecessary to decide that in this case, and I should like to reserve that question until it arises.

I agree that this appeal should be dismissed.

Appeal dismissed.

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

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

Judicial Committee of the Privy Council.

June 17 and July 8, 1919.

(Present: The Right Hons. Lords Parmoor, Wrenbury, Sterndale, and Sir Arthur Channell.)

The Kronprinzessin Cecilie (Part Cargo ex). (a)

ON APPEAL FROM A DECREE OF THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Condemnation of part cargo—Appeal by persons not owners at the time of seizure—Absence of locus standi.

Held, that the appellants, an American company, not being the owners of the goods at the time of the seizure (the goods at that time being the property of German and Austrian companies) had no such interest as would entitle them to be heard in support of their appeal, nor were they entitled to ask for an amendment of the proceedings by substituting the names of the owners for their own as claimants and appellants, and therefore the appeal must be dismissed.

The Proton (14 *Asp. Mar. Law Cas.* 268; 118 *L. T. Rep.* 519; (1918) *A. C.* 578) *and* The Antilla (14 *Asp. Mar. Law Cas.* 378; 119 *L. T. Rep.* 746; (1919) *A. C.* 250) *followed.*

Appeal from a decree of Evans, P. pronouncing against the claim of the appellants and ordering that the indemnity bond given by the appellants in the sum of 3757*l.* be estreated and the sum paid into court.

The goods in question had been shipped by the appellants, the Vacuum Oil Company of Rochester U.S.A., on the German steamship *Kronprinzessin Cecilie* under bills of lading dated the 24th July 1914, and consigned to Hamburg to German and

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

Austrian firms. On the 5th Aug. 1914 the steamer with her cargo, including the goods in question, was seized as prize in the port of Falmouth. On the 18th Aug. 1914 a writ was issued in prize claiming condemnation of the ship and cargo as enemy property.

The Prize Court condemned the ship (13 Asp. Mar. Law Cas. 307; 114 L. T. Rep. 567) and subsequently condemned the goods. The Privy Council allowed the appeal of the shipowners, being of opinion that the provisions of art. 1 of the Sixth Hague Convention of 1907 as to the status of merchant vessels on the outbreak of war applied, and set aside the condemnation of the ship and made an order for her detention in the form adopted in *The Chile* (12 Asp. Mar. Law Cas. 598; 112 L. T. Rep. 248; (1914) P. 212). By art. 4 of the convention the principle which applies to an enemy ship in the circumstances referred to in art. 1 applies also to enemy cargo on board the ship. The question argued was whether under the Sixth Hague Convention the cargo or the money derived from the sale of the cargo was liable to be confiscated or only to be detained until the termination of the war.

Keely, K.C. and *J. G. Joseph* for the appellants.

R. A. Wright, K.C. (Sir *Gordon Hewart*, A.-G., with him) for the Crown.

The considered opinion of their Lordships was delivered by

Lord PARMOOR.—The appellants are a corporation incorporated according to the laws of the State of New York in the U.S.A., with registered office and place of business at Rochester, in the State of New York. In July 1914 the appellants shipped certain barrels of oil, and one box of brass stencils on the steamship *Kronprinzessin Cecilie*, a ship which belonged to the Hamburg-America Steamship Company, incorporated under the law of the German Empire, and having its registered office at Hamburg. There are three bills of lading, one in respect of 1619 barrels of oil consigned to a German company and carrying on business in Germany, and the other two bills of lading were severally in respect of sixty-five barrels of oil, and in respect of 130 barrels of oil, and one box of brass stencils consigned to an Austrian company, registered and carrying on business in Vienna. In all cases the goods were shipped f.o.b., and at the time of the seizure were the property of the German and Austrian companies respectively. It was stated by counsel that the shares in the German and Austrian companies were wholly owned by the New York Company. The evidence is that with the exception of two small shareholders, who were respectively citizens of Denmark and Italy, all the shareholders in both companies are citizens of the U.S.A. The appellants undertook with both the German and Austrian companies to bear the loss by failure of either of them to receive any consignment by reason of the seizure thereof, but the liability to seizure depends on the ownership of the property and not on the risk of loss from failure of the adventure.

The *Kronprinzessin Cecilie* was diverted to Falmouth on the 3rd Aug. 1914, and on the 5th Aug. the ship and goods were seized. When the case of the ship came before the Prize Court, the late President, Sir Samuel Evans, condemned her on the ground that the provisions as to detention in the Hague Convention did not apply. This board, however, decided on appeal that the proper order to make was an order for detention, and the order for condemnation was set aside. The question of the condemnation of the goods was heard by the late President on the day after the condemnation of the ship, and their condemnation followed as a necessary consequence. The appellants claim that they are entitled to a detention order in the same form as that which has been made in the case of the ship, and there is no reason to doubt that such an order would have been made if the case had stood over until after the decision by this board on appeal had been given in the case of the ship.

The first point, however, to be decided is whether the appellants, not being at the time of seizure owners of the goods, have any interest in the goods such as would entitle them to be heard on the appeal. Their Lordships are of opinion that the appellants, not being owners of the goods, have no such interest, and that on this ground alone the appeal must be dismissed. It was, however, argued before their Lordships that either an amendment should be allowed to enable the owners of the goods to be made parties to the proceedings, or that their Lordships would correct an error in the order of the court below, in whatever way it had been brought to their notice. Their Lordships intimated during the hearing that an application for amendment could not be entertained at the instance of appellants who had themselves no interest which entitled them to be heard. The same principle applies to the argument that their Lordships should correct an error, brought to their notice by the appellants, in the order made in the Prize Court. The appellants having no such interest in the goods as would entitle them to be heard are in the position of mere outsiders and have no *locus standi* either to criticise the order of the court below or to ask that such order should be varied or set aside. In *The Proton* (14 Asp. Mar. Law Cas. 268; 118 L. T. Rep. 519; (1918) A. C. 578) it was held that the claimant was not at the time owner of the vessel, and consequently could not maintain the appeal. Lord Sumner, in delivering their Lordships' judgment, says: "If the learned judge's first finding is right, this appeal fails, for M. Kouremetis (the appellant) has no character except that of owner in which he can claim to have the ship released to him, and, if not her owner, has no *locus standi* to criticise or complain of her condemnation."

In *The Antilla* (14 Asp. Mar. Law Cas. 378; 119 L. T. Rep. 746; (1919) A. C. 250) it was held that the appellants were not entitled as of right to appeal under sect. 5 of the Naval Prize Act 1864. The following passage occurs in the judgment of their Lordships: "Although it be the case that the effect of the adjudication, which was ultimately arrived at, was to bar the further chance of the claimants obtaining the goods, apart from the bar imposed by the fact that the appellants were silenced by being struck out of the case, their Lordships think upon the true view that they cannot be heard to question on appeal a final decree for condemnation, which, however it may affect their interests, was made after they had been validly dismissed from the proceedings and were no longer before the court."

There is no difference in principle between hearing a party validly dismissed from a suit, and

a party who has no interest in the goods condemned, and has failed to establish any right to appear or be heard.

In *The Palm Branch* (13 Asp. Mar. Law Cas. 512; 120 L. T. Rep. 101; (1919) A. C. 272) an order was made by consent of the Crown that the condemnation should be set aside, and the proceeds of the goods remain in the Prize Court. In the present case the Attorney-General, who appeared on behalf of the Crown, was asked to consider whether, under the special conditions, the consent of the Crown might not be given as in the case of *The Palm Branch*, but it was stated to their Lordships that there were reasons which prevented the Crown adopting this course. The decision of their Lordships in this case has reference to the hearing of a case on appeal, and has no reference to procedure in the Prize Court.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants, *Kerly, Sons,* and *Karuth.*

Solicitor for the respondent, *Treasury Solicitor.*

June 17, 19, *and July* 15, 1919.

(Present: The Right Hons. Lords PARMOOR, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL.)

H. SALTI ET FILS *v.* PROCURATOR-GENERAL. (*a*)

ON APPEAL FROM A DECREE OF THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—"Supply" of goods to an enemy—Enemy agent at Shanghai—Trading with the Enemy Proclamations 1914 *and* 1915.

The appellants were Ottoman subjects who before the war had traded at Antwerp as diamond merchants. In 1913 *they entered into an agreement with an Austrian subject that he should act as their agent for the sale of diamonds in the East for five years. In Aug* 1914 *they moved to London, and in Dec.* 1914 *were granted by the Treasury authority to carry on their trade. In Sept. and Nov.* 1915 *they forwarded by post to their agent at Shanghai packets of diamonds for sale. The packets, being deliverable to an enemy subject, were seized at the Postal Censor's office and were subsequently condemned by the President (Sir Samuel Evans) on the ground that the transaction was a trading with the enemy. On appeal:*

Held, that the appellants, being resident and carrying on their trade in England, came within the preamble to the Trading with the Enemy Proclamation (No. 2) *of the 9th Sept.* 1914. *Their agent at Shanghai, though not an "enemy" within the terms of that proclamation, since he was neither resident nor carrying on business in an enemy country was, however, of enemy nationality within clause* 1 *of the Trading with the Enemy (China, Siam, Persia, and Morocco) Proclamation* 1915, *and the earlier proclamation therefore applied. It followed by the transaction, the appellants had supplied goods to an enemy within the meaning of clause* 5 (7) *of the Proclamation of* 1914.

Decision of the President affirmed.

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

APPEAL from a decree of Sir Samuel Evans, P. condemning sixteen parcels of diamonds, sent by the appellants to James Blode, of Shanghai, on the ground that they were the subject matter of unlawful trading with the enemy.

Inskip, K.C. and *J. C. Conway* for the appellants.

Sir *Gordon Hewart* (A.-G.) and *Trickett* for the Crown.

The considered decision of their Lordships was delivered by

Lord WRENBURY.—The claimants are Ottoman subjects. For some thirty years before the war they carried on business in Antwerp as diamond merchants. Owing to the invasion of Belgium by the Germans they left Antwerp in Aug. 1914 and came to London. On the 23rd Dec. 1914 they obtained from the Treasury an authority to trade as diamond merchants in this country on conditions which are not relevant to anything here to be decided. In Nov. 1915 they left this country for Amsterdam, and have since remained there.

In Sept. 1915 the claimants sent by post from London two registered packets of diamonds addressed to James Blode at the American Post Office, Shanghai, and in Nov. 1915 (before they left this country) sent a third registered packet to James Blode at the American Post Office, Shanghai.

James Blode was an Austrian subject. By an agreement in writing made in 1913 the claimants had engaged him as their agent to sell their goods in Eastern Asia for a period of five years at a salary without commission upon the terms that he should not represent any other firm as agent. The diamonds were sent to him as such agent for sale.

The packets of diamonds reached the British Post Office at Shanghai and were returned by the post office to the chief postal censor in London on the ground that, being addressed to James Blode, an enemy subject, they were not deliverable. On the 29th Nov. 1916 the Postal Censor's Office in London seized the packets as prize to the use of His Majesty.

On the 12th June 1917 the Procurator-General issued a writ claiming the condemnation of the goods.

It is not disputed that the goods were confiscable if the transactions between the claimants and Blode amounted to trading with the enemy or intercourse with the enemy.

In their Lordships' opinion it is not necessary to determine whether the goods were confiscable at common law. The case is in their judgment covered by the proclamations to which they proceed to refer.

The Trading with the Enemy proclamation (No. 2), dated 9th Sept. 1914, after reciting in the preamble that it was "expedient and necessary to warn all persons resident, carrying on business or being in Our Dominions of their duties and obligations towards Us," went on to declare that—

3. 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.

. . . . .

5. From and after the date of this proclamation the following prohibitions shall have effect (save so far as licences may be issued as hereinafter provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our dominions: . . . (7) Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country, or an enemy, any goods, wares or merchandise, nor directly or indirectly to supply to or for the use or benefit of, or obtain from any person any goods, wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for or coming from an enemy country or an enemy. . . . (9) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy.

The claimants as persons resident and carrying on business in this country were within the words of the preamble and were within the proclamation. But James Blode was not within art. 3, for although of enemy nationality he was neither resident nor carrying on business in an enemy country.

On the 25th June 1915, however, a further Proclamation was made—namely, the Trading with the Enemy (China, Siam, Persia and Morocco) Proclamation 1915. This proclamation by its preamble recited that it was expedient that "transactions between British subjects and persons of enemy nationality resident or carrying on business in China, Siam, Persia or Morocco should be restricted in manner provided by this proclamation," and declared that:

1. The proclamations for the time being in force relating to trading with the enemy shall, as from the twenty-sixth day of July, nineteen hundred and fifteen, apply to any person or body of persons of enemy nationality resident or carrying on business in China, Siam, Persia, or Morocco in the same manner as they apply to persons or bodies of persons resident or carrying on business in an enemy country.

James Blode was a person of enemy nationality resident or carrying on business in China. He was therefore within art. 1 of this latter proclamation, and consequently the former proclamation applied to him. As already pointed out, the claimants were within the former proclamation. The result is that the former proclamation applies to both the claimants and Blode, unless it can be said that the words "British subjects" in the preamble to the latter proclamation have the effect of confining to British subjects the operative words of the latter proclamation which render the former proclamation applicable. In their Lordships' opinion those words have not that effect. The generality of the words in the operative part is not as matter of construction restricted by the words of the preamble. Further, it cannot be that the intention of the proclamation was to give to persons resident in and amenable to the laws of this country but not in the full sense of the words "British subjects" a greater liberty than was allowed to subjects of the British Crown.

It remains to consider whether any words in the former proclamation cover the present case.

The transaction between the claimants and Blode was not one in which the former were trading with the latter or entering into any commercial contract with him. Their Lordships do not rely on sub-clause 9. Neither is it necessary to rely on the concluding words of sub-clause 7. The first words of (7) in their opinion cover this case. The claimants were supplying to Blode goods, wares, or merchandise, and none the less because they were supplying them to him as agent for sale on behalf of the claimants. Blode was not a mere servant. He was agent for sale—an agent precluded by contract from representing any other firm as agent. He would have authority to fix a price, to give credit, and to act on behalf of his principals in any manner in which an agent for sale may bind his principal. A principal in distributing his goods amongst his agents for sale and sending so many parcels to A, so many to B and so on is correctly described as supplying the goods to his agent. The context of the clause is "supply to or for the use or benefit of." The supply, therefore, need not be "for the use or benefit of" the person; it is sufficient that the supply shall be to him. In their Lordships' opinion the first words of sub-clause 7 cover this case.

For these reasons their Lordships hold that these goods were rightly condemned, and that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitor for the appellant, *Albert M. Oppenheimer.*

Solicitor for the Crown, *Treasury Solicitor.*

Jan. 16, 17, *and July* 31, 1919.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL).

THE HAMBORN. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION (IN PRIZE), ENGLAND.

Prize Court—Ship—Neutral flag—Vessel owned by company incorporated in neutral country—Enemy control of company—Right of Prize Court to determine real ownership of ship.

On the 27th Oct. 1915 *the* H., *while on a voyage from New York to Cuba, and flying the Dutch flag, was captured by a British cruiser. The* H. *was owned by a single-ship company registered in Holland, the whole of the shares in the company being owned in equal moieties by two other Dutch companies. All the shares in these other Dutch companies belonged to Germans and German companies. In substance the vessel's trade was part of the commerce of Germany.*

Held, that in the case of an incorporated company the right and power of control might form a true criterion of its national character, and, as the centre and whole effective control of the Dutch company owning the vessel were in Germany, the vessel must be regarded in a Court of Prize as belonging to German subjects and liable to be condemned.

Decision of Evans, P. (14 *Asp. Mar. Law Cas.* 204; 118 *L. T. Rep.* 316; (1918) *P.* 19) *affirmed.*

APPEAL by the claimants from a decree of the Prize Court, reported 118 L. T. Rep. 316; (1918) P. 19), pronouncing the steamship *Hamborn* to have belonged at the time of seizure to enemies of the Crown, and condemning her as good and lawful prize.

MacKinnon, K.C. and *Balloch* for the appellants.

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

Sir *Ernest Pollock* (S.-G.) and *C. R. Dunlop*, K.C. for the respondent.

The considered opinion of the board was delivered by

Lord SUMNER.—The late President condemned the steamship *Hamborn* upon the ground that she was "a German vessel belonging to German owners." Her owners, the appellants, contend that they are a limited liability company, incorporated in Holland according to Dutch law, and that their ship was on the Dutch register of shipping and that she flew, as well she might, the flag of the kingdom of the Netherlands. Literally all this is true. The President spoke of her as being "nominally" owned by a Dutch company, but held that she "must be regarded as belonging to German subjects" and, quoting from *The Fortuna* (1 Dods. Rep. p. 81), that "it is no inconsiderable part of the ordinary occupation of a Prize Court to pull off the mask and exhibit the vessel in her true character," he laid it down that "the court is not bound to determine the neutral or enemy character of a vessel by the flag she is flying or may be entitled to fly at the time of capture." In fact, however, in this case there is no mask to be pulled off, if by that is meant some deception to be exposed. The appellant company really is a Dutch company; the ship was bought before the war and really was the company's property. The company is not shown to be a nominee holding in trust for other persons. There seems to have been no disguise or concealment or attempt to delude either the captors or the court and, according to the municipal law applicable, namely, that of Holland, the appellants are a Dutch incorporation, and the ship is theirs and enjoys the rights and is subject to the obligations which attach to a Dutch ship. Evidently there is some inaccuracy, no doubt inadvertant, in the language employed by the President and on this the appellants' argument is rested.

The facts are these. The appellant company, the Naamlooze Vennootschap Maatschappij Stoomschip *Hamborn* (or the Hamborn Steamship Company) is a single-ship company and the whole of its shares belong in equal moieties to two other Dutch companies, the Naamlooze Vennootschap Handelsen Transport Maatschappij Vulcaan of Rotterdam (or the transport company) and the Vulcaan Kohlen Maatschappij, also of Rotterdam (or the coal company). As to the transport company, all the shares but two, which belong to the German firm of Thyssen and Co., of Mulheim on the Ruhr, are the property of a German company, the Gewerkschaft Deutsche Kaiser of Hamborn. The shares of the coal company are held exclusively by three companies, the Vulcaan Transport Company above-mentioned and two German companies, the Gewerkschaft Rhein and the Gewerkschaft Lohberg, both of Hamborn. All the directors and shareholders of the last two companies are Germans, resident in Germany. So are the directors of the Vulcaan Transport Company, and they have under their supervision and control as managers two Germans who have resided in Holland since the formation of the appellant company in 1913 and attend to the practical business details of the Vulcaan Transport Company, which in its turn holds the office of manager to the Hamborn Steamship Company. It does not appear that they have any business of their own, and before the appellant company was formed they were clerks employed by the Deutsche Kaiser Company, the one till 1907, the other till 1910.

Sufficient details are given of the ship's regular trade to make it quite clear what she was bought for. Her trade was, with unimportant exceptions, to load ore at Spanish ore ports for Rotterdam, going out with coal from South Wales to French ports to save a ballast voyage. When the war broke out, she was sent across the Atlantic and was trading on time charter there when she was captured. The transport company, which owns half the capital of the appellant company, was incorporated to own and manage lighters and tugs for the carriage of cargo up the Rhine and its tributaries, on behalf among others of the Deutsche Kaiser Company for whom it carries ore. Thyssen and Co. and the Deutsche Kaiser Company own ironworks in Germany and there was not a single person interested in any of these companies at the time of her capture who was not an enemy subject. Their Lordships entertain no doubt that the *Hamborn* was bought and employed as a useful tender to the German iron industry on the Ruhr, that her other trading was ancillary, and that her Dutch flag, Dutch ownership, and local management at Rotterdam was adopted merely for the convenience of her German import trade. For some purposes no doubt she belonged to and was counted as part of the mercantile marine of the kingdom of the Netherlands, but in substance she and her trade were a support to and a part of the commerce and the shipping of the German Empire. The legal effect of all this, particularly on her liability to capture, is another matter.

The true question is one, in the President's phrase, of determining the neutral or enemy character of the *Hamborn*. Unless either her Dutch flag or the country of incorporation of the owning company or the place of residence of her subordinate managers or some or all of these matters be conclusive, she bore a character which justified her condemnation, for she formed part of that enemy commerce which a belligerent is entitled to disable and restrain.

It may be as well to put on one side certain aspects of the effect of using a national flag, which are not now relevant and are really only false analogies. If a ship for her own purposes has assumed and used a national flag, to which she is not really entitled, she may in some circumstances be held bound by the nationality which she has thus assumed without warrant. If a ship lawfully flies a national flag, she may in some cases be said, by a figure of speech, to derive from her flag the system of municipal law by which her contracts or her civil liabilities are governed. In the first case she cannot deny as against captors the national character which she has irregularly taken; in the second, she derives from the national character, which is actually hers and is indicated by her flag, the system of legal rights and liabilities applicable to her. Neither case touches the position where in a question with captors it becomes necessary to consider whether the ship, though in contemplation of technical municipal law a neutral ship, of neutral registry, and entitled to the benefits of a

neutral flag, is, in the view of the law of nations, a ship of enemy character and liable to be treated in accordance with that character. If the case turned on her user *de facto* at the time of capture it would be simple; so it would be, if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service. The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person. It was decided in the case of *Daimler Company Limited* v. *Continental Tyre and Rubber Company (Great Britain) Limited* (114 L. T. Rep. 1049; (1916) 2 A. C. 307) that, in the case of an incorporated company, the right and power of control may form a true criterion, the control, that is, of those persons who are the active directors of the company and whose orders its officers must obey, or the control of those persons who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes. The application of this test presents no difficulty here, for no living person and no sentient mind exercised or possessed any control over the Hamborn Steamship Company, except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam, if not altogether immaterial, at any rate cannot affect the result, since the question is not one of trading with enemy subjects, resident or carrying on business in a neutral country, but is one of the character of an artificial *persona*, whose trade is carried on for it under the supreme direction and control of enemies born. Their Lordships agree with a passage of the President's judgment which sufficiently represents the true gist of his reasoning: "The centre and whole effective control of the business of the Hamborn Steamship Company was in Germany. Having regard to these facts, the vessel must be regarded in this court as belonging to German subjects," in a claim by captors for condemnation.

One small point remains. By art. 57 of the Declaration of London, varying the rule of international law, the neutral or enemy character of a ship is simply determined by the flag which she is entitled to fly. Down to the 25th Oct. 1915 the Crown, by adopting the Declaration of London, had waived its right to rely on other criteria. On that day was published an Order in Council by which that waiver was withdrawn. The ship was captured on the 27th Oct. It is said that the appellant company was unaware of this order, but its ignorance cannot have the effect of compelling the Crown to continue to waive rights which in truth were in full effect, nor, if knowledge of this kind could matter, would it be the knowledge of the company, which merely owned the ship, but that of the time charterers who sent her to sea, as to whom nothing is proved.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants, *Pritchard* and *Sons*.

Solicitor for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 25 and 31, 1919

(Before ROWLATT, J.)

HOLT HILL SAILING SHIP COMPANY LIMITED *v.* UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION LIMITED. (*a*)

Insurance (Marine)—Increased value policy—Constructive total loss—Repaired value exceeding cost of repairs.

The plaintiffs' sailing vessel H. H. *was insured for* 3000*l. in an "increased value" policy to pay only in the event of a total or a constructive total loss. The vessel had also been insured in an ordinary Hull "all risks" policy for* 12,500*l. The "increased value" policy contained a clause as follows: "No vessel insured in this association shall be deemed to be a constructive total loss unless the cost of repairing the damage caused by perils insured against shall amount to* 80 *per cent. of the value in the ordinary Hull 'all risks' policy, say* 12,500." *During the currency of the policy the vessel met with damage, was abandoned, and afterwards salved. The cost of repairs was more than* 10,000*l., which is* 80 *per cent. of* 12,500*l., but the repaired value was about* 25,000*l.*

Held, that, inasmuch as the repaired value of the vessel was in excess of the cost of repairs, there was no constructive total loss, and therefore the underwriters were not bound to pay under the increased value policy.

ACTION in the Commercial List.

The plaintiffs claimed 3000*l.* and interest as for a constructive total loss under a policy of marine insurance on increased value.

The plaintiffs' sailing vessel *Holt Hill* was insured for 3000*l.* in an "increased value" policy, dated the 11th April 1916, to pay only in the event of a total or a constructive total loss. The form of the policy provided for a valuation of the ship, but this was left blank.

The vessel had also been insured in an ordinary Hull "all risks" policy for 12,500*l.*, and by the policy of the 11th April 1916 now in question it was provided as follows:

No vessel insured in this association shall be deemed to be a constructive total loss unless the cost of repairing the damage caused by perils insured against shall amount to 80 per cent. of the value in the ordinary Hull "all risks" policy, say 12,500*l.*

During the currency of the policy the *Holt Hill*, while on a voyage from Nantes to America, met with heavy gales, was damaged, abandoned, and afterwards salved. The cost of repairs was more than 10,000*l.*, which is 80 per cent. of 12,500*l*, but the repaired value was about 25,000*l.*, which was far more than the cost of repairs. In fact, the ship was sold for a considerable sum, substantially unrepaired.

R. A. Wright, K.C. and *A. T. Miller* for the plaintiffs.

(*a*) Reported by T. W. MORGAN Esq., Barrister-at-Law.

MacKinnon, K.C. and *Greaves Lord* for the defendants.

Cur. adv. vult.

March 31.—Rowlatt, J. read a judgment in which, having stated the above facts, he proceeded as follows:—Upon these facts the assured seek to recover under this policy as for a constructive total loss because the cost of repairs, though not reaching the repaired value, exceeded 10,000*l.* This involves reading the clause, which is expressed to provide that the ship shall not be deemed to be a constructive total loss unless the cost of repairs exceeds 10,000*l.*, as involving the stipulation that she shall be deemed to be a constructive total loss if those costs do exceed 10,000*l.*; in other words, that 10,000*l.* is to be treated as substituted for the repaired value of the ship for the purpose of ascertaining whether there is a constructive total loss.

This reading of the clause does great and manifest violence to the language, but if it can be collected from the general purport of the policy, or from the nature of the transaction, that such was the intention, it would be justifiable to extract the affirmative proposition out of the negative, as contended for. It seems to me, however, that there is no reason whatever why the clause should not mean just what it says. If this is so, the position is that the underwriters are to pay if the ship is a constructive total loss as defined by the general law now found in the Marine Insurance Act, namely, if the cost of repairs exceeds the value of the ship when repaired, with a proviso, by way of guarding against over-valuation, that the cost of repairs amount to 80 per cent. of the value in the "all risks" policy.

In fact, if this is what the parties intended, I do not see what form of words they could have chosen better calculated to express that intention than those which they have used. On the other hand, if they had desired to substitute the agreed figure of 10,000*l.* for the repaired value, the direct and plain language of the well-known institute clause was ready to hand as a precedent. There is no tradition of obscurity in defining the position in this respect.

I do not know whether underwriters usually pay when the condition provided for in the clause is satisfied without agitating the question of the actual repaired value, but I cannot read the clause as compelling them to do so.

This point disposes of the case, and I express no opinion upon any of the questions raised as to notice of abandonment.

Judgment for the defendants.

Solicitors: *Rawle, Johnstone*, and *Co.*, for *Weightman, Pedder*, and *Co.*, Liverpool; *Lightbound Owen* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

Friday, April 4, 1919.

(Before Lord Sterndale, President).

The Kronprins Gustaf. (*a*)

Prize Court—Contraband—Conditional contraband—Shipment at neutral port—Destination—Enemy or neutral port—Consignee—Consignor's agent for sale—Declaration of London—Order in Council, No. 2, *Oct.* 29, 1914, *clause* 1 (*iii*).

By art. 35 *of the Declaration of London, it is provided that "conditional contraband is not liable to capture, except when found on board a vessel bound 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." This article, which abrogated the doctrine of continuous voyage, was adopted by the Order in Council dated the* 29*th Oct.* 1914, *subject to certain modifications, one of the modifications being clause* 1 (*iii*), *under which it is provided, "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 or if they show a consignee of the goods in territory belonging to or occupied by the enemy."*

In April 1915 *certain bags of coffee, conditional contraband, were consigned by N. of S., a neutral port, to T. of M., another neutral port, T. being the consignor's agent for sale, T. sold the coffee to a neutral firm who bought it with the intention of reselling it to another firm in H., a German city. The coffee was shipped on a neutral vessel, which was captured, and on the Crown claiming condemnation of the coffee the buyers resisted the claim on the ground that the coffee had been shipped to a named consignee and that they were entitled to the protection of the Order in Council of the* 29*th Oct.* 1914.

Held, that as the agent for sale was a person who had to act according to the instructions of his principal, he was not such a consignee as to satisfy the requirement of the Order in Council, and that as the real control of the coffee had not passed to him, the coffee was subject to condemnation.

This was a case in which the Crown sought the condemnation of certain goods as conditional contraband.

The conditional contraband, 500 bags of coffee, was shipped by the firm of Nossack and Co., of Santos, on board the Swedish steamship *Kronprins Gustaf*. The coffee was consigned to one Thomee, of Malmo. The bills of lading were dated the 9th April 1915, the vessel sailed on the 17th April 1915, and the goods were seized as prize on the 20th May 1915.

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

The claimants were Nordblom and Co., a firm of provision merchants of Narberg, Sweden, and by their affidavit they stated that they had bought the coffee in Jan. 1915 from Nossack and Co., through the agency of Thomee, and had agreed to sell the same by a contract dated the 4th March 1915 to a firm, Otto Hesse, of Hamburg. The claimants further stated that when they heard of the seizure of the coffee and became aware that they would have to give a guarantee that it should not be utilised otherwise than for neutral consumption they cancelled the sale.

On behalf of the Crown it was argued that the coffee was clearly intended for enemy use and consumption, and that if it had not been intercepted it would have been delivered in Hamburg. Under the circumstances, therefore, the protection afforded by the Order in Council of the 29th Oct. 1914 did not extend to it, as Thomee was not such a consignee as was contemplated by the order, and the consigning firm had not parted with the real control of the goods.

On behalf of the claimants it was argued that, even if the goods had an enemy destination, which was not admitted, the protection of the Order in Council applied.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir E. M. Pollock, K.C.), and *Stuart Bevan* for the Procurator-General.

Sir *Erle Richards*, K.C., and Sir *Robert Aske* for the claimants.

The following cases were cited :

The Louisiana, 14 Asp. Mar. Law Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 461;

The Kronprinzessin Victoria, 14 Asp. Mar. Law Cas. 391; 120 L. T. Rep. 75; (1919) A. C. 261.

The PRESIDENT.—This is a case in which the Crown asks for the condemnation of 500 bags of coffee consigned to Gustaf Thomee, of Malmo, and claimed by Messrs. Nordblom and Co., who claim as purchasers from Messrs. Nossack and Co., of Santos, the shippers. The shippers are described in the usual affidavit, filed on behalf of the Crown by Mr. Greenwood, and it is not necessary to say more about them than that they obviously had very strong German sympathies. The company is composed of German shareholders, though whether it is a German firm in the sense of making these goods enemy property, it is not necessary to consider. It also appears clearly from the documents that Messrs. Nossack and Co. were engaged in business transactions with Germany. There is a letter from Eugen Nossack in Hamburg to Fritz Nossack in Santos, dated the 28th Nov. 1915, in which the writer says :

I hope something will come from Berens (in Hamburg), otherwise the prospects of profit for this half-year look bad, as you are not executing anything. Bremen is annoyed and all agents depressed, so have not the courage to persuade people to make outlays from which there will be no result whatever. Avoid any reference whatever to Germany in all invoices and documents, otherwise the coffee will be seized if England detains the steamer, for all receivers must produce original telegrams, invoices, &c, before the goods are allowed to proceed.

Again, a few days after, on the 2nd Dec. 1915, Eugen Nossack wrote again to Fritz Nossack in Santos :

It is a pity you never make suggestions for business. A firm here that is very well disposed towards you, for example, has bought from Urban 3000 lavados, which came through quite easily and were at once sold here at a profit of 40 pfennigs. But there is no news whatever from you, not even in regard to the numerous orders. Naturally all business is going to rival firms. Marder somewhat weaker in Holland is going up.

I take it that that is a reference to the institution of the Netherlands Oversea Trust, and it is not necessary to read any more to show that this firm were naturally and properly, from their point of view, trading with Germany and sending coffee into Germany as far as they could. Now, the information about the consignee in the Crown's affidavit is that he is a member of a firm of commission agents carrying on business at Malmo. Then it gives the income, showing a rise in profits from 1913 to 1915, but nothing startling, and

Since the war the profits of the firm have been chiefly connected with coffee, and it has also received large quantities of tea and dried fruits which were intended for Germany. The firm is willing to lend its services for any business proposed by the enemies of Great Britain, and it has acted as intermediaries and dummy consignees for several enemy firms, including Eugen Urban and Otto Hesse. During 1913 and 1914 no coffee was imported by the firm; but between March 1915 and Dec. 1915 at least 1024 tons of coffee were shipped to it in its own name.

I disregard the general statement as to its willingness to lend its services for any business proposed by the enemies of Great Britain and confine myself to the fact that it acted as an intermediary and a dummy consignee. I have had occasion to find that Thomee acted as nominal consignee in the Urban group of coffee cases, and the late President found the same thing in regard to other cases. At any rate, I have no doubt that Thomee did act in that way constantly. At any rate he was the consignee in this instance.

The history of the transaction as I follow it is this. On the 26th Jan. 1915 Thomee made a contract in which the sellers were Nossack and Co. and the buyers the claimants. The price was 52 marks per 50 kilos, and payment was by sight draft on the bank at Malmo. Marine and war insurance were to be covered by the buyer, and on the same day Thomee wrote to the purchasers asking them to send a guarantee to the bank in Malmo certifying that they would honour the documents for 500 bags per *Kronprins Gustaf* purchased from Nossack through Thomee at 52 marks per 50 kilos. The claimants did guarantee the bank as they were asked, and the bank then sent a cable to Brazil: "We pay draft covering March shipment per *Kronprins Gustaf* 1000 bags coffee account Gustaf Thomee."

Apparently that took some time to go through, because, on the next day, the shippers say by cable that they had not been informed of the credit; but they were eventually informed of it, and the credit was opened. On the 4th March 1915 there was a contract between the claimants and Mr. Hesse, of Hamburg, for 500 bags of Santos coffee, shippers Nossack and Co, price 65 pfennigs per half kilo, which leaves a profit of 13 marks per 50 kilos to the claimants. That contract did not go through, and it failed to do so for the reason that the consignment was seized by the British patrol. But taking the claimants' case as being a genuine one, namely, that this was a purchase by them from Nossack and Co.

through Thomee, there is no doubt that, but for the interference of the British cruisers, the contract would have been carried out and the goods would have gone to Hesse. The question then for decision is whether these goods had an enemy destination, and if so whether they are liable to condemnation as prize.

It was argued on behalf of the Crown that both Thomee and the claimants are mere nominees of somebody, either the shippers or Hesse. Now, I think that Thomee was a dummy consignee. I do not use that word in any offensive way. I do not think he was acting as consignee in any way of deception. He was a consignee as agent for the shippers, and it may be a consignee as agent may be a consignee under certain circumstances sufficient to satisfy the definition of the term in the case of the *Louisiana* (*ubi sup.*) and the *Kronprinsessin Victoria* (*ubi sup.*); for although he is only an agent for sale, he has such entire control that he may be the consignee within those cases. I do not express an opinion upon the point; I merely say that it is possible. But, under ordinary circumstances, the agent for sale is a person who is acting according to his principal's instructions, and I see nothing in this case to show that Thomee had any independent control more than any other agent who has to do what his principal tells him. Therefore he does not seem to satisfy the definition of a consignee, acting as agent, according to the use of the term in the two cases to which I have just referred—namely, some person other than the consignor, who has a free and absolute control over the goods. I think he was representing Nossack and Co. There is no suggestion that he ever bought from Nossack and Co. and re-sold to the claimants. The contract was made by Nossack and Co. They were the sellers to the claimants, and it was stated to be made through Thomee. Therefore the first thing that I decide is that Thomee was not a consignee who would satisfy the requirement of the Order in Council of the 29th Oct. 1914, as interpreted by the cases so often referred to.

That being so, if the goods had an enemy destination they are liable to condemnation. I do not see how it can be doubted that these goods had an enemy destination. The claimants have put the matter before me with perfect frankness, and they say, "We did sell to Hesse." Whether they communicated that to the shippers or not I do not know; but at the same time that the goods were dispatched from Santos they were proceeding under a contract by the shippers to the claimants and also under a contract by the claimants to Hesse, by which they would be delivered to them in Hamburg. I cannot doubt therefore, that the coffee had an enemy destination, and, consequently subject to the question of Art. 43 of the Declaration of London, I think the goods are liable to condemnation, because Hamburg is a base of supply, from which it may be inferred that they were destined for the armed forces of the enemy.

It is said that the transaction is protected under Art. 43 of the Declaration of London. That article protects persons who are shipping contraband which is not contraband at the time of the shipment.

The facts here are that there was a declaration of what was contraband in Aug. 1914, which undoubtedly included these goods. There was a notification in Nov. 1914 to various neutral countries that the British Government would treat as contraband certain things, which did not include coffee. A notice of that alteration was given to Sweden, but not to Brazil. This vessel, the *Kronprins Gustaf*, sailed from a Brazilian port, and the last part of Art. 43 says that a vessel is deemed to be aware of the existence of a state of war or of a declaration of contraband if she left the neutral port subsequent to the notification of the Government of the country concerned of the declaration of contraband, provided such notification was made in sufficient time. Notification was made to Brazil somewhere in Aug. 1914, and this vessel sailed on the 17th April 1915, and therefore, so far as Brazil is concerned, a ship sailing from there must be deemed to be aware of the notification of the contraband.

But what is said here is that that might be true if the ship belonged to Brazilian owners. But she does not, for she belongs to Swedish owners, and notification was given to Sweden in Nov. 1914 that coffee would not be treated as contraband, and therefore every Swedish owner was entitled to go on shipping coffee until the notification had been given. But I do not think that is correct. It is not really necessary to decide it. I think that this ship sailed from a Brazilian port, and must be deemed to be aware that the goods were contraband. But it is obvious that a person in Sweden who received notice somewhere on or about the 22nd or 23rd March 1915 of the ratification of the Proclamation had ample time to inform his vessel in Santos long before the 2nd April, and therefore, even supposing that that contention was sound, there was ample time to give information to the vessel.

Of course what the claimants wish me to say is this, that anybody who has made a contract before the withdrawal of the order of Nov. 1914 is entitled to carry out that contract, although the British Government has given notice that it is going to insist upon its rights as to contraband; but as to that I can find no foundation for such an argument in the provisions of the Declaration of London or anywhere else, and that contention fails. The contention as to the protection of Art. 43 fails, because I think that a ship sailing from a Brazilian port must be deemed to be aware that the goods were contraband. Even if the fact of her being Swedish is taken into account, there was notice to Sweden in ample time for the shipowner to inform his ship, and therefore all the grounds of claim fail, and the claim must be dismissed and the goods must be condemned as prize.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *W. A. Crump and Sons.*

April 14 *and* 30, 1919.

(Before Lord STERNDALE, President.)

THE DIRIGO, THE HALLINGDAL, AND OTHER VESSELS. (*a*)

Prize Court—Prize—Contraband—Enemy goods on neutral ships — Enemy property — Passing of property—Conditions of liability to condemnation —Declaration of Paris, art. 2*—Reprisals Order in Council, the* 11*th March* 1915*—Neutral shipowner —Knowledge of nature of cargo—Condemnation of ship—Sale of goods—Proceeds in court—Order for release—Claim for interest on amount of proceeds of sale—Practice.*

The American branch of an enemy firm consigned a quantity of goods of a contraband character, food stuffs and cattle feeding stuffs, from America to certain neutral firms in Scandinavia. The goods were shipped sometimes in the name of the enemy firm, and sometimes in the names of other firms. The vessels in which the goods were shipped were either captured or diverted into British ports, and the Crown claimed the condemnation of the goods as contraband. The grounds of the claim were (1) *that where enemy goods were consigned on neutral vessels art.* 2 *of the Declaration of Paris did not enure for the benefit of the enemy so as to entitle him to claim protection for his goods, or, alternatively, that there was no protection accorded to an enemy under the said article in respect of contraband goods even though they had not an enemy destination; and* (2) *that the property in the enemy goods could not pass to a neutral during transit so as to preserve them from condemnation under prize law, or, alternatively, to detention under the Reprisals Order in Council of the* 11*th March* 1915.

Held, (1) *that art.* 2 *of the Declaration of Paris protected the enemy goods themselves and was not intended simply to give a neutral shipowner the right of complaint in case of interference with the voyage of his vessel; and* (2) *that the doctrine that property in enemy goods cannot pass from an enemy to a neutral during transit did not apply in the following cases:* (a) *Where the goods were shipped upon a vessel chartered by the purchaser and payment was made and all documents handed over before the vessel sailed, the contract being f.o.b. and payment to be made against documents at the port of loading;* (b) *where the goods were shipped on a general ship not chartered by the purchaser under a contract f.o.b., including freight and insurance, payment against documents at the port of loading, or c.i.f. with the same provision as to payment, and payment was made and the documents handed over before the vessel sailed; and* (c) *where the same conditions existed and payment was not made and the documents were not handed over until after the ship sailed, because of the accidents of business and not because there was any intention to reserve the right of disposition.*

When goods are seized as prize and afterwards sold by order of the court, even if the court eventually makes an order of release, there is no general principle under which the successful claimants are entitled to interest upon the money realised by the sale because the Crown has had the use of it.

In the present state of the authorities there is no settled rule that a neutral vessel which carries a cargo, the substantial portion of which is contraband, and where the shipowner is unaware of the nature or the cargo, is liable to condemnation as prize.

THESE were actions for the condemnation of food stuffs and cattle feeding stuffs as contraband, and in the case of the sailing ship *Dirigo* of the vessel also. There were concerned in all the sailing ship *Dirigo* and thirteen steamships—all Scandinavian. There was also a special question raised in the case of one of the steamships, the *Hallingdal*, as to the allowance of interest upon the money obtained upon the sale of a ship when eventually the ship is released. The hearing of the actions took place on several days in Feb., March, and April 1919, and the learned President delivered his judgments on the 14th and 30th April 1919.

The consignments, the subject-matter of the action, were all shipped from New York between the autumn of 1914 and the early part of 1916. The real shippers in each case were a firm of grain and feeding stuff importers and dealers, K. and E. Neumond, who had their headquarters at Frankfurt-on-Main, in Germany. They also carried on business at New York, St. Louis, New Orleans, and Galveston, in the United States of America, and soon after the outbreak of the Great War in 1914 they opened an office in Copenhagan. Although, as above stated, K. and E. Neumond were the actual shippers in every case, they sometimes made their shipments in the names of other people. The European business of the firm was carried on by Eugen Neumond, whilst the New York branch was managed by Karl Neumond. The relationship between the United States office and the headquarters in Germany is fully set out in the judgment.

On behalf of the Crown it was submitted that upon the evidence the whole of the consignments had an enemy destination; but even if the court was not satisfied as to the enemy destination and considered that the goods comprised in the shipment would have been consumed in Scandinavian countries, nevertheless the goods were at all material times enemy property and liable to detention under art. 4 of the Reprisals Order in Council of the 11th March 1915 (*infra*). The shippers in each case, under whatever name the shipments took place, were an enemy firm. The headquarters of the firm were in Germany, and the American branches must be considered as being an enemy firm as the effective control of the whole business was German, and the representative in New York, Karl Neumond, had not lost his German nationality and domicil. Even if Karl Neumond had lost his German nationality and had acquired a United States domicil, yet his connection with the German headquarters was such as to make the business carried on in the United States a German business, and the property of the United States branches enemy property. The goods being enemy goods originally, no property in the same had passed to the various claimants before the seizure and the Crown was entitled to have them condemned as prize. It was further contended that the claimants could not claim the protection of art. 2 of the Declaration of Paris (*infra*).

On behalf of the various claimants it was submitted that the domicil of Karl Neumond was American, that the place of shipment was to be considered when deciding in whom the property

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

in the goods resided, and that therefore the shipments were not enemy property. It was further submitted that the property in the goods had passed from Neumond to the claimants, and even if the court was of opinion that they had originally an enemy character, that enemy character had been lost. Lastly, it was contended that there was no right of seizure and condemnation as contraband as the destination was not an enemy one, and therefore the claimants were entitled to the protection afforded by sect. 2 of the Declaration of Paris.

The points raised on either side are fully dealt with by the learned President in his judgment.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir E. M. Pollock, K.C.), *Clement Davies*, and *J. B. Neibitt* for the Procurator-General.

Sir *Erle Richards*, K.C., *Balloch*, *Darby*, Sir *Robert Aske*, and *A. W. Grant* for the various claimants of the goods.

MacKinnon, K.C., and *C. R. Dunlop* for the owners of the *Dirigo*.

By art. 2 of the Declaration of Paris:

The neutral flag covers enemy's goods with the exception of contraband of war.

By art. 4 of the Reprisals Order in Council of the 11th March 1915:

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 officers of the Crown, unless it be shown that the goods had become neutral property before the issue of the order.

The following authorities were cited in the course of the arguments and the judgment:—

The Vigilantia, Roscoe's English Prize Cases, vol. 1, 31; 1 Ch. Rob. 1;
The Neutralitet, Roscoe, vol. 1, 309; 3 Ch. Rob. 295;
Turner v. *Liverpool Dock Trustees*, 6 Ex. 543;
The Baltica, Roscoe, vol. 2, 628; 11 Moo. P. C. 141;
Jansen v. *Driefontein Consolidated Mines*, 14 Asp. Mar. Law Cas. 150; 87 L. T. Rep. 372; (1902) A. C. 484;
The Southfield, 14 Asp. Mar. Law Cas. 150; 113 L. T. Rep. 655;
The Flamenco, 1 Br. & Col. P. C. 509;
The Odessa, 13 Asp. Mar. Law Cas. 27; 114 L. T. Rep. 10; (1916) 1 A. C. 145;
Daimler Company v. *Continental Tyre and Rubber Company*, 114 L. T. Rep. 1049; (1916) 2 A. C. 307;
The St. Tudno, 13 Asp. Mar. Law Cas. 516; 115 L. T. Rep. 634; (1916) P. 291;
The Maracaibo, 13 Asp. Mar. Law Cas. 522; 115 L. T. Rep. 639; (1916) P. 266;
The United States, 13 Asp. Mar. Law Cas. 568 116 L. T. Rep. 19; (1917) P. 30;
The Kronprinz Gustaf Adolf, 2 Br. & Col. P. C. 418;
The United States (*No.* 2), 2 Br. & Col. P. C. 525;
The Hypatia, 13 Asp. Mar. Law Cas. 574; 116 L. T. Rep. 25; (1917) P. 36;
The Hakan, 13 Asp. Mar. Law Cas. 479; 117 L. T. Rep. 619; (1918) A. C. 148;
The Parchim, 14 Asp. Mar. Law Cas. 196; 117 L. T. Rep. 738; (1918) A. C. 157;
The Hamborn, 14 Asp. Mar. Law Cas. 204; 118 L. T. Rep. 316; (1918) P. 19;
The Leonora, 14 Asp. Mar. Law Cas. 209; 118 L. T. Rep. 362; (1918) P. 182;
Story's Principles and Practice of Prize Courts (Pratt's Edit.), pp. 61, 64;
Bonfils' Droit International Public, 7th edit., pp. 950, *seq.*;
Snow's Cases on International Law, p. 568;
Hall's International Law, 7th edit., pp. 751, *seq.*

Cur. adv. vult.

April 14.—THE PRESIDENT.—In these cases the Crown asks for condemnation of a number of shipments carried in several different ships. The value of the property is large—over 280,000*l.* There are twenty-three consignments carried in thirteen ships, and there are twenty-two claimants to the twenty-three parcels. All the goods carried are foodstuffs or cattle-feeding stuffs.

The link between the various cases is that the shippers in all cases, either nominally or actually, were a firm of K. and E. Neumond, and it is alleged that this firm was an enemy firm engaged in providing Germany and the German Government with contraband goods, and that in all the shipments with which this case is concerned the goods were destined for Germany and were liable to condemnation as conditional contraband. Even if this was not established it was contended that the goods were liable to condemnation as enemy property, or to detention under the British reprisals orders.

The circumstances of the different shipments were by no means the same, but the character of the shippers, K. and E. Neumond, was common to them all, and it will be well, therefore, to examine this in the first place. The firm of K. and E. Neumond is a firm of grain and feeding stuffs importers and dealers at Frankfurt. They also carried on business at New York, St. Louis, New Orleans, and Galveston, and after the beginning of the war they opened an office in Copenhagen. The relationship between the Frankfurt and American houses will be considered in more detail later. The partners in the business were Karl and Eugen Neumond, and the business in New York was opened in 1911 or 1912, under the management of Karl, the elder brother. At the outbreak of the war Karl was in Germany, but he went back to America in Sept. 1914, having made arrangements with Ludwig Eyber, an official of the War Ministry, to ship grain and flour to Copenhagen to be forwarded to Germany. This was done with the official support of the German Government, and before the end of Nov. 1914 large shipments of grain and flour had been sent to Germany in pursuance of this arrangement. In the meantime K. Neumond had met Dr. Albert, Counseller of

the Ministry of the Interior of the German Empire, who was in America as a member of an official commission for the purpose of purchasing supplies and making financial arrangements for Germany. Other members of the commission were Dr. Meyer Gerhardt and Prince Hatzfeld. Dr. Albert, in purchasing supplies, acted with or on behalf of the Zentral Einkaufs Gesellschaft, which was a company established to centralise the imports of a number of commodities, chiefly foodstuffs and fats, and had very large powers conferred upon it by the German Government for that purpose. After a short time Karl Neumond acted on behalf of Dr. Albert and the Zentral Einkaufs Gesellschaft instead of Eyber. The business was financed by credits opened by the Disconto Gesellschaft of Berlin, and no doubt the money was found by the German Government, for when the purchases on behalf of Eyber had not exhausted the credit, the balance was allocated to purchases on behalf of Dr. Albert and the Zentral Einkaufs Gesellschaft.

Eugen Neumond remained at Frankfurt except for occasional business visits in Germany and Scandinavian countries until he was called up for military service in 1916. He obtained several postponements of his service, and his applications were supported by Dr. Albert, by Count von Bernstorff, and by the Reichsbank and other bankers in Germany on the ground of his utility in obtaining goods for that country.

K. and E. Neumond often used cover names in communicating with each other and with other persons, and shipped goods in names other than their own, in order to conceal the fact that they were the shippers. Sometimes they used the names of persons who were sellers to them of the goods, sometimes the names of other firms who had no connection with the transactions at all. In some cases they had authority to use these names, and in others they had no authority whatever, and shipped goods in the names of firms who knew nothing of the matter. In 1916 the firm organised a system of secret or private mail service between New York and Germany *viâ* Scandinavia for the benefit of themselves, Dr. Albert, the Zentral Einkaufs Gesellschaft, and the German banking houses and others were concerned in the business. Special couriers carried the mails, and the firm's offices in New York and Copenhagen were used as sorting offices. This business was carried on until the United States entered the war, when K. Neumond was interned as a dangerous alien enemy. The head office of the firm was in Frankfurt, and the houses in the United States and Copenhagen were, in my opinion, only branches of that firm. They are described as being quite separate in some of the letters passing between Frankfurt and America, and in the sense that the accounts of the operations of the branches were separately kept, it is a correct description; but these branches accounted for their profits to the head office in Frankfurt, and the direction of the business generally rested with that office. In my opinion, the business was an enemy business, although part of its operations were conducted in neutral countries, and the case is not similar to that mentioned in some of the authorities of a person or firm carrying on different businesses in enemy and neutral countries respectively. I think, therefore, that goods shipped by this firm were enemy property.

The evidence with regard to the firm and its operations was very voluminous. It consisted of a long affidavit of Mr. Greenwood on behalf of the Crown, derived from the usual sources, and a very large number of intercepted wireless messages, cables, and correspondence. The latter were almost entirely in cipher and code, and they have been deciphered and decoded at the cost of a great deal of labour with the greatest ability and ingenuity by Mr. Gaskoin, a witness from the Censor's Office. Fortunately, occasions presented themselves which gave him the opportunity of verifying his translation of some of the intercepted communications, and I have no doubt that it was substantially correct. As about three days were necessarily occupied in reading these communications to me, I have not thought it necessary to set them out in any detail.

It will, I think, be apparent from what I have stated that the greatest suspicion must attach to any transactions in which K. and E. Neumond were concerned, and that there is a strong presumption in favour of the goods concerned in such transactions being contraband. It must, however, be remembered that the firm had an extensive business before the war, and that it is not shown that they gave up business with Scandinavia and confined themselves entirely to contraband transactions afterwards. It is therefore possible that they may have entered into contracts under which they consigned goods to neutrals for the purpose of their own consumption or business, and, as will be seen later, some of the transactions in this case, especially those relating to feeding stuffs as distinguished from food stuffs, were of that nature.

Turning now to the different shipments, I think the first four, that is, two by the *Alfred Nobel* (one of wheat and one of flour), one by the *Björnstjerne Björnson*, and one by the *Fridland*, may be taken together. Two of the shipments were made in the name of the Guaranty Trust Company of New York, and two in the name of Norris and Co., from whom the goods were brought; but in all the cases the real shippers were K. and E. Neumond. In the case of Norris, K. and E. Neumond made it a condition of the sale that Norris should secure war risk insurance in American companies in their own name, and should also allow the goods to be shipped in their name. A similar proposal was afterwards made to Norris and Co., but they refused to entertain it on account of the suspicious nature of the transaction.

In the case of the *Alfred Nobel* claims were put in by the Guaranty Trust Company and K. and E. Newman of New York—another name for K. and E. Neumond—in the case of the *Björnstjerne Björnson* and the *Fridland* by the Guaranty Trust Company and Norris and Co. for two shipments, and the Guaranty Trust Company alone for the other shipment. No evidence, however, was filed by K. and E. Newman or by Norris and Co., and the only effective claim in all the cases was that made by the Guaranty Trust Company.

In the case of the *Alfred Nobel* the claimants put in a contract by K. and E. Newman to Beckman and Jörgensen, c.i.f. Copenhagen, payment on arrival, and the bill of lading stated the shippers as the Guaranty Trust Company, and made the goods deliverable to their order. The claim stated the contract to be made by K. and E. Newman as the agents for the

claimants, but no such statement was contained in the affidavit filed on their behalf, and in my opinion there was no foundation for it. The affidavit merely alleged that they were holders of the bill of lading, and so had control of the goods. In the case of the shipments by the *Björnstjerne Björnson* and the *Fridland* no contracts were produced, and the only allegations in the affidavits were that the claimants held the documents relating to the goods. There was no allegation in any of the cases that the goods were the property of the claimants.

Looking at the evidence and the well-known nature of the claimants' business, I am of opinion that the highest at which their case can be put is that they held the documents relating to the goods to secure some interest arising from advances or payments made in respect of them, and the case of *The Odessa* (*ubi sup.*) shows that such an interest gives them no right to a claim in this court. The claims must be dismissed with costs. Considering the history of the firm of K. and E. Neumond and the nature of their transactions, I have no doubt that these goods were intended for Germany, and I find that in a letter, probably written in March 1916, by K. and E. Neumond to the War Ministry in Berlin, they assure the Ministry they will do everything to secure a favourable result of the prize proceedings in respect of the goods. This fact, coupled with the connection previously mentioned of the firm with the Zentral Einkaufs Gesellschaft and the German Government, makes it clear that these goods were destined for the enemy Government or their armed forces, and they must be condemned as good and lawful prize.

The next case with which I shall deal is that of the *Henrik*. In this case the goods were shipped in the name of G. W. McNear, Inc., but really by K. and E. Neumond. The consignees were the Spannmals Konstgodnings och Foderamnes Aktiebolaget, and a claim was entered by Simonsson and Hallberg, of Stockholm. These claimants, however, failed to comply with an order for security, and the claim was struck out. No claimant therefore appeared before me.

The intercepted documents establish that these goods were sent by K. and E. Neumond and were under their control, and that McNear and Simonsson and Hallberg were persons acting under their directions. I propose to read a few of them. On the 18th Jan. 1916, Neumond, of Frankfurt, wrote to Neumond of New York, saying:

Credit *Henrik* when once it had been opened directly by the Disconto Gesellschaft with the Skandinaviska Kredit Aktiebolaget. Confirmation of sales by E. Neumond. We omitted this from the last mail dispatch from Copenhagen because we feared England might open the letters, but we will send it by the next mail. Buyer's contracts: You seem still unable over there to picture correctly the transaction here. To get these G. W. McNear contracts undersigned by the *pro formâ* buyers is not easy; at this moment, in regard to past cases, it is impossible. Even if goods are seized and a contract is absolutely essential, we cannot say with certainty that we can obtain the contracts in question signed. We would, however, in these cases, do everything possible to secure that the contracts are signed. For the rest, it should not be very hard for you to soothe McNear as to the outstanding contracts. *Henrik*, shipment on: We must now see to it that we can get the goods sent on.

On the 12th Jan. 1916, the Disconto Gesellschaft, of Berlin, wrote to Neumond, of Frankfurt:

We inform you hereby that according to telegraphic advice, the Scandinaviska Kredit Aktiebolaget, Stockholm, has accepted from the Guaranty Trust Company, New York, on the basis of the previously opened credit for 240,000 dollars (the credit has been somewhat exceeded) a draft for 245,923.30 dollars per 7th Feb. 1916, for which we have debited the Zentral Einkaufs Gesellschaft here. We are booking to your debit, according to our agreement, for percentage commission on the above-mentioned amount—245,923 dollars at 5.38 dollars, M.1,323,065 per 17th Jan. current.

The sum of 245,923.30 dollars is identified as relating to the shipment on the *Henrik* by a document contained put in by the claimant. On the 10th March 1916, one of Neumond's letters to the New York house contains this passage:

Henrik: Your report regarding the ship will be communicated by K. Neumond personally to McNear. We certainly were not aware that the note from the correspondence with the Zentral Einkaufs Gesellschaft that they are not willing to sell the barley at present. From your radio of the 5th March we note that the bills are to be consigned to London. In our answer of the 7th March we informed you that the papers can be sent to London. McNear has so far done whatever we asked him, and we do not think he will leave us in a hole regarding the claim to be made at London.

On the 15th March 1916 they wrote:

Henrik.—We note that you found our cable answer too short. From your cable we thought all we had to answer was if bills should be returned or not. In the future we will try to be more explicit. We have taken this matter up with Mr. Lindheim, of Hays, Kaufman, and Lindheim, and he informs us that the matter must be claimed from—(then there is a blank)—as the stand taken here is that McNear had a contract with Rudolf Larsen, and that he has been paid for his shipments; therefore the title has passed. Please have Simonsson and Hallberg send all possible papers to the Swedish Minister in London, informing him that he should communicate with Hays at the Coburg Hotel, London. Simonsson and Hallberg should write that they have heard that this gentleman was quite successful in these kinds of matters, and therefore they selected him as their lawyer. (This last sentence is simply an excuse for having the matter handled by Hays.) Please send us copies of all papers which are going—(then there is another blank)—to London, and should you desire any further information please do not fail to communicate with us. A cable which we sent to Copenhagen that the bills would be forwarded to London was returned on 13th March, for the reason that the addressee was unknown.

On the 27th Feb. 1916 they wrote:

Unnecessary *Henrik* steamer. You told us only that we were not to return the bills of lading, but we asked you to instruct us generally, which you failed to do. You should try in such cases to put yourself into our place, and so be less laconic, and rather more exhaustive, in your wireless replies. We want to know definitely whether we are to take no steps here, or what we are to do at all. What shall we do as to the bills of lading at the bank? Simonsson and Hallberg have received from the Swedish Foreign Office the letter, a copy of which is inclosed. Simonsson and Hallberg can send the documents it demands, barring the correspondence by cable and letters which ought to prove the price, but which, as we knew, does not exist. To prevent any clashing at Copenhagen with your proceedings we wired to Schues on the 25th Feb. as follows:—"Please radio *re Henrik*; Hugh Murphy, New York. Sweden requests

Simonsson and Hallberg transferring bills contracts to England instruct telegram."

And on the 8th March 1916:

Henrik; Up to now no reply to Copenhagen's radio to Neumond N.Y. of the 25th Feb. has arrived We arranged first of all at Stockholm that Simonsson and Hallberg should receive the inclosed confirmatory letters from the Skandinaviska Kredit Aktiebolaget concerning their payment. We also arranged, in case Simonsson and Hallberg require delivery, that the Skandinaviska Kredit Aktiebolaget should hand over the documents to Simonsson and Hallberg without payment on the part of the Disconto Gesellschaft.

There can be no doubt that these goods were sent with the same intention and to the same destination as those previously condemned, and they must also be condemned as good and lawful prize.

I shall now deal with the case of the *Dirigo*. In this case the Crown asks for the condemnation of the ship as well as the cargo. The goods consisted of 83,048 sacks of barley, the whole cargo of the ship. It was shipped in the name of M. H. Houser on behalf of K. & E. Neumond, and consigned to A/B J. Brunn at Kalmar, and was claimed by the consignees. The claim was made on the ground of a sale to the consignees, and the Crown contended that there was no real sale to them, and that they were only acting under the direction of Neumond. It appears from a number of intercepted messages, which it is unnecessary to set out, that the insurance on this cargo was all arranged in Frankfurt by Neumond, but it was contended that this was not known to the claimants, who had not to undertake the war insurance. In this connection a letter from Neumond, Frankfurt, to Neumond, New York, of the 30th March 1916 is important:

McNear's Contract Form: War risk for buyer's account. As to this point, we are beset by these reflections or questions: If needed, what proof can the buyers bring against England that McNear was instructed to cover war risk, or what have the buyers to show that they themselves covered war risk? If England demands from the buyers proof of premium payments for war risk, where is it to come from? Please let us have the views or decision of Neumond, New York, on this matter.

And also another letter of the 6th April 1916:

A/B J. Brunn is claiming the goods as if the loss really affected him, and E. Neumond had actually sold him the goods on McNear's account, in accordance with the confirmation to Neumond, New York, through E. Neumond. Your brother is giving Brunn the analogous confirmation, so there remains only one gap, and that is the war risk point. Neumond, New York, must get a letter from McNear of the proper date, which must take the place of the war risk policy, in which McNear confirmed that he had covered the barley in Washington, and that premium amounts to—(then there is a blank); that he was not sending the policy with the bills of lading, because, in case of a claim the policy must be in his hands, but that this guarantee letter must be regarded as a policy, and any money coming from the company must be paid to the holder of the guarantee. The . . . also must be mentioned, and then, as far as we can see, there is but one gap, and that is that Brunn has paid nothing for war risk, although in the contract it says: War risk for buyers' account. In the *Prinz Valdemar* case, if it agrees with New York's regulations as to war risk, the policies must be sent to the Skandinaviska Kredit Aktiebolaget for Joh. Kock, or a corresponding confirmation letter, and Kock must still pay the insurance. All this must necessarily be sent by messenger. The marine insurance policy for the *Prinz Valdemar* also must naturally be in Stockholm. Eugen Neumond has returned from his journey to J. Brunn. For the time being, Brunn could not be induced to visit London in person but even without making the trip he will press the case of the *Dirigo*.

On the 22nd April 1916 a letter was written by the Procurator-General in the following terms

I am directed by His Majesty's Procurator-General to acknowledge the receipt of your letter of the 19th April inclosing documents relating to this claim, and to say that he would be glad if you would be so good as to forward all the correspondence relating to the transaction and the marine policy. The Procurator-General will also be glad if you will ascertain by whom the insurance premium was paid, and to see the insurance proposal and premium receipts.

This was sent on to the claimants on the 23rd April 1916, and must have been sent by them to Germany, for it was forwarded in cipher by Neumond, of Frankfurt, to Neumond, of New York. Incidentally this gave Mr. Gaskoin an opportunity of verifying the correctness of his deciphering, for on discovering that the letter forwarded in cipher was one written by the Procurator-General, he obtained a copy from his office and so ascertained that it was correctly deciphered. The claimants, in answer to the letter from the Procurator-General, sent certain documents and explanations in a letter of the 3rd May. They say:

We are in receipt of your valued letter of the 23rd April, and do ourselves the honour to send you inclosed our correspondence with E. Neumond, of the firm of K. and E. Neumond, San Francisco, through which firm we bought the barley shipment in question from the firm of G. W. McNear. From this you will obtain further information as to marine insurance and war risk, for which, however, we have no receipt. Ditto you will find inclosed our correspondence with the Disconto Gesellschaft as to the purchase of dollars, also our correspondence with the Skandinaviska Kredit Aktiebolaget, as to covering seller's drafts. Hoping that no objections will be made to these, we renew our request that our goods may be released. If this, however, is not done, we ask that at least half our money may be paid to us, since naturally we have been tied up with our money through this affair.

In due time they received a letter of the 8th May from Neumond, of Frankfurt, in these words

Thanking you for your esteemed letter of April, we have noted your information, but we would venture to ask you in future when composing letters in the *Dirigo* case intended for London, very kindly to communicate with us as to the wording. Please send us a sample and statement of price of the oats (feeding-stuffs?), meal, as well as information as to where the goods are stored.

I cannot on these materials come to any other conclusion than that the claimants were mere nominees of K. and E. Neumond, and that these goods were intended by that firm for the use of the German Government, and they must be condemned as good and lawful prize. It may be noted that these transactions were financed through the Disconto Gesellschaft, of Berlin.

I now come to the cases in which there are claims which present much greater difficulties. Speaking generally, they present these differences from the cases with which I have so far dealt. With one exception they are concerned with

feeding-stuffs as distinguished from foodstuffs, and they are not financed by the Disconto Gesellschaft or other German banks, and the Guaranty Trust Company, which was concerned in the other cases, does not seem to be concerned with these. The first with which I propose to deal is that of the *Hallingdal*. This consignment consisted of a cargo of 25,441 sacks of cotton seed cake shipped by K. and E. Neumond to Eriksen and Christensen, of Nörresundby. The claimants were Peder P. Hedegaard and Hans P. H. S. Larsen. Hedegaarde bought the cargo from Ericksen and Christensen on joint account with Larsen, and they alleged that they had bought it for sale and use in Denmark.

Complaint has often been made in this court that claimants do not in their evidence give full information as to the transactions in question. In this case they cannot complain on the ground of quantity, for the claimants have filed close upon 500 pages of affidavits and documents in support of their case, containing, so far as I can see, the communications between all the parties concerned in the business. It would be idle to examine this mass of documents in detail; they show all the little differences and negotiations between the various parties that would naturally arise in a genuine transaction, and it was not denied that on the face of them they showed a *bonâ fide* case and supported the claimants' claim. It is the fact that documents have been fabricated for the purpose of deceiving this court, but they have not been of the nature of this correspondence, and although it may be conceivable that it might have been fabricated, it is so improbable as to be hardly worth considering. It must also be considered that there is nothing but the character of Neumond, the shippers, which in any way contradicts or throws doubt upon the claimants' case; there is nothing incriminating in the intercepted documents and no suggestion of a connection of the claimants or their vendors with contraband transactions is suggested by the Crown. I have no hesitation in accepting the claimants' evidence, and therefore I find that these goods were bought for neutral consumption and had no enemy destination. There remains a question as to whether they still continued, according to prize law, the property of the enemy firm of Neumond, and as this is a point which arises with regard to many other shipments, I defer its consideration for the present.

The next claim is in respect of shipments on board the *California*, and in some of these cases, as in several others, the claimants had been paid by their underwriters. An application was made to me to add the underwriters as co-claimants or to substitute them. This was opposed by the Crown as unnecessary, because this court would not take notice of the claims of underwriters. There was no evidence in any of the cases that any enemy underwriters were concerned, and I do not think it necessary that the underwriters should be joined. I think that, if it were necessary, an order should be made so joining them.

There are four parcels in question shipped upon the *California*, all shipped in the name of K. and E. Neumond—that is, 619 bags linseed cake to Andersen, 1282 to Pugh and Genkil, 638 to Elkan Wulff, and 350 to Carõe and Co. All these claimants filed evidence, giving full details of the transactions, and there was nothing incriminating in the intercepted documents or in Mr. Greenwood's affidavit. The claim of Pugh and Genkil is made as agents for the Importskompaniet Aktiebolaget, of Kallundborg, who are also claimants of a parcel shipped in the *Bolmen*. Nothing incriminating is suggested against the Importskompaniet. I have examined the documents in these cases very carefully, and I see no reason for doubting their genuineness. I find that in all these cases the purchasers bought *bonâ fide* for use in neutral countries, and that there was no intention to send the goods to the enemy.

The next ship is the *Virginia*, in which there were two consignments, both shipped by K. and E. Neumond, one of 955 bags of peanut cake to Fritz Thosen, and one of 1946 bags to Elkan Wulff. In these cases again the evidence of the claimants seems to me to be satisfactory, and there is nothing in the Crown's case to make me doubt its correctness. I therefore come to the same conclusion—namely, that these goods were honestly bought for neutral purposes and had no enemy destination.

The next shipments are those in the *Kentucky*. Six parcels were shipped on this vessel, all in the name of Spencer, Kellog, and Sons, for K. and E. Neumond, three of 700, 614, and 700 bags of linseed cake respectively, consigned to the Baltic Company, of Copenhagen, 350 bags to Johan Christiansen, 350 to the Sydjydsk Korn och Foderstoff Kompagnie, and 1400 bags to Niels Gjedde. The first two parcels consigned to the Baltic Company were claimed by Marius Rasmussen, and the third by Einar G. V. Hoyer, in each case as sub-purchasers from the Baltic Company. The evidence in these cases also seems to me to be quite *bonâ fide*, and the claimants, who were purchasers from the Baltic Company, show resales by them which in one case involved the claimant in a payment of damages from failure to deliver. There may have been some doubt about the position of the Baltic Company, but I do not think it affects the claimants, and I do not think an enemy destination is proved.

In the other three consignments by this vessel the consignees are the claimants. I accept their evidence also. It has all the appearance of being genuine, and there is nothing in the Crown's case to throw any doubt upon it. In some of these cases also re-sales have been made and claims for damages had resulted.

The next cases are two shipments of 2358 and 2028 bags of buckwheat in the *Gerd* and *Urna* respectively. They were shipped in the name of Huffman, but really on account of Neumond, and consigned to the Aktieselskab de Danske Spritfabrikker of Copenhagen, who were the claimants. These shipments, though on two ships, were made under one contract effected by the claimants through Pugh and Genkil, with Christensen and Schrei as agents for Neumond. The intention originally was that the whole should be shipped on the *Gerd*, but afterwards part was shipped on the *Gerd* and part on the *Urna*. The reason for the purchase given by the claimants was that at that time only imported grain could be used for distilling, which was their business. There is nothing against the purchasers or their agent, and nothing incriminating in the Crown's evidence, and I see no reason to doubt their evidence.

On a later voyage of the *Virginia* than that already dealt with, 3635 bags of cocoanut cake were shipped by Neumond under the name of the Gorgas Pierie Manufacturing Company to Eriksen and Christensen, who claim it. In this case also I see no reason to doubt the claimant's evidence.

On the *Bolmen* there were two parcels shipped, one of 1814 bags of rape cake shipped to Elkan Wulff, and one of 900 bags to the Importokompaniet, of Kallundborg. The shipments were made in the name of Newman Brothers and Worms, but really by K. and E. Neumond. The goods were claimed by the consignees, who were also claimants in cases with which I have already dealt. The documents produced by them in these cases, as in the others, seem to me to be genuine, and I accept the claimants' evidence.

It will be seen that these cases present several similar features. In most of them the goods consigned are comparatively small lots of feeding-stuffs, such as would naturally be bought by persons carrying on the business of the claimants for their ordinary legitimate trade. Though no doubt feeding-stuffs would be useful and acceptable to Germany, there is no statistical case of excessive imports into Scandinavia made in respect of them as in respect of foodstuffs, and all the finance of the transactions is carried out through Scandinavian banks, while the Disconto Gesellschaft and the Guaranty Trust Company, who are so prominent in the cases of contraband shipments, do not appear in any way in these cases. In all of them, too, there is nothing incriminating in the intercepted documents or in the history of the claimants so far as the Crown has ascertained it. It is true that in many of the cases the shipments, though really by Neumond, are made in other names, but often this was not known to the claimants till some time after the contracts had been made, and in any case that fact does not, in my opinion, prove any bad faith on the part of the claimants.

The case of the shipment to the Baltic Company on the *Florida* stands on a different footing. In the first place, it is a shipment of wheat flour and not of feeding-stuffs, and therefore the statistical case is applicable to it, and shows a large import of foodstuffs into Scadinavia for the purpose of being forwarded to Germany. Then, though I do not attach much importance to it, there is no formal contract in this case, but the agreement is contained in letters. Again, the transaction does not go through in the ordinary way. The sale was c.i.f., and yet the purchasers insured against war risk.

This they say they did because they wanted the goods to be insured against risks of every kind. This could not be carried out in America, and therefore it was done with Danish underwriters in the Danish War Insurance on account of the sellers. In accounts sent by Neumond, Frankfurt, to Neumond, New York, in Feb. 1916, there are entries which in the absence of explanation seem to refer to this case. They are under the head debit, and are as follows :—Baltic Company, Copenhagen, M.7260.35; Advance Insurance, Florida, M.1537.20; Marine Insurance, Florida; M.595.35; These entries are referred to in a letter between the same parties in the following way. They are followed by the entry of a certain number of marks against K. Neumond's securities account No. 1, New York, and the letter is :

> The K. Neumond Securities Account 1, New York was founded by Neumond, Frankfurt, on the 31st Oct. 1913, and notified to Karl Neumond on the 18th Nov. 1913. It consisted of shares bought for Karl Neumond at Newman Brothers and Worms. Newman Brothers and Worms were credited for the same in Neumond's, Frankfurt, books under the 31st Oct. 1913, the amount being debited to the securities account 1. All payments made to Newman Brothers and Worms on the part of Neumond, New York, were regularly debited to Neumond, Frankfurt, so that Neumond, Frankfurt, must certainly have paid for the shares.

As this was a transaction of their New York house, which in its result would affect the head house in Frankfurt, it would have to be taken into account between the two houses in some way, and it was contended by the claimants that the explanation given by the Crown, namely, that these entries show that the Frankfurt house had found the money for the claimants was incorrect.

Mr. Morch, a director of the company, in his affidavit, said he was unable to understand why these entries should have been made, and that he could only conjecture that they arose out of the financial relationships of the two firms, which does not throw much light on the matter.

In the circumstances I thought it right to grant the application of the claimants for an adjournment to enable them to give some explanation of the entries, and to communicate with Neumond, of Frankfurt, for that purpose. On the adjourned hearing no further explanation was given, and as the claimants' case is a *bonâ fide* sale to them for neutral purposes, I cannot see why these entries should be made. I cannot say that I think the claimants have proved their case, and I do not think they have shown that Neumonds were not directing the transaction. If they were, I cannot doubt that the goods were intended for Germany, and for the use of the Government or armed forces, and there must be a judgment of condemnation, with costs.

Since the adjourned hearing a telegram has been produced to me in which the claimants state that an affidavit sworn by their manager is on its way. They state the contents of the affidavit shortly as being that there was a sale to them paid out of their own money, and that no part of the money so paid was repaid by K. and E. Neumond. It also states that their manager has seen the entries and can give no explanation of them. I will treat the matter as if I had that affidavit before me, and it does not seem to me to clear up the matter. Assuming that from the nature of the accounts between the two houses it was necessary to bring into account the value of the goods, this reasoning does not apply to the entry as to their war insurance. On the claimants' case this was paid by them, and neither Neumond of Frankfurt, nor Neumond of New York, had anything to do with it and yet it appears debited by the one to the other in an account which according to the passage from the letter I have read, deals with payments made by one house on account of the other, and therefore *primâ facie* represents a payment made to the claimants for war insurance on this parcel. I think this affidavit leaves the claimants' case still unproved.

An important question was raised by the Crown as to the right order to be made if the property still remained in K. and E. Neumond, an enemy firm. It was contended that in that case the goods should be condemned as prize, and the ground of the contention, as I understand it, was that under the Declaratian of Paris enemy goods carried under a neutral flag were still liable to condemnation, even if not contraband. It was argued that the Declaration of Paris was made in the interest of neutrals, and that they alone acquired any rights under it, and therefore its only effect was to give the neutral shipowner a right to complain of the interference with his voyage by the seizure of the enemy property. He is still subject to the rights of search, and according to the argument the enemy goods may still be seized and be taken from his ship, and as this is a legitimate exercise of a belligerent's rights it is difficult to see what advantage is gained.

I doubt very much whether this point is really open to me, as it has been dealt with by the Privy Council in the case of *The Hakan* (*ubi sup.*). In that case Lord Parker said: "It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture, unless it consisted of contraband goods. See the Declaration of Paris.

"The cargo owners did not appear or make any claim in the action, although according to the usual practice of the Prize Court even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothenburg. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in Council. Under these circumstances the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship."

This is no doubt only a dictum and not necessary for the decision of the case, but it is a considered dictum of the Privy Council, and I should probably consider myself bound to follow it even if I did not agree with it. I wish, however, to say that, speaking with all respect, I entirely agree with it. I failed to get any satisfactory answer from any of the counsel for the Crown to the question: If their contention is right, what is the practical effect of that section of the Declaration of Paris?

Again, if that contention is right, a very great number of orders made by the late President and by myself, following his decisions in which under the Reprisals Order enemy property was ordered to be detained with a declaration that it was enemy property, were entirely wrong, and orders for condemnation should have been made. All these orders were made at the instance of the Crown. It is also difficult to see the utility of making the Reprisals Order so far as enemy property is concerned when there is no enemy destination. Those orders gave rights to detain such property; but if the argument of the Crown was sound, they were already liable to the greater penalty of condemnation. These considerations, however, may be said to be only matters of prejudice, and it was argued that the point may be a good one, though the Crown had accepted a lower right in previous cases.

The contention seems to me to be opposed to the plain words of the Declaration of Paris. In order to accept it the words must be read something in this form: "The neutral flag covers enemy goods so far as concerns the interest of the neutral shipowner." I can find no such limitation. There may, of course, be a practical difficulty in the enemy owner appearing to assert his rights, but that difficulty is to be dealt with by Lord Parker in the passage which I have already read from *The Hakan* (*ubi sup.*). The contention also seems to me to be entirely contrary to the history of the matter. This is shortly stated in Hall's International Law, 7th edit., p. 751, and shows that the whole dispute was whether enemy goods in neutral ships should or should not be liable to seizure. The Declaration of Paris, by its lengthy preamble, states that it was intended to settle the long-standing dispute, and it could only be settled by an agreement that such goods should or should not be so liable. In my opinion the meaning is that such goods should be exempt from seizure, and if such was not the meaning I can see no practical use in the Declaration at all. I am told that the point was argued before the late President in a case in which judgment was not delivered, but until that time it does not seem to have occurred to anyone.

Assuming, therefore, that these goods still remained enemy property, no order of condemnation can be made, as I have found that they had not an enemy destination, and therefore they did not fulfil the condition which would make them contraband. I do not accept the argument that to make them contraband under the Declaration of Paris it is sufficient that they should be on the list of conditional contraband. If the condition is not fulfilled they are not contraband.

In the circumstances now existing with regard to hostilities, the question of detention is not a very important one, but I think it well to examine whether these goods did still remain enemy property. This depends upon whether the doctrine of prize law that property cannot pass from an enemy during transit applies to these cases.

They divide themselves into three classes: (1) Where the goods were shipped upon a vessel chartered by the purchaser and payment was made and all documents handed over before the vessel sailed, the contract being f.o.b. and payment to be made against documents at the port of loading; (2) where the goods were shipped on a general ship, not chartered by the purchaser under a contract f.o.b. including freight and insurance, payment against documents at the port of loading, or c.i.f. with the same provision as to payment, and payment was made and the documents handed over before the vessel sailed. In all cases war risk was excluded, and was on account of the purchaser, but this is not material; (3) where the same conditions existed and payment was not made and the documents were not handed over till after the ship sailed because of the accidents of business and not because there was any intention to reserve the right of disposition. If the documents were retained with such an intention I think that the property would not pass till after

the transit had begun and the prize rule would apply.

The only case of the first class is that of the *Hallingdal*. In my opinion in this case the prize rule does not apply. The intention of the parties clearly was that the property should pass before the ship sailed, and municipally it undoubtedly did pass. Two reasons for the prize rule were given in an often quoted passage from the judgment of Sir T. Pemberton Leigh in the case of *The Baltica* (*ubi sup.*): "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 seems 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 so likely to be merely colourable, to be set up for the purpose of misleading or defrauding the 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 the 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."

This was cited with approval by the late President in the case of *The Southfield* (*ubi sup.*). In my opinion neither of these two reasons applies to this case. The ship had not incurred the risk of putting to sea when the property passed, and in the judgment in *Turner* v. *Liverpool Dock Trustees* (*ubi sup*) I find this passage: "There is no doubt that a delivery of goods on board of the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery." Here the ship was the purchaser's own ship for the time, and the seller, so far from imposing special terms restricting such delivery, had handed over all the documents and given complete control to the purchaser before the vessel sailed. It was, however, argued that the transit began at the seller's warehouse, and the place, wherever it was, from which the goods came; and the case of the *United States* (*No.* 2) (*ubi sup.*) was cited in support of this view. The circumstances of that case were so different and this point so clearly not present to the learned President's mind, that I do not consider it as an authority. I do not lay it down as a general proposition that the transit can never begin till the vessel sails (the circumstances of each case must be considered), and in this case I think it did not. The words "Before shipment" in Pratt's Story at p. 64 were also pressed upon me; but the same passage speaks of "during the voyage and *in transitu*," and the learned author was evidently dealing with a case in which the shipment was for the purpose of sending the goods on the voyage before the property had passed. In the case of the *Hallingdal*, therefore, I think there must be an order of release.

The second class of cases is not so strong, as in them the vessel was not chartered by the purchaser, but was a general ship in which the seller had engaged room. See the case of the sailing vessel *Parchim* (*ubi sup.*). In such a case, however, the master who signs the bill of lading becomes a bailee for the person named in it—in these cases the purchaser—unless there is something to show that such was not the intention.

In these cases the clear intention of the parties was that the property should pass to the purchaser before the ship sailed, and that from the time of its passing the goods should be at the risk and under the control of the purchaser; and when payment was made and the bills of lading handed over the enemy seller had no more concern with them. This took place while the vessel was still lying in the neutral port, and although the cases are not so strong as that of the *Hallingdal*, I think the same reasoning applies, and that these goods also should be released.

The third class of cases is the most difficult of all, and it is one on which I have had great doubts. In one case it arises in a very marked way—namely, in the shipment by the *Urna*. As I have pointed out, this shipment was made under the same contract as that by the *Gerd*, and the whole quantity was intended for shipment on one ship, but afterwards made on board two for convenience. In the case of the *Gerd* the documents were handed over and payment was made before sailing in the case of the *Urna* after the ship had sailed, and it is difficult to think that under the same contract the property was intended to pass in the one case and not in the other. In this case, as in all the others in which the documents were not handed over until after sailing, they were not withheld by the shipper with any intention of reserving the disposition of the goods, in which case the property would not pass until they were handed over, or even of maintaining a lien. The explanation is given by Mr. N. Morch, managing director of the Baltic Company of Copenhagen, who, in his affidavit, says:

> It is our practice through our bank in Copenhagen to provide a credit with a bank at the port of shipment, which latter bank pays for the goods and receives the documents on our behalf and forwards them to our bank, which in turn receives and holds them on our behalf, debiting us with the amount paid. We usually leave the documents with the bank until the goods arrive, when they are handed over to our buyers against payment by them. It was because in the case of the *Florida* we desired to have the bills of lading before the goods arrived that the bank were asked to lend us the bills of lading as mentioned in Mr. Jurgen's affidavit.
>
> My business experience enables me to say that when a credit is provided shippers are in practice content to put the goods on board on the faith of the credit, knowing that when the bills of lading are signed they have only to present them to the bank in order to obtain the money. Moreover, when a credit is provided it is not necessary even as a business precaution that the documents should be presented before the ship sails,

because the money is available, whether the documents are presented before or after the date of sailing. It often happens that the ship sails so soon after the goods are shipped that, although the documents are presented and paid in due course of business routine, they may not be actually paid until after the ship sails; but the obligation to pay them exists from the time the cargo is loaded and the goods are at the risk of the buyers from that time. On the other hand, the buyers are entitled to demand the delivery of the documents on tendering the contract price.

In these cases also I have come to the conclusion, though with great hesitation, that, as the documents were not handed over before the vessel sailed, from the accidents of business and not with any intention of reserving a disposition, they stand upon the same footing as the second class, and that the goods must be released.

The question of when the property passes is one of the intention of the parties, and I think that here the intention was that it should pass when the goods were appropriated to the contract by putting them on board the ship, and that the master from that time held the goods as bailee for the person named in the bill of lading, and that therefore there was delivery.

I think that this is also indicated in some cases by the contract being f.o.b., though qualified by including c.i.f. or f.o.b., but if this fact stood by itself, I should attach little importance to it.

These cases seem to me to differ from those in which the ship sailed with the goods still the property of the enemy and the transfer took place at sea, and, to be more analogous, to those mentioned in the case of *The Baltica* (*ubi sup.*) of sales in a neutral or enemy port; though I think the court was there alluding to sales completed before shipment. I mention, to show that I have not overlooked it, the argument that transactions like these may be merely colourable or fraudulent sales. That is true; but the same argument would apply to such sales as are mentioned in the case of *The Baltica* (*ubi sup.*) in a neutral or enemy port. Every sale, wherever made, may be fraudulent or colourable, and would then be disregarded; and these are no more open to that consideration than others, and stand on a different footing from sales made in property passing when the goods are at sea and no delivery can be made.

In all these cases, therefore, except those in the *Alfred Noble*, the *Björnstjerne Björnson*, the *Fridland*, the *Dirigo*, and the *Florida*, I make orders for the release of the goods. But there was clearly very good reason for bringing the cases before the court, and I make no order as to costs in respect of them.

The only remaining question is whether the ship *Dirigo* is liable to condemnation. She was owned by G. W. McNear, Inc., and was claimed by them. If my judgment as to her cargo is correct, the whole of it was contraband, and the Crown asked for her condemnation on that ground alone, according to the judgments of the late President in the case of *The Hakan* (*ubi sup.*) and the *Maracaibo* (*ubi sup.*).

In a judgment of mine lately delivered I expressed the opinion that in view of the judgment of the Privy Council in the former case (*The Hakan*, *ubi sup.*) I thought it well not to act on that contention but to examine whether there was knowledge on the part of the owner of the nature of the cargo, and I propose to adopt that course in this case. I hope that in some case the question whether, irrespective of knowledge, the fact that a large proportion of the cargo being contraband, and, if so, what proportion, is a ground of condemnation of the ship, may be decided by the final Court of Appeal.

There are in this case other circumstances to be considered. In the first place the cargo on the *Dirigo* at the time of shipment still remained the property of McNear, Inc., the owners of the vessel, and this was held in the case of *The Neutralitet* (*ubi sup.*) to be an important circumstance. In the case of *The Hakan* (*ubi sup.*) Lord Parker, referring to the case of *The Neutralitet* (*ubi sup.*), says: "It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation; but this rule was subsequently modified. Lord Stowell deals with the matter in the case of *The Neutralitet* (*ubi sup.*). 'The modern rule of the law of nations is, certainly,' he says, 'that the ship should not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such 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 policy of modern times has, however, introduced a relaxation on this point; and the general rule now is that the vessel does not become confiscable for that act. But the rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one.' It is to be observed that Lord Stowell does not say that the particular cases to which he refers are the only exceptions to the modern rule. On the contrary, his actual decision in the case of *The Neutralitet* (*ubi sup.*) creates a third exception. It should be observed, too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship."

I am not quite sure that this passage applies fully to a case where the shipper has sold the goods to a purchaser who has the full control over them, and the goods only remain his because the documents have not been presented and the property has not passed.

Again, the shipment was made in the name of M. H. Houser, who had no interest in the goods, and was paid by McNear for the use of his name. This of itself would perhaps not be very important, but McNear also persuaded Houser to make an affidavit that the goods were his property, and included that affidavit among the ship's papers. McNear's explanation to Houser that as the shipments were made in his name he was the owner until he received payment is entirely unsatisfactory, for Houser had no payment to receive except that for the use of his name. The *Dirigo*, too, was not the only ship owned or chartered by McNear in which contraband goods were carried. The *Dunsyre*, which

sailed in April 1915, was captured in all probability collusively by the Germans in July, and the cargo delivered to Neumond of Frankfurt and the ship released. In the course of a dispute as to whether some allowance should be made in respect of freight by reason of the *Dunsyre* having discharged at a port other than Stockholm McNear on the 23rd Nov. 1915 wrote as follows:

Dunsyre. We have replied to this in our previous letters. We regret we cannot meet your friends over the discharge of the vessel in a different port. Quite apart from the legal point of view, the fact of this vessel having discharged in one of their own ports must have saved them a lot of money in the way of transhipping charges, &c., amounting to far more than the 6*d.* they claim from us. Besides, you might make it clear to your friends that we are doing all in our power to help them, and that they should appreciate this. No doubt if you explain matters in this light to them they will drop this claim, which is founded on "red tape" only and not on common sense.

In another letter, dated the 4th Nov. 1915, McNear wrote to Messrs. K. and E. Neumond:

Dunsyre Accounts. We have gone carefully into the statement that you sent us under the date of the 5th Oct. The exchange on the freight was figured at 4.80, as per contract, and freight deducted accordingly. Your debit note, therefore, is not in order, and we cannot accept it.

As to the 50 cents per ton less there is nothing in our contract with Du Rietz to this effect, and while it was understood with you that if the destination was other than Stockholm the price was to be reduced 50 cents per ton, this meant within the usual range as per charter-party. The cargo was cleared for Stockholm, and simply because the Germans captured the vessel and took her to Swinemunde is no concern of ours, and we decline to recognise any claim on this account.

The *Andrew Welch* was prevented by the Swedish authorities from reaching Germany, or being captured, but 90 per cent. of the cargo reached Germany. The *Prinz Valdemar* was captured—again, in all probability, collusively—and the cargo delivered to Neumond of Frankfurt. The ship was released and sold by McNear to the Zentral Einkaufs Gesellschaft. The *Henrik*, with which I have dealt in an earlier part of this judgment, was intercepted, and in a letter from Neumond of New York, to Neumond of Frankfurt, of the 10th March 1916, there occurs this passage:

McNear has so far done whatever we asked him, and we do not think he will leave us in a hole regarding the claim to be made in London.

The same letter shows that McNear was there discussing a number of shipments made on behalf of Dr. Albert with Karl Neumond, who was then in San Francisco. There are a number of letters which it is not necessary to set out in detail, in which McNear makes use of the common mercantile expression "your friends" in a context which points to his knowledge of these friends concerned in the transactions being Neumond of Frankfurt, and many of these occur in letters in which an option is given to these friends to buy the *Dirigo* at the conclusion of her voyage. Instructions were given to the master of the *Dirigo*, which are, to say the least, suspicious. I will quote some of the letters. On the 24th Aug.—this is, I think, an instruction not to the *Dirigo*, this is to the *Andrew Welch* or to the steamers generally—

In *re* route to take by steamers. We shall try to bear your instructions in mind for the future.

That is written by McNear to Neumond. Then on the 26th Aug. 1915 Neumond wrote:

Dirigo. After having worked rather hard on this proposition, we have wired you last night as per inclosed copy. We have a good chance to place this sailing vessel now, but our friends want mainly feeding articles, and neither beans nor wheat nor flour. If we cannot get any cake or so, we may decide to ship barley only. We hope that you can get the vessel firm, and we should like to see it shipped in the name of Houser, with whom we understand you are in close touch. Your firm offer for this cargo is expected in the course of the day. We have sent you a wire in answer to your night letter as per inclosure.

On the 21st Sept. 1915 McNear wrote:

Dirigo. We are expecting advices daily of her arrival at Port Townsend. Our surveyor has gone north to meet her, and we hope to get the cargo loaded and the vessel on the way without delay. We note buyers' names as given in your letter of the 17th Sept., and are making contracts accordingly.

On the 9th Nov. 1915 McNear wrote:

Dirigo. We inclose copy of letter to the master as desired. As regards option on this steamer, seeing that it will be another four months before she arrives on the other side, there is plenty of time to discuss the matter later on, for you quite understand the value of the ship will fluctuate a great deal during that period. If your friends were prepared to buy the vessel right now, we could no doubt come easily to an understanding.

Finally, on the 9th Nov. 1915 McNear wrote to to Captain W. M. Mallett, Master, American ship *Dirigo*, as follows:

Dear Sir,—The bearer of this, who is at the same time the owner of the cargo and who will indemnify himself by producing the bills of lading, may ask you to proceed to a port beyond Kalmar, as the bills of lading recite, and, in any case, you may act in accordance with his instructions reporting to us upon your final arrival, the cargo to be discharged upon surrender of the original bills of lading.

This last letter was handed to Neumond, though the alleged purchaser of the cargo was J. Brunn. In this case also I granted an adjournment in order to give the claimant a further opportunity of meeting the case for the Crown, and he filed two further affidavits; one only set out some letters about the *Dunsyre*, the other was mainly a protest against the admission of hearsay evidence, and also denied some allegations as to two persons of the names of Weissmann and Koppel. As I have not based my judgment in any way on these allegations they are immaterial, and the principle that this court in matters of prize is not bound by the ordinary rules of evidence has been too firmly established for a long time to be now questioned.

I think the facts which I have stated point clearly to the conclusion that the claimants knew quite well that these goods were contraband intended for Germany, and that the *Dirigo* must be condemned as good and lawful prize with costs.

[The effect of this judgment was that property, including the value of the *Dirigo* and her cargo, was condemned to the value of about 232,480*l.*, and property to the value of about 50,360*l.* was released.]

April 30.—Application was now made on behalf of the claimants in respect of the released goods on the *Hallingdal* for interest. The goods were seized on the 21st Dec. 1915 and sold by order of the court in March and April 1916. The claimants had paid for the goods in Nov. 1915, a month before their seizure.

Sir *Erle Richards*, K.C., and *Balloch* for the claimants.—The claim for interest ought to be allowed. The Crown had had the benefit of the use of the amount of the proceeds of the sale of the goods for three years. This was profit which really belonged to the claimants. The late President had given it as his opinion, though the point had never been actually decided, that when an order was made for the release of goods which had been seized interest should be paid by the Crown: (see *The Kronprinz Gustaf Adolf*, *ubi sup.*).

Clement Davies for the Procurator-General.—No general principle had been laid down by the late President in the case cited, and there was no authority for the contention of the claimants. There was no justification for the continuation of proceedings in the case of *The Kronprinz Gustaf Adolf* (*ubi sup.*) after a certain date, and what was really awarded to the claimants there was not really interest but damages. The case of the *Hallingdal* was different, as there had been a specific finding that the case was one in which the Crown was justified in bringing the whole matter into court.

Sir *Erle Richards*, K.C. in reply.

THE PRESIDENT.—I do not think that I ought to make any order in this case. I confess that some of the language used in *The Kronprinz Gustaf Adolf* (*ubi sup.*) seems to show that the late President meant to lay down a rule that wherever the Crown had had the benefit of the money they ought to pay interest to the claimants when an order for release was made. But I do not think that he did intend to lay that down as a general rule, and I cannot see that to do so is in any way consistent with the numbers of orders which have been made for the release of goods by this court without payment of interest. The late learned president certainly thought that in the case of *The Kronprinz Gustaf Adolf* (*ubi sup.*) the Crown had gone further than they ought to have done, but it was not on that ground that he gave interest. I do not think that he gave interest by way of damages, but he gave interest because he thought that in all the circumstances of the case there was such a hardship upon the claimants that he ought to do something to mitigate it, and he mitigated it by giving interest on the money. It is by no means clear that the claimants in this particular case may not be in a very much better position through the sale of these goods with the proceeds paid into court than they would have been in otherwise. It does not follow that if the goods had been retained they would necessarily have been worth as much at the time of their release as at the time of their seizure.

In this case the question whether the goods ought or ought not to be released was a difficult question, which the Crown had a perfect right to have investigated by the court; and I see no reason why the claimants should be placed in a better position than they would have been if the goods had still remained in specie. They would then have had no claim for compensation, although they might have suffered loss. Unless it is to be laid down as a general principle that, whenever goods are sold and the money comes into the hands of the Crown, and an order for release is afterwards made, the claimants are to have interest on the money because the Crown has had the use of it, there are no special grounds in this case for allowing interest. I do not think that any such general rule can be laid down, and I think that the whole of this matter is governed by these words which are contained in the judgment of the late President: "It is to be regretted that the claimants have suffered inconvenience and loss, but these consequences are in such times often unavoidable. While I cannot give them damages for capture without lawful cause I deem it right, having regard to all the circumstances, to make an order which will mitigate their loss to some extent."

I do not think that there are any circumstances in the case of the *Hallingdal*, which is now before me, which would make it right for me to order compensation by way of interest upon the money released. I therefore refuse to make any order.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche*; *Thomas Cooper* and *Co.*

May 9 *and* 12, 1919.

(Before Lord STERNDALE, President.)

THE DÜSSELDORF. (*a*)

Prize Court—Neutral territorial waters—Three miles limit—Extent of limit—Capture within territorial waters—Violation of neutrality—Absence of intention on part of captors—Miscalculation of distances—Release of captured vessel—Right to damages and costs—Discretion of court.

A German steamship was proceeding with a cargo of iron ore from N., in Norway, to E., in Germany, and whilst on her voyage she was captured by an armed British naval vessel which was patrolling off the coast of Norway. The seizure took place within three miles of the coast line of two small islands which, although some distance from the mainland, were connected with the mainland at low water. The Norwegian Government claimed the release of the vessel and her cargo on the ground that the capture had been made within neutral territorial waters and that there had therefore been a violation of Norwegian neutrality.

Held, that, as the two islands were not disconnected from the mainland at low water, the three miles limit allowed by international law must be measured from their coast lines, and that an order must be made for the release of the German vessel and her cargo on the ground that there had been a violation of neutrality by the seizure having taken place in territorial waters.

Held, also, that as the officer in command of the British naval vessel which effected the capture had made a miscalculation, and that as the seizure had been made under misapprehension and mistake and without any intention of violating territorial waters, the court, in the exercise of its discretion, would make no order for damages or costs.

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

THIS was an action in which the Crown asked for the condemnation of a German vessel, the *Düsseldorf*, and her cargo, and the Norwegian Government asked for the release of the same on the ground that the vessel was seized within Norwegian territorial waters.

The *Düsseldorf*, a German steamship, was captured by H.M.S. *Tay and Tyne* off the coast of Norway on the 22nd Feb. 1918. At the time of her capture she was on a voyage with a cargo of iron ore from Narvik to Emden, and the seizure took place at Buholmerassa, near Trondhjem, and the main question in the case was whether the capture was effected within the territorial waters of Norway. In addition to the claim for the release of the vessel and cargo, the Norwegian Government put forward a claim for damages and costs.

The *Attorney-General* (Sir Gordon Hewart, K.C.), *Butler Aspinall*, K.C., and *Raeburn*, K.C. for the Procurator-General.

Sir *Erle Richards*, K.C. and *Balloch* for the Norwegian Government.

The following authorities were cited:

The Twee Gebroeders, 3 Asp. Mar. Law Cas. 237; Roscoe's English Prize Cases, vol. 1, 286; 3 Ch. Rob. 162;

The Anna, Roscoe, vol. 1,499; 5 Ch. Rob. 373.

The PRESIDENT (Lord Sterndale).—In this case the Crown is asking for condemnation of a German vessel, the *Düsseldorf*, and her cargo, and a claim is put in which is described as the shipowner's claim. That is a mistake. It is not in reality the shipowner's claim. It is a claim on the part of the Norwegian Government on the ground that the seizure of the vessel was made at any rate partly within the territorial waters of the Norwegian Government, and by that they mean in this case within three miles of the Norwegian land, whatever that may be. The Norwegian Government has claimed that their territorial waters extend to a distance of four miles; but in this case they do not press that claim, and without giving it up in any way in principle they content themselves with asking in this case for the release of the vessel and for damages and costs, because the seizure was made within the three miles limit.

The capture was a capture of s German vessel called the *Düsseldorf* by a British vessel called the *Tay and Tyne*, which was what is called a Q-boat. She was to ordinary observation a merchant ship, but she was in fact an armed naval vessel, and she was cruising off the coast of Norway on the 22nd Feb. 1918, in command of Lieutenant Mack. He had been on deck in the morning, but had gone below, and it was reported to him that there were some vessels in sight. He went on deck, the *Tay and Tyne* being then on a course S. 43 E., and making about eight knots; and he saw two vessels which were crossing one another or approaching one another, one going to the north and one going to the south. The one going to the south was the *Düsseldorf*, and he followed her. She was about seven or eight miles off, and bearing about E. In order to intercept her, he altered his course when he was about two miles from her. The *Düsseldorf*, being deceived, I suppose, by the merchant ship appearance of the *Tay and Tyne*, hoisted the German flag, whereupon the *Tay and Tyne* hoisted the White Ensign and gave the signal to stop. Lieutenant Mack says that at that time the *Düsseldorf* was about on the same course, which course he took to be about S.W. If she had made any substantial alteration, it would have altered her bearing from him, and he would have observed it. As she did not take any notice of his signal to stop, he fired a shot across her bows, and she then stopped. He passed under her stern and came up inside her about 100 yards off, and there he took a three-point bearing, which is of importance in this case.

The story told by the *Düsseldorf* is that she was coming down the coast; that she was keeping what is called the inner lead, *i.e.*, keeping well in to the coast, and her pilot says that they had been doing that because they had instructions to keep within territorial waters, and within what the British would recognise as territorial waters; that coming down in that way she came to a group of rocks called Grundene. She passed along at a distance which the witnesses have variously stated as from a cable to a mile of the Grundene Rocks, that she altered her course under starboard helm three or four points, and came through a channel marked on the chart between the Grundene Rocks and some rocks which are called Sorskythlen, and that brought her course to a little to the eastward of south, and she then continued on that with the intention of going through what is called the Buholmeraasa Channel, that being part of the continuation of what is called the inner lead. Now, if these courses were followed, the result of that would be to bring her very much farther inshore and nearer to the coast than the position which is marked by Lieutenant Mack; and I may say the position as marked on the chart is agreed to on both sides as representing the position which his bearings would give.

I do not accept that story told by the *Düsseldorf*. I do not know that it is necessary to go into many details, but there are indications on the multiplicity of charts that have been put before me that that is not the ordinary way in which a vessel going through the Buholmeraasa would navigate. When the witness who said he went to the east of Sorskythlen first gave evidence, I had doubt about it, and these doubts have certainly been made graver by an examination of the different charts and the courses different persons (I do not know whom) have put on them. I think that she was coming down the inner lead. I think probably the explanation is that she went outside the Grundene, because the marks at the north port, if she was coming inside, are not very good; but I do not think that she altered substantially, in the way she says she did, to port to come through the channel between Sorskythlen and Grundene. It does not seem to me the natural way to come. I think what she did was to continue, not exactly in the line marked on the chart, but something down that line to round the south western corner of the Sorskythlen and not to come between the Sorskythlen and the Grundene rocks. I think she was going to the Buholmeraasa Channel, and therefore I think that she was altering to a certain extent—it is difficult to get her exact course down—I think she did alter and was altered to go into the Buholmeraas Channel. Now, coming down in that way would bring her very much nearer to the position marked as her position when taken

by Lieutenant Mack than the course he gave in his account; and I think, although possibly that position may be somewhat too much out, it is in the neighbourhood of where these vessels met. I am inclined to think it very likely that is rather too far out. It is possible that the bearings may not have been quite accurate. I think they were very nearly accurate, and so far as that goes I think that if the position was farther inshore than that which is shown on the marked chart it is for the claimants to establish it.

I do not accept the position which the claimants' witnesses gave, not because I think they are saying what is untrue or intended to be untrue, but because I do not think that their bearings are right. I do not think that bearings are at all to be relied on, though I cast no doubt whatever on the good faith of the withesses who gave them. That being so, although I have some doubt that this position, which is marked on the chart according to the bearings of the British, is rather too far out, I cannot say that it is proved that it is; and I propose to take that therefore as the position. If it were another 100 or 200 yards to the east and south there would be no question in this case, and it would be within three miles of what is indubitably the mainland of Norway, and I am by no means certain it ought not to be farther in, but I take it on the Crown's evidence, and I take it on the position marked on the chart before me.

A witness was called from the Norwegian Navy—Captain Scott Hansen—and this chart was given to him; and he was asked, taking a spot arrived at upon the Crown's evidence as the centre, to say where the three-mile radius would come, and he has described a circle on this chart, and that has not been quarrelled with by anybody. It goes inside a group of islands, one of which is called Buholmen, and it cuts two pieces of land —I do not call them islands, for reasons which I will state directly—Sneisholmen and Rugholmen. They are pieces of land, one of 700 or 800 metres in length, and the other 300 or 400 metres in length. At high tide they are islands —that is to say, there is a narrow passage of water between them and the mainland. At low water that passage is dry, and there is nothing to separate them from the mainland.

The question is, from what place are these three miles to be reckoned. One contention on the part of the claimants was a very extreme contention. I do not decide anything about it, because I do not think that it is necessary in this case; I only say that I do not wish to be taken as accepting the contention that whenever there is a piece of rock, however small, however uninhabited, however uninhabitable, that must also be taken as part of the territory, and the three miles of territorial waters must be measured from that rock, so that if it happens to be 2¾ miles out there will be really a distance of 5¼ miles from what is ordinarily called the mainland. All I say is that I give no opinion about it in this case, because it is not necessary; but I do not wish to be taken as accepting it as accurate.

There was then a smaller contention, if I may use that expression, that at any rate an island such as the one I have mentioned, Buholmen, which is, I think, 300 metres long, is large enough to be part of the mainland. That, again, I prefer to leave over for decision when it is necessary to decide it. But I cannot see my way to saying that two pieces of land which are not disconnected from the mainland at low water, and not separated in any way, are not part of the mainland. If that is so, then, taking the position given by the Crown, this capture—part of the operation of capture at any rate—took place within three miles of the Norwegian coast so defined. It is a very near thing, indeed, whether it was within the three miles of what is indisputably the mainland, with no question of islands or channels sometimes dry. As I have said, it is a very near thing indeed—a matter of about 100 to 200 yards.

Accepting the Crown's case to a full extent, in my opinion part of the operations of this capture took place in Norwegian territorial waters and, therefore, there must be an order for the release of the ship and its cargo.

I ought to say that there are two things that, I think, appear quite clearly in this case. One is this, that it is very difficult indeed to judge on a coast like Norway where the three miles limit does begin, and the other is that it seems to me quite clear that these British naval officers had no intention of violating Norwegian neutrality. In my opinion, they had just got within the territorial waters; but I do not think that they had any intention of doing it, and that they meant to confine their operations outside of territorial waters, and only did not do so by some mistake.

A claim is made on the part of counsel for the Norwegian Government for damages and costs, and I have been referred to certain cases dealing with this matter. Upon the authorities it appears to me that this question of damages and costs is one which is entirely in the discretion of the court, and where a capture has been made through misapprehension or mistake this discretion ought not to be exercised in favour of the claimant of the vessel which has been seized. Under the circumstances I do not think that there are any grounds for awarding damages here. If British ships had been sent with wrong instructions, according to international law, that would be another matter; but the officer here did apparently think that the three miles limit had to be taken from the mainland and not from the islands. I do not know what was the impression formed by him as to Buholmen. What really happened, I think, was that a *bonâ fide* mistake was made. It was fully intended to respect the neutrality of Norwegian waters, but Lieutenant Mack unfortunately miscalculated as to the distance. That being so, I do not think that there is sufficient ground, according to the cases, for ordering either damages or costs.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the Norwegian Government, *Waltons* and *Co.*

May 28, 29, *and* 30, 1919.

(Before Lord STERNDALE, President.)

THE NOORDAM AND OTHER VESSELS. (*a*)

Prize Court—Neutral vessels—Diversion into British ports—Letter mail—Securities—Goods—Seizure—"Correspondence"—Enemy origin—Enemy property—Continuous transit—Duration of same—Right of detention—Order in Council of the 11*th March* 1915*—Reprisals Order, art.*4*—Eleventh Hague Convention, art.* 1.

Bonds, coupons, and other securities of a similar character are goods within the meaning and operation of the Reprisals Order in Council of the 11*th March* 1915*, and the seizure of them under the Reprisals Order as enemy property or goods of enemy origin is not invalid even if they are consigned as "correspondence" by reason of art.* 1 *of the Eleventh Hague Convention. Nothing contained in a reprisals order is invalid provided that it does not impose unreasonable inconvenience or loss upon a neutral.*

Where goods are purchased bonâ fide *by a neutral from an enemy, whether the purchase takes place in the country of the enemy or in the country of the neutral, and the goods are sent immediately from the country of that neutral purchaser to another neutral country, the goods are neither enemy property nor of enemy origin, and the doctrine of continuous transit has no application so as to confer upon the Crown the right of seizure and detention.*

THESE were cases in which the Crown claimed the right to detain certain bonds and other securities which had been seized amongst the mails carried by neutral vessels.

Four Dutch vessels, the *Noordam*, the *Rotterdam*, the *Zaandijk*, and the *Gelria*, whilst on their way from Holland to New York, were met by British cruisers and were diverted to British ports in accordance with the provisions of art. 4 of the Reprisals Order in Council dated the 11th March 1915, which is in the following terms: "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 court may in the circumstances deem to be just." The four vessels carried mails, and, when the mail bags were examined, a quantity of bonds, coupons, and other securities were found and seized. The value of the securities seized was about 100,000*l*. None of the securities were German, but consisted of Japanese bonds, American railroad bonds, and coupons relating to Japanese loans and other securities.

Various claims were entered by a number of neutral persons and neutral firms as to the greater part of these securities, and, as it was alleged by the claimants that they had bought the securities, it was contended that, even if the securities were goods, they were neither enemy property nor of enemy origin, and consequently did not come within art. 4 of the Reprisals Order. It was further contended that as the securities were contained in correspondence the same could not be seized on the ground that correspondence was inviolable under art. 1 of the Eleventh Hague Convention, which is in the following terms: "The postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral or enemy ship at sea is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay. The provisions of the preceding paragraph do not apply in case of violation of blockade to correspondence destined for, or proceeding from, the blockaded port."

The particular points connected with each of the cases of the securities are dealt with in detail by the President in his judgment.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir E. M. Pollock, K.C.), and *Geoffrey Lawrence* for the Procurator-General.

Sir *Erle Richards*, K.C. and *Darby* for Wiegman's Bank and others.

Theobald Mathew for the American Express Company.

Darby, *A. W. Grant*, and Sir *Robert Aske* for various other claimants.

The following authorities were cited:

The Baltica, Roscoe's English Prize Cases, vol 2, 628; 11 Moo. P. C. 141;
Daimler Company v. *Continental Tyre and Rubber Company*, 114 L. T. Rep. 1049; (1916) 2 A. C. 307;
The United States, 13 Asp. Mar. Law Cas. 568; 116 L. T. Rep. 19; (1916) P. 30;
The Frederik VIII., 13 Asp. Mar. Law Cas. 570; 116 L. T. Rep. 21; (1916) P. 43;
The Leonora, 14 Asp. Mar. Law Cas. 209; 118 L. T. Rep. 362; (1918) P. 182;
The Stigstad, 13 Asp. Mar. Law Cas. 310; 120 L. T. Rep. 106; (1919) A. C. 279.

The PRESIDENT (Lord Sterndale).—The Crown in these cases is asking for an order of detention under the Retaliation Order with regard to a number of securities which were seized from the letter mail, I think all of them, on their way to New York. I am not sure that one or two were not going to New York. The grounds upon which the Crown has asked for the order to be made is that these securities were either enemy property or had an enemy origin, and that therefore they came within the Reprisals Order of the 11th March 1915. The article of the Reprisals Order which is here in question states that every merchant vessel sailing 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 an allied port. Goods so discharged are to be placed in the custody of the marshal of the Prize Court, and if not requisitioned for the use of His Majesty's Government are to be detained or sold by the marshal of the court under the direction of the Prize Court.

The question that arises is whether these securities, which consist of bonds, coupons, and a few shares, are goods. The judgment of the late Sir Samuel Evans in the case of *The*

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

Frederik VIII. (*ubi sup.*) seems to me to decide that they are, and therefore if they are of enemy origin or are enemy property an order of detention ought to be made with regard to them. It seems to me that what I have to look at is whether these goods at the time they were seized were in course of transit from an enemy country, or whether they were otherwise enemy property. One of the first points argued before me was this, that these goods were still in transit from Germany, although they might have been delivered to somebody in Holland, and by that somebody in Holland sent on the transit upon which they were seized—in other words, that the transit was one transit from Germany, as was held in the case of *The United States* (*ubi sup.*).

I think that that is quite correct with regard to securities sent from Germany for sale in America on account of the person who sent them from Germany. I also think that it does not matter that on the way they had been put into the hands of intermediaries who were acting for the German persons in order to send them on to America. There are cases of that kind here, and, according to the decision in the case of *The United States* (*ubi sup.*), where a person in Germany has sold goods or securities to persons in America, and those persons have paid for them before they started on their transit from Germany across Holland and the Atlantic to America, it is all made on the impulse, if I may call it so, of the German seller. It is all one transaction, and it does not matter that part of it is by land in Germany or through a neutral country like Holland. That is the decision in the case of *The United States* (*ubi sup.*), and it goes a long way, and, moreover, I have no wish to question it. It is a decision which is binding upon me, and if the facts show that the present case comes within that principle then, of course, there must be an order for detention.

But I do not think that that principle applies if there is a sale by somebody in Germany or a sale in Holland of property which is German, and delivery is made of the securities themselves to the Dutch purchaser, and the Dutch purchaser sends the securities or goods for his own purposes to America, although he may do it the day after or upon the very day that he bought them. If there is a really *bonâ fide* sale and delivery in that way, in my opinion there is not a continuous transit from the seller in Germany to the buyer in America. A sale has been made to somebody in Holland, and a delivery has been made to somebody in Holland, and from that moment the seller has no control over the goods at all. I do not think that it matters that the seller sold to a person in Holland because he thought that the buyer would send the goods on to America. There is no continuity in the transit. When the goods get into the buyer's hands the transit is over. This is laid down in a number of cases, but more particularly in the case of *The Baltica* (*ubi sup.*). If in these cases the claimants satisfy me that they bought these goods from people in Hamburg or Amsterdam, and received delivery, then I shall make no order for detention, because I do not think that the securities are enemy property. So far as enemy property is concerned, I do not think that they are enemy property, because the doctrine of continuous voyage or continuous transit would not apply to them.

It is necessary, therefore, for me to enter upon an investigation of these cases to see whether I believe them or not. I take it that it is pretty clear that a great number of the persons engaged in these matters, claimants and others in Holland and America, were German, and if not really German they were either of German origin or naturalised Germans, or had German influence. There were a great number of neutrals, whether they were naturalised or born neutrals, who sympathised with Germany, and did everything they could to help Germany, and a good number of the claimants in these cases are people in that category. They have done so because they were Germans by birth or blood, and because they sympathised with their own country. They might have done it because, although it is difficult for us to believe, they thought Germany was in the right, or they might have done it because they thought Germany was going to win; but a great number did sympathise with Germany. I have to take that into consideration, but I certainly cannot accept the position that underlies some of the arguments, that anybody who is working in the interest of Germany comes necessarily under the doctrine, however permissible it may be to inquire into his tendencies and character.

Now, in some of these cases the evidence is very strong that the persons concerned bought these securities for their own use and sent them to America for their own purposes, and unless there is something which ought to lead me to suspect that evidence I do not see why I should not accept it.

The first thing put before me is this—that these goods bear the German stamp and some of them were registered in the name of German owners. The German stamp means this, that the bonds had been dealt with in Germany. It is said that these bonds cannot be dealt with—they are not negotiable in Germany—unless they bear the German revenue stamp. That does not show anything more than that they had been at some time dealt with in Germany. Therefore there is some evidence that they are German owned. Then there is the point raised before me that not only do these bonds bear the German stamp, but that they do not bear the Dutch stamp. That point was raised at quite a late stage, and it was not part of the basis upon which the case was opened to me at all. It was not mentioned. I cannot find a trace of it in any of the documents put before me. The Attorney-General did not mention it, but in consequence of my putting a question as to what was the meaning of the stamp upon the securities, some evideace was given that if these were dealt with upon the Dutch Stock Exchange they would have to bear a Dutch revenue stamp. Of course that only affects the cases where the claimants say that they bought on the Dutch Stock Exchange, and not those cases where they say that they bought in Germany, because without evidence of a much stronger character than that which has been adduced, I cannot accept the proposition that if a man in Holland buys securities in Germany and has them sent to him in Holland, and then sends them to America, that is a transaction in Holland which would require a stamp to be put on as a transaction taking place there. The transaction does not take place there. It may be that I am wrong, but the evidence does not satisfy me that any stamp would be required

under these circumstances. The witness who was called upon this point, a gentleman well skilled in the foreign market, but speaking rather by analogy from what happens on our own Stock Exchange, and without any experience of such a case as that where the purchase was made in Germany and the payment remitted from Holland, and the securities then sent to Holland, said, "I think no Dutch stamp would be required."

Now, as to the purchase upon the Dutch Stock Exchange, this point comes to nothing, unless it shows that the transactions which these people say took place could not have taken place, and that therefore their story must be incorrect, and the documents they produce fictitious. If that is not so, it means that they might, if they had been genuine transactions, have had the Dutch stamp put upon the securities. If the stamp had been affixed they would have had a better value in the market, because it would have appeared that they were not coming direct from Germany. But the last piece of information before me was this, that a transaction of that kind could not have taken place. The stamp could not have been put upon the securities upon a transaction of that kind, because such a transaction could not have taken place unless the security bore a Dutch stamp of a date earlier than Jan. 1915. If there was evidence to show that there could be no dealings upon the Dutch Stock Exchange without a Dutch stamp, then it would go a long way to show that this was incorrect; but I have no evidence that that requirement, if it was a requirement, was not frequently disregarded, as some other requirements are. I have no evidence before me of what the Dutch stamp law of revenue is as to this matter, and I do not think that the gentleman who gave evidence had had experience of that kind of thing arising. Therefore the evidence does not satisfy me that these transactions—these purchases and sales—could not have taken place; and if it does not satisfy me as to that it is of no value at all.

I was asked to grant an adjournment so that the Crown might give further evidence on this point. I was at first inclined to do so, because I like to have the full materials; but it was opposed by the claimants, and I do not think that I ought to do it. It is a new point, that does not arise upon any of the documents, or upon the case as opened to me, and I think that the Crown came here to fight this case on different points, and not on that point, and if they fail upon the original case, I do not think that I ought, in face of opposition from the other side, to grant an adjournment for the purpose of making what is in effect a new case. I do not think it right to do so, and therefore I shall put that question of the absence of the Dutch stamp on one side, except in so far as it may have some bearing upon the question as to whether these were enemy securities or not.

Now, that is the way in which I have to deal with these cases, and I will now go through each of them separately.

The first is that of a claim by Wiegman's Bank, Amsterdam, to 968*l.* 19*s.*, Japanese coupons sent to the Irving National Bank, New York. There is an affidavit by Wiegman, and he is a gentleman whose bank is said to have been well affected to Germany. I will assume that that is the case. He says that the bank bought the coupons between the 3rd and the 7th Jan. 1916, and he exhibits what is called a bordereau, which was forwarded to the Irving National Bank. Then in a subsequent affidavit he gives the addresses of the persons from whom he got the coupons, and the days on which he bought them. Most of them were bought in Germany, and four were bought in Holland, and he exhibits documents which show payments for the securities. He swears that they were delivered to him, and that he then sent them on to New York.

I do not know any reason to doubt what he says. I can see no ground for saying that the whole statement is untrue, and that all those documents are fabricated, and if the securities were bought honestly, and if he was acting as a purchaser in his own interest in sending them from Holland to America, in my opinion they are not enemy property, and the doctrine of *The United States* (*ubi sup.*) does not apply, because there was not a continuous transit, and they were not in transit at the time from the enemy. No order of enemy property, therefore, ought to be made in respect of this first item.

The next case is a different kind of transaction, and it is a claim by the American Express Company of New York, the claim having reference to Japanese and American railway bonds and notes of the value of 3077*l.* The case here is that the American Express Company in Berlin, a German-registered company, bought these securities and sent them to the American Express Company in New York. The American Express Company of Berlin must be considered as an enemy company, and as the property was in them when it started it continued in them until it reached New York and got to the hands of somebody else. Mr. Mathew, who appeared for the American Express Company, argued thus: It is true that this is technically a German-registered company, but it is entirely American. That is to say, 99 per cent. of its shareholders are American, and 1 per cent. British, and, according to the case of *Daimler Company* v. *Continental Tyre and Rubber Company* (*ubi sup.*), the court should go behind the legal entity of the company and see who are the persons interested in it, and who are the real controlling persons. How that is to be found out, and whether it is a bare majority or a two-thirds majority, or whatever it may be, was not specified, but it is not necessary to go into it because the judgment of Lord Parker expressly excepted from the operation of that principle the question of property. As this is a question of property it is obvious that that does not apply to this case at all.

But what seems to me to be very clear upon the facts is that the securities were never the property of the Berlin Company at all. They were bought by the company for the American Company, and the latter were debited by the Berlin Company with the price of the securities. If the Berlin Company had bought the securities for themselves, and had sent them to be sold for them, it would be a different matter. But they were bought on account of the American Company, and delivered as they were to the agents of the American Company in Holland, and by them sent to America. There was again no continuous transit. They were delivered to the agent of the purchaser in Berlin and sent to Holland, and

received there by another agent of the purchaser, and by him sent to the purchaser in New York, and it does not seem to me that that case either comes within the principle that I am asked to apply.

The next case is that of Kalker and Polack, who sent some Japanese bonds to Zimmerman and Forshay, of New York. All the bonds bear the German duty stamp, and some of them were of German issue. That is to say, they were Japanese bonds issued upon the German Bourse. The affidavit in regard to the case is that the claimants bought of the Deutsche Bank Japanese 4½ per cent. loan. They bought also of the National Bank some other Japanese securities, and from Hardy and Co., of Berlin, some others. Messrs. Kalker and Polack are also no doubt persons with German sympathies, but here again I do not see anything to induce me to say that the whole account of the transaction is untrue, and that the whole of the documents exhibited are false. It may be that they are, and that I ought to suspect them; but, after all, even if I did, suspicion is not enough. One must have something before one to disbelieve a person who is speaking about a transaction which I have nothing to show me was in any way an out-of-the-way or an extraordinary transaction, or one not in the ordinary way of business. These securities were being dealt with, and persons were buying them and reselling them in America, and there was nothing exceptional in the transaction. They were delivered to Kalker and Polack and sent on by them after delivery by them as purchasers, and I think their case is made out with regard to them.

I pass over the next three cases, because there is no appearance, and I then come to the case of Louis Korijn and Co., who sent to New York one gold Northern Pacific 4 per cent. bond. That bond bore the German stamp, and, therefore, there is some *primâ facie* evidence of its coming from Germany. It was bought through a stock-broker of Amsterdam. The exhibits show evidence from the broker confirming the transaction, and also a receipt showing that the money was paid. I see no reason to disbelieve that Mr. Korijn received that bond, or to doubt the transaction. Mr. Korijn is concerned with another transaction later on, which is on a different footing altogether, but as to this case of the bond I see no reason for thinking that there should be an order of detention.

The next claim is that of Mr. Hamburger to some coupons sent by Wiegman to Hamburger and Sons. The affidavit in this case is that of Mr. S. D. Hamburger, who is domiciled at Hamburg, and he says that he forwarded the coupons to Wiegman's Bank at Amsterdam, and that the bank sent them to Hamburger and Sons. Mr. Hamburger does not pretend that he ever sold the coupons to anybody, but sent them through Wiegman's Bank to New York. Clearly, that comes within the case of *The United States* (*ubi sup.*). They were enemy property, and there was a continuous transit, and, therefore, there must be an order of detention.

The next case which I have to deal with is another transaction by Mr. Louis Korijn, and this concerns a number of Japanese bonds sent to be sold in America. He says as to these that he bought them from the Deutsche Bank. The claimant says that he bought some from the Deutsche Bank and some from another source, and that they were all delivered to him, and that he bought them out and out. In consequence of some documents to which I shall have to refer later, I have considerable doubt about the relationship existing between him and the Deutsche Bank, but I have nothing referring to these transactions at all. I have nothing to contradict his statement, and though for reasons which I will explain when I come to his later consignments, I have some considerable doubt about it, I think I ought to accept that story also.

The next two cases are consignments by Kalker and Polack to Zimmerman and Forshay, 200 Baltimore and Ohio shares, value 4000*l.*, and 4000*l.* Japanese bonds. With regard to these, an affidavit was filed by Mr. Scully, of Zimmerman and Forshay, that he bought some of these securities from the Deutsche Bank. As to the Baltimore and Ohio shares, Mr. Kalker says that he bought them on the 29th Dec. 1915. from stockbrokers in Amsterdam and he also bought some other shares from a firm in Frankfurt. These two consignments were sent to Zimmerman and Forshay for sale. There, again, I cannot see any reason for not accepting that story. Then we come to more consignments of Kalker and Polack to Zimmerman and Forshay—two lots of bonds each of the value of 4000*l.* The account of that is the same—that they were bought by Kalker and Polack, and were in their possession, and were sent to Zimmerman and Forshay for sale, and I see no reason to doubt these transactions any more than the others with which I have been dealing, in which Kalker and Forshay were concerned.

I come next to transactions in Northern Pacific Railway bonds and Japanese coupons of nearly 1000*l.*, sent by Wiegman's Bank, Amsterdam, to the Irving National Bank, New York. With regard to these the evidence is that they were bought, the greater number of them at least, in Germany, and some of them in Amsterdam or some other neutral country, and that they were paid for and delivered to the claimants before they were shipped to America. That is a matter as to which I see no reason to doubt what is put forward.

The next consignment is one of Chinese Railway coupons from Gillissen and Co., Amsterdam, to Redmond and Co., New York. With regard to that I was told that the affidavits were in the post, and I said that I would not give judgment until I had seen these. Therefore I give no judgment as to that case.

At present with regard to the consignment by the American Express Company, of Rotterdam, to a Mr. J. F. Fargo, New York, of bonds and coupons of the value of 1460*l.*, it is now admitted by the American Express Company that these were sent on behalf of a gentleman who is resident in an enemy country, and is for the purpose of this court an enemy. Therefore there will be an order that these bonds be detained.

Coming next to consignments by Messrs. Wiegman, who are the people who have the largest number of consignments in these cases, they are on the same footing as the others of Messrs. Wiegman with which I have dealt. The evidence by them satisfies me that these were real purchases by Messrs. Wiegman. Some of these

consignments were for Japan, and I am satisfied of their real destination, and therefore they are in the same position as the other transactions of Wiegman's.

Then there is another transaction of Kalker and Polack, but as to that there is no claim.

I come to the last shipment on the *Rotterdam*, Louis Korijn and Co. to Hirsch Lillenthal and Co., New York, of a certain number of Pennsylvania Railroad shares and debenture bonds. This is a matter which is on a different footing from any of those with which I have already dealt, and it is a matter which has made me have some doubt about the other transactions of Mr. Korijn, because these are shares which were bought from the Deutsche Bank. The debenture bonds were not bought from the Deutsche Bank, but from stockbrokers in Amsterdam. The reason that these transactions have caused me some doubt is that upon the face of them they look just the same as any other transaction; but with regard to the Pennsylvania shares, and, indeed, with regard to the Japanese bonds also, I find that they were dealt in by a gentleman in Berlin who, I am told, is the broker for the Deutsche Bank and that Hirsch Lillenthal and Co. were to sell these securities for Mr. Korijn, and for his account. Mr. Korijn says the Deutsche Bank delivered them to him and the Deutsche Bank had nothing more to do with them, but I find that the persons to whom they were consigned sending a wireless: "British seize 40 Pennsylvania 6500 Japan." Up to that it does not tell them very much, but it goes on: "Are you replacing?" I do not know how that is to be reconciled with the account that Mr. Korijn gives that the Deutsche Bank had nothing whatever to do with the matter. On the strength of that cable I do not feel justified in accepting Mr. Korijn's account with regard to these bonds. There is no explanation given; there may be an explanation quite consistent with the story that he has told, but none is given, and the burden being on him to satisfy me that these securities against which there is a *primâ facie* case are not enemy property, he does not do it, and with regard to these consignments there must be an order.

With regard to one bond of the Northern Pacific, the Deutsche Bank has nothing whatever to do with that, and I see no reason why the claimant should not have it, and with regard to another bond, though I have grave suspicions, I will give him the benefit of the doubt.

The next one that I have to deal with is the consignment of 800*l.* bonds by Wiegman's to Sutro Brothers and Co., New York. They say they bought them, and I accept their account.

The next is a rather peculiar case. It is a claim by J. P. Sabee to some bonds sent by the Amsterdamsche Bank, Amsterdam, to himself. The claim is not by Sabee himself, but by an assignee who puts forward his claim by reason of the assignment from Sabee. These securities apparently went forward with a letter from the Amsterdam bank to Sabee, which says that the bank at Amsterdam is forwarding for the account of the Adriatische Bank some bonds, the numbers of which are the numbers of the bonds we are here concerned with; and some coupons, which are identified with these coupons. These are claimed by the assignee of Sabee, who puts in an assignment dated the 8th Oct. 1918 and is an assigment in consideration of one dollar and other valuable considerations. It is a nominal consideration. He says the goods were the property of Sabee, who, in an affidavit, tells an extraordinary story, and the evidence is inconsistent with the documents, and there must be an order as to these securities.

The next claim is by a Rotterdam bank to some shares sent to Hallgarten and Co., New York. The evidence of the bank manager is that the shares were sent to the bank by an officer in Leipzig, who asked them to give their assistance in forwarding these shares to America. They were forwarded to America for the purpose of sale on account of the owner of the shares, who was a German subject, or, at any rate, an alien enemy. The bank say that if a banker receives securities for sale on behalf of a client the securities become the property of the bank, and he is not bound to sell these securities; he may sell any other of the same description, and it is the bank's practice to do so, and no harm is done to anybody. All I say is that if that is Dutch law, that securities consigned to a banker for sale on behalf of a client become the property of the bank, it is not English law. They do not become the property of the bank; they continue the property of the customer, and, therefore, in my opinion, in this case the securities are the property of the alien enemy, and there must be an order as to them.

The next case has reference to some coupons sent by the Amsterdamsche Bank to the Banco Allemande, Santiago, a branch of a Berlin bank. The evidence by the Amsterdam bank is absolutely vague, and I cannot say that their case is proved. If I am doing an injustice to the Amsterdam bank I am sorry for it, but if they want to prove their case they should put in a claim, and if they wish to deal with the property in certain securities they should deal with them, and show what the property is.

Then there is a claim by Wiegman's Bank to a bond and some coupons sent by them to the Banco de Chile, Santiago, and their account is the same as they gave in other cases. They say they bought and paid for the securities. I have accepted their account in the other cases, and I see no reason why I should not accept it in this.

Then there are numbers of cases in which no claim has been made. It is quite unnecessary to go through the report in each of them. The report shows that there is a *primâ facie* case of enemy property. When there is a *primâ facie* case of enemy property which has been left uncontradicted for three years, and when there is nothing before me in any way to displace that case, it is not displaced, and, therefore, in those cases there must be an order for detention. I ought to have said, in dealing with the absence of the Dutch stamp, that that only applies, in any case, to dealings on the Dutch Stock Exchange in bonds, and does not apply to coupons. There would not be a stamp for coupons, so that the effect of that point would be confined to a very small matter indeed.

I have only dealt with the cases, so far, upon the basis of enemy property; but I have also to deal with the question of enemy origin. If they are of enemy origin, they are liable to be detained as much as if they were enemy property. I have,

however, no intention of deciding the question of enemy origin. There is a good deal to be said for the view taken by the late President that enemy origin and enemy destination are terms that go together in the Reprisals Order, and, that if enemy destination means goods going into enemy country, so enemy origin means goods coming out of an enemy country. But I am not going to decide that that is the necessary meaning at all.

There is another argument which has been addressed to me by Sir Erle Richards, which depends not only upon the meaning of the word "origin" in this Reprisals Order, but the word "originating" in the subsequent order—namely, that it means something that originates in a country. That is to say, that anything coming out of is not necessarily of origin in that country. That again I have no intention of deciding, but the matter was one discussed in the case of *The Leonora* (*ubi sup.*) before the Privy Council, a decision in which has not yet been given. [See now *The Leonora*, 14 Asp. Mar. Law Cas. 209; 121 L. T. Rep. 527; (1919) A. C. 974.] I do not think that it is necessary to give a definition of these words; but whatever definition is given to it, it does not apply to these goods where there has been a *bonâ fide* sale and delivery before shipment. If I am right in the view which I take, they do not come in transit from an enemy country at all. The transit from the enemy country ends when the goods are delivered to persons in a neutral country, and if that is so, then they do not come from an enemy country for shipment, but from a neutral country.

These bonds, which are none of them German bonds, but Japanese bonds, American railroad bonds and coupons, are not things which had their origin in the other sense with the enemy at all. They are foreign securities dealt with in Germany, and, therefore, whatever meaning is applied to these two words, origin and originating, it seems to me that they are not of enemy origin. There may be other meanings; but I cannot think of any meaning of enemy origin which would include them if I am right that the transit ended when they arrived in a neutral country.

I think that it is necessary to allude to one other argument that has been put forward, and if it is sound, then the Reprisals Order is bad. That is the argument as to the Hague Convention. It was said that by reason of the Hague Postal Convention No. 11, art. 1, correspondence, which it is said includes these bonds, securities and coupons cannot be seized. The article provides that postal correspondence of neutrals or belligerents, whether official or private in character, is inviolable.

I am not at all convinced, to begin with, that these bonds and securities are correspondence. In some cases I believe that these securities were inclosed in an envelope with a letter. In some cases the evidence shows that they were made up into parcels, and, when made up into parcels in that way, if they had been sent by parcels post they would be outside the convention. But it is argued that because people are prepared to spend money by sending them at postal rates, they become inviolable. I cannot think that that is the case. I cannot think that it depends on whether they go by letter mail or parcel mail. I referred to some instances that had happened during the war, when such things as rubber, coffee, and other articles were sent by letter mail. The answer to that was: "Oh, but you don't generally find them sent by letter post, and correspondence must mean correspondence ordinarily sent by letter post."

I am not satisfied that that is right. I do not know how the convention could be worked if it was. I think that it would be impossible, and I am not satisfied that this matter is within the convention at all. But if it is, it seems to me to follow that a convention of this kind cannot deprive a belligerent of his right of reprisal against another belligerent which has broken every possible canon of international law, because it is said that you are not justified by the convention just as you are not justified by the ordinary canons of international law. It was said that if you did so it would be an unreasonable hardship on neutrals; but in my opinion there is no case of this being an unreasonable hardship on neutrals, and I do not think that there is anything in the Hague Convention to make the Reprisals Order invalid, or that there is anything in that point, and my judgment on it must be in favour of the Crown.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Waltons* and *Co.*; *Travers-Smith, Braithwaite,* and *Co.*; *Parker, Garrett,* and *Co.*; *Botterell* and *Roche.*

Tuesday, July 15, 1919.

(Before Lord STERNDALE, President.)

THE RAN. (*a*)

Prize Court—Neutral ship—Vessel under charter for a single voyage—Charter to neutral—Cargo—Partly contraband—Goods wrongly described—False papers—Knowledge of charterer—Ignorance of shipowner—Ignorance of Master—Ship not liable to condemnation.

A neutral vessel was chartered to a firm of another neutral nation under a charter for a single voyage between certain specified ports. The vessel was loaded with a cargo of a miscellaneous character, some of the goods shipped being contraband, and amongst the contraband goods was a quantity of rubber which was falsely manifested as gum. The vessel was brought into a British port, where the rubber was seized and afterwards condemned as prize. The Crown then asked for condemnation of the vessel on the grounds that she was carrying contraband and was sailing under false papers.

Held, that where a vessel is under charter for a single trip—whatever may be the liability in the case of time charters—in the absence of knowledge on the part of the shipowner or of the master that the vessel was carrying contraband, even though the charterer was fully aware of the fact, the Crown cannot claim condemnation of the vessel.

THIS was an action in which the Crown asked for the condemnation of the steamship *Ran* on the ground that at the time of her seizure she was carrying a cargo of which more than one half was composed of contraband goods, and also that her papers were false, in that some of the goods which were rubber were described as gum.

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

The *Ran* was a Norwegian vessel of 3022 tons gross, which left New York on the 13th Nov. 1914 for Liverpool, Gothenburg, and Malmö. She carried a general cargo, which was seized at Liverpool as contraband. A large part of the cargo was ultimately released—namely, a quantity of copper and some cases of crude rubber. The remainder, consisting of a number of parcels of rubber described as gum and certain aluminium ingots, were condemned by the late President, Sir Samuel Evans, on the 12th Oct. 1917 as being contraband destined for Germany. The Crown now claimed the condemnation of the vessel.

The steamship *Ran* was owned by Mr. Jacob Olsen, a Norwegian subject carrying on business at Bergen. The vessel was chartered under the terms of a charter-party dated the 14th Oct. 1914, to Messrs. Barber and Co., shipowners, of New York. Under the terms of the charter-party the ship was chartered for a single voyage from the United States to Scandinavian ports, including Copenhagen, to be employed in carrying merchandise in lawful trades. The vessel was delivered to the charterers under the charter-party on the 5th Nov. 1914. The vessel was then loaded, and amongst the goods put on board were the parcels of rubber falsely described as gum, above referred to, which were consigned by a firm in New York, E. D. Maurer and Co., to Ullman and Co., at Copenhagen, and to Forsberg and Mark, in Gothenburg.

The bills of lading were not made out by the master, but by the charterers, Messrs. Barber and Co., and it appeared that the master had given authority to the charterers to this effect. The master in fact delegated the whole responsibility as to the shipping of the goods to the charterers.

The *Ran* and the various parcels of rubber were seized as prize on the 8th Dec. 1914.

The *Attorney-General* (Sir Gordon Hewart, K.C.) and *C. W. Lilley* for the Procurator-General.—The Crown was entitled to condemnation of this vessel as prize, as she had been engaged in carrying contraband to the extent of more than one-half of her cargo, which was intended for Germany. The vessel itself was, under the circumstances, to be considered privy to the carriage of the contraband, and also to its carriage under a false description. The questions of contraband and false papers had been disposed of already by the late President. The question was now how did these matters affect the shipowner. Even if the shipowner was personally unaware of the nature of the goods carried, he must be held to be responsible for the fraudulent use to which his ship had been put by the charterers to whom he had parted with the control of his vessel. The charterers had been given a free hand and they had been able to ship what they chose. If it was held that in a case like the present the ship was to go free because of the want of knowledge on the part of the shipowner of the nature of the cargo carried by his vessel, the Crown would have no remedy whatever against fraudulent uses of this character. A shipowner had only to charter his vessel and disclaim all knowledge of what was being done, and the charterers might act as they pleased. If a vessel was chartered and then carried contraband goods to the knowledge of the charterers the consequences of this action ought to be visited upon the shipowner, and he should be held responsible. There could be no doubt in this case that the charterers at any rate were fully aware that the vessel was carrying contraband, and the consequences ought to be the condemnation of the ship. The late President had referred to such a condition of things as the present in the case of *The Hakan* (13 Asp. Mar. Law Cas. 479; 115 L. T. Rep. 639; (1916) P. 266), when he had expressed the opinion that shipowners ought not to be allowed to shelter themselves behind charter-parties under a plea of ignorance and escape the consequences attaching to contraband trading.

Sir *Erle Richards*, K.C. and *Balloch* for the shipowner.—The ship should not be condemned In order that there should be a decree of condemnation it was necessary to show that the shipowner had full knowledge of the whole facts, that was, in such a case as the present, that his vessel was carrying contraband goods which were intended for the enemy. Of that there was no proof whatever. Indeed, the Crown had not pretended that the shipowner knew anything whatever as to the nature of the goods shipped or as to their destination. Again, all the evidence put forward showed equally that the master was totally ignorant of the destination of the goods, so that there was no ground for attributing knowledge to the shipowner through the master. There was, therefore, in this case an absolute absence of knowledge on the part of both the shipowner and the master that the vessel was carrying contraband. As to the false papers, there was no case in which it had been held that a neutral ship should be condemned simply on the ground of carrying false papers of the character disclosed in the present instance. The existence of false papers might be evidence from which the court might infer knowledge of other facts if the circumstances warranted it. But there was nothing of the kind in the present case. The charterers of the vessel acted independently of the shipowner, and the acts of the former did not affect the latter, more especially when the charter was of a particular character, and limited to a definite period. This limitation to a single voyage in the present case distinguished it from the case of *The Hakan* (*ubi sup.*), and the words of the late President on this point did not apply. This seemed clear from the judgment of Lord Parker, when the case of *The Hakan* came before the Privy Council (13 Asp. Mar. Law Cas. 479; 117 L. T. Rep. 619; (1918) A. C. 148). Beyond the authority cited there was no case which supported the contention of the Crown, and there was nothing in international law to make the shipowner liable for the acts of charterers. There were, therefore, no grounds for the condemnation of the ship, and the bail deposited to secure her release should be discharged.

Lilley in reply.

The PRESIDENT (Lord Sterndale)—In this case the Crown asks for the condemnation of the steamship *Ran* because she had been carrying contraband, and by that is meant contraband with an enemy destination. It is said that she was carrying contraband to the knowledge of the owner of the ship, either to his individual knowledge, or to the knowledge of the master, who was the owner's agent, or to the knowledge of the charterer, whose knowledge, if proved, it is

said, would affect the knowledge of the owner just as though it was the knowledge of the owner himself.

This vessel, the *Ran*, was under charter to a firm of Messrs. Barber and Co. for one transatlantic trip, specified in this way: "For a transatlantic trip from the United States to Scandinavia, between Bergen and Malmö, including Copenhagen and the time occupied to be a minimum of forty days." The charter then goes on to specify the payment to be made for the use and hire of the vessel per month, &c.

That is the charter for the one trip, and the payment is by time. It is not of the nature of some time charters, which give the use of the ship to the charterer either with a limit only as to ports or without a limit at all. Other clauses in the charter say that this is not to be a demise of the ship, because obviously it is not, but merely an agreement for the use of the ship for the voyage which I have mentioned.

The vessel carried a large cargo. I think it was 3000 tons odd, and it was a various cargo. In one of the telegrams it is described as a composition cargo, and it was described in a cable from the agent in New York to the owner in Norway in this way: "*Ran;* cargo consists of grease, lubricating oil, wax, oil-cake, meal, corn, oil, copper and gum."

Therefore it was a cargo which contained, on the face of it, several articles which were either absolute or conditional contraband. It was rather early in the war when the voyage took place, and many goods, which afterwards became absolute contraband, were at that time only conditional contraband or not contraband at all. But the ship carried such things as grease, lubricating oil, meal, corn, and copper, some of which were either conditional or absolute contraband at the time, provided that they were going to an enemy country. The vessel also carried what was described as a cargo containing some gum, and a cable sent by the shipowners to their agent in New York a reference was made to the fact that the *Bergensfjord* had been intercepted, and they thought this vessel also would be intercepted. She was to go on a voyage which would take, her first to Liverpool, and there she would be examined. That was pointed out to the master by a letter written to him on the 13th Nov. 1914, the day of the sailing, in which they said:— "Your ports of discharge are Liverpool, Gothenburg, and Malmö. Our Liverpool agents . . . have full authority to act for us in all contingencies, and any orders which they may give will be considered coming from us. . . . As your cargo will be examined at Liverpool by the British authorities we shall be glad if you will take care to obtain a proper release from the authorities there, so that you will not be compelled to return to any other port should you meet any British warships in the North Sea." Then it goes on to state that: "A complete set of documents will be placed on board the steamer including a list of all the consignees."

There appears to have been some correspondence, in which it was pointed out that the bills of lading ought to contain the names of the consignees, or there would be trouble in consequence of the bills of lading being to order, as it was pointed out that they were in the case of the *Bergensfjord*.

The trouble here arises in respect of a few parcels of rubber consigned to a firm of Ullmann and Co. There were a number of cases which, I am told, weighed thirteen tons. That rubber was described as gum, both in the manifest and in the bills of lading. The manifest was really a statement for the benefit of the Customs authorities in New York. It was described by the shippers, E. D. Maurer and Co., as "crude gum." It was, in fact, rubber, and it was condemned by the late President on the ground that it was contraband intended for Germany; that Ullmann and Co. were intending to send it to Germany, and that it was falsely described as gum. Now, I have had my attention called to the judgment in the case in which that cargo was condemned, and, reading on the face of the judgment, it seems to me that there can be no question that Ullmann and Co. were intending to send the rubber to Germany, and it may have been described as gum for the purpose of concealing the fact that it was a contradand article going to Germany. The learned President said: "The Crown rely also upon the fact that the goods in the *Ran* and another ship were shipped as gum. How this came about appears by the letters and cablegrams. It was not suggested by Ullmann but he acquiesced in it."

These cablegrams were not read to me. The late President had held that the description of rubber as gum, in spite of the affidavit declaring that that was an ordinary description, was not a proper description and was a false description of a consignment of rubber, and he condemned that portion of the cargo.

With that judgment I have no right nor have I any wish to quarrel, and it seems to me quite right, and I have to accept it. But then there arises the question, what is the position as far as regards the shipowners?

The shipowner's only information, as far as I know, was contained in the cablegram which I have referred to, and in a letter very much to the same effect. Those documents showed the owner that there were parcels of goods on board the ship which were upon the list of contraband articles if they were going to an enemy destination. But they did not show him that those goods were in fact going to such a destination. With regard to the vast majority of the goods that was not so. One parcel described as rubber or crude rubber went through to a neutral destination, and I think that that was the case with regard to some of the other parcels. I see nothing whatever to show any knowledge upon the part of the owner, or any intention on his part, that this vessel should be used for contraband purposes.

Then we come to the master. I am inclined to think, without deciding it, that the master, as he was the agent of the owner, the ship not having been demised to the charterers, would affect the owner with any knowledge that he had of any improper use of the vessel. He has filed an affidavit which is to this effect. He says he saw that copper and aluminium formed part of the cargo, and he went to the Norwegian consul to find whether they were contraband. He found that they were, and he then called at the charterers' office and satisfied himself that none of the cargo was destined for any country at war with Great Britain. He says that he was also informed that the charterers were getting affidavits from the

shippers giving the names of all the consignees and stating that the cargo was for use in Sweden. He says that the affidavits were handed to him before he sailed with a letter of instruction.

Then, as to the question of description of rubber as gum, the last paragraph of his affidavit is curiously worded, but the effect is that these goods were packed in cases. He then goes on: "I did not see what was inside, and I saw no reason to doubt when they were described as gum that they properly answered that description, but even if I had known that they were rubber I should not have thought there was anything wrong, because gum and rubber are interchangeable names to me as a Norwegian. I know that in my language rubber is sometimes called gum, and whether it was called rubber or gum I should not have taken any notice of it."

That is the effect of the paragraph, and I think that it is right, and that that was the state of the mind of the master. No doubt has been thrown upon the fact of his going to the Norwegian consul and getting the information that he did as to whether the cargo was contraband and what was going to be done with it, and there is not to my mind any evidence to show that the master had any knowledge that there was an intention to send these parcels to an enemy country, any more than the other parcels of copper or aluminium or any of the other goods on the contraband list which in fact were not going to enemy countries. There is nothing whatever in my opinion against the master, and, indeed, so far as I have proceeded, as to the knowledge of the owner and the master. I do not think that the Crown has seriously contended that they had any real knowledge of the matter.

But then we come to a more difficult and more important question, namely, had the charterers, Messrs. Barber and Co., information and knowledge that these goods were contraband going to an enemy country, and, if so, does that knowledge affect the owner? With regard to Messrs. Barber and Co., there is quite a different case from that raised against the owner and the master, and it is based very much upon the affidavits of the shipper.

In the first place. I think it will be said that Messrs. Barber and Co. ought to have known that to describe rubber as gum was a misdescription, and that it must be concluded that they did know, because the shipper says he sent to them invoices on the face of which the goods appeared to be described as rubber which he intended to be attached to the ship's manifest, and which Messrs. Barber and Co. received but did not attach to the ship's manifest, because they knew that rubber was being concealed under the name of gum, and they were not going to give it away.

Well, it does strike one as odd, if E. D. Maurer and Co. were describing this as gum, and at the same time were sending forward invoices showing it as gum, that Messrs. Barber and Co. should do anything else, because E. D. Maurer and Co. were the people really concerned. It is difficult to see why E. D. Maurer and Co. should show that the goods were rubber, and Messrs. Barber and Co. should keep the information back. That is the strongest part of the case against Messrs. Barber and Co. It is not very convincing to my mind. It is to be remembered that Messrs. Barber and Co. were dealing with the whole of the cargo, and it is difficult to see why, when they were dealing straightforwardly with so much the largest proportion of the cargo, they should have gone out of their way with regard to this small portion to do something deceptive and dishonest. It is said that they had not an opportunity of seeing this affidavit by E. D. Maurer and Co. in time to answer it before the hearing of this case. That is one of the reasons that they did not answer that allegation. It is also alleged in the affidavit of E. D. Maurer and Co. that it was the shipping company, which would include Messrs. Barber and Co., who had requested that the rubber should be shipped as gum, or otherwise they would not accept it. That is categorically and entirely denied by Mr. McKay, who is the vice-president to Messrs. Barber and Co. The passage in the affidavit referred to says this: "This shipping as gum was suggested by the steamship company, and it was the only way they would accept the shipment." The suggestion is that they would not accept it as rubber in order that they might escape having their ship detained and searched.

There is no question that the ship would be searched, and there would be examintion of her cargo. The ship was going to call at Liverpool, and her manifest showed such goods as copper, foodstuffs, and aluminium. It is said that there is more case against Messrs. Barber and Co. than against the owner and the master of the ship, and, if it were necessary to decide it, I should probably give Messrs. Barber and Co. an opportunity of saying what they have to say as to the case. I may say that even on the evidence as it stands I am not convinced that Messrs. Barber and Co. had the knowledge that these goods were misdescribed for the purpose of being sent to Germany, and were going to be sent to Germany. But I do not think it necessary absolutely to decide it, because I think that even if they did know under the circumstances of this case their knowledge would not affect the owner so as to make the ship liable to condemnation. There is no case that has been cited to me in which the knowledge of a charterer that some portion of the cargo is contraband intended for an enemy destination has been held sufficient to condemn the ship and to be equivalent really to the owner's knowledge.

I think that it is right to say that, and it is well to remember that knowledge of the misdescription is not of itself enough. It must be a knowledge of the misdescription under such circumstances as to lead to the inference that the person who knew of the misdescription also knew of the contraband nature and contraband destination of the goods. As I say, I can find no case, and none has been cited in which such a knowledge on the part of a charterer has been held sufficient to justify the condemnation of the ship. The passage to which I was referred, and the strongest passage—in fact the only one of any importance—in which the relation of charterer and owner with regard to this matter has been laid down, is a passage of the late President in the case of *The Hakan* (*ubi sup.*). In it he says: "I should have no hesitation in drawing the inference that the owners did know."

It is quite obvious that that decided the case, and anything that followed was not necessary for its decision, but was a statement of principle

which, in my opinion, ought to bind me if it affected the question of this case. The learned President went on: "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. A vessel's immunity or penal responsibility ought not to depend upon such arrangements."

In the case of *The Hakan* (*ubi sup.*), which was a small vessel chartered for the purpose of traffic in the Baltic, and was carrying contraband articles to Lubeck, it was to that circumstance that the late President was alluding when he spoke of waters favourable to contraband trading. But still I do not think that the principle he laid down is confined to that, and I think he meant to say that if the result of the charter is to take the disposal of the vessel out of the hands of the owner and leave it to the charterer to do what he likes with her, then the owner cannot escape the consequences of what the charterer does, because he has chosen to give the control of it over to the charterer. I do not think the learned President had under his notice at that time a charter of this description. What was in his mind was a charter by which the owner really left it in the hands of the charterer to do what he liked with the vessel so long as he paid the hire. But it is not applicable to the charter which I have here, because it is a charter for only one trip to neutral ports. It is quite true that they are ports not very far from the enemy country, but they were also in the country or the adjoining country to which the vessel belonged. It is a charter for one transatlantic trip of a Norwegian vessel to Scandinavian ports, and I do not think that that is such a handing over and divesting himself of responsibility on the part of the owner as was under the contemplation of the late Sir Samuel Evans in the passage which I have read. The case of *The Hakan* (*ubi sup.*) went to the Privy Council. The passage which I have read was not dealt with by their Lordships. Lord Parker, in delivering their Lordships' judgment, said: "There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master of the nature of the cargo."

I do not think that that was meant to affect the owner with the knowledge of the charterer in a charter of this description, even if such knowledge existed. No doubt every charter puts the ship into the control of the charterer to a certain extent, but if the owner charters his ship for one specific voyage from a neutral port to another neutral port and the objects of the charter can be perfectly well carried out as it was in this case in the great majority of the parcels by perfectly legitimate trading, he cannot be condemned to the loss of his ship just because the charterer on a voyage of that kind, against the owner's wishes and without his knowledge, sends some minute proportion of the cargo to an enemy country.

Therefore, in this case I am of opinion that the Crown has not made out a case for the condemnation of the ship, and there must be an order for the discharge of the bail. I think, however, that it was a perfectly proper case to bring before the court, and I shall therefore make no order as to costs.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Botterell* and *Roche.*

Wednesday, July 30, 1919.

(Before Lord STERNDALE, President.)

THE PELLWORM AND OTHER VESSELS. (*a*)

Prize Court—International law—Enemy vessels—Stoppage on high seas—Drifting into territorial waters— Boarding in territorial waters—Capture —Test of right of capture.

A number of enemy vessels were met by a British squadron on the high seas. The vessels immediately hauled down their flag and afterwards stopped their engines when ordered to do so. They refused, however, to steam astern or to steer in a westerly direction according to orders, and eventually drifted into Dutch territorial waters. They were then boarded and taken into a British port.

Held, that the capture of the vessels was not completed until the boarding parties took possession, that consequently there had been a violation of Dutch neutrality, and that there must be an order for release.

THIS was a case in which the Crown asked for the condemnation as prize of four German vessels, the *Pellworm*, the *Brietzig*, the *Marie Horn*, and the *Heinz Blumberg.*

The evidence was taken at various hearings in March and May 1919, and the point in dispute was as to the time at which possession was taken of the vessels. They hauled down their flags whilst on the high seas; they stopped their engines when ordered to do so, but they refused to steam astern or to steer westward when orders to this effect were given, and so drifted into Dutch territorial waters, when they were boarded.

The Dutch Government asked for the release of the vessels.

The whole of the facts are fully set out in the judgment of the President.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir E. M. Pollock, K.C.), *Aspinall*, K.C., and *Dunlop*, K.C. for the Procurator-General.

R. A. Wright, K.C. and *Bisschop* for the Dutch Government.

Sir *Erle Richards*, K.C. and *Page* watched the case on behalf of the shipowners and the cargo owners.

Cur. adv. vult.

July 30.—The PRESIDENT.—In this case the Crown asked for condemnation of four German merchant ships—the *Pellworm*, the *Brietzig*, the *Marie Horn*, and the *Heinz Blumberg*—which were captured off the coast of Holland. So far as the vessels and their cargoes are concerned, there is no doubt that they were subject to capture, but the Dutch Government opposed their condemnation and asked for their release on the ground that they were captured within Dutch

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

territorial waters. They were captured by some British destroyers, forming part of a half flotilla led by the *Undaunted*, and the particular destroyers concerned in this case are the *Sylph*, the *Thruster*, the *Teazer*, and the *Springbok*; the *Pellworm* being captured by the *Springbok*, the *Breitzig* by the *Thruster*, the *Marie Horn* by the *Teazer*, and the *Heinz Blumberg* by the *Sylph*. The *Sylph* was the leading vessel of the destroyers concerned, and on the morning of the 16th July 1917 was detached with the *Teazer* to examine a ship off the Dutch coast. They found that she was inside territorial waters and therefore they left her, and steered a course about S W. off the land and joined the other two vessels again.

At about 5 a.m. G.M.T. the *Sylph* took bearings of the Zuider Haak Buoy and the Schulpen Gat Buoy, which showed her to be well outside territorial waters. At that time the vessel was put on a S.W. course, and very soon after the *Pellworm* was sighted, slightly on the starboard bow and on about an opposite course to the *Sylph*. The wind was roughly S.S.W., and the tide setting, if anyting, in shore. The force of the wind is in dispute, and also the force and direction of the tide, but I think that the inference to be drawn from the evidence is that this combined tendency was to set a vesael towards the land, even though only slightly.

The other three German vessels were following the *Pellworm* in what is described by the commander of the *Sylph* as a sort of indented line ahead. They were carrying the German mercantile flag, according to the evidence from the destroyers, and after they were sighted they hauled down their flags and altered their course towards the shore. This was relied upon by the Crown as a surrender, but I am satisfied by the evidence that it was not, but was an attempt to get into, or to get further into, territorial waters, and so escape. When they altered their course the *Sylph* hoisted the international signals, "Stop engines" and "Steer to the west," but it seems doubtful whether the latter signal was understood. The commander of the *Sylph* thinks it doubtful if the engines were then stopped, and he fired a shot across the bows of the *Pellworm* and the second ship, and then across the bows of the *Heinz Blumberg*. That vessel stopped when the shot was fired and was hailed to steer to the west or she would be sunk, but her master and crew got into the boats and left her. The *Sylph* sent a boarding party on board, who attempted to take her in tow, but the tow rope parted and they let go an anchor. This dragged at first, but afterwards held, and then a steaming party went on board and she was taken to Harwich. When she brought up to her anchor she was within half a mile of the shore. The commander of the *Sylph* said he was not certain whether the *Heinz Blumberg* was within the three-mile limit when the boarding party went on board, but I think, on the evidence, that she was. I do not think that, in the circumstances, she would have drifted to the extent necessary to bring her from a position outside territorial waters to within half a mile of the shore in the time necessary for the operations described.

The destroyer next to the *Sylph* was the *Teazer*. She says that she sighted the German vessels when they were about five or six miles from the land, that she followed the *Sylph* and fired a shot across the bows of the *Pellworm*, the leading vessel, which was then four or five miles from the land, and stopped at the shot. The *Teazer* then went on, passing the Pettenpolder buoy on her port hand at a distance of two-and-a-half miles, and steered for the *Marie Horn*, the last but one of the German ships, which appeared to be the nearest to the land. She fired a shot across the bows of the *Marie Horn*, which stopped her engines, but, with her way and the wind and tide, continued to drift towards the land. The *Teazer* followed her, hailing her to go astern, and head to the west, but she did not do so, and the *Teazer* sent a boarding party on board, who let go the anchor when she was two to two and a half miles from the land.

The *Thruster* was the leading vessel of the next division, which consisted of herself, the *Tetrarch*, and the *Springbok*, and she, after sighting the German vessels, hoisted a signal to stop, and fired a shot across the bows of the *Brietzig*, which hove to at a distance, according to the commander of the *Thruster*, of four miles from the shore. The *Thruster* followed and put a boarding party on board, the distance from the shore being estimated then by the commander of the *Thruster* at three and a half miles, though he says he was not certain about it. I think that she was nearer to the shore and was within the territorial limit. The commander of the *Thruster* also said that when the German ships turned towards the shore and the destroyers hoisted the signal to stop, the German ships paid no attention until a shot was fired across their bows.

The *Pellworm*, the leading German ship, was captured by the *Springbok*, which followed the *Thruster*. She passed the Pettenpolder buoy on her port side at a distance which was estimated at two miles, and after going to the *Brietzig*, came back to the *Pellworm*, which was then stopped, and put a boarding party on board of her, when she was about 1000 yards from the Pettenpolder buoy. Slightly outside the Pettenpolder buoy is about two and a third miles only from the land; this would put the position of the *Pellworm*, when the boarding party went on board, within territorial waters.

Upon this evidence given by the Crown, the German vessels were well outside the territorial limits when first sighted, and when they stopped their engines, but admittedly, except in the case of the *Brietzig*, within that limit when the boarding party was put on board. In opening the case the Solicitor-General made the statement that the final act of capture in all cases was within territorial limits. In the case of the *Brietzig*, I have said that the estimate of three and a half miles from the shore is a mistake, and that she was within the three-mile limit when the boarding party was put on board.

This evidence, however, is entirely denied by the witnesses called for the Dutch Government. That Government has a line of coastguard stations down the coast, and Lieutenant Sander, of the Dutch Navy, described the arrangements by which observation was kept on all vessels passing up and down the coast, and cross-bearings taken from two stations simultaneously if it was considered necessary. The plan seemed, so far as I am competent to judge, well devised, but as a fact only one cross-bearing was taken on this morning at all, and that was a bearing of the

Pellworm. It was taken at 7.15, which corresponds to about 5.55 G.M.T. and is really of very little value as she had then been captured by the *Springbok*, and there is very little dispute about her position at that time. The reason given by the Group Commandant for not taking cross-bearings earlier is that the first reports were such, simultaneously from all stations, that he could not follow them; not an unnatural explanation when it is remembered that there were at least four German vessels and a number of destroyers all calling for observation at the same time. Still, there was a very large body of evidence from the coastguard stations all tending to show that all the operations from the first sighting of the German vessels took place within the three-mile limit, and that all the vessels must have been within the Pettenpolder buoy. There was also evidence from the German vessels and the Dutch pilots on board that they were navigating within the three-mile limit, which would be a natural thing for them to do, but, on the other hand, a chart taken from the *Pellworm* showed a line apparently indicating a course which, if continued, would take that vessel outside the Pettenpolder buoy and put her well outside the territorial limits at the place where these occurrences took place.

If the position taken by the *Sylph* and the courses given to her by other vessels are accurate, it is clear that the destroyers could not have been so near to the land as has been said by the witnesses from the shore, and a suggestion was made to the commander of the *Sylph* that he had mistaken the buoys of which he took the bearings, and that they were not the Zuider Haak and Schulpen Gat buoys. I do not think that this is likely; any other buoys in the neighbourhood are so unlike those, that I do not think an experienced officer would make such a mistake. I think therefore that the position is fairly accurate, but I do not think that I can rely on the accuracy of the courses. The German vessels were admittedly making for the land until they stopped their engines and were afterwards drifting towards it, and the destroyers were admittedly making for the German ships, and in those circumstances I do not think the courses would be accurately kept.

On the other hand, I do not think that I can accept the evidence of the witnesses from the land, which, as I have said, would put the destroyers always within the Pettenpolder buoy. I do not see my way to reject the evidence of officers from all the destroyers except the *Sylph*, that they passed outside the buoy, leaving it on their port hand. I do not attach much importance to the estimate of their distance from it, or, indeed, to any of the estimates of distance, whether of the destroyers from the land or of the land from the destroyers and German ships. The visibility was poor and variable and the coast line is low and has few prominent objects on it, and I think that persons on board the destroyers and on the shore might very easily be mistaken in their estimates.

The conclusion I have come to on the evidence is that the German vessels were outside the territorial limit when sighted and signalled to stop, and were close upon it, if not within it, when they stopped, but were well within it when a boarding party was put on board and possession actually taken of them.

The question is whether in these circumstances there was a violation of Dutch neutrality. For the Crown it was contended that the capture took place outside territorial waters when the German vessels hauled down their flags or at any rate when they stopped their engines, and that from that time they were entirely under the control of the British destroyers. In this state of things it was contended that the putting a boarding party on board was only an act done in the management of a ship already captured and was therefore not an act of war done within neutral waters. In support of this contention the cases of *The Rebeckah* (Roscoe's English Prize Cases, vol. 1, 113; 1 Ch. Rob. 227) and *The Edward and Mary* (Roscoe, vol. 1, 312; 3 Ch. Rob. 305) were cited. I do not think these authorities really give much help in this case. They were concerned with the rights of contending captors between themselves, and not with the rights of neutrals in territorial waters. It is not, however, necessary to decide whether the formal taking possession of a vessel which has already submitted to capture is a violation of neutrality if done within territorial waters, because in my opinion there was in this case no such submission or *deditio*, as it is called, as in the case of *The Rebeckah* (*ubi sup*).

As I have already pointed out, the hauling down of the flags by the German vessels was not a submission to capture, because the commander of the *Sylph* states distinctly that it was done first at the time when they altered course towards the shore, in order if possible to escape. Nor do I think that the stopping of the vessels' engines was such a submission. They submitted so far as to stop their engines in order to avoid being sunk by gunfire, but they continued to make way towards the shore by carrying their headway; and, after that was lost, by drifting, and refused to go astern or to steer to the westward when ordered to do so.

It may be that at first the signal to steer to the westward was not understood, but in the case of the *Marie Horn* at any rate there is distinct evidence from the *Teazer* that when followed and hailed to go astern or to steer to the westward, she would not do so. I think the other vessels were doing the same, and that the object of all of them was, if possible, although they had stopped their engines, to escape into neutral waters and to avoid capture.

The act of capture was not in my opinion complete until the boarding party took possession, and as this was in each case after the captured vessel was in Dutch territorial waters, there was a violation of Dutch neutrality and the vessels must be released.

I do not however, think that there was any deliberate intention to violate Dutch neutrality. Some of these same destroyers had followed other vessels immediately before, and had left them on finding that they were in Dutch waters, and I do not find in this case any of those circumstances which are necessary in order to subject the Crown to a liability for damages or costs.

There will therefore be a decree of release, but no order as to damages or costs.

Solicitor for the Procurator-General, *Treasury Solicitor*.

Solicitors for the Dutch Government, *Ince, Colt, Ince*, and *Roscoe*.

Solicitors for the shipowners, *Walton* and *Co.*

House of Lords.

July 7, 8 *and* 29, 1919.

(Before Lords FINLAY, CAVE, DUNEDIN, SHAW, and WRENBURY.

WILLIAM ALEXANDER AND SONS *v.* AKTIESELSKABET DAMPSKEBET HANSA AND OTHERS. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Charter-party—Construction—Demurrage—Lay days — Exceptions — "Always provided steamer can discharge at this rate."

The terms of a charter-party provided that the charterers of the ship were to unload its cargo of timber at the rate of 100 *standards per day, "always provided steamer can . . . discharge at this rate." Owing to the shortage of labour at the port of discharge the ship was detained beyond the number of lay days.*

Held, that the general rule established by the authorities was that if the charterer had agreed to load or unload within a fixed period of time (and id certum est quod certum reddi potest) *he was answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they were covered by exceptions in the charter-party, or arose through the fault of the shipowner or those for whom he was responsible; and, as there was no default here on the part of the shipowners, the charterers were liable to pay demurrage.*

Held, further (*Lord Wrenbury dissenting*), *that the proviso in the charter-party should be read as referring to the structural capacity and fitness of the ship for discharging, and did not extend to mere inability on the part of the ship to find labour. The charterer was not excused by the fact that the shipowner as well as himself was prevented, without any fault on his part, from doing his share of the work.*

Decision of the Second Division of the Court of Sessions, reported sub nom. Th. Frondal and Co. *v.* William Alexander and Sons (56 *S. L. Rep.* 60), *affirmed.*

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland affirming an interlocutor of the Lord Ordinary (Lord Hunter).

The appellants were the charterers, and the respondents were the owners of the steamship *Hansa*.

The action was brought by the respondents against the appellants for demurrage.

By the charter-party the *Hansa* was to load at Archangel a cargo of timber and proceed with it to Ayr, "the cargo to be loaded and discharged at the rate of not less than 100 standards per day counting from the steamer's arrival at the respective ports, and notice of readiness given in writing during business hours and permission to load granted, whether berth available or not, always provided the steamer can load and discharge at this rate." "Should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid at 70*l.* per day and *pro rata* for any part thereof."

If the discharge at Ayr had been carried out at the stipulated rate it would have been completed in six and one-third days. Owing to scarcity of labour at the port, the discharging, which began on the 17th Nov. 1915, was not completed until 6 p.m. on the 2nd Dec. By the custom of the port the discharge was a joint operation. It was the duty of the shipowners to put the cargo on the quay and of the charterers to remove it thence. Both shipowners and charterers employed the same stevedore for this work, and as he could not get enough men delay took place alike as regards the placing of the cargo on the quay and its removal thence. The appellants having been sued by the respondents for demurrage at the stipulated rate urged that they were not liable, as the ship was not in a position to put the cargo on the quay at the stipulated rate owing to the same cause—namely, the scarcity of labour—which prevented the appellants from removing it.

The Lord Ordinary rejected this plea and gave judgment for the respondents, and the Second Division upheld his decision.

Condie Sandeman, K.C. and *Douglas Jameson* (both of the Scottish Bar) for the appellants.

MacKinnon, K.C. and *J. Anderson Maclaren* (the latter of the Scottish Bar) for the respondents.

The following cases were referred to:

Love and Stewart Limited v. *Rowton Steamship Company Limited*, 13 Asp. Mar. Law Cas. 500; 115 L. T. Rep. 415; (1916) 2 A. C. 527, at p. 535;
Budgett and Co. v. *Binnington and Co.*, 6 Asp. Mar. Law Cas. 549, 592; 63 L. T. Rep. 742; (1891) 1 Q. B. 35;
Thiis v. *Byers*, 3 Asp. Mar. Law Cas. 147; 34 L. T. Rep. 526; (1876) 1 Q. B. Div. 244;
Porteous v. *Watney*, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. 195; 3 Q. B. Div. 534;
Starker v. *Kidd and Co.*, 3 Q. B. Div. 223;
Guirle v. *Garland and Rogers*, (1917) 2 S. L. T. 254;
Northfield Steamship Company v. *Campagnie L'Union des Gaz*, 12 Asp. Mar. Law Cas. 87; 105 L. T. Rep. 853; (1912) 1 K. B. 434;
Armitage v. *Insole*, 1850, 14 Q. B. 728;
Randall v. *Lynch*, 2 Camp. 352; 12 East, 179;
New Steam Tug Company v. *M'Clew*, 7 Macph. 733;
Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; 5 App. Cas. 599;
Hansen v. *Donaldson*, 1874, 1 R. 1066;
Mackay v. *Dick and Stevenson*, 6 App. Cas. 251;
Abchurch Steamship Company Limited v. *Stinnes*, 1911, S. C. 1010;
Dampskibsselskabet Danmark v *Poulsen and Co.* (1913) S. C. 1043;
Carver on Carriage by Sea, p. 788, s. 612;
Bell's Principles, sect. 432;
Bell's Corum (M'Laren's edit.), p. 622.

The following considered judgments were read:—

Lord FINLAY. — This is a claim by shipowners for demurrage under a charter-party. The Lord Ordinary decided in favour of the pursuers (now respondents), and the Second Division affirmed his decision. The questions arising on this appeal from their affirmance are two—(1) as to the general nature of the obligation imposed upon a charterer by a clause providing for discharge in a fixed number of days; and (2) as to the meaning and effect of the words at the end of the marginal note in this charter-party

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

"always provided steamer can load and discharge at this rate." The appellants are the charterers and the respondents the owners of the steamship *Hansa*. By the charter-party the vessel was to load at Archangel a cargo of timber and proceed with it to Ayr. The third clause in the charter-party so far as material is as follows:

The cargo to be loaded and discharged "*at the rate of not less than* 100 *standards per day, counting from steamer's arrival at the respective ports and notice of readiness given in writing during business hours and permission to load granted, whether berth available or not, always provided that steamer can load and discharge at this rate.*" . . .

The words in italics form the marginal note and there is a provision in the charter that "should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid at 70*l.* per day and *pro ratâ* for any part thereof."

If the discharge at Ayr had been carried out at the rate of 100 standards per day, the time occupied would have been six and one-third days. Owing to a scarcity of labour at the port, the discharging, which began on the 17th Nov., was not completed until 6 p.m. on the 2nd Dec. By the custom of the port the discharge was a joint operation. It was the duty of the shipowners to put the cargo on the quay and of the charterers to remove it thence. Both the shipowners and the charterers employed the same stevedore for this work and so he could not get enough men, delay took place alike as regards the placing of the cargo on the quay and its removal thence. The appellants having been sued by the respondents for demurrage at the stipulated rate, urge that they are not liable, as the ship was not in a position to put the cargo on to the quay at the stipulated rate, owing to the same cause, scarcity of labour which prevented the appellants from removing it.

Lord Hunter, the Lord Ordinary, rejected this contention. He said: "It is well settled that where a merchant has undertaken to discharge a ship within a fixed number of days he is liable in demurrage for any delay of the ship beyond that period unless such delay is attributable to the fault of the shipowner or those for whom he is responsible. The risk of delay from causes for which neither of the contracting parties is responsible is with the merchant."

The second division, consisting of the Lord Justice-Clerk, Lords Dundas, Salveson and Guthrie, were unanimously of the same opinion. Lord Dundas said that in view of the authorities, if Mr. Sandeman's appeal for the appellants was to succeed it must be in the House of Lords.

On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here for *certum est quod certum reddi potest*), he is answerable for the non-performance of that engagement, whatever the nature of the impediments unless they are covered by exceptions in the charter-party or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language used by Scrutton, L.J. in his work upon charter-parties and bills of lading, art. 131. Of the authorities I will mention only *Budgett* v. *Binnington* (6 Asp. Mar. Law Cas. 549, 592; 63 L. T. Rep. 742; (1891) 1 Q. B. 35), and I refer especially to the judgment in that case given by Lord Esher.

Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness and I understand that this is the opinion of all your Lordships.

It seems to me that the appeal on this point must fail.

With regard to the construction of the concluding words of the marginal note, the motive of the charterers for desiring the insertion of these words is immaterial; the question is, what is the true meaning of the words themselves. As regards all mechanical facilities and appliances the steamer was equipped for delivery at the rate mentioned in the charter-party. It was owing to the shortage of labour that she was unable so to deliver. It was forcibly contended that it was for the ship to provide the labour as well as the appliances; that appliances without labour are of no use, and that it is a condition of the charterer's liability in terms of the marginal note that the steamship should be in a position to discharge at the stipulated rate, having men and appliances alike.

I do not think that this meaning should be read into the words of this proviso. The Court of Appeal in the case of *Northfield Steamship Company* v. *Compagnie L'Union des Gaz* (12 Asp. Mar. Law Cas. 87; 105 L. T. Rep. 853; (1912) 1 K. B. 434) took the view that such words should be read as referring merely to the physical capacity of the ship for discharging, and that where the inability to discharge was due to want of labour without fault on the part of the shipowner or of his servants, the charterer would not be protected by such words. I think they were right. If it had been intended that mere inability on the part of the ship to find labour should excuse the charterer, much clearer words would have been employed. The terms used are not sufficient to work such a departure from the well-established rule that the charterer is excused from delivery in the stipulated fixed time only when he is prevented from doing his part by the default of the shipowner. He is not excused by the fact that the shipowner, as well as himself, was prevented, without any fault on his part, from doing his share of the work.

I think that this appeal should be dismissed with costs.

Lord CAVE authorises me to say that he concurs in the judgment I have just read.

Lord DUNEDIN.—The general question of the construction of a contract to load and discharge a vessel within a certain date, is too well settled to be unsettled now. In the words of Mr. Bell, principles 432—"When lay-days and demurrage are stipulated the shipper's obligation is absolute not to detain the ship beyond the days, and he will be liable for damage although occasioned by causes over which he has no control." The only

real question in this case is as to the effect of the ship clause. As to this I agree with the learned judges of the court below. It is, I think, impossible to draw any distinction between any of the various kinds of agencies which are not within the control of the ship, any one of which may delay the loading or unloading. If, therefore, the clause in question were given the most expanding meaning it would certainly reverse the ordinary legal result of the stipulation as to lay-days. I agree with the Lord Justice-Clerk that if that was meant it would have to be effected by unambiguous words. If, on the other hand, the clause is to have a restricted meaning, then I agree that it must refer to some defect peculiar to a ship as a ship. So construed it is not without its use, for I do not agree with what Mr. Sandeman urged, namely, that if the clause were not there, and the ship's hatches were such that unloading within the days was not possible, the ship could not insist upon demurrage. In such a case I think the general rule would apply, the charterer having taken upon himself to guarantee the discharge within a certain number of days Such a case is distinct from a case of actual fault on the part of the master hampering discharge. I should only in conclusion mention the case of *Hansen* v. *Donaldson* (I. R. 1066), upon which the appellant placed great reliance. I think that decision can be well supported, but only in one view—namely, that the master was able to get extra assistance, and did not get it. Whether that was a true view of the facts matters not. The Lord Justice-Clerk in one passage shows, I think, that a case of the present sort was not in his view to be ruled by that decision. He says: "Until the shipmaster, not being prevented by an external or adventitious circumstance, was prepared to give delivery there could be no detention of the vessel in the sense of the charter-party." Shortage of available labour is an external and adventitious circumstance. Lord Ormidale speaks of culpable delay on the part of the ship in putting out the cargo, and that this is the true view of the case seems to follow from the fact that both the Lord Justice-Clerk and Lord Ormidale accepted the general law as to the charter guaranteeing the unloading in a certain time as settled by the cases.

I think the appeal should be dismissed.

Lord SHAW.—I concur.

I am of opinion that the judgments of the courts below are correct, and that the demurrage of 490*l.* is due. No question is raised in the appeal as to the calculations upon which this sum is reached, and it is admitted that the lay-days were exceeded by seven, these lay-days being calculated in the proportion of 100 standards per day of the total cargo of 630 standards. The question in the case arises upon clause 3 of the charter-party and these words therein—*i.e.*:

> The cargo to be loaded and discharged at the rate of not less than 100 standards per day, counting from the steamer's arrival at the respective ports, and notice of readiness given in writing during business hours and permission to load granted whether berth available or not, always provided the steamer can load and discharge at this rate.

It is admitted that notice of readiness to discharge was duly given by the ship on her arrival at Ayr on the 17th Nov. 1915. The reason in fact why the ship was not discharged within the lay-days is admittedly stated accurately in the examination of the witness Kenny, who was charged by both parties to make arrangements for the discharge of the ship:

"Q. Did you get for the ship all the men that you could get?—A. All that I could find round about; any old man who was knocking about I employed and put him on ship work." In a later passage the same witness says: "The complaint then really was a fewness of men, shortage of labour. Apart from that I never heard anything said on the subject."

As applied to facts like these the law is perfectly well settled. In *Randall* v. *Lynch* (11 Camp. Rep. 355), Lord Ellenborough stated the position in law which has never been departed from: "I am of opinion that the person who hires a vessel, detains her, if at the end of the stipulated time he does not restore her to the owners. He is responsible for the various vicissitudes which may prevent him from doing so."

This proposition was repeated in ampler words by Lord Selborne in *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; 5 App. Cas. 599): "There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo when a ship which has been chartered arrives at its destination and is ready to discharge lies (generally) upon the charterer. If by the terms of the charter party it is agreed to discharge it within a fixed period of time that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing to time and which cause the ship to be detained in his service beyond the time stipulated."

This law has been applied over and over again and is too settled to be shaken. The risk of vicissitudes which prevent the loading or discharge of cargo within the stipulated lay days lies unconditionally with the charterer. This is the prescription of the general law. To avoid its application either (1) the contract of parties must be absolutely clear; or (2) it must be established that the failure of the charterer's duty arose from the fault of the shipowners or those for whom they are responsible. The law of Scotland is identical with that of England on this topic. Mr. Bell is as clear as the English judges quoted, when he says in his "Principles": "When lay days and demurrage days are stipulated, the charterer's obligation is absolute not to detain the ship beyond the days; and he will be liable for the demurrage or for the loss arising from detention although occasioned by circumstances over which he has no control." Recent cases in Scotland have followed this clear rule.

But the appellants found upon *Hanson* v. *Donaldson* (*sup.*). I do not look upon that case as varying or invading the principle. In so far as it may be held to do so—and some of the language of the Lord Justice-Clerk (Moncreiff) is not very clear—the decision must, in my humble opinion, be reckoned a bad one. But, in truth, the decision was one upon fault, and to prevent a person from claiming damages or a remedy under contract in respect of circumstances which he himself has brought about is a principle of much

wider application in law than in regard to shipping. Lord Ormidale, however, cleared up the point in his opinion when, after quoting Mr. Bell as above, he comments as follows upon the passage: "He does not mean to say and does not say that the merchant or consignee is liable for the consequences of detention caused by fault on the part of the ship; or, in other words, by the culpable or undue delay of those in charge of the ship in putting out the cargo."

It was on this latter ground that *Hanson's* case was decided. It is admitted in the present case that no fault attaches to the respondents. The responsibility for delay and consequent damage is accordingly with the appellant. It would have been with them under the general law supposing wind and weather had been such as to prevent discharge of cargo, and even under this special charter-party it is expressly provided that the unloading days have to count, "whether berth available or not." It is not disputed that the vessel was of a capacity and had equipment to enable the proviso to be complied with—namely, that the "steamer can load and discharge at this rate." A proviso of that description cannot be construed in a general sense so as to wipe out the well-known obligations and responsibilities which rest upon the charterer. The inability to discharge is an inability of the steamer in the more limited sense of a reference to the vessel itself, its equipment, or the like. And the meaning of the clause is that, suppose, for instance, the charterer was ready and able to discharge at 100 standards per day, but, on account of the ship's defect or lack of equipment, her maximum discharge could only be fifty standards a day, then, of course, in such a case the position of the ship is just the same in result as if by deliberate fault of those in charge of her the performance by the charterer of his obligations had been prevented. Construed in any broader sense the proviso would wipe out the obligation, and this can never be allowed.

Lord WRENBURY.—This is the charterers' appeal from an interlocutor holding them liable for demurrage. There arise two points for decision, first, whether, if the charter had not contained the proviso presently stated, the charterers would have been liable; and, secondly, whether, if the first question be answered in the affirmative, the charterers are protected by the proviso "always provided steamer can load and discharge at that rate."

The charter provides as follows: "The cargo to be loaded and discharged at the rate of not less than 100 standards per day 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," &c. For the moment, I stop there. The cargo was 630 standards, and by arithmetical computation, therefore, although not by definition of lay days in so many words, the charterers were entitled to six and one-third lay days. The action is for demurrage at per day in excess of that time.

The vessel was detained for thirteen and one-third days. The cause of delay in discharge was shortage of labour at the port of discharge.

The general rule is that the duty of providing sufficient means for the discharge of the cargo lies upon the charterer. The party who has contracted to unload within a specified time must bear the loss occasioned by any excess of time although the delay is not occasioned by any default on his part. But this, of course, is subject to any provision to the contrary in the charter. In the absence of such a provision the charterer contracts not to do his best to deliver, but contracts to deliver. In the charter so far as I have quoted it I find nothing to relieve the charterer from this contractual obligation. If the charter had not contained the proviso, I think the charterer would have been liable.

The second question is: whether he is relieved by the proviso. The words are: "always provided steamer can load and discharge at this rate." It was admitted by the pursuers that it was the duty of the ship to dump the cargo on the quay. The witness Steele, who was agent for the ship at Ayr, acting as he says "of course for the ship" endeavoured to obtain but failed to obtain sufficient labour. When the ship had dumped the cargo on the quay it was the cargo owner's duty no doubt to keep the quay from being blocked with timber. There was no default by the cargo owner in that respect. The ship was never kept waiting on the shore gang. The timber was promptly removed whenever landed on the quay.

In these circumstances, the question is as to what is the meaning of the words "provided steamer can" discharge. The language is, of course, elliptical. It must refer not merely to the structural capacity of the steamer, *e.g.* that she has only certain hatch ways and no more, but also to at least the mechanical appliances with which she is fitted, *e.g.*, that she has only certain engines and of certain horse power and no more. I see no reason why it should not refer also to the labour which is to work the mechanical appliances. Suppose the powers were electric but the motion were out of order. The steamer then I conceive cannot discharge. How does this differ from the case where the motors are in order but there is no man to pull a lever and start the power? Or suppose the power was steam, but there was neither stoker nor engineer. The machinery is not machinery for any effective purpose, unless it can be operated. Then, does the case differ when the machinery can be worked, but there is no manual labour to introduce the goods to the machinery and cause it to operate upon them, and again to disengage the goods and set the machinery free to operate upon further goods? All these are to my mind similar in kind. The steamer whose ability is the test, must I think, be a structure, plus a control which will give life to that which without it is powerless and which will make it an apparatus capable for giving discharge. Discharge is a word which involves activity not mere passive existence. If the expression is to be thus understood, the contract is that the charterer will discharge at 100 standards a day, provided that the steamer is such as regards (*a*) her structure; (*b*) her engine and mechanical power; (*c*) such labour to utilise these mechanical appliances as it is for the steamer to supply as that she "can discharge" (*i.e.* admitted dump on the quay) 100 standards a day. This, I think, is the meaning of the proviso. The delay was caused by the deficiency of the labour above called (*c*). The proviso cast

upon the ship the responsibility for this deficiency. The result is, in my opinion, that the proviso has relieved the charterers from a liability which would otherwise have rested upon them. For these reasons, I think that the appeal should be allowed.

Agents for the appellants, *Ince, Colt, Ince,* and *Roscoe,* for *John W.* and *G. Lockhart.* Solicitors, Ayr, and *Dove, Lockhart,* and *Smart,* S. S.C., Edinburgh.

Agents for the respondents, *Bolterell* and *Roche,* for *Lucas, Hurry, Galbraith,* and *Macpherson,* Writers, Glasgow, and *Macpherson* and *Mackay,* S S C., Edinburgh.

Nov. 18 *and* 20, 1919.

(Before the LORD CHANCELLOR (Lord Birkenhead), Lords HALDANE, DUNEDIN, and BUCKMASTER.)

STOOMVAART MAATSCHAPPIJ SOPHIE H. *v.* MERCHANTS' MARINE INSURANCE COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Policy—F.c. and s. clause—War risks—Perils of the sea—Loss by explosion of drifting mines.

The appellants, a Dutch company, insured a steamer and freight against a total loss with the respondent insurance company. On the 18th Aug. 1914 *the ship left Petrograd on a voyage to Helsingfors. She was escorted by Russian warships until she was outside the Russian minefields, when the escort left her. After she had proceeded another fifty-seven miles she struck three mines in succession, and was totally lost. The mines were assumed to be fixed mines which had been placed by the Russians to protect the northern coasts of the Gulf of Finland and had broken adrift.*

Each of the policies contained the clause "Warranted free from capture, seizure, detention, and all other consequencess of hostilities (piracy, riots, civil commotions and barratry excepted)" and also a clause providing that the insurance was specially to cover loss through explosions.

In an action on the policies the appellants contended that the ship was lost by marine and not war risks, and that the clause warranted free from capture, &c., referred to hostile acts which amounted to taking possession of the ship insured and did not include consequences of hostilities which were not ejusdem generis *with capture, seizure, and detention such as the destruction of the ship by drifting mines.*

Held, that the loss of the vessel was the direct consequences of hostilities, and the respondents were not liable therefore under the policies.

Decision of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal affirming a judgment of Bailhache, J. dismissing a claim for a total loss made by the appellants, the owners of the Dutch steamship *Alice H.* against the respondents as insurers of the ship and freight.

The question in the appeal was whether the respondents were liable under the contracts of insurance for the loss of the ship and freight.

The facts are fully stated by the Lord Chancellor.

Schwabe, K.C. and *Robertson Dunlop,* K.C. for the appellants.

R. A. Wright, K.C. and *Stuart Bevan,* K.C. for the respondents.

The LORD CHANCELLOR (Lord Birkenhead).—This appeal is from a judgment of the Court of Appeal dated the 23rd Oct. 1918 affirming a judgment of Bailhache, J. of the 1st May of the same year, by which he dismissed a claim for total loss made by the appellants, the owners of the Dutch steamship *Alice H.*, against the respondents as insurers of the ship and freight. The question to be determined by your Lordships is whether the respondents are liable under the contract of insurance for the loss of the ship and freight.

The facts relating to the loss of the ship may be stated quite shortly. On the 18th Aug. 1914 she left Petrograd on a voyage to Helsingfors. At 1 a.m. on the 20th Aug., after she had reached a spot in the Gulf of Finland about thirty miles to the southward of Hango Fiord, she struck three mines in succession. The mines exploded and caused such damage to the vessel that she sank. The mines were either fixed mines which had been placed by the Russians near Hango for defensive purposes, and had broken adrift to the spot where they were struck by the ship, or, on an alternative view, they may have been German mines. The respondents had effected insurances upon the hull and freight of the *Alice H.* under two policies of marine insurance dated the 30th Jan. 1914, for £1,500 for twelve months commencing on that date. The policies were identical in their terms. The documents purporting to contain these terms consisted of an ordinary English policy, which throughout the case was referred to as document 1, to which, however, were attached two other documents, one headed "Blom & Van Der Aa, Insurance Brokers, Amsterdam," which is referred to throughout the cases as document 2, and the third which was spoken of as document 3, containing certain clauses printed in red. Document 2, which is neither signed nor filled in in the vacant spaces, contains a clause printed in red in the following terms: "This insurance is exclusively subject to the English laws, and more particularly to the English marine insurance laws of 1906, and is effected on the conditions of the English Lloyd's policy as if it had been subscribed on such policy, and more particularly on the conditions of the attached clauses No. ( ), and all the stipulations on the printed text of the policy or in the 'Deposited Rotterdam Exchange Conditions' that are not in conformity with the conditions and customs of the Lloyd's policy are herewith declared void." It is only necessary to add upon this part of the case that the "Deposited Rotterdam Exchange Conditions" were not produced in the court below, and so far as appears from the evidence which was presented in that court they never were made part of the contract.

Now in document No. 1 the "warranted free of capture" clause had originally found a place; it was in these terms: "Warranted free of capture, seizure, and detention, and the consequences therof or any attempt thereat, piracy excepted, and also from all consequences of riot, civil commotion, hostilities or warlike operations, whether before or after declaration of war." It was, however, struck out, and the erasure was initialled on behalf of the respondents. The policy therefore had a contract which, confined to document 1, was an insurance covering both marine and war risks. Document 3, if it formed part of the contract, contained, however, a clause, unnumbered, which dealt with

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

the matter; it is in these terms: "Warranted free from capture, seizure and detention, and all other consequences of hostilities (piracy, riots, civil commotion and barratry excepted)." The first question, therefore, that arises for decision in this case is what document or documents constitute the contract between the parties? If the contract is limited to document No. 1, there is no answer to the plaintiffs' claim. If, on the other hand, the contract on the true construction of it is expressed in the three documents (documents 1, 2, and 3) other considerations will arise for decision.

I am clearly of opinion that in this matter it is necessary to look for the terms of the contract to all three documents in order to produce a composite contract, and I am encouraged in this view by the demeanour of the plaintiffs throughout the whole of this litigation. When I examine the pleadings I find that the defendants in their points of defence clearly indicated that they looked to the three documents as containing the contract. Whether or not the formal laws of pleading as it is practised now in the Commercial Court would have been content with a simple joinder of issue upon a defence so indicated, I do not pause to inquire, because I am of opinion that had the plaintiffs at that stage of the litigation intended to contend that document 1, and document 1 alone, contained the contract, they would have thought it prudent to express such a contention explicitly on the pleadings. And when I pass on to consider what took place before the trial judge, I am much confirmed in my view that it was not then the important part of the plaintiffs' case which it has become to-day to contend that the contract was contained in document 1. Had this been the contention of the plaintiffs in the court of first instance, it would have been their principal contention, for the reason that if document 1, and document 1 alone, was the record of their contract they had a complete answer to the defence which it was attempted to make. I do not find in the record of the proceedings which I have read, nor do I find in the terms of the judgment of the learned judge, the slightest indication that this contention was seriously pressed upon him by the plaintiffs in their case. I am of opinion from the internal evidence that it was the intention of both parties to express their intention in all three documents.

I pause here to observe that I agree entirely with the observations made by the co-judges in the courts below as to the extreme slovenliness of forming contracts so casually and in such scattered terms in important commercial matters. What really happened here, however, may, I think, be conjectured with reasonable certainty. The original form suggested for the contract is contained in the Lloyd's policy. Additions are then made to it as the result of suggestions coming from abroad, and these suggestions, as I understand the history of the matter, are accepted, and so a document very inconvenient to construe cones into existence.

When it is once decided that the contract is to be found not in a single document, but in all three, other considerations are advanced on behalf of the appellants here. It is said in the first place that if the red clauses, that is to say, the provisions of document 3, form part of the contract, nevertheless the respondents are liable under their policy, because the damages here were not the direct cause of hostilities. That argument is based upon the assumption, which may or may not be well founded, that these mines had floated for a very considerable distance before the moment of contact with the vessel. I am unable to assent to this argument, and, indeed, it involved Mr. Schwabe in what appeared to me to be the absurdity of contending that if a torpedo which was launched by a vessel destroyed the vessel at which it was launched, that would be the result of hostilities, but if it missed that vessel and a few moments later struck another vessel and sank it, that would not be the result of hostilities. I cannot take this view. These mines were placed there for hostile purposes; they were placed there, in other words, to carry out some purpose which was to contribute to the progress of the war. They lost their moorings, as in human experience frequently happens to mines, and so, having lost them, they came into contact with this vessel. I have no doubt that such a contract, with its fatal consequences to the vessel, was a direct result of hostilities within the meaning of that clause.

But it was then contended by the appellants that in any event the words "all other consequences of hostilities" are to be construed as being *ejusdem generis* with the words which precede, "capture, seizure, and detention," and so construed it is contended that the sinking of this vessel by contact with floating mines connot be described as being a consequence of hostilities. Here, again, I am unable to accept the view that is put forward by the appellants. What we have to ask ourselves in this case, as in all these cases, is, Do generic words precede the words the effect of which is in controversy? Can a genus, in other words, be evolved from the terms "capture, seizure, and detention." I think it can. The genus here is a category more or less complete of various disadvantages and risks following upon a state of war. The words "capture, seizure, and detention" are in any case suggestive of, certainly consistent with, a state of hostilities, and when those words are followed by the expression "all other consequences of hostilities" the matter seems to me to be perfectly plain, "capture, seizure, and detention and all other consequences of hostilities."

I therefore arrive without difficulty at the conclusion that, just as capture, seizure, and detention are consequences or may be consequences of hostilities, and were evidently contemplated by the parties to this contract as being consequences of hostilities, those words "other consequences of hostilities" are to be construed and ought to be construed so as to include the casualty which has happened in this case.

I am of opinion, therefore, that this appeal should be dismissed with costs, and I move your Lordships accordingly.

Lord HALDANE.—I have arrived at the same conclusion as your Lordship on the Woolsack. I do not propose to add anything upon the first two questions with which your Lordship dealt—namely, the question what documents constituted the contract, and the question whether what happened was a direct cause of loss in such a fashion as to come within the terms of the policy of insurance. But I wish to add a few words upon the construction of the exception in the warranty clause.

The words are very short: "Warranted free from capture, seizure, and detention, and all other consequences of hostilities (piracy, riots, civil commotions and barratry excepted)." Now, in accordance with well-known principles of construction, the rule

of *ejusdem generis* is applied in cases where an intention is to be collected that that rule should apply. One judges of that intention from the words, and it yields to any expression which seems to exclude it, but the rule is broadly this: that where you have an enumeration which is obviously an enumeration of species falling within a genus, the general words following upon the enumeration are held not to exclude the genus, but to cover only further species which belong to that genus. The rule, as I have said, may yield to intention, but it is the rule which is *primâ facie* applied in the construction of such documents.

Now, applying the rule to the extent to which I think it can be legitimately applied, that is to say, to the extent to which it can be applied consistently with the expressions made by the parties, I think the true reading of them is this: the exception extends, first of all, to capture, seizure, and detention due to hostilities, and then, under a second set of words, all other consequences due to hostilities that are *ejusdem generis* in the sense that the assured are thereby deprived of the ship, but excepting from such consequences those that are in the nature of "piracy, riots, civil commotions and barratry." I think that to that extent and in that fashion—and to that extent and in that fashion alone, so far as my mind is concerned—the application of the rule can be made in such a way as to apply the principle of *ejusdem generis* in the only fashion in which it can be legitimately applied in considering the clause we have before us.

Lord Dunedin.—I concur. I do not think it necessary to add anything except a single word on the last point which the noble and learned Viscount has spoken of.

After all, you have got to find a genus in order to have the application of the rule of *ejusdem generis*, and the choice here must be either that the genus is hostilities in general and the consequences thereof, or is simply that one form of the consequences of hostilities where a ship is taken and remains intact. It seems to me that the whole common sense view of the situation points to the first, and accordingly the other words which come after it cannot have the rule of *ejusdem generis* applied to them in the restricted manner in which alone they would be of any use.

Lord Buckmaster.—This is an action upon a policy of insurance, and the first question that arises for consideration is, What is the evidence of the contract upon which the action is brought?

In ordinary circumstances a policy in the form of one of many documents which have been laid before your Lordships would be sufficient for that purpose; but here the appellants (who were the plaintiffs in the suit) laid before the learned judge who tried this case no fewer than five documents, which were all fastened together. They do not appear to have accompanied this tender of evidence by any protest against the consideration of anything except the one document which is admittedly the foundation of the whole proceedings, nor could they have done so, because by common consent one of the documents atached to it is a document which must be regarded for the purpose of considering what the contract is.

The only question that remains is whether the other documents have to be considered too. I must admit that, except for the special circumstances in which this case stands, I should have found it difficult to have accepted the view that all three documents together formed the contract; because the last document but one is notice given by a mortgagee that apparently was issued after the contract was signed, and on the top of that is again fastened a most material document which limits the character of the trading in the Baltic, where the vessel was making its voyage. But the thing which convinced me that all these documents must be regarded together is the fact that they were received by the plaintiffs without protest, and produced by them as the evidence of their case.

All, therefore, that remains for consideration is whether, when all the documents are considered together, the plaintiffs are entitled to say that the policy has covered the risk. Even this is not easy to determine, because the documents are confused and contradictory. It must, however, be accepted that from the general words which cover the loss there is an exception, and that exception is to be found in the red note which warrants that the policy is to be outside the "capture, seizure, and detention and all other consequences of hostilities (piracy, riots, civil commotions and barratry excepted)" Mr. Schwabe contends that in that clause you have to consider the words "all other consequences" as *ejusdem generis* with "capture, seizure, and detention," and that as the loss was due to the complete destruction of the vessel by sinking by mines, the exception does not take his case outside the present words.

The discussion of the question of *ejusdem generis* is very liable to be more diffuse than profitable. Roughly speaking, it merely means this: that where in at least two cases illustrations are given of particular instances, and those are followed by general words, if you can from the instances mentioned obtain a general characteristic that will cover the general words, the general words do not extend beyond those characteristics, but if you find in the general words themselves again further exceptions which showed that the general words must be regarded as having a wider ambit than would be covered by the special characteristics, then the doctrine of *ejusdem generis* does not apply. In fact, the whole question is purely one of construction, and the artificial rule is due to the assumption that if special instances are named and followed with general words, the draftsman would not have taken the trouble to give the special instances if the general words were intended to have a wide and general ambit.

In the present case I agree with what has been said by the noble and learned Lord on the Woolsack as to the effect of this clause. If this vessel had been crippled by a mine she would have been detained, and when she was sunk by a mine it is difficult to see why she is not be to regarded as within the general words "all other consequences of hostilities."

Appeal dismissed.

Solicitors for the appellamts, *Russell* and *Arnholz*.
Solicitors for the respondents, *Waltons* and *Co.*

Judicial Committee of the Privy Council.

Jan. 23, 24, 27, 28, 31, *and July* 31, 1919.

(Present: The Right Hons. Lords SUMNER, PARMOOR, WRENBURY, STERNDALE, and Sir ARTHUR CHANNELL)

THE LEONORA AND CARGO. (*a*)

ON APPEAL FROM THE PRIZE COURT, ENGLAND

Prize Court—Reprisals—Seizure of neutral ship and cargo—Cargo of "enemy origin" — Order in Council of the 16th Feb. 1917—*Validity*

The Order in Council of the 16th Feb. 1917, *known as the Second Retaliatory Order, which authorises the condemnation of vessels carrying cargo to or from countries contiguous to Germany, provided that such vessels have not first called at an appointed British or allied port for examination, is justified by the recognised principles of international law, and involves no greater hazard or prejudice to neutral trade than is commensurate with the gravity of the enemy outrages and the common need for their repression.*

Decision of Evans, P. (14 *Asp. Mar. Law Cas.* 209; 118 *L. T. Rep.* 362; (1918) *P.* 182) *affirmed.*

APPEAL from an order of Evans, P, reported 14 Asp. Mar. Law Cas. 209; 118 L. T. Rep. 362; (1918) P. 182, allowing an action for condemnation of the steamship *Leonora*. The *Leonora* was a Dutch steamship bound from Rotterdam to Stockholm direct. The ship and cargo were seized pursuant to an Order in Council of the 16th Feb. 1917, known as the Second Retaliatory Order, which, after reciting the German memorandum of the 31st Jan. 1917 as being in flagrant contradiction of international law and as rendering further measures necessary against enemy commerce, declared that goods which were found on the examination of any vessel to be goods of enemy origin or with an enemy destination should be liable to condemnation, and that any vessel carrying goods of enemy origin should be liable to capture and condemnation in respect of the carriage of such goods, provided that in the case of any vessel which called at an appointed British or allied port for examination no sentence of condemnation should be pronounced in respect only of the carriage of goods of enemy origin.

Sir Samuel Evans, P. condemned ship and cargo.

Sir *John Simon*, K.C., Sir *Erle Richards*, K.C., *MacKinnon*, K.C., and *Bisschop* for the appellant shipowners.

Leslie Scott, K.C., *Balloch*, *Stuart Bevan*, and *Le Quesne* for the appellant cargo owners.

Sir *Ernest Pollock* (S.-G.), *Greer*, K.C., and *Clive Laurence* (Sir *Gordon Hewart*, A.-G., with them) for the respondents.

The considered opinion of the board was delivered by

Lord SUMNER.—The *Leonora*, a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on the 16th Aug. 1917 by His Majesty's torpedo-boat F77, outside territorial waters and shortly after passing Ymuiden. She was taken into Harwich. Her cargo, which was neutral-owned, consisted of coal, the produce of collieries in Belgium. It was not intended that she should call at any British or allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the Order in Council dated the 16th Feb. 1917, and both the shipowners and the cargo owners appeal.

Their Lordships are satisfied that the cargo was "of enemy origin" within the meaning of pars. 2 and 3 of that order. The term had been used in the order of the 11th March 1915, par. 4, and, owing to doubts as to the effect of the word 'enemy" therein, a further order was made on the 10th Jan. 1917, which applied the term "enemy origin" as used in that paragraph to goods "originating in any enemy country." In the present case the question is one of the interpretation of the third order, that of the 16th Feb. 1917, which, beyond saying that it is supplemental to the above-mentioned orders, makes no further express reference to them, but from the recital as to the recent proceedings of the German Government, it is plain that the order of 1917 dealt with a wider mischief and was intended to have a wider scope than the previous order. It is therefore necessary to have regard to the system of exploitation then in force in Belgium for the advancement of German interests, in order to appreciate the full effect of the words "enemy origin." It is not necessary to inquire whether, within the terms of the order, a Belgian origin could, as such, be regarded as an "enemy" origin for this purpose, or what the effect, if any, of the German occupation might be on the view to be taken of the nationality of persons resident in Belgium. The collieries from which this coal came were included in the German "Kohlenzentrale," a system by which the coal production of Belgium was strictly controlled and was compulsorily manipulated, with the object of supporting German exchange and assisting German commercial transactions with neutral countries, especially Holland and Sweden. In particular the export of Belgian coal to Sweden was encouraged, because it assisted to procure a reciprocal importation of ore from Sweden. The actual sale of this very cargo was arranged in Cologne by an official of the Kohlenzentrale in his own name, nor is it proved that he was in fact selling on behalf of some undisclosed principal, either in Belgium or elsewhere. Payment for it was made by lodging Swedish kroner in a Stockholm bank to the credit of the Kohlenzentrale. It is stated in the German regulations that "the amount realised by the sale will be paid to the vendors," whoever they may have been. Perhaps this may have been so, for, if no money at all reached the colliery, presumably the getting of coal there would come to an end, but whatever crumbs may have been allowed to fall from the master's table, the fact is clear that these coals were won, sold, and shipped as part of a German Government trade, carried on for the benefit of the enemy in prosecuting the war. To deny to them the term "of enemy origin," as used in this order, would be pedantic. The order is devised to give effect to a scheme of retaliation, which will compel the enemy to desist from outrageous conduct by crippling or preventing trade in goods, which in a broad

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

but very real sense he made his own. It does not employ this expression "of enemy origin" as a mere geographical term, nor as merely descriptive of the nationality of the original owners of the coal, who were involuntary and probably reluctant victims of the German system. Upon this point the view of their Lordships is that the learned President's conclusion was right.

The appellants' main case was that the order in Council was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that as against them it could not be held to fall within such right of reprisal as a belligerent enjoys under the Law of Nations. A subordinate part of their argument was that in its application to the *Leonora* the order was bad, because no British port had been appointed at which she would call for the examination of her cargo. In so far as this circumstance forms part of the general hardship to neutrals it will be dealt with presently. As a separate point their Lordships think that it fails, for the language of the Order in Council does not constitute the appointment of some British port for examination of the cargoes, either of this ship or of ships in general, of a condition precedent to application of the order. The proviso relieving vessels, which call at an appointed port, operates not as a prescription of the circumstances under which alone such application is admissible, but merely as a mode of mitigating the stringency of the order. The evidence discloses no reason why the appointment of a convenient port should not have been applied for to facilitate the *Leonora's* voyage, and a difficulty cannot be relied on as a circumstance of excessive inconvenience to neutrals which it was in their power to remove by such simple means.

Upon the validity of the Order in Council itself the appellants advanced a twofold argument. The major proposition was that the order purported to create an offence, namely, failure to call at a British or allied port, which is unknown to the Law of Nations, and to impose punishment upon neutrals for committing it: in both respects it was said that the order is incompetent. The minor proposition was that the belligerent's right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.

In *The Stigstad* (14 Asp. Mar. Law Cas. 388; 120 L. T. Rep. 106; (1919) 1 A. C. 279) their Lordships had occasion to consider and to decide some at least of the principles upon which the exercise of the right of retaliation rests, and by those principles they are bound. In the present case nevertheless they have had the advantage of counsel's full re-examination of the whole subject, and full citation of the authorities, and of a judgment by the President in the Prize Court, which is itself a monument of research. The case furthermore has been presented under circumstances as favourable to neutrals as possible, for the difference in the stringency of the two Orders in Council, that of 1915 and that of 1917, is marked, since in the case of the later order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their Lordships, however, after a careful review of their opinion in the *Stigstad*, think that they have neither ground to modify, still less to doubt, that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general restatement of the doctrine or a minute re-examination of the authorities.

There are certain rights, which a belligerent enjoys by the Law of Nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode, in which the right is exercised, consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent Sovereign does not create a new offence *motu proprio*; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a Court of Prize with a new jurisdiction or make the court his mandatory to punish a new offence. The office of a Court of Prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a Court of Prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes, by which the Law of Nations as applicable to maritime warfare is enforced. Statutes and International Conventions may invest the court with other powers or prescribe other modes of enforcing the law, and the belligerent Sovereign may in the

appropriate form waive part of his rights and disclaim condemnation in favour of some milder sanction, such as detention. In the terms of the present order, which says that a vessel (par. 2) shall be "liable to capture and condemnation" and that goods (par. 3) shall be "liable to condemnation," some argument has been found for the appellants' main proposition, that the Order in Council creates an offence and attaches this penalty, but their Lordships do not accept this view. The order declares, by way of warning and for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a Court of Prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the court. That a rebuttable presumption is to be deemed to arise under par. 1, and that a saving proviso is added to par. 2, are modifications introduced by way of waiver of the Sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form—namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral so extreme as to invalidate it as against him? In principle it is not the belligerent who creates an offence and imposes a penalty by his own will and then by his own authority empowers and directs the Court of Prize to enforce it. It is the Law of Nations, in its application to maritime warfare, which at the same time recognises the right, of which the belligerent can avail himself *sub modo*, and makes violation of that right, when so availed of, an offence, and is the foundation and authority for the right and duty of the Court of Prize to condemn, if it finds the capture justified, unless that right has been reduced by statute or otherwise, or that duty has been limited by the waiver of his rights on the part of the Sovereign of the captors.

It is equally inadmissible to describe such an Order in Council as this as an executive measure of police on the part of the Crown for the purpose of preventing an inconvenient trade, or as an authority to a Court of Prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions *arguendo*, beg the question. Undoubtedly the right of retaliation exists. It is described in *The Zamora* (13 Asp. Mar. Law Cas. 144, 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77); it is decided in the *Stigstad*, as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral, if this right were a mere executive right not subject to review in a Prize Court; it would be a denial of the belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience This latter contention has already been negatived in the *Stigstad*. The argument in favour of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable. With the terms of the Proclamations and Orders in Council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade," but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the Law of Nations recognises as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree.

The onslaught upon shipping generally, which the German Government announced and carried out at the beginning of 1917, is now matter of history. Proof of its formidable character, if proof were needed, is to be found in a comparison between the Retaliation Orders in Council of 1915 and of 1917, and their Lordships take the recitals of the latter order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to what is the real question in the present appeal—namely, the character and the degree of the danger and inconvenience to which the trade of neutrals was in fact subjected by the enforcement of that order. They do not think it necessary to criticise theoretic applications of the language of the order to distant seas, where the enemy had neither trade nor shipping, a criterion which was argued for, but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a retaliatory order visits on neutrals the consequences of others' wrongdoing, always disputed, though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of Retaliation, may impose upon them fresh restrictions, but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth, and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the *Leonora* was engaged, and they have sincerely endeavoured, as far as in them lay, to view these facts as they would have appeared to fair-minded and reasonable neutrals and to dismiss the righteous indignation which might well become those who recall only the crises of a desperate and terrible struggle.

Compliance with the requirements of the Order in Council would have involved the *Leonora* in difficulties, partly of a commercial and partly of a military character. Her voyage, and with it the ordinary expenses of her voyage, would have

been enlarged and the loss of time and possibly the length of the voyage might have been added to by the fact that no port or class of ports of call had been appointed for the purpose of the order. Inconvenience of this character seems to be inevitable under the circumstances. In so far as it is measurable entirely in terms of money, the extra expense is such as could be passed on to the parties liable to pay freight and neither by itself nor in connection with other and more serious matters should this kind of inconvenience be rated high.

It is important to observe that the order does not forbid the carriage of the goods in question altogether. The neutral vessel may carry them at her peril and that peril, so far as condemnation is concerned, may be averted, if she calls at an appointed port. The shipowner, no doubt, would say that, if his ship is to make the call, he will never be able to ship the cargo, for its chance of escape would be but small, and that, if he is to get the cargo, he must risk his ship and undertake to proceed direct to her destination. The contention is less formidable than it appears to be on the surface. Their Lordships know well, and the late President with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every other damaging circumstance about it have been disguised and concealed, where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and indeed to prepay, whatever freight the shipowner might require in order to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favourable terms of purchase, insurance or otherwise, as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the order would exclude neutrals from all the advantage of the trade. If the voyages were fewer in number, they would tend to be more profitable singly, and in any case this particular traffic is but a very small part of the employment open, and legitimately so, to neutral traders and the risk of its loss need not be regarded as of great moment.

There is also some evidence, though it is not very clear, that Dutch municipal law forbade, under heavy penalties, that such a deviation, as would be required by a call at a British port, should be made by a Dutch ship, which had cleared for Sweden. If, however, the Order in Council is in other respects valid, their Lordships fail to see how the rights of His Majesty under it can be diminished or the authority of an international court can be curtailed by local rules, which forbid particular nationals to comply with the order. If the neutral is inconvenienced by such a conflict of duty, the course lies in the prescriptions of his own country's law, and does not involve any invalidity in the order.

Further, it is pointed out that, with the exception of France, the other allied Powers did not find it necessary to resort to a similar act of retaliation, and it is contended that, upon a comparison with the order of 1915 also, the consequences involved in a disregard of the order of 1917 were of unnecessary severity and were unjustifiable. The first point appears to be covered by the rule that on a question of policy—and the question whether the time and occasion have arisen for resort to a further exercise of the right of retaliation is essentially a question of policy—a Court of Prize ought to accept as sufficient proof the public declarations of the responsible executive, but in any case the special maritime position of His Majesty in relation to that of his allies affords abundant ground for refusing to regard a different course pursued by those allies as a reason for invalidating the order of 1917. If the second point involves, as it seems to imply, the contention that a belligerent must retaliate on his enemy, so far as neutrals are concerned, only on the terms of compensating them for inconvenience, if any is sustained, and of making it worth their while to comply with an order which they do not find to be advantageous to their particular interests, it is inconsistent with the whole theory on which the right of retaliation is exercised. The right of retaliation is a right of the belligerent, not a concession of the neutral. It is enjoyed by law and not on sufferance; and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.

Accordingly, the most material question in this case is the degree of risk to which the deviation required would subject a neutral vessel which sought to comply with the order. It is said, and with truth, that the German plan was by mine and by submarine to deny the North Sea to trade; that the danger, prospective and actual, which that plan involved must be deemed to have been real and great, or else the justification of the order itself would fail; and that the deviation, which the *Leonora* must have undertaken, would have involved crossing and recrossing the area of peril.

Their Lordships recall and apply, what was said in the *Stigstad*, that in estimating the burden of the retaliation account must be taken of the gravity of the original offence which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an order of this severity may never be needed and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this records contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and

inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for, the matter being one of degree, it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German mine-field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtaining an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the Order in Council, and therefore were not concerned to ascertain how much danger, or how little, their compliance would really involve. Proof of the amount of danger involved in crossing the mine-field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the *Leonora* did reach Harwich in safety.

Under these circumstances their Lordships see no sufficient reason why, on a question of fact, as this question is, they should differ from the considered conclusion of the President. He was satisfied that the Order in Council did not involve greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their Lordships are not minded to disturb his finding. The appeals accordingly fail. Their Lordships will humbly advise His Majesty that they should be dismissed with costs.

Solicitors for the appellant shipowners, *Guedalla* and *Jacobson*.

Solicitors for the appellant cargo owners, *Botterell* and *Roche*.

Solicitor for the respondent, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

March 19 and 20, 1919.

(Before BANKES and DUKE, L.JJ. and A. T. LAWRENCE, J.)

ITALIAN STATE RAILWAYS *v.* MAVROGORDATOS AND ANOTHER. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Hire payable in advance—Default in payment of hire—Withdrawal of ship from service of charterers — Redelivery to owner — Apportionment of hire.

By a time charter-party the owner of a ship placed the use of the ship and her master and crew at the disposal of the charterers for twelve months. Hire was payable monthly in advance from the day of the ship's "delivery" until her "redelivery" at a port in West Italy or the United Kingdom at the charterers' option. Failing the punctual and regular payment of the hire, the owner was to be at liberty to withdraw the ship from the service of the charterers without prejudice to any claim the owner might otherwise have on the charterers.

On the 10th Jan. 1917 a month's hire became due, but was not paid. On the next day, while the ship was making for Barry under charterers' orders, the owner by letter to the charterers withdrew her from their services. The ship arrived at Barry on the 23rd Jan. The charterers having claimed a declaration that the charter-party was still subsisting, the owner counter-claimed for hire from Jan. 11 to Jan. 23, on the ground that the ship was not redelivered to him until the 23rd Jan.

Held, that there being no demise of the ship, but only a contract for her services, the word "redelivery" was inappropriate and could not be construed literally; that the ship was redelivered when the owner withdrew her from the service of the charterers; and that he could not recover hire for the use of the ship after the 11th Jan.

APPEAL by the shipowner from a decision of Sankey, J.

By a charter-party of the 21st Jan. 1916, made between A. M. Mavrogordatos, owner of the Greek steamer *Antonios M. Mavrogordatos*, the owner agreed to let and the Italian State Railways agreed to hire the ship for twelve months from the 25th March 1915.

The charter-party was in substance as follows:

2. The owner was to provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew, and to pay for the insurance on the vessel and for all oil, tallow, and waste required for the engine room, and to provide and pay for the proper and efficient working of the steamer.

3. The charterers were to provide and pay for all coal, fuel, port charges, pilotages, agencies, and all other charges and expenses whatsoever except those before stated.

5. The charterers were to pay for the use and hire of the vessel at the rate of 28*s.* on her guaranteed summer dead weight as above per

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

calendar month, "commencing on the day of her delivery as aforesaid," and at the same rate for any part of a month; the hire to continue from the time specified for commencing the charter "until her redelivery within the limits and time mentioned above for delivery to owners in the same good order and condition as when accepted, fair wear and tear excepted, at a port in West Italy, or in the United Kingdom at charterers' option."

6. Payment was to be made as follows: In cash monthly in advance at the National Provincial Bank, Cardiff, to the Anglo-Levant Shipping Company, Limited, or their nominees and, failing the punctual and regular payment of the hire or any breach of the charter-party, the owner was to be at liberty "to withdraw the vessel from the service of the charterers without prejudice to any claim that they the owners may otherwise have on the charterers in pursuance of this charter."

9. The captain although appointed by the owner was to follow the instructions of the charterers who were to furnish him from time to time with the necessary sailing directions, and he was to keep a full and direct log to be exhibited to the charterers or their agent when required.

10. The captain was to sign bills of lading at any rate of freight the charterers or their agents might choose, without prejudice to the stipulations of the charter-party, the charterers agreeing to indemnify the owner from any consequences that might arise from the captain's signature to the bills of lading, or his otherwise following the charterers' instructions.

The charter-party contained the usual exceptions of act of God, perils of the sea, fire, arrests, and restraint of princes, &c.

On the 10th May 1916 the vessel was placed at the disposal of the charterers. On the 17th May she was requisitioned by the Greek Government, and hire was suspended. The requisition ceased on the 18th Dec. 1916, and the charterers ordered the ship to Barry. A month's hire payable in advance became due on or before the 10th Jan. 1917, but by mistake it was not paid. Thereupon the agents for the owner wrote to the charterers as follows: "Jan. 11, 1917.—Messrs. The Italian State Railways, Cardiff.—Dear Sirs—Steamship *Antonios*.—We are instructed by the owner of the vessel to give you notice that in consequence of your failure to pay freight in advance in the terms of the charter, the charter-party dated the 21st Jan. 1916 is hereby cancelled." When this letter reached the charterers' agents at Cardiff, the ship was in harbour at Lisbon on her way to Barry, at which port she arrived on the 23rd Jan. 1917.

On the plaintiffs' claim that the charter-party was still subsisting, Sankey, J. gave judgment for the defendants. On the counter-claim he held that the charterers were not liable for hire after the 11th Jan. 1917. The owner appealed.

Leck, K.C. and *R.A. Wright*, K.C. for the appellant.—The withdrawal of the ship by the owner from the services of the charterers was "without prejudice to any claim" the owner might "otherwise have on the charterers," and the owner had a claim to have the ship redelivered at a named port. The ship could not be "redelivered" at sea, and the so-called cancellation of the charter meant that she should be redelivered only on arrival at port. The charterers are therefore liable for hire up to the 23rd Jan., when the ship reached Barry, or for the same amount as damages for breach of contract. Secondly, the owner had a vested right to a month's hire, or an apportioned part thereof if he should resume the disposition of her before the end of the month: (*Wehner* v. *Dene Steam Shipping Company* (1905) 2 K. B. 92; 10 Com. Cas. 139. As the owner did not resume possession of the ship, and she remained on the charterers' business till the 23rd Jan., he is entitled to hire up to that date.

MacKinnon, K.C. and *Neilson* for the respondents.—The use of the word "redelivery" is inappropriate as there was no demise of the ship, but only a contract by the owner to render services to the charterers, by putting at their service the ship, the master, and the crew. The owner elected to discontinue these services while the ship was making for Barry, and has no claim for hire after he "cancelled" the charter-party. It may be that a shipowner must allow the charterers to carry out their obligations to the cargo-owner, but as between the shipowner and the charterers the ship was withdrawn from the service of the charterers. On the 11th Jan. the owner cancelled the charter-party and withdrew the ship from the service of the charterers, and, having withdrawn the ship from the service of the charterers, he is not entitled to hire after the date when he withdrew the ship.

Leck, K.C. in reply.

Bankes, L.J.—The ship in question sailed from Algiers on the 18th Dec. 1917, under the time charterers' orders, on a voyage to Barry. She put in at Gibraltar and Lisbon, but that fact is immaterial. I treat her as having started on a voyage from Algiers to Barry. While she was on this voyage the day came on which a month's hire was payable in advance under the terms of the charter-party. That day was, according to Sankey, J., the 9th Jan. at 10 p.m., or, according to the charterers, Jan. 10th. Whichever date is correct the month's hire was not paid. It is not material to consider the motive of the shipowner; no doubt it suited his purpose to do what he did. He gave notice in writing to the charterers dated the 11th Jan. 1917 in these words: "The charter-party dated the 21st Jan. 1917 is hereby cancelled." It would have been more accurate to say that the ship was withdrawn from the charterers' service, but his actual words were as I have stated. That notice would have reached the charterers' representatives at Cardiff a day or two after the 11th Jan. The ship was then in Lisbon harbour, but neither of the parties were aware of this. I treat the ship as being on the high seas. The master, receiving no further instructions, continued the voyage begun under the charterers' orders, and arrived at Barry on the 23rd Jan. The main contention of the shipowner is that the ship was not redelivered to him by the charterers till she arrived at Barry. That is a question of general importance.

Another point was taken which has no real bearing on the correctness of the judgment under appeal—namely, that the shipowner had a vested cause of action for the whole month's hire in advance immediately on the expiration of the

10th Jan., and could maintain an action for the whole month's hire though he subsequently withdrew the ship from the service of the charterers before the month had expired. It would be strange if the law should allow an owner to withdraw his ship on the 11th Jan. and yet claim payment of a full month's hire in advance dating from 10 p.m. on the previous day; but on this point Mr. Wright was prepared to accept the view of Channell, J. in *Wehner* v. *Dene Steamship Company* (*sup.*) that when properly considered the position of a shipowner in such circumstances is that the consideration is apportionable, and that he cannot recover hire except for the period during which his ship is actually at the disposal of the charterer. Channell, J. expressed his view in these words: "As the 550*l.* was payable in advance, it seems to me that if they did take possession of the ship supposing that they had taken possession of the ship a week after, they could only have claimed to retain one week's hire out of that as a portion. The consideration, either wholly or partially, failed. I do not think that when the consideration for the payment which ought to be made in advance has not been given the payments can be sued for afterwards." It is unnecessary to discuss the correctness of that view. Mr. Wright does not dispute it. He accepts the proposition that, the owner being entitled to sue for hire in advance, the charterers may by some rule of law reduce the amount payable by a sum representing the time during which the owner deprived them of the use of the vessel, and allowance has been made on account of hire for the ship's service up to and including the 11th Jan.

But it is said that the charter-party provided that the hire should continue until the ship's redelivery, and that she cannot be said to be redelivered while on the high seas continuing the voyage commenced under the charterers' orders, which have never been cancelled. One must consider the language of the charter-party in order to give that argument its true weight. It is founded on the word "redelivery." As pointed out by Mr. MacKinnon, that is not an apt word to express the obligation of either party to the other under such a contract as this. It might be an appropriate word if the ship had been demised, but under a charter like the present by which the owner places the ship with her captain, officers, seamen, engineers, firemen, and crew at the disposal of the charterer for a certain period on certain terms, the only redelivery possible is to make such arrangements as will enable the owner to resume control and the expiration of the charter and, it may be, if necessary, to inform the master that he is no longer under the charterer's orders, but must consider himself under the orders of the owner. That is the real meaning of the word "redelivery" in this charter-party. Earlier in that instrument the use which is to be conferred on the charterers is exactly described. The conferring of that use is spoken of as "delivery as aforesaid." When the use is determined and the vessel is replaced at the owner's disposal, that is described as "re-delivery." What is meant by replacing the vessel at the owner's disposal? As long as the charter-party continues the charterers retain the right to give to the master directions which he is bound to obey. It may be that "redelivery" of the vessel included giving directions to the master to look to the owner for further orders. But what happened in this case was that the owner withdrew the vessel from the service of the charterers. By so doing he necessarily withdrew from the charterers any right to give further directions to the master. If he chooses to withdraw the vessel while she is on the high seas the same result follows; he thereby withdraws from the charterers the power to give any further directions to the master; the power to give directions revests to the owner. It may be that he cannot exercise the power because he cannot get into touch with the vessel; that is a mere accident, and does not alter the conclusion that when the owner withdraws the ship from the service of the charterers there is nothing more which the charterers can do in the way of redelivering the ship to the owner. The material point of time is that moment when as a matter of law the power of giving orders to the master passes from the charterers to the owner, and that is the moment when the owner chooses to exercise the option of withdrawing the ship from the service of the charterers. It was said that this withdrawal was "without prejudice to any claim the owner may otherwise have on the charterers in pursuance of this charter." In my opinion that clause saves the rights of the owner in reference to breaches of the charter-party which may have been committed, or any right which may have already accrued: it does not place the charterers under any fresh obligation coming into force after the date when the ship has been withdrawn. For these reasons I think the judgment of Sankey, J. was right and this appeal must be dismissed.

Duke, L.J.—I agree. This case raises a novel question as to the liability for hire between the 11th Jan. 1917, the date of the notice given by the agents of the shipowners to the charterers, and the 23rd Jan., when the ship arrived at Barry and the master began again to take orders as to the disposition of the ship from the owner. The owner claims that he is entitled to hire during that period by the express terms of the charter-party, and particularly by that clause which provides for hire at the rate of 28*s.* per ton on the steamer's dead weight per month, "commencing on the day of her delivery as aforesaid . . . continue from the time specified . . . until the redelivery within the time mentioned above . . . at a port in West Italy or in the United Kingdom at charterers' option."

I agree with Bankes, L.J. that "redelivery" here means restoration of the power of disposal to the owner. There never was a demise of this ship; she remained from first to last in the possession of the owner. "Delivery" and "redelivery" in this clause relate to the same thing, the power of disposition of the ship. When the power of disposition is restored to the owner there is a redelivery within the meaning of the clause. The owner says that there was no such restoration until the ship was notionally handed over to him at Barry and came within his reach there. That contention ignores the effect of the notice of the 11th Jan. by which the owner declared that the charter-party was cancelled. That put an end to the charterers' right to issue orders to the master. It was a resumption by the owner of the right to dispose of the ship's services, and, after that resumption of control, any

further obligation upon the charterers to surrender control was at an end.

Then it was said that the owner, if not entitled to freight under that clause, is entitled to damages to an equal amount for the charterers' breach of contract, the breach being the failure of the charterers to pay punctually the hire due on the 10th Jan. That this breach occurred while the ship was beyond the reach of the owner, so that he could not resume effective control of her, and that, therefore, he is entitled as damages to an equal amount to hire for the period from the 11th Jan. to the 23rd Jan., when he got possession of his ship at Barry.

That argument is fallacious. The non-payment of the hire was not the cause of loss, if any, incurred by the owner through not getting possession of his ship till the 23rd Jan. The real cause was his own act in withdrawing his ship of his own volition on the 11th Jan., when he was well able to make an advantageous choice between leaving control to the charterers and assuming it himself. Having taken that course, presumably with a just regard to his own interest, he cannot rely upon it as giving him a right to damages. Mr. Wright contended that by the terms of the charter party the withdrawal of the ship was without prejudice to any claim of the owner against the charterers, and that on the 10th Jan. there was a complete cause of action for a month's hire under the charter-party, of which the charterers could only avoid payment in full upon grounds of commercial fairness or equity. But he elected, no doubt on good grounds, not to challenge the decision of Channell, J. in *Wehner* v. *Dene Steam Shipping Company* (*sup.*), that is a case like this, where the owner has resumed control of the ship before the month has expired, he can only claim an apportioned part of the month's hire. When once that is admitted the claim for a month's hire, tempered or modified though it be on grounds of fairness or equity, falls to the ground. On these grounds the judgment of Sankey, J. must be affirmed.

A. T. LAWRENCE, J.—I agree with Mr. MacKinnon's contention that it is not possible to construe the word "redelivery" in this charter-party literally. This charter-party is not a contract of demise. It is an ordinary contract, whereby the possession of the ship remains in the shipowner. The services of the ship, master, and crew were let to the charterers, who could never do more by way of redelivery than restore or give up those services to the owner. The owner himself intervened, and, exercising his right upon the non-payment of a month's hire in advance, withdrew the vessel from the services of the charterers, who could no longer restore that which had already been resumed.

It is said that this left unaffected a cause of action in respect of the month's hire. I think in one sense it did. There was a vested cause of action. But to mind it was not an action of debt, but for damages for breach of a promise to pay hire, the consideration for which was not executed. Therefore the shipowner can recover the damages he has actually suffered, but no more; and as he resumed control on the 11th Jan. he cannot claim in respect of hire after that date. It is not a case of debt for an apportioned part of a month's hire, or upon a partial failure of consideration, but rather a question of the true measure of damages sustained by the shipowner through non-performance of the charterers' promise to pay a month's hire in advance on the 10th Jan. On these grounds I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Constant* and *Constant*.

Solicitors for the respondents, *Williamson, Hill* and *Co.*, for *Ingledew* and *Sons*, Cardiff.

July 11, 15, 16, *and* 31, 1919.

(Before WARRINGTON, DUKE, and ATKIN, L.JJ.)

BRITAIN STEAMSHIP COMPANY LIMITED *v.* THE KING. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Admiralty Charter-party T. 99—*Requisitioned vessel — Navigating without lights — Admiralty — Admiralty Regulations—Collision—Loss of Vessel —Marine risk—F.c. and s. clause—Consequences of "hostilities or warlike operations."*

A steamship was lost while under requisition by the Admiralty on the terms of the charter-party known as T. 99, *clause* 19 *of which provided as follows: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive, clause. Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."*

While the steamship was in the service of the Admiralty she was being navigated without lights at night, in accordance with the Admiralty regulations. She was run into and sunk by another vessel, which was also being navigated without lights under the same regulations.

It was admitted that in the circumstances the collision could not have been avoided by the exercise of reasonable care and skill on the part of those in the control of either steamship. The suppliants presented a petition of right to recover compensation for the loss of their steamship. They claimed that such loss was a "consequence of hostilities or warlike operations" within the meaning of the above clause, and that the Admiralty were therefore liable for the loss.

It was decided by Bailhache, J. (120 *L. T. Rep.* 275) *that the Admiralty regulation that vessels should navigate at night without lights greatly increased the risk of collision, but that it was still a marine risk; and that loss due to compliance with that regulation by a vessel not otherwise engaged in a warlike operation was not a loss due to a warlike operation, and was not excluded by the clause referred to from an ordinary policy of marine insurance. The suppliants appealed.*

*Held, that navigation without lights, provided that the errand itself upon which the ship was bound was a peaceful one—*e.g., *the carrying of an ordinary cargo from port to port—was a peaceful operation performed under conditions adopted by reason of*

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

the existence of a state of war, and was not of itself a warlike operation simply because of the existence of war conditions.

British and Foreign Steamship Company Limited *v.* King (14 *Asp. Mar. Law Cas.* 121; 118 *L. T. Rep.* 640; (1918) 2 *K. B.* 879) *distinguished.*

Decision of Bailhache, J. affirmed.

APPEAL by the plaintiffs from the decision of Bailhache, J. upon a petition of right heard by his Lordship in the Commercial Court (*ubi sup.*)

The facts of the case and the arguments of counsel sufficiently appear from the judgments.

MacKinnon, K.C., *R. A. Wright*, K.C., and *Dunlop*, K.C. for the appellants.

Norman Raeburn, K.C. (Sir *Gordon Hewart*, A.-G., with him) for the Crown.

Cur. adv. vult.

July 31.—The following written judgments were delivered:—

WARRINGTON, L.J.—These are two appeals which, on a different state of facts, raise the same question—namely, whether the loss of a ship in the one case by collision, in the other case by running on a rock, is to be treated as the result of a marine risk or as the consequence of hostilities or warlike operations. The question in the one case arises between the shipowners and the Crown under a charter-party in the form known as T. 99, in the other between the war risk underwriters and the marine risk underwriters.

Bailhache, J. has decided the first case in favour of the Crown, and the second in favour of the marine risk underwriters. In the first case, the *Britain Steamship Company Limited* v. *The King*, the question is raised by a petition of right praying His Majesty to cause the petitioners to be reimbursed in respect of their claims for the loss of their steamship the *Petersham*.

On the 6th May 1918 the *Petersham* was on a voyage from Bilbao to Glasgow with a cargo of iron ore. The night was very dark. The *Petersham* at about 11.20 p.m. came into collision with the steamship the *Serra*, belonging to the port of Bilbao, and at the time on a voyage from Swansea to Barcelona *viâ* Bilbao. The collision took place in the neighbourhood of and about twelve miles from Trevone Head on the north coast of Cornwall. As the result of the collision the *Petersham* sank. Both ships were sailing without lights in accordance with the Admiralty regulations and instructions given with a view to safeguarding British and other mercantile tonnage from enemy action and the consequences thereof. The collision could not owing to the absence of lights have been avoided by the exercise of reasonable care and skill on the part of those on board the two ships respectively, and in fact in action between the present suppliants and the owners of the *Serra* it was held that no negligence had been proved, and such finding is accepted by the Admiralty as correct.

The *Petersham* was at the date of the collision in charter to the Admiralty, under a time charter in the form know as T. 99. It contains two material clauses, 18 and 19, which are as follows: "18. The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered unfit for service, by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk. 19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof or of any attempts thereat, and also from all consequences of hostilities or warlike operations whether before or after declaration of war."

I will now state the facts in the second case, that of *British India Steamship Company Limited* v. *Green and others and Liverpool and London War Risks Association Limited* (see *post*, p. 559). There are two appeals; first, the appeal of the war risk underwriters from the judgment of Bailhache, J. against them, and, secondly, that of the plaintiffs against his judgment in favour of the marine risk underwriters. The real combatants are the two sets of underwriters.

The steamship lost was the *Matiana*. She was homeward bound on a voyage from Egypt with cotton. The accident causing her loss happened on the night of the 1st May 1918. The *Matiana* and three other merchant ships were sailing in convoy under the escort of four of His Majesty's ships. Under sect. 31 of the Naval Discipline Act the master was bound to obey the orders of the officer commanding the escort, *i.e.* the senior naval officer present, in all matters regarding the navigation of his ship and the security of the convoy and under sect. 46 of the Naval Prize Act 1863 was subject to a heavy penalty should he fail to do so.

The convoy had to traverse a part of the Mediterranean, between Sardinia and the Gulf of Tunis, which was infested by enemy submarines. With the object of avoiding an attack the convoy steered a course more northerly than that usually adopted in time of peace. At 9.30 p.m. under order of the senior naval officer the course was changed from N. 30 W. to N. 81 W. The ships had been warned earlier in the evening that this change of course would be made. At about 12.15 the *Matiana* struck a small reef called the Keith Reef, which is unlighted. Some hours later she was torpedoed, but it is admitted that the ship was lost as a consequence of the stranding. The master believed that his position at 9.30 was such that a course N. 81 W. would have taken him some nine miles to the southward of the Keith Reef. The naval officer was not called, and nothing therefore is known as to his information at the time he gave the order to turn.

The currents in that neighbourhood are very uncertain. The convoy was sailing a zigzag course from 10 p.m. until this accident, but the master says, notwithstanding that fact, he was keeping the correct mean course of N. 81 W. Either the ship must have been further to the northward at the time of the turn than was supposed, or she must have drifted north during the three and a quarter hours between 9.30 and 12.15, but there was no evidence proving how it came about that she struck the reef instead of passing to the southward of it. There was no evidence.

The naval officer's order to change the course was given in consequence of information that a submarine was in the neighbourhood. In fact the contrary would appear to be the case, for the

change had been arranged some hours before, the moment of the change only being left to be decided.

The facts resolve themselves into this, that the ship was lost by stranding when sailing in convoy on a course prescribed by the commander of the convoy, not for the purpose of avoiding or risking attack by a particular enemy whose presence was known, but as part of a series of precautionary measures taken for the safety of these merchant ships in waters in which enemy craft might not improbably be encountered.

The *Matiana* was insured by two policies, first one ordinary marine policy containing a clause "warranted free from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or any attempt thereat, and also from all consequences of hostilities or warlike operations whether before or after declaration of war"; and, secondly, a war risk policy expressed to cover amongst other things all consequences of hostilities or warlike operations by or against the King's enemies whether before or after declaration of war.

Bailhache, J. has in this case held that to sail with convoy is a warlike operation in itself, and he has also held that the stranding was directly due to it, and was therefore the consequence of a warlike operation within the meaning of the policy.

It is admitted in both cases that collision in the one case and stranding in the other is *primâ facie* a marine risk for which neither the Admiralty in the one case nor the war risks underwriters in the other would be liable. To make them liable it is necessary to establish that the loss was the consequence of hostilities or warlike operations. This involves two propositions: (1) That, according to the true construction of the charter-party in the one case and the policies in the other, there were hostilities or warlike operations of which the loss could be the consequence; and (2) that the loss was in fact the consequence thereof, bearing in mind the well-known principle of insurance law that to render insurers liable the peril must be the proximate and not a remote cause of the loss.

If the first proposition is not established the second cannot be, and I will therefore deal first with the question of construction. It is admitted by the suppliants that the expression "warlike operations" is that on which the question turns as being wider than hostilities, and I propose to consider the meaning of that expression alone.

There has so far been no decision in this court covering either of the cases before us, for in *British and Foreign Steamship Company Limited* v. *The King* (14 Asp. Mar. Law Cas. 121; 118 L. T. Rep. 640; (1917) 2 K. B. 773; (1918) 2 K. B. 879), where a collision occurred while ships were sailing without lights, it was not disputed that under the circumstances of that case the sailing without lights was a warlike operation. The *St. Oswald*, the ship whose loss gave rise to the question, was engaged in the transport of troops in the course of the evacuation of Gallipoli and was bound for Helles to take troops on board, while the colliding ship was the French warship the *Suffran*. In fact Scrutton, L.J. says that in his view the case must not be taken as deciding either that every collision where the vessels are steaming without lights is a war risk, or that steaming without lights by Admiralty orders is always a warlike operation.

In the case of the *Petersham* the only warlike operation alleged is the steaming without lights by Admiralty orders, and the question reserved by Scrutton, L.J. therefore arises for decision. As to sailing with convoy and its effects there has been no decision at all. What then, in the absence of authority, is the meaning of the expression "warlike operations" in a clause originally devised to exclude the consequences thereof from the ambit of a policy of marine insurance, and afterwards and as a form to define the risks undertaken by those who contract to bear or who insure against the risks so excluded.

To my mind the expression suggests some act done by one or two parties at war with each other against the other of them, or by one of such parties with the object of meeting or avoiding an actual or a threatened attack by the other. There seems to me to be a clear distinction between an operation of such a kind and one of a peaceful character conducted under conditions rendered necessary or desirable by the existence of a state of war. Many operations were conducted during the war now ended under conditions different from those under which they would have been conducted in time of peace. Trains were run with closely drawn blinds; street traffic was conducted in darkened streets, and many other examples could be given. In my opinion it could not properly be said that in any such cases the operations themselves become warlike operations.

So, with regard to the more important subject of maritime traffic and intercourse for avoiding capture or destruction by enemy craft, it becomes necessary or desirable that ships should sail under certain unusual conditions. One of these is the absence of navigation lights. The sailing without lights, provided the errand itself on which the ship is bound is a peaceful one—*e.g.*, the carrying of an ordinary cargo from port to port—is a peaceful operation performed under conditions adopted by reason of the existence of a state of war and is not of itself a warlike operation.

So with regard to sailing with convoy. This is only another device adopted for the purpose of avoiding attack or providing means of defence or escape in case an attack should be made. The duty of those in charge of the merchant ships in the convoy to obey the commands of the naval officer in command of the escort is the natural result of the sailing of several ships in company and of the purpose for which they do so, but again the sailing in company and the presence of the escort with the necessity of obedience to the orders of the commander thereof are, in my opinion, nothing but special conditions under which the peaceful operation of conducting maritime traffic has to be carried on by reason of the existence of a state of war.

Of course, the sailing with convoy may easily assume the character of a warlike operation. If the convoy were actually attacked, or if one attack were impending or immediately apprehended, then from that moment the operations might well become warlike operations.

In the case of the *Matiana* nothing of this sort happened. There was no evidence that the fatal change of course was ordered as the result of any

information leading to the belief that the ships would be attacked; on the contrary, it was determined on long before it was made, and the course was apparently chosen and imposed on the convoy as a precautionary measure for avoiding possible attacks.

In my opinion, therefore, in both cases there were no warlike operations of which it could be said that the loss was the consequence.

In the view I take of the construction and effect of the expression "warlike operations" it becomes unnecessary to consider the further question whether, assuming my view is wrong, the actual loss can in either case be said to be the consequence—viz., the direct consequence—of the particular warlike operation.

In the case of the *Petersham*, Bailhache, J. expressed no opinion on this point, as he took the same view of construction as I have expressed. In the case of the *Matiana*, however, he did express the opinion that the loss was the consequence of the warlike operation. He seems to have thought it enough to say that it was due to the fact that the ship was sailing under orders.

With great deference in the face of his experience, I have grave doubts whether this can be so. I think it is incumbent on those who seek to throw the loss on the war risks underwriters to prove that the loss was the direct consequence of some warlike operation. Assuming that the order of the commander was a part of the operation, I do not think it was proved in this case that the loss was directly caused by that or by the master's obedience to it. The plaintiffs in fact leave it in doubt whether the stranding was inevitable if the order was obeyed, or whether there was some other cause, such as the effect of currents, which brought it about.

In the result, I am of opinion that in the case of the *Petersham* the appeal must be dismissed with costs. In the case of the *Matiana* the first appeal must be allowed and judgment entered for the defendants the war risks underwriters with costs here and below, and the plaintiffs' appeal against the marine underwriters must also be allowed and judgment entered against them with costs here and below.

Duke, L.J.—On the 6th May 1918 the steamship the *Petersham* was on a voyage between Bilbao and Glasgow, and was being navigated without lights "under Admiralty regulations and instructions," when she came into collision with the steamship the *Serra*, on a voyage between Swansea and Bilbao, navigated in like manner, and the *Petersham* sank.

The material facts as to the collision are summed up in this statement of the suppliants in the petition of right: "The said collision could not, owing to the absence of the usual navigation lights, have been avoided by the exercise of reasonable care and skill by those on board the *Petersham* and the *Serra*. The absence of these lights was in accordance with the directions and instructions issued by the Admiralty with a view to safeguarding British and other mercantile tonnage from possible enemy action and the consequences thereof."

The *Petersham* was insured by the Admiralty against (*inter alia*) consequences of warlike operations. Bailhache, J. has held that the loss was not a loss in consequence of warlike operations, and the owners appeal from that decision. The matter at issue is whether the sailing of the *Petersham* without lights was a warlike operation. To cite from the judgment of the learned judge (120 L. T. Rep. 275; (1919) 1 K. B., at p. 581): "Does the mere fact that, in order to avoid the common danger of attack by submarines, a vessel upon a non-warlike errand in obedience to Admiralty regulations and instructions sails without lights constitute a warlike operation?"

That sailing without lights may be a warlike operation or part of such an operation is shown by the admission made on the part of the Crown in the case of *The St. Oswald* (see *British and Foreign Steamship Company Limited* v. *The King*, 14 Asp. Mar. Law Cas. 121; 118 L. T. Rep. 640; (1917) 2 K. B. 769; (1918) 2 K. B. 879), which was much discussed during the arguments. The question, however, which was considered in this court in *British and Foreign Steamship Company Limited* v. *The King* (*ubi sup.*) was not whether sailing without lights in time of war is a warlike operation, but whether the sailing of the *St. Oswald* without lights on the occasion then under consideration was the proximate cause of her loss.

I have not been able to see that the judgments pronounced here upon that question can be of use in determining whether the sailing of the *Petersham* and the *Serra* without lights was a warlike operation. For this purpose it is necessary to consider what, within the meaning of the contract of insurance made by the Admiralty, is a warlike operation, and what was the character of the operation in course of which the *Petersham* was sunk. Was it an operation of war or an operation of commerce?

The examination of the case which was made on behalf of the appellants satisfied me of the circumstances under which the words "warlike operations whether before or after a declaration of war" were added to the common form of warranty against consequences of hostilities which had been previously in use. I think, however, that knowledge of these circumstances does not necessitate if it would justify—which I suppose it would not—any departure in this case from the rule that the language of the contracts is to be construed according to its plain meaning. Warlike operations before or after a declaration of war, and warlike operations of States between which war begins without a declaration of war, are manifestly included in the warranty.

The case does not seem to me to raise the question, which was incidentally considered in the arguments for the appellants, whether warlike operations on the part of subjects of belligerents, undertaken on their own responsibility, could fall within a warranty against consequences of warlike operations. The decision of Bailhache, J. in the case which was mentioned of a merchant ship which rammed a floating object upon the supposition that it was an enemy submarine and was held to be covered under a policy against consequences of warlike operations in respect of damage thereby suffered depends on its own facts and is not now under review. The considerations which were material there do not arise here. Neither the *Petersham* nor the *Serra* committed any act of belligerency.

As was pointed out by Bailhache, J., it is not suggested that the *Petersham's* occupation at the time of her loss was other than peaceful. The present insurance as an insurance against consequences of warlike operations was, I am satisfied, an insurance only against consequences of warlike operations in the proper sense of the terms "war" and "warlike" as they are used in relation to the warfare of belligerent States: (see Hall on International Law, 7th edit., pp. 61 and 65).

The operation on the part of a combatant Power which is relied upon by the appellants in their petition of right is the issue by the Lords Commissioners of the Admiralty of "Directions and Instructions with a view of safeguarding British and other mercantile tonnage from possible enemy action and the consequences thereof." As is pointed out by the learned judge in the court below, these regulations were of a perfectly general character, not issued specifically to the *Petersham* and not issued with regard to the voyage she was on. The issuing of the regulations was a purely precautionary measure, and there was nothing in the situation of the *Petersham* at any material time which made the observance of them a warlike operation.

The statement of the facts appears to me to lead inevitably to the conclusion stated in the judgment. I think, therefore, that the appeal fails.

The opinion expressed by the learned judge in the court below in the course of his judgment with regard to the sailing of vessels with convoy is the subject of appeal in the case of *British India Steam Navigation Company Limited* v. *Green and others and the Liverpool and London War Risks Association Limited* (see *post*, p. 559), and I do not think it necessary to discuss it in connection with this appeal.

ATKIN, L.J.—This petition of right is brought upon the terms of a charter-party by which the Admiralty chartered for an indefinite time the suppliants' steamship the *Petersham*.

The material clauses of the charter-party are clauses 18 and 19. The intention of the parties, stated broadly, is plain. The suppliants were to bear the sea risks. The Admiralty were to bear the war risks as defined in clause 18. The wording of clause 18 is not as clear as it might be. The risks said to be undertaken are those which would be excluded from an ordinary policy by the ordinary Institute f.c. and s. clause.

Logically to ascertain the effect of this, one has to see what risks were included in the ordinary policy, and then to consider the effect of this exception clause. If the exceptions were under that, the risks insured there to the extent that they were under would be irrelevant. But the case is as argued before us on the footing that the Admiralty had undertaken to be liable for the risks mentioned in the exception clause as though they had issued a policy to cover such risks. And for the purposes of this case I shall assume that such is the true construction.

For the purpose of construction, however, it is, I think, relevant to consider how the contract comes to be presumed in these words, bearing in mind the traditional values of most of the phraseology of contracts of marine insurance as established by commercial usage and prudent decisions of many countries.

The risks expressed to be taken by the insurers in the body of an ordinary Lloyd's policy, so far as they are relevant to war, do not appear to have altered since the time of the Napoleonic wars. They are now (see first schedule to the Marine Insurance Act 1906) as they were then: Men-of-war, enemies, takings at sea, arrests, restraints and detainments of all kings, princes, and people, together with the general clause, all the perils, &c., which is to be construed *ejusdem generis*.

This exception clause has grown. It appears to have begun in Napoleonic times by free of capture and seizure in ports of discharge. It developed to free of capture and seizure generally. By 1863 it was free of capture, seizure, and of hostilities or the consequences thereof.

In 1883 a general meeting of the underwriting community of the United Kingdom assembled at Lloyd's adopted the clause in its present form, which adds to hostilities "warlike operations": (see Owen on Marine Insurance Notes and Clauses, 3rd edit., pp. 8, 9).

I have not found an earlier use of the words "warlike operations" and I think it probable that they arose out of the operations of our fleet at Alexandria. Operations conducted against persons who were in rebellion against a friendly Power, and without a state of war having been declared, were not operations in a war, but warlike operations.

The other point to be remembered is, as already noticed, that the words in their original collocation were meant to express exceptions from already ascertained risks—viz., those expressed in the ordinary policy of marine insurance. The words have to be applied to the loss in question.

The facts as stated in the petition are admitted. The *Petersham* appears to have been making an ordinary commercial voyage from Bilbao to Glasgow with a cargo of iron ore. She was under requisition by the Admiralty on the terms of the charter T. 99, which is entitled "Collier or Oiler Transport," but does not expressly restrict the kind of cargo to be carried. She was run into by the steamship the *Serra*, which struck her on the starboard side and sunk her.

The *Serra* was a steamship belonging to the port of Bilbao, and was engaged on an ordinary commercial voyage from Swansea to Barcelona *viâ* Bilbao with a cargo of patent fuel. Both ships were navigating without the usual navigating lights, the *Petersham* as alleged "in accordance with Admiralty regulations and instructions," the *Serra* as alleged "by direction of the Admiralty."

It was assumed before us that both ships were so sailing without lights in pursuance of orders made under the Defence of the Realm Regulations r. 37. Such order was made under the Defence of the Realm Act 1914 (4 & 5 Geo. 5, c. 29) which provides as follows: "His Majesty in Council has power, during the continuance of the present war, to issue regulations as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces, and other persons acting in his behalf for securing the public safety and defence of the realm." He may by such regulation provide for the punishment of 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.

It is admitted that owing to the absence of the usual navigation lights the collision could not have been avoided by reasonable care and skill. It is said, therefore, that the loss here arose from warlike operations and the consequences thereof.

First, it is said that navigating without lights was in itself a warlike operation. The absence of lights was for the protection of the vessels from enemy submarine attack which formed part of the declared belligerent policy of the enemy. The sinking of the vessel was, therefore, a consequence of a warlike operation, since it is admitted that the absence of lights made it impossible to avoid the collision by reasonable care and skill.

Secondly, it was said that at any rate the Admiralty order was a warlike operation, and the sailing in pursuance of the order and the sinking were consequences.

The order in operation at the time of the collision will be found in the Defence of the Realm Manual, 5th edit., revised the 28th Feb. 1918, at pp. 358-9, "the areas in which submarines or raiders may be met vessels are to be carefully darkened from sunset to sunrise, and are to proceed without navigation lights. These lights must be so arranged that they can be instantly shown to avoid collision and extinguished as soon as the danger of collision is past. Navigation lights, when specially ordered to be shown, must be dimmed to a visibility of less than two miles." The order then proceeds to give directions for carrying out the order that visibility should be dimmed under a heading "Admiralty war instructions for British merchant vessels."

It is not necessary in the present case to consider how and why the *Serra* became liable to obey British or Admiralty instructions. The case was argued on the footing that there was no distinction between the two vessels in this respect.

Was the loss under these circumstances a "consequence of warlike operations?" I cannot think that it was. The clause must be read as a whole in connection with the context, and, on reading it, I think that the expression "warlike operations" connotes the attributes of operations that form part of a series of acts of war, belligerent acts by combatant forces, whether offensive or defensive, "hostilities" between enemy nations at war with one another. "Warlike operations" are included in "hostilities," but may range outside it as, for instance, where armed force is being used for putting down rebellion, or where neutral territory is being protected in anticipation of war by defensive methods appropriate to war—*e.g.*, by laying down mines.

I do not think that "warlike operations" need be directed to the immediate hurt of the enemy. I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties, while exercised in the area of war, could be included. A ship is sunk by collision with a destroyer navigating without lights in the course of patrolling in search of submarines, or is sunk by collision with an armed warship steaming at full speed without lights in the area of war: (*British and Foreign Steamship Company Limited* v. *The King*. 14 Asp. Mar. Law Cas. 121; 118 L. T. Rep. 640; (1918) 2 K. B. 879). In both these cases I should have thought it clear that the vessel causing the loss was engaged in a "warlike operation," and the only question that would arise would be: Was the operation the proximate cause of the loss?

It is to be observed that in the last-named case it was admitted on the part of the Crown that steaming without lights on the part of both vessels was a "warlike operation." In view of that admission and the undisputed facts in that case, and in view of the express reservation of the general question in the judgment of Scrutton, L.J., I cannot treat the decisions as governing the present case.

I also think that a non-combatant while at sea may, for purposes of defence, engage in an act of war—a "warlike operation." This is the case of the merchant ship that rams, or attempts to ram, an enemy submarine, held, as I think rightly, to be a "warlike operation," even though it be doubtful if the object rammed was, in fact, an enemy submarine (*McGregor Company* v. *Martin Lloyd's List*, 17th June 1918).

But the above cases—and they may be multiplied—appear to me to be essentially different from a loss suffered from a collision between two vessels, both of which are engaged in ordinary commercial traffic. The operation is the operation of conveying goods by sea from one commercial harbour to another. The risk of collision is an ordinary risk of such an adventure. It is true that the voyage is performed in war time and under war conditions. It is an operation in war, but not a "warlike operation." Like many other peaceful operations conducted in time of war it is conducted under different conditions from those of peace. The risks are increased; the risk of collision by sailing without lights; the risk of stranding by sailing on unaccustomed routes; the risk of foundering; by difficulties in receiving, when needed, necessary repairs. But to increase marine perils by reason of war is not to convert them into war perils. The "warlike operation" is said to be sailing without lights.

I asked, during argument, whether, while the vessels were sailing by day, they were engaged in a "warlike operation," or did they begin the "warlike operation" when the sun went down? I am not conscious of having received an answer.

If regard is to be had to the natural meaning of the words, it can be tested by reference to land operations. An omnibus is proceeding with dimmed lights in darkened streets in pursuance of Government orders made for the protection of a city and its inhabitants from an attack by hostile aircraft. Is the omnibus engaged in a "warlike operation"? and, if by reason of the lack of light it collides with a wayfarer or another omnibus, is the consequent injury the consequence of a "warlike operation," and was the wayfarer similarly engaged in a "warlike operation"? Lights are, in pursuance of the same order, darkened in a public building, and a visitor by reason thereof falls and injures himself. Is he the victim of a "warlike operation"?

To these inquiries the sole answer of counsel was a cautious protest against the introduction of such mundane matters into the esoteric mysteries of marine insurance.

I think that in the contention of the appellants the major premise is flung far too wide. I have indicated what I conceive to be the necessary restrictions as to meaning of warlike operations. It is unnecessary to deal with all the possible cases that may or may not come within the words. But in my opinion the present case is not a case within clause 19. And I agree, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan.*

Solicitor for the Crown, *Treasury Solicitor.*

July 16, 17, *and* 31, 1919.

(Before WARRINGTON, DUKE, and ATKIN, L.JJ.

BRITISH INDIA STEAM NAVIGATION COMPANY LIMITED *v.* GREEN AND OTHERS AND LIVERPOOL AND LONDON WAR RISKS ASSOCIATION LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Marine risks policy—War risks policy—"Hostilities or warlike operations"—Vessel navigated in convoy under Admiralty control—Vessel stranded on rocks—Torpedoed by enemy submarine—Total loss of vessel—Whether due to warlike operations.

A steamship homeward bound on a voyage from Egypt, one of four merchant vessels which were being navigated in convoy under Admiralty control, the escort being four warships, when in the Mediterranean stranded on the rocks at midnight on the 1st May 1918. *After lying there some hours she was torpedoed by an enemy submarine. The convoy had to traverse a part of the Mediterranean which was infested by enemy submarines; and, with the object of avoiding an attack, the convoy steered a course more northerly than that usually adopted in time of peace. The master of the vessel was bound to obey the orders of the officer commanding the escort. Efforts were made to get the vessel off, but they failed. On the 5th May there was a gale, and the vessel became a total loss. The vessel's position was hopeless from the first, and, even if she had not been torpedoed, she would still have been a total loss. The vessel was insured under two policies —one against marine risks, and the other against war risks. The material clause of the two policies insured the vessel against "all consequences of hostilities or warlike operations by or against the King's enemies whether before or after the declaration of war."*

Held, that sailing in convoy was only a device adopted to avoid attack or to provide means of defence or escape in case an attack should be made, being part of a series of precautionary measures taken for the safety of merchant vessels; and that there was no warlike operation of which it could be said that the loss was the consequence, inasmuch as the vessel was lost by stranding when sailing in convoy on a course prescribed by the commander of the convoy.

Decision of Bailhache, J. reversed.

(*a*) Reported by T. W. MORGAN and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

THE plaintiffs claimed for a loss under two policies of marine insurance on their steamship *Matiana,* which was torpedoed while she was aground on Keith Rocks in the Mediterranean.

By a policy dated the 13th March 1918 the Liverpool and London War Risks Insurance Association Limited insured the plaintiffs' steamship *Matiana* for 25,500*l.* against war risks. The material clause in the policy insured against "all consequences of hostilities or warlike operations by or against the King's enemies."

By a policy dated the 24th Dec. 1917, subscribed by the defendant, Mr. R. H. Green, and other underwriters, the steamship *Matiana* was insured for 284,760*l.*, of which sum the defendant R. H. Green's proportion was 2505*l.* 9*s.* 11*d.*, against marine risks.

The *Matiana* was one of four steamers going under convoy under Admiralty control from Alexandria to the United Kingdom with a cargo of cotton. At midnight on the 1st May 1918, when she was in the Mediterranean, she stranded on Keith Rocks. According to the evidence, there was a chance that she might have been salved, and efforts were made to get her off, but they failed. After lying there about eleven hours she was torpedoed by an enemy submarine. On the 5th May there was a gale, and she became a total loss.

The learned judge found as a fact that her position was hopeless from the first, and that, even if she had not been torpedoed, she would still have been a total wreck.

The steamers, in accordance with the orders of the senior naval officer, pursued a zigzag course, and at the time of the stranding were sailing through a submarine-infested area, and some thirty miles to the northward of the ordinary peace-time course. The master of the steamer stated that he was nine miles north of his reckoning, and so much nearer to the rocks. The night was dark, the steamers were on an unaccustomed course, and the currents were variable and their direction and force were unknown. The master was under the orders of a King's officer, and was not responsible for the course taken. His business was to keep his position relatively to the other three ships.

The learned judge found as a fact that no negligence on the part of the master of the *Matiana* was proved.

The plaintiffs claimed alternatively 25,500*l.* and interest from the war risks underwriters, or 2505*l.* 9*s.* 11*d.* and interest from the marine risks underwriters.

The war risks underwriters said that the loss the *Matiana* was due to a peril of the sea—namely, a stranding upon the rocks. The marin risks underwriters said that the loss was due to warlike operations.

On the 20th and 21st Feb. 1919 the case came on to be heard before Bailhache, J. sitting in the Commercial Court.

MacKinnon, K.C. and *Lewis Noad* for the plaintiffs.—The loss was due to a war risk. The *Matiana* was sailing with other steamers under an escort of warships. She was zigzagging in accordance with the orders of a naval officer. The master was bound to obey such orders. Therefore the stranding of the *Matiana* was due to a warlike operation. Moreover, if she had not been torpedoed she might have been salved eventually.

R. A. Wright, K.C. and *Claughton Scott* for the defendants the marine risks underwriters.—Steaming in a convoy under naval orders is a warlike operation or a consequence of hostilities. The navigation here was not in accordance with the ordinary rules of good navigation. The operation was carried on under the orders of the naval authorities and with the object only of protecting oneself against enemy action. That was a warlike operation: (see *British and Foreign Steamship Company* v. *The King*, 14 Asp. Mar. Law Cas. 121; 118 L. T. Rep. 640; (1918) 2 K. B. 879).

Aspinall, K.C. and *Raeburn* for the war risks underwriters.—At the time of the loss the *Matiana* was not engaged in a warlike operation, but was engaged in a commercial venture. The loss was due to stranding upon the rocks, which was a peril of the sea. The stranding was due to the negligence of the master of the steamer or of the naval officer in charge of the convoy or of both. It was not due to a warlike operation.

MacKinnon, K.C. replied.

It was decided by Bailhache, J. that no negligence on the part of the master of the *Matiana* or of the King's officer in charge of the convoy was proved; that the loss of the ship was due to warlike operations as the proximate and direct cause, for, although stranding is *primâ facie* a marine peril, yet, inasmuch as the vessel was sailing in convoy, which is a warlike operation, she was engaged in a warlike operation; and that, in the absence of negligence on the part of the master of the vessel, the stranding was due to warlike operations as the proximate and direct cause, and consequently the loss of the vessel fell on the war risks association to the exoneration of the marine risks underwriters.

From that decision the defendants the Liverpool and London War Risks Association Limited, now appealed; and there was a cross-appeal by the plaintiffs as a precautionary appeal against the defendants the marine risks underwriters in the event of the appeal of the defendants the war risks association being allowed.

Aspinall, K.C. and *Norman Raeburn*, K.C. for the appellants, the war risks association.

R. A. Wright, K.C. and *Claughton Scott* for the respondents Green and others, the marine risks underwriters.

MacKinnon, K.C. and *Lewis Noad* for the plaintiffs, the appellants on the cross-appeal.

The arguments adduced in the court below were substantially repeated, and the material authorities there cited were again referred to.

Cur. adv. vult.

July 31.—The following written judgments were delivered:—

Warrington, L.J.—See *ante*, p. 508.

Duke, L.J.—In the case of the *Matiana* the underwriters against war risks appeal from the judgment of Bailhache, J. based upon a finding that the stranding and loss of this vessel were the consequences of a warlike operation. The learned judge held that sailing with convoy is a warlike operation, and on that ground held the appellants liable.

The *Matiana* had sailed from Alexandria for London with a cargo of cotton together with three other merchant steamships, under the protection of a convoy of warships. Certain material facts with regard to the voyage were admitted. The *Matiana* would not have been allowed to sail except under convoy. Her master was bound to obey the orders of the naval officer in command of the convoy. That officer chose the route of the voyage. The region in the Mediterranean which the vessel had to traverse was frequented by enemy submarines. The object of the commander of the convoy was to bring the *Matiana* and the other merchantmen safely through this region.

There were allegations of negligence which the learned judge found not proven, and as to which it is sufficient to say that they had relation to the master's unquestioning compliance with his sailing orders notwithstanding that the course, or the set of the currents in the locality, carried his vessel nine miles to the north of the course on which he assumed that she was, and headed her directly towards the rocks of the Keith Reef, on which she stranded.

The learned judge did not deal with the contention of the appellants that the burden of proof upon the respondents included proof that the vessel was not lost by reason of negligence.

The question whether sailing with convoy was in the present case a warlike operation cannot be satisfactorily discussed without defining the terms "convoy" and "sailing with convoy." Both are commonly used, and were used in the court below and in this court with ambiguous meanings. "Convoy" can without departure from common use be applied indiscriminately to the naval escort, the protected merchantmen, and the flotilla which includes both. "Sailing with convoy" can be given a like varied meaning. In legal terminology, however, "convoy" is the proper name of the protecting naval force, and "sailing with convoy" is the sailing of merchantmen under protection of the King's ships: (see Park's Law of Insurance, 8th edit., p. 693). This clearly appears upon examination of the statutory provisions as to convoy, which extend from the Naval Discipline Act of Charles II. (13 Car. 2, c. 9, s. 13) to the Naval Discipline Act 1866 (29 & 30 Vict. c. 109, ss. 30, 31) now in force.

I select as illustrative phrases the following: "Ships appointed for convoy," in the statute of Charles II., "to sail under the convoy and protection of such ship or ships, vessel or vessels, as shall or may be appointed for that purpose," and "to continue with such convoy and not to separate or depart therefrom without leave for the purpose from the officer having the command of such convoy," in sects. 1 and 2 of the Act of 1803 (42 Geo. 3, c. 57), which prohibited sailing without convoy. I refer also to sects. 30 and 31 of the Act of 1866.

In the present case some evidence was given of the practice as to convoy in the Mediterranean in 1918, but it added nothing to the state of facts which was to be presumed from compliance with the general law. All that can be said upon the facts proved is that convoy was appointed by the Admiralty for the *Matiana*, that she sailed with such convoy, and that her master was therefore bound to conform to the orders of the commander of the convoy, including that which set the course of the vessel at the time in question.

Bearing in mind the distinction between convoy and the vessels under convoy, it becomes

necessary to consider the case with regard to each. To say that the sailing of merchantmen with convoy in times of war is necessarily a warlike operation is to make too general a statement. Neutral convoy has been well-known in warfare. The armed neutrality of the northern Powers of Europe between 1800 and 1810 and the provisional definition inserted in the Declaration of London a few years since with regard to "neutral vessels under the convoy of a man-of-war flying the same flag" are sufficient reminders of this fact.

Further, convoy has in past times been appointed for protection against pirates: (see *Jeffery* v. *Legender*, 3 Lessing, 320, as reported by Sergeant Lessing, who was engaged in the case).

It is necessary to inquire whether in the present case there was a warlike operation of the warships engaged, or of the merchantmen, or of both. Counsel for the respondents seemed to me to assume that all operations of the warships of belligerents on the high seas must be warlike operations, and presumably that any stranding of such a ship would be a stranding in consequence of warlike operations. That could be tested as matter of argument if it were assumed that the course taken on the voyage here in question had put a vessel of the naval convoy in the position in which it actually put the *Matiana*. Let it be assumed, however, that the naval vessels of the convoy were engaged in a warlike operation, can it be said that the *Matiana* was so engaged?

Three alternative modes of stating the case of the *Matiana* were brought under discussion. She was said to have been navigated under naval orders for the belligerent purpose of "breaking through" enemy forces known to be operating in the region in question. She was also said to have been engaged with the convoy in defeating a blockade of the enemy against British trade coming westward from Mediterranean ports, and to have been stranded in effecting that object. The control of merchant shipping assumed by the Admiralty under the Defence of the Realm Acts and Regulations, and carried out by regulations as to convoy and other matters, was also said to be a warlike operation, and the sailing of the *Matiana* under that control to be part of the operation.

Whether these were warlike operations and whether the *Matiana* was engaged in these warlike operations or one of them is matter of fact. I am satisfied that in point of fact the *Matiana* was never ordered to do, never did, and never participated in, any warlike operation or belligerent act. She never lost her character of a merchant ship carrying merchandise. She sailed under naval protection in circumstances of peril, but at all times scrupulously observed the warranty contained in her insurance against war risks that she should be employed only in commercial trading. The stranding, therefore, was not due to any warlike operation in which she was herself engaged.

So far as enemy action was concerned, it is no doubt true that the course laid down by the commanding officer of the convoy was taken by reason of the presence of enemy submarines on the usual route—the route from which the *Matiana* was diverted. There was, however, no evidence of the presence or reported presence of a submarine within range of the convoy and her charge at any material time. The deviation was made by way of precaution and not because of any immediate action of the enemy. The *Matiana* was not stranded in any effort at escape from a present danger.

As was pointed out in *Becker, Gray, and Co.* v. *London Assurance Corporation* (14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101), there is a real distinction between "loss by perils insured against and loss in avoiding them, loss by capture and loss by fear of it": (per Lord Sumner, at p. 111 of (1918) A. C.). In the present case the stranding was not an immediate consequence of any warlike operation of the enemy. So far as the King's forces were concerned there was no more than the choice of a course by which warlike operations could be avoided, but by which a convoyed vessel was accidentally put upon the rocks. The order of events in the chain of consequences is this: The state of war, the enactment of Defence of the Realm Regulations, the appointment of convoy, and the adoption of an ill-chosen course. To my mind these considerations show that the owners of the *Matiana* have no claim upon the underwriters against war risks.

It is unnecessary to consider the questions raised with regard to negligence, or in particular the complaint of the appellants that the absence of affirmative proof of negligence was held to be conclusive of that matter as against them.

The appeal succeeds upon the ground that the loss was not within the terms of the policy.

Atkin, L.J.—This case raises a similar question to that in *Britain Steamship Company Limited* v. *The King* (*ante*, p. 507). Here the claim is not under a charter-party, but under a policy of marine insurance by which the assured are covered against war risks in the following clause 20 so far as material. This insurance is only to cover the risks of capture, seizure, and detainment by the King's enemies and the consequences thereof, or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies whether before or after declaration of war. Clause 5 of the policy contains warranties which are as follows: [His Lordship read it, and continued:]

The vessel in question—the steamship *Matiana*—while sailing in the Mediterranean with convoy on a course directed by the senior naval officer in command of the escorting ships stranded on Keith Reef which is situate north of the Gulf of Tunis, north-east of Biserta. She was carrying a cargo of cotton from Alexandria to the United Kingdom, and was in company with three other vessels similarly engaged.

The vessels had been taking a course more to the north than usual in order to avoid a submarine-infested area, and a couple of hours before the stranding they had been directed to take a westerly course by a previously arranged direction of the commander of the escort. The master of the *Matiana*, when he received the pre-arranged signal, was about nine miles out of his reckoning, as he says was also the captain of one of the escorting vessels. It was suggested that negligence on the part of the master of the *Matiana*, or of the commander of the escort, was proved; but the judge rightly held, as I think, that the contention, if relevant, failed.

It was further contended by the underwriters that to establish proximate causation the plaintiffs had affirmatively to prove that negligence of the master did not contribute to the loss, and that such proof failed. In the view I take it is unnecessary to consider these questions, and I express no opinion upon them. There is no evidence to show why the commander of the escort ordered the course to be taken which exposed one or other of these convoyed ships to the risk of striking the reef in question.

It is said that the merchant ships sailing in convoy were engaged in a warlike operation, and that the loss was the consequence of the warlike operation. The learned judge in the court below has approved of that contention. His reasons are to be found expressed in his judgment in *Britain Steamship Company Limited* v. *The King* (120 L. T. Rep. 275; (1919) 1 K. B. 575, at p. 580), which he delivered after hearing the argument in this case, and in his judgment in the present case (1919) 1 K. B. 632).

With the distrust of my own judgment which I always feel when differing from Bailhache, J., I do not agree with his decision. It appears to me fallacious to identify the merchant vessels sailing with convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd, and are not engaged in the operation of shepherding. It is true that the merchant ships have to obey the instructions of the commander of the warships.

Sailing under convoy has been an incident of mercantile ventures in time of war for centuries, and for many years has been the subject of legislation. The Convoy Act in force in the early years of the nineteenth century (43 Geo. 3, c. 57) will be found set out in Abbott on Shipping (4th edit., 1812, p. 577). The preamble is: "Whereas it will add to the security of trade and prevent ships sailing without convoy except in certain cases."

The present statutory provision regulating the respective duties of commander of the escort and masters of the merchant ships (apart from the temporary provisions of the Defence of the Realm Regulations) are to be found in the Naval Prize Act 1864 and the Naval Discipline Act 1866, ss. 30 and 31. The latter Act imposes a duty on a naval officer, amongst other things, not to demand money from any merchant or master for convoying any ships or vessels "intrusted to his care," and empowers him to enforce his orders by force of arms. The former Act, sect. 46, had already imposed a duty upon the masters to obey under penalty of 500*l.* fine or one year's imprisonment. The lawful orders clearly include orders as to course to be taken. But the fact that non-combatants are in particular circumstances or in particular areas made subject to the orders of combatant officers conducting warlike operations does not appear to me sufficient ground for inferring that while obeying those orders they were engaged in warlike operations. I can imagine that the laws of war might press very hardly upon them if a victorious enemy took the same view.

Following the reasoning I have adopted in the *Petersham* case (*ante*, p. 507), I come to the conclusion that the *Matiana* was not herself engaged in a warlike operation. But this is not sufficient in itself to decide the case, for it was urged that, at any rate, the loss was a consequence of a warlike operation by the commander of the escort in controlling the course of the convoyed ships. I doubt whether the giving of an order in itself can ever be an operation. That which is done under this order constitutes the operation, and, to ascertain whether such operation is warlike or not, no doubt one must look to the position of the person giving the order, as well as to the nature of the order, and the person or persons by whom it is to be performed. But I will assume that in giving the order when he did to take a particular course the commander was performing a warlike operation. Was the loss the consequence of it?

I think that the clause should be construed in accordance with the general principles of insurance law as covering only the consequences proximately caused by hostilities or warlike operations. For this view one has the great authority of Willes, J. in *Ionides* v. *Universal Marine Insurance Company* (8 L. T. Rep. 705; 14 C. B. N. S. 259, at p. 289), intended to be approved, I think, by Lord Halsbury in *Anderson* v. *Marten* (10 Asp. Mar. Law Cas. 494; 99 L. T. Rep. 254; (1908) A. C. 334, at pp. 339 and 340).

It seems to be unnecessary to discuss the precise words in which the necessary relation of cause and effect should be described, for the language has been finally settled in the Marine Insurance Act 1906, s. 55 (1). Subject to the provisions of this Act and unless the policy otherwise provides, the insured is liable for any loss proximately caused by a peril insured against; but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. This is the statutory rule, and, as stated by Lord Sumner, it should always be rigorously applied in insurance cases: (see *Becker, Gray, and Co.* v. *London Assurance Corporation*, 14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101, at p. 112).

In the present case the naval commander changed the course at 9 3. At ten the order was given to zigzag; and at 11.15 the *Matiana* struck the Keith Reef. The actual loss was caused by an ordinary sea peril, that of stranding. It seems to me impossible to say that the naval officer directed her on to the reef, or that her striking was the inevitable or even the probable consequence of his order. That she struck the reef was a mischance. It could not be calculated. It was not presumably caused by his order. It was precisely the trend of mischance that constitutes a marine peril when voyaging in an unknown or unchartered route.

No doubt by taking the course she was ordered the vessel was exposed to the risk of striking this reef; but in my view the true result of the order was merely to expose the ship to a greater chance of suffering a loss from marine peril. A naval order to incur marine risks by taking a dangerous channel, by sailing in a fog-bound area, by navigating at full speed, or, as in the case of *Britain Steamship Company Limited* v. *The King* (*ante*, p. 553); without lights, does not proximately cause the loss, if in fact the vessel suffer loss, from collision or stranding.

The difference between the two channels referred to in the judgment of Erle, C.J. in the

case of *Ionides* v. *Universal Marine Insurance Company* (8 L. T. Rep. 705; 14 C. B. N. S. 259, at p. 286) illustrates the point, though I think it needs qualification. The Chief Justice takes the case of a vessel directly compelled by hostilities to navigate a mined channel. Loss by mines is a consequence of hostilities.

On the other hand, if she is similarly compelled to navigate a narrow and dangerous channel and without negligence is stranded, loss by such stranding would, in my opinion, not be a consequence of hostilities. I think Erle, C.J. would have so decided, though in his illustration by omitting the special danger of the channel and introducing the element of negligence the distinction loses some of its value.

For these reasons, consistently with the provision of the Marine Insurance Act and with authority, I feel myself bound to hold that the loss in the present case was not from a peril insured against, and that the judgment in the court below should be set aside and entered for the war risks underwriters. It follows that the plaintiffs' appeal should be allowed and judgment entered for them against the marine risks underwriters.

Appeal allowed.

Solicitors for the appellants, *Rawle, Johnstone,* and *Co.*, agents for *Hill, Dickinson,* and *Co.*, Liverpool.

Solicitors for the respondents, *William A. Crump* and *Son*; *Waltons* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 3 *and* 4, 1919.

(Before BAILHACHE, J.)

DUNLOP BROTHERS AND CO. *v.* TOWNEND. (*a*)

Marine insurance—Floating policy—Goods to be thereafter declared—Declaration by consignees—All goods except goods insured against war risks under Government scheme—Consignee's liability to declare under floating policy consignments insured under Government scheme—Loss of consignment—Insurable interest—Policy run out—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 26 *and* 29.

The plaintiffs effected a Lloyd's floating policy for 2000*l. upon produce and/or merchandise, to be thereafter declared and valued as per marine policy from certain ports in the East to the United Kingdom against war risks. The plaintiffs' interest was as consignees for sale in respect of selling commission, advances made or to be made and drafts accepted or to be accepted against shipments (within the terms of the policy) advised or made to them from time to time, save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions, if given, they were bound to carry out) to insure under the Government scheme of war risks insurance. The plaintiffs declared under the floating policy all the goods which came within the terms of the policy except such goods as they were instructed by their principals to insure against war risks under the Government scheme. They duly declared against the policy a shipment of raisins from Bombay to Liverpool. This shipment was lost by enemy action while on the voyage. The question was whether the plaintiffs were justified in failing to make declarations under the floating policy in respect of those consignments which they were instructed by their principals to insure against war risks under the Government scheme of war risk insurance, that arrangement not having been communicated to the underwriters of the floating policy. It was admitted that if the plaintiffs were bound to declare all the goods coming forward to them as consignees irrespective of whether they were instructed to insure them under the Government scheme or not, the floating policy had run off, as there were other consignments insured under the Government scheme which had not been declared by the plaintiffs.*

Held, that on the true construction of sects. 26 *and* 29 *of the Marine Insurance Act* 1906 *the plaintiffs ought to have declared all the goods which came within the terms of the policy, irrespective of whether they were instructed to insure them under the Government scheme or not, and that therefore the policy had run off and the claim failed.*

PRELIMINARY point of law. The plaintiffs sued the defendant, who was an underwriter, on a floating policy of marine insurance dated June 1916, to recover from him his proportion of the sum of 1665*l.* in respect of the loss of a number of cases of raisins.

The policy was a Lloyd's floating policy for 2000*l.* and was effected by the plaintiffs, Dunlop Brothers and Co. in June 1916, upon produce and and (or) merchandise to be thereafter declared and valued as per marine policy from certain ports in the East to any ports in the United Kingdom against war risks only.

The plaintiffs delivered particulars of the interest intended to be covered, as follows:

The plaintiffs' interest was as consignees for sale in respect of selling commission, advances made or to be made and drafts accepted or to be accepted against shipments (within the terms of the policy) advised or made to them from time to time, save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions, if given, they were bound to carry out) to insure under the Government scheme of war risks insurance.

The plaintiffs declared under the floating policy all the goods which came within the terms of the policy except such goods as they were instructed by their principals to insure against war risks under the Government scheme of war risks insurance, and not under the policy.

They duly declared against the policy a shipment of 770 cases of raisins from Bombay for Liverpool per steamship *Karema* the proportion of the value thereof attaching to the policy being 1665*l.*

The *Karema* was sunk by enemy action in November while on a voyage to Liverpool, and the raisins were lost.

The defendant by his defence did not admit that the plaintiffs were interested in the policy as alleged, or that the insurance was intended to cover such alleged interest. He also alleged that there were many other consignments covered by the policy which should have been declared

(*a*) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

thereon and which if they had been declared would have exhausted the policy.

The question of law to be determined was whether the plaintiffs were justified in failing to make declarations under the floating policy in respect of those consignments which they were instructed by their principals to insure against war risks under the Government scheme of war risk insurance.

This question was ordered to be tried as a preliminary question of law.

Leck, K.C. and *Raeburn* for the plaintiffs.

R. A. Wright, K.C. and *Simey* for the defendants.

The following authorities were referred to:

Marine Insurance Act 1906 s. 26, sub-s. (3); s. 29, sub-s. 3;

Reliance Marine Insurance Company v. *Duder*, 106 L. T. Rep. 936; 12 Asp. M. C. 223; (1913) 1 K. B. 265;

Scott v. *Globe Marine Insurance Company*, (1896) 1 Com. Cas. 370;

Stephens v. *Australasian Insurance Company*, 27 L. T. Rep. 585; L. Rep. 8 C. P. 18.

BAILHACHE, J.—In this case the plaintiffs sue an underwriter upon a floating policy of marine insurance, dated the 10th June 1916, in respect of the loss of a number of cases of raisins. The policy describes the subject-matter of the insurance to be "produce and/or merchandise," and it is insured from certain ports in the East to the United Kingdom against war risks only. The reason for that is that the marine risks were covered on the other side; but it was not convenient to cover the war risks in the East, so that was done in London.

The case comes before me upon a question of law, on the assumption that certain particulars delivered by the plaintiffs in this case are correct. Those particulars are as follows: "The plaintiffs' interest was as consignees for sale in respect of selling commission, advances made or to be made and drafts accepted or to be accepted against shipments (within the terms of the policy), advised or made to them from time to time, save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions, if given, they were bound to carry out) to insure under the Government scheme of war risks insurance."

The point to be determined really turns on the last words, "save as to such shipments as the plaintiffs should be instructed by the shippers whose instructions if given they were bound to carry out) to insure under the Government scheme of war risks insurance."

It arises in this way. The plaintiffs are the agents of certain people in the East for the sale of their goods in this country. The goods are shipped to the plaintiffs, who made advances from time to time in respect of the goods, and therefore the plaintiffs were interested in their safe arrival by reason of the selling commission which they would make if they arrived, and of the advances which they made against them before arrival. The plaintiffs took out this floating policy with reference to those goods. They declared under this floating policy all the goods which came within the terms of the policy except such goods as they were instructed by their principals in the East to insure against war risks under the Government scheme of war risks insurance and not under this policy.

The question to be determined in this case is whether the plaintiffs were justified in failing to make declarations under this floating policy in respect of those consignments which they were instructed by their principals to insure against war risks under the Government scheme, that arrangement not having been communicated to the underwriters of this policy.

It is agreed that if the plaintiffs were bound to make declarations of all the goods which came forward to them as consignees irrespective of whether they were instructed to insure them under the Government scheme or not the floating policy had run off and the claim fails.

Those are the assumptions and the circumstances in which the case comes before me to be tried.

When a floating policy on goods is taken out the assured contemplates that goods will be coming forward in which he or the person on whose behalf he takes out the floating policy will, at any rate at the time of the loss, have an insurable interest. The floating policy might be taken out because of the insurable interest of other persons on whose behalf the floating policy is taken out. There are many kinds of insurable interest. The most obvious and most complete is the insurable interest of an owner in goods, but from that full and complete interest down to the smallest that can be covered by insurance there are many varying degrees of insurable interest. It is sufficient that the person on whose behalf the policy is taken out has some pecuniary interest which would be safeguarded by the safe arrival of the goods, and be injured by the failure of the goods covered by the floating policy to arrive.

Under the Marine Insurance Act 1906 it is not necessary that the interest which the assured intends to insure should be declared to the underwriter. That is provided by sect. 26, sub-sect. 2, which is in these terms: "The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy."

Sub-sect. 3 of the same section provides that "where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered."

Sub-sect. 3 has been the subject of a good deal of judicial criticism on the ground that it is difficult to understand. I think the chief difficulty about it is due to the fact that the word "interest" is very often used in marine insurance in two senses.

It is very often used to mean the nature of the interest which the assured has in the subject-matter of the insurance, and it is also often used in the looser sense to indicate the subject-matter of the insurance itself. When, however, the same section of an Act of Parliament contains the word "subject-matter" and the word "interest" used together it seems to me quite clear that the word "interest" must be construed in its stricter and proper sense. I think that sub-sect. 3 means that where the policy designates the subject-matter insured in general terms, as, for instance, in this case, merchandise, it shall be construed to apply to the interest—that is to say, the pecuniary

or insurable interest which the assured intended should be covered, whether that interest be that of the owner or whether it be that of a person who has made advances, or of a person who is interested in the safe arrival of the goods by reason of the commission which he shall get on the sale, and, of course, the policy applies to a case where a person takes out a floating policy not to cover any pecuniary interest of his own, but to cover the liabilities and interest of persons on whose behalf he is instructed to insure.

That interest need not be declared, but the law is that the policy shall only cover the interest which it is intended to cover. An illustration of the extent to which a floating policy with no declared interest may be extended to cover the interest intended to be covered is to be found in *Stephens* v. *Australian Insurance Company* (1 Asp. Mar. Law Cas. 498; 27 L. T. Rep. 585; L. Rep. 8 C. P. 18). An illustration showing how strictly a policy in general terms is limited to the interest which it was originally intended should be covered by the assured, is to be found in *Scott* v. *Globe Marine Insurance Company* (1 Com. Cas. 370). That was a case in which a carrier took out a floating policy to cover the goods of such of his consignees as should instruct him to insure against the risks of carriage. It so happened that there was a loss of goods in respect of which he was personally liable, and he endeavoured to make a declaration under that policy, which he had not taken out on his own behalf or to cover any interest of his own, for that loss, and it was held that inasmuch as that was not the interest which he had originally intended to cover, he could not do that.

Here the interest which the plaintiffs intended to cover was their interest as persons selling goods on commission, in respect of their commission and advances on goods coming forward from their principals in the East. The subject-matter is wide enough to cover all the declarations which it is said ought to have been made, and the interest also is wide enough to cover the declarations which ought to have been made. It is, however, suggested that the interest may be limited because the principals from time to time gave instructions to the plaintiffs not to insure particular goods which came forward in the ordinary way with these underwriters, but to insure them with the war risk underwriters.

In my opinion that is not a limitation of the interest at all. The interest of the plaintiffs was precisely the interest which they had originally intended to insure under this policy, and these instructions to them by their principals in no way affected or limited their interest or altered it in the slightest degree. They were merely instructions that instead of insuring with A. the plaintiffs should insure precisely the same interest with B. As I understand the working of floating policies it is an essential principle that declarations must be made of all goods which come within the terms of the policy to which the interest intended to be covered at the time of the floating policy is taken out attaches: see Marine Insurance Act 1906, sect. 29, sub-sect. 3.

The goods about which the question arises in this case were goods which came within the terms of the policy. They were goods to which the interest of the plaintiffs attached, but they were goods in respect of which the plaintiffs had instructions to insure with somebody else. The fact that they had instructions to insure these goods with somebody else seems to me to be wholly immaterial. It in no way affects their interest, and they could no more act on these instructions, to the detriment of the defendant, than they could select for themselves what goods they would declare and what goods they would not declare under the policy.

It seems to me that this is really quite a plain case, and upon the true construction of sections 26 and 29 of the Marine Insurance Act 1906 the plaintiffs ought to have made those declarations which the defendant says should have been made on this policy.

If this is right then upon the facts which are admitted the policy has run off. In the result there must be judgment for the defendant.

Judgment for the defendant.

Solicitors for the plaintiffs, *R. Greening* and *Co.*

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

Naval Prize Tribunal.

March 28 *and June* 5, 1919.

(Before Lord PHILLIMORE, Admiral of the Fleet Sir GEORGE CALLAGHAN, and Sir GUY FLEETWOOD WILSON).

THE DERFFLINGER AND OTHER SHIPS. (*a*)

Prize—Naval Prize Tribunal—Naval Prize Fund —Payments to be made into fund under Royal Proclamation — Droits of Crown — Droits of Admiralty—Naval Prize Act 1918 (8 *&* 9 *Geo.* 5, *c.* 30)—*Royal Proclamation of the* 15*th Aug.* 1918.

By Royal Proclamation, dated the 15*th Aug.* 1918 *and made under the Naval Prize Act* 1918 (8 *&* 9 *Geo.* 5, *c.* 30), *His Majesty declared it to be his intention to grant to the naval and marine forces of the Crown the proceeds of the prizes captured during the war which should be declared by the Naval Prize Tribunal, constituted under the above-named Act, to be droits of the Crown. Owing to the complex conditions of modern naval warfare the tests laid down in the Order of Council of* 1665-6 *as to the distinction between droits of the Crown and droits of Admiralty—which latter now revert to the Exchequer—became an impossibility in the literal sense, and various tests have been applied by the Naval Tribunal, constituted under the Naval Prize Act* 1918, *as to what should be held to be droits of the Crown and what should be droits of Admiralty. To these typical cases, as decided in the case of* The Abonema and other Ships (120 *L. T. Rep.* 252; (1919) *P.* 41), *the following are now added:*

(a) *Where enemy vessels are compelled under any circumstances to leave foreign ports and are afterwards captured on the high seas, the proceeds are droits of the Crown and not of the Admiralty, and go to the Naval Prize Fund.*

(b) *Where an enemy vessel sailing under the enemy flag and owned by an enemy company, in which,*

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

however, a neutral company has the whole interest, is captured and condemned as prize, but afterwards released to the neutral company on the grounds of policy, the value of the vessel, together with interest should be paid into the Naval Prize Fund.

(c) *Where contraband goods are consigned by neutrals to other neutrals, and upon seizure are condemned as prize on the ground of having an enemy destination, but a portion of the proceeds is afterwards paid to the claimants on the grounds of policy, there is no claim upon the Exchequer to bring into the Naval Prize Fund the amount paid out to the claimants.*

(d) *Where contraband goods, originally intended for a neutral country, are seized, and proceedings are taken in respect of the same in the Prize Court, but instead of carrying the matter to adjudication the Crown enters into an arrangement, prior to the passing of the Naval Prize Act* 1918, *whereby the contraband goods are released and delivered to the Crown and afterwards sold at a profit, no allowance is to be made in respect of the same for the payment of any sum by the Exchequer into the Naval Prize Fund.*

IN these cases various points arose for the consideration of the Naval Prize Tribunal, a court specially established under the Naval Prize Act 1918, as to whether certain moneys should or should not be paid into the Naval Prize Fund, as being droits of the Crown.

The whole question as to droits of the Crown and droits of Admiralty is fully set out and discussed and the authorities cited in the case of *The Abonema and other Ships* (120 L. T. Rep. 252; (1919) P. 41). These cases are additional types of cases which were brought before the Naval Prize Tribunal for consideration.

The *Derfflinger*, together with six other enemy vessels were in Egyptian ports about the time of the outbreak of the Great War in 1914. In Oct. 1914 they were taken by the Egyptian authorities, at the instigation of the British Government, and towed out to sea beyond the three miles limit where they were seized by British cruisers and taken back into Egyptian ports as prizes and there dealt with as such. The question was whether the proceeds formed droits of the Crown or were droits of Admiralty.

The *Forde* was a Norwegian vessel carrying contraband, which came into the Downs and was seized there. It was admitted, on behalf of the Exchequer, that the proceeds were droits of the Crown, and no argument was therefore adduced as to the same.

In the other cases the point for consideration was whether the Crown, having released ships or goods for political or other considerations, ought in any case to account for the values involved to the Naval Prize Fund.

The *Attorney-General* (Sir Gordon Hewart, K.C.) and *Pearce Higgins*, for the Exchequer.

Sir *R. B. D. Acland*, K.C. and Captain *Maxwell Anderson*, R.N., for the Naval and Marine Forces.

Cur. adv. vult.

STEAMSHIPS DERFFLINGER, PINDOS, ROSTOCK, HELGOLAND, ACHAIA, CONCADORO, AND MARQUIS BACQUEHEM.

June 5.—Lord PHILLIMORE.—The judgment which I am about to deliver deals with the various cases which were argued before this tribunal on the 28th March last, and as to which we reserved our decision.

The first case we had to consider was that of five German vessels, the *Derfflinger*, *Pindos*, *Rostock*, *Helgoland*, and *Achaia*, and two Austrian vessels, the *Concadoro* and *Marquis Bacquehem*, which either were in Egyptian ports at the beginning of the war, or reached them shortly afterwards. All of them but the *Marquis Bacquehem* declined to quit port, and all remained there till, under compulsion by the Egyptian authorities, they received on board a British crew sufficient to navigate them outside territorial limits. When they had been so navigated they were formally captured by some British commissioned men-of-war, and were taken to Alexandria, where they were condemned as prize, either by the Egyptian Prize Court or by the Judicial Committee of the Privy Council upon appeal. The question to be decided is whether the seizures which led to condemnation are to be considered as having been made when possession was taken of the vessels in port before they sailed out, or as being made by the men-of-war who performed the act of formal capture at sea. In the first case, subject to any question which might arise between the British Crown and the Government of Egypt, they would be droits of Admiralty and pass to the Exchequer. In the latter case they would be droits of the Crown and pass into the Naval Prize Fund.

At the time when these things were done, Turkey was not at war with Great Britain, and Egypt still remained under the suzerainty of the Ottoman Porte, and during the litigation it was contended on behalf of these German vessels that Egypt must be held to have been at that time a neutral country; but the Privy Council rejected this view, holding that the territory, whether neutral or not, was in the actual military possession of the British Crown. Whether, even if this were so, captures in port would inure to the benefit of the Egyptian Government was, in the opinion of Cator, J., of the Court of Alexandria, a doubtful point; and when he adjourned the leading case on this subject for certain further inquires, he directed that opportunity should be given to the Egyptian Government to put in a claim. But that Government declined to do so, and the matter therefore rests to be decided solely between the British Exchequer and the British Fleet.

It was urged before us, on behalf of the Exchequer, that, for the purpose of deciding whether the ships were lawful prize or not, both the Prize Court at Alexandria and the Judicial Committee had gone behind the formal captures at sea, and had looked to the anterior circumstances, and decided the several cases with reference to those circumstances, and that we should, in the same way, look to the anterior circumstances and conclude from them that the captures at sea were merely formal acts, and that the vessels had in truth been seized while they were in port, and moved out to sea under the constraint of superior force, and that the so-called captures at sea were, in fact, merely incidental steps in the subsequent dealings with vessels which had been already captured.

But, if this were so, the whole procedure of moving these vessels from an Egyptian port out to sea, bringing them into reach of a man-of-war,

submitting them to a formal capture and bringing them back to an Egyptian port, was an unnecessary risk and expense, a purely dramatic and almost farcical act. It is not for us to inquire minutely into the political considerations which, owing to the peculiar position of Egypt, and the Convention which for some purposes neutralises the Suez Canal, apparently induced His Majesty's Government to ordain this method of procedure. It is obvious that either with a view of avoiding offence, or because it was doubtful whether seizure in port would be held to warrant a condemnation as prize, it was determined to have what may be called a clean act of capture at sea, and that the title to treat these vessels as prize was intended to be rested upon the capture at sea; and, this being so, my colleagues and I agree that we must hold that these cases must be treated as captures at sea, and as droits of the Crown, and that the proceeds must in accordance with the provisions of the Royal Proclamation of the 15th Aug. 1918 go to the Naval Prize Fund.

STEAMSHIP FORDE.

Lord PHILLIMORE.—The next case which we had to determine is taken as a typical case for the purpose of ascertaining what is to happen to vessels which came into the Downs and were there seized, with the result that they or their cargoes or parcels of their cargo were ultimately condemned as prize. The typical case is that of the steamship *Forde*. She is a Norwegian vessel, which on the 22nd Jan. 1916, in the course of a voyage from Brazil to Christiania, entered the Downs. She had as part of her cargo a large quantity of coffee, out of which 3750 bags have been condemned as prize.

It was understood that we should have to determine whether captures in the Downs were to be treated as captures at sea, in which case they would be droits of the Crown, or whether the Downs were to be treated as a port, creek, or road of this kingdom, in which case the patent of the Lord High Admiral would give the capture to him, and the proceeds would go to the Exchequer. We were, however, relieved from deciding this point, because it became manifest that the reason why the vessel proceeded to the Downs and anchored there, and remained at anchor till her papers had been examined and this cargo was captured, was because the system of patrol established in the North Sea, and the British Channel was such that every neutral or enemy vessel passing, or about to pass, through the Straits of Dover was compelled to proceed to the Downs, and remain there till further order, and that this case was therefore governed by our previous decision in the case of *The Florida* (14 Asp. Mar. Law Cas. 409; 120 L. T. Rep. 252; (1919) P. 41), where we held that it was the fear of His Majesty's Navy and of capture at sea, with all its incidents, which led the owners to direct the master to proceed and led the master to proceed to Kirkwall.

The Attorney-General, arguing on behalf of the Exchequer, saved the court trouble by admitting that this must be so. We have no doubt about it, and therefore we decide that the condemned parcels of cargo on board the *Forde*, and all similar cases, must be droits of the Crown.

STEAMSHIP LEDA AND OTHERS.

Lord PHILLIMORE.—We now come to a group of cases which raise other considerations, namely, the extent to which the Crown could in times past interfere with rights of captors by releasing captured vessels or cargoes, or by discontinuing proceedings for their condemnation. In all wars of any importance, except the Turkish War of 1807, for more than two centuries there has been either a prize statute or a Royal Proclamation or an Order in Council giving to the vessels of His Majesty's Fleet all prizes taken after the outbreak of war, except those which the Crown could not give, having already granted them to the Lord High Admiral. But it is settled law that this grant to the captors was to be construed as qualified in one respect. The Crown, whose officers conducted the prize proceedings, did not part with the right to release before adjudication vessels or cargoes captured as prize, and the captor was not entitled to proceed to adjudication or to require the Crown to proceed to adjudication. On the other hand, after adjudication the captor's right was considered to be vested and indefeasible.

Upon grounds of the highest policy it is most important that this right of the Crown should not be questioned and it is in terms saved or preserved by sect. 5 of the Act (*infra*) under which this tribunal sits. It is, on the other hand, not to be forgotten that after adjudication the captor's title used to be regarded as indefeasible. There is, however, some reason to think that it required a formal sentence or decree to give the captors this indefeasible right. The leading authority for the proposition, though there are several other cases to support it, that the Crown has the right of releasing to which we have referred, is the case of *The Elsebe* (Roscoe, vol. 1, 441; 5 Ch. Rob. 174). This vessel is evidently the same as *The Elsabe* (4 Ch. Rob. 408), where it was treated as a typical case of the second Swedish fleet which sailed under convoy in order to resist search.

In the earlier case, Sir William Scott, in his judgment, laid down the principles on which he held this resistance unlawful and as warranting condemnation; and the report concludes by the word "condemned." And yet she is the vessel which the Crown afterwards released, and in respect of which he upheld the right of the Crown to release. The point apparently has never been noticed. Probably the explanation is that no formal sentence or decree of condemnation was drawn up so as to carry out the language of his judgment. Possibly the advisers of the Crown had already anticipated that there might be negotiations with Sweden, which would end, as apparently they did, in the release of these vessels. But the fact that, after having said that he condemned the vessels he afterwards supported the release by the Crown, shows the extent to which, in his opinion, the powers of release could go.

We have now to apply these principles to the cases before us. The *Leda* was a vessel sailing under the German flag, and having for her owners a German incorporated company. She was captured and taken to Bermuda, and put into the Prize Court there and condemned as prize.

It was then represented to the authorities that in substance the vessel was owned by the Standard

Oil Company, of New Jersey, which had formed the German Company, because, owing to the ship having been built in Germany, she could not be registered as an American ship. Upon this representation, the Crown, as an act of grace, released her. Since the hearing of the argument copies of the actual documents have been obtained.

The first document, to which the Marshal and the Commander-in-Charge at the Dockyard are parties, is in the following terms:

In the Prize Court of Bermuda. In Prize No. 1. The *Leda*, Richard Klemz, Master. Whereas, on the twenty-first day of November last, the said ship *Leda* was, by a decree of this Honourable Court, condemned as good and lawful prize, and as taken by His Majesty's ship *Suffolk*: And whereas on the thirteenth day of January last the said court made an order for the delivery of the said ship *Leda* to the Crown through the Lords Commissioners of the Admiralty:

Now therefore, I, the undersigned Frederick Lennock Godet, Marshal of the said court, do hereby certify that I have this day, in pursuance of the said Order, delivered the said ship to the Crown through the said Lords Commissioners of the Admiralty, through Commander Duncan Tatton Brown, Royal Navy, Commander-in-Charge of His Majesty's Dockyard at Bermuda, the duly authorised representative of the said Lords Commissioners for the purpose of such delivery.

And I, the undersigned Commander-in-Charge, do hereby certify that I have this day, on behalf of the Crown, through the said Lords Commissioners, accepted delivery of the said ship.

As witness our hands this twentieth day of April. One thousand nine hundred and fifteen. (Sgd.) F. LENNOCK GODET, Marshal. (Sgd.) D. TATTON BROWN, Commander-in-Charge of the Bermuda Dockyard.

By the second document of the same date, to which the Commander-in-Charge and the agent of the Standard Oil Company are parties, the Commander certifies that he has, on behalf of the Crown, released the ship to the company, and the agent certifies that he has accepted delivery. A transaction in this form could not have occurred under the old law. The ship having been condemned, the captors' rights in her would have been vested, the ship would have been sold by the Marshal, and, if the Crown had been desirous of restoring her to her former owners, it would have had to have bought her at the sale.

If this transaction had occurred after the passing of the Naval Prize Act, it is clear that it is the intention of the Act that such a prize, being a droit of the Crown, should enure for the benefit of the Fleet, and the proclamation puts this in plain terms:

The net produce of all such prizes captured during the present war, as shall be declared by the tribunal appointed under the said Act to be droits of the Crown . . . shall be paid into the Naval Prize Fund.

The machinery by which this would be worked is par. 2 of part 1 of the schedule:

(2) Where any ship or goods condemned by any Prize Court, being droits of the Crown, have, whether before or after the condemnation, been delivered to the Crown . . . . a sum equal to the value of the ship or goods at the date of delivery, together with interest from the date of such delivery.

Now, does it make any difference that this transaction occurred before the passing of the Naval Prize Act? This is, no doubt, a question of some difficulty, but, in the opinion of the majority of the tribunal, it should be decided in favour of the Fleet. In principle there seems no reason why the almost accidental fact of the date of the transaction should deprive the Fleet of a right; and, if the language of the statute is carefully scrutinised, it points in the same direction.

To make the contention of the Exchequer good, some words like "subsequent to the passing of this Act" ought to have been introduced into the paragraph. In this connection it may be noticed that sect. 1 of the Act refers to "sums which have been or may be received."

Therefore, upon the whole, we hold that a sum equal to the value of the *Leda* at the date of delivery, together with interest, which we fix at 5 per cent. from the 20th April 1915, the date of delivery, should be paid by the Exchequer into the Naval Prize Fund. For this purpose the value of the *Leda* must be arrived at. Probably it can be agreed; if not, further application must be made to the tribunal, and we will direct how it should be ascertained.

Sir GUY FLEETWOOD WILSON. — I greatly regret that I do not find myself in agreement with the judgment delivered by Lord Phillimore, in so far as it relates to the case of the steamship *Leda*, and I propose to state the reasons which lead me to differ from the conclusion to which he and Admiral Callaghan have come.

The steamship *Leda* was captured at sea, and condemned at Bermuda on the 21st Nov. 1914 as good and lawful prize. On the 20th April 1915, in pursuance of an order of the court, dated the 13th Jan. 1915, the steamship *Leda* was delivered to the Lords Commissioners of the Admiralty. The Crown did not, however, retain the vessel, but on the 20th April 1915, for reasons of policy, handed her over to the Standard Oil Company, of New Jersey, who held the whole interest in the German Company by which the *Leda* was nominally owned.

It was submitted on behalf of the fleet that the case fell literally within the words of par. 2 of Part 1 of the schedule to the Naval Prize Act 1918, which prescribes among the list of payments to be made into the Naval Prize Fund:

(2) Where any ship or goods condemned by any Prize Court, being droits of the Crown, have, whether before or after the condemnation, been delivered to the Crown, with or without the payment of any money into court, or any undertaking to pay any money into court, a sum equal to the value of the ship at the date of delivery, together with interest from the date of such delivery. . . .

and that payments into the prize fund should be made of the value of the ship, notwithstanding that she had been already released at the time of the issue of the Prize Proclamation.

On behalf of the Treasury it was contended that the Crown had, before the issue of the Royal Proclamation of the 15th Aug. 1918, relating to the grant of prize money to the fleet, released the *Leda* to the Standard Oil Company of New Jersey; that the Crown was entitled to make this release, no grant of prize having been made at the date on which the ship was so released; and that the Crown, by the Proclamation of the 15th Aug. 1918, cannot be held to have granted to the fleet the value of a prize already granted to other grantees.

It would appear to be an axiom of prize law that all prize belongs as of right to His Majesty the King, and the condemnation by a Prize Court operates to confirm His title. It was not seriously contended on behalf of the fleet that prior to the date of the issue of the Prize Proclamation the Crown had the legal right at its discretion to grant away prizes, even after condemnation, but it was contended that if it did so it should make good to the Prize Fund the value of such prizes.

Under the practice adopted in former wars it appears to me that the Crown had the right to dispose of prizes, even after condemnation, before the issue of a Prize Proclamation granting prizes to the captors. It may well be that the Crown did not often avail itself of this right, because the encouragement of privateers rendered the issue of a Prize Proclamation essential immediately after the outbreak of war; but this consideration does not, I think, affect the fact that legally the Crown had the right to release condemned prizes up to the date of the issue of the Prize Proclamation. The case of *The Elsebe*, or *Elsabe* (*ubi sup*), cited by Lord Phillimore, would, however, seem to be an instance of the exercise of the right.

The question, therefore, is whether the Naval Prize Act 1918 and the Prize Proclamation of the 15th Aug. 1918 affect this right. So far as I am able to understand the law, a statute does not possess retroactive force unless it is expressly stated to do so, and the fleet can only succeed in their contention if the Naval Prize Act 1918 and the Prize Proclamation are given retroactive effect from a date antecedent to the release of the steamship *Leda*. Although the Act and the Proclamation deal with ships and cargoes captured since the outbreak of war, and therefore prior to the passing of the Act and the issue of the Proclamation, they must, I think, be construed to apply to ships and goods in the possession of the Crown at their date, and I cannot find in the Naval Prize Act anything to give it any such retroactive effect as is required to include the steamship *Leda* within its scope, nor anything to indicate that it was the intention of the Proclamation to grant to the fleet the value of prizes which had already been ceded to other grantees.

In coming to this conclusion I think that I am fortified by sect. 5, sub-sect. 2, of the Naval Prize Act 1918 by which it is provided as follows:

> Nothing in this Act shall be construed as prejudicing or affecting any prerogative or right of His Majesty to grant or release any ship or goods subject to prize jurisdiction, or the proceeds of sale thereof, or money representing the same, or to grant or release any droit of the Crown.

If I am correct in my belief that the Crown had a legal right to release this ship before the issue of a Prize Proclamation, it seems to me clear that the right is preserved, notwithstanding any other words in the Act, which at most appear to me to be ambiguous.

In my opinion, it is clear from the general tenor of the Naval Prize Act 1918 and the proclamation that it was only the intention to grant to the fleet the value of prizes, being droits of the Crown, which remained in the hands of the Crown at the date of the issue of the proclamation. At that date the *Leda* was no longer the property of the Crown to grant away, nor was the Crown in possession of any assets representing her value. I am unable, therefore, to see how the grant to the fleet can include her value.

I am also of opinion that par. 2 of Part 1 of the schedule—"Payments into the Naval Prize Fund"—relates only to vessels which were held by the Crown at the time of, or subsequently to, the passing of the Act, and has no application to vessels which had been released before that date. That the words of the paragraph must be read with some limitation is clear to me, for if this were not the case the Crown would be liable to pay into the Prize Fund the value of a ship which had been delivered to it and afterwards returned to the Admiralty Marshal, notwithstanding that the Prize Fund would thereby receive the value of the ship twice—once from the Crown and once from the sale of the vessel by order of the court.

It seems clear that this is not the intention or the meaning of the Act, and in considering what limitation is to be imposed, I hold that it is in accordance with the intention of His Majesty and of Parliament, and in accordance with the dictates of good sense, that the grant to the fleet should be limited to those prizes, or their values, or the proceeds of their sale, which were in possession of the Crown at the date of the issue of the proclamation, or came into their possession thereafter.

For these reasons, I am unable to agree that the value of this vessel should be paid into the Prize Fund.

THE MEAT PACKERS' CASES.

Lord PHILLIMORE.—Before the war, large quantities of meat were consigned from the United States to Germany. After the outbreak of war, when it became impossible, owing to the British blockade, to send shipments direct to Germany, the practice was adopted of sending them to Denmark and the other Scandinavian countries. When the enormous increase in these consignments attracted attention some of the vessels conveying them were seized and put into the Prize Court, and large portions of their cargoes were ultimately condemned. These cases are reported as the *Kim*, *Alfred Nobel*, *Bjørnstjerne Bjørnson*, and *Fridland* (13 Asp. Mar. Law Cas. 178; 113 L. T. Rep. 1064; (1915) P. 215).

Notwithstanding these seizures, further consignments began to come forward and were also seized and prize proceedings were begun. At this time the United States of America was a neutral country; and the political influence of those engaged in the trade was thought to be considerable, and the interests involved were large. It was just one of those cases where the importance of preserving the Crown's right to release for political reasons was made manifest. Accordingly an arrangement was arrived at by which, while the previous condemnations were maintained, and while the cargoes in the Prize Court were brought to formal adjudication, 93 per cent. in some cases, and 90 per cent in others, of the value of the cargoes were to be returned to the meat packers. The method of carrying out this arrangement was to obtain a decree from the Prize Court, the material part of which is as follows:

> Upon the application of counsel for His Majesty's Procurator-General, counsel for Armour and Co., and the respective solicitors for Sulzberger and Sons Com-

pany, Swift and Co., Morris and Co., and G. H. Hammond being present and not objecting, the President condemned as good and lawful prize of war the part cargoes (or the proceeds of sale thereof) *ex* the above vessels claimed by the above-named claimants (save and except the part cargoes or the proceeds of the sale thereof of the steamships *Artemis*, *Dronning Olga*, *Hellig Olav*, and *Louisiana* claimed by Sulzberger and Sons Company), subject to the terms that out of the proceeds of sale of such part cargoes there be paid out to Chandler P. Anderson, of the Ritz Hotel, W., by authority of, and on behalf of, the above-named claimants jointly the sum of 634,937*l.*, as being an agreed amount representing 75 per cent. of such proceeds or estimated proceeds. Dated the 14th day of April 1916.

It should be observed that under this decree only 75 per cent. was to be paid back to the packers, leaving 25 per cent. in court. The difference between 75 per cent. and 90 per cent. or 93 per cent., as the case may be, seems to have been met by payments out of the Exchequer. At any rate, no claim is now preferred by the Exchequer to the 25 per cent. which remains in the Prize Court, and has already been adjudicated upon by us. But the counsel for the fleet have contended that the Exchequer should bring back the 75 per cent, into the Prize Court, so that we may adjudicate upon it. To this claim two answers have been made. The first answer is that the true meaning and business of the transaction was that the Crown thereby exercised its power of release as to three-quarters of the cargoes which had been seized. If the cases had proceeded to a final hearing, the Crown might have succeeded or might have failed or might have succeeded in part and failed in part, and therefore it was reasonable to effect a compromise. Or even supposing that there was no doubt that all the cargoes would have been condemned, the exercise by the Crown of this power of release was justified by political considerations. If the old law and practice had prevailed, and there had been a Prize Act or proclamation vesting captures in the captors, the form which the proceedings would have taken in order to avoid cavil would probably have been different, The Crown would have procured condemnation of specific parcels, amounting to 25 per cent., and would have released all the rest. If the Naval Prize Act, under which we sit, had been in force at the date of the transaction, a similar course would probably have been taken also to avoid cavil. But in substance the result was the same. The counsel for the fleet relied upon the fact that all was condemned, but the same decree which condemned all embodied a release of three quarters, and it is not open to a party to take advantage of one part of a decree and reject the rest.

The other answer rests upon the language of the Naval Prize Act. This Act directs that there shall be paid into the Naval Prize Fund the sums which have or may be received in respect of ships and goods captured during the present war specified in Part 1 of the schedule to this Act, and when reference is made to the schedule there is no provision in its five paragraphs which would cover these sums. The only possible paragraph is the first:

Part 1. (1) Any money in court paid in respect of any ship or goods condemned by any Prize Court, whether in the United Kingdom or elsewhere, being droits of the Crown, together with any accumulations of interest accrued on any such money. . . ."

And that will not do, because there was not at the date of the passing of the Act, and has not been since, any such "money in court." Either answer—either the one of substance or that which may be called the technical one—seems to us sufficient, and accordingly we decide that there is no claim upon the Exchequer to bring back into the fund the 75 per cent. which has been paid out.

THE SWEDISH COPPER CASE.

Lord PHILLIMORE.—The Swedish copper case was the other case argued before us at the last sitting of the tribunal. These parcels of copper, which were originally intended for Sweden, were seized and landed at various ports in this country, and proceedings were taken in the Prize Court, but not carried to adjudication. Eventually the copper was released and delivered to the Crown, the transaction taking the following form:

A letter was addressed by the Procurator-General to the Admiralty Marshal, informing him that consent had been given to an order for release of the "undermentioned consignments of copper," which should be delivered to the order of His Majesty's Government, who hold the bills of lading. Thereupon the letter was filed in the registry, and the terms of it were recorded in the Cause Books, and the actual delivery of the bills of lading ensued. In two of the cases an order of the courts was made upon the application of the Procurator-General that he might be at liberty to discontinue the cause. In the other case or cases no formal order seems to have been required by the Prize Court. Some part of the copper was taken over by the War Office and the Ministry of Munitions. Other parcels were sold and the profit realised amounted to 18,741*l.* 1*s.* 5*d.* No claim is preferred on behalf of the Fleet to the copper or to so much of its proceeds as is equivalent to the sum paid to the owners of the copper, but a claim is preferred to have the profit above mentioned brought into the Naval Prize Court, and this we have now to consider.

The substance of the transaction was that the Crown, instead of proceeding to take its chance of adjudication, followed by an open sale effected by the Marshal, made a private arrangement with the claimants. Such a transaction is unusual, and if it had taken place when the old law and practice prevailed, or had taken place since the passing of the Naval Prize Act, and if also the copper would have been certainly condemned as contraband, it would have been irregular. It should, however, be observed that there is no reason to suppose that the copper was deliberately purchased at an under value, and it is the case that in other copper transactions of a similar nature, there was no profit, and in one case a loss. Even were we to consider the transaction as irregular, it is difficult to see how, if it had occurred in the old days, it could have been successfully impeached, especially when one recollects the strength of the language in which Sir William Scott in *The Elsebe* (*ubi sup.*) laid down "that the Crown is completely *dominus litis* and also *dominus rei litigatæ*, supposing there is no claim maintainable on the part of any neutral proprietor." And if the transaction

could not have been impeached, one has further to look to see whether there was any known mode of procedure by which the captors could have entitled themselves to all or any part of the profit. It was admitted by counsel for the fleet that the only way in which the claim could be supported under the Naval Prize Act 1918 was by bringing it under the fifth paragraph, Part I., of the schedule, which is as follows:

(5) Any other sums received in respect of ships and goods subject to prize jurisdiction which the Tribunal consider may reasonably be treated, having regard to the principles and practice heretofore observed by Prize Courts, as being sums to which, had there been a grant of prize to captors, captors would have been entitled.

During the argument no precedent for any analogous claims under the old law was put before us, but we gave opportunity for further research, and it was suggested from the Bench that the nearest analogy might be found in the doctrine of pre-emption, which will be found fully stated in Sir Robert Phillimore's Commentaries on International Law, vol. 3, sects. 267 to 270, and Sir William Scott's decision in the case of *The Haabet* (Roscoe, vol. 1, 212; 2 Ch. Rob. 174). Pre-emption is described as a milder belligerent right than compensation, and as a fair compromise between the right of the belligerent to seize and the claim of the neutral to export his native commodities, though immediately subservient to the purposes of hostility. When commodities were thus taken, according to the practice of the British Prize Court a profit of 10 per cent. was usually allowed to the proprietor of the goods seized for the purposes of pre-emption.

Since the argument in court, the tribunal has been assisted by careful papers from both sides on the subject of pre-emption and on the practice of purchase *pendente lite* by the Government of naval stores when forming the cargoes of vessels brought into the Prize Court, a matter which has, however, only a remote connection with the subject to be considered. If it had appeared that the practice in cases of pre-emption had been to treat the captors as thereby acquiring any interest in the prize analogous to that which they would have got on a condemnation, or to give them any allowance or gratification, it might be right to hold that the fifth paragraph already quoted would warrant the tribunal in decreeing some money payment to be made to the Naval Prize Fund in respect of the profit on this transaction in copper, and the Attorney-General, acting for the Exchequer, did not dispute the jurisdiction of the tribunal to make such an order. But, no precedent having been produced, there is no warrant for this tribunal making any such order, and we must consequently disallow this claim. It only remains to say we think that the costs of the counsel and the fleet should be paid out of the Naval Prize Fund.

STEAMSHIPS ALINE WOERMANN, LOME, ANNA WOERMANN, MAX BROCK, ARNFRIED, PAUL WOERMANN, ERNA WOERMANN, RENATA AMSINCK, HANS WOERMANN, FULLAH, HENRIETTE WOERMANN, HAUSSA, JEANNETTE WOERMANN, MUNGO, KAMERUN, HERZOGIN ELIZABETH, KUKA.

Lord PHILLIMORE.—The question whether these ships are to be held to have been captured by the naval forces of the Crown solely, and not by the joint operation of the military and naval forces of the Crown, and the further question, which is a delicate and difficult one, as to what the consequences would be if it was the result of a joint operation, have been before the tribunal for some time.

On the 4th Dec. 1918 we heard the evidence of Captain Fuller, and considered several documents which were put before us bearing on the question whether the captures were or were not the result of a joint operation. We have hitherto postponed giving our decision upon this point, because we were informed that in the event of our concluding that it was the result of a joint operation, it was desired on the part of the Exchequer that the further question should be remitted for solemn argument; and it may well be that there have been other captures effected during the course of the war which will make it necessary for the tribunal to consider this further point. But inasmuch as we are all clearly of opinion upon the facts that these captures were not the result of a joint operation, but were effected solely by the naval forces, we see no reason for further delaying our decision in these particular cases, and we now determine and declare that these captures were droits of the Crown, and that the money in the Prize Court representing these captures should go to the Naval Prize Fund.

Solicitor for the Exchequer and for the naval and marine forces, *Treasury Solicitor*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

May 14, 15, *July* 25, *and Oct.* 15, 1919.

(Before Lord STERNDALE, President.)

THE BERNISSE AND THE ELVE. (*a*)

Prize Court—Neutral vessels—Diversion of route—Reasonable cause—Neutral vessels sailing from allied ports—Absence of reasonable cause—Order in Council of the 16th Feb. 1917—*Practice—Payment out of security for costs.*

On their voyage from an allied port in Africa to a neutral port in Europe two neutral vessels were met and stopped by a British cruiser. The stoppage took place outside the zone which had been declared by the Germans to be a prohibited zone for neutrals on account of the existence of the submarine policy of destruction of shipping. The vessels were in possession of all the documents of clearance at the allied port of departure required by the allied Governments, and the same were in order, but they had not got a "green clearance," which was a document given by the British authorities to vessels which had called at a British port. As the vessels were bound for a neutral port which afforded means of access to enemy territory, the British naval authorities, acting under the provisions of the Order in Council of the 16th Feb.

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

1917—*the full terms of which are set out below—ordered the vessels to proceed to a British port for examination, and by so doing diverted the vessels from their usual course through the area of danger which the Germans had declared to be a blockaded region. Before arriving at the British port to which they were ordered to proceed both vessels were attacked by German submarines and torpedoed, with the result that one was sunk and the other was so badly damaged that it had to be beached. The damaged vessel did eventually reach the neutral port of destination. The shipowners, masters, and crews of the two vessels then brought actions and claimed damages and restitution against the Crown, the commander of the British cruiser who ordered the diversion, and the officer who was placed in charge of the vessels, the ground of the claim being the unwarranted diversion from a safe channel of navigation to a dangerous area, which was known to be such by the naval authorities.*

Held, that, as the Order in Council of the 16th Feb. 1917 did not apply to vessels which sailed from an allied port, the absence of a "green clearance" afforded no reasonable ground for diverting the vessels from the usual course and sending them through a dangerous zone to a British port, and, as there was no other reasonable ground upon which an excuse could be put forward by the Crown for the diversion, the Crown were liable for the destruction and damage caused, and a decree of restitution must be made.

Where security for costs has been ordered against plaintiffs and money has been accordingly paid into court, the plaintiffs are entitled to have the amount of the security paid out to them upon succeeding in their claim, even though the defendants obtain a stay of execution pending an appeal.

THESE were two actions which were heard together in which damages were claimed against the Crown in respect of the damage and loss of two neutral vessels, one of which was torpedoed and had to be beached, and the other was torpedoed and sunk. The plaintiffs were the shipowners and the masters and crews of the two vessels. The defendants were the Procurator-General or "other proper officer of the Crown in its office of Admiralty" and Commander Howard and Lieut. Rogers of H.M.S. *Patia*.

The *Bernisse* and the *Elve* were two small steamers, owned by a Dutch firm, which traded between West Africa and Holland. The place from which they sailed in West Africa was Rufisque, a port in French Colonial territory, and the cargo carried was composed mainly of ground nuts. When the vessels started from the French Colonial port all their papers were in order, and they had all the documents required by the French Government. Whilst on their voyage from West Africa to Rotterdam, however, the vessels were visited by officers of the British Navy, and as they did not possess what was known as a "green clearance," which is a card showing that they had been cleared from a British port of departure or a British port of call, an order was given that they should put into Kirkwall for examination, in accordance with the terms of the Order in Council of the 16th Feb. 1917.

The plaintiffs alleged that there was no ground for ordering the vessels to proceed to Kirkwall instead of allowing them to proceed by way of the English Channel, as they had been accustomed to do on former voyages, and that the Crown were liable for the damages and loss arising through the unwarranted diversion of the vessels from a safe course of navigation through an area which to the knowledge of the naval authorities formed a part of the area declared to be blockaded by Germany, dangerous to navigation, and only to be entered by neutral vessels at their own risk. The *Bernisse* and the *Elve*, as already stated, were torpedoed, and the latter sunk by German submarines whilst in the blockaded area.

The Crown pleaded that the statement of claim of the shipowners disclosed no cause of action, that the vessels were proceeding to Rotterdam, which was a port affording "means of access to the enemy territory" within the meaning of the Order in Council; that they were rightly ordered to proceed to a British port for examination, and that the real cause of the damage and loss was the action of the German submarines, and not any legitimate order issued by the British naval authorities.

By the Order in Council, dated the 16th Feb. 1917 it is provided as follows:

Whereas by an Order in Council dated the 11th day of March 1915, His Majesty was pleased to direct certain measures to be taken against the commerce of the enemy; and whereas the German Government has now issued a memorandum declaring that from Feb. 1917 all sea traffic will be prevented in certain zones therein described adjacent to Great Britain, and France, and Italy, and that neutral ships will navigate the said zones at their own risk; and whereas similar directions have been given by other enemy Powers; and whereas the Orders embodied in the said memorandum are in flagrant contradiction with the rules of international law, the dictates of humanity, and the treaty obligations of the enemy; and whereas such proceedings on the part of the enemy render it necessary for His Majesty to adopt such further measures in order to maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries, and for this purpose to subject to capture and condemnation vessels carrying goods with an enemy destination or of enemy origin, unless they afford unto the forces of His Majesty and his allies ample opportunity of examining their cargoes, and also to subject such goods to condemnation: His Majesty is therefore pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that the following directions shall be observed in respect of all vessels which sail from their port of departure after the date of this Order: (1) A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy trading without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court. (2) Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods, provided that, in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in art. 1 shall arise. (3) Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation. (4) Nothing in this order shall be deemed to affect the liability of any vessel or goods to capture or condemna-

tion independently of the order. (5) This order is supplemental to the orders of the 11th March 1915 and the 10th Jan. 1917 for restricting the commerce of the enemy.

Sir *Erle Richards*, K.C. and *Bisschop* for the plaintiffs.—The Crown were liable for the damage and loss caused in connection with these two vessels, as there was no reasonable ground for diverting them from their ordinary course and sending them to Kirkwall for examination, and so exposing them to the risks of attack by German submarines. The vessels were met outside the danger zone, and at the time of the visit by the naval authorities the sea was smooth, and the search, even assuming that there was the right of visit and search, might have been exercised there and then. There was no right to expose these ships to exceptional dangers. They were bound from a French Colonial port—that is, an allied port—with documents in their possession from the French authorities which were equivalent to a licence to carry their cargoes to Rotterdam, and these documents should have been sufficient to satisfy the British naval authorities to allow the ordinary course to be pursued. The absence of the "green clearance" was not enough to entitle the naval authorities to divert the course of the vessels and to insist upon examination. There was no reasonable ground for their action. There were no grounds for suspicion. Reliance was placed by the Crown upon the terms of the Order in Council of the 16th Feb. 1917, and the fact that the port of destination, Rotterdam, was a port affording means of access to the territory of the enemy. This might be a strong argument in their favour if the vessels had come from a neutral port, and the examination on the high seas was impossible or difficult. But these vessels came from an allied port, and the terms of the Order in Council were not applicable. There was no obligation, under the circumstances, for a visit to be paid to a British port for examination. The loss and damage having thus arisen through the unreasonable conduct of the naval authorities, there being no ground whatever for suspicion and no authority under the special Order in Council, the Crown were liable to the plaintiffs, and an order should be made for restitution and costs. The following authorities were referred to:

The Ostsee, Roscoe's English Prize Cases, vol. 2, 432; 9 Moo. P. C. 150;
American Journal of International Law, vol. 9, pp. 55 *et seq.*, vol. 10, pp. 73 *et seq.*, and 121;
Oppenheim's International Law, vol. 2, p. 539.

The *Attorney-General* (Sir Gordon Hewart K.C.), the *Solicitor-General* (Sir E. H. Pollock K.C.), and *Bruce Thomas* for the defendants. The papers carried by the vessels were not sufficient to permit of an unfettered right of pursuing their own course without reference to the order of the British naval authorities. The conditions were such, in relation to maritime affairs, that the right of visit and search could not be carried out with safety on the high seas, and it was essential that there should be the right to order the vessels to proceed to a port for examination. The vessels in this case were bound for a port which afforded access to the enemy country, and the naval authorities were justified in ordering them to proceed to Kirkwall. There was no particular or extraordinary risk or danger incurred by the diversion. The Order in Council was applicable, even though the voyage commenced from an allied port, and there was a reasonable ground, under all the circumstances, for the diversion. What had taken place was the result of German action, which might have happened under any conditions, even if the vessels had been permitted to pursue their usual course. In the absence of any tortious or unjustifiable acts on the part of the captors the Crown could not be held liable for damages. They cited

The Betsey, Roscoe's English Prize Cases, vol. 1, 63; 1 Ch. Rob. 93;
The Maria, Roscoe, vol. 1, 401; 4 Ch. Rob. 348;
The John, Roscoe, vol. 2, 232; 2 Dods. 336;
The Zamora, 13 Asp. Mar. Law Cas. 144. 330; 114 L. T. Rep. 626; (1916) 2 A. C. 77;
The Sigurd, 117 L. T. Rep. 639; (1917) P. 250;
The Leonora, 14 Asp. Mar. Law Cas. 209; 118 L. T. Rep. 362; (1918) P. 182; 121 L. T. Rep. 527; (1919) A. C. 974.

Sir *Erle Richards*, K.C. in reply.

Cur. adv. vult.

July 25, 1919.—The PRESIDENT (Lord Sterndale).—In this case a claim was made on behalf of the owners of the steamships *Bernisse* and *Elve* for damages against the Crown arising from damage to the *Bernisse* and the loss of the *Elve*, and the question which arises lies in a narrow compass, but is not easy to decide. The question is whether, in the circumstances, the Crown, acting by the admiral in command of the cruiser patrol at the place where the vessels were stopped, had reasonable cause for detaining them and sending them into Kirkwall.

The facts, so far as it is necessary to state them, are as follows: The two vessels were small steamers of about 950 tons gross, owned by P. A. van Es and Co., and at the time were under charter to a firm called the Naamlooze Vennootschap Oliefabriken Calve to carry a cargo of ground nuts from Rufisque, a port in the French colony of Senegal, to Rotterdam. The cargo was consigned to the Netherlands Oversea Trust, and was shipped at Rufisque by a company called the Nouvelle Société Commerciale Africaine. This company had obtained permission to export the nuts from the Governor-General of French West Africa, and the requisite documents of clearance, which will be more particularly described later, were obtained for the shipments. The two vessels made their voyages under the charter in company, and the facts as stated apply to both of them.

This was the second voyage made by them to the port of Rufisque for a cargo of ground nuts. On the former they went by the southern route—*i.e.*, through the English Channel, and were visited, but not searched, on the outward voyage. They loaded a similar cargo and left Rufisque on the 14th Feb. 1917. They obtained the following documents, the *Déclaration de Simple Exportation*, the *Manifest de Sortie*, and what is called the *Acquit-à-Caution*. This is a document permitting the export of cargo on security being given by the shippers, guaranteed by a substantial firm of merchants, that the cargo shall be delivered at the port of Rotterdam within three months. On the homeward voyage the vessels were visited in the Downs and the ships' papers examined. After an interval of several days, which I was informed was increased by some misunderstanding as to

the return of the papers, they were allowed to proceed, and arrived at Rotterdam and discharged their cargo. As I understand the evidence the cargo was kept under the supervision of the Customs until it was certain that it was being used only for the purpose of being converted into oil in Holland and not being exported. On the 4th April 1917 the vessels left Rotterdam in ballast on the second voyage, and on this occasion they took the northward route by the north of Scotland. They were visited by British cruisers on the 11th and the 13th April 1917, but were allowed to proceed, and arrived at Rufisque on the 25th April 1917. There they again loaded a cargo of ground nuts and left for Rotterdam on the 2nd May 1917, carrying the same papers as on the former voyage. It was not disputed that these papers were in order for a vessel leaving the port of Rufisque, The vessels again took the northward route, and on the 20th May 1917 were stopped by H.M.S. *Patia* and boarded by an officer from her. They were stopped in lat. 62 4 N. and long. 15 10 W., which is just outside the area declared by the Germans to be prohibited and one in which any vessel would be liable to be torpedoed and destroyed by submarines. After examination of their papers and some communication between the boarding party and the cruiser, and the cruiser and the Admiral, they were ordered into Kirkwall. The masters protested, because their course to Kirkwall would take them through the prohibited area and expose them to danger from submarines, but they were told that they must go and that a wireless message had been sent into Kirkwall for an escort. They therefore proceeded, each having a British officer and some men on board, who took charge of the ship, and on the 23rd May 1917 they were attacked by a German submarine, which torpedoed both vessels, with the result that the *Elve* sank and the *Bernisse* was badly damaged, but succeeded in continuing her voyage to Kirkwall. There she was temporarily repaired and eventually reached Rotterdam. It was stated that the submarine fired on the crew as they were getting into and while in the boats, but no lives were lost.

It was for this loss and damage that this claim was made, and the liability of the Crown seems to me to depend upon whether there was reasonable ground for diverting the vessels and sending them into Kirkwall.

It was argued on behalf of the Crown that there was no liability unless the result of the order was to expose the vessels to greater danger than they would have incurred if not sent into Kirkwall, and that the danger from submarines was just as great on the ordinary course to Rotterdam as on that to Kirkwall. I do not think that this argument is well founded.

If the Crown had no reasonable grounds for taking possession of the vessels and diverting them from their course, it is a wrongdoer, and it cannot excuse itself from returning the property to its rightful owners by saying that it cannot do so by reason of the wrongful or even criminal act of a third person: (see *The William*, 3 Ch. Rob. 316; Pratt's Story, p. 39). But if it is necessary to determine the question, I have no hesitation in finding that although there was danger from submarines outside the prohibited area, it was much greater within, and that therefore by reason of the action of the Crown the vessels were exposed to greater danger.

It is therefore necessary to consider whether there was any reasonable cause for putting the vessels in charge of a British officer and crew and taking them into Kirkwall. In my opinion this depends upon the question whether in the circumstances the absence of what is called a "green clearance" formed such a justification. Wider questions were argued during the case, involving the whole question of the rights of a belligerent to send a vessel into port for examination, instead of examining her at sea as was the practice in former times. I do not think this case raises that question, for I am satisfied upon the evidence that the officer who stopped the vessels was of opinion that there was nothing connected with the papers or the cargoes of the vessels which required further search to be made, and that no one considered that there was any reasonable ground for detaining the vessels any longer or sending them in for examination except the absence of the so-called green clearance. I shall deal with the evidence on this point later.

A green clearance is a card so called from its colour, employed during the war to show that the vessel to which it is given has been cleared either from a British port of departure or a British port of call, and derives its importance in this case from the provisions of an Order in Council of the 16th Feb. 1917, which is in these terms; it recites what is declared to be the improper and unlawful action of Germany and the necessity for further reprisals than had been taken before, and then proceeds: "A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court." The green clearance shows that a vessel has either come from or has called at a British port, but it is to be observed that a vessel which has called at an allied port has complied with the conditions of the order just as much as one which has called at a British port, and yet such a vessel will not have a green clearance, but some clearance corresponding to it, according to the law of the allied nation to which the port belongs.

The facts, so far as it is necessary to state them, are as follow: When the vessels were stopped, a lieutenant, Royal Naval Reserve, was sent from the British cruiser and boarded the vessels. He examined the papers, and it is not disputed that, so far as they went, they were in order, but there was no green clearance. Among them was the document previously mentioned, called an *Acquit-à caution*, which has been translated as an acknowledgment subject to security. It is not a very legible document, but no objection was taken to it on that ground, and there was no suggestion that the officer did not read it and understand it. In effect, it was a clearance of the goods and a permit to export them subject to an undertaking by the shippers, guaranteed by a substantial firm of merchants as to the destination of the goods. It also contained a statement that an authority to export the cargo of nuts had

been obtained from the Governor-General. By the bills of lading the goods were consigned to the Netherlands Oversea Trust, and the papers showed a shipment at and a voyage from a French Colonial, and therefore an allied port, with all the regular clearances and papers necessary in the circumstances. Acting on instructions, the lieutenant asked if the master had a green clearance, and was told he had not, and he reported the whole facts to the commander of the cruiser.

The commander of the cruiser thought the case was an exceptional one, and therefore communicated with the Admiral to know what he was to do, giving to the Admiral all the information which he himself had, and received in answer an order directing him to send the vessels into Kirkwall. An armed party was then put on board, and they proceeded on the voyage to Kirkwall. The evidence of the commander of the cruiser is, in my opinion, so important on the question of the reasons for sending the vessels to Kirkwall that I propose to give it in some detail.

He was asked: "Did you receive a report from Lieutenant Rogers as to what he had found, the papers and so on, on board the *Bernisse*?—(A.) Yes. (Q.) He has told us that he had not found a green clearance?—(A.) Yes, he stated that. I asked particularly if the ship had a green clearance. (Q.) What would the effect of a green clearance be?—(A.) With a green clearance they are allowed to proceed on their route. (Q.) If they had not got a green clearance, did you divert them, or what?—(A.) Instructions were asked for, if there was anything doubtful, from the Admiral, otherwise they were allowed to proceed. I considered this a doubtful case, and therefore I asked instructions from the Admiral by wireless. (Q.) And after receiving instructions, did you order her into Kirkwall?—(A.) I ordered the ship into Kirkwall. (Q.) You told us you considered the case a doubtful one. Will you tell me, what was the difficulty in your mind with regard to the vessel?—(A.) Because she had already called at an allied port, or she was from a French port. Therefore I had no instructions to let them go on French certificates of any sort, or consular certificates, so I asked for instructions.

(Q. The President) That is not quite an answer to the question that the Solicitor-General asked you, which was: Why did you consider it was a doubtful case?—(A.) It was out of the ordinary. Most neutrals do not have green clearances, and, therefore, they are always sent in or reported because they were from neutral ports as a rule. But this vessel being from a French port, I was informed that she had a customs' guarantee that the cargo was correct. I had not got the full details what to let in and what not, and so I asked for instructions by wireless. (Q.) Let us go by steps. If she had had a green clearance would you have allowed her to proceed or not?—(A.) I should. (Q.) But without the green clearance, what would you do, in ordinary cases?—(A.) I have no authority—I should have sent her in. (Q.) Owing to the absence of the green clearance?—(A.) Yes.

Then he was asked by the Solicitor-General: "This was, as you have explained, a doubtful case." (Q. The President) I misunderstood your expression, I think, about "doubtful case." You mean in the case of an ordinary neutral vessel without a green clearance you would have sent her in without any doubt?—(A.) Yes. (Q.) But as this vessel was not coming from a neutral port, you thought there was a doubt about it?—(A.) As far as I can recollect, Lieutenant Rogers, the boarding officer, signalled that the masters of the two ships were particularly anxious to go on, and they had no port authority from a French port about guarantees as regards cargo, and so I thought there was possibly some ground for not allowing them to go on, and I therefore took instructions. (Q.) I take it that you thought that it was a suspicious case, but you thought it was a less suspicious case than an ordinary neutral vessel without green papers?—(A.) I do not say that I have any opinion about it being suspicious or not. I thought it a little bit out of the ordinary case.

Then in cross-examination he was asked this: "I want to ask you one question, if I may. You were at this time acting under the Reprisals Order of Feb. 1917, which made it necessary for every ship to call at a British port?—(A.) Yes. (Q.) You were?—(A.) Well, I do not know about the Reprisals Order. (Q.) I meant the Order in Council of Feb. 1917, which I am sure, must have been within your knowledge?—(A.) If the ships did not want to be sent in they had to call at a British port. (Q.) That is under this Order of Feb. 1917?—(A.) Yes. (Q.) And unless you were acting in the absence or the presence of the green certificate, you were giving effect very properly to that Order in Council?—(A.) Yes. (Q.) As to the case of this particular ship, you never saw the documents, I suppose?—(A.) I did not. (Q.) And what happened was that Lieutenant Rogers signalled to you the contents of the nature of the documents, and you signalled on to the Admiral—by wireless?—(A.) Yes. (Q.) You communicated, rather, I ought to say, with the Admiral?—(A.) Yes. (Q.) And the Admiral, also without seeing the documents, gave his orders—of course, it must have been so."

This evidence, in my opinion, shows clearly that the vessels were not sent in for search in the ordinary sense of the word, and that the officers concerned were conscious that there was no reason for detaining them or sending them in except the absence of a green clearance. It also shows, in my opinion, that in sending them in the officer concerned did so in execution of the powers of the Order in Council of Feb. 1917, and for no other reason, and therefore I think that the issue in the case is narrowed to the question whether there was reasonable ground for thinking that the provisions of the Order in Council applied to this case.

I have already pointed out that a vessel might strictly comply with the conditions of the Order by calling at an allied port and still have no green clearance, but it seems to me clear that the Order has no application to a vessel which leaves a British or allied port, and that such a vessel is not obliged to call at another British or allied port in order to escape the presumption raised by the Order in Council and the consequent sending in for examination and possible adjudication. I am, therefore, of opinion that the absence of a green clearance afforded no reasonable ground for sending these vessels to Kirkwall, and, as no other reasonable ground was suggested, I think there must be a decree of restitution, with costs. I do not think that there is any ambiguity or

difficulty in the terms of the Order in Council, and I think that it clearly did not apply to this case.

My judgment is based entirely upon the conclusion which I draw from the evidence in this particular case that the vessels were not sent in for search in the ordinary way, that the officers were satisfied that there was no ground for so sending them in, and that the sole cause for so doing was that they were considered to come within the provisions of an Order in Council which had no application to the case. It has no relation to the general question of the right to search a vessel in port instead of at sea.

On application being made on behalf of the Crown, leave to appeal was granted.

Oct. 15, 1919.—Application was made on behalf of the claimants that the sums paid into court as security for costs in the two actions should be paid out to the plaintiffs. The Crown resisted the application and applied for a stay of execution pending the appeal.

The PRESIDENT.—There will be a stay of execution in this case, but I do not think that the Crown are entitled to ask that the money paid into court as security for costs should be retained there. Here were two cases in which foreign shipowners were plaintiffs in claims made against the Crown and in which they have succeeded. The plaintiffs had to give security for costs in the ordinary way. They now ask that the sums paid in by them as security should be paid out to them as they have made good their claim. On the other hand, the Crown ask that these sums should be retained in court because they have got a stay of execution. The effect of ordering that this money should remain in court would be to give the Crown a peculiar advantage—it would give the Crown security for the costs of their own appeal, or it would give them security for the satisfaction of the judgment on appeal if it is given in their favour. They are not entitled to either. I shall, therefore, make an order for the payment out to the claimants of the moneys paid in by them as security.

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

Solicitor for the defendants, *Treasury Solicitor.*

Judicial Committee of the Privy Council.

Aug. 1, 5, *and Dec.* 5, 1919.

(Present: The Right Hons. Lords HALDANE, DUNEDIN, ATKINSON, and SUMNER.)

CANADIAN PACIFIC RAILWAY COMPANY *v.* STEAMSHIP STORSTAD AND OTHERS. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Ship—Collision—Sale of vessel liable for damages—Limitation of liability—No application therefor by owners—Distribution of insufficient fund—Priority between life and property claimants—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60) *ss.* 503, *sub-s.* 1; 504, 509.

The appellants were the owners of a steamship which foundered with loss of life as the result of a collision with a Norwegian steamship. They brought an action in rem *in Canada, where the Norwegian vessel was arrested, and the court held the Norwegian vessel to be alone to blame, and ordered that she should be sold and the proceeds of the sale deposited in court for distribution, and the amount of the claims was referred to the registry. The claimants for loss of life then intervened and an order was made fixing the amount of the damage resulting to each of the parties, but without prejudice to the question whether some claims were payable in priority to others.*

No proceedings were taken by the owners of the Norwegian ship for limitation of their liability.

It was held by the Admiralty judge and by a majority of the Supreme Court of Canada that the claimants in respect of loss of life had absolute priority against so much of the fund in court as is taken to represent l. per ton of the S.'s registered tonnage, and were entitled to rank pari passu *with the appellants against the remainder of the fund.*

Held, allowing the appeal, that there was no ground for assuming a policy or intention on the part of the Legislature to establish a general preference applicable to all circumstances in favour of life claimants, or to treat any sum which may happen to be in court in a collision action generally, as if it had been brought into court in one particular way under the statute, and that the fund must be divided among the different claimants pro rata *in proportion to the amounts of their respective proved claims.*

Decision of the Supreme Court of Canada (*reported* 56 *Can. S. C. Rep.* 324) *reversed.*

APPEAL from a judgment of the Supreme Court of Canada, dated the 11th March 1918, in a suit arising out of the loss of the passenger steamship *Empress of Ireland*, on the 29th May 1914.

The collision occurred in the Gulf of St. Lawrence between the steamships the *Storstad* and the *Empress of Ireland*, one of the regular passenger steamers belonging to the Canadian Pacific Railway Company, and the latter ship was sunk with great loss of life. The railway company, as the result of the collision, commenced an action *in rem* against the *Storstad*, and that ship's owners filed a counter-claim against the Canadian Pacific Company. While the proceedings were pending the railway company applied, with the consent of her owners, that the *Storstad* should be sold and the proceeds of the sale deposited in court. The Admiralty Court found the *Storstad* alone to blame, and ordered a reference to the registrar and merchants to consider all claims that might be made for a share of the funds in court.

The railway company did not contest the claims themselves, but from the first took up the position that the claims could only be paid *pari passu* with their own claim, which amounted to nearly two and a half million dollars, and on that basis of division nothing whatever would be left for the claimant respondents. This would be the result of the Canadian statute which provises generally for a limitation of the liability of the owner of a wrong-doing ship to 38.92 dollars per ton gross, whether or not the loss of goods and damage to property be accompanied by injury to the person

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

or loss of life. On the other hand if the imperial statute applied the loss of property having been accompanied by loss of life, the respondents submitted that the liability of the owners extended to 15*l.* per ton of the ship's tonnage, and that seven-fifteenths of the fund in court must be affected only to claims in respect of personal injuries and loss of life, and that as the total amount was far from representing 15*l.* per ton of the *Storstad*, which was a vessel of 6028 tons gross register, the claimant respondent should be entitled to rank *pari passu* with the railway company in the remaining eight-fifteenths thereof. That was a modification of the original claim of the respondents, who at first claimed that their prority on 7*l.* was absolute, and that as this amount exceeded the entire fund they were entitled to the whole of it subject only to the appellants' costs. This view was adopted by the registrar and confirmed by Maclennan, J., acting as deputy local judge in Admiralty. He came to the conclusion that claims arising from loss of life were absolutely privileged upon the fund in court, and that the deputy registrar in distributing the fund *pro rata* among the claimants for loss of life, after providing for costs incurred by the different parties had come to a right decision.

The railway company appealed on two grounds (1) that the Canadian statute should alone apply and (2) that the provisions respecting the limitation of liability of the shipowners only applied in the case of proceedings for limitation having been instituted by the shipowners themselves, and only then if there were formal findings of want of fault or priority on their part in connection with the loss. Assuming that the provisions of the imperial Act were to be applied then in the result the claimants were not entitled to the absolute priority which had been declared in their favour by the courts below, but only to a division of the fund into two parts upon one of which claimants in respect of loss of property only were entitled to share *pro rata* with all others.

The respondents denied these several propositions, and submitted that as there was an apparent conflict between imperial and colonial legislation, the imperial Act must prevail.

The Attorney-General for Canada was given notice of the issue thus raised for the consideration of the court and the main points at issue were reduced to the following:—

(1) Whether the legislation of the Dominion of Canada had any right to enact laws dealing with shipping in respect of ships not registered in Canada.

(2) If it had not then how sects. 53 and 54 of the Imperial Shipping Act 1894 should be worked out and applied.

The Supreme Court (Sir Charles Fitzpatrick, C.J., Davies and Anglin, JJ., Idington and Duff, JJ. dissenting) by a majority allowed in part the appeal of the present appellants by directing that the sum in hand for distribution be divided into two funds, the first consisting of seven-fifteenths and the other of eight-fifteenths therof attributing the first exclusively among claimants in respect of life and personal injury, and the second rateably amongst all classes of claimants, including any of those claims in respect of loss of life and personal injury for such part of their claims as might not have been satisfied.

The railway company appealed.

W. N. Tilley, K.C. (of the Canadian Bar) for the appellants.

Languedoc, K.C. (of the Canadian Bar) for the respondents.

The considered opinion of their Lordships was delivered by

Lord SUMNER.—This appeal arises out of the disastrous collision between the steamship *Storstad* and the *Empress of Ireland*, which occurred in the St. Lawrence on the 29th May 1914. The *Empress of Ireland* foundered, with much loss of life; the *Storstad* proceeded to her destination—Montreal. There she was arrested, and an action *in rem* was begun at the suit of the Canadian Pacific Railway Company, owners of the *Empress of Ireland*. Those who were entitled to make personal claims in respect of loss of life were in a position of some embarrassment, for the Maritime Conventions Act does not apply to Canada, and the *Storstad* was the property and the only property of a single ship company—the Aktieselskabet Maritime—incorporated and domiciled in Norway. Pending a decision as to the responsibility for the collision they held their hands.

On the 27th April 1915 the Exchequer Court of Canada, by the judgment of Dunlop, J. sitting in Admiralty, held the *Storstad* to have been also to blame. Against this decision there was no appeal. The ship was sold by order of the court for $175,000 which sum was deposited in court, and the question of the amounts of the claims was referred to the registry, the owners of the *Storstad* taking no further part in the inquiry.

The claimants for loss of life then intervened in the action, and on the 22nd March 1916 an order was made in the terms and under the circumstances which are thus set out in the report to the court made by the deputy district registrar in Admiralty.

Whereas on the 22nd day of March 1916, at one of the adjournments of the reference, a large number of solicitors on behalf of the plaintiff intervenants and claimants, representing majority in number and amounts claimed, agreed and consented, that the Deputy District Registrar do forthwith accept the claims of all the parties as being duly recorded and proved, that is to say, "It is hereby admitted that the loss and damage of each of the said parties resulting from the sinking of the *Empress of Ireland* amount to the said sums" (referring to them) "but without prejudice to the rights of any or all the parties as to their pretensions that the claims of any of them were filed too late, or as to their pretensions that some of the claims are entitled to payment in whole or in part by priority over others, and without waiver of any other rights, except only as to the amount of the said loss and damage in each case."

The proved claims amounted in the aggregate to $3,069,483.94, of which $469,467.51 were for loss of life, and the residue was for loss of property. An acute conflict thus arose between the two interests, and in the result it has been held by the Admiralty Judge and by a majority of the Supreme Court of Canada (with a variation not at the moment material) that the claimants in respect of life lost have an absolute priority against so much of the sum in court as is taken to represent 7*l.* per ton of the *Storstad's* registered tonnage, and further rank *pari passu* with the claim of the Canadian Pacific Railway Company against the remainder of the fund. The registered tonnage of the *Storstad* was 6028 tons gross.

No proceedings were ever taken by the owners of the *Storstad* for limitation of their liability, and the fund in court; which was one sum and one fund and not two, was simply the proceeds of the sale with some accrued bank interest, and had no connection with the gross registered tonnage of the ship or the amounts of 15*l.* per ton or 8*l.* per ton or with the law relating to limitation of liability. Furthermore, the order above recited only admitted the now respondents as claimants on the fund in the action *in rem*, and gave them the benefit of the finding that the *Storstad* was alone to blame, and made no admission whatever as to the character of the fund in court or as to any prior claim to it in favour of the life claimants. Their rights must rest and were only rested in argument on the effect of the limitation of liability sections in the Merchant Shipping Act. Before their lordships the appellants abandoned part of the contentions raised below, and admitted that this statute and these sections alone are material.

The following passages from the judgment of Anglin, J. conveniently give the reasoning which prevailed with the majority of the judges of the Supreme Court: "Sect. 503 is not merely an enactment for the shipowner's benefit limiting his liability. It contains a substantive provision for the advantage of claimants in respect of loss of life and personal injuries, upon whom it confers valuable rights of priority. A construction, which would make the existence and enforceability of these rights entirely dependent upon the shipowner's seeking and obtaining a judgment under sect. 504 declaratory of the limitation of his liability and fixing the amount thereof, would seem so utterly unreasonable and so contrary to what Parliament apparently intended should be the effect of the statute, that in my opinion it should not prevail. Whether the loss of life and personal injury claims are to have a limited preference over loss of property claims or are to rank *pari passu* with them on the entire fund available was not left to be determined by the action or the inaction of the shipowner, whether prompted by interest or purely spontaneous. . . . Were the court to distribute the money now available *pro rata* amongst all the claimants, as the plaintiff contends for, the policy of sect. 503 of the Merchant Shipping Act would be defeated. It would be equally disregarded were the entire proceeds of the sale of the ship devoted to a fund available exclusively to satisfy demands in respect of loss of life and personal injury. The statute does not give them any such priority. It provides for the concurrent establishment of two distinct funds, in which it defines different rights."

Their Lordships are unable to accept this reasoning. Limitation of liability is the creation of statute. It is a provision in favour of the shipowner, and operates to restrict the rights of those to whom he is liable. Incidentally the sections furnish the rule by which to determine the rights of parties interested in the fund created by the operation of the sections themselves, but if the shipowner, for whatsoever reason, does not bring the sections into operation, no one else can do so, and they do not in such case have effect. This is the result of the enactment itself, for it expressly provides for procedure to limit the shipowner's liability, and sets up no principle or rule as to the rights of different classes of claimants apart from such limitation. The owners of the *Storstad* took no proceedings for limitation of their liability. If she had turned out to be of such value that the amount ultimately paid into court equalled the aggregate amount of the proved claims, they would have been paid in full, no matter how many pounds per gross register ton that amount represented. If the tonnage of the ship had been so small that the amount in court exceeded 15*l.* per ton, the whole of it would, nevertheless, have been available in satisfaction of the proved claims. Nothing would have prevented the claimants as a body from enjoying their full rights, arising out of the faulty navigation of the ship and the damage caused thereby, unless the shipowners had availed themselves of the statute. As they had not done so, nothing prevents a particular class of these claimants—in this case the appellants—from enjoying the full benefit of their legal rights. It is an accident, and an unfortunate one, that there is not money enough for all, but this accident gives the respondents no more and the appellants no less right than if the fact had been otherwise. If, instead of being made intervenants in the Canadian proceedings by consent sent, the respondents had found it worth their while to sue the shipowners in Norway *in personam*, they would have been entitled, if successful, to a judgment for the full amount of their claim, notwithstanding the fact that the result of the proceedings *in rem* in Canada had withdrawn a part of their opponents' assets beyond the reach of execution on their judgment.

Since the sections do not apply, no more need be said now upon their construction and operation. Their Lordships will only add, that they are unable to find any ground for assuming a policy or intention on the part of the Legislature to establish a general preference applicable to all circumstances in favour of life claimants, or to treat any sum, which may happen to be in court in a collision action generally, as if it had been brought into court in one particular way under the statute.

The appellants contended further that the Limitation of Liability sections had no application because it had not been shown that the loss of the *Empress of Ireland* happened without the actual fault or privity of the owners of the *Storstad*. Their Lordships refrain from discussing this point because it appears to them to be devoid of any substance. It was neither proved nor suggested that the *Storstad* was in any respect ill found. She belonged to an incorporated company and not to natural persons, and it was proved at the trial that the whole cause of the collision was the bad navigation of the officer of the watch. In such circumstances what room can there be for discussion of the actual fault or privity of the Aktiesselskabet Maritime?

In the result the appeal succeeds, and with costs; nor is there any ground for allowing the appellants costs to be taken out of the fund in court as suggested by the respondents. The judgments of the Court of Exchequer and of the Supreme Court must be set aside, and the case must be remitted in order that judgments may be entered, directing a division of the fund in court among the different claimants, appellants and respondents, *pro rata*, in proportion to the amounts of their respective proved claims. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Blake* and *Redden*.

Solicitors for the respondents, *Laurence Jones* and *Co.*

Oct. 21 *and Dec.* 8, 1919.

(Present: The Right Hons. Lords SUMNER and PARMOOR, the LORD JUSTICE-CLERK, and Sir ARTHUR CHANNELL.)

THE E. 14. (*a*)

APPEAL FROM THE HIGH COURT OF JUSTICE (ENGLAND) ADMIRALTY DIVISION (IN PRIZE).

Prize Court—Appeal—Prize bounty—"Armed ship"—Troopship—Naval Prize Act 1864 (27 & 28 *Vict. c.* 15), *s.* 42—*Order in Council the* 2*nd March* 1915.

By the combined effect of sect. 42 *of the Naval Prize Act* 1864, *and the Order in Council dated the* 2*nd March* 1915 *a prize bounty is payable among such of the officers and men of His Majesty's warships as are actually present at the taking or destroying of any "armed ship" of the enemy, calculated at the rate of* 5*l. for each person on board the enemy ship at the beginning of the engagement.*

A submarine belonging to the British Navy sank an enemy troopship which had on board Turkish troops with their rifles and ammunition, and with six field guns on her deck, which could have been used effectively against the submarine. The vessel herself was part of the Ottoman naval force, being a fleet auxiliary manned by naval ratings and commanded by officers of the Turkish Navy, and she carried as part of her regular equipment a few light guns with which she could defend herself. At the time in question she had on board a crew of 200 *officers and men, and* 6000 *Turkish troops.*

Held, that, although the main character of the Turkish ship destroyed was that of a transport, nevertheless her status was something more than a merchant ship used to carry troops as she was in fact armed, and as sect. 42 *of the Naval Prize Act* 1864 *did not confer or withhold the grant of prize bounty according as the armament was the main or an incidental characteristic of the vessel, the appellants were entitled to prize bounty.*

Decision of Lord Sterndale, P. reversed.

APPEAL by the commander, officers and crew of His Majesty's submarine *E.* 14 who sought pursuant to sect. 42 of the Naval Prize Act 1864 and the Order in Council of the 2nd March 1915 to establish their claim to a grant of 5*l.* per head of the 6000 Turkish troops, and of the 200 ship's complement who were on board the *Gul Djemal* when they destroyed her with a torpedo in the Sea of Marmora on the night of the 10th May 1915.

The application was first heard by the late President (Sir Samuel Evans), who held that the expression "armed ship" in sect. 42 of the Act of 1864 meant a fighting unit of the enemy fleet, and that on the facts before him it had not been proved that the *Gul Djemal* was such a ship. He therefore, dismissed the application, but expressly gave the claimants liberty to apply again should they meanwhile get further evidence of the status of the *Gul Djemal.*

The proceedings before Evans, P. are reported 116 L. T. Rep. 192; (1917) P. 45.

The claimants obtained further evidence, the witness being an officer who at the time was a prisoner at Constantinople.

Lord Sterndale to whom the second application was made on the 25th Nov. 1918 found himself unable to hold that the *Gul Djemal* was an armed ship, as he agreed with Evans, P. that the fact that there were on board a few light guns would not constitute her an armed ship any more than a merchant vessel armed for self-defence. Accordingly he dismissed the application.

The claimants appealed.

Sir *Erle Richards*, K.C. and *G. P. Langton* for the appellants.

Sir *Gordon Hewart* (A.-G.) and *J. G. Pease* for the Crown.

The considered judgment of the board was delivered by

Lord SUMNER.—In this appeal the commander, officers and crew of His Majesty's Submarine *E.* 14 seek, pursuant to 27 & 28 Vict. c. 25, s. 42, and the Order in Council dated the 2nd March 1915, to establish their right to a grant of 5*l.* per head of the 6000 Turkish troops, and of the 200 ship's complement, who were on board of the *Gul Djemal* when they destroyed her with a torpedo in the Sea of Marmora, near Kalolimno Island, on the 10th May 1915. The troops had their rifles and ammunition, and with them were six Krupp 75-mm. field guns also with ammunition, and so disposed on the ship's deck astern that at suitable ranges they could have been used against the *E.* 14 with effect. The ship herself was part of the Ottoman naval force, a fleet auxiliary manned by naval ratings and commanded by officers of the Navy of the Sublime Porte, and she carried a few light quickfiring guns as part of her regular equipment, with which she could defend herself, if necessary. At the time in question she was acting as a troop transport, and this would appear to have been her regular employment. She was on her way to the Dardanelles, and it was known to the Turkish Government that British submarines had passed up the Straits for the purpose, among others, of interfering with that traffic.

By sect. 42 of the Naval Prize Act 1864, the right in question would attach if the *Guj Djemal* was, in the words of the section, an "armed ship of any of His Majesty's enemies." This is entirely a matter of construction of the section in its application to the facts of this case, and no other question was raised in the appeal. Little assistance, if any, s to be derived from prior decisions or earlier legislation. No decision before the war turned on or touched this section, and in the cases decided during the war the present contention had not been raised. The older Acts go back for many generations. At one time the number of guns, and not of men, carried by the ship destroyed, was the measure of the grant, and until the Crimean War the expression "armed ship" was not used. No settled practice was shown to have existed in the grant of "head money," as it was called, that could be regarded as affecting the ordinary meaning of the words of the section, and no reasons of policy were suggested, which would point to an intention to use those words in one sense rather than in another.

It is plain on the facts that the *Guj Djemal* was a ship, and a large one; that she was a ship of His Majesty's enemies, a unit in the Turkish Fleet; and that she was armed. If then these single and undisputed facts are put together, she was in fact "an armed ship of His Majesty's enemies." Why was she not so within sect. 42? It is true that she was used to transport troops. It is true also that she got no chance to use her arms, or at least none that Turkish troops or seamen were minded

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

to take; such is the nature of an injury by a well-placed torpedo. It is true that she did not go forth to battle, nor was she in any case fit to lie in the line but the section says nothing about this. It may be that her regular service consisted in carrying troops and stores, and that her combatant capacity was not high, but it can hardly be doubted that, if a suitable opportunity had occurred, it would have been her duty to fight and even to attack a hostile submarine.

The contention presented on behalf of the Crown was, that her main character was that of a transport, and that the fact that she was armed was only an incident. The section, however, does not distinguish between the purposes for which the armed ship is armed, nor does it confer or withhold the grant according as the armament carried is the main or an incidental characteristic of the enemy Sovereign's ship. The contention prevailed with the late President, who gave effect to it in the following words: "An armed ship, within the meaning of the section to be construed, is a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement." Evidently this proposition is open to several objections. It makes the rights of His Majesty's forces depend on the purpose with which his enemies may have dispatched their vessel, on what either way is a warlike service.

It employs a term—"offensive action"—which in practice is of indefinite meaning, and in any case involves an inquiry into the state of mind of the hostile commander. Sir Samuel Evans elucidated his meaning thus in another passage: "In my opinion, if it were proved that she carried a few light guns, that would not constitute her an armed ship any more than a merchant vessel armed for self-defence; nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops."

Their Lordships are unable to accept those propositions. Of the case of a merchant ship they say nothing, for this is a question on the meaning of the words "ship of the enemy," and the appellants did not contend, nor needed they to do so, that any ship but one in State service would be covered by those words. There is again no evidence that the rifles and field-pieces were not intended to be used at sea under any circumstances, little as any occasion for their use was to be looked for, and it must be recollected that defence is not confined to taking to one's heels or even to returning a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first. No criteria would more embarrass the application of the enactment than these, and to introduce the test of the ship's commission is to introduce something which involves a re-writing of the section. Their Lordships are of opinion that the words of the section are plain, and that the facts fit them, and accordingly the appellants are entitled to succeed; that the decree appealed against should be set aside and that this appeal should be allowed with costs, and that the case should be remitted to the Prize Court to make such formal decree in favour of the appellants as may be required. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants, *Botterell* and *Roche*. Solicitor for the Crown, *Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Nov. 7, 1919.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

WHITTLE *v.* MOUNTAIN. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Time policy — Houseboat at anchor in creek—"Liberty to shift"—Docking clause—Towage to dock for repair—Peril of the sea—Abandonment of adventure—Liability of underwriter.

The plaintiff insured his houseboat, the D., *by a time policy "whilst anchored in a creek off Netley, however employed, with liberty to shift." The policy contained a clause: "Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." During the currency of the policy the plaintiff wished to have the* D. *cleaned, and she was taken from the river Hamble up Southampton Water to a yard on the Itchen (a distance of about seven miles), which was the nearest and most convenient yard. The* D. *was lashed alongside a tug and thus towed, but sank outside the yard. It was found that certain seams were defective, and had opened and let in the water raised by the bow wave from the tug and tow. The plaintiff was unaware of the defect. When he had the* D. *removed from the Hamble the plaintiff did not intend to send her back during the currency of the policy.*

Held, that (1) *the loss was due to a peril of the sea;* (2) *the plaintiff was protected by the docking clause;* (3) *the plaintiff had not at the time of the loss abandoned the insured adventure. Per Bankes, L.J.: The words "liberty to shift" did not authorise the plaintiff to take the vessel from the Hamble to the yard.*

APPEAL by the defendant from the judgment of Bailhache, J. without a jury.

The plaintiff sued to recover for a loss under a policy of marine insurance, underwritten by the defendant, on the plaintiff's houseboat, *Dorothy*. The policy, which was a Lloyd's policy, dated the 19th Aug. 1918, was for a period of six calendar months, commencing the 14th July 1918 and ending the 13th Jan. 1919, "whilst anchored in a creek off Netley, however employed, with liberty to shift." The policy covered the usual perils, and it contained the following clauses: "Including all risk of docking, undocking, changing docks, and going on gridiron or graving docks, as may be required during the currency of the policy. In the event of any deviation or change of voyage, it is hereby agreed to hold the assured covered at a premium to be arranged." The policy was a renewal of a similar policy for six months, when the *Dorothy* was let in Jan. 1918 to the Admiralty to house workmen employed by some contractors who were raising a wreck off Calshot. She was then anchored in the river Hamble. In June 1918 the plaintiff gave notice to terminate the hiring, which was terminated early in September.

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

When the contractors' workmen left the *Dorothy* in Sept. 1918, she was in such a condition that the plaintiff decided to have her taken to Camper and Nicholson's yard on the Itchen, above Southampton Docks, placed on the gridiron there, cleaned, painted, and re-decorated for himself and family to reside in, and her hull examined. He also intended, when these operations were completed, to lay her up in the Itchen for the winter. The yard was the nearest and most convenient yard with a gridiron. The plaintiff accordingly arranged that she should be towed from the Hamble to the yard by a small tug called the *Test*, and he arranged to have three men on board the *Test* to assist in the towage operations. The machinery of the *Test* broke down and she was not available for the towage, and the deputy dockmaster sent a larger and more powerful tug, called the *Dorrington*, to tow the *Dorothy* to the yard. She went to the Hamble on the 21st Sept., but the master found no one in charge of the *Dorothy*, the men sent to the *Test* being prevented from going down by the breakdown of the machinery. He put two men and a boy on board the *Dorothy*, and lashed her alongside the *Dorrington* in the ordinary way, with fenders to keep her off the *Dorrington*, and made fast ahead and astern. In this way she was towed at a speed of about five or six knots from the Hamble up Southampton Water to the yard, a distance of about seven miles. On arrival outside the yard it was found that about four feet of water had entered the *Dorothy* during the course of the towage, and she made further water until she sank. The *Dorothy* was subsequently raised and repaired, and the action was brought on the policy to recover the amount of the expenses so incurred. It was admitted that both the Hamble and the yard were within the port of Southampton.

Bailhache, J., found that the water got into the *Dorothy* during the course of the towage through an opening in some of the topside seams above the ordinary water-line, the bow wave from the *Dorrington*, combined with the bow wave from the *Dorothy*, raising the level of the water and causing the water to reach the leaky and defective seams and to enter the *Dorothy*, and thereby causing her ultimately to sink. He held that the moving of the *Dorothy* from her anchorage in the river Hamble (which, it was agreed, came within the words "a creek off Netley") to Camper and Nicholson's yard came within the clause giving liberty to shift, and that the loss was due to a peril of the sea; and he gave judgment for the plaintiff.

The defendant appealed.

R. A. Wright, K.C. and *E. A. Digby* (*Simey* with them) for the defendant.—The policy was not in force at this time of the loss, nor did it in any case cover the loss. The adventure was terminated. The risk was for six months while anchored in a creek off Netley with liberty to shift. The vessel left the creek and there was no intention to return there. The words "liberty to shift" do not help the plaintiff. They mean "liberty to shift" for the purposes of the adventure, which was at anchor in the creek for six months. The shifting was not for the purposes of the adventure. Further, the plaintiff is not protected by the docking clause, which means the docking of a vessel anchored in the Hamble; nor was the docking incidental to the risk covered, particularly in view of the fact that there was no intention of returning to the Hamble. Lastly, the loss was not caused by a peril of the sea. The bow wave from the tug which raised the water to the level of the defective seams of the tow was an inevitable incident of the towage, and there was nothing fortuitous or unexpected causing the loss. They referred to

The Xantho, 6 Asp. Mar. Law Cas. 8, 207; 55 L. T. Rep. 203; 12 App. Cas. 503;

Ballantyne v. *Mackinnon*, 8 Asp. Mar. Law Cas. 173; 75 L. T. Rep. 95; (1896) 2 Q. B. 455;

Sassoon and Co. v. *Western Assurance Company*, 12 Asp. Mar. Law Cas. 206; 106 L. T. Rep. 929; (1912) A. C. 561;

Dudgeon v. *Pembroke*, 2 Asp. Mar. Law Cas. 323, 3 Asp. Mar. Law Cas. 101, 393; 31 L. T. Rep. 31; L. Rep. 9 Q. B. 581; 36 L. T. Rep. 382; 2 App. Cas. 284;

Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 45; and sched. 1, Rules for Construction of Policy, r. 7;

Pearson v. *Commercial Union Assurance Company*, 2 Asp. Mar. Law Cas. 100, 3 Asp. Mar. Law Cas. 275; 35 L. T. Rep. 445; 1 App. Cas. 498.

Leck, K.C. and *L. C. Thomas* for the plaintiff.—The adventure was never abandoned. At the most there was only an intention to deviate. Assuming there was no intention to return to the Hamble, the loss took place before that intention was given effect to. In any case the plaintiff is protected both by the words "liberty to shift" and the docking clause. The yard where the vessel was docked was the most convenient and suitable yard to take the vessel to from the Hamble. The loss was therefore covered by the policy. [They were not called upon as regards the question of perils of the sea.]

Digby replied.

Bankes, L.J.—The policy was on a houseboat called the *Dorothy*, and in the policy as well as in the policy which preceded the one in question she was described as "anchored in a creek off Netley." By agreement the vessel was allowed to lie at anchor in the river Hamble, and therefore the description of the vessel in the policy must be taken as "anchored in the river Hamble." She had been let for occupation by some workmen who were engaged in raising a wreck off Calshot Castle, and on the determination of the letting it was necessary to have her examined and cleaned and decorated for the plaintiff and his family to reside in her. For that purpose she had to be towed to Camper and Nicholson's yard on the Itchen, where there was a gridiron, a distance of about seven miles from her anchorage. The plaintiff arranged for a small tug of low power to be sent with some of his men to assist, but the machinery of this tug broke down, and a high-powered tug was sent without the plaintiff's men. The *Dorothy* was lashed alongside the tug and towed in that way. On the voyage sea-water found its way into the *Dorothy* and in consequence she foundered near the yard, and expenses were incurred in raising and repairing her. The action was brought to recover those expenses. The learned judge found that the seams of the *Dorothy* above the water line were open, and that the breast wave made jointly by the tug and the *Dorothy* raised the water to the level of the defective seams, and she in consequence sank.

It was said that there was no peril of the sea. Bailhache, J. found that there was, and I agree with him. I think that the unusual height of the breast wave caused by the large tug and the *Dorothy* may properly be called a fortuitous accident or casualty

of the sea, and if it caused or contributed to the loss it is immaterial that the vessel was unseaworthy.

The next matter raises a more difficult question. The policy was on the *Dorothy* "whilst anchored in" the Hamble "with liberty to shift," and it contained a docking clause: "including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." Two points are raised in this regard. It is said first that the taking of the *Dorothy* from the Hamble to the yard on the Itchen was not covered by the shifting clause; and, secondly, that taking her there, considering the distance and that she would have to leave the Hamble and be towed up Southampton Water, could not be covered by the liberty to dock.

One must see what are the limits placed upon the adventure by the language of the policy. First, as regards the shifting clause. There is a limitation of time from the 14th July 1918 to the 13th Jan. 1919, and of space indicated by the words "whilst anchored in a creek off Netley"—or, to use the agreed equivalent, "whilst anchored in the river Hamble"—with liberty to shift. How is that area of space extended by the "liberty to shift"? Those words, being used of a vessel at anchor, mean, in my opinion, liberty to shift from one anchorage to another within the limits of the river Hamble. Upon this point I agree with the contention of the defendant, and cannot agree with the judgment of Bailhache, J. But then comes the liberty of docking and going on the gridiron. According to the evidence there was a gridiron at this yard, and it was not suggested that there was a dock or a gridiron in the Hamble. If therefore the defendant's contention on this point is right, the result is that no meaning can, on the facts of this case, be given to the liberty to dock clause, because, if the area of the adventure is never to exceed the limits of the Hamble, there is no dock in the Hamble, and none, at any rate none with a gridiron, nearer than Camper and Nicholson's yard. One must therefore either ignore the docking clause, or say that it was within the intention of the parties that the vessel might be taken to this the only available gridiron, and that the parties intended that the insured adventure should cover the vessel proceeding to this particular gridiron. For these reasons I think that the appeal should be dismissed.

Scrutton, L.J.—I arrive at the same result as the President of the court, but as I am not quite sure that I do so by the same road as the learned judge below, and as it is a case out of the ordinary I will express my judgment in my own way.

Commander Whittle had a houseboat, called the *Dorothy*, and apparently at the beginning of the year 1918, he either let her to, or she was commandeered by the Admiralty for the purpose of housing some workmen who were engaged in salving a wreck somewhere near Calshot Castle, at the mouth of Southampton Water, and Commander Whittle took out a policy to cover the *Dorothy* against certain risks. What those risks are is not exactly clear. The underwriters were told before the policy was issued that the *Dorothy* was going to lie in a named creek off Netley, on the other side of Southampton Water from Netley. They were apparently told before the second policy was issued that she was not lying in that creek, but in a creek up the Hamble river, on the same side, nearly opposite Calshot Castle, and in each policy they used the words "Whilst anchored in a creek off Netley," regardless of the fact that she was not anchored off Netley, but was anchored somewhere else. One would be tempted to think that the wording of the policy might apply to her while moored for the purpose of carrying on salvage work near Calshot, but the policy says "however employed," so you cannot limit it to that.

The policy contains the phrase, "with liberty to shift." The learned judge has taken the view that "however employed with liberty to shift" would enable the vessel to shift up Southampton Water to another ordinary mooring place for houseboats or yachts in the waters of the Itchen. At present I do not think I can put so wide a meaning on the words "liberty to shift." It is not necessary in my view to determine it, but at present I should require to give it more consideration before I agreed with the learned judge in the view he has taken. These general clauses are usually interpreted and limited with regard to the adventure contemplated by the policy, and I find some difficulty in getting out of this policy that it is a time policy on the *Dorothy* wherever moored in Southampton Water. It is not necessary to express a final opinion on the point, except to say that I do not at present agree with the learned judge's view about it.

But there is another clause in the policy which applies to a houseboat, that is, the docking clause, and that has to be given effect to again with reference to the principle of the adventure contemplated by the parties, and the general words that are not to have the meaning given to them if they go outside the adventure contemplated. That clause is in these words, "including all risk of docking, undocking, changing docks, and going on gridiron or graving, as may be required during the currency of the policy. What was happening when the loss in question occurred was that the *Dorothy* was being towed up from the Hamble river to a gridiron at works on the Itchen, just above Southampton Docks, and was going, according to the evidence, to be put on the gridiron for the purpose of cleaning her bottom, and seeing to the condition of her underworks after she had been lying for some years in the Hamble river, or at the mouth of Southampton Water. It is very likely, and I will assume that, when she had done her docking and had gone on the gridiron, she would very likely not go back to the Hamble river, but lay up in the upper waters of the Itchen. It has been argued before us by the two counsel for the appellant that once the owner of the *Dorothy* had made up his mind that she was not coming back to the Hamble river, the journey to the dock, even for the purpose of repairing the damage incurred while she was lying in the Hamble cannot be covered, because the moment she left the place never to return, the policy was at an end, although what she was doing was going to repair damage done during the insured adventure. That is putting too narrow a construction upon it, and giving no effect to the docking clause, supposing the assured makes use of the docking clause at the end of the adventure within the terms and period of the policy to put right damage which has been done during the insured adventure. The learned judge having covered the ship under the shifting clause was inclined to think he could not cover her under the docking clause. I know the difficulties about covering her under the shifting clause, but I

am quite clear that she can be covered under the docking clause. She was going to be put on the gridiron during the currency of the policy because it was required from what had happened to her while she was lying anchored in a creek off Netley within the meaning of the policy. Therefore, on the question of whether the risk attached during her towage I come to the same conclusion as the learned judge, though on rather different grounds from those on which he arrived at his conclusion.

The second point taken is this; it is said that the *Dorothy* was unseaworthy, and that it was only the unseaworthiness that caused the loss. The policy is a time policy. Therefore, under the well-known doctrine now embodied in the Marine Insurance Act, "there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where with the privity of the assured the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." It is admitted that there was no privity of the assured in sending this vessel on her towage in an unseaworthy state, because the assured did not know of it; therefore, that clause does not apply, but it is said that the loss happened through unseaworthiness, and unseaworthiness only, so that it does not amount to a peril of the sea, and the definition of perils of the sea in the Marine Insurance Act is referred to. "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." When the loss happens at sea of a ship which is not the subject of a warranty of seaworthiness one is very often in a difficult position, and an explanation has been given of the result by Blackburn, J. in *Dudgeon* v. *Pembroke* (*sup.*), which is the explanation generally referred to when this matter is dealt with. There the ship was unseaworthy when she went to sea; the assured did not know of it; she went ashore while she was making for Hull in distress, and the cause of her going ashore was partly because she was full of water and became unmanageable. "The cause of that cause, viz., her being in distress and full of water, was, that when she laboured in the rolling sea she made water; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent anyone who knowingly sent her out in that state from recovering indemnity for this loss." The learned judge assumed that what happened in the present case was that the ship as she lay at anchor was seaworthy. Her under-works, the part ordinarily under water was quite taut, staunch and strong, but he has found that she was towed up by a more powerful tug than had been expected, being moored alongside of the tug; that an unusual breast wave was made by that towage, and that affected a part of the ship not usually affected by water where the seams had opened partly from towage by a too powerful vessel, and the water made its way through these seams, and he has found that that is a state of things coming within the law, as explained by Blackburn, J. It is his finding of fact. There was evidence on which the learned judge could come to that finding, and I do not feel disposed to dissent from his finding, though he might have made a finding which would have brought the case within the propositions of law stated by the defendant's counsel. For these reasons I agree with the judgment of the President, that the appeal should be dismissed.

Atkin, L.J.—I agree. I so entirely agree with the judgment that has just been delivered that I do not propose to add anything further upon these points, except that I should like to say one word on the question upon which I think we all differ from the learned judge below, namely, on the question of whether this journey to the gridiron in question was within the docking clause, and upon that I think one derives considerable help from the case of *Pearson* v. *Commercial Union Assurance Company* (*sup.*). There was a time policy against fire effected on a steamship. The policy described it as then "lying in the Victoria Docks," but gave it "liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy." Then in order to go into dry dock the ship, which was a paddle steamship, had to have the lower half of the paddle removed, and she then proceeded under tow to a yard which was two miles away up the river, and then proceeded to be repaired, and then, instead of coming back, she moored out in the river for the purpose of replacing her paddle. Now it was held by all the judges that the visit to the dry dock was within the terms of the policy, but that the mooring in the river for about ten days for the purpose of replacing the paddle was not within the policy, and what is said there by Lord Cairns is this: "The ship is therefore covered by the policy during the three months so long as it is lying in the Victoria Docks, and so long as it is in dry dock, or at all events in a dry dock in the port of London." And later on "your Lordships find that the dock called Lungley's Dry Dock was the only dock in the Thames which would take in the Indian Empire, and that even into this dock the ship could not be received without taking off the lower half of the paddle wheels." Lord Penzance said: "In construing the meaning and extent of this liberty, I think great latitude should be allowed to state at length in writing all that the vessel might be intended to be allowed to do in going to the dry dock, in lying there while repaired, and then returning, the length of time to be occupied . . . could not be comprised in any but a very lengthy document. The convenience of mercantile transaction makes this impossible in many cases, and in this mercantile contract of insurance especially it is always the custom to express the mutual bargain in short and conventional terms. In construing such terms it is always to be borne in mind that the object of insurance is indemnity from the risks attending some commercial adventure or operation which the owner of the subject of insurance is engaged upon, and it is well understood by both parties that the desire and object of the assured is that the policy should extend to all such risks, of the character insured against, as may arise by the adventure or operation being carried out in the usual and ordinary manner. The assured, therefore, is not intended to be bound to make his mode of carrying out the adventure conform to the words of the policy, rigidly construed, and confined to what is absolutely necessary; but the

general words of the policy are intended to be construed so as to conform to the usual and ordinary method of pursuing such adventure." It is obvious that in construing a liberty clause such as this you are to give a reasonable interpretation to the liberty, and to my mind it certainly extends to a dry dock or a gridiron which upon the evidence was the most convenient place, if not the only place, to which this vessel could go. The evidence was that there was no place nearer, or more suitable, and so far as I know there is no contradiction of that fact, and you have the vessel going to a dry dock within the port and proceeding to it as being the most convenient place, and without incurring any increased marine risk, because it proceeds there in smooth water. It appears to me, therefore, that it is impossible to narrow that liberty so as to exclude this dock. Whether or not it would enable the vessel to proceed to some dock which is outside the limits of the port in which it was then lying is a different matter. I think, therefore, that it was within the docking liberty.

On all the other points I entirely agree with what has been said by Scrutton, L.J., and for these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Constant* and *Constant.*

Solicitors for the defendant, *William A. Crump* and *Son.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PRIZE COURT.

July 18 *and* 21, 1919.

(Before Lord STERNDALE, President.)

THE ANICHAB AND OTHER VESSELS. (*a*)

Prize Court—Property of enemy—Maritime prize—Lighters and craft seized afloat—Lighters and craft seized when beached—Lighters and craft seized on land—Removal to avoid capture—Military and naval operations—"Hot pursuit"—Nature of operations—Right to damages for wrongful seizure—Jurisdiction of Court—Naval Prize Act 1864 (27 & 28 *Vict. c.* 25), *s.* 34—*Fourth Hague Convention* 1907, *art.* 53—*Eleventh Hague Convention* 1907, *art.* 3.

A number of enemy owned tugs, lighters, and other craft, as well as a quantity of material, were seized by the British forces during the course of the campaign in South-West Africa in 1914 *and* 1915. *Some of the seizures took place in two ports which were occupied by the British forces, a part of the craft being afloat and a part being beached, some below and some above high water mark. Upon the approach of the British forces part of the craft was moved inland, and was eventually seized some six months later at the places, which were respectively* 148 *and* 310 *miles distant from the coast. The Crown claimed condemnation of the whole.*

Held, that all the captures made in the ports, either afloat or beached above or below high-water mark, were good and lawful prize, but that upon the evidence, the captures made inland were not made in "hot pursuit," and the claimants were entitled to have the craft so seized released, but that no damages could be awarded for wrongful seizure, such matters being subject to settlement by diplomatic action after the peace.

THIS was an action in which the Crown asked for the condemnation of a certain number of tugs, lighters, and other craft and material belonging to the enemy.

During the campaign in German South-West Africa in 1914 and 1915 the enemy territory was invaded and the ports of Swakopmund and Luderitzbucht were occupied These ports are respectively north and south of Walfisch Bay. Prior to the war the Woermann line, which was a German steamship company, did considerable trade with South Africa generally, and at the ports named the company had a number of tugs, lighters, and other craft—of various sizes—which were used for the purpose of loading and discharging the German liners and of taking passengers and goods to and from the same. There was also at these ports a quantity of other property, such as buoys and rope fenders, also enemy property, some belonging to the Woermann Line and some belonging to other persons. When the ports of Swakopmund and Luderitzbucht were occupied, some of the craft were afloat, some were beached below high-water mark, whilst others were beached above high-water mark. The whole of these were seized. But a number of the craft upon the approach of the British forces, were taken inland by the Germans in order to avoid capture. They were found some six months later at two places—Omaruru and Otavi—which were respectively 148 and 310 miles distant from the coast, when they were seized by the military forces.

The Crown now claimed condemnation of the whole as prize, whilst the Woermann line asked for the release of that part of the craft and material which was their property on the ground that it was not liable to condemnation by international law.

By sect. 34 of the Naval Prize Act 1864 (27 & 28 Vict. c. 25), it is provided:

> Where in an expedition of any of Her Majesty's naval or naval and military forces against a fortress or possession on land, goods belonging to the State of the enemy or to a public trading company of the enemy exercising powers of government are taken in the fortress or possession, or a ship is taken in waters defended by or belonging to the fortress or possession, a Prize Court shall have jurisdiction as to the goods or ship so taken, and any goods taken on board the ship, as in the case of prize.

By art. 53 of the fourth Hague Convention 1907, it is provided:

> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or goods apart from cases governed by maritime law, depots of arms, and, generally, all kinds of war material, may be seized, even though belonging to private persons, but they must be restored, and indemnities for them regulated at the peace.

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

By art. 3 of the eleventh Hague Convention 1907, it is provided:

Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities.

Wylie for the Procurator-General.—The craft and material seized in the two ports of Swakopmund and Luderitzbucht were lawful prize as seizures of enemy property in port, and the craft and material captured at Omaruru and Otavi, being in the first instance enemy property subject to capture as maritime prize, were also lawful prize as having been taken inland in order to avoid a pursuing belligerent. An enemy was not entitled to claim protection for property which was *primâ facie* liable to be seized as maritime prize by carrying it inland so as to avoid capture, any more than he was entitled to deprive a belligerent of his rights by transferring his property, even for valuable consideration to a neutral: (see *The Bawean*, 14 Asp. Mar. Law Cas. 255; 118 L. T. Rep. 319; (1918) P. 58). In the case of *The Roumanian* (13 Asp. Mar. Law Cas. 8; 114 L. T. Rep. 3; (1916) 1 A. C. 124), Lord Parker's judgment was entirely in favour of the contention of the Crown in a matter of this kind. Lord Parker had stated that where property liable to capture as maritime prize was taken ashore so as to avoid seizure, a belligerent had a perfect right to follow and take the same if he could. Although six months elapsed between the time of landing and the capture in the interior, the case was one which, under all the circumstances of time and locality, should be considered as one of "hot pursuit," and such as to give the Prize Court jurisdiction: (see *Lindo* v. *Rodney*, 2 Douglas, 612n.).

Stuart Bevan, K.C. and *Darby* for the claimants. —Whatever right of seizure and condemnation existed as to the craft and material afloat, this right did not extend to the craft and material above high water mark, and more particularly to that part of it which was seized inland. This was not the subject of maritime prize. But as to the craft seized whilst afloat at Swakopmund and Luderitzbucht, that was of a small and insignificant character, and consisted of tugs, lighters, &c., employed in local trade. That should make it secure from condemnation. Again, as to the craft which had been beached, this should not be condemned. Two of the craft were actually beached for repair prior to the outbreak of war. In no case could they be considered as "war material," and therefore they were protected as private property under the fourth Hague Convention. Further, upon the evidence some of the seizures were made in the course of naval operations. Therefore, the Naval Prize Act 1864 did not apply. Whatever then might be the decision of the court as to the craft captured in the ports, the right of capture did not extend to the craft taken at Omaruru and Otavi, which were situated so far inland. Moreover, the lapse of six months showed that they were not taken in "hot pursuit." The craft and material captured at these places should be released, and damages should be awarded to the claimants for wrongful seizure.

Wylie in reply.

In addition to the cases above noticed, the following were referred to in the course of the arguments:

Story's Principles and Practice of Prize Courts Pratt's edit, p. 29;
Rothery's Prize Droits, p. 126.

The PRESIDENT (Lord Sterndale).—This is a curious case, and one of a nature which has not come before me hitherto. It is a case in which the Crown asks for condemnation of some tugs, lighters, rafts, and other property, including buoys and rope fenders, belonging to the Woermann Line, and some craft supposed to be the property of the German Government, and other craft supposed to be the property of other persons. Most of the craft seems to have been seized at Swakopmund, and the goods at Omaruru, about 148 miles from the coast, while others were taken at Otavi, about 310 miles from the coast.

The first question which arises is as to the tugs and other craft which were at or about those ports at the time that the Union of South Africa forces took possession. Possession was taken during the hostilities between the German South-West African forces and the Union of South Africa forces. The incidents which preceded the taking possession of these goods have been very scantily detailed, but I gather that one, at any rate, of these ports had been bombarded by a British cruiser, and I take it that a portion of the British forces were conveyed to that port. I think that Luderitzbucht was occupied in Sept. 1914 and Swakopmund in Jan. 1915, and at that time there were found some of the tugs and some of the craft afloat in these waters. Some of the craft were beached above and some below high water. In some cases they had been beached for the purpose of repairs, and in some cases in consequence of the approach of the Union forces, to avoid seizure. When the Union forces approached I am satisfied that they took possession of all the craft, both above and below high-water mark.

The first point to be decided in this case is whether these craft are the subject of maritime prize. Subject to the question of the Hague Convention, with which I shall deal later, I have no doubt whatever that they are the subject of maritime prize. Where craft which has been used has been seized, it does not matter whether or not they are at the time of seizure on the seas, and it does not seem to matter whether they are seized by officers of the navy or by somebody who is acting for His Majesty's Government. These craft were intended for use on the high seas, and it does not matter whether they were beached or on the high seas. The case is very similar to that of goods which are liable to seizure and condemnation, and which have been put into warehouses in the port of the destination, or, to give a more concrete example, of oil which has been pumped into tanks at the port, as in the case of *The Roumanian* (*ubi sup.*).

These vessels were not exclusively employed in coast fishing, nor were they exclusively employed in coast trade. They were used for the purpose of facilitating the operations of the vessels which ran in connection with the Woermann Line. They were used for the purpose of loading and unloading vessels of the Woermann Line, and for taking passengers to and from their ships. It

seems to me that these were not small vessels exclusively employed in local trade, but were craft employed in assisting the trade of the big ships of the Woermann Line, which did a large business with South Africa prior to the war. To my mind, therefore, these craft which were taken afloat or were beached, either above or below high-water mark at either of these places, are good and lawful prize, and should be condemned as such.

But now there comes a question of a different and difficult character, and one as to which I have very great doubt. It arises in these circumstances When the Union troops were approaching, whether they approached by land or sea, a number of these lighters were put on rail and sent up to the interior of the country. They were sent, some about 100 miles and some about 300 miles, and some possibly to other places a greater distance away. The bulk of them were sent to a place called Otavi, about 310 miles away, and a place called Omaruru, 148 miles away. Those at Otavi were taken up some considerable time before the occupation of that place by the Union troops; so also were those which were taken up to Omaruru. They were taken to Omaruru in Aug. and Sept. 1914, and to Otavi in March and April 1915. Now between the time of Sept. 1914 when Luderitzbucht was occupied, and Jan. 1915, when Swakopmund was occupied, I have a blank, and I am told nothing at all as to what the Crown was doing or what the operations were until Omaruru was captured on the 20th June 1915, and Otavi on the 1st July 1915. All I know is what I am told by Sir O. Murray in his affidavit, namely, that His Majesty's military forces, operating under the Government of the Union of South Africa in German South-West Africa, occupied Luderitzbucht on the 19th Sept. 1914, and Swakopmund on the 14th Jan. 1915, both these places being on the coast of that Protectorate, and that in the course of their operations in the Protectorate, the South African forces occupied the northern section of the railway lines from Swakopmund to Otavi, and found and seized at Omaruru, 148 miles inland, six lighters, and at Otavi, 310 miles inland, a launch, some lighters, rope fenders, and other articles.

That suggests to me that the forces were approaching the railway lines from the land and not from the sea. They must have come from the sea originally, but that has suggested to me a land operation, and it may be that it was not until June and July that they occupied the northern part and so took possession of the whole. I do not know whether this is correct as the evidence before me is very vague; but I think that I am correct in my surmise. The position then stands in this way. There was an occupation of the coast in Sept. 1914 and Jan. 1915, at the two places respectively. No doubt operations of some kind were going on in the meantime. What they were I do not know. Six months afterwards, speaking roughly, on the 20th June, Omaruru was captured and on the 1st July 1915 Otavi was captured and no doubt by the military forces, and there were found, not afloat or in the river but ashore, these lighters and other things which had been taken up there, no doubt to avoid capture, and they had remained there until, as the result of the climate and of the necessity of keeping them damp in order to avoid the vessels cracking, one of them at any rate had become quite covered with vegetation. They had been there on land for several months.

The question is whether, at the date of seizure, namely, when these places were occupied, they were the subject of maritime prize. I have not any doubt that Lord Parker was quite right in saying as he did in the case of *The Roumanian* (*ubi sup.*), that if property is liable to seizure at sea and the enemy succeeds in getting it ashore, a belligerent has a right to pursue his enemy and to take the property from him, just as much as if he ran away at sea and if he remained at sea. I was told that I must treat this as a case of that kind—it is called a case of "hot pursuit." This hot pursuit took six months if it was a hot pursuit. I do not mean to say that there might not have been a hot pursuit all the time, and that the forces might have been getting on as fast as they could after the craft, but I have no evidence that they were. It is just as consistent on the evidence before me that these operations might have ceased for a time and new operations begun. All I know is that after the first taking possession of the ports there is an interval of about six months, and then these craft were taken at places respectively some 150 and 300 miles up the country, and were taken on land by military forces.

It does not seem to me, in these circumstances, that they are the subject of maritime prize. I do not think it matters that they are craft. They are property on land, and are taken by the land forces in land operations, and therefore I do not think they are the subject of maritime prize. I think with regard to the lighters and the other property seized in the interior that there must be no order of condemnation, but an order of release, and therefore as prize they must be released from the Prize Court.

I was asked to say that they must be released with an indemnity to their owners, and the argument in support of this was based upon two grounds. One ground was that they came under sect. 1, art. 53 of the fourth Hague Convention 1907. But it seems to me that that article does not confer on me as a judge sitting in prize the right, or impose upon me the duty of settling these indemnities. They are to be settled at the peace, and to be settled by diplomatic action, and I do not think, therefore, on that ground that I can give any judgment for an indemnity. But there is another ground, and it is this. When a captor brings articles which he has seized into the Prize Court and asks for condemnation, if it appears that he has seized them wrongfully the court has jurisdiction to make him pay damages in respect of the seizure if it appears that he has acted without any reasonable ground. But in order to arrive at such a conclusion the court must be satisfied on both points—the wrongful seizure and the absence of reasonable ground.

The courts have always been disposed to look very closely into the matter before they say that the captor had no reasonable ground for what he had done. The reason for this is obvious, as otherwise a belligerent might be greatly hampered in the exercise of his rights. I do not think that it is an easy question. It may be that I am wrong in the conclusion I have come to, but I cannot say

that there was not sufficient doubt to give reasonable ground for what was done on behalf of the Crown. The cases show that where there is a document difficult to construe, or a document at law which is not very plain, a mistake in construing the document will not be considered as an unreasonable action on the part of the person who construes it, and I think that this case falls within that principle. Therefore, though there must be a release, I do not think that there ought to be any damages given, and if there is to be any indemnity for these craft under The Hague Convention that is a matter which will have to be settled elsewhere, and not here.

My judgment, therefore, will be as to the craft and other things seized in the ports, either afloat or beached, above or below high water mark, there will be a decree of condemnation. With regard to the other articles which were seized at Omaruru and Otavi, respectively, there will be a decree of release, but without any order as to damages or costs.

With regard to the other craft, unclaimed, some of which are alleged to belong to the German Government and some to various German owners, there is no question about seizing on land, although the evidence is a little vague about it. But I have come to the conclusion on the evidence that the vessels were either afloat or above or below high water mark, and therefore they fall under the first part of my judgment, and there must be a decree of condemnation so far as they are concerned.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitors for the claimants, *Goldberg* and *Burrett.*

May 6 and July 25, 1919.

(Before Lord STERNDALE, President.)

THE ACHILLES AND OTHER SHIPS. (*a*)

Prize Court—British ships—Enemy goods—Discharge in British ports—Possession taken of goods by controller—Sale by controller]—Proceeds of sale—Liability to condemnation as prize.

Goods belonging to an enemy firm were shipped before the outbreak of war on British ships and arrived at certain ports in this country after the outbreak of war. The goods were consigned to a branch of the enemy firm which had been established for some years in this country. Under the powers conferred by the Trading with the Enemy Act 1914 (4 *& 5 Geo. 5, c.* 87) *the British branch of the enemy firm had been placed by the Board of Trade under the care of a controller. The controller took possession of the goods and sold them in the ordinary course of business, handing over the proceeds to the Public Trustee, acting as custodian of enemy property. The Public Trustee in turn accounted to the Admiralty marshal, who seized and arrested them as enemy property and paid them into the Prize Court for adjudication.*

Held, that, as the goods themselves were liable to seizure and condemnation as prize in the first instance when they were in port, the fact that they were afterwards dealt with and sold by the controller, who was not an agent of the enemy firm, but an officer of the High Court, did not deprive the Crown of the right to claim the proceeds of the sale thereof in the same way that it would have been entitled to claim the goods themselves if they had remained in specie.

The Glenroy (14 *Asp. Mar. Law Cas.* 207; 118 *L. T. Rep.* 318; (1918) *P.* 82) *discussed and followed.*

THIS was an action on behalf of the Crown claiming the condemnation of the proceeds of the sale of enemy goods.

The goods in question consisted of various consignments which were shipped at Asiatic ports on board the *Achilles* and twelve other vessels—all British steamships—and were the property of an Austrian company called Alois Schweiger and Co. The goods were shipped before the outbreak of the war between Great Britain and Austria, and were consigned to the Manchester branch of the Austrian company. When war broke out the Manchester branch was placed under the controller appointed by the Board of Trade in accordance with the provisions of sect. 3 of the Trading with the Enemy Act 1914 (4 & 5 Geo. 5, c. 87). The controller took possession of the goods and sold them to various customers of Alois Schweiger and Co. This was done in the ordinary way of business. Afterwards the controller handed over the proceeds to the Public Trustee, acting as custodian of enemy property. In turn the Public Trustee handed over the sums received by him to the Admiralty marshal, who seized and arrested the same as enemy property and paid them into the Prize Court for adjudication. The Crown now claimed the proceeds as prize.

The *Attorney-General* (Sir Gordon Hewart, K.C.) and *C. W. Lilley* for the Procurator-General.

There was no appearance, nor was any claim entered, on behalf of Alois Schweiger and Co.

The facts and the arguments are sufficiently indicated in the judgment. *Cur. adv. vult.*

July 25, 1919.—The PRESIDENT (Lord Sterndale)—The Crown asks for the condemnation of a sum of 32,370*l.* 9*s.* 6*d.*, being the net proceeds of the sale of various consignments and of part consignments of hides, beeswax, gamboge, gum, and gutta-percha, which had been shipped on board the British steamship *Achilles* and twelve other British vessels and brought to this country and discharged in the ports of London, Liverpool, and Hull.

The consignments all belonged to an Austrian firm called Alois Schweiger and Co., which had a branch establishment in Manchester which was carried on in the name of Alois Schweiger and Co. Limited. This branch was, after the outbreak of war, placed under a controller appointed by the Board of Trade. The controller sold all the goods and remitted the proceeds of the sale, which are the subject-matter of this claim, to the Public Trustee, acting as custodian of enemy property. The Public Trustee in turn accounted for the proceeds to the marshal, who seized and arrested them as enemy property and paid them into the Prize Court for adjudication.

There is no doubt that the goods, when they were afloat, when they arrived in the British ports, and when they had been discharged into warehouses in those ports, were enemy property,

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

and as such were liable to seizure and condemnation, as good and lawful prize to the Crown in its right to droits of Admiralty (see *The Achilles*, 1 Asp. Mar. Law Cas. 165; 117 L. T. Rep. 414; (1917) P. 218). In those circumstances, the late learned President condemned those parts of the consignments which had been seized unsold in the warehouses in the ports where they had been discharged, ex ten of these vessels. The remaining parts of those consignments had been sold and the proceeds of the sales of those remaining parts are included in the present claim.

There is no doubt that the proceeds here claimed are enemy property, and the only question is, are they liable to seizure and condemnation as good and lawful prize to the Crown in its right to droits of Admiralty?

The question, of course, arises because the property was not still in warehouse in specie, but had been realised. In a case cited to me, that of the *Clan Mactavish* and the *Ballarat* heard on the 18th Sept. 1916 (unreported), the late Sir Samuel Evans condemned the proceeds of goods under circumstances very similar to the present. In fact, the circumstances there were stronger against the Crown, if I may put it in that way, than in this case. In that case the goods had been shipped by a German company, the Metallgesellschaft, for which Henry R. Merton and Co. Limited were acting as agents in this country, and Merton and Co. sold the goods and realised them and handed over the proceeds to a public official. Sir Samuel Evans condemned them, and that, no doubt, is a very strong case, because Merton and Co. were acting as agents, as I understand the facts, for the Metallgesellschaft, and therefore when they received the goods and sold them it was as if the Metallgesellschaft had received and sold them. That case was not the subject of very much consideration before Sir Samuel Evans, and I do not know that all the points which occurred in argument upon the present case were present to his mind. But as I do not think that this case falls within the same category as the case of the *Clan Mactavish* and the *Ballarat* (*ubi sup.*), I do not consider that it is necessary to discuss that particular decision. Another case was cited in which the circumstances were somewhat similar—namely, that of *The Glenroy* (14 Asp. Mar. Law Cas. 207; 118 L. T. Rep. 318; (1918) P. 82). The facts of that case were as follows: The *Glenroy*, a British steamship which sailed from Shanghai before the outbreak of war, bound to Antwerp and Rotterdam, was, after the commencement of hostilities, diverted into the Port of London. Her cargo included 2800 bags of sesame seed, shipped at Shanghai by Schnabel, Gaumer, and Co., a German firm, with offices at Hamburg, Hankow, and Shanghai, the branches in China being registered in the German Consulates. The seed was consigned "to order, Rotterdam." After the arrival of the vessel in the Port of London, the seeds, being unclaimed and of a perishable nature, were sold by the shipowners for the account of whomsoever it might concern. On the 3rd Aug. 1917 the proceeds were handed over to the Admiralty marshal, by whom they were seized as prize. It was held that the goods being subject to seizure and condemnation as enemy property in port, the proceeds of the sale, nothing having intervened to change their character, must also be condemned.

In that case the matter was argued at greater length and with more elaboration than in the case of the *Clan Mactavish* and the *Ballarat* (*ubi sup.*). But, as in this case before me, it was only argued on one side, and I regret here that in the circumstances the argument could only be on one side; but every consideration that could be advanced, supposing there had been a claimant, was put before me very fully by the learned counsel who appeared for the Crown. Therefore I do not think really that any serious difficulty is occasioned by the fact of the case not having been argued on both sides.

Passages have been quoted to me, as they were quoted in the case of *The Glenroy* (*ubi sup.*) from Story's Principles and Practice of Prize Courts, Pratt's edit. pp. 28-30 and I have also been referred to Lord Parker's judgment in the case of *The Roumanian* (14 Asp. Mar. Law Cas. 207; 114 L. T. Rep. 3; (1916) 1 A. C. 124), in which he speaks in wide language of the possibility of following goods which have once become liable to seizure. I think some construction must be put on those words rather more narrow than the construction which has been put upon them in this case, and in other cases which have been argued before me; but I do not think that it is necessary to discuss them at any length because I do not think that this case raises such a wide question as was argued upon the authority of those statements.

In this case the goods were sold in the ordinary way of business, I think I may say, because, according to an account which was put in, they were sold to different persons, chiefly in Lancashire (Manchester, Liverpool, Warrington, and other places), who were customers of the firm of Alois Schweiger and Co., and who bought the goods for the purpose of using them in their businesses. The goods were sold in small lots in the ordinary way of business. If that had been done by Alois Schwieger and Co. themselves or by somebody acting directly as their agents, I think it would at any rate be a very arguable question whether the Crown was entitled to an order of condemnation. But that is not the position. The position is that the goods were sold and dealt with by the controller who was appointed under the Trading with the Enemy Act 1914, in order to manage and to take care of the business of Alois Schweiger and Co., and the position of such a controller so appointed is defined in the Act of Parliament under which he is appointed—that is, the Trading with the Enemy Act 1914. Sect. 3 of that Act provides that in certain circumstances, of which this is one, "The Board of Trade may apply to the High Court for the appointment of a controller of the firm or company and the High Court shall have power to appoint such a controller, for such time and subject to such conditions and with such powers as the court thinks fit, and the powers so conferred shall be either those of a receiver and manager or those powers subject to such modifications, restrictions, or extensions as the court thinks fit."

The controller therefore is in the position of a receiver and manager appointed by the court and the position of a receiver and manager appointed by the court is stated in Kerr on Receivers in the following words: "The effect of

the appointment of a receiver is to remove the parties to the action from the possession of the property. But receivers and managers are merely custodians of the property of which they take possession." I am quoting from p. 176 of the sixth edition. Then at p. 181 it is stated: "The possession of a receiver appointed in an action is the possession of the court." And again, at p. 184: "If the receivership does not contain a direction for payment to the judgment creditor, the receiver holds the property, when it reaches his hands *in medio*, and it remains subject to all claims which are paramount to that of the judgment creditor at the date when the order was obtained."

Of course, these passages are not applicable in terms to this case, because here there are no parties to the action and no judgment creditor, but they do show that a receiver and manager, like a controller, is an officer of the court and is not the agent of the person who owns the business of which he is controller.

Again, I find, in the case of *Burt, Boulton, and Hayward* v. *Bull and another* (71 L. T. Rep. 810; (1895) 1 Q. B. 276) when before the Court of Appeal, these passages. Lord Esher, M.R. says: "What is the position of such a receiver and manager? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the court can dismiss him, or give him directions as to the mode of carrying on the business or interfere with him if he is not carrying on the business properly. The incidents of his relation to the court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is, of course, impossible to suppose that the relation of agent and principal exists between him and the court."

The question in that case was whether the receivers and managers were personally liable upon a contract they had made for the purchase of goods. Lopes, L.J. said: "It was argued that the defendants had only given the order as agents (*i.e.*, as agents for the company). But the company, after their appointment, had no control over the business. It could give no orders and make no contracts. The defendants could not be said to be agents for anybody." Now, that was the position of the controller according to the Act, and the result of that is that when he received these proceeds and dealt with them he received them, not as agent for Alois Schweiger and Co., but as an officer appointed by the court to take possession of the goods belonging to that firm, and he had to deal with the proceeds of the goods if and when he sold them, according to the order of the court.

That seems to me to put him in the same position as the shipowner who sold the goods in the case of *The Glenroy* (*ubi sup.*). In each case the seller—the shipowner in the one case and the controller in the other—did not hold the proceeds as agent for the company, but he held them as a person who had to account for them in the same way that he would have had to account for the goods if they had not been sold. In these circumstances, it seems to me that this case falls within the decision in *The Glenroy* (*ubi sup.*). There was a fund which was put, as it is called, *in medio*, and according to the decision in the case of *The Glenroy* (*ubi sup.*), where there is a fund of that kind arising from a sale of goods which are liable to seizure, the proceeds are liable to seizure also. There is certainly no doubt that this decision is a considerable extension of the old doctrine of seizure of goods. I doubt very much whether, under the old doctrine, when goods were once gone, you could seize them—that is, no seizure would be allowed. But circumstances change and the principles on which the court acts have to be adapted to the changed circumstances.

It seems to me, considering that these proceeds were received by the controller, that this case falls within the authority of *The Glenroy* (*ubi sup.*), and that there must be an order of condemnation.

Solicitor for the Procurator-General, *Treasury Solicitor.*

July 24 *and* 25, 1919.

(Before Lord STERNDALE, President.)

THE ORANJE NASSAU AND OTHER SHIPS. (*a*)

Prize Court—Cargo—Contraband—Conditional contraband—Shipments by enemy domiciled in neutral country—Consignments to neutral country—Continuous voyage—Named consignees—Consignments "to order"—Declaration of London 1909, *art.* 35 *—Order in Council* 29*th Oct.* 1914.

By the Declaration of London Order in Council No. 2 *of the* 29*th Oct.* 1914, *art.* 35 *of the Declaration of London* 1909 *was adopted by Great Britain with the modification that conditional contraband should be liable to capture on board a vessel bound for a neutral port if the goods were consigned "to order" or if the ship's papers did not show who was the consignee of the goods.*

Whilst the order was in force conditional contraband was consigned by an enemy subject domiciled in a neutral country to the Netherlands Oversea Trust, either as agents for the consignor or as agents for third parties who had bought them in the ordinary course of business.

Held, that it was a question of fact in each case whether the Netherlands Oversea Trust were consignees within the meaning of the Order in Council and the decisions thereunder, so as to render the goods confiscable. If the goods were received by the Trust as agents for the consignor to be disposed of in accordance with the consignor's directions, and if they had an enemy destination, then they were liable to be condemned. If, on the other hand, the goods were received by the Trust as agents for persons who had bought them in the ordinary course of trade the goods were not liable to condemnation whatever their destination might be.

THIS was a case in which the Crown asked for the condemnation of certain shipments of coffee and cocoa as being conditional contraband intended for Germany.

The coffee and cocoa in question were shipped on three neutral vessels, the *Oranje Nassau*, the *Prins der Nederlanden*, and the *Orion*, by Mr. C. Voigt, who was a German subject resident

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

and domiciled in Haiti. The goods were intended to be landed, in the first instance, in Holland. In the first case the shipment was to the Netherlands Oversea Trust simply, without specifying what should be done with them afterwards; in the second case, the shipment was to the Netherlands Oversea Trust for the Rotterdamsche Bankvereeniging; and of the goods shipped in the third case—that is, on the *Orion*—some were consigned to the Netherlands Oversea Trust simply and others to the Netherlands Oversea Trust for the Rotterdamsche Bankvereeniging. This bank had made advances to Mr. C. Voigt against the goods.

All the goods in question were shipped by Mr. C. Voigt whilst the Declaration of London Order in Council. No. 2, of the 29th Oct. 1914, was in force. This Order in Council adopted art. 35 of the Declaration of London 1909, with modifications. The article itself is as follows: "Conditional contraband is not liable to capture, except when found on board a vessel bound 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." The article in question practically put an end to the doctrine of continuous voyage so far as conditional contraband was concerned, but when it was adopted by the Declaration of London Order in Council, No. 2, just referred to, the modification attached to the article was to the effect that notwithstanding the provision of the article conditional contraband was to be liable to capture on board a vessel bound for a neutral port if the goods were consigned "to order," or if the ship's papers did not show who was the consignee or who were the consignees of the goods

The Declaration of London Order in Council No. 2, 1914, was withdrawn by a subsequent Order in Council, dated the 7th July 1916.

The Crown contended that, under the circumstances of the case, the Netherlands Oversea Trust were not persons other than the consignor to whom the consignor had parted with the real control of the goods, whilst the claimant, Mr. C. Voigt, contended that the Netherlands Oversea Trust were the consignees named in the bills of lading, and that, therefore, the goods were not liable to condemnation under the Order.

The *Attorney-General* (Sir Gordon Hewart, K.C.), the *Solicitor-General* (Sir E. M. Pollock, K.C.), and *Clive Lawrence* for the Procurator-General.

Sir *Robert Aske* for the claimant.

The following cases were cited during the arguments:

The Louisiana, 14 Asp. Mar. Law Cas. 233; 118 L. T. Rep. 274; (1918) A. C. 461;
The Kronprinzessin Victoria, 14 Asp. Law Cas. 391; 120 L. T. Rep. 75; (1919) A. C. 261;
The Kronprins Gustaf, 121 L. T. Rep. 474; (1919) P. 182.

The PRESIDENT (Lord Sterndale).—This case is concerned with shipments of coffee and cocoa on three vessels—one on board the steamship *Oranje Nassau*, another on board the *Prins der Nederlanden*, and the third, apparently a transhipment from other vessels, on board the *Orion*. They were all shipped by Mr. C. Voigt, who lives at Haiti, from Aux Cayes, which is part of the State of Haiti, in each case to the Netherlands Oversea Trust. In the first case, the shipment by the *Oranje Nassau* to the Netherlands Oversea Trust was simply without specifying what was to be done afterwards with the goods; in the case of the shipment by the *Prins der Nederlanden* it was to the Netherlands Oversea Trust to the, or for the, Rotterdamsche Bankvereeniging; and in the third case, one of the shipments on board the *Orion*, consisting of 819 bags, was to the Netherlands Oversea Trust, and the other two shipments on board that vessel were to the Netherlands Oversea Trust to, or for the, Rotterdamsche Bankvereeniging.

There are one or two preliminary questions to be decided in this case. The first of these questions is as to the character of Mr. Voigt. I do not mean his personal character; I mean as to his character whether he was an enemy or not. As far as I can ascertain from the evidence, he is a German who was resident and carrying on business in Haiti, and, so far as I know, he had no profession or business elsewhere. There is a certificate that in 1917 he was naturalised. I do not think, looking at the letter which was read from his son, that he was naturalised at the time of these transactions. At any rate, there is nothing to show that he was, and in a draft affidavit, to which I shall have occasion to refer again, which has arrived without his signature, he was to say: "I am a German by birth, but so far as I know I have lost my German nationality." There is no allegation that he had been naturalised at the time of the drafting of the affidavit in 1916, and I do not think he was. I only deal with the matter because there was some little discussion about it, but to my mind it is immaterial. He was carrying on business at Haiti. He has a commercial domicil there, and therefore I think the property of his business there was neutral property and not enemy property. But it really does not matter except perhaps as throwing light upon his intentions.

Another matter is that it is said in any event, whatever may be my decision as to enemy destination in this case, the only order that can be made is an order of detention, because these shipments, even if intended for Germany, came under the protection of the Order in Council of the 29th Oct. 1914, and, in the first place, all the consignments were to the Netherlands Oversea Trust, and as they had control over the consignments they were the consignees within the meaning of the *The Louisiana* (*ubi sup.*) and other cases. I do not think that contention is correct. The Netherlands Oversea Trust was established to prevent contraband being sent into Germany, and in order that goods might be shipped to them, and, being shipped to them, might not be interfered with by the British authorities, and so neutral trade might not be molested more than was necessary. The character in which the Trust received consignments seems to me to depend upon the facts of each particular case. If they received them as agents for consignees or purchasers who had

bought the goods, and who, when they arrived in Holland, had the control over them and could direct their ultimate destination as they liked, the character of the Trust was the character of the purchaser for whom they were acting, and they then would be consignees within the Order in Council and the decisions upon it. But if the trust were only receiving the goods as agents for the consignor, to dispose of them at a later period for the consignor in the way which he directed, in my opinion, they were not such consignees, and their position was the position again of the person for whom they were receiving the goods. It is quite true there was a stipulation that they should not give up the goods until certain requirements of theirs had been complied with, and certain agreements had been signed with them as to the ultimate use of the goods; but when that was done the Trust had to give up the goods to the person for whom they were acting, and the determination of what was to be done with them rested not with the Trust, but with the person for whom they had been acting. Therefore it does not seem to me that it can be said that the Trust were persons other than the consignor who had the complete control of the goods. They could control them to the extent that they would not give them up until certain stipulations had been complied with, but when once they were in the hands of the person for whom they were sent, the trust could not control them any more.

In the first case the Trust were the consignees named in the bill of lading, without anything more, and as they had no interest in the goods at all, they would therefore hold them when they got them for the consignor. They would have to deal with them, subject to their requirements being complied with, as the consignor wished. In three of the other cases they received them for the Rotterdamsche Bankvereeniging, a company which had made advances against the goods, and, having advanced against the goods, were to dispose of them so as to repay themselves the advances, and account to the shipper and the person to whom they advanced for the balances, when the advances had been repaid. They were persons who had not control of the goods. They had, to a certain extent, I suppose, a discretion as to the selling of the goods, because they had to sell them at the best price, but they had to sell them under a power of sale given them in order to repay their advances, and they had to account to the shipper for any balances they received. In the last case the Netherlands Oversea Trust were to receive the goods for the bankers of Hooft and Co. Hooft and Co. were the persons with whom it is said a contract had been made for the sale and purchase of these goods. If that was a real, genuine sale, possibly in that case the Trust might be said to be receiving goods for Hooft and Co., who had a complete control over them, and then they might come within the Order in Council of the 29th Oct. 1914. But, as a matter of fact, in this particular instance of the *Orion*, I think the sale to Hooft and Co. was not made until after the seizure. I shall have to examine later whether Hooft and Co. were acting as independent persons or whether they were acting with and under the instructions of the consignor; therefore I do not think that it is right to say that the only order that can be made is an order of detention, and I have to examine whether there was in this case an enemy destination.

Of the various persons who are concerned in the cases which are now before me the first who has to be considered is the shipper Voigt. There does not seem to be very much in Mr. Greenwood's affidavit against him from a contraband point of view, except that he is set down as a German. It is said: "It appears that the man is a German, and that his shipments of coffee and cocoa addressed to Holland and Sweden were financed by Landt and Rickertsen, of Hamburg, and in some cases were sold in Hamburg. He appears to have used the name P. N. Neptune as a cover name for some of his transactions."

Then the consignees in two or three cases through the Netherlands Oversea Trust are the Rotterdamsche Bankvereeniging. They are described as: "A banking company registered in Holland in 1911. This bank is one of the most notorious firms acting for enemy traders, it having acted as agent for very numerous firms in Germany and Austria. Shortly after the commencement of the war it loaned part of its Rotterdam offices to the Disconto Gesellschaft, Berlin, who sent a representative to carry on their business from Rotterdam. The firm sent out a telegraphic code to its clients, in defiance of the British Government's prohibition of the use of code in telegrams sent over British cables, and on the matter being discovered the bank gave the Foreign Office an undertaking not to use the code, and a further undertaking to abstain from conducting any transaction for the benefit of the enemies of this country. This latter undertaking the bank has regularly broken."

It is right to say that that description has been the subject of vehement protest by the Rotterdamsche Bankvereeniging, who say practically that there is no truth in the statement at all. The next person with whom I have to deal is a gentleman of the name of Adèr. He is an exporter, coffee broker, and agent of foreign houses for business in cotton, coffee, and sugar. He is an agent for Landt and Rickertsen, of Hamburg, with whom he trades direct, and is a regular intermediary for Munchmeyer and Co., of Hamburg. He banks with the Rotterdamsche Bankvereeniging. He is the gentleman who was to sell those goods in Amsterdam. Landt and Rickertsen, for whom he was agent, are only described as exporters of Hamburg. Amsinck and Co., of New York, are described as financial and mercantile agents. They have acted as postal and cable intermediaries for enemy firms, and have assisted such firms by arranging and financing their purchases and sales on many occasions. I mention them because they are the persons who helped Landt and Rickertsen in the finance of this matter. That leaves, I think, only Hooft and Co., and this is the description of them: "Of Amsterdam. They also have an office at Rotterdam. They were fined 23,550 florins on the 21st Dec. 1916 by the Netherlands Oversea Trust in respect of the export of 355 bales of coffee."

They are the only persons who are said to purchase any of the cocoa or coffee I have to deal with in the present case. There certainly is a leaning towards Germany in any transactions entered into by the persons the accounts of whom I have read, and it will

be noticed that Mr. Perl has been mentioned as referring to Adèr. That is in a circular issued on the 12th May 1915. I have no evidence that the circular reached Voigt but it shows what is going on shortly. He says: "I have received detailed reports from the Consular authorities in Haiti and the Dominican Republic. I have also received detailed information on the principal questions from the Imperial professional Consuls in Rotterdam, Christiania, and Copenhagen. On the other hand, news is still wanting from Sweden and from Italy, which latter country has, I suppose, been eliminated in the meantime for conveyance to Germany."

Then he describes the difficulties which are in the way of exporting to Germany. He says: "Both the Dutch shipping companies, which keep up their service with America require that all goods should be consigned to the Netherlands Oversea Trust in Amsterdam, who on their part require an enormously high guarantee from the import merchants to the effect that the products are not being forwarded to Germany. The Danish Line demands from shippers a declaration on oath before the Danish and British Consuls to the effect that the goods are destined for consumption in Denmark." He goes on: "In spite of that, it would seem not an absolutely remote possibility yet to supply Germany from here with many sorts of goods which it wants, and so far as German merchants undertake this feat, they render a service thereby to the Fatherland. Of course anything would have to be avoided in this in the goods as well as the papers that would give away the German destination. . . . From the Netherlands no cocoa (excepting powder), skins and hides, nor metals, excepting zinc and tin, must be exported; but according to art. 7 of the Rhine Shipping Acts there is a free conveyance through Holland, and there is also conveyance if reported as such not later than at arrival of a ship in a Dutch port. The shipment would have to take place by neutral ships in any kind of journey and to one of the following Rotterdam firms which are almost all known to me personally and favourably. . . . In Amsterdam the following houses are concerned: W. Adèr, Curacao Commercial Company."

That is the gentleman who was going to dispose of the goods, according to the claimant's case, for him in Amsterdam. He is a gentleman who is vouched for here by Mr. Perl as a gentleman favourable to the possibility of getting goods into Germany. I propose to read a few letters from Landt and Rickertsen to Voigt showing the sort of business they were doing together, Landt and Rickertsen were in Hamburg. On the 21st July 1915, they wrote to Mr. Voigt: "We hope Messrs. Amsinck and Co. succeeded in diverting this shipment (which you seem to have ordered to Helsingborg) in time at New York for Holland. . . . As in such a case, as you write, the consignment to the Trust cannot be avoided, you can only comply with such consignments as you did with the produce per steamship *Nickerie*."

On the 6th Aug. 1915 they write to Mr. Voigt inclosing four account sales saying that 144 bags of coffee by the *Prins der Nederlanden* and 320 bags by the *Oranje Nassau* had been sold to Hamburg on the account of Mr. Voigt, and that he had been debited with the expenses of taking the goods from Amsterdam or Christiania to Hamburg, and after paying the advances and debiting the advances on account, Landt and Rickertsen had to account to him for the balance. In Jan. 1916, Mr. Voigt writes a letter which to me seems of some importance. It is to the Rotterdamsche Bankvereniging, and is as follows: "In view of the fact that the goods have been paid for in advance by you, and therefore ownership holds good until the sum advanced has been repaid, I have given the certificate that the goods are your property for this once.

"According to the national laws here the ownership is vested in the consignee as soon as the bills of lading have been made out, or even if it has only been declared at the office of the steamship company or at the Customs that the shipper intends to ship the goods to the same.

"I hope very much that you will succeed in proving by means of the bills of lading and the invoice and draft drawn against them that the coffee really belongs to you.

"Until I receive further instructions from your side, I shall not undertake any further shipments, and I would ask you to consider whether it would not be practicable to endeavour to find a method by which it would be possible to make a direct shipment to your address."

I do not know what the national laws of Haiti are, nor has counsel for the claimant been able to inform me, and I think it is quite clear from that letter that what he was saying was: "I have given you a certificate to show this was your property and you must make it out as you can."

Whatever be the laws of Haiti, that was not true, and he knew that it was not true. They were their property to this extent, that they had the right to sell them in order to repay themselves advances, but, as I have already said, they had to account to him for anything over these advances. That was not used, it is quite true. It was to be used, because at that time the master of the steamer was refusing to take the consignment to the Netherlands Oversea Trust, and wanted this declaration instead, but after a time he changed his mind; but, as throwing some light on Mr. Voigt's state of mind, it seems to me just as important to show that he was prepared to use a false certificate as that he did in fact use it.

On the 28th Jan. 1916, he writes showing that he is in touch with Mr. Perl. On the 13th May 1916, Voigt writes to them: "I beg you not to mention our relations with mutual connections, as these may be wrongly interpreted on the part of the English."

Then he refers to a firm of Muller, Schall, and Co., with whom there had been some financial transactions. These are the words which he uses: "I do no business with the firm of M., S., and Co., whom I only know by name. There is no proof of any German interest in any of the consignments which my firm had *en route* for neutral countries, and none exists either."

He does not say that these are not going to enemy countries, but he says that there is no proof of it. I do not know that I need really read any more of the correspondence.

This, I think, is enough to show that these four concerns, Landt and Rickertsen, Amsinck and Co., the Rotterdam Bank, and Voigt were engaged in a business of sending consignments by Voigt to get into Germany.

It is said that that is only confined to consignments which were made to Landt and Rickertsen. There certainly is some ground for thinking that the Rotterdamsche Bankvereeniging and Adèr were also engaged in sending contraband goods to Germany if they got the chance.

There is the usual statistical case which has been proved in many instances that Holland was receiving an enormously larger quantity of coffee than could possibly be consumed in the country, and that very much larger prices could be obtained for this commodity in Germany than in Holland.

It seems to me that there is therefore a *primâ facie* case that these goods were going to be sent to Germany, if possible, but, if not possible, they were to be sold in Holland, and were to be sent to Mr. Adèr in order to do what he could to get the best returns for them, and the best returns for them were undoubtedly to be obtained by sending them on to Germany.

So far as we know their history, what happened was this: One firm, and one firm alone, have bought any of those goods. In one instance, I think they bought them before the seizure. In other instances, they bought them after the seizure, and that firm was Hooft and Co., and Hooft and Co. are a firm who have been fined by the Netherlands Oversea Trust for sending, in breach of their undertaking, goods consigned to them into Germany.

We have from Hooft and Co. the almost invariable explanation that it was not their fault in the least—that it was somebody to whom they had sold who had in breach of their undertaking sent the goods to Germany, and that they had recouped Hooft and Co. for the fine. They are persons, I think, who may be said to be rather suspect in the matter, and as the date when the fine was inflicted on them by the Netherlands Oversea Trust was Dec. 1915, it is not a very violent conclusion that before that date they had been engaged in the same sort of transaction.

It is impossible to say that there is no *primâ facie* case there against the goods. One has to look how it is met. Mr. Voigt has made no affidavit himself. I do not wish to press that against him too much, because it is a fact that in 1916 a draft affidavit had been prepared which was seized in the mail *en route* by the British Government and never reached him, but that was in 1916. It is now 1919. Neither has Mr. Voigt ever asked what he should do to prove his case, nor have his advisers over here ever communicated with him, and said, "Why haven't you sworn that affidavit that was sent to you? If it has gone wrong here is another. Swear this." Therefore, it does not seem to me, although it may be rather regretted that the draft affidavit was prevented reaching him, to explain the fact that we have no affidavit from him here at all.

The draft affidavit was rather vague. The only denial that he put in at all as to these goods being destined for Germany is the last paragraph: "The goods were consigned to the Trust and were intended for consumption in Holland only."

There is the evidence of the bank, and there is some correspondence, and I think it is partly made out that some of the goods were consigned to Landt and Rickertsen for their account, and some were consigned for account of Voigt. But it comes to the same thing in the end, because Landt and Rickertsen were acting just as Adèr was, and the Rotterdam Bank were to sell for Voigt on his account and for his benefit.

The question which I have to answer is this: Is this case sufficient to rebut the *primâ facie* case made by the Crown showing that these people were doing their best to get the goods into Germany, and were all acting for the same end and pursuing the same methods. I do not think that it does rebut it. I think that the intention of these gentlemen was to get the goods into Germany if they could. It is pointed out in some of the letters that although there were difficulties the goods did get into Germany afterwards, and it is certainly to my mind a very material circumstance that the only persons who can be found to have purchased any of the goods at this time were this firm, who had been fined heavily by the Netherlands Oversea Trust for a breach of contract.

There is no case here of a sub-sale to persons in Holland. There is no suggestion of any matter of that kind, and I think that the case for the claimant is not sufficient to rebut the presumption arising in the Crown's case, and that there must be a decree of condemnation, with costs.

Solicitor for the Procurator-General, *Treasury Solicitor.*

Solicitor for the claimant, *Waltons* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 13 *and* 14, 1919.

(Before BANKES, WARRINGTON and DUKE, LJJ.)

THE GAGARA. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

International law—Shipping—Practice—Writ in rem *against ship—*Res *in possession of Esthonian Government—Impleading foreign Government—Status of—Provisional recognition—*De facto *independence—Comity of nations—Jurisdiction of British courts.*

The plaintiffs issued a writ in rem *against a ship which was in the possession in England of the Esthonian Government, who moved to set the writ aside. The British Government had, for the time being, and with reservations as to the future, recognised the Esthonian National Council as a* de facto *independent body. Further, in the present view of His Majesty's Government, the Esthonian Government, was such a Government as could, if it thought fit, set up a Prize Court.*

Held, that the British Government had, for the time being, recognised the Esthonian National Council as being a sovereign Power, and that, as a sovereign Power cannot be impleaded in the British courts, the writ must be set aside.

APPEAL from a judgment of Hill, J., from which the facts are taken.

"On the 1st Jan. 1919 the plaintiffs, described in the writ as the West Russian Steamship Company

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

Limited, procured to be issued out of this court a writ *in rem* against the steamship *Gagara*, now sailing under the name of the *Kajak*, and the parties interested in the said steamship, and procured the said ship, which was lying in the Port of London, to be arrested by the marshal. In the affidavit to lead warrant of arrest, the plaintiffs are stated to be 'A corporate body incorporated under the laws of Russia having their registered office at Petrograd and to be the true and lawful owners of the said steamship.' The writ is indorsed with a claim for possession as owners. It stated the ship to be of the port of Petrograd. As required by Order V., r. 15, in actions of possession, notice of the commencement of the action was given to the Consul-General of Russia. On the 9th Jan. appearance under protest was entered, and a summons was taken out asking that the writ, service, and all subsequent proceedings be set aside on the ground that the owners of the *Gagara* are the Esthonian Government. The matter having been adjourned into court, the summons has since been amplified by a notice of motion alleging (1) that the court has no jurisdiction, and (2) that, if it has, it ought in its discretion to refuse to entertain the suit. The grounds on which it is said that the court has no jurisdiction are (*a*) the dispute is between two foreigners as to a foreign ship; (*b*) the ship was and is in the service of the Esthonian Government; (*c*) the ship is the property of the Esthonian Government; and (*d*) the ship has been properly and lawfully condemned as prize by a decree of the Esthonian Government.

"The facts as concerns the ship appearing from the affidavits filed for the plaintiffs are as follows; The head office of the company was or is at Petrograd. It has sub-offices at Reval and other places. Mr. Zalenoff is managing director. Mr. Tornigas is manager. The plaintiff company in 1914 purchased the *Gagara*, and she was transferred to the company, and in July 1914 was registered in the name of the company as owners at Petrograd under the Russian merchant flag. During the earlier part of the war, the *Gagara* was under some form of requisition in the service of the Government of the Czar, and afterwards by arrangement with the company in the service of the Government which succeeded—Prince Zeroff's Government. The Bolshevik Government, having come into power on the 21st June 1918, declared 'the whole of the Russian mercantile fleet, including the *Gagara*, to be national property, and in April 1918, enacted the formalities for fulfilling such declaration'—par. 7 of Mr. Zalenoff's affidavit. During the spring and summer of 1918 the *Gagara* was at Petrograd under repairs which were being done under the Bolshevik Government. The employees of the company's office were left there, but the directors were forcibly turned out. Mr. Zalenoff, after a time in prison, ultimately was able to leave for Copenhagen. Mr. Tornigas also later on succeeded in escaping from Petrograd. They are now both in London, and Mr. Zalenoff holds the power of attorney of the company. In the autumn of 1918 the Bolshevik Government loaded a cargo of wood on the *Gagara*, and sent her on a voyage to Copenhagen under the captain who had originally been appointed by the company, with some of the old crew and others put aboard by the Bolshevik Government. The Bolshevik Government had changed her name from *Gagara* to *Severnaja Kommuna*. The next that Mr. Zalenoff and Mr. Tornigas heard of her was that the *Gagara* had proceeded to Reval on a voyage to Copenhagen, and then that the vessel and her crew had been seized by the Esthonian Government, which had put on board another crew, and that the company's Reval branch had addressed to 'The Ministry of Trade and Industry of the Esthonian Provisional Government' a protest dated the 14th Dec. 1918, wherein they state that they learned that the ship had been seized by the Esthonian Government as a prize of war, and protest that the ship was seized by the Bolsheviks quite illegally and protest against the ship and her cargo being considered a prize of war, and lay on the Esthonian Government all the responsibility for whatever may happen to the ship in future. Mr. Tornigas, who was then at Helsingfors also telegraphed to the 'Minister President of the Esthonian Government' saying that the ship belonged to the company and asking for her release. Receiving no satisfaction, Mr. Zalenoff and Mr. Tornigas proceeded to London and began the present proceedings.

"The facts concerning the ship appearing from the affidavits filed for the Esthonian Government are as follows: About the 4th Dec.1918, the ship was captured by the Esthonian Government; she was then flying the red flag of the Bolshevik Government; she had on board Seals of that Government, including a Seal 'Fleet of Soviet Republic steamer *Severnaja Kommuna*' and bills of lading of her cargo, dated 1-12-1918, which expressed the cargo to be shipped by 'The People's Commissary of Trade and Industry Petrograd Department' unto 'authorised Representative of the Russian Socialist Federative Soviet Republic in Scandinavia, Voronovsky' at Copenhagen. The ship was brought into Reval and 'A Decree of Condemnation against her was made' by the Esthonian Government. A translation of what is described as an 'extract from Journal of Records of the Esthonian Provisional Government' exhibited to the affidavit contains the following 'ships as war prizes:—Minister of Trade and Industry, Koestner, informs that besides steamship *Kodurnaa*, steamship *Severnaja Kommuna* ex *Gagara* has arrived at Reval with a cargo of wood. It is decided to condemn both vessels as war prizes, together with their cargoes, and to make the disposal of the cargoes the duty of the Minister of Trade and Industry.' Upon this, as appears from a certificate of tonnage exhibited to the affidavit of the present master, the ship was registered under the name of *Kajak* at Reval, as of Esthonian nationality, and with the Esthonian Republic designated as owners. Captain Kommus was appointed master by the Esthonian Provisional Government, and by their instruction a bill of lading, dated the 13th Dec., 1918 was signed by Captain Kommus for the cargo already on board whereby the cargo was expressed to be shipped by the 'Esthonian Provisional Government' to be delivered at London 'unto the Esthonian Government Representative, Professor Piipy,' and the ship sailed under the Esthonian flag and arrived in London under command of Captain Kommus, and with a crew appointed by the Esthonian Government. The appearance under protest was entered, and this motion is made on behalf of what is described in the affidavits as the Esthonian National Council and Provisional Government, claiming to be a Democratic Republic, and the sovereign governing power of Esthonia, and the affidavits which set out the statements already

summarised assert that a state of war exists between the Esthonian Government and the Soviet—*i.e.*, Bolshevik Government, and assert that the *Gagara* is the property of the said Esthonian Government, and engaged in the service of the Government and at present being used by that Government for purposes in connection with the war.

"A number of affidavits having been filed relating to the status of the Esthonian Government, I though it right to inform the Foreign Office and to invite its assistance; and it has been stated to me by the legal representatives of the Crown that His Majesty's Government 'has for the time being, provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a *de facto* independent body, and accordingly has received certain gentlemen as informal diplomatic representatives of the Esthonian Provisional Government,' and, further, that the present view of His Majesty's Government, again without in any way binding them as to the future, is that the Government so recognised is such a sovereign Power as could, if it thinks fit, set up a Prize Court. It appears from documents in the case that the provisional recognition of the Esthonian National Council and Provisional Government was antecedent to the date in December when the ship was seized at Reval, and it continues to this day."

Hill, J. said that if, for the time being, the Esthonian National Council was recognised by His Majesty's Government as a *de facto* independent body, and the Esthonian Provisional Government as its executive, the courts of this country must, for the time being, recognise it also. The plaintiffs must seek their remedy in the Esthonian Courts. The writ, the warrant of arrest, and all subsequent proceedings must be set aside with costs, and the motion must be allowed.

The plaintiffs appealed.

Inskip, K.C. (*Dumas* and *J. R. Ellis Cunliffe* with him) for the appellants.—The defendants have not been able to show that the British Government have recognised the Esthonian National Council as being an independent sovereign body. They have shown that this Government is benevolently disposed towards Esthonia, and recognises that the Esthonian Government is for the time being independent and have the status of belligerents. That, however, is not enough. The recognition is only limited and provisional, and deals only with the present and not with the future. The sovereignty of Esthonia is at present limited and not absolute. This case is not therefore governed by the case of *The Parlement Belge* (42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 Prob. Div. 197). He referred to

The City of Berne, 1804, 9 Ves. 347;
Mighell v. *Sultan of Johore*, 70 L. T. Rep. 64; (1894) 1 Q. B. 149;
Oppenheim on International Law, 2nd edit., vol. 1, p. 90;
Westlake on International Law, Part 1, Peace, p. 57;
Halleck's International Law, 4th edit., vol. 1 p. 90;
Wheaton's International Law, 5th edit., p. 37;
Historicus' Letters on International Law, p. 24;
Peru (*Republic*) v. *Dreyfus Brothers and Co.*, 58 L. T. Rep. 433; 38 Ch. Div. 348;
The Manilla, 1808, Edw. 1;
The Helena, 1801, 4 C. Rob. 3.

Bateson, K.C., and *F. L. Hinde*, for the Esthonian Government, were not called upon.

Bankes, L.J.—This is an appeal from a decision of Hill, J., which he gave under the following circumstances: The West Russian Steamship Company Limited, brought an action *in rem* against the steamship *Gagara*, now sailing under the name of *Kajak*, and the parties interested in the steamship. The same plaintiffs also brought an action against the freight. They alleged that they were the owners of the steamship, and claimed a declaration to that effect, and an injunction against persons removing the vessel or her cargo, or permitting the same to be removed, and a decree condemning the defendants in costs and damages. An appearance was entered under protest, and a motion was then made to the Admiralty Court to set aside the writ and all subsequent proceedings upon the ground that the Court had no jurisdiction to entertain the action, on four grounds: (1) The dispute was between two foreigners as to a foreign ship; (2) the steamship was and is in the service of the Esthonian Government; (3) the vessel and her cargo were the property of that Government; and (4) the vessel has been properly and lawfully condemned as prize by a decree of that Government.

Hill, J. dealt with the case in reference to the claim that the vessel was the property of the Esthonian Government and had been lawfully condemned as prize, and he gave no decision in reference to the point that the dispute was between two foreigners as to a foreign ship. The plaintiffs appealed.

The question which Hill, J. decided, and which we have to decide, is whether the Esthonian National Council has been recognised by the Government of this country as having the status of a foreign Sovereign. If so, it is not disputed that the Courts of this country will not allow that Council to be impleaded in any of these Courts. The principle upon which that practice proceeds was laid down in *The Parlement Belge* (*sup.*), in a passage which was quoted by Lord Esher in *Mighell* v. *Sultan of Johore* (*sup.*), and which is as follows: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." From that passage it appears that the principle arises from international comity, and the rule is there laid down with reference to matters in respect of which the Court will not exercise its territorial jurisdiction.

Hill, J., in his judgment, indicated the grounds on which he thought that the claim of the Esthonian Government came within the rule so laid down. He said: "In the first place, the Esthonian

Government is in actual possession of the ship, and that Government states that the ship is being used by it for public purposes. The plaintiffs invite the Court to take that possession away by arrest of the ship, and ultimately by decree to transfer it to the plaintiffs. But to permit the arrest is to compel the Esthonian Government either to submit to the jurisdiction of the Court or to lose their *de facto* possession, and to compel the Esthonian Government to submit to this Court the question of the ownership of the *Gagara*. In accordance with the principles laid down in *The Parlement Belge* (*sup.*) and *The Broadmayne* (13 Asp. Mar. Law Cas. 356; 114 L. T. Rep. 891; (1916) P. 64), I conceive I cannot compel the Esthonian Government to submit to the jurisdiction. But if that difficulty could be got over, there remains this further difficulty. The Esthonian Government seized the ship *jure belli*, and condemned her as the property of their enemy, the Bolshevist Government." On those grounds Hill, J., came to the conclusion that the case was one in reference to which the Court would not exercise jurisdiction, provided the Court was satisfied that the Esthonian Government were recognised by our Government as a foreign Sovereign With that part of his judgment I entirely agree.

The question therefore which remains is whether Hill, J. was right in coming to the conclusion that the evidence before him was such that he ought to come to the conclusion that the Esthonian National Council had been recognised as having the status of a foreign Sovereign. Upon that point I refer to a passage in Lord Esher, M.R.'s judgment in *Mighell* v. *Sultan of Johore* (*sup.*), and particularly to a passage in Kay, L.J.'s judgment, as to the materials upon which the court is justified in acting, and constrained to act, in such a matter. Lord Esher says: "I am of opinion . . . that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another Sovereign, that in the courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent Sovereign." Kay, L.J. says: "The status of a foreign Sovereign is a matter of which the courts of this country take judicial cognisance—that is to say, a matter which the court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany." Then he goes on to say, dealing with the letter from the Colonial Office, signed by an official there, and purporting to be written by the direction of the Secretary of State for the Colonies: "Proceeding as it does from the office of one of the principal Secretaries of State, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her courts of justice that an individual cited before it is an independent Sovereign, I think that statement must be taken as conclusive."

In the present case the statement is in the fullest sense authoritative. It emanates from the Foreign Office, and was presented to Hill, J. by His Majesty's Attorney-General; and the only question is whether amounts to a statement that the Esthonian National Government has the status of a foreign independent Sovereign.

The materials before the court consist partly of certain letters passing between the Foreign Office and some gentlemen who addressed the Foreign Office as being the authorised representatives of Esthonia, and partly of a statement by the Attorney-General and by junior counsel for the Treasury at the hearing before Hill, J. The plaintiffs' counsel's submission, as I understand it, is that, so far as the statements in the letters of the Foreign Office are concerned, they are deliberately ambiguous statements of a benevolent character, and not such an emphatic and deliberate statement of fact as the court should require; and he further says that no statement as to the recognition of a sovereign State can be sufficient unless it appears that the recognition is irrevocable. On that last point he cites two passages from Westlake's International Law and Oppenheim's International Law. He has also cited passages from Hall, Halleck, and Wheaton. It does not appear however, that those writers entirely agree on that particular point. At any rate, their statements have reference to conditions very different from the exceptional conditions existing as regards the status of States in Europe at the time that this dispute arose.

I read the letters of the Foreign Office as being statements which recognise to the full the sovereignty of Esthonia, but with the limitation that, under the exceptional conditions due to the setting up of the Peace Conference, no undertaking could be given to continue the recognition, if conditions altered, and I think that that would be a sufficient statement to compel the court to decline jurisdiction in reference to any matter which comes within the principle laid down in the passage which I have read from the judgment in *The Parlement Belge* (*sup.*). But, however that may be, I think myself that the statements which were made by the law officers of the Crown are free from the objections that counsel for the plaintiffs suggested were to be found in the letters of the Foreign Office. The Attorney-General said: "Our own Government—and looking at the affidavits in this case I see the statement is no less true, whether the Government of France or of the Government of Italy—has, for the time being provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a *de facto* independent body, and, accordingly, has received a certain gentleman as the informal diplomatic representative of that Provisional Government. The state of affairs is of necessity provisional and transitory. The matter remains to be determined in the way which has been described." Junior counsel for the Treasury, at a later stage, said: "If it would assist the court I have the Attorney-General's authority for stating to the court that, in the present view of His Majesty's Government, and without in any way binding itself as to the future, the Esthonian Government is such a Government as could, if it thought fit, set up a Prize Court."

Reading those deliberate statements of the law officers of the Crown as expressing the attitude of the Government towards the Esthonian National Council, I cannot help feeling that if the court were to exercise jurisdiction in respect of such a dispute as arises in this action, they would not be acting in accordance with what was pointed out in the *Parlement Belge* (*sup.*) as being the principle of international comity, and that there would be a

divergence of action as between the courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to adopt.

On those grounds, I think that the view of Hill, J. was right.

Warrington, L.J.—I agree for the same reasons, and have nothing to add.

Duke, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellants, *Ince, Colt, Ince,* and *Roscoe*; for the respondents, *William A. Crump* and *Son.*

June 30 *and July* 1, 1919.

(Before Bankes and Scrutton, L.JJ. and Eve, J.)

The Hassel. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision — "Pilot vessels when engaged on their station on pilotage duty"—Lights—Regulations for Preventing Collisions at Sea 1896, *art.* 8.

Art. 8 *of the Regulations for Preventing Collisions at Sea* 1896 *requires that "pilot vessels when engaged on their station on pilotage duty" shall carry "a white light at the mast head, visible all round the horizon," and "On the near approach of or to other vessels they shall have their side lights lighted, . . . and shall flash or show them at short intervals, . . ." It also requires that, when not engaged on their station on pilotage duty, pilot vessels shall carry lights similar to those of other vessels of their tonnage.*

The pilot cutter S., *while proceeding out from Barry Docks to put a pilot on board a vessel which had signalled for a pilot, was carrying at her masthead the "all-round" white light. On the approach of the steamship* H. *she did not flash or show her side-lights, and was run into and sunk by the* H. *off the entrance between the breakwaters.*

Held, by the Court of Appeal, affirming Hill, J., that the H. *was not to blame for the collision; and held by Hill, J. and by Scrutton, L.J. in the Court of Appeal that the* S. *was not engaged on her station on pilotage duty, and was to blame for carrying only her masthead white light.*

Action of damage by collision.

The plaintiffs were the owners of the pilot cutter *Shamrock* and her master and crew, proceeding for their lost effects.

The defendants were the owners of the Norwegian steamship *Hassel.*

On the evening of the 25th Jan. 1918 a collision took place off the entrance to Barry Docks between the *Shamrock* and the *Hassel.* The *Shamrock* was proceeding out to a vessel which had signalled for a pilot. Her sails were set, but as there was little or no wind she was being propelled by oars. The *Hassel* was coming in. The pilot cutter was exhibiting at her masthead a white light visible all round the horizon, which those on board the *Hassel* only made out among the other white lights visible in the vicinity at a distance of about 300 yards. It was contended by the defendants that the *Shamrock* was exhibiting improper and misleading lights, and that the *Hassel* was not to blame for the collision.

Lewis Noad and *R. F. Hayward* for the plaintiffs.

Laing, K.C., and *Dumas* for the defendants.

Hill, J.—This is a claim by the owner of the pilot cutter *Shamrock* and the master and crew, proceeding for their lost effects, against the owners of the steamship *Hassel* to recover damages for the sinking of the *Shamrock* at the entrance to Barry by collision between the *Shamrock* and *Hassel* on the evening of the 25th Jan. 1918. The *Shamrock* is a cutter of 51ft. in length. There is no evidence as to her exact tonnage. She carried a crew of three hands and three pilots. The *Hassel* was a steamship of 3968 tons gross and 356t. long. She had a part cargo, and was in charge of a pilot. The *Shamrock* was coming out from Barry and the *Hassel* was proceeding into dock. It was a fine, clear, moonlight night. The tide was one and a half hours ebb. In between the breakwaters at the mouth of the entrance channel the tide would be slack, but just outside, on that state of the tide, it would, across the entrance, be of a force of between two and three knots.

The *Shamrock* had been lying inside the west breakwater, and was proceeding out to put a Newport pilot on board a steamer which had signalled for such a pilot. She carried at her masthead an "all-round" white light. She had a red and green combination light lit, but it was never exhibited. She had sail set, but there was hardly any wind, and she was being worked out with the help of sweeps at a very slow speed. The *Hassel,* which was showing regulation lights and also docking lights, had been dodging about outside waiting for the display of the signal to indicate that she could enter dock—the exhibition of a green light on the end of the jetty. A steamer passed down coming out, and then the docking signal was displayed, and the *Hassel* turned and headed for the entrance, N.W. and then N.W. by N. She had a tug ahead and another astern.

The plaintiffs' case was that the *Shamrock* was between the breakwaters or a little outside them, and well on the west side of that passage, when the masthead and red lights of the *Hassel* were seen about a quarter of a mile away and a little abaft the port beam, the *Shamrock* heading about S.W.; and that the *Hassel* came on and, when within a length or two of the *Shamrock,* opened her green light and ran into the cutter.

The defendants' case was that the *Hassel* was waiting for the docking signal, and that after the outward-bound steamer had passed down the docking signal was displayed, and she proceeded towards the entrance with her engines working at slow and stop, and got on to a N.W. by N. heading and then saw, at one and a half cables distance, a white light, which was the "all-round" masthead light of the *Shamrock,* and, very shortly afterwards, the sails of the *Shamrock.* The *Shamrock* was then in the middle of the entrance between the breakwaters, a little on the port bow of the *Hassel,* Upon that, the helm was hard-a-ported and the engines given a touch ahead, and the bow tug was ordered to pull to the eastward, and the stern tug was ordered to hold up the stern of the *Hassel* also to the eastward; but the tide, which was setting across just outside the entrance, had such an effect on the *Hassel,* that it carried her to the westward on to the *Shamrock* before the *Hassel* had time to

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

carry out her intended manœuvre of getting her head to the eastward and passing under the stern of the *Shamrock*. The pilot said he could not starboard to counteract the effect of the tide because of the presence of the *Shamrock*, and he could not go astern because it was too late, and the *Hassel* was too far in, and if he had attempted to do so the tide would have set the *Hassel* down on to the breakwater. He further said that if he had known of the *Shamrock* earlier he could have gone astern.

I find that the collision was in the line across the ends of the breakwaters, or possibly a little outside that line. I find that the collision happened as the defendants say it happened, not by any starboard ing of the *Hassel*—there was none—and not by the stern tug of the *Hassel* pulling the stern to the eastward against the tide, and throwing the *Hassel's* head to the westward, but by the tide setting her to the westward and preventing her from turning sharply enough to avoid the *Shamrock*. I am advised that when the *Shamrock* was seen the pilot was quite right not to go astern; it was too danger ous, having regard to the tide. I am also advised that when the *Hassel* saw the *Shamrock* there was nothing which the *Hassel* could properly be called upon to do which would have prevented the collision. Upon that advice I find that at that time, and from that time forward, there was no negligence on the part of the *Hassel*. Had the *Hassel* been aware that the *Shamrock* was in the channel at a time when the *Hassel* was considerably further out, the *Hassel* could, by going astern, have avoided the collision, and in my view, therefore, could and ought to have gone astern had she been aware of the position of the *Shamrock*. The question therefore is: Ought the *Hassel* at such earlier time to have been aware that the *Shamrock* was proceeding out through the channel? It must be remembered that the *Shamrock* was moving very slowly indeed —those on board of her say at about a knot. She had only such movement as her sweeps gave her. She was showing an "all-round" white light, and nothing else. In my opinion she was carrying an improper, and in the circumstances, a misleading light. I do not think the carrying of that light can be justified under any regulation. Counsel for the plaintiffs contended that she was "engaged on her station on pilotage duty" within art. 8 of the Regulations for preventing Collisions at Sea, and therefore the light she had required to carry was "a white light at the masthead, visible all round the horizon." But if she was on her station on pilotage duty, then according, to art. 8, she "shall carry a white light at the mast head, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes." That she certainly was not doing.

Moreover, pilot vessels, when engaged on their station on pilotage duty, shall "on the near approach of or to other vessels . . . have their sidelights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side."

That also the *Shamrock* certainly did not do. I think she was not on her station. I dare say she was on pilotage duty, because she was going out to put a pilot on board a ship. But it seems straining it very much to say that, from the moment she got under way from inside the west breakwater, she was on her station; but even if she was, and was justified in carrying her "all-round" white light she was bound to carry out the rest of the obligations which attach to pilot vessels in such a position, namely, to show a flare-up light or flare-up lights at short intervals, and to exhibit her side lights on the near approach of or to other vessels.

On the other hand, if, I think, she was not engaged on her station on pilotage duty, her obligation was to "carry lights similar to those of other vessels of her tonnage." I do not know what her precise tonnage was. She either came within art. 5 or art. 6 or art. 7 (3). If she was under twenty tons she came within art. 7 (3). Therefore she either had to carry side lights under art. 5, or exhibit them under art. 6, or, under art. 7 (3), if she was a vessel "under oars or sails, of less than twenty tons," her obligation was to "have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side." In such a position, for the *Shamrock* to carry a single "all-round" white light was not only against the regulations, but was most misleading.

Whether there was a breach of the regulations or not, the question still remains, having regard to the fact that the *Shamrock* carried and exhibited this "all-round" white light and nothing else, and whether those on board the *Hassel* ought to have seen it sooner, and, having seen it, appreciated that it was the light of the vessel under way and proceeding down to the entrance. There were, as one might anticipate, many white lights being exhibited to the northward of the entrance, and the *Shamrock* was proceeding very slowly. I am advised and I entirely agree, that there was no negligence in those on board the *Hassel* in not sooner picking out the white light of the *Shamrock* from the stationary lights, or in not sooner appreciating that the white light was that of a vessel under way and coming down to the entrance.

I therefore find that there was no negligence on the part of the *Hassel*, and so finding, it is unnecessary to determine whether the *Shamrock* got under way before or after the docking signal was displayed. It is admitted that it would be wrong for her to get under way after the docking signal was displayed. Nor is it necessary to determine, whether, even if the *Shamrock* got under way before the docking signal was displayed, it was proper to continue down the channel when the *Hassel* was seen to be coming up; or, in other words, although actually being propelled by oars, whether the *Shamrock* was not within the by-law which forbids vessels lying or remaining in the course of the traffic. I need not determine that.

The facts which I have already found make it clear that the plaintiffs have made out no case of negligence against those in charge of the *Hassel*, Therefore there must be judgment for the defendants.

The plaintiffs appealed.

Bateson, K.C., and *Lewis Noad* for the appellants.

Laing, K.C., and *Dumas* for the respondents, the defendants.

[The arguments were confined to the question whether those on board the *Hassel* were negligent.]

Bankes, L.J.—This is an appeal from a judgment of Hill, J., in an action in which the owners of the *Shamrock* claimed that the loss of that vessel in a collision which occurred between the *Shamrock* and the *Hassel* was due entirely to the fault of those in charge of the *Hassel*. The learned judge found that the *Hassel* was not to blame, and upon that finding gave judgment for the defendants, and the plaintiffs now appeal.

There is a good deal in the story of the events which preceded the accident about which there is no dispute. The *Shamrock* was a pilot cutter about 50ft. in length. She had been lying moored to a buoy a short distance inside the western breakwater at the entrance to Barry Harbour. The collision occurred on the evening of the 25th Jan. 1918, at 7.30; and it is admitted on all hands that it was a fine clear night, and there was no appreciable wind. It is to be regretted that no evidence was given as to the exact position in which the *Shamrock* was lying, and what course she took in getting from her moorings to the place where the collision occurred. But no evidence was given about that; and the case of the *Shamrock* was confined to the statement that she was being navigated with sweeps, that she was proceeding at the rate of about one knot, and, at the time of the collision, she had got past the western breakwater and outside the entrance, a distance, perhaps, of some 300 feet, and she was then proceeding on a course heading south-west.

The *Hassel's* case, as pleaded, was that, when the *Shamrock* came into view, she was apparently close to the western breakwater, and one of the questions about which there was a dispute was as to the exact position of the *Shamrock* at the time the collision occurred. It is quite true that, both in the preliminary act and the defence, the appellants had pleaded that the *Shamrock* was apparently close to the western breakwater; but when they came to give their evidence they asserted that the real position, as ultimately ascertained, of the *Shamrock* was that she was practically half-way between the two breakwaters right in the entrance of the harbour, and the learned judge accepted the *Hassel's* story on that point. He says: "I find that the collision was in the line across the end of the breakwaters, and possibly a little outside that line." In that finding I concur, and that, therefore, places the position of the *Shamrock* at the time of the collision. She was showing only one bright white light, a masthead light. I think that, had a different view been taken in reference to those on board the *Hassel* appreciating what that white light meant, there might have been a very serious question as to whether the *Shamrock* was under the circumstances, showing the proper light. But, having regard to the advice that was given to the learned judge in the court below, and the same advice given to us by our assessors in this court, it is not really necessary to consider whether the *Shamrock* had, or had not, under the circumstances in which she was placed, the proper lights. She had this one bright white light, and it is not disputed that that light is discernible at a very considerable distance. Those on board the *Hassel* said they did not appreciate that this white light was the light of a vessel until they got within about a cable or a cable and a half's length of it, and the reason which they gave for that was that there were so many white lights showing at that part of the dock, and that this vessel was moving at so slow a pace that it was not reasonable to expect that any proper look-out should have appreciated that there was a vessel right in the middle of the fairway. At the time when the docking light was clearly exposed, inviting vessels to enter, it was not reasonable to expect that they should or could have appreciated that fact. In the court below the judge was advised, and he accepted the advice, that that case on the part of those on board the *Hassel* was a reasonable answer, and we are given the same advice by our assessors, I accept it, and think, under the circumstances. that there was no negligence on the part of those on board the *Hassel* in not appreciating sooner than they did the fact that the *Shamrock* was in the position in which she was, being moved slowly right across the entrance to the dock by sweeps at the time when the *Hassel* was being invited to their knowledge to enter through this narrow and awkward entrance.

It is obvious, therefore, that the *Shamrock* had placed herself in a position not only of very considerable danger to herself, but a position which rendered the navigation of any vessel coming into this narrow entrance under the then existing conditions very difficult and dangerous. There was an ebb tide running with the force of about two and a half to three knots. and the evidence also was that for some little distance just outside the entrance the tide had very much less effect than it had a little further out; and therefore, in the case of a vessel like the *Hassel*, which was 340ft. long, there came a period when the tide would have much more influence upon her stern than upon her bows, and would tend, therefore, to sweep her round; and having regard to her length and the entrance being only 350 feet wide, that might place her in a position which it would be extremely difficult for her to manœuvre without running great risk of fouling either the eastern or the western breakwater.

That was the position of these two vessels, as found by the learned judge in the court below, and whose finding we accept. But then it was said that, assuming that to be the case, those on board the *Hassel* were guilty of negligence, because, appreciating, as they did, the fact that the *Shamrock* was where she was, and that the two vessels were that distance apart, the *Hassel* could, by the exercise of proper manœuvres, have avoided the collision; and it is argued that the manœuvres which she ought to have executed were to reverse, or, by proper tug action, to have secured that her head should be drawn sufficiently to the starboard to avoid collision with this little cutter. [The Lord Justice considered the evidence in this regard, and said that he accepted the advice of the assessors that it was too dangerous for the *Hassel* to reverse, and that there was nothing that she could have been properly called upon to do which would have prevented the collision.] For these reasons the appeal must be dismissed with costs.

Scrutton, L.J.—I agree, but as I think a general question of importance to pilotage cutters is involved, I will add a few words. The first question is, taking the *Hassel's* own account of the distance at which she first saw the *Shamrock*, could she, by the exercise of reasonable care and skill, have avoided the pilot cutter lying in the entrance? That is a pure question of seamanship, and I am not sufficiently confident in my own nautical knowledge to accept the suggestion of counsel for the appellants, who

ask me to disregard the opinion of four competent seamen. The second question is whether those on board the *Hassel* ought to have seen this cutter earlier. We are advised by our assessors that there was no negligence in not realising sooner that the white light on the *Shamrock* was not a shore light. Those two findings are necessary to support the judgment in the court below that the *Hassel* could not by reasonable care and skill have avoided the *Shamrock*.

In my view the cutter was quite wrong in carrying only her masthead white light. That would be the light to show if she were "engaged on her station on pilotage duty," but I do not think that because a cutter is going to put a pilot on board some ship or is bringing a pilot away from some ship, she is "engaged on her station on pilotage duty" or is entitled to carry a white light only and not side lights. I think this pilot cutter would have created some astonishment in Barry Harbour if she had started letting off flares; and that the harbour master would have stopped the fireworks very promptly, for the reason that she was not on her station on pilotage duty. I gather that it is a habit with pilot cutters to take an extended view of what is their station, and I think the sooner they put the idea out of their heads, and have recourse to ordinary side-lights which will give other vessels a much better chance of seeing what they are doing, the better. In *The Reginald* (1907, 10 Asp. Mar. Law Cas. 519), it was held that a pilot cutter returning from her pilotage station with only a white light was not exhibiting proper lights, and I agree with that decision. Further, the cutter came out about the time when the docking signal for the *Hassel* to enter was exhibited, and she could easily have been stopped; by going on she put unnecessary difficulties in the way of a large vessel to which pilot cutters are merely ancillary. I agree that the appeal should be dismissed.

EVE, J.—I have had some doubt about the case, but I am satisfied that the decision turns on questions of seamanship, on which we ought to avail ourselves of the advice of our assessors. As regards the questions whether the *Shamrock* was on her pilotage station and was exhibiting her proper lights, I prefer to keep an open mind, as these matters have not been argued on the appeal.

Appeal dismissed.

Solicitors for appellants, *Gamlen, Bowerman*, and *Forward*, for *Hunter* and *White*, Newport; for the respondents, *Gilbert Robertson*, Cardiff.

July 1, 2, *and* 3, 1919.

(Before BANKES and SCRUTTON, L.JJ. and EVE, J.)

H.M.S. DRAKE. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Ship "not under command" — When entitled to give "not under command" signal —Duty of ship "not under command"—Keeping course and speed—Regulations for Preventing Collisions at Sea 1910, *arts.* 4, 21.

A ship, which, while not absolutely helpless, is in such a condition that she cannot take the ordinary and prompt measures which a vessel of her type may reasonably be expected to take, may be entitled to hoist the "not under command" signal. A ship which is not under command and has properly hoisted the appropriate signal under art. 4 *of the Regulations for Preventing Collisions at Sea is not thereby necessarily bound to keep her course and speed under art.* 21

Per Scrutton, L.J.: A vessel which is "not under command" is not entitled to mislead vessels which have to keep out of her way, by taking action first in one way and then in another without justification. She is entitled to take the proper manœuvres suited to her case.

The Hawthornbank (9 Asp. Mar. Law Cas. 535; 90 *L. T. Rep.* 293; (1904) *P.* 120) *distinguished.*

(a) Reported by W. C. SANDFORD, Esq., Barrister at-Law.

APPEAL by the plaintiffs, the owners of the *Mendip Range*, from a judgment of Roche, J., in an action for damage by collision.

The plaintiffs sued the defendant, Captain S. H. Radcliffe, R.N., commanding H.M.S. *Drake*, for damage to the *Mendip Range*, the result of a collision which occurred between the two vessels in Rathlin Sound on the morning of the 2nd Oct., 1917. The weather was fine and clear, the wind southerly (a light to a moderate breeze), and the tide, which was at flood, was setting to the eastward with a force of about two knots an hour. The *Mendip Range*, a screw steamship of 4495 tons gross and 385ft. in length, was on a voyage from Philadelphia to Glasgow with a general cargo. The case for the plaintiffs was that the *Mendip Range* was in Rathlin Sound, on a course of S.E. ¾ E. magnetic, making about ten knots an hour, when the *Drake* was observed about three miles away and three points on the port bow of the *Mendip Range*, in the company of some destroyers and enveloped in smoke clouds, steering south-west, and that, shortly afterwards, she exhibited two discs, indicating that she was not under command. When the vessels were about a mile distant, the helm of the *Mendip Range* was starboarded, and two short blasts sounded; and whilst she was going off under starboard helm the *Drake*, being then on the starboard bow of the *Mendip Range*, was seen turning to starboard. As it had become impossible to clear by porting the *Mendip Range*, her helm was put hard a-starboard, her engines full speed astern, and three short blasts were sounded. The *Drake*, however, continued to turn to starboard, struck with her ram the starboard side of the *Mendip Range*, and rendered it necessary for the *Mendip Range* to be beached. The plaintiffs also alleged that the defendant and those on board the *Drake* (*inter alia*) failed to keep their course and speed, improperly exhibited the "not under command" signals, and ported her helm or allowed her head to go to starboard after displaying those signals.

The case for the defence was that the *Drake* was south-east of Rathlin Island after being torpedoed, and was heading southward in a disabled and damaged condition, with a heavy list to starboard. She was then making about five to six knots an hour, and swinging under a port helm with the object of rounding Rue Point and reaching, if possible, Church Bay. The *Mendip Range*, one of the *Drake's* convoy before she was torpedoed, was seen about three or four miles distant, and about six points on the starboard bow. The *Drake* then exhibited two black discs to show that she was not under command, and kept her helm aport, and, her whistle having been damaged in the explosion,

sounded a short blast on the fog horn. The *Mendip Range*, when crossing ahead of the *Drake*, altered her course to port, and, although the *Drake* signalled by flags and waved to her to keep clear, and the engines were stopped and put full speed astern, and the helm put amidships, came on with considerable speed under starboard helm, recrossing the bows of the *Drake* from port to starboard, and with her starboard side struck the stem of the *Drake*. It was further alleged by the defendant that those on board the *Mendip Range* were negligent in (*inter alia*) starboarding, and in not keeping clear of the *Drake*.

Roche, J., in giving judgment, found as facts that the greater part of the *Drake's* alteration in her course occurred at quite a late stage, and that, although the action of the *Drake* under port helm was taken before the *Mendip Range* altered her course under starboard helm, its effect was such as not to become apparent to those on board the *Mendip Range*; that the *Mendip Range* thereupon starboarded, and the Drake continued under port helm, the collision being thus brought about. On the point whether the *Drake* was improperly exhibiting "not under command" signals, the Elder Brethren disagreed. With regard to engines, they agreed that the *Drake* was under command. As to helm, however, one Elder Brother thought that she was under command, and ought not to have exhibited the two black discs, being of opinion that she was able to get out of the way of another vessel in the manner which that vessel would have reason to anticipate. The other Elder Brother took the opposite view, being of opinion that, the steam steering gear having been rendered useless, and the telephonic communication having broken down, it would take a very considerable time to pass the orders along to the helm by word of mouth. Under these circumstances, Roche, J., said he could not find that the commander of the *Drake* was negligent in hoisting the "not under command" signals. As to the main charge made against her—that she improperly ported her helm—he said that the allegations made against her, based on the authority of *The Hawthornbank*, amounted to this—that, if a vessel showed "not under command" signals, she must adhere to the policy indicated by her. As to that, much, if not everything, depended upon what was found to be done; and he had found that the order to port helm was given on board the *Drake* before there was any alteration of course on board the *Mendip Range*, and he was satisfied that port helm action was taken, not for the *Mendip Range*, but for the general purposes of the *Drake* in directing her course to the beach, where she wished to anchor in shoal water. He was advised that, although she was not a sinking ship, as appeared from the fact that she was going to anchor in shoal water and not to beach immediately, it was most desirable that she should get there as soon as practicable, and that all the indications were that those in charge of the *Drake* were doing their best to that end. In those circumstances, he was unable to find that the *Drake* was guilty of negligence because she took that action, inasmuch as she thought that the *Mendip Range*, having regard to the *Drake's* "not under command" signals, would shape to pass, and would be able to pass, clear of the *Drake* on her port side and to the southward of her; and he did not find that the course taken by the *Drake* was negligent or improper. The learned judge further said that he had been asked to give judgment as if there were a counter-claim. He did not, however, find negligence on the part of the *Mendip Range*; and the findings would be that neither ship was to blame, with the result that he gave judgment for the defendants, each party to bear their own costs.

The plaintiffs appealed.

The Regulations for Preventing Collision at Sea, 1910, provide:

Art. 4. (*a*) A vessel which from any accident is not under command shall carry [lights] . . . and shall by day carry in a vertical line one over the other not less than 6ft. apart, where they can best be seen, two black balls or shapes each 2ft. in diameter. (*d*) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and cannot therefore get out of the way. . . .

Art. 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.

Laing, K.C. and *Lewis Noad*, for the appellants, cited

The P. Caland, 7 Asp. Mar. Law Cas. 83, 206, 317; 65 L. T. Rep. 496; (1891) P. 313; 67 L. T. Rep. 249; (1892) P. 191;

The Hawthornbank, 9 Asp. Mar. Law Cas. 535; 90 L. T. Rep. 293; (1904) P. 120.

Aspinall, K.C. and *Dunlop*, K.C. for the respondent.

Bankes, L.J.—In this action the owners of the *Mendip Range* sought to establish that the damage to that vessel, which was the result of a collision with H.M.S. *Drake*, was due to the negligence of those in charge of the *Drake*. The latter had been torpedoed and shortly before the collision occurred she had exhibited the signal which is prescribed under art. 4 (*a*) of the Regulations for Preventing Collisions at Sea 1910 for a vessel not under command. Considerable importance in this case attaches to the proper construction of that article, and to what is the necessary consequence of a compliance with it.

Counsel for the appellants contended that those in charge of the *Drake* were not justified in exhibiting the "not under command" signal, on the ground that the condition of the vessel was not such as to justify any careful and skilful seaman in considering that she was not under command so as to justify action under art. 4. The article provides that, where the signal is exhibited, the lights and shapes under sub-sect. (*d*) of that article are to be taken by other vessels as signals that the vessel showing them is not under command, and cannot, therefore, get out of the way. I understand the argument to be that, because under the article the vessel flying the signal cannot get out of the way, it follows that the other vessel must get out of the way; and it further follows that art. 21 applies to the vessel flying the signal, and that therefore that vessel must keep her course and speed. That contention raises an important question—first, as to the proper construction of the article dealing with a vessel not under command. Personally, I do not think it possible to give any definition of what will constitute a vessel not under command, and I think the undesirability of doing so is well indicated by the view taken by Lord Herschell in *The P. Caland* (*sup.*). [The Lord Justice stated the facts of that case, and proceeded:] In the Court of Appeal the Master of the Rolls had attempted to lay down what might be called a rule of construction. He

said: "Looking at the words of the statute—the first part of the clause which speaks of her not being under command, and the second of her not being under command so that she cannot keep out of the way—taking these two together, it seems to me that the real construction of the rule is that she must be in such a position that she is not under command in this sense, that she cannot keep out of the way of another vessel coming near her. If she can be steered and if she can be stopped and can go ahead, which is necessary in order that she may be steered, then she is under command, and the apprehension of her being likely, however well founded, in a few moments to be out of command does not show that she is out of command at the moment spoken of." Lord Herschell, in commenting on that construction, said that he thought it was too narrow, and he gave an instance where a vessel, although having steerage way, yet, owing to some disablement, answered her helm so slowly that, should occasion arise, she could not get out of the way in the manner which another vessel would have reason to anticipate, might be a case which would fall within the rule; and he gave another example, where, owing to the breakdown of machinery, the vessel was no longer capable of being propelled, and it seemed probable that she might entirely cease to be capable of being propelled at any moment. He said that might be a case which might well, if the circumstances justified it, fall within the rule.

It seems to me, speaking broadly, that, in determining whether a vessel properly comes within this article, it is necessary to consider, not only the safety of the vessel itself, but also the safety of any other vessel approaching her; and although the vessel may be able to move forward or astern, or still able to answer her helm, yet her condition may be such that she cannot take the ordinary and prompt action which a vessel of her type might reasonably be expected to take. Without laying down any rule, because it appears to me that each case must depend upon its own circumstances, and in every case it must be a matter of degree, yet I think that, under the circumstances I have indicated, it may well be that a vessel may be regarded as being not under command, and ought properly, in the interest of those navigating the sea, to be considered as not under command, although she may be able to go ahead or astern or answer her helm. In my opinion, therefore, every case must depend upon its own circumstances; and in every case, assuming there is what a lawyer would consider as any evidence on the point, the answer to the question whether a vessel is or is not under control must be largely, if not entirely, a matter of seamanship.

In the present case I have no hesitation in saying, as a lawyer, that there is ample evidence that the *Drake* was not under control. She had been torpedoed and holed; two of her engine rooms were flooded; she was in imminent danger of her bulkhead giving way; and, as a result, she was unable to proceed at more than a very moderate speed—those in charge of her think from five to six knots, Roche, J. being of opinion that she actually went seven knots. Possibly she was going faster than those on board her appreciated or thought justifiable. Her steam steering gear had been rendered useless; the means of communication with the engine room had been seriously interfered with; and, although her engines would work either ahead or astern, and it was possible to steer the ship by an elaborate arrangement of placing men to communicate one with the other in order to give directions to the man at the hand steering gear, which was below the water line, yet I think there is abundant evidence that this vessel was, at the material time, not under command. I think that this evidence was amply sufficient to justify a finding that the *Drake* was not under command, and I should so find on my own knowledge, small as it is on such matters; but we have asked this question of those who advise us. "Having regard to the injuries to the *Drake*, particularly the difficulty of communicating with the man at the wheel, do you consider that the hoisting of the signal 'not under command' was justified?" The answer is "Yes"; and I entirely agree.

The appellants endeavoured to draw a distinction between where a vessel is not in fact under command and where those in charge of her are justified in considering that she is not under command. Personally, I cannot see any distinction. If a court were to find that the vessel was not in such a condition as to be properly described as being "not under command," they would not conclude that the officers and others were justified in considering that she was in that condition. The court came to the conclusion as to whether the officers were justified upon the opinion that they themselves formed as to the actual condition of the vessel.

The next contention raised on behalf of the appellants upon the construction of article 4 is important; but I cannot agree with it. All that the article provides is that, where the lights and shapes required by the article are exhibited, they must be taken by other vessels as a signal that the ship showing them is not under command, and cannot, therefore, get out of the way. If the vessel cannot get out of the way, the other vessel must keep out of her way; and it follows that, in the case of vessels which are on crossing courses, as these vessels were, the one which, but for the exhibition of the signal, would be the stand-on ship is converted into the keep-out-of-the-way ship. But is the reverse true—namely, that the keep-out-of-the-way ship is necessarily converted into the stand-on ship in the sense that she must keep her course and speed? I cannot think that that is the construction of the regulation, and for this reason: A disabled vessel exhibiting the "not under command" signal may be so disabled that it is impossible for her to keep any course or any speed, and I do not agree with the contention of counsel that the learned President in *The Hawthornbank* (*sup.*) was laying down any general rule of construction. I think he was merely expressing an opinion as to what should be the course of that particular vessel in that particular case; and although I entirely agree that the rule laid down in regard to that vessel may apply to a large number of vessels exhibiting the signal, it is not true to say that the rule is applicable to all vessels so exhibiting. What the learned President said in that case was that some time before the collision took place the *Hawthornbank* ported her helm. He went on to say: "The Elder Brethren take the view, and I agree, that that was a material cause in bringing about this collision. The helm was ported, the vessel paid off, and I think but for that having taken place there was a great probability that the plaintiff's ship would have got across the bows of the barque. My view, therefore, is that, having signalled that she was not under command, and

that the other vessel must act for her, she ought not to have acted in the way she did, but should have kept her course and let the brigantine get out of the way." That, of course, is a statement of the President's view in reference to the facts of that case, which was a case in which it was possible for the vessel exhibiting the signal to keep her course, but in which, apparently, she deliberately altered it so as to materially contribute to the collision.

Having dealt with these two matters of law, I will now deal as shortly as I can with the facts of this case.

The *Drake* was torpedoed about nine o'clock a.m. about five miles off Altcarry Head, forming the north-easterly point of Rathlin Island. She had been in charge of a convoy, of which the *Mendip Range* had formed a part. The convoy had dispersed, and the *Drake* was proceeding in a southerly direction when she was torpedoed. Her captain had to decide what he should do. He first thought that he could get the vessel into Belfast, but, after consulting with the engineer, he came to the conclusion that to attempt to bring her there would not be safe. So he decided, if possible, to bring the vessel into Church Bay, and there await the arrival of salvage tugs. In order to do that he had to turn the ship round; and he proceeded on a southerly course, following the land until he arrived off Rue Point. At that time the *Mendip Range* was coming in an easterly direction through Rathlin Sound, making about ten knots an hour—with the tide I think it would be about thirteen knots an hour. It is a matter of dispute as to the speed at which the *Drake* was proceeding, but the learned judge puts it at about seven knots. The vessels first sighted each other when they were distant about three miles apart, and there is no material dispute between the parties as to their relative positions then. The evidence of the *Mendip Range* is that she saw the *Drake* about three miles away, three points on her port bow. The evidence of the *Drake* is that she saw the *Mendid Range* three to four miles away, about six points on her starboard bow. That would make the *Mendip Range* heading about south-east, and the *Drake* south-west. The vessels were, therefore, upon crossing courses. It is at that stage, or very shortly afterwards, that they first sighted each other. That is where the really important point of difference between them occurs.

The master of the *Mendip Range* said that, when he first sighted the *Drake*, he did not realise that she was flying the "not under command" signals, and he did not do so until she approached within about a mile of them. He took counsel with one of his officers as to the proper and prudent course to take, and they came to the conclusion, having regard to the way in which the *Drake* was heading, that it would not be safe to attempt to cross her bows; and he therefore decided to pass astern of her, and for that purpose he starboarded his helm. He says that, after he had starboarded his helm for two or three minutes the *Drake* continued on her southward and westward course, and there was no alteration from the course which he had originally seen her following. He says that, after two or three minutes had elapsed, the *Drake* suddenly ported, and continued to port, with the result that, in a very short space of time, she rammed the *Mendip Range* on her starboard bow. He says that the vessels were for the time starboard to starboard before the *Drake* changed her course under a port helm. If that was the case the *Drake* would be in fault. It is not the case of the *Drake* keeping her course and speed, or anything of the kind. It is not the case of a disabled vessel unable to control herself. If this case is correct, it is a deliberate change of course, the disabled vessel putting herself under a port helm, and continuing under that port helm with sufficient speed to render a collision between the two vesssels inevitable, and so bringing about this serious damage. If those are the facts it is not necessary to consider the construction of the rule. But the *Drake* disputes that position altogether. Her witnesses say that it is not the case that they altered their course in the sense that they ported the helm for the first time after the *Mendip Range* had starboarded; that it is not the case that they continued on a south-westerly course for two or three minutes after the *Mendip Range* had starboarded; that it is not the case that the vessels were ever starboard to starboard. They say that the real facts were that they were, and had been practically ever since the *Mendip Range* first sighted them and they first sighted her, under a port helm. They say it is quite true that the *Drake* was not steering or answering her helm in the way she would have done if she had been an uninjured vessel. She required much more helm than she otherwise would have required, and she yawed about, and they could not keep her upon her course. But that was not their fault; they had given her a port helm; they had given orders for twenty degrees port helm as soon as, or before, they sighted the *Mendip Range*, and they continued on under port helm; they gave no other order; and if the vessel sheered off rapidly at the last, it was because of her disabled condition and not because there was any alteration of the helm.

Those were the two stories with which the learned judge had to deal. Speaking for myself, I think that, if the plaintiffs' story is accepted, the *Drake* was liable. On the other hand, if the story given by those on board the *Drake* is accepted, it was a case of inevitable accident. Having regard to the judgment of the learned judge, it is material to notice that there was an allegation on the part of the *Drake* that those on board the *Mendip Range* were negligent. There was, therefore, before the learned judge the question whether the *Mendip Range* was to blame, and the question whether the *Drake* was to blame—a double issue. As regards the *Mendip Range*, it was, of course, very material to consider whether, assuming that the *Drake* was under a port helm, she was under a port helm the result of which was visible, and ought to have been appreciated by those on board the *Mendip Range*; because, if her master at the time of giving the order to starboard ought to have realised that the *Drake* was under a port helm, he could not have been acquitted of negligence. That was one of the issues with which the learned judge had to deal; and he came to the conclusion, and in that conclusion I quite concur, that the action of the *Drake* under her port helm was not so appreciable as to impute any blame to the master of the *Mendip Range* for not realising, when he gave the order to starboard, that he was starboarding to a vessel then already committed to a port helm.

But, in spite of the fact that the *Mendip Range* is absolved from blame, it does not follow that the *Drake* is to blame, because the *Drake* would not be to blame unless the evidence established that, after the *Mendip Range* had committed herself

to a starboard helm, she committed herself to a port helm. The learned judge has, I think, in his judgment, dealt with these two issues together, instead of separately; and I think that that possibly accounts for the way in which he has expressed his opinion on one or two matters. Personally, I am quite satisfied with the evidence of Captain Radcliffe and his navigating lieutenant. [The Lord Justice then dealt with the evidence of these and other witnesses, which, he said, showed that the *Drake* was committed to a port helm before the *Mendip Range* committed herself to a starboard helm, and continued :] Counsel for the respondent pointed out one matter which is important in reference to the captain's evidence, and that is that, the steam whistle having been rendered useless, he attempted to give the signal that he was under a port helm by means of his fog horn at the time when the vessels were possibly some three miles apart. That, of course, is quite inconsistent with the vessel being on a south-west course, and on a south-west course under either a starboard helm or no helm at all. The learned judge deals with the matter in this way. Speaking of the course of the *Drake* after she had turned round, he says: "She proceeded so to do, for that purpose turning round first under a starboard helm, so as to get into position, and was then navigated under what may be described generally as port helm." Later he says: "Certainly when some witnesses come and speak of the *Drake* having been under port helm for three quarters of an hour, the only explanation of that can be that it is quite true that, for a very substantial period, she had been discontinuously and at intervals acting under port helm to make a course towards the south part of Rathlin Island, which she desired to make." The learned judge seems there to say: "Well, she was committed to a port helm, but she was acting discontinuously and at intervals under a port helm." If he means by that to describe the action of the vessel herself, that is one thing; but if he means to indicate that varying orders were given to the helm, with great submission to him, I do not think that the evidence really justifies it. He goes on: "and that may explain the exaggeration of time which is given as the period for which she was under port helm continuously before the collision." I think he is there speaking not of the evidence of the captain and of the navigating lieutenant so much as the evidence of the lieutenant-commander. Then he says: "But I am satisfied that the *Drake* was not under effective port helm for anything like ten minutes before the collision." Stress is laid on the word "effective," and I think that the learned judge was laying stress upon it for the purpose of vindicating the *Mendip Range* rather than of indicating his view as to the action of the *Drake*. In another passage he says: "It is obvious that a good deal and, as I find, the greater part of the alteration of the *Drake* occurred at quite a late stage, as I am advised that it is a nautical probability; and I find as a fact, that although the action of the *Drake* under port helm was taken before the *Mendip Range* herself altered under starboard helm, its effect was not such as to become apparent to those on board the *Mendip Range*." He is there clearly dealing with both issues together. He is acquitting the *Mendip Range*, because he says the course of the *Drake* was not apparent. But, according to my view, he is also acquitting the *Drake* when he says that the action of the *Drake* under port helm was taken before the *Mendip Range* herself altered her course under starboard helm. Further on he says: "As to that, of course, much, if not everything, depends upon what one finds was done; and I have already found, and repeat the finding that the order for port helm action was given on board the *Drake* before there was any alteration on board the *Mendip Range*, and I am satisfied that port helm action was taken, not for the *Mendip Range*, but for the general purposes of the *Drake* in directing her course to the beach where she desired to anchor in shoal water." The general conclusion which I draw from the learned judge's judgment is that he intended to decide, and did decide, this material question as to whether the *Drake* took port helm action after the *Mendip Range* had starboarded. He intended to decide it in favour of the *Drake*. It is suggested, no doubt, that the *Drake* turned more rapidly under her port helm at the last than she had done at an earlier stage; but I do not think that the learned judge intended to find, and personally I do not think he would have been justified in finding, that there was an alteration of helm in the sense that anyone on board the *Drake* gave any fresh helm orders.

That is a conclusion at which I have arrived upon this evidence, and, in my opinion, the view taken by the learned judge was right, and I think that the *Mendip Range* cannot be charged in this case in any way with having contributed to the accident, and I think also that those in charge of the *Drake* were not to blame. The case is one, so far as she is concerned, of inevitable accident. In my opinion the learned judge arrived at the right conclusion, and the appeal must be dismissed.

Scrutton, L.J.—This is a case of some little difficulty, but, after considering carefully the arguments addressed to us and the facts of the case, I am not satisfied that the judgment of the learned judge below was wrong; indeed, I am inclined to think it was right.

There are two points of some general importance in connection with the construction of article 4. The first point is whether the *Drake* was entitled to hoist the two black balls, a signal to be taken by other vessels as an indication that the vessel showing them is not under command, and therefore cannot get out of the way. Art. 15 (c), which deals with similar signals in fog, uses language which is different, but which must be intended to mean the same thing; it speaks of "a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre, as required by these rules." I take it, therefore, that either the signal under art. 4 or the signal under art. 15 is, in effect, a notice to the other ship that, because of an accident, she cannot be relied on to do what would be expected from an ordinary ship, because of either her present condition or of the extreme probability of something resulting from an accident in the near future; consequently, that the other ship must keep out of her way and not rely on her complying with the rules. Further, it seems to me that the rule does not mean that the vessel must be absolutely helpless, but she must be in such a condition that her means of directing her course by steam and helm are not reliable, and not what would be expected from an ordinary ship. When a ship is in that condition she is justified in warning other ships that she cannot be relied on

to act in the ordinary way, and that they must keep out of her way. Of course, she cannot make that condition simply by hoisting the black balls; she must show facts which reasonably afford some ground for her taking that view. We have asked those who advise us, it being a matter largely of nautical skill, whether they consider on the facts that the *Drake* was in that condition, and their opinion is that she was not under command; and so far as it is matter for me on the admitted evidence I entirely agree. The *Drake* had been torpedoed; she had a list to starborad; two of her engine rooms, out of four, were out of action, one full of water, the other through the breaking of the connections; the bulkheads were leaking, and if they gave way a very serious state of things would exist. She had only half her engine power. She could not go at anything like full speed, for fear of starting her bulkheads; her steam steering gear was disabled; she was only able to steer by orders transmitted by a line of persons communicating them by word of mouth to the stearing gear, which was situated right aft and under the water line. Her steam siren was disabled, so that she could not give steam signals, and she was under the urgent necessity of getting as soon as she could to a particular bay where she might anchor in shallow water, and where there might be a possibility of salving her. These matters afford ample materials for the finding of the fact that she was out of command. We are advised that she was out of command within the meaning of the rules, and I agree with this advice. That is the first point of general importance that arises.

The second point is this. When a ship is out of command in this way, what are her obligations to other ships, and what are the obligations of other ships of keeping out of her way? The first effect obviously is that, whereas, before that condition existed, in certain states of facts she had to keep out of the way of other ships which kept their course and speed, the signal puts the burden of keeping out of her way on the other ships. But what burden does it put on her? I do not think that burden can be to do nothing. She may be in a sinking condition, just able to struggle to a neighbouring port or bay. She may be able—though inefficiently and not very reliably—to do something that will save her. She must be entitled to do that in spite of having hoisted the "not under command" signal. It cannot be that she is to do what is called keep her course. Her course may be a thing that will lead her to danger instead of leading her to safety. She is entitled to do whatever is the proper thing to do under the peculiar circumstances of danger she is in, and she cannot in my view be under any obligation to keep the course she was on previously to hoisting the signal. She is not put in the position of the stand-on ship, which has to keep her course and speed, and I do not understand Lord Gorell, in *The Hawthornbank* (*sup.*) to have said anything suggesting that she was in that position. What I understand Lord Gorell to have meant is that, in the peculiar circumstances of that case, where a ship has said that she was not under command, and there was no urgent necessity for her doing anything, because she had a tug just waiting to pick her up, she should not then take a definite and precise course of action for which there was no immediate justification. So far as one can be sure of anything, I am sure if that particular ship had been in such a condition that she could only have saved herself by porting to try to get to a shallow bay, Lord Gorell would not have said that she was in any way departing from any obligation imposed on her though having hoisted the "not under command" signal. That signal is an indication to the other vessel that she must not rely on the vessel exhibiting the signal taking the action of an ordinary vessel, and that some accident has happened to her which may render it necessary for her to do something which the other vessel would not anticipate. In my view, a ship which has hoisted that signal could take a step of this sort. She must not mislead by first taking a perfectly plain and precise course of action, and then suddenly do something else without any justification. But to take a course of action to save herself is not in any way departing from her obligation, because thereby she does not keep her previous course.

If those are the two sets of principles, what has happened in this case? The learned judge has found that the *Drake*, after hoisting her two black balls, and before altering her course, had committed herself to a port helm, an action not taken for the *Mendip Range*, but for the general purposes of the *Drake* in directing her course to the beach, where she desired to anchor in shallow water. That is to say, being damaged, she was taking the course necessary to preserve herself from further injury. That, in my view, was a perfectly proper course for the *Drake* to take, even though she had hoisted two black balls and her means of saving herself were unreliable. So far as one can see the evidence amply justifies that finding of the judge. If one looks at the chart and sees where the *Drake* was torpedoed and the course she was proposing to make, and looks also at the course of the *Mendip Range*, heading toward Fair Head, and sees the place where the *Mendip Range* must have been when she saw the *Drake* clear of Rue Point, about three miles off, it seems to me to be an irresistible conclusion that the *Drake*, seen at this place, and, in fact, going to Church Bay, must have been then under port helm. It was the only thing she could be doing reasonably to carry out her very proper plan of getting into Church Bay to try and save herself. If so, it is not a case where the *Drake* has, after the *Mendip Range* has committed herself to a course of action, taken an unnecessary course which led to the collision. The *Drake* was taking a course necessary to save herself, and the *Mendip Range* misunderstood her. I agree with the finding of the learned judge that, under the peculiar circumstances, the *Mendip Range* was not to blame; but I also agree with his finding that the *Drake* was entitled to hoist the two black balls, showing she was out of command, and that she was entitled to continue the course which she was on, before the *Mendip Range* acted in the way she did, to save herself. She was unable to avoid the collision, not through negligence, but because there was no step that she could have properly taken in the short time that elapsed after each vessel realised what the other was doing.

For these reasons, which I have only expressed separately because of the two points about the "out of command" signal and the duty of ships which hoist these signals, I agree with the judgment that has been delivered.

Eve, J.—I agree with all that has been said as to the effect of art. 4 providing for a vessel "not under command," and as to its application to the

circumstances of this case. As to the facts, I only desire to add this, that I am not prepared to say that I should have found them in the same way as the learned Judge in the court below. The conclusions, however, which are sought to be set aside rest largely upon probabilities, and this much I can say, that, having done my best to weigh all the probabilities of the case, I am unable to resist the impression that, whatever my own leaning may be, the decision of the learned Judge is as likely to be right as a decision the other way. In these circumstances I agree with the order dismissing the appeal.

Appeal dismissed.

Solicitors: For the appellant, *Downing, Handcock, Middleton,* and *Lewis,* agents for *Bolam, Middleton,* and *Co.,* Sunderland; for respondent, *Treasury Solicitor.*

Nov. 4, 5, 10, 11, *and Dec.* 12, 1919.

(Before Lord STERNDALE, M.R., ATKIN, L.J., and EVE, J.)

GAUNT *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Policy against all risks—Transit of goods—Exposure to wetting—Exceptional damage to goods—Evidence of existence of "casualty"—Deck cargo—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 30 (2); *sched.* 1, *rules* 14, 17.

The plaintiff bought wool f.o.b. at a named foreign port. The wool came from different places down to that port, and was carried partly by land and partly by small local steamers. Some part of it was usually carried on deck. On arrival at the port of loading it was put into hulks until the ocean steamer could receive it. At times there was too much wool to be taken into the sheds, and some part of it was stored outside.

As the wool had been sold f.o.b. at the named foreign port it was only insured by the sellers as far as that port, leaving the ocean transit to be insured by the purchasers. The policy for the insurance had to be read with a cover note containing essential terms not in the policy, and the risk was thus described: "Including all risk of craft, fire, coasters, hulks, transhipment, and inland carriage by land and (or) water and all risks from the sheep's back and (or) station while awaiting shipment and (or) forwarding and until safely delivered into warehouses in Europe, with liberties as per bills of lading." On the arrival of the wool in England it was discovered that a considerable quantity of the bales were badly damaged by water, the wool being discoloured, tender and heated, and still wet.

Held, that where the evidence showed damage quite exceptional, and such as had never in a long experience been known to arise under the normal conditions of transit, there was evidence of the existence of a "casualty" or something accidental, and of a danger or contingency which might or might not arise although the particular nature of the casualty was not ascertained; and that the damage to the wool in the present case must have been caused by salt water which must have reached the wool during transit on board the local steamers as deck cargo.

Schloss Brothers *v.* Stevens (10 *Asp. Mar. Law Cas.* 331; 96 *L. T. Rep.* 205; (1906) 2 *K. B.* 605) *considered and applied.*

Decision of Rowlatt, J. reversed.

Semble, *that the effect of rule* 17 *of the rules in the first schedule to the Marine Insurance Act* 1906—*that deck cargo is no part of the subject-matter of an insurance unless specifically insured in the absence of any usage to the contrary—has made no alteration in the law as it existed before that Act came into operation.*

APPEAL by the plaintiff from the decision of Rowlatt, J.

The facts of the case sufficiently appear from the following judgments.

MacKinnon, K.C. and *R. Newell* for the appellant.

R. A. Wright, K.C. and *Le Quesne* for the respondents.

Cur. adv. vult.

Dec. 12 1919.—The following written judgments were, delivered:—

Lord STERNDALE, M.R.—This is an appeal from a decision of Rowlatt, J. in favour of the respondents in an action brought against them by the appellant upon a policy of insurance.

The question arises under the following circumstances: The appellant had bought the wool in question partly from a company spoken of throughout the case as "the Explotodora" and partly from a Mr. Hirst, who had bought from the same company. The terms of the purchase in each case from the Explotodora were f.o.b. Punta Arenas. The wool came from two or three different places down to that port, and was carried partly by land and partly by small local steamers. It is sometimes stored in sheds until the local steamers can take it, and is then loaded either from moles or direct from the beach into them. Some part of it is usually carried on deck. On arrival at Punta Arenas it is put into hulks till the ocean steamer can receive it. At times there is too much wool to be taken in the sheds, and some part of it is stored outside.

The Explotodora had for some time been in the habit of insuring their wool with the respondents, and the insurance had been generally in respect of the whole transit to England. In this case, as the wool had been sold f.o.b. Punta Arenas, the Explotodora only insured it as far as that port, leaving the ocean transit to be insured by the purchasers. The policy for the insurance has to be read with a cover note, to which each party appealed as containing essential terms not in the policy, and it was common ground that these terms must be read into it. The subject-matter was described as wool "clips" in the cover, and "bales of wool" in the policy, and the risk was thus described: "Including all risk of craft, fire, coasters, hulks, transhipment, and inland carriage by land and (or) water and all risks from the sheep's back and (or) station while awaiting shipment and (or) forwarding and until safely delivered into warehouses in Europe, with liberties as per bills of lading."

This clause also appeared in the policy, and it may be enough to say it was a warranty against consequences of war and hostilities.

There was also a clause as to limitation to the following effect: "100,000*l.* (limit in any one place

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

or in any one hulk or store, 75,000*l*. Limit in any one ocean steamer, 150,000*l*.)."

The wool arrived in England, and no complaint was made in respect of it till after it had been taken into the appellant's premises at Bradford and about 140 bales had been used. It was then discovered that a considerable quantity of the bales were damaged by having been wetted, and an examination was made by surveyors for the appellant and for the Standard Marine Insurance Company, who were the insurers of the ocean transit. Unfortunately no surveyors were present on behalf of the respondents because no claim had been made upon them at that time.

The learned judge in the court below has criticised this examination as more or less abortive and as cursory. On looking at the evidence and the report, I think the examination was made in the ordinary way and is not open to the learned judge's criticism. The examination was made on behalf of the Standard company by representatives of Messrs. Jacomb and Co., described by the London Salvage Association as "our usual wool experts." One of them went down first and examined a portion, and then his superior went himself and examined a larger quantity, and he reported to the Standard Company in these terms:

20th Sept. 1917.—Acting under your instructions [this is from Messrs Jacomb, Son, and Co.], we instructed our Mr. P. E. Seaward to survey the above-mentioned wools, and he reports as follows: On Friday, the 14th Sept., I was able to see about 500 bales. Yesterday, the 19th Sept., I attended at Mr. W. C. Gaunt's Mill, Valley Combing Company, Canal-road, Bradford, where the wools are stored, and surveyed a further 1500 bales, being in all about 2000 bales out of the above 2162 bales; I was unable to see the balance as I was informed they had been sorted and put into manufacture. After a very careful examination I have to report that all the bales are more or less damaged by water, and in my opinion sea water. Some of the bales are very badly damaged, the wool being discoloured, tender and heated, and still wet. A large proportion of the bales have now dried, leaving the wool stained and tender. In some cases the wool in the bale is very slightly damaged, but the bales show signs of water. How the damage occurred it is impossible to say; undoubtedly it is of long standing, as the dryness of a large proportion of the bales testifies. I consider a fair and proper allowance (subject, of course, to the terms and conditions of the policies) is an all-round allowance of 25 per cent., and I am glad to say I was able to convince Mr. Gaunt to this effect and obtain his agreement. I would mention that I have no doubt that the few remaining bales I was unable to see were damaged to the same extent; I have Mr. Gaunt's assurance that they were in similar condition to the bales surveyed.

It is quite true that all the bales were not opened, but as this examination was made on the instructions of the London Salvage Association by their usual wool experts and apparently accepted by the Standard Company as satisfactory, I think it may be taken as sufficient. The result was that it was agreed that an all-round allowance of 25 per cent. was fair. The respondents at first asked for a considerably larger percentage.

The plaintiff, who had taken an assignment of all the insurances on this wool, brought an action against both the Standard Marine Insurance Company and the defendants. On the trial evidence was given on behalf of the plaintiff and both defendants, including that of the witnesses examined on commission at Punta Arenas, and Rowlatt, J. found that the damage to the wool was not caused by anything that occurred during the ocean transit, and gave judgment for the Standard Company on that ground. That decision was not questioned.

He also found that it had been caused by water coming upon the outside of the bales and penetrating inwards, and not from the wet condition of the wool when packed, and that it had been caused during the transit from the premises of the Explotodora to Punta Arenas. He found, however, that the plaintiff had not proved that it had occurred by reason of any of the perils insured against, and therefore gave judgment for the defendants.

I have already stated the way in which the wool was brought from the stations of the Explotodora to Punta Arenas, and it is not necessary to do more than state shortly the evidence given as to the way in which the damage occurred.

Witnesses familiar with the way in which this business was carried on were examined on commission. But no evidence was produced tracing the transit of these particular bales or showing what had happened to them. It was stated that such evidence could not be obtained for two reasons. First, the difficulty of finding and securing the men who had actually worked, such difficulty being occasioned by the nature of the country in which the work was done; and, secondly, the fact that during the transit to Punta Arenas no record was kept of the exact marks and numbers of the bales which were being handled, and therefore these bales could not be distinguished from others.

It appeared, however, that the logs of the small steamers showed bad weather and rain at times, and that some bales shipped on them about this time were wet, and also that some of these bales received on board the ocean steamers were stated in the mate's receipts and bills of lading to be wet and damaged.

It was also proved that sometimes there was not room in the sheds for all the wool accumulated for shipment on the river steamers, and that some had to be piled outside the sheds, where tarpaulins were provided, but not always effectively used. Evidence was also given that bales sometimes got wetted with salt water by an unexpectedly high tide while piled on the beach, and also by spray coming over them when carried on the deck of river steamers.

Evidence was given that part of the wool was always carried on deck. Great congestion prevailed at this time, because of the difficulty in obtaining transport, with the result that the storage places were crowded and some of the wool had to be stored outside.

Mr. Burbury, the manager of the Explotodora, stated that in his experience of the carriage of wool extending over many years, he could not remember any case of a serious claim in respect of damage arising during the transit from the stations to Punta Arenas, and that the statements in the logs and mate's receipts indicated that something abnormal had happened. The chief officer of one of the ocean steamers also gave evidence that the part of these bales which he received was the worst cargo he had ever seen.

I think, in considering whether this afforded evidence of a loss by the perils insured against, it is important to bear in mind, what those perils were. The insurance was against all risks of craft, fire, coasters, hulks, transhipment, and inland

carriage, by land and (or) water, and all risks from the ship's back and (or) station while awaiting shipment and (or) forwarding.

The cases relating to an insurance against all risks are not many, and I think that of *Schloss Brothers* v. *Stevens* (10 Asp. Mar. Law Cas. 331; 96 L. T. Rep. 205; (1906) 2 K. B. 605) is the only one that throws much light on the matter. Both parties accepted the decision of the learned judge—Walton, J.—in that case, that in order to constitute a loss under the policy, the damage must have been caused by something accidental, or in the nature of a casualty, and must not be the result of the ordinary handling of the goods under normal conditions existing at the time and place of transit. It has sometimes been expressed that the loss must be due to contingencies and dangers which may or may not occur, and not to such as must occur.

I think that where the evidence shows damage quite exceptional, and such as has never in a long experience been known to arise under the normal conditions of such a transit there is evidence of the existence of a casualty, or something accidental, and of a danger or contingency which might or might not arise, although the particular nature of the casualty was not ascertained.

I think such a state of things was proved by the evidence I have set out above, and therefore I cannot agree with the learned judge's finding that the plaintiff had not proved a loss within the perils insured against.

It would, of course, have been competent to the insurers to rebut this *primâ facie* case by proving that the loss occurred by something outside the insured perils. But no such evidence was given. I think that the learned judge treated the policy too much as one against specific perils in which it is necessary to prove specifically that the loss came within one of them, and did not give sufficient attention to the fact that this was a policy of an unusual kind against all risks, and that it was sufficient to show that the loss was occasioned by a casualty or something accidental, without proving further in what the exact nature of that casualty consisted.

There were, however, several other points raised by the defendants with which I have to deal: First, it was argued that the policy cannot be assigned so as to enable the assignee to sue on it without joining the assignor. I think a sufficient answer to this point is that a policy is expressly made assignable by sects. 50 and 51 of the Marine Insurance Act 1906.

The next point was that the defendants' liability is confined to damage at Punta Arenas, that such damage is not proved, and that the damage in England is the result of the plaintiff's own acts in shipping the wool and sending it on stowed in a confined space. The policy expresses the risk to be until delivered from the hulk at Punta Arenas to the ocean steamer. It, therefore, contemplates a delivery of the wool to the ocean steamer, and if the actual damage found is the necessary result of the damage up to the time I think the defendants are liable for it.

If the plaintiff acted wrongly or negligently in sending forward the wool without reconditioning, or something of that sort, the case might be different.

The third point was that it was not shown whether this damage was due to rain or sea water, and that, if by sea water it was occasioned while the wool was on the local steamers. In that case it was argued that it was not and could not be shown that the damage was not wholly or partly caused to the wool carried on deck, and that, even if only so caused in part, it could not be shown how much was caused to deck and how much to under-deck cargo, and therefore no sum could be awarded in respect of damage to the under-deck cargo.

This argument, of course, depends upon an assumption that the defendants are not liable for damage to deck cargo unless specifically insured. In support of this contention reliance was placed upon the general principle that deck cargo is not covered unless specifically mentioned, and also upon rule 17 under the Marine Insurance Act 1906, I think the first point is met by the evidence that it was the regular practice and had been for years, to carry these consignments of wool, or some part of them on deck.

The point arising under the Marine Insurance Act 1906 is different. The effect of the rule is that deck cargo is no part of the subject-matter of an insurance unless specifically insured, in the absence of any usage to the contrary. A question arises whether this rule has altered the law existing before the Marine Insurance Act 1906. Before that Act deck cargo was held covered if a usage to carry cargo of that description on deck were proved, although such usage was unknown to the underwriter.

It was, however, contended that the law had been altered, and that it was now necessary to prove a usage of insuring such cargo without specifically describing it as deck cargo. This is the view expressed by the editors of the recent edition of Arnould on the Law of Marine Insurance and was forcibly pressed upon us by Mr. MacKinnon in his able argument. I doubt whether it was intended to make such an alteration in a well-known principle of Marine Insurance. But, whatever be the construction of the rule, I think that the necessary proof of usage was given in this case. It was shown that it had been the practice to carry wool like this on deck for many years, and that the defendants had also, for many years, insured such wool without any specific mention of its being carried on deck. And I think that such evidence is not rebutted by showing merely that the particular underwriter who effected this insurance was not informed of the practice.

It may be noticed, though I do not think it necessary for the decision of this part of the case, that a director of the Explotodora and member of the firm of their agents, Messrs. Duncan, Fox, and Co., was also a director of the defendant company.

Another point was raised on the limitation which I have mentioned, that is, 100,000*l.* limit in any one place or in any one hulk or store. There was at one of the stations, Puerto Prat, an amount exceeding in value the limit, partly in store and partly outside the store. The plaintiff contended that the limit was not exceeded because the part in the store and the part outside must be treated separately, and that neither part by itself exceeded the limit, I do not think this is right. I think the whole quantity at Puerto Prat was in one place, and that the limit was exceeded. It was argued though faintly, that the clause as to limitation was a warranty and that, as it was broken, the policy was avoided, I think this cannot be maintained, and that the result is that the claim in respect of the wool at Puerto Prat must be reduced proportionately.

It was also contended that the defendants were not liable for the damage to wool stored in the open because they were not told that it was so stored when an alteration was made in the limit or at any time. The answer to this, in my opinion, is that if these facts afforded a defence in any way it would, in whatever form it is put in argument be a defence on the ground of concealment of a material fact, and such defence is not pleaded and was not raised at the trial.

The last point with which I have to deal, is the suggestion that if the wool was exposed to extra risk by reason of being stowed in the open, from congestion caused by want of transport this was the consequence of the war and therefore came within the warranty against loss from all consequences of hostilities or warlike operations. I think that this is not so ,and that such operations were not the proximate cause of the loss.

I think the appeal should be allowed and judgment entered for the plaintiff with costs here and below. With regard to the amount of the judgment, it must be ascertained by a reference and on that reference it will be competent to the defendants to give evidence of any facts which show that the whole of the loss was not the natural consequence of the damage occasioned in transit to Punta Arenas. In the event of the judgment standing, the question of the amount would go either to an official referee, or to somebody agreed between the parties, but, failing agreement, to the official referee.

Atkin, L.J.—The learned judge in the court below has given judgment for the defendants in this case on the ground that the plaintiff has not established a loss by perils insured against.

By common consent the terms of the contract of insurance in this particular case are to be ascertained by reading the policy together with the cover notes. It is thus found that the insurance is upon a number of "bales of wool" valued at fixed sums "from sheep's back in the interior to Punta Arenas." against all risks from sheep's back until delivered from the hulk at Punta Arenas to the ocean steamer.

I assume for the purpose of this case, in accordance with the admission of counsel, that all risks means all risks from fortuitous accidents and casualties. If the assured under such a policy proves a loss which may probably be caused by some fortuitous accident or casualty, and may not be equally probably caused by any happening not a fortuitous accident or casualty, or otherwise not covered by the policy, he *primâ facie* proves a loss within the policy. The defendants may, of course, displace the case of the plaintiff by proving the actual cause, and that the loss from such cause is not within the policy. For example, inherent vice, wilful misconduct of assured, or some other cause not of the character of an accident or casualty, or otherwise expressly or impliedly excluded from the policy.

In the present case it appears to me that, subject to the question as to deck cargo, to which I propose to refer, the plaintiff, by establishing loss by wetting, and proving that the loss occurred during the transit, established a *primâ facie* case. I think that the facts show that the wetting might probably be caused by some fortuitous accident or casualty and there is no other cause of a different character suggested as equally likely to produce, or even capable of producing, the loss other than wilful misconduct, the onus of which is certainly on the insurer, or loss when carried on deck.

It is necessary to deal with the last suggestion. I think that the facts are consistent with some of the damage, at any rate, being caused while the wool, or part of it, was being carried on the decks of the local steamers. And if loss by such cause was not within the policy, the *primâ facie* case disappears. There would then be evidence indicating a loss by peril not covered, equally probable as a loss by a peril covered; and, though it is plain from the bills of lading that some damage was done to some wool before shipment on the local steamers in the absence of identification of such wool, or the amount of such loss, I think the plaintiff would fail in his proof.

The question therefore arises whether damage to the wool while carried on the deck of the local steamers was covered by the policy. For this purpose it is necessary to refer to the Marine Insurance Act 1906. By sect. 30 (2) it is enacted as follows: "Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the first schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them."

When reference is made to the schedule, it will be found that it departs from the scope assigned to it in the section in one or two instances. Rule 14, as to standing, does not appear to be concerned with the scope or meaning of the word "stranded." So in rule 17, after a definition of "goods" we find this sentence: "In the absence of any usage to the contrary, deck cargo or living animals must be insured specifically and not under the general denomination of goods." I think that this must be read as enacting, not that the general description—"goods" does not include deck cargo but that the subject-matter of the insurance, however described, will not be covered while carried on deck unless it is specifically insured as deck cargo.

In the former view, the clause would not apply in the present instance for the subject-matter of the insurance is particularised as "wool," and not given the general denomination of "goods." In the latter view, however, the clause does apply, "where the context does not otherwise require." The effect of the rule is, I think, not to remove from the perils insured against, the perils incident to carriage on deck, but to remove from the scope of the policy so much of the described subject-matter as is carried on deck. It does not limit the perils, but limits the subject-matter of insurance; I think, therefore, that the fact that the insurance is against "all risks" is not inconsistent with the full operation of the clause, and that, therefore, the context does not require the exclusion of the clause.

It remains to consider whether the plaintiff established the existence of "any usage to the contrary." The meaning of these words is not plain. Before the passing of the Marine Insurance Act 1906, I think it was well established that the rule that an ordinary marine policy did not cover deck cargo did not apply where it was proved that there was a usage of trade to carry on deck the particular class of goods on the particular transit even though the particular underwriter did not in fact know of the existence of the usage. See *Apollinaris Company Limited* v. *Nord-Deutsche Insurance Company*, 89 L. T. Rep. 670; (1905) 1 K. B. 252), where the ignorance of the usage by the underwriter is one of the facts stated.

I am inclined to think that the Act of 1906 did not intend to alter the law, and that a "usage to the contrary" means a usage to carry on deck goods of the class described on the insured voyage, that being a usage which at the time of the passing of the Act, negatived the operation of the general rule which is being enacted by the Act.

But it must be admitted that, construing the words without reference to the then state of the law, the more natural meaning seems to be: deck cargo must be insured specifically, unless there is a usage that it need not be insured specifically, which makes the usage a usage in the business of marine insurance rather than a usage in the business of marine transport. This seems to be the view of the learned authors of the editions of Arnould on the Law of Marine Insurance, published after the Act of 1906.

As I have said, I do not think that the Legislature meant to alter the law by introducing such a refined distinction into a well-known commercial transaction. But in the present case, in either view of the meaning of the Act, it appears to me that the plaintiff established the necessary usage. The evidence clearly shows that the practice of conveying wool on the deck of the local steamers had existed for many years, and was well known.

The fact that the local bills of lading expressly excluded the ships liability for deck cargo as between shipowner and shipper, so far from being inconsistent with the existence of the usage, rather points to deck cargo being contemplated. There was also evidence that this class of goods had been insured for many years with the defendants, in policies which did not specifically mention deck cargo. I think that the defendants must be deemed to have taken the risk of the deck cargo covered under the well-known usage, even though their particular underwriter stated that he did not know of it.

Under these circumstances, I think that the true inference is that the usage referred to in rule 17 was established, and that a loss from wetting, occasioned while the wool, or part of it, was carried on deck, was within the policy. It follows that the plaintiff's *primâ facie* proof of loss by perils insured against was established, and in the absence of evidence by the defendants rebutting it, the plaintiffs are entitled to judgment.

There is one further point to which it is necessary to refer. It was contended by the defendants that the plaintiff was under an obligation to take reasonable care that the goods should not be damaged by an insured peril, and that, so far as the damage was caused by the negligence of the defendants or their servants in protecting the goods from wet whether, rain, or sea water, they could not recover.

I think two answers can be given to this. In the first place, it appears to me that the insurers are liable for loss caused by the negligence of the insured or his servants unless the acts complained of amount to wilful misconduct of the insured (sect. 55, 2 (*a*).)

In the second place, in any such case the onus would be on the insurer to eastblish such cause of loss, and such onus was not discharged. I do not think that the provisions of sect. 78 (4) modify the provisions of sect. 55 as is suggested as a possible view by the learned authors of Arnould on the Law of Marine Insurance (8th edit., sect. 799 (*a*). I think that the only effect of that subsection is to impose a duty to sue and labour—a very restricted duty compared with the general obligation contended for. In any case what I have said as to the onus of proof applies to a breach of this obligation.

I do not deal with the other parts of the case, upon which I entirely agree with the view of the facts and the law taken by the Master of the Rolls. I agree with the order pronounced by him.

Eve, J.—I have very little to add to what has already been said by my Lords.

It is incontestible that the wool arrived in Punta Arenas in a seriously damaged condition and there is no evidence before us to show that this damage was accentuated during the ocean transit. No case, therefore, has so far been laid for the defence founded on an obligation on the part of the assured to recondition the wool before shipment.

Further, in my opinion, the true conclusion to be drawn from the evidence is that the damage occasioned prior to shipment at Punta Arenas was due to the action of salt water—a conclusion which excludes from consideration suggestions as to inherent vice in the wool when packed, negligent land transport from the stations to the coast, and improper storage or insufficient protection against rainfall there or in the hulks where it was placed pending transfer to the ocean steamer.

From this it results that the salt water must have reached the wool either by an abnormally high tide before shipment on the local steamers or during transit on board those steamers, and probably as deck cargo. As no evidence was given of any abnormally high tide having occurred there only remains the latter of those alternatives to explain the damage.

The question is this: Does the insurance cover this risk? The answer involves the consideration of two points, the one whether damage to cargo on board the local steamer by shipment of salt water was caused by a casualty within the meaning of the decision in *Schloss Brothers* v. *Stevens* (10 Asp. Mar. Law Cas. 331; 96 L. T. Rep. 205; (1906) 2 K. B. 605), and the other whether in the absence of specific mention the deck cargo was included in the policy.

If my view of the proper conclusion to be drawn from the evidence as to the immediate cause of the damage is right, I think that there was clearly a casualty within the decision I have referred to. But if the particular nature of the contingency out of which the damage arose is on the evidence left indeterminate, I agree with the other members of the court there was produced on behalf of the plaintiff evidence from which it is legitimate to infer the existence of such an accident or casualty.

On the more difficult question whether the "usage to the contrary" mentioned in rule 17 of the first schedule of the Marine Insurance Act 1906 relates to a general usage of trade to carry the particular goods on deck or to a general usage not to insure specifically the goods so carried, I prefer to express no opinion inasmuch as I agree with the other members of the court that, whichever of the two be the usage to be established, the assured has in this case established it.

The appeal in my opinion succeeds, and should be allowed in the terms already pronounced by the Master of the Rolls.

Appeal allowed.

Solicitors for the appellant, *Ballantyne, Clifford, and Co.*

Solicitors for the respondents, *Waltons and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Nov. 10 *and* 25, 1919.

(Before SANKEY, J.)

SHIPPING CONTROLLER *v.* LLOYD BELGE (GREAT BRITAIN) LIMITED. (*a*)

Charter-party—T.99—Ship requisitioned by Government—Liability for loss by enemy action—Meaning of "ascertained value."

The claimants, the Lloyd Belge (Great Britain) Limited, a British company under Belgian State control, were the owners of the steamship P., *a British vessel, which they purchased on the 30th May* 1916 *for* 129,500*l. The* P. *was then under requisition to the British Government, under the charter-party known as T.99, whereby the Government undertook to pay to the owners the "ascertained value of the steamer at the time of her loss," if caused through enemy action. The* P. *was lost by enemy action in Nov.* 1917, *while still under such requisition. Her value at that date in the British market was* 111,000*l. As the owners were under Belgian control they were prohibited by regulations under the Defence of the Realm Act from purchasing another vessel in the British market to replace the* P. *The price in the neutral market was at the rate of* 65*l. per ton. The owners contended that, as they were prohibited from purchasing in the British market, they could only replace the* P. *by the purchase of a vessel in the neutral market at* 65*l. per ton, which for a vessel of similar size would amount to* 432,900*l., and they claimed that this sum was the ascertained value of the vessel at the time of her loss; alternatively they claimed the sum of* 129,500*l. which was the original purchase price of the vessel. The controller contended that the "ascertained value" at the time of the loss, was the value of the vessel in the British market. The umpire upheld the Controller's contention and awarded the sum of* 111,000*l.*

Held, that the umpire's award was right, the "ascertained value" at the time of the loss being the value of the vessel in the British market.

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

The facts appear sufficiently from the head note and the judgment.

R. A. Wright, K.C. and *Simey* for the owners.—The "ascertained value" of the vessel at the time of her loss is the amount which the owners would have to pay to replace her by a similar vessel. As the British market is closed to them they are entitled to the amount which they would have to pay in the neutral market, which is the only market open to them. If the market value at the time of the loss is the amount the owners are entitled to recover, it must be the market value in the market that is open to them. They are therefore entitled to the sum of 432,900*l.*, which is the amount they would have to pay in the neutral market for a similar vessel. If that contention is wrong, then they are entitled to recover the amount they originally paid for the *Persier* namely, £129,500. They referred to

The Harmonides, 9 Asp. Mar. Law Cas. 354; 87 L. T. Rep. 448; (1903) P. 1.

Sir *E. Pollock* (S.-G.) and *Dunlop*, K.C. for the controller:—The charter party provides that the owners shall be paid the ascertained value at the time of the loss, that means the market value in the English market. They are not entitled to claim either the replacement value or the amount originally paid for the vessel, if it had been intended that they should be paid either of these amounts it would have been so stated in the charter party. They referred to

The Columbus, 3 W. R. 158;
The Philadelphia, 14 Asp. Mar. Law Cas. 68; 116 L. T. Rep. 794; (1917) P. 101.

Wright, K.C. in reply. *Cur. adv. vult.*

Nov. 25.—SANKEY, J., read the following judgment:—

This is an award started in the form of a special case by a Legal Umpire for the purpose of ascertaining the sum payable by the Shipping Controller to the owners of the steamship *Persier*, which was sunk by enemy action upon the 11th Nov. 1917. The matter came on for hearing on the 29th Nov. of last year, and was, at the owners' request, referred back for further findings, which are now before the Court. The vessel, at the time of her loss, was under a requisition to the Admiralty, and by clause 19 of the charter-party under which she was hired the Shipping Controller became liable to pay to her owners "the ascertained value of the steamer at the time of her loss."

The material facts, as set out in the award, are as follows: (*a*) On the 30th May 1916 the owners purchased the *Persier*, then under requisition, for 129,500*l.* (*b*) On the date of her loss the *Persier* was still under requisition on the terms of the charter party T.99. (*c*) There was a market for the purchase and sale of British-owned ships in Dec. 1917. (*d*) The value of the *Persier* in the market at the date of her loss was 111,000*l.* (*e*) By reason of the restrictions imposed by the Regulations issued under the Defence of the Realm Act, and the general position of shipping, the Shipping Controller refused to permit the owners to purchase further British-owned steamers after the loss of the ship, and it was impossible for the owners to purchase any British vessel to replace the *Persier*. The price in the market of neutral tonnage was about 65*l.* a ton.

In par. 1 (*d*) of his findings, the umpire says: "There was no evidence before me that the claimant company is or was under any obligation to maintain its fleet by the replacement of lost vessels, save so far as the replacement of lost vessels may be a business necessity for maintenance of the trading efficiency of the claimant company, and I so find." The contention of the controller was that the owners were only entitled to claim the market value of the *Persier*, and the umpire upheld this contention and awarded the sum of 111,000*l.* subject to the present case. The learned counsel for the owners has asked me to remit the award a second time on the ground that if, as he contends, the umpire is wrong, the award ought to be in his clients' favour, either for the sum of 129,500*l.*, for which they purchased the vessel, or the sum of 432,900*l.*, which was her replacement value by the

(*a*) Reported by L. H. BARNES, Esq., Barrister-at-Law.

purchase of a vessel in the neutral market at 65*l.* a ton.

It is unnecessary for me to accede to this request, for I am of opinion that the umpire's award in favour of the controller is correct, and for the following reason: (1) By clause 19 the amount agreed to be paid to the owners in the event of the vessel being lost is the ascertained value of the steamer. The steamer was a British vessel, and her value in the market at the date of the loss has been found by the umpire to be 111,000*l.* In my opinion that value is the ascertained value within the meaning of the contract. The claimants contend that such sum will not enable them to replace the vessel by another steamer, because (*a*) they are unable to purchase another vessel in the British market by reason of the fact that they are neutrals, and this market is not open to them; and (*b*) the sum will not enable them to replace the vessel by the purchase of another in the neutral market, as the sum required for that purpose is 432,900*l.*; and, further, (*c*) that in any event they are entitled to the sum which they paid for the vessel in 1916, viz., 129,500*l.*

The answer to these contentions is that the amount to be paid to the owners, under the contract, is not a sum which will enable them to replace the vessel or the sum for which they bought her, but "the ascertained value of the steamer at the time of her loss." which has been found by the umpire to be 111,000*l.* The owners are not entitled to obtain the sum necessary to purchase a vessel for nearly half a million in a neutral market because they are personally disqualified from purchasing one in the British market. The ascertained value of the vessel, found to be 111,000*l.*, is the utmost her owners would have been able to obtain for her had they been British subjects, and I cannot think they are entitled to get three times as much because they are not British subjects. In effect, the owners claim a very large sum of money, not because it is the ascertained value of the vessel, but because it is the ascertained value of some other vessel, viz., a similar vessel in the neutral market. In my opinion their contention is wholly without foundation, and the award in favour of the Controller must be upheld, with costs.

Solicitors for the controller, *Treasury Solicitor.*
Solicitors for the owners, *William A. Crump and Son.*

May 22, 26, 27, *and* 28, 1919.

(Before Bailhache, J.)

Wilson, Holgate, and Co. *v.* Belgian Grain and Produce Company. (*a*)

Sale of goods—C.i.f. contract—Payment—Cash against shipping documents—Tender—Policy of insurance—Broker's cover-note—Certificate of insurance—Not legal tender—Rights of buyer.

By a contract in writing, the plaintiffs sold to the defendants a quantity of Brazilian manioc starch at 105l. per ton c.i.f. Havre, to be shipped from Brazil Nov.-Dec. 1918, and (or) Jan. 1919, payment net cash, in London against shipping documents, on arrival of the goods at port of discharge. The goods were duly shipped at Brazil under the contract, and on the 3rd Feb. 1919 arrived at Havre. After some delay, the plaintiffs tendered shipping documents and claimed the price. The documents included, instead of a policy of insurance on the goods, a broker's cover-note. This the defendants refused to accept, but agreed to accept a certificate of insurance coupled with the broker's undertaking to hold the insurance policies, when issued, for the defendants' account. The documents were re-tendered, but although there was a certificate of insurance, there was no broker's undertaking, and the defendants again objected to the tender.

Held, that the plaintiffs had failed to comply with their legal obligation to tender a policy of insurance, or with their substituted obligation to tender a certificate of insurance plus a broker's guarantee, and therefore effect must be given to the buyers' objection. Judgment for the defendants.

Action in the Commercial List tried by Bailhache, J.

The plaintiffs claimed the price of a quantity of Brazilian manioc starch, or, alternatively, damages for non-acceptance of the goods.

By a contract in writing, dated the 24th Oct. 1918, the plaintiffs, Messrs. Wilson, Holgate, and Co., sold to the defendants, the Belgian Grain and Produce Company, 300 tons of Brazilian manioc starch at a price of 105*l.* per ton, c.i.f. Havre. The goods were to be shipped from Brazil Nov.-Dec. 1918 and (or) Jan. 1919, and payment was to be made net cash in London against shipping documents. The goods were duly shipped under the contract at Brazil, and in due course arrived at Havre. After some delay the shipping documents were tendered, but these documents included, instead of a policy of insurance on the goods, a broker's cover-note. This the defendants (the buyers) refused to accept. Then it was agreed between them over the telephone that the defendants were to accept in lieu of a policy of insurance, a broker's cover-note coupled with a broker's undertaking to hold the policy when issued, for the defendants' account. The plaintiffs made a re-tender of the documents which, instead of a policy included only a certificate of insurance without any broker's undertaking. The defendants refused to take up the documents or pay for the goods. The further facts are fully stated in the judgment.

MacKinnon, K.C. and *Pitman* for the plaintiffs.

Leck, K.C. and *Claughton Scott* for the defendants.

Bailhache, J.—The judgment which I am about to deliver in this case is one which, sitting as a judge in the Commercial Court, I am almost ashamed to deliver, because I am going to give effect to an objection so technical that I think commercial men in the city of London may well complain that effect is given to such an objection in the Commercial Court. But I am of opinion that the objection is a sound one in law, and I am bound to give effect to it, and it is fatal to the plaintiffs' claim.

The action arises in the following circumstances: By a contract dated the 24th Oct. 1918, the plaintiffs, Messrs. Wilson, Holgate, and Co., agreed to sell to the defendants, the Belgian Grain and Produce Company, 300 tons of Brazilian manioc starch. The contract was a c.i.f. contract for Havre. It was agreed that the sellers were to

(*a*) Reported by T. W. Morgan, Esq., Barrister-at-Law.

provide marine and war risk insurance, free of particular average, covering the value of the goods as stated in the invoice. The starch was to be shipped from Brazil during the months of Nov. and Dec. 1918 and (or) Jan. 1919. The starch was duly shipped, under the contract, on board a French ship, the *Avare*, in Dec. 1918, and that ship with the goods on board arrived off the port of Havre on the 18th Jan. 1919. At that time she could not be discharged at Havre, and was ordered to Cherbourg to await her turn for discharge at Havre. The vessel returned to Havre, and arrived there the second time about the 3rd Feb. and got into a discharging berth.

There was some little delay in the shipping documents coming forward. The bill of lading did come forward, and was presented with an invoice, and a broker's cover-note for an insurance for the correct amount being insured by the plaintiffs in this case, on the 7th Feb. 1919. On that occasion two objections were taken by the defendants, to the documents as tendered. One was with regard to the invoice, and the objection to that was that the tare of the bags had not been deducted from the invoice. That matter was discussed over the telephone, and by agreement 1 per cent. was taken off the invoice as representing the tare.

The other objection was to the cover-note. The only question that has been argued in this case, and the only question I have to decide, is the question about the insurance document which was tendered to the defendants and which they refused to accept. That they did object to the cover-note was common ground, and what they wanted, and insisted upon, instead of the cover-note is also common ground. What they insisted upon is expressed in the plaintiffs' letter to the Belgian Grain Company, the defendants, dated the 10th Feb. 1919: "Regarding insurance, it was agreed that we should obtain from our brokers an undertaking to hold insurance policies at your disposal." In reply, the defendants wrote a letter dated the 11th Feb. 1919, saying: "We told you that we required insurance policies, but that we would, if things in other respects were in order, not object to certificates of insurance signed by a satisfactory broker undertaking to hold the policies for our account." Therefore, over the telephone, it was agreed that the defendants were to be satisfied with a certificate of insurance coupled with a broker's undertaking to hold the policies for the defendants' account.

On the 11th Feb. there was a re-tender of documents, and I am satisfied that a certificate of insurance was shown to the defendants' managing director. The latter now says that all he saw was a broker's cover-note. On the 11th Feb., while the matter was still fresh in his mind, he wrote to the plaintiffs this letter: "With regard to your retender of the documents for above at 2.30 p.m. to-day, we beg to confirm our previous letter, and to call your attention to the fact that the tender included a certificate of insurance which is irregular." The defendants' managing director now says that he did not see the certificate of insurance, but that the expression "certificate of insurance" in that letter is a verbal inaccuracy. He says that all he saw was the broker's cover-note. I am satisfied, however, on the evidence, that when the documents were retendered the certificate of insurance which was shown to me was shown and tendered to the defendants and was objected to by them. That certificate of insurance had not upon it, nor was there with it any undertaking by the broker to hand the policies of insurance, when procured, to the defendants.

The only question which I have to decide is whether there was an effective legal tender of the documents which the defendants were bound to accept. It has been settled for nearly fifty years that under a c.i.f. contract the documents which require to be tendered are a bill of lading, an invoice, and a policy of insurance. I refer to the judgment of Lord Blackburn in *Ireland* v. *Livingston* (1 Asp. Mar. Law Cas. 389; 27 L. T. Rep. 79; L. Rep. 5 H. L. 395), fifty years ago. It was settled then and was apparently settled law at that time. It is perfectly well understood that that is what is legally required to be tendered under a c.i.f. contract.

A number of witnesses of high standing in the City of London have beeen called by Mr. MacKinnon for the plaintiffs. They have given evidence that it is the common practice nowadays, instead of tendering a policy of insurance, to tender a broker's cover-note or a certificate of insurance. A certificate of insurance is usually, but not always, used in a case where the seller has an open or floating policy upon other goods or goods to a larger extent than those which are the subject-matter of the sale, and a certificate of insurance is used to show that the goods the subject-matter of a particular sale are covered by an open or a floating policy for a larger amount. The evidence is that these brokers' cover-notes and the certificates of insurance as issued by brokers in this country are constantly accepted by buyers and taken by them in place of policies of insurance. The certificate of insurance is also used so as to take the place of the broker's cover-note. Dealing with certificates of insurance, it must be borne in mind that I am not referring at all to American certificates of insurance, which stand on a totally different footing, and are policies, and are accepted in this country as policies. I am dealing only with broker's cover-notes and certificates of insurance as issued by brokers in this country.

I have no doubt that what the witnesses say is perfectly right. Policies take some time to make out, particularly if there are a number of underwriters or several companies. The companies make out there own policies, and take their own time about it, more or less, and the brokers make out the policies for the underwriters. In either case a little time is occupied, and when documents require to be tendered with promptness on the arrival of a steamer, to avoid delay in discharging the steamer or to avoid incurring expenses by the buyer not being ready to take delivery, it is not always practicable to obtain actual policies of insurance. To facilitate business, buyers are in the habit of accepting brokers' cover-notes and certificates of insurance, and not insisting on the policies. But no instance was given to me where there has been any contest about it, and no instance has been given to me in which a buyer has insisted on a policy and his demand for a policy has been resisted and he has given way. None of the witnessess who were called were prepared to say that the buyer was bound to take anything but a policy of insurance. All they could say was that so far as they knew this was a thing which was constantly done and was never refused. As I say, no instance was given in

which there had been a contest about it, and I think that represents the true position. The seller, if required, must deliver, and be prepared to deliver, a policy of insurance; but in order to facilitate business there has grown up this practice among business men of not insisting on their strict rights to have a policy, particularly since the war, when there was a shortage of clerks and a super-abundance of policies. They have been taking these cover-notes and certificates of insurance.

I am not satisfied that any custom has arisen since *Ireland* v. *Livingston* (*sup.*) was decided which obviates the necessity for a seller tendering a policy of insurance if the buyer requires it. Of course, there are obvious differences between the buyer's position under a policy of insurance and his position under a broker's cover-note or a certificate of insurance. Without going through them all, I will mention just one or two. Under a policy of insurance which deals, as it should do, with the buyer's own contractual goods, and with nobody else's, a buyer has a direct right of action on the policy against the underwriters to the policy. Under a broker's cover-note he has no right of action, as far as I can see, against anybody. I doubt if he has any right of action against the broker, even though the broker's cover-note is indorsed. The broker, I should suppose, was liable to his own principal, or to the person who instructed him to effect the insurance, and not to some person to whom the goods were sold. If the buyer had a right of action against the brokers it could only, presumably, be for negligence or for some misrepresentation, and it is quite a different sort of action from that which he would have against the underwriters.

The same thing applies to a certificate of insurance. So far as the broker's cover-note is concerned, and possibly also as far as a certificate of insurance is concerned, there is this further practicable trouble, that the buyer might be faced with some serious difficulty as to the broker's general lien for his charges against the person who instructed him to take up the policies and on whose behalf he issued his cover-note or his certificate of insurance. Those are the practical differences between a policy of insurance and either a cover-note or a certificate of insurance. In my judgment, it is not proved to me that the buyer was bound to take under a c.i.f. contract anything other than a policy of insurance, which policy relates to the goods which are the subject-matter of his own contract of sale, and not to any other goods at all.

That being, as I understand it, the legal position with regard to policies of insurance, it is clear that the parties may waive their right and agree that they will take something else. I am satisfied in this particular instance that the defendants did on the 8th Feb. 1914 agree to take something else. If something else is agreed to, and if the buyer is waiving his right to take a policy and is agreeing to take something else, that something else can only be forced upon him if it agrees absolutely with what he has, in fact, agreed to take. If the buyer is waiving his rights to have a policy of insurance, and is insisting upon something else, he is entitled to have that other thing which he is insisting upon.

The defendants were prepared to take a certificate of insurance coupled with the broker's undertaking to hold the policies, when issued, for their account. What was tendered to them was a certificate of insurance minus the broker's undertaking. It seems to me, therefore, that the defendants did not get that which they stipulated for, and were prepared to take, in lieu of a policy. They were entitled originally to the policy, and that they did not get. Their right to the policy was waived by them by saying that they would take a certificate coupled with a broker's guarantee.

It seems to me, therefore, that the plaintiffs did not comply with their legal obligation to tender a policy or with their substituted obligation to tender a certificate of insurance plus a broker's guarantee. In these circumstances, most reluctantly sitting, as I said, as judge of the Commercial Court, I have to give effect to the buyer's objection in this case, and to give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Kekewich, Smith,* and *Kaye.*

Solicitors for the defendants, *William A. Crump* and *Son.*

Monday, Dec. 1, 1919.

(Before Bailhache, J.)

Owners of Spanish Steamship Sebastian *v.* Altos Hornos de Vizcaya. (*a*)

Charter-party—Coal to be shipped in United States—Proclamation prohibiting export except under licence—Shipowner aware of prohibition—Steamer delayed by non-arrival of licence—Liability of charterers.

A Spanish steamer was chartered to load a cargo of coal at Norfolk, Virginia, within a specified time, for delivery in Spain. Before the loading had been started a Proclamation was issued by the President of the United States prohibiting the export of coal from the United States to Spain, except under licence. Application for a licence was immediately made by the charterers' agents, who were also agents for the owners. Pending the arrival of the licence the loading of the coal was proceeded with and was completed within the specified time, but owing to a delay in the arrival of the licence the ship was detained several days. The shipowners claimed damages for the detention.

Held, that as both the owners and the charterers knew, through their common agents, of the character of the cargo at the time of the shipment, and of the possibility of delay owing to the Proclamation, it could not be said that the charterers had committed a breach of the charter-party in loading that cargo, or that they should be liable for the consequences of the delay.

Award stated in the form of a special case.

By a charter-party dated the 18th May 1917, made between Messrs. F. Sainz-e Inchaustegui, of Bilbao, the owners of the steamship *Sebastian,* and Altos Hornos de Vizcaya, of Bilbao, the charterers, it was agreed (*inter alia*) that the said steamer should proceed to Norfolk, Virginia, and there load from the charterers a full and complete cargo of coal not exceeding 3900 tons nor less than 3700 tons, and being so loaded should proceed to Bilbao, and there deliver her cargo on payment of freight at the rate of 120*s.* per ton.

(*a*) Reported by L. H. Barnes, Esq., Barrister-at-Law.

The charter-party contained, amongst others, the following clauses:

(3) The cargo to be loaded as below, running hours (excluding bunkering time) commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between business hours of 9 a.m. and 5 p.m. or 1 p.m. on Saturdays.

If detained longer charterers shall pay demurrage at the following rate: 250*l.* per running day.

Any time lost through riots, strikes, lock-outs, or any dispute between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the coal for which the steamer is stemmed, or by reason of accidents to mines or machinery, obstructions on the railway or in the docks, or by reason of floods, frosts, fogs, storms, or any cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In case of partial holiday or partial stoppage of colliery or collieries from any or either of the aforenamed causes, the lay hours to be extended proportionately to the diminution of output arising from such partial holiday or stoppage, but no deduction of time shall be allowed for stoppages unless due notice be given at the time to the master or owner. In the event of any stoppage or stoppages arising from any of the above causes continuing for the period of six running days from the time of the vessel being ready to load, this charter shall, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages, become null and void.

In the event of such stoppage or stoppages commencing after the vessel is ready to load and continuing for six running days, then this charter shall, at the expiration of such period, provided that no cargo shall have been shipped on board the steamer privious to such stoppage or stoppages, become null and void.

If at the commencement of such stoppage or stoppages the steamer is on demurrage, then provided that no cargo has been shipped and the stoppage extends to not less than 75 per cent. of the collieries working steam coal (including the colliery working the coal for which the steamer is stemmed), the charterers may, at any time, during such stoppage after the expiration of three days from the commencement thereof, give three days' written notice that they are prepared to cancel this charter, and from and after the expiration of such notice no further demurrage shall be payable in respect of the time lost through such stoppage, but the charterers shall pay demurrage up to the expiration of such notice. On receipt of such notice the steamer may either thereupon sail or the owners may within twenty-four hours of its receipt give the charterers written notice of their intention that the steamer shall remain until the termination of the stoppage, and in such event the charterers shall, upon the termination of the stoppage, load the steamer under this charter, her lay hours commencing at 7 a.m. of the day on which such collieries generally restart work. In the event of the owners not giving such notice as above mentioned, then upon payment of the demurrage due to the steamer this charter shall become null and void.

Any question arising under this clause shall be referred to a committee in London consisting of one shipowner, to be nominated by the owners, and one colliery owner, to be nominated by the charterers, and should they be unable to agree the decision of an umpire selected by them shall be final.

(7) The act of God, the King's enemies, restraints of princes and rulers, and perils of the sea excepted. Also fire, barratry of the master and crew, pirates, collisions, strandings, and accidents of navigation, or latent defects in or accidents to hull and (or) machinery and (or) boilers always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the owner of the ship, or by the ship's husband or manager. The owners shall not be liable for any delay in the commencement or prosecution of the voyage due to a general strike or lock-out of seamen or other persons necessary for the movement or navigation of the vessel. Charterers not answerable for any negligence, default, or error in judgment of trimmers or stevedores employed in loading or discharging the cargo. The steamer has liberty to call at any ports in any order, to sail without pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life and property.

(8) The cargo to be taken from alongside by consignees at port of discharge free of expense and risk to the steamer, Sundays and holidays excepted as below; if longer detained, consignees to pay steamer demurrage at the rate of 250*l.* 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 prevent or delay 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 peseta per ton of 20cwt. or 1015 kilos, and providing only steam, steam winches, winchmen, gins, and falls.

The following addendum was incorporated into the first paragraph of clause 3, and also into clause 8 of the charter-party:

Eight working days, Sundays and holidays excepted, to be allowed charterers for completing the loading and discharging.

By an agreement dated the 10th Dec. 1917, between the owners and the charterers, the disputes and differences which had arisen between them were referred to two arbitrators, who, at the request of the parties, stated their award in the form of a special case.

Special Case.

Upon the hearing of the arbitration the following facts were admitted or proved to our satisfaction, namely:

(1) On the 9th day of July 1917 the President of the United States of America issued a Proclamation whereby it became unlawful to export from or ship from or take out of the United States of America to (*inter alia*) Spain, her colonies, possessions or protectorates certain articles, including coal, except under licence from the American Government, which Proclamation came into force on the 15th day of July 1917.

(2) (*a*) That on the said Proclamation coming to the knowledge of the shippers, the Pocohontas Fuel Company Incorporated, on the 11th day of July 1917, they on that date made application to the Bureau of Foreign and Domestic Commerce Division of Export Licences, in Washington, for the necessary licence to export 15,050 tons of coal to the charterers in steamers then expected to arrive, which included this steamer.

(*b*) That the steamer arrived at Norfolk (Virginia) on the 14th day of July 1917, and was ready to load at 9 a.m. on the 16th day of July 1917.

(*c*) That the loading of the coal was completed at 3.30 a.m. on the 18th day of July 1917, and the bill of lading under which the coal was shipped was signed on that day.

(*d*) That subsequently the steamer was moved, on the instructions of the shippers (who informed her master that it had been arranged between the owners and the charterers that a parcel of general cargo should be shipped) to the Merchandise Pier, where the charterers shipped 116,231 kilos of general cargo, the loading of which was completed at 6 p.m. on the 18th day of July 1917.

(*e*) That the time occupied in loading, exclusive of bunkering time, was two days four and a half hours.

(*f*) That during the time the steamer was loading her cargo her master informed the Pocohontas Fuel Company Incorporated (who were acting in the dual capacity of agents for the charterers and agents for the owners) that it was convenient to prepare for the clearance of the steamer, and the Pocohontas Fuel Company Incorporated replied that they were awaiting the receipt of the export licence for which they had on the 11th day of July 1917 made application to Washington, and which they expected to receive daily.

(*g*) That the licence from the American Government permitting the export of the cargo shipped in the steamer was not received until the afternoon of the 1st day of August 1917, although according to the said Bureau of Foreign and Domestic Commerce a licence for the shipment of 15,000 tons had been mailed from Washington some days earlier.

(*h*) That the steamer was cleared at the Custom House under the export licence and was authorised to sail from Norfolk (Virginia) at 5 p.m. on the 2nd day of August 1917.

(*i*) That the steamer was detained waiting the receipt of the export licence from 6 p.m. on the 18th day of July 1917, when the loading of the general cargo was completed, until 5 p.m. on the 2nd August 1917, a period of fourteen days twenty-three hours.

(*j*) That the steamer arrived at Bilbao on the 21st day of August 1917 and was ready to discharge her cargo at 9 a.m. on the 22nd day of August 1917, but owing to a strike then prevailing at that port, discharging was not commenced until 6 a.m. on the 29th day of Aug. 1917. The discharging was completed at 2 p.m. on the 8th Sept. 1917.

(*k*) That the steamer lost approximately seven days at Bilbao in consequence of the said strike.

(*l*) That the charterers were paid by the receivers of the general cargo freight at the rate of 250*s.* a ton on the 116,231 kilos carried in the steamer.

6. We hold:

(*a*) That the prohibiting of the export of cargoes of coal until licences had been granted by the American Government was consequent on the United States of America being in a state of war and was a circumstance entirely beyond the control of the charterers.

(*b*) That the necessary steps to obtain the export licence to ship the said cargo were taken in due time and everything possible was done to obtain the licence with the least possible delay.

(*c*) That the charterers on receiving notice of the steamer's readiness were entitled to load the steamer before licence had been received, and in so doing did not commit a breach of the charter-party.

(*d*) That in the circumstances the charter-party would not, in the event of no cargo having been shipped for a period of six running days from the time the steamer was ready to load, have been null and void within the meaning of clause 3 of the charter-party, unless failure to ship had arisen from one of the causes specified in that clause, namely, riots, strikes, &c., which prevented the working or delivery of coals for which the steamer was stemmed. The cargo was available for shipment and the steamer was loaded expeditiously, and this paragraph of clause 3 does not apply.

(*e*) That the delay in the steamer's sailing after the cargo had been shipped was entirely due to the said Proclamation and the delay in the issuing of the necessary licence by the Bureau of Foreign and Domestic Commerce, Division of Export Licences, and was "a restraint of princes and rulers" within the meaning of clause 7 of the charter-party, and the charterers are under no liability to the owners in connection therewith.

(*f*) That save as is hereinafter mentioned . . . the charterers did not commit any breach of the charter-party, and they fulfilled their obligations thereunder.

(*g*) That in connection with the loading of the steamer no demurrage or damages for detention are due to the owners.

The arbitrators further held:

(*h*) That the time occupied in loading and discharging exceeded the lay days by three days eighteen and a half hours.

(*i*) That the charterers were not entitled to ship any cargo but coal into the steamer and that in so doing they committed a breach of the charter-party.

The question for the court was whether the arbitrators were right in holding as set out in par. 6 of their award.

Subject to the opinion of the court they awarded that the charterers pay to the owners of the *Sebastian*:

(*a*) 942*l.* 14*s.* 2*d.*, being three days eighteen and a half hours' demurrage at the rate of 250*l.* a day.

(*b*) 250*s.* a ton on the 116,231 kilos of general cargo carried in the steamer in breach of the terms of the said charter-party, less any freight which has been paid by the charterers to the owners in respect of the general cargo.

R. A. Wright, K.C. and *G. P. Langton* for the owners.—It was the duty of the charterers to load a cargo which was fit to be carried without the risk of detention. Here the cargo, owing to the Proclamation, was a "dangerous" cargo in the sense that the loading of it would cause the ship to be detained until the licence was obtained: By loading the coal the charterers warranted that it was not a "dangerous" cargo, they therefore, had committed a breach of their duty and were liable for the delay. The charterers were not protected by the provision as to "Restraint of Princes," as the exceptions in clause 7 of the charter-party were not mutual, but for the benefit of the owners only. They referred to

Mitchell, Cotts, and Co. v. *Steel Brothers and Co. Limited*, 13 Asp. Mar. Law Cas. 497; 115 L. T. Rep. 606; (1916) 2 K. B. 610;
Brass v. *Maitland*, 6 El. & Bl. 471;
Dunn and others v. *Bucknall Brothers*, 9 Asp. Mar. Law Cas. 336; 87 L. T. Rep. 497; (1902) 2 K. B. 614;
Barker v. *Hodgson*, 3 M. & S. 267;
Jacobs v. *Credit Lyonnais*, 50 L. T. Rep. 194; 12 K. B. Div. 589;
Braemount Steamship Company Limited v. *Andrew Weir and Co.*, 11 Asp. Mar. Law Cas. 345; 102 L. T. Rep. 73;
Blackburn Bobbin Company v. *Allen and Sons*, 119 L. T. Rep. 215; (1918) 2 K. B. 467.

MacKinnon, K.C. and Sir *Robert Aske* for the charterers.—It is admittedly the duty of charterers who know of certain dangers or difficulties that may ensue from loading a certain cargo to warn the shipowners who are in ignorance of the circum-

stances, but here all the facts were known equally by both parties, and the charterers were not liable. Under the charter-party the charterers were bound to load this specific cargo, and the detention of the ship was caused by circumstances entirely beyond their control, and they had committed no breach of their obligation. It was not necessary to rely upon the clause as to restraint of princes. They referred to

Acatos v. *Burns*, 3 Ex. Div. 282;
Banfield v. *Goole and Sheffield Transport Company Limited*, 103 L. T. Rep. 201; (1910) 2 K. B. 94;
Ford v. *Cotesworth*, 23 L. T. Rep. 165; L. Rep. 5 Q. B. 544;
Cunningham v. *Dunn*, 3 Asp. Mar. Law Cas. 595; 38 L. T. Rep. 631; 3 C. P. Div. 443.

Wright, K.C., in reply.

Bailhache, J.—This case comes before me upon an award stated, and upon the facts the case is a simple one, but on the law it is not so simple. The charter-party in question was made between Spanish gentlemen, and for the purpose of carrying coal, which was to be loaded at the port of Norfolk, in America, and shipped to a Spanish port, but the arbitration was to be an English arbitration.

The facts are these. The charter-party was made on the 18th May 1917, at Bilbao, and the steamship *Sebastian* was to proceed to Norfolk, Virginia, and load a cargo of coal and carry it to Bilbao and there discharge. She was to load in eight working days, holidays excepted, and by a clause in the charter-party there was also an exception in the case of riots, strikes, &c., excusing the charterers from delay in the events enumerated in that clause. Clause 7 deals with the act of God, the King's enemies, restraint of princes, and various other exceptions. It appears that after the charter-party was entered into there was a Proclamation made by the President of the United States, early in July 1917, prohibiting the export of coal from America to Spain except under licence. This came into force on the 15th July 1917. The *Sebastian* arrived at Norfolk on the 14th July, and was ready to load on the 16th July and the coal was loaded within her lay days. The loading at Norfolk was done with extraordinary rapidity, but though the loading was done well within the lay days, there was a certain amount of delay which arose from the fact that although the charterers' agents applied for the necessary licence, they did not in fact succeed in getting it until the 1st Aug., with the result that the *Sebastian* was delayed for a period of fourteen days twenty-three hours, or, roughly, fifteen days. I do not think it was contested that it was the obligation of the charterers to procure the licence, and the arbitrators have found that they took all reasonable steps to get the licence, and so far as they were concerned there was no delay. In these circumstances, the owners claimed either demurrage or damages for detention for the period during which the *Sebastian* was detained after the loading of the coal on board until the licence was obtained—fifteen days. The two arbitrators agreed on their award, and decided against the owners' contention.

The position was this, that when the *Sebastian* arrived, or immediately after she arrived, and before she had finished the loading, this coal was a cargo which it was unlawful for her to carry from the United States to Spain. There was an intervening illegality of the law of America which prevented the cargo being carried, and Mr. Wright has argued that the cargo had become a dangerous cargo, not in the ordinary sense of the word dangerous, but dangerous because it was a cargo of a character which was bound to cause detention of the ship; and he argued that it was the duty of the charterer of the ship to load a cargo that she could carry without delay to her port of destination. Now there have been many cases decided upon that question of the loading of a "dangerous" cargo, using that word in the sense in which Mr. Wright uses it and in which I use it in giving judgment in this case; but the cases referred to, and so far as I know, all those cases, have been cases in which there has been peculiar knowledge on the part of the shipper and ignorance on the part of the shipowner. Sometimes it has been a question whether the cargo was dangerous in the ordinary sense of the word, sometimes whether it was contraband or not. In a case *Mitchell, Cotts, and Co.* v. *Steel* (13 Asp. Mar. Law Cas. 497; 115 L. T. Rep. 606; (1916) 2 K. B. 610), before Atkin, L.J., Atkin, J., as he then was, it was a question of a cargo, equally known to both parties, of rice, but the dangerous nature of the rice arose because it could not be carried to a particular port without delay, owing to the permission of the British Government being required; this was known to the charterers, but not to the shipowners.

I think the law is that in a case where both parties contract to carry a specific cargo, the nature of which is known to both of them, and, when that cargo is loaded, the difficulties that there may be in the way of the cargo being forwarded are equally known to both of them—in a case like that the charterer does not commit any breach in loading that cargo which he has so contracted to load, In this case the cargo was loaded at Norfolk, Virginia, by the shippers, the Pocohontas Fuel Company, who acted as agents for both the shipowners and the charterers. Whatever was known, therefore, to the charterers was equally known to the owners through their agents in Virginia, they being the same persons. It seems, therefore, that this is a case of a cargo taken on board and loaded with known disabilities, and taken on board by the shipowner with equal knowledge.

Under these circumstances it seems to me that the position of the charterers was this: They had become bound to obtain this licence, and it was their duty to obtain it without unreasonable delay, and the arbitrators have found that they did obtain the licence to export this coal from the United States to Spain without any delay, and that they did all that was necessary to proceed with the matter, and in these circumstances it appears to me impossible to hold that the consequences of the delay in this case should fall on the charterers rather than on the shipowners.

What the position would have been if the Proclamation had been absolute it is a little difficult to see. One would suppose that in a case like that the Proclamation might have been treated as a frustration of the adventure. However, that point does not arise, because the shipowners had knowledge at the time their agents took on board this cargo—which was the cargo contracted to be shipped—of all the difficulties and dangers.

A further point was taken on the part of the charterers, that the charter-party contains an exception in the case of restraints of princes, &c., and it is said that this Proclamation was a restraint

of princes, and that even if the first point was wrong they were right on this and ought to be excused. As to that I do not desire to express any final opinion, because I think their first point is right. But I should like to say this, that there is considerable difficulty in reading clause 7, beginning: "Act of God, the King's enemies, restraints of princes, &c.," as a mutual clause, the difficulty being that there is an exception clause (clause 3), where the exceptions are clearly the charterers' exceptions, and it looks, therefore, as if clause 3 is the charterers' clause and clause 7 the shipowners' clause. It is true there is an exception in clause 7 for the charterers, but that is an exceptional exception, and it seems to me that in the present circumstances I ought not to draw the inference that clause 7 is a mutual clause. I do not say that it is or that it is not. There seems to be some difficulty about it, and I desire to keep that point open to be decided when it arises. I decide the case on this ground, that under the circumstances of the case the charterers committed no breach of the contract.

Solicitors for the owners, *William A. Crump* and *Sons*, for *Gilbert Robertson* and *Co.*, Cardiff.

Solicitors for the charterers, *Botterell* and *Roche*, for *Botterell, Roche*, and *Temperly*, Newcastle.

Thursday, Dec. 11, 1919.

(Before BAILHACHE, J.)

OWNERS OF STEAMSHIP RICHARD DE LARRINAGA *v.* ADMIRALTY COMMISSIONERS. (*a*)

Policy—War risks—"Consequences of hostilities or warlike operations"—Merchant vessel with convoy—Steaming without lights by Admiralty orders—Collision with warship proceeding to take up escort duty—Whether a warlike operation.

A steamship which was insured by one set of underwriters against war risks, and by another set of underwriters against marine risks, was proceeding in a convoy at night without lights, by orders of the Admiralty, when it came into collision with a warship also proceeding without lights. The warship was on its way to a certain port to take up duty as an escort to a convoy. The question referred to the arbitrator was whether the collision was the consequence of war or marine risks. The arbitrator held that neither vessel was guilty of negligence and that the war risk underwriters must bear the loss. The war risks policy covered "all consequences of hostilities or warlike operations by or against the King's enemies."

Held, that the warship was at the time engaged in a warlike operation and consequently the collision was caused by a war risk. Award upheld.

AWARD in the form of a special case.

The steamship *Richard de Larrinaga* was insured by two sets of underwriters against war and marine risks respectively. The war risks policy covered "all consequences of hostilities or warlike operations by or against the King's enemies."

On the night of the 23rd July 1917 the *Larrinaga* was proceeding in a convoy, at about seven knots, from the United States to England, and in accordance with Admiralty orders was steaming without lights.

(*a*) Reported by L. H. BARNES, Esq., Barrister-at-Law.

The night was very dark, and the vessel came into collision with H.M.S. *Devonshire* which was steaming at about twelve knots, also without lights. The *Devonshire* had been on duty at Halifax, and was proceeding to Hampton Roads to take up duty there as escort to a convoy.

The question referred to the arbitrator was whether the collision was the consequence of war or marine risks. The arbitrator found that neither of the vessels was negligent, and that the collision was due to hostilities or warlike operations and that the war risks underwriters must bear the loss.

Raeburn, K.C. and *Porter* for the war risk underwriters.—Unless the sole cause of the loss was a warlike operation the war risk underwriters were not liable. Here the real cause of the collision was the fact that the *Larrinaga* was sailing without lights, and that was a marine and not a war risk, as it had been held that the absence of lights on a merchant vessel did not constitute her a vessel engaged on a warlike operation. The war risk underwriters were therefore not liable. Further the *Devonshire* was not at the time of the collision engaged on a warlike operation as she was merely proceeding from one port to another to take up warlike duties. The case was therefore distinguishable from *Ard Coasters Limited* v. *The King* (35 Times L. Rep. 604), where the warship was undoubtedly engaged on a warlike operation. They also referred to

Reischer v. *Borwick*, 7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548;
Britain Steamship Company v. *The King*, 14 Asp. Mar. Law Cas. 507; 121 L. T. Rep. 553; (1919) 2 K. B. 670.

R. A. Wright, K.C. and *Miller*, K.C. for the marine risk underwriters.—This case is covered by *Ard Coasters Limited* v. *The King* (*sup.*). The test is whether the *Devonshire* was engaged on a warlike operation at the time of the collision. During war almost any movement of a warship in the course of its combatant duties in the area of war was a warlike operation: (per Atkin, L.J. in *Britain Steamship Company* v. *The King, sup.*). Here the loss was caused by a warlike operation and the war risk underwriters were liable.

Raeburn, K.C. in reply.

BAILHACHE, J.—This case raises again, under slightly different circumstances, perhaps, to those in other cases which have been previously decided, the frequently debated question during the war as to whether the loss of or damage to a ship at sea is to fall upon the war risk or the marine risk underwriters. This vessel, the steamship *Richard de Larrinaga*, was insured under two policies, the marine risk policy containing the usual f.c. and s. clause, and the war risk policy containing the following clause: "This insurance is only to cover the risks of capture, seizure, and detainment by the King's enemies, and the consequences thereof or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after declaration of war."

Now the facts are extremely simple. The collision occurred at night between the steamship *Richard de Larrinaga*, which was a merchant ship,

and H.M.S. *Devonshire*. Both ships were proceeding without lights, and the collision took place whilst the *Devonshire* was proceeding from Halifax to her station at Hampton Roads in order to pick up some vessels which she was to convoy. She was therefore proceeding to take up her duties as a convoying ship when this collision unfortunately occurred. The question to be decided is whether the damage to the steamship *Richard de Larrinaga* falls upon the marine risks or the war risks underwriters. Now the primary or actual proximate cause of the damage was the collision, and if all the risks were covered by one policy I should not have to enquire further, but in all these cases, where the marine risks are covered by one policy and the war risks are covered by another policy, and where one has to inquire whether the loss was due to a cause which would *primâ facie* fall upon the marine risks underwriters, one has to go a step further back to know what was the proximate cause, if I may call it that, of the actual cause of the loss. I make that remark because of some observations which were made by the Court of Appeal in *British India Steam Navigation Company Limited* v. *Green and others and Liverpool and London War Risks Association Limited* (14 Asp. Mar. Law Cas. 513; 121 L. T. Rep. 559; (1919) 2 K. B. 670) as to what was the proximate cause of the loss in that case. In this case one has to inquire what was the actual proximate cause of the collision; the collision being *primâ facie* a marine risk. The actual cause of the collision in this case was that both vessels were proceeding without lights at night. The mere fact that two merchant vessels are proceeding without lights at night does not constitute a war risk. That was decided in *Britain Steamship Company Limited* v. *The King* (14 Asp. Mar. Law Cas. 404; 120 L. T. Rep. 275; (1919) 1 K. B. 575), which was upheld in the Court of Appeal (14 Asp. Mar. Law Cas. 507; 121 L. T. Rep. 553; (1919) 2 K. B. 670). It has been decided in *Ard Coasters* v. *Rex* (35 Times L. Rep. 604) that where a collision takes place between a merchant vessel and a patrol boat, both proceeding at night without lights, the patrol boat being actively employed at the time on her duties as a patrol, the collision is due to a war risk because the patrol boat is actively engaged upon her duties as a patrol. The necessary inference from the judgment of the Court of Appeal in *British India Steam Navigation Company* v. *Green* (*sup.*) is that where ships are proceeding under convoy the movements of His Majesty's ships which are protecting the convoyed ships are warlike operations. I held in that case that the whole convoy was to be treated as one entity, and that no distinction was to be drawn between the convoyed ships and the convoying ships. The Court of Appeal, however, pointed out that I was wrong about that, and Atkin, L.J. in a rather picturesque phrase said that I must have confused the shepherd with the sheep, but there seems to be no doubt that His Majesty's ships which were actually convoying and conducting the convoy were engaged in warlike operations. I do not think that the case of the *British and Foreign Steamship Company* v. *The King* (117 L. T. Rep. 94; (1917) 2 K. B. 769) assists us very much. That case proceeded as the Court of Appeal pointed out in *British India Steam Navigation Company* v. *Green* (*sup.*), upon admissions made by the Crown, which seem to have made the result in that case inevitable. Leaving that case out of account, I think that the authorities establish the following propositions; namely, that where one of His Majesty's ships is sailing at night without lights, and is engaged in hostile duties, such as looking for submarines, and collides with another ship, the collison is due to a consequence of hostilities; similarly if one of His Majesty's ships is engaged in convoying other ships, and they are sailing without lights at night, and a collision occurs, in that case the collision is a consequence of hostilities or warlike operations. The question which remains, and which is not absolutely covered by authority, is what is the position in such a case as the present one, where one of His Majesty's ships is sailing at night without lights, but is not at the moment actively engaged in actual warlike operations, such as patrolling on the look-out for submarines or actually convoying ships, but is proceeding to her station for the purpose of taking up her duties there as a convoying ship. Atkin, L.J., in *Britain Steamship Company* v. *The King* (*sup.*) said: "I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties while exercised in the area of war, could be included." I respectfully agree, and I think that when one of His Majesty's ships is proceeding to her station to take up her duties as a convoying ship she is engaged on a warlike operation, and indeed that almost any movement in war-time at sea of one of His Majesty's ships is a warlike operation. I do not think that any assistance is derived from illustrations with regard to anything which takes place on the land, particularly on land in this country.

When the movements of one of His Majesty's ships is being dealt with, the true analogy, if analogy is required, is that of the movements of an army in an enemy country, because the whole of the sea is an enemy country. Where two nations are at war, it may be that, so far as one of the belligerents knows, there is not one of the enemy's warships within a reasonable distance, but at the same time it is necessary, particularly in these days of submarines, when at any moment a submarine attack may take place, to keep a vigilant look-out, and, in my opinion, when one of His Majesty's ships is proceeding either to take up her station to act as a convoying ship or, indeed, on almost any other duty, she is engaged in a warlike operation. If it is night, part of the warlike operation is to sail without lights, and if as a result of that a collision takes place, it seems to me that that result is a marine risk. One has, then, to carry the inquiry further back and consider whether it falls within one policy or the other. The marine risk is due to the warlike operation, and therefore it falls upon the war risk underwriters. That is what the arbitrator has found in this case, and in my judgment his award is right and must be upheld.

Award upheld.

Solicitors for the war risk underwriters, *Thomas Cooper* and *Co.*, for *Hill, Dickinson* and *Co.*, Liverpool.

Solicitors for the marine risk underwriters and for shipowners, *Charles Lightbound* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 4 *and* 7, 1919.

(Before BANKES and SCRUTTON, L.JJ. and EVE, J.)

THE ORDUNA. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Vessels on crossing courses—"Give-way vessel"—Late action—"Keep-on" vessel not keeping course and speed—Regulations for Preventing Collisions at Sea 1910, *arts.* 19, 21, 22.

Arts. 19, 21, *and* 22 *of the Collision Regulations should be strictly observed in relation to one another.*

There may be cases where a vessel is relieved from the obligation of maintaining her course and speed, but strict adherence to art. 21 *is important. The stand-on ship under art.* 21 *ought to keep her course and speed until the last possible moment. Such cases should be scrutinised with the greatest care.*

Observations of Lord Parker in The Olympic and H.M.S. Hawke (1913) *P.* 279), *as to the circumstances under which the stand-on vessel may be relieved of her obligation, considered by Bankes, L.J.*

Judgment of Hill, J. varied, both vessels being found equally to blame.

Where vessels each materially contribute to a collision the court ought not to attempt to apportion the blame unless there is some clear indication of the extent to which one is more blameworthy than the other.

APPEAL by the owners of the *Orduna* from a decision of Hill, J. in an action of damage by collision.

The plaintiff was the owner of the steamship *Konakry*, and the defendants, the Pacific Steam Navigation Company, were the owners of the steamship *Orduna*. The collision took place on the night of the 1st Dec. 1918, off the south coast of Ireland, the weather being fine and clear, the wind southerly and a moderate breeze.

The plaintiff's case, on the pleadings, was that the *Konakry*, a screw steamship of 5742 tons gross, bound from Queenstown to Trinidad in ballast, manned by a crew of forty-six hands, was on a course of S. 49 degrees W. true, making about six knots an hour, when those on board her observed at a distance of four to five miles, and bearing about one and a half points on the starboard bow, the two masthead lights and some deck lights of the *Orduna*. The *Konakry* kept her course until the red light of the *Orduna* became visible, when she ported her helm, and, when the *Orduna's* red light had been brought on to her port bow, then steadied. The vessels then approached each other in a position to pass safely port to port; but shortly afterwards the *Orduna*, without sounding any signal, opened her green light, the red still remaining visible, when the *Konakry* again ported her helm and sounded one short blast. The *Orduna* answered with one short blast, and shut in her green light, but almost immediately opened it again; whereupon the helm of the *Konakry*, which was still a-port, was ordered hard-a-port, and she again sounded one short blast. The *Orduna* then sounded two short blasts and came on at a high rate of speed with both side-lights visible; and, the vessels being then so close that there was no other chance of avoiding a collision, the engines of the *Konakry* were kept working at full speed, and the helm was put hard-a-starboard to try to throw her quarter clear. The *Konakry* several times hailed the *Orduna* to hard-a-port her helm; and though she appeared to do so at the last moment, it was too late, and the *Orduna* with her stem struck the port side of the *Konakry* a heavy blow about 80ft. from the stern with so much force and doing so much damage that the *Konakry* had to be abandoned and was lost. The plaintiff alleged that those on board the *Orduna* were negligent in failing to keep their course, and in improperly starboarding.

The defendants' case was that the *Orduna*, a triple-screw steamship of 15,499 tons gross, bound from New York to Liverpool with passengers and cargo, and manned by a crew of 270 hands, was on a course of N. 66 E. true, making about fourteen knots, when the masthead and green lights of the *Konakry* were seen between two and three miles away, and bearing about a point on the port bow. The *Orduna* kept her course and speed until the *Konakry*, which continued to approach showing her green light and shaping to cross ahead, had drawn very close, and was about ahead, when the helm of the *Orduna* was starboarded and then put hard-a-starboard; and immediately afterwards, when the *Konakry* blew a short blast in reply to the two short blasts of the *Orduna* (which were blown when the helm of the *Orduna* was starboarded) and opened her red light, the helm of the *Orduna* was put hard-a-port, her whistle sounded a short blast, and her starboard engine was put full speed astern to assist the helm, and then her port engine was put full speed astern; but very shortly afterwards the *Konakry* struck the stem and port bow of the *Orduna* a heavy blow with her port quarter, causing serious damage. The defendants alleged that the *Konakry* failed to keep out of the way of the *Orduna*; that she failed to avoid crossing the *Orduna*; and that, when crossing ahead, she improperly ported.

Regulations for Preventing Collisions at Sea 1910:

Art. 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.

Art. 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.

Art. 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.

Hill, J., who was assisted by two of the Elder Brethren, did not accept the evidence of the plaintiff's witnesses. In his view, the *Konakry* stood on much longer than they had stated, and took action much later, and when they were much nearer the *Orduna* than was admitted by them. He accepted the defendants' evidence, so far as it described the *Konakry* as standing on, and the vessels approaching, with the red light of the *Orduna* to the green of the *Konakry*, until a late period; but his conclusion on that evidence was that, at the time the *Orduna's* helm was starboarded the *Konakry's* green light was not on the *Orduna's* starboard bow—it was not more than ahead, if it was as much as ahead, of which his Lordship was doubtful. His

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

further conclusion was that the porting of the *Konakry* was not later, but probably rather earlier, than the starboarding of the *Orduna*. His Lordship continued: "On these facts it follows that, but for the starboarding of the *Orduna*, the *Konakry* would have gone clear. The Elder Brethren are clearly of that opinion upon the whole facts of the case. They are also of opinion that the *Konakry* did not get into such a position as regards the *Orduna* as to justify the *Orduna* starboarding as she did. For that starboarding the *Orduna* must be to blame. The starboarding was not done in the agony of collision. The second officer says he starboarded when the *Konakry* 'was still at a safe distance.' Whatever that means, it at any rate negatives the idea that the starboarding was in the agony of collision. The starboarding was action taken because the green light appeared to be crossing, or about to cross, the bows of the *Orduna*, and the second officer assumed that the *Konakry* was not porting or about to port. In such a position it is very difficult for the stand-on ship to justify starboarding. The ships were not passed ships—it was, at least, always possible that the *Konakry* might at the last moment port, or might already have begun to port. If she did port, the starboarding would defeat the proper manœuvre; if she did not port, she would rapidly pass on to the starboard bow, and the starboarding would have been unnecessary. I am advised that the starboarding was clearly wrong, and the hard-a-starboarding aggravated the fault. I am further advised and am clearly of opinion that the reversing was too late. I incline to think that, if the position was such as in the view of the second officer to call for action at all on the stand-on ship, it called for reversed engines. But at least when, immediately on the starboarding, it was seen that the *Konakry* 'was closing rapidly,' according to the proof of the second officer, or was so close that he feared collision, according to his deposition, it ought to have been immediately obvious that the *Konakry* was porting, and the action which would best aid to avert collision was undoubtedly not hard-a-starboarding, but full astern on both engines. If the second officer had reversed both engines instead of hard-a-starboarding, there would, even then, probably have been no collision. Therefore the *Orduna* is to blame."

His Lordship then dealt with the question, which to him was one of much difficulty, as to whether, although the *Konakry* did not port as soon as she might have done, but ported in time to have cleared the *Orduna*, if the latter had not starboarded, she was justified in leaving the porting to a comparatively late time. He pointed out that, in fact, she acted in such time that she altered nearly six points before the collision, and said that the Elder Brethren were of opinion that she, in the circumstances, acted in sufficient time, and that he followed their advice and acquitted the *Konakry* of blame in that respect, the result being that the *Orduna* was alone to blame.

The defendants appealed.

Bateson, K.C. and *Stephens*, K.C. for the appellants.

Aspinall, K.C. and *Raeburn*, K.C. for the respondents.

BANKES, L.J.—This is an appeal from a decision of Hill, J., who found that, of the two colliding vessels, the *Orduna* alone was to blame.

The collision took place at night off the coast of Ireland. The *Konakry*, a steamship of 5742 tons gross and 300ft. long, was in ballast. The *Orduna*, a passenger vessel, upwards of 15,000 tons gross and 569ft. over all, was carrying cargo and passengers. The night was fine, and both vessels had their proper lights. Their conjoint speed was about twenty knots, the *Orduna* having about fourteen knots and the *Konakry* about six knots; but the vessels were on crossing courses, there being a difference of seventeen degrees between the opposite courses. The *Konakry's* course was S. 49 W., and the *Orduna's* N. 66 E.

Under these circumstances, the *Orduna* was the stand-on ship, and it was the *Konakry's* duty to keep out of the way. At the trial the case for the *Konakry* was that she was from the first endeavouring to keep out of the way, and that she ported, ported again, and ported a third time, but was unable to keep out of the way, because the *Orduna* starboarded into her. The learned judge refused to accept the story of the *Konakry*, and proceeded to deal with the case upon the evidence from the *Orduna*. That was not in all respects satisfactory evidence, because the officer who was, in fact, in charge of the *Orduna* at the time of the collision was not called as a witness. It was said he was ill, and ultimately his deposition and proof were read; and the learned judge had to deal with the case upon those materials, and upon the statement of a fourth officer, who gave evidence.

The position of the *Konakry* was that, under art. 19 of the Regulations for Preventing Collisions at Sea 1910 it was her duty to keep out of the way, and under art 22, being the vessel directed by the rules to keep out of the way, if the circumstances of the case admitted it, to avoid crossing ahead of the other. There was no reason whatever why the *Konakry* should not have obeyed both these articles. She did neither; and for some reason she took no action according to the learned judge's finding, until the vessels were about a quarter of a mile apart, and the *Konakry* was just about ahead of the *Orduna*.

The first question that naturally arises is whether, under those circumstances, the *Konakry* was to blame for the collision, either entirely or partly, and upon that point the learned judge says: "The Elder Brethren are of opinion that the *Konakry* was, in the circumstances, justified in what she did, and that she acted in sufficient time, and I follow their advice and acquit the *Konakry* of blame in that respect." I think it is significant that the learned judge does not express his own opinion or really indicate that he is satisfied with the view which the Elder Brethren expressed. He simply says he followed their advice. Speaking for myself, if I had to decide this point without any expert assistance, I should most assuredly have come to the conclusion that the *Konakry* was to blame. I cannot see any justification whatever for her standing on in the way in which she did, and putting the *Orduna* in the position in which she was placed. We have taken our assessors' opinion, and they do not agree with the Elder Brethren in the court below. They think the *Konakry* was to blame in not taking action sooner to get out of the way of the *Orduna*.

There comes now the much more difficult question as to the action of the *Orduna*. To judge of that action it is necessary to come to a decision as to the relative position of these two vessels at the time

action was taken by the *Orduna*, and I think the fair inference from the evidence is that the vessels were about a quarter of a mile apart. I do not think the distance was more than 500 yards, and I think the *Konakry* was about ahead of the *Orduna*. The learned judge states his view on that matter thus: "The conclusion I draw from all this, and especially from the deposition of the second officer, is that at the time the helm was starboarded the green light of the *Konakry* was not on the starboard bow of the *Orduna*; it was not more than ahead, if it was as much as ahead, of which I am doubtful." The evidence on that point consisted of the evidence of the fourth officer, and the deposition and proof of the junior second officer. The fourth officer's answer, in reply to the question as to what the *Konakry* did, was: "She narrowed on the port bow until she came right ahead, and finally she got a little on the starboard bow." When he speaks of "finally," I do not understand him to say that that was her position before action was taken on the *Orduna*; I think he was indicating the position at which she was at a time when, acting under her port helm, she must have got, as counsel for the *Orduna* has pointed out, to some extent on the starboard bow of the *Orduna*. That is not the material time. The material time is when the order was given by the second officer of the *Orduna* to starboard.

The case of the second officer is that he did not consider the position one in which there was risk of collision. He acted, not in the agony of collision, and not in the first instance to avoid a collision, but because he considered that he was justified in assuming that the *Konakry*, which was breaking, and had broken, the regulations, was continuing on her course, and would not alter so as to avoid risk of collision. She was not fully clear, and was still a crossing vessel; and partly by failing up to that time to get out of the way, and partly because, when she was so nearly across, she had failed to give any indication by a signal that she was about to take action under her port helm, he assumed that he was justified in considering it was not a case of a risk of collision at all, but was a case in which he was justified in considering that she would continue her course without taking action, and that he therefore was entitled to starboard his helm in order to give the vessel a wider berth. That is what I understand to be his case as indicated in his proof and deposition. In his proof he says: "When the *Konakry* was about a quarter of a point on the starboard bow and distant about a quarter of a mile off, I ordered the helm to be starboarded ten degrees, and immediately afterwards, as the ships were closing rapidly, I ordered hard-a-starboard, and I myself blew the whistle two short blasts. My reason for giving the order to starboard was that it was clear that the other ship was passing on to my starboard side, and I starboarded to give her a wider clearance." Further on he says: "When I gave the order to starboard I did not consider there was risk of collision." In his deposition he rather alters the language, but I do not think that he intends to alter the effect of what he said: "When the green light was almost right ahead and still at a safe distance deponent sent the extra fourth officer to the wheel house to order the helm ten degrees to starboard, and when the extra fourth officer returned, the green light was about one quarter point on the starboard bow, and getting so close that deponent feared a collision. Deponent immediately ordered the helm hard-a-starboard." That is the second action, which I will deal with presently.

We have had an interesting discussion as to the effect of the regulations upon a person who finds himself in the position in which this second officer said he found himself. I have pointed out it does not seem to me to be a case where two vessels are crossing, involving risk of collision, because the second officer's case is that there was no risk of collision. He does not suggest that his action was justified, because it was action taken in the agony of collision; nor does he suggest that it was justified, because, under the regulations, the other vessel was not able, by her own action, to avoid the collision. The contention is that this is one of those possible cases, indicated by Lord Parker in *The Olympic and H.M.S. Hawke*, where he says (1913) P., at p. 279): "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger." I think possibly that that expression of opinion may at some time have to be considered. Lord Parker continues: "If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and speed." This second officer's case is that the *Konakry* had allowed the time for acting to go by, and that he was, under those circumstances, justified in taking the course he took. I think there may be such cases, but I agree entirely with what counsel for the respondent said as to the importance of adhering to the strict observation of the regulations. I think such a case ought to be scrutinised with the very greatest care. A somewhat similar case was suggested to exist in *The Norman Monarch* (Lloyd's List, Dec. 10, 1918), and no member of the House of Lords accepted the proposition that the other vessel in that case, the *Phrygia*, was in such a position. The Lord Chancellor, it was quite true, suggested that, if the *Norman Monarch* had been exactly ahead of the *Phrygia*, she might possibly have been justified in starboarding her helm, having regard to the fact that the *Norman Monarch* had given no indication she was about to port; but he only suggested it was a possibility, and the view of Lord Phillimore suggests that it would be dangerous to accept the position, as he expresses it, that the officer of the *Phrygia* thought that the *Norman Monarch* would draw ahead in a few seconds. I think that a person who desires to bring his case within the exception to which I have referred, must make it abundantly plain that he comes within the exception, and that he was justified in taking up the exceptional position to which Lord Parker refers in *The Olympic and H.M.S. Hawke* (*sup.*). It is largely a question of seamanship, and we have put a question to those who advise us upon this particular point; and inasmuch as the House of Lords has suggested that it would be an assistance if the questions were recorded, I will read the questions we suggested and the answers given:

"Assume the courses of the two vessels to have been crossing courses, the *Konakry* S 49 W., the *Orduna* N. 66 E., the joint speed twenty knots, and that the vessels approached each other, and were about a quarter of a mile apart, with the *Konakry* about ahead of the *Orduna* before either vessel took

action for the other, do you consider there was a want of care and skill and proper seamanship (*a*) on the part of those in charge of the *Konakry* in not taking action sooner to keep out of the way of the *Orduna?*" The answer is, "Yes, she should have ported sooner." Then "(*b*) On the part of those in charge of the *Orduna* (1) in starboarding, assuming that the order to starboard was given at practically the same time as the *Konakry* gave the port action signal?" The answer is, "Yes." Then "(2) in hard-a-starboarding and not reversing?" The answer is, "Yes." "Would the starboarding of the helm of the *Orduna*, followed by her porting in the way described by the second officer, alter her course laterally, so as to bring her" —to use the learned judge's language—"nearer the line of the *Konakry's* advance?" The answer is, "Yes."

I accept and agree with the view of those who advise with regard to the action of the *Orduna*. It seems to me that the second officer's action was that of a man who, having regard to the Regulations, was unduly cautious, if I may use that expression. There was no real necessity for him to take action at the time; and although one sympathises with a person in that position, and the responsibility which rested upon him, yet he must take the consequences, if the fact be that he acted before he was justified in so acting.

The next question is whether the default of these two vessels, as I have indicated it, materially contributed to the collision, and upon that question we have had advice. Counsel for the appellants argued that the court should come to the conclusion that the learned judge was wrong in the conclusion that the helm action of the *Orduna* brought her nearer the line of the *Konakry's* advance. That is a matter upon which I personally am not in a position to express any confident opinion; but we have put the question expressly to those who advise us, and they take the same view as the learned judge, and those who advised him, about the action of the *Orduna* in her starboarding and not reversing. In face of those opinions, I think it is plain that the action of the *Orduna* did contribute to the collision, and we are so advised. We also asked a question, and we have been advised that the action of the *Konakry* contributed to the collision. It is easy to say that one vessel was more to blame than the other; but I do not think the Court ought to attempt to apportion blame, unless there is some clear indication of the extent to which the one was more blameworthy than the other. I do not think we can come to any such conclusion in the present case. Each contributed materially to the collision, and, in my opinion, the proper conclusion is that both vessels were to blame for this collision. The appeal will accordingly be allowed to that extent.

SCRUTTON, L.J.—I am not sure that, if I had been trying this case without assessors, my judgment would have been in all respects the same as the one in which I am concurring; and it is fair to the parties that they should know my state of mind after listening to the arguments in a case of some difficulty and importance.

There are three rules concerned when two steam vessels are crossing so as to involve the risk of collision. The vessel which has the other on her own starboard side should keep out of the way. Where one of two vessels is to keep out of the way, the other should keep her course and speed; and every vessel which is directed by the rules to keep out of the way of another vessel should, if the circumstances admit, avoid crossing ahead of the other. I entirely agree, and wish to emphasise, if it is necessary, the importance of these rules being strictly observed. The position of ships crossing with a risk of collision is difficult. It has been thought right to tell one of the ships to keep her course and speed, and the other ship to keep out of the way. The give-way ship can act with much greater certainty if she knows that the stand-on ship is going to do exactly what she is doing when seen. If the stand-on ship acts too soon, she may easily put the give-way ship in a great difficulty; and, hard as it is, she ought to keep her course and speed until the last possible moment. I entirely agree as to that.

The *Konakry* was the give-way ship. She ought to have passed under the stern of the *Orduna*, and kept out of her way. It is a little difficult to be sure as to what she exactly did, because her witnesses have been disbelieved, and she comes before the court with a story which the court has found to be inaccurate, and adopted, no doubt, to put the best face she could on her proceedings. Her case is that she saw the *Orduna* a point and a half on her starboard bow. She says she kept on porting, and the court disbelieved her. What she did apparently was to keep on as if she were going to cross the bows of the *Orduna*—breaking art. 22, and without giving any whistle signal—until she was either ahead, or very nearly ahead, of the *Orduna*, and at a time when the two vessels were within half a mile of each other. It seems to me that, up to that time, she was acting as if she was going to break the rules, acting in a way which put great embarrassment on the stand-on ship, and in a way in which, if a collision followed from her action in apparently breaking the rules, it would be impossible for her to escape blame. Our assessors have advised us that she was guilty of want of seamanlike care in taking that course, and that it contributed to the collision. I entirely agree, and I should have come to the same conclusion myself, and I suspect from the language of the learned judge's judgment that he would have come to the same conclusion, but for the advice of his assessors. So much for the *Konakry*.

I have found considerably more difficulty in the case of the *Orduna*. The rules put a duty on the *Orduna*, if the ships are crossing, so as to involve risk of collision. Suppose the give-way ship is not manœuvring to pass under the stern, and has got right ahead of the stand-on ship in a position in which, if she keeps her course, there will be no collision. I have great difficulty in seeing, under those circumstances, that there is a crossing so as to involve a risk of collision; and, if there is no crossing so as to involve a risk of collision, it may be said that the stand-on ship no longer has the duty of standing-on, and will not be wrong if she starboards, because there is no crossing so as to involve a risk of collision. At the same time, I quite appreciate that, if the courses are crossing, but the ships have not yet crossed, and if although the give-way ship has not yet acted, she can act and pass under the stern by her own action alone, the stand-on ship is in the position in which she ought to stand-on. It is very difficult to say where one position passes into the other, and, personally, it strikes me as very hard to find the stand-on ship to blame because, when the other ship is apparently

going to break the rules, the stand-on ship does not appreciate rightly the exact moment at which she is free to act. I have felt very great difficulty as to the position of the *Orduna*. There is, however, this undoubted fact, as I read the evidence: If the *Orduna* had merely kept her course and speed, the *Konakry* would have gone clear by her porting, although in rather a startling way, a way calculated to disturb any navigator on the *Orduna* when he saw what the *Konakry* was doing. Again, if the *Konakry* had done what she appeared to be going to do—break the rule and cross ahead and keep her course—she would have gone clear without there being any necessity for the *Orduna* doing anything; and again, if the *Orduna* had merely reversed and not starboarded, the collision would not have happened.

Those being the facts, when four nautical assessors have advised the court, two below and two here, that they think the *Orduna* was guilty of lack of seamanlike skill in starboarding under the circumstances put to them, I do not feel confident enough in my own judgment to go contrary to their opinion. I appreciate and am impressed by the great importance of maintaining the stand-on rule and that influences me in not acting upon the opinion I might otherwise have formed. I am also impressed by the fact that, in *The Norman Monarch* (*sup.*), where a very similar problem was presented, all the members of the House of Lords who delivered judgment, I think, came to the conclusion that the fact that the vessel was apparently going to cross ahead was not a justification for the stand-on vessel departing from the rule. It is quite true, and I wish to state it, that *The Norman Monarch* case is a little complicated by the fact that the case of *The Phrygia* was not: "You were a steam vessel crossing ahead and apparently would have gone right ahead, and I am relieved from any obligation." The case of the *Phrygia* was: "You looked like a sailing vessel because you were not showing your masthead light, and for a sailing vessel I was justified in starboarding under your stern." The *Phrygia* started with this enormous difficulty: the court was advised that it was gross neglect, with the other vessel acting in the way the *Norman Monarch* was acting, to take her for a sailing ship in the existing state of the wind; but, even giving full weight to the difference of the facts, I think the judgments, particularly that of Lord Phillimore, are in accordance with the view which would be arrived at in this case, if we found the vessels both to blame. While I feel considerable doubt in this case, I do not feel justified in dissenting, and I feel bound to concur in the judgment which has been delivered. Once both vessels are found to blame, I do not see any material in this case for departing from the old rule.

Eve, J.—I agree. I do not think the appellants have established that the *Konakry* was on their starboard bow when she ported. The finding of the court below, that she was not more than ahead when the helm of the *Orduna* was starboarded was, I think, the inevitable inference from the deposition of the navigating officer of the *Orduna*. In these circumstances, with the vessels in these relative positions, at less than half a mile apart, the question resolves itself into this: Was the second officer of the *Orduna* justified in concluding that the *Konakry* was intending to pass to starboard and had no intention of porting? If he was so justified, his starboarding was justifiable, and, indeed, a praiseworthy course, because it was calculated to secure more sea room for the passing vessels. If, on the other hand, he was not so justified, he was acting contrary to the rules; and, if his so acting contributed to the collision, it is impossible to hold his vessel free from blame. I agree entirely with what fell from the President as to the burden imposed on those who seek to establish a case justifying a departure by the stand-on vessel from the rule. We have been advised that the *Konakry* was not navigated with skilful seamanship, in that she delayed too long in her action. We have also been advised that the starboarding, and the hard-a-starboarding, on the part of the *Orduna* was unseamanlike, and when we are finally advised that the seamanship, or the defective seamanship, on both vessels contributed to the collision, it seems to me the only conclusion at which we can arrive is that both vessels were to blame, and that, in the circumstances, we are not here able to do more than to apportion the blame equally between them. For these reasons, I think the appeal must be allowed to the extent which the learned President has stated.

Appeal allowed. Both vessels equally to blame.

Solicitors: for the appellants, *Pritchard and Sons*, for *Batesons, Warr* and *Wimshurst*, Liverpool; for the respondent, *Treasury Solicitor*.

Nov. 20, 24, *and Dec.* 5, 1919.

(Before Bankes, Warrington, and Scrutton, L.JJ.)

Wilson Shipping Company Limited *v.* British and Foreign Marine Insurance Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Time policy—Steamship chartered by Admiralty—Indemnity against war risks—Partial loss by marine risks—Subsequent total loss by war risks—Excepted peril—Unrepaired damage—Depreciation—Merger—Continuing prejudice—Liability of marine risks underwriters.

The plaintiffs' steamship, the E., *was insured against marine risks only, but including particular average, with the defendants, under a time policy dated the* 16*th March* 1917. *The steamship was under charter to the Admiralty on the T.*99 *form under which the Admiralty contract to pay for the loss, by war risks, of steamers chartered to them, the value to be ascertained at the date of the loss. The* E. *was sunk by submarine attack on the* 25*th Jan.* 1918, *during the currency of the time policy with the defendants. The steamship had sustained some damage previously, during the currency of the same policy, which had depreciated her value at the date of her total loss by war risks by the sum of* 1770*l. The Admiralty accordingly paid the owners* 1770*l. less than they otherwise would have paid, and the owners contended that the marine risks underwriters must make that sum good. The underwriters contended that they were not liable to pay for damage to a vessel, if, before repairs, the damage was followed by total loss during the currency of the same policy. The policy incorporated a clause which provided that the underwriters should*

(*a*) Reported by T. W. Morgan and W. C. Sandford, Esqrs. Barristers-at-Law.

not be liable for unrepaired damage in addition to a subsequent total loss sustained during the time covered by the policy.

Held, that there was no merger of the partial loss in the subsequent total loss, as the partial loss continued to the prejudice of the owners notwithstanding the subsequent total loss, and that the defendants were liable.

Livie *v.* Janson (1810, 12 *East*, 648) *distinguished.*

Judgment of Bailhache, J. reversed.

Action in the Commercial List tried by Bailhache, J.

The plaintiffs, who were the owners of the steamship, the *Eastlands*, claimed from the defendants, who were underwriters, 1770*l*., under a time policy of marine insurance, in respect of the loss of that steamship.

The steamship was totally lost by submarine attack on the 25th Jan. 1918. At that date, the steamship *Eastlands* was insured against marine risks only, but including particular average, with the defendants, under a time policy dated the 16th March 1917. She was under charter to the Admiralty, having been requisitioned in May 1915, on the T.99 form of charter-party, under which the Admiralty undertook to pay for the loss, by war risks, of steamers chartered to them, the value to be ascertained as at the date of the loss.

During the currency of the time policy issued by the defendants, the steamship *Eastlands* sustained damage and losses by perils insured against. While some of this damage was still unrepaired, the steamship was totally lost by an excepted peril —namely, submarine attack, which was a war risk and was covered by the Admiralty indemnity, subject to the provision that the value of the vessel was to be ascertained as at the date of her loss.

In consequence of the damage thus sutained during the currrency of the policy, some of which damage was still unrepaired, the value of the steamship *Eastlands* had been depreciated at the date of her loss by the sum of 1770*l*., and the Admiralty paid the owners 1770*l*. less than they otherwise would have done but for the unrepaired damage. The owners now claimed that sum from the underwriters.

The defendants pleaded (*inter alia*) that the policy provided that in no case should underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the time covered by the policy, and, further, that they were not liable to pay for damage to the steamship, if, before repair, the damage was followed by a total loss during the currency of the same policy.

The policy incorporated the Institute time clauses, one of which was follows: "In no case shall the underwriters be liable for unrepaired damage in adddition to a subsequent total loss sustained during the time covered by this policy."

Bailhache, J. gave judgment for the defendants.

The plaintiffs appealed.

R. A. Wright, K.C. and *W. A. Jowitt* for the appellants.

MacKinnon, K.C. and *Claughton Scott* for the respondents.

The following authorities were referred to in the course of the arguments:

Livie v. *Janson*, 1810, 12 East, 648;
Lidgett v. *Secretan*, 24 L. T. Rep. 942; 1 Asp. Mar. Law. Cas. 95; L. Rep. 6 C. P. 616;
Knight v. *Faith*, 1850, 4 Jur. 1114; 15 Q. B. 649;
Stewart v. *Steele*, 1842, 5 Sc. N. R. 927;
Pitman v. *Universal Marine Insurance*, 46 L. T. Rep. 863; 4 Asp. Mar. Law Cas. 544; 9 Q. B. Div. 192;
Stewart v. *Merchants' Marine Insurance Company*, 53 L. T. Rep. 892; 5 Asp. Mar. Law Cas. 506;
The Dora Forster, 49 W. Rep. 271; (1900) P. 241;
Arnould on Marine Insurance, s. 1032, 9th edit, 1914, vol. 2, 1298;
Halsbury, Laws of England, s. 929 (vol. xvii.), 469;
Woodside v. *Globe Marine Insurance Company*, 73 L. T. Rep. 626; 8 Asp. Mar. Law Cas. 118; (1896) 1 Q. B. 105.

Cur. adv. vult.

Dec. 5, 1919. — The following judgments were read:—

Bankes, L.J.—The appellants' vessel, the *Eastlands*, was insured under a time policy for a year underwritten by the respondents against the usual marine perils, including particular average, but excluding war risks. During the currency of the policy the vessel sustained damage by the perils insured against. The vessel was taken to Cardiff and dry-docked, and some of the necessary repairs were done. The cost of these repairs was 928*l*. 14*s*. 8*d*. The estimated cost of the necessary repairs, the doing of which was postponed, was 1770*l*. Shortly after the vessel left Cardiff, and during the currency of the policy, she was torpedoed and became a total loss. At the time she was lost she was under charter to the Government upon terms which entitled the owners to be paid by the Government the value of the vessel at the time of the loss. The Government claimed that the value of the vessel at that time had been depreciated by her want of repair to the extent of the estimated cost of the necessary repairs, and they accordingly deducted the sum of 1770*l*. from the amount they would otherwise have paid the appellants. The appellants claimed that they were entitled to be paid by the respondents the two sums of 1770*l*. and 928*l*. 14*s*. 8*d*. The respondents paid the latter, but refused to pay the former. Hence the present action, the respondents contending that, the vessel having become a total loss during the currency of the policy, the appellants were not entitled to recover anything in respect of partial unrepaired damage. Bailhache, J. has accepted this contention. After a review of the authorities, he states that, in his opinion, the law stands thus: "Whether an underwriter is or is not liable for unrepaired damage cannot be ascertained until the expiration of the policy. If before the expiration of the policy there is a total loss, he is not liable to pay for the earlier unrepaired damage sustained during the currency of the same policy, and it makes no difference whether the total loss falls upon him, or is due to an excepted peril against which the owner is insured or uninsured." The appellants challenge the accuracy of both branches of the learned judge's conclusion.

I have no doubt as to the correctness of the learned judge's view as to the time at which the liability of the underwriter is to be ascertained, though I should prefer to substitute "termination of the risk" for the expression "expiration of the policy."

It seems to me that there may be cases, of which the present is one, in which the latter expression would fail to do justice to the assured's position.

In the present case it was contended that the assured had a vested cause of action in respect of the particular average loss, either at the termination of the voyage which the *Eastlands* completed after leaving Cardiff dry-dock, or alternatively at the time when she entered the dry-dock for the purpose of being repaired. The case of *Stewart* v. *Merchants' Marine Insurance Company* (*sup.*) was cited in support of this contention. The language of Lord Esher, M.R. in that case must be read with reference to the facts he was dealing with, and in my opinion do not support the appellants' contention. In the case of *Stewart* v. *Steele* (*sup.*) a claim was made against underwriters for the cost of unrepaired damage to a ship which was subsequently sold to be broken up. Maule, J., when dealing with the contention that the plaintiffs in that case had a vested right of action at the moment of the happening of the loss which nothing could afterwards divest, points out that the principle had already been established that the proper time to estimate the loss where the party is put to no expense is at the expiration of the risk. To the same effect is the judgment of Lindley, J. in *Pitman* v. *Universal Marine Insurance Company* (*sup.*), where he says: "Against what do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained." The reason for this rule no doubt is, that according to accepted practice, now embodied in sect. 16 of the Marine Insurance Act 1906, the insurable value of a ship is the value at the commencement of the risk. Hence, if in an open policy the assured in case of a total loss receives the full value of his vessel at the commencement of the risk, he cannot claim to have been damnified by the fact that during the currency of the policy the vessel had suffered damage, which had not been repaired, and in consequence of which therefore he had been put to no expense. In the case of a valued policy where the assured receives all that he bargained for, the case is even clearer. The law where a claim arises as between the same parties and on the same policy is now embodied in sect. 77, sub-sect. 2, of the Marine Insurance Act 1906. In the present case the claims of the appellants are not under the same policy, or against the same parties. Their claim in respect of the total loss was against the Government, their claim in respect of the partial loss is against the respondents as underwriters of the policy covering marine risks. Bailhache, J. is of opinion that this fact makes no difference, and he comes to that conclusion by an examination of the authorities. I am unable to agree with this part of the judgment of the learned judge. It does not appear to me that the cases which were cited to the learned judge, and to which he refers, cover the particular point which has to be decided in this case. It must, I think, be decided upon principle and with the help to be derived from the reasoning of the learned judges to whose judgments we have been referred.

Livie v. *Janson* (12 East, 648) is the case mainly relied upon by the respondents both in this court and in the court below. The facts in that case were that the vessel was insured from New York to London warranted free from American condemnation. She sailed from New York, and was shortly afterwards driven ashore by perils insured against and sustained serious partial damage. She was while in that condition seized and condemned by the American Government. The assured apparently claimed against the underwriters both for the total loss, and for the previous partial loss. In his judgment Lord Ellenborough, C.J. appears to me to deal with the case from two separate points of view: first, whether the total loss of the vessel could in any sense be attributed to the causes which brought about the previous partial loss, and for this purpose he discusses the question of *causa proxima*; secondly, whether under the circumstances the assured suffered any pecuniary loss by reason of the damage to the vessel in respect of which any claim for indemnity could arise. The decision of the case proceeded apparently entirely upon the view of the facts taken by the learned judge. The only rule of law which he lays down is certainly not opposed to the present contention of the appellants. It is in these words (10 East, at p. 654): "Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against." The learned judge expressly confines the rule to a case where the previous deterioration becomes ultimately a matter of perfect indifference to the interest of the assured. In *Pitman's* case (*sup.*) Cotton, L.J. lays down the law thus: "Where in the case of a partial loss the owner has not repaired the vessel, he is entitled to have made good to him the depreciation at the end of the risk in the value of his vessel, so far as this is caused by the peril insured against." If, therefore, the appellants had during the currency of the policy sold their vessel for a sum representing its value if repaired less 1770*l.* the cost of completing the repairs, it would seem clear that they would have been entitled to recover the 1770*l.* from the underwriters. If so, is there either principle or authority which compels this court to say that though the 1770*l.* would be recoverable in the one case, it is not recoverable in the other, the loss to the assured being the same in both cases? I think not. As I have already pointed out, Lord Ellenborough, C.J. in his statement of the rule in *Livie* v. *Janson* (*sup.*) impliedly recognises the possibility of cases occurring in which the assured might be able to show that the previous deterioration of which the learned judge speaks might be of serious concern to him. In *Knight* v. *Faith* (15 Q. B., at p. 668) Lord Campbell, C.J. commenting upon the argument in that case based on *Livie* v. *Janson* (*sup.*) says this: "The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired; and, if a total loss occurs from which they are exempt, they are not liable for any prior

partial loss which in that event does not prove prejudicial to the assured." In *Lidgett* v. *Secretan* (*sup.*) Willes, J. more than once points out what, in his opinion, was the reason for applying what he speaks of as the doctrine of merger, which is now incorporated in the rule as contained in sect. 77, sub-sect. 2, of the Marine Insurance Act 1906. He says: "The doctrine of merger cannot apply to such a case as this. The reason for applying it where the partial loss and the total loss occur during the continuance of the same risk is obvious; the parties never intended that the insurers should be liable for more than a total loss in any event"; and again: "The authorities, when looked at, will be found to amount to this: A partial loss is not paid for if there is a total loss of the vessel during the period covered by the policy; because, when the underwriter pays the total loss, he actually discharges all partial losses occurring during the voyage, except such as fall within the suing and labouring clause, which are apart from the sum insured. He never stipulated to pay more than the total loss; and, if he were to pay a partial loss, and also the whole value of the vessel, he would be paying more than he undertook to indemnify the assured against." The case with which we are now dealing is an exceptional one, in that under the Government contract the value of the vessel at the time she was lost is what the assured recovers. Under these circumstances the reasoning which underlies the so-called doctrine of merger does not appear to me to apply as the respondents are not liable for the total loss, and the appellants have suffered loss through the depreciation in the value of their vessel by the partial unrepaired damage. I think that they are entitled under these circumstances to be indemnified against that loss. Mr. MacKinnon suggested that the appellants had suffered no loss because they in fact received from the Government a larger sum than the amount of the valuation inserted in the policy underwritten by the respondents. This argument cannot succeed. The question is not what the appellants would have received under the latter policy had the vessel been totally lost owing to a marine peril, but what have the appellants in fact lost under the contract with the Government by reason of the fact that the vessel had sustained the partial damage which had not been repaired. It is not necessary in the present case to express any opinion upon the construction put upon the judgment of Lord Ellenborough, C.J. in *Livie* v. *Janson* (*sup.*) by Willes, J. in *Lidgett* v. *Secretan* (*sup.*), where he deals with the case of the uninsured owner in respect of the total loss who claims against his insurer for partial unrepaired loss. In my opinion, the appeal succeeds, and the judgment must be set aside and judgment entered for the appellants for the amount claimed with costs here and below.

Warrington, L.J.—The action in this case was upon a policy of marine insurance effected with the defendants by the plaintiffs on their steamship *Eastlands*, the plaintiffs claiming to be paid the estimated amount of an unrepaired partial loss arising from a marine peril. The loss is admitted and there is no dispute as to amount, but the defendants deny their liability on the ground that the ship, having become a total loss before the expiration of the risk from a cause not covered by the policy, that is, a war peril, they cannot be called upon to make good an unrepaired partial loss. Bailhache, J. has adopted this view and given judgment for the defendants relying on the authority of *Livie* v. *Janson* (*sup.*), a decision of the Court of King's Bench. The plaintiffs appeal.

The Marine Insurance Act 1906 contains no express enactment covering the case, sect. 77, sub-sect. 2, being confined to an unrepaired partial loss followed by a total loss under the same policy, but it does contain a provision, sect. 91, sub-sect. 2, that 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, shall continue to apply to contracts of marine insurance.

The real question is, what is the scope of the rule laid down in *Livie* v. *Janson* (*sup.*), and does it, when properly understood and applied to the facts of this case, relieve the underwriters from their *primâ facie* liability under the policy? The material facts are not in dispute and may be shortly stated. The policy is a time policy for a period commencing on the 20th Feb. 1917 and ending on the 20th Feb. 1918. The usual Institute time clauses, including the free from capture and seizure clause, are part of the policy. One of these is as follows: "In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy." This clause only applies if the total loss there referred to is one for which the underwriters are liable. The ship was under charter to the Admiralty. On the 29th Oct. 1917 she grounded while entering Dunkirk and sustained the damage in question. On the 5th Nov. she started on another voyage without being repaired and on the 15th Dec. she arrived at Cardiff where she went into dry dock. The necessary repairs were estimated at 2698*l.* of which repairs costing 928*l.* were effected, leaving damage unrepaired estimated at 1770*l.* On the 25th Jan. 1918 she became a total loss as the result of a war peril. By the charter-party the Admiralty undertook the risks of war, such risks being so undertaken on the ascertained value of the steamer if she be totally lost at the time of such loss. The value of the ship was duly ascertained and paid by the Admiralty, but they deducted from her value as a sound ship the 1770*l.* above mentioned, being the amount of the damage remaining unrepaired at the time of her loss. But for this damage the plaintiffs would have received her full value as a sound ship, and it is the 1770*l.* so lost that they seek to recover from the defendants. I ought to mention that for the purpose of the policy the ship was valued at 62,000*l.*, being some 20,000*l.* less than the ascertained value under the charter-party.

I now turn to the authorities in order to answer the question which, as I have said, is, I think, the real question to be determined. *Livie* v. *Janson* (*sup.*) was decided in 1810. In that case a ship was insured by a voyage policy warranted free from American condemnation. In the course of the voyage she ran ashore, sustaining partial damage, but next day was seized by the American authorities and was finally condemned, thus becoming a total loss. The owners sued the underwriters in respect of the partial loss. The judgment of the Court of King's Bench was for the defendants and was delivered by Lord Ellenborough, C.J. In giving judgment Lord Ellenborough began by pointing out that the plaintiffs could not recover for the total loss, for though the marine peril—stranding—

facilitated her subsequent capture and condemnation it was not the *causa proxima* of the total loss, and the plaintiffs could therefore recover, if at all, only for the deterioration of the ship and goods by reason of the sea damage. He then proceeded as follows (12 East, at p. 654): "Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters." He then gives a reason for the rule founded on the nature of insurance as a contract of indemnity and lays stress on the fact that in the case before the court the persons who were prejudiced by the deterioration were the American Government who had seized the ship and cargo and not the assured, and he adds (12 East, at p. 655): "There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." On this I think it is clear that the words, "And the previous deterioration becomes ultimately a matter of perfect indifference" to the interests of the assured, are an essential part of the rule and the underwriters cannot obtain the benefit of it without establishing the fact so expressed. Do the subsequent authorities in any way modify or affect this position? In *Knight* v. *Faith* (*sup.*) a ship was insured under a time policy expiring on the 23rd Sept. Before the expiration of the risk she sustained partial damage from perils of the seas, and after the expiration of the risk she was sold by the master under circumstances which the assured alleged amounted to a total loss under the policy. This point was decided against the assured, but it was further held that the ultimate loss of the ship did not prevent the assured recovering for the partial loss, for the partial loss continued to his actual prejudice and was not merged in any total loss for which the insurer was liable. The greater part of the judgment is devoted to the question whether the assured could recover as for a total loss. On the other point Lord Campbell, C.J., delivering the judgment of the court, says (15 Q. B., at p. 668): "The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired; and, if a total loss occurs from which they are exempt, they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured." He then refers to *Livie* v. *Janson* (*sup.*), mentioning in particular the fact that the assured in the event which happened were not in any degree prejudiced by the partial loss, and points out that in the case then before the court the grounding of the ship had continued a prejudice to them ever since. It seems to me that in Lord Campbell's view, as in Lord Ellenborough's, it is only a partial loss which in the event does not prove prejudicial to the assured in respect of which he cannot recover.

The next case is *Lidgett* v. *Secretan* (*sup.*). There were there two voyage policies. Before the expiration of the risk under the first policy the ship sustained partial damage from a peril insured against, which remained unrepaired at the expiration of the risk. During the currency of the risk under the second policy, she became a total loss. It was held that the assured were entitled to recover under the first policy for the partial damage and under the second for the total loss. This case, of course, differs from *Livie* v. *Janson* (*sup.*) in that the total loss occurred after the expiration of the risk covered by the policy under which the claim in respect of partial damages was made. It is this fact on which stress is laid by the judgment of Willes, J., and the question of continuing prejudice by reason of the partial loss did not arise and was not in fact considered. I have carefully read the material part of the judgment of Willes, J., and I can find nothing in it which indicates that in his view the decision in *Livie* v. *Janson* (*sup.*) would have been the same if in fact the assured had suffered from the partial damage or loss continuing after and in spite of the subsequent total loss.

In *Pitman* v. *Universal Marine Insurance Company* (*sup.*) the question arose as to the mode of ascertaining the sum payable by the underwriters in respect of unrepaired damage where the ship in her damaged condition was sold during the continuance of the risk. The only question was as to the amount payable by the underwriters, their liability being admitted. It is true that Lindley, J. in his judgment says: "If in such a case" (that is, in which a ship has been injured as the consequence of a peril insured against and is not repaired) "the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all." But this is a dictum only and, for the purpose of the case the learned judge was considering, the continuance after a total loss of the prejudicial effect of a partial loss was not material. None of the other cases seem to me really to bear on the point and certainly do not in any way conflict with the view that the fact that the deterioration as the result of partial damage ultimately becomes a matter of indifference to the assured is essential to a defence of the underwriters founded on the decision in *Livie* v. *Janson* (*sup.*).

In the present case the plaintiffs have proved that the deterioration of the ship as the result of the unrepaired partial damage was a continuing prejudice to them notwithstanding the subsequent total loss. This partial damage arose from a peril insured against, and, in my opinion, the defence to the plaintiffs' claim has not been sustained. It has been contended that the continuing prejudice results from the form of the contract under which war risks were covered and not from the peril insured against. The damage arises from the peril insured against, and, in my opinion, it is immaterial to what circumstances the continuance of the resulting loss is due; if it in fact continues, this is enough to exclude the application of the rule in *Livie* v. *Janson* (*sup.*). I also think the fact that the ship was valued for the purposes of the policy at a sum less than the net sum paid as compensation for her loss is irrelevant.

On the whole I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs for the 1770*l.*

Scrutton, L.J.—This appeal from Bailhache, J. raises a difficult question of marine insurance. Shortly, the facts are that a ship insured by a time policy against perils of the sea suffered a particular average loss, part of which was repaired, and part, of the value of 1770*l.*, left unrepaired, when on a subsequent voyage covered by the same policy the

ship was totally lost by war perils. At the time she was under a Government charter, by the terms of which the Government paid in case of her loss by war risks her value at the time of the loss. They consequently deducted from her sound value 1770*l.* for the unrepaired damage. The assured then claimed on the underwriters for the repaired and unrepaired damage by perils of the sea. The underwriters paid the repaired damage, but declined to pay the unrepaired damage, on the ground that it was merged in the total loss, for which they were not liable. The judge has held the view of the underwriters correct, and the assured appealed.

The only assistance that the Marine Insurance Act 1906 gives is contained in sect. 77, sub-sect. 2, of that Act: "Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss." The reason for this is fairly clear. The assured under an open or a valued policy in the case of a total loss recovers the sound value of the ship at the commencement of the risk (Marine Insurance Act 1906, ss. 16 and 68); though there has been subsequent particular average damage before the total loss (*Shawe* v. *Felton*, 1801, 2 East, 109); or, in a valued policy, though she was not sound at the beginning of the risk, if there was no fraud in the valuation (*Barker* v. *Janson*, 17 L. T. Rep. 473; L. Rep. 3 C. P. 303). If the assured recovers the whole value of the ship, to give him a partial loss in addition, which has caused him no damage would give him more than an indemnity. If he has spent or become liable for money on repairs, this is an additional expense or loss to him caused by perils insured against, and he can recover this cost of repairs; not, however, if the repairs, though done, were done on bottomry, and the owner was only liable if the ship arrived safely, an event which did not happen: (*The Dora Foster*, *sup.*, per Barnes, J.). So far the principle of indemnity, neither more nor less, is followed, which Bowen, J. in *Castellain* v. *Preston* (49 L. T. Rep. 29; 11 Q.B. Div. 380) said is a broad principle to be resorted to with confidence in any difficult question of insurance. The statute is limited to cases "under the same policy." The policy itself contains the clause: "In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy." This only relates to total losses under the policy, and is inserted because of a preceding condition splitting the time policy into voyages, for the purposes of the 3 per cent. memorandum. The statute, however, by sect. 91, sub-sect. 2, continues the rules of common law so far as they are not inconsistent with the express provisions of the Act, and the judge below has arrived at his conclusion on the common law authorities.

Take next a case where a partial unrepaired loss under one policy is followed by a total loss not covered by the first policy, but covered under another policy concurrent in time. There it has been decided by Mathew, J. that the assured can recover under the second policy the full insured value of the ship at the commencement of the risk. In *Woodside* v. *Globe Marine Insurance Company* (*sup.*), a ship insured by one policy against perils of the sea, and by another valued policy against fire, first suffered a heavy partial unrepaired loss by perils of the sea and then was consumed by fire. The assured recovered her full undamaged value on the fire policy, and consequently suffered no loss. Difficult questions, however, might arise if the assured sued first on the marine policy, and still more difficult questions if either underwriter who had paid a loss claimed to be subrogated to the rights of the assured against the other underwriter, on which I prefer to express no opinion, except that they should be worked out if possible on the broad principle of indemnity.

Come next to the case where the assured suffers a partial unrepaired loss by perils of the sea against which he is insured, and then loses his ship by perils not covered by his policy. This case arose in *Livie* v. *Janson* (*sup.*) before Lord Ellenborough and the Court of Common Pleas in 1810. A ship insured against perils of the seas "warranted free from American condemnation," in attempting to leave New York at night to avoid American embargo was driven ashore by ice and suffered damage. While ashore she was seized by the American Customs and condemned for breach of the embargo. The assured claimed on his policy, (1) for a total, (2) a partial loss. As to the total loss Lord Ellenborough held that the proximate cause was the condemnation, not the stranding. This part of the case has been doubted by Willes, J. in *Ionides* v. *Universal Marine Insurance Company* (8 L. T. Rep. 705; 14 C. B. N. S. 259) by the Court of Common Pleas in *Hahn* v. *Corbett*, (1824, 2 Bing, at pp. 205, 211, and 212), and by Mr. Phillips in his standard work on Marine Insurance, ss. 1136 and 1743. It has, however, no bearing on the present case which is concerned with the claim for a partial loss. As to this, and the claim for total loss, Lord Ellenborough, in reserving judgment, said (12 East, at p. 652) it was "useless to be seeking about for odds and ends of previous partial losses which might have happened to a ship in the course of her voyage, when at last there was one overwhelming cause of loss which swallowed up the whole subject-matter." This appears rather to look at the state of the ship than at the pecuniary result to the owner, or any claim he might have for indemnity under the contract. In giving the reserved judgment, the Court laid it down as a rule (12 East, at p. 654) that "Where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately matter of perfect indifference to his interests, he cannot make it the ground of a claim on the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against." I gather that, in a case where the Court thought the previous deterioration did affect the assured's interests, they would allow him to recover. Indeed, the Court say later (12 East, at p. 655), "There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." Such a case would apparently arise if the assured were insured against total loss by a policy which only gave him the value at the time of loss, in which case the previous deterioration would affect his interests. I have, however, personally great difficulty in seeing how the previous deterioration in *Livie* v. *Janson* (*sup.*) did not affect the insured's interests. He had, when it happened, a damage to the ship, which would be made good at the expiration of the policy, by a claim on the marine underwriter,

and he had a damaged ship, the two together giving him a full indemnity. He lost the damaged ship, without having a claim against anyone for that loss, and he is said also and therefore to have lost his remedy for the previous damage, although it would seem that the loss of the ship as damaged, for which he was his own insurer, had nothing to do with the remedy and indemnity for the previous damage for which he was insured. This seems to infer from the fact that an owner is, to use the common phrase, "his own insurer," that he must be taken to have recovered the full sum he would have recovered if insured. But he does not recover that sum. Willes, J. has given an explanation of the position in *Lidgett* v. *Secretan* (*sup.*), which, with the most sincere respect for that very great judge, I am also unable to understand. He says: "In such a case, the assured puts himself in the same position that the underwriter would have been in if he had insured against a total loss generally; and therefore, when such loss arises, the underwriter must be considered by the terms of the contract to be in the same position as if he had so insured and had paid for a total loss, and consequently the claim for a partial loss falls to the ground." Why because the assured is uninsured against a total loss from specified causes the underwriter against loss from other causes is to be treated as if he had insured against losses against which he did not insure I fail to perceive. If "underwriter" is a slip for "owner his own insurer" the comment above applies.

Livie v. *Janson* (*sup.*) was held in *Lidgett* v. *Secretan* (*sup.*) not to apply where the total loss was under a subsequent policy to that under which the partial loss fell, because the loss was to be estimated at the end of the policy. It was also held not to apply in *Knight* v. *Faith* (*sup.*), where a sale without notice of abandonment, therefore not a total loss, took place after the expiration of the policy. In that case, however, Lord Campbell said (15 Q. B., at p. 668): "If a total loss occurs from which they"—the underwriters—"are exempt they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured," repeating the language in *Livie* v. *Janson* (*sup.*), but treating the damage in that particular case as a continuing prejudice because it lessened the selling value of the ship on sale.

I doubt myself whether *Livie* v. *Janson* (*sup.*), so far as it deals with an uninsured owner whose ship is totally lost, and who has no means of recouping himself that loss, is rightly decided. He seems to me to be prejudicially affected by the previous partial damage to the ship. But *Livie* v. *Janson* (*sup.*) has been cited without disapproval in several cases during its long life, though never, as far as I can find, when it was directly in point on the facts of the case, and I should be reluctant definitely to overrule it, unless it was necessary. The court in *Livie* v. *Janson* (*sup.*) clearly contemplates cases where the existence of previous damage may affect the interests of the assured. Such cases appear to arise where owing to the previous damage the assured has a smaller claim for the total loss than he would otherwise have, as for instance where his policy covering total loss only covers the value of the ship at the time of the loss and, therefore, reduces, her sound value by the previous damage; or where, as in this case, he can recover from his charterer only the value of the ship at the time of the loss, and the charterer therefore deducts the unrepaired damage from the sound value. A similar case would be where the damaged ship is sold during the currency of the policy for a smaller sum because of its damaged condition. As I have said, it is not necessary to decide whether an owner who has no remedy at all for the total loss is deprived of his claim for previous partial damage, though it seems odd that he should recover, if his claim over is affected and reduced by previous damage, and not recover if he has no claim over it at all, in which case he certainly is not indemnified for previous damage.

For these reasons, I am unable to agree with the judgment of Bailhache, J., and think the appeal should be allowed and judgment entered for the plaintiffs for the amount claimed with costs here and below.

Appeal allowed.

Solicitors for the appellants, *Downing, Handcock, Middleton*, and *Lewis* for *Bolam, Middleton*, and *Co.*, West Hartlepool.

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

Dec. 8 *and* 9, 1919.

(Before BANKES, WARRINGTON, and SCRUTTON, L.JJ.)

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY LIMITED *v.* THE KING. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice — Petition of right — Fiat — Arbitration — Staying proceedings — Step by the Crown in the proceedings — Petition of Right Act 1860 (23 *&* 24 *Vict. c.* 34), *ss.* 2, 3, 4, 7 — *Arbitration Act* 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 4, 23.

(1) *It is competent in a proper case to stay, under sect.* 4 *of the Arbitration Act* 1889, *proceedings in a petition of right which contains a written agreement to submit differences to arbitration.*

(2) *The granting of a fiat is not a step by the Crown in the proceedings within the meaning of the section.*

(3) *In the circumstances of this particular case there had been no written agreement to submit differences to arbitration.*

So held by Bankes and Warrington, L.JJ.

Held, further, by the whole court, that, as the subject-matter of the dispute involved an important constitutional question, the proceedings in the petition ought not to be stayed.

Decision of Bailhache, J. affirmed.

APPEAL by the Crown from an order of Bailhache, J. in chambers, who affirmed an order of a master refusing to refer to arbitration a petition of right.

By Royal Proclamation of the 3rd Aug. 1914, His Majesty authorised and empowered the Lords Commissioners of the Admiralty by warrant under the hand of their secretary or under the hand of any flag officer of the Royal Navy holding any appointment under the Admiralty to do the acts following—namely, "to requisition and take up for our service any British ship or British vessel as defined by 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,

(*a*) Reported by W. C. SANDFORD, Esq., Barrister-at-Law.

and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned, 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 to be constituted and appointed by us for this purpose."

The respondents, the Anglo - Newfoundland Development Company Limited, were the owners of two steamships, the *Cranley* and the *Alconda*.

By letters dated respectively the 22nd Jan. and April 1917 the Lords Commissioners of the Admiralty requisitioned the *Cranley* and the *Alconda*. The letter of the 22nd Jan. 1917 was as follows: "I am commanded by my Lords Commissioners of the Admiralty to acquaint you that it has been found necessary to requisition the *Cranley* under Royal Proclamation of the 3rd Aug. 1914 for use on urgent Government service under the conditions of the *pro forma* charter-party T. 99 inclosed. . . . Rates of hire have been fixed for requisitioned ships on the basis of the reports of the Admiralty Transport Arbitration Committees subject, in the case of certain classes of vessels, to subsequent modifications (*vide* form T. 11541 attached). These rates have been generally accepted by shipowners, and payments on account on this basis will be made to you as soon as possible on receipt of a claim therefor. . . ." The letter of April 1917 requisitioning the *Alconda* was to the like effect.

Charter-party T. 99, which contained forty-two clauses, purported to be made between the owners of the requisitioned steamship and the Director of Transports for and on behalf of the Lords Commissioners of the Admiralty. By clause 2 the owners agreed to let and the Admiralty agreed to hire the steamship for a term of calendar months certain from the day she was placed at the disposal of the Admiralty at in such dock or at such wharf or place immediately available as the Admiralty might direct, she being then ready to receive cargo and tight, staunch and strong. By clause 4 hire was to commence on and from the day of delivery to the Admiralty. By clause 5 the Admiralty agreed to pay for the use and hire of the steamer at the rate of per calendar month commencing when she should be placed at Admiralty disposal as provided in clause 4.

Clause 31. Any dispute arising under the charter shall be referred under the provisions of the Arbitration Act 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law.

Form No. T. 11541, mentioned in the letter of the 22nd Jan. 1917, was a form of agreement which, as stated by the report of the Admiralty Transport Arbitration Board (Addendum No. 4), had been arrived at between a representative committee of owners and the Director of Transports at a meeting on the 1st March 1915. It specified certain scales of rates per ton gross register per month for requisitioned ships of the class to which the *Cranley* and the *Alconda* belonged. The report also stated that by agreement the owners should be indemnified against any extraordinary expenses connected with the charter to the Government and also against third party commitments, such expenses and indemnification to be outside the rate of hire.

The respondents were not satisfied with the payments made to them by the Government on account of hire and expenses. On the 6th June 1919 they prepared a petition of right claiming as extraordinary expenses and third party commitments certain payments amounting to 11,056*l*. made by them for insuring the vessels in obedience, as they said, to the direction of the Government, and also asserting that, by terms arranged by the Admiralty Transport Arbitration Board, the basis of payment for requisitioned ships was to include a rate of hire sufficient to yield a fair shipping trade profit after allowing for running and establishment expenses and depreciation of ship and engines. Further, under par. 10 of the petition of right, they claimed a reasonable rate of remuneration which, they asserted, would be one covering all the expenses they had incurred, an allowance for depreciation and classification, and a fair shipping trade profit. The petition was intituled in the King's Bench Division and the venue was laid in Middlesex, as directed and authorised by sect. 1 of the Petition of Right Act 1860. It was then left with the Secretary of State for the Home Department in order to be submitted to His Majesty for his fiat that right be done, as directed by sect. 2 of the Act. The fiat was granted by the Attorney-General. A copy of the petition and fiat were then left at the office of the Solicitor to the Treasury indorsed, as directed by sect. 3 of the Act, with the words: "The suppliants pray for a plea or answer on behalf of His Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed." According to the practice pursued under sect. 3, the Solicitor to the Treasury transmitted the petition and fiat to the Writ Department of the Central Office of the Royal Courts of Justice together with a copy for service, and the petition and fiat were filed in the Writ Department.

A summons was taken out on behalf of the Crown to stay proceedings in the petition of right under sect. 4 of the Arbitration Act 1889. The affidavit stated:

3. The said ships were requisitioned by letters from the Admiralty to the suppliants dated the 22nd Jan. 1917 in the case of the *Cranleu* and April 1917 in the case of the *Alconda*, and I believe the said letter of April 1917 was accompanied by a letter of the 6th April 1917. . . 4. The agreements relied upon in the petition are the agreements contained in the said letters and in the Report of the Admiralty Transport Arbitration Committee. . . . 5. The said agreements constitute or contain respectively agreements to submit differences to the arbitration of the Board of Arbitration to be appointed under His Majesty's Proclamation of the 3rd Aug. 1914. . .

The Petition of Right Act 1860 (23 & 24 Vict. c. 34):

Sect. 1. A petition of right may, if the suppliant think fit, be intituted in any one of the superior courts of common law or equity at Westminster in which the subject-matter of such petition or any material part therof would have been cognisable if the same had been a matter in dispute between subject and subject, and if intituled in a court of common law shall state in the margin the venue for the trial of such

petition; and such petition shall be addressed to Her Majesty in the form or to the effect in the schedule to this Act annexed (No. 1). . . .

Sect. 2. The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

Sect. 3. Upon Her Majesty's fiat being obtained to such petition a copy of such petition and fiat shall be left at the office of the Solicitor to the Treasury, with an indorsement thereon in the form or to the effect in the schedule (No. 2) to this Act annexed, praying for a plea or answer on behalf of Her Majesty within twenty-eight days, and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate, and the same shall be prosecuted in the court in which the same shall be intituled, or in such other court as the Lord Chancellor may direct.

Sect. 4. The time for answering, pleading, or demurring to such petition, on behalf of Her Majesty, shall be the said period of twenty-eight days after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the Solicitor to the Treasury, or such further time as shall be allowed by the court or a judge; provided always, that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the court in which such petition shall be prosecuted, or the venue for the trial of the same.

Sect. 7. So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right. . . .

The Arbitration Act 1889 (52 & 53 Vict. c. 49), s. 4, provides:

If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Sect. 23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

The master refused to stay the proceedings, and his decision was affirmed by Bailhache, J.

The Crown appealed.

Sir *Gordon Hewart* (A.-G.), *MacKinnon*, K.C., and *Ricketts* for the Crown.

R. A. Wright, K.C. and *Claughton Scott* for the respondents.

In addition to the cases mentioned in the judgments, *Lobitos Oilfields Limited* v. *Lords Commissioners of the Admiralty* (117 L. T. Rep. 28; 33 Times L. Rep. 472; (1917) W. N. 227), and *Ives* v. *Willans* (70 L. T. Rep. 674; (1894) 2 Ch. 478) were cited.

Bankes, L.J.—The respondents are the owners of two vessels, the *Cranley* and the *Alconda*, which were requisitioned by the Government by virtue of the proclamation of the 3rd Aug. 1914. The respondents claimed that they were entitled to more than the Government was willing to pay them for the hire of the vessels, and prepared a petition of right and applied for the necessary fiat. The fiat was granted and the respondents commenced proceedings in the High Court by filing the petition. Then the advisers of the Crown applied for an order under sect. 4 of the Arbitration Act 1889 to stay all further proceedings in the petition. That application failed before both the master and the judge in chambers. The Crown appeals.

The respondents contend that the appeal should be dismissed on four grounds—first, that the Crown has taken a step in the proceedings; secondly, that when a petition of right has been filed it cannot be referred to arbitration; thirdly, that in this case there was no submission to arbitration; and, fourthly, that, if the court has a discretion, it should not exercise that discretion by referring this dispute.

The first two contentions are of general importance to the relation between the Crown and the subject. In my view, it would be a misfortune to the subject if they should prevail, because if they did the Attorney-General before issuing a fiat would have to consider not only whether there is a claim worthy to be investigated, but also whether the Crown should insist on arbitration as the means of investigating it; and so the subject could never present to a court of justice his view that his claim should be tried in court and not by arbitration.

Whether the Crown has taken a step in the proceedings depends on the Petition of Right Act 1860 and sect. 4 of the Arbitration Act 1889, by which, when legal proceedings have been commenced by one party to a submission against another, either party may after appearance and before taking any step in the proceedings apply to the court for a stay. The question is whether the Crown by issuing the fiat has taken a step in the proceedings in the court. In my view it has not. The fiat is a matter preliminary to the legal proceedings. The Petition of Right Act 1860 prescribes the steps to be taken by a suppliant. [The Lord Justice read sects. 1, 2, and 3 of the Petition of Right Act.] The practice is laid down thus in the Yearly Practice (1920, p. 802) under the heading "Steps before filing": "The petition must be left with the Secretary of State for the Home

Department for the purpose of being submitted to the Sovereign for the indorsement of his fiat 'Let right be done.' . . . A copy bearing such fiat must be taken to the Writ Department of the Central Office, together with a copy or copies for service. A number is given, and if in the Chancery Division, a judge is assigned, and the copy bearing the fiat filed in the department." In my opinion, it cannot be said that a legal proceeding has been commenced in the court until the steps indicated by the statute and the practice in accordance therewith consequent on the granting of the fiat have been taken and pursued.

The second point, which is also of general importance, is this: that when a proceeding has been commenced in the court there is no power to remove it from that court in which it has been instituted and refer it to arbitration. It is necessary to examine sects. 3, 4, and 7 of the Act. Sect. 3 has been already referred to; the latter part of it is important; after the petition and fiat have been left with the Solicitor to the Treasury and have been by him transmitted to the proper department "the same shall be prosecuted in the court in which the same shall be intituled, or in such other court as the Lord Chancellor may direct." To sect. 4, which prescribes the time for answering, pleading, or demurring, there is a proviso: "Provided always that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General, or of the suppliant, to change the court in which such petition shall be prosecuted, or the venue for the trial of the same." The argument for the Crown is that these two sections are imperative and that, unless the Lord Chancellor otherwise orders, the petition must be prosecuted in the court in which it is intituled and the venue must be that stated in the margin of the petition. On the other hand, it is urged that these provisions are subject to the general provisions of sect. 7. [The Lord Justice read sect. 7.] I see nothing in the Arbitration Act 1889, either in sect. 4 of that Act or elsewhere, inconsistent with the provisions of sects. 3 and 4 of the Petition of Right Act 1860. It may be that an application to transfer the petition of right from one court to another court, or to change the venue, must be made to the Lord Chancellor. The present application is of another kind. It is an application to apply sect. 4 of the Arbitration Act 1889 to this petition of right. Its object is not to change either the court or the venue; it is to invoke the jurisdiction conferred by the Arbitration Act 1889 upon the court to order, in certain cases and circumstances, that the parties, having agreed to refer a matter to arbitration, shall proceed to arbitration as the proper means of determining the matter in dispute, and that as a consequence the proceedings in the court shall be stayed. On this point also the argument for the respondents fails.

The remaining points affect this particular case. As to the third, the respondents contend that there was here no submission to arbitration. It is a condition precedent to any application under sect. 4 of the Arbitration Act 1889 that there should be a submission to arbitration by both parties to the dispute. A submission is defined by sect. 27 of the Arbitration Act in these terms: "Unless the contrary intention appears, 'submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." It is not necessary that both parties should have signed the written agreement; if a person has accepted a written agreement and acted upon it he is bound by it for this purpose, although he may not have set his hand to the document: (*Baker* v. *Yorkshire Fire and Life Assurance Company*, 66 L. T. Rep. 161; (1892) 1 Q. B. 144). The law is clearly and accurately stated by Astbury, J., who reviewed all the authorities, in *Hickman* v. *Kent or Romney Marsh Sheep Breeders' Association* (113 L. T. Rep. 159; (1915) 1 Ch. 902): "The result of these decisions is, I think, that if the submission is in writing and is binding on both parties as their agreement or as the equivalent in law to an agreement between them the statute is satisfied." It is said that in the documents which the Crown present to the court there is an agreement binding on both parties as their agreement in reference to the requisition of these steamers and the hire to be paid for them. In my opinion no such agreement can be made out. The documents leave the requirements of the Government in such doubt that no court could take them as constituting a clear agreement with a submission to arbitration. The proclamation of the 3rd Aug. 1914 gave the Admiralty authority to requisition British ships on condition that the owners should receive payment for their use and for services rendered during their employment "and compensation for loss or damage thereby occasioned, 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 to be constituted and appointed by us for this purpose." The Board of Arbitration was constituted. It is suggested that the owners, the respondents, have agreed to submit this particular dispute to the Board of Arbitration. Of the letters referred to in the affidavit of the Solicitor to the Treasury there are three substantially in the same form. The first is dated the 22nd Jan. 1917, and signed on behalf of the Lords Commissioners of the Admiralty. It runs thus: "I am commanded by my Lords Commissioners of the Admiralty to acquaint you that it has been found necessary to requisition the ss. *Cranley* under Royal Proclamation of the 3rd Aug. 1914 for use on urgent Government service under the conditions of the *pro forma* charter-party T. 99 inclosed." Now the Royal Proclamation indicates that, failing an agreement, the amount of payment for hire and the amount of compensation shall be settled by the Board of Arbitration to be constituted under the proclamation. The *pro forma* charter-party T. 99 by clause 31, instead of an arbitration before the Board of Arbitration, provides that "any dispute arising under this charter shall be referred under the provisions of the Arbitration Act 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and, should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties." It is useless to urge that this clause has in practice been taken as applying to disputes differing in kind from that which is before us. In truth the document which the Crown presents as an agreement says in one breath "This vessel is requisitioned on the terms of the proclamation," and in another "This vessel is requisitioned on the terms of charter-party T. 99" and the two are irreconcilable. Unless there is

an assent to one or the other of these tribunals no agreement is established. It is not sufficient to say that the owners have allowed their vessel to be taken; their mere acquiescence is not an agreement that there shall be a reference to the Board of Arbitration constituted under the proclamation. The position of the Crown is not strengthened by what follows. The letter goes on to say: "Rates of hire have been fixed for requisitioned ships on the basis of the reports of the Admiralty Transport Arbitration Committee subject, in the case of certain classes of vessels, to subsequent modifications (*vide* form T. 11541 attached)." That document is attached. It shows an agreement come to by certain persons, not in a position to bind the respondents in any way, to accept certain rates of hire per ton gross register, subject to subsequent modifications. It goes on to say: "Payments on account on this basis will be made to you as soon as possible on receipt of a claim therefor." The form of that letter, the requisitioning of the ships without objection, and the acceptance of payment on account are altogether insufficient to establish an agreement upon the terms suggested by the Crown.

There is further the grave constitutional question whether the proclamation can validly require that the amount payable to the owners shall in default of agreement be ascertained by an award of the Board of Arbitration. That challenges the validity not only of the alleged agreement to refer, but of the agreement on which this petition is based. We must exercise our discretion by refusing to withdraw such a question as that from the consideration of the courts. On these last two grounds the appeal fails and must be dismissed.

Warrington, L.J.—I agree. Two questions have been raised (1) a question of great general importance—whether after the King's fiat has been given to a petition of right there is any jurisdiction in the court under sect. 4 of the Arbitration Act to stay further proceedings on the petition; the second, a question affecting this particular case, whether there has or has not been a submission to arbitration and, if there has been, whether the suppliant has or has not shown sufficient reason why the matter should not be referred in accordance with the submission.

To my mind if there were no jurisdiction such as the Crown invokes here, it would be a most unfortunate thing for the subject; for then the advisers of the Crown before a fiat was granted would have to consider whether or not the case was one which ought in their opinion to be referred to arbitration and, if they thought it ought to be referred, it would be competent to them to refuse the fiat and so leave the suppliant without the power of recourse to the courts.

The existence of the jurisdiction depends upon sect. 4 of the Arbitration Act 1889. Before that section applies, certain conditions must be fulfilled. First, there must be a submission; secondly, a party to the submission must commence legal proceedings in a court against another party to the submission; thirdly, that party must not have taken any other step in those proceedings. If those conditions are fulfilled then that other party to the proceedings may apply to the court to stay them in order that the question may be referred to arbitration.

The second of these conditions is that legal proceedings must have been commenced. When is a legal proceeding commenced in a petition of right? The petition itself is, in accordance with the Petition of Right Act 1860, a petition addressed to the King, and the prayer of the petition is not for the relief claimed by the suppliant. The prayer of the petition is: "Your suppliants therefore humbly pray that Your Majesty may be graciously pleased to direct this petition to be indorsed with Your Majesty's fiat 'Let right be done.'" Then by sect. 3 of the Act, upon the fiat being obtained, a copy of the petition and fiat are to be left—that is by the suppliant or his advisers—at the office of the Solicitor to the Treasury with an indorsement thereon in the form or to the effect in the schedule No. 2. That indorsement is that "The suppliant prays for a plea or answer on behalf of His Majesty within twenty-eight days after the date hereof or otherwise that the petition may be taken as confessed." According to the practice now pursued in these cases the petition, when so left at the office of the Solicitor to the Treasury, is taken to the Central Office of the court and is there filed.

In my view the presentation of the petition to the King is not a legal proceeding at all. It is a petition praying the King to allow legal proceedings to be taken. When he has given his fiat, then the the legal proceedings are commenced by leaving the petition with the Solicitor to the Treasury, which is equivalent to serving a writ upon an ordinary defendant, and by filing the petition, with the indorsement upon it, in the Central Office. No legal proceedings are therefore commenced by merely presenting the petition and obtaining the fiat. It follows that the granting of the fiat is not a step in any legal proceedings. Therefore on the general question I am of opinion that the court had jurisdiction to entertain an application under sect. 4 of the Arbitration Act 1889 notwithstanding that the fiat had been given.

But when that point has been decided in favour of the Crown there is the further question whether there is jurisdiction to stay these particular proceedings. That depends upon the provisions and particularly sects. 3, 4, and 7, of the Petition of Right Act 1860. Sect. 3 provides that after the transmission of the petition to the particular department to which the subject-matter of the petition may relate "the same shall be prosecuted in the court in which the same shall be intituled, or in such other court as the Lord Chancellor may direct." Sect. 4 provides that "It shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the court in which such petition shall be prosecuted, or the venue for the trial of the same." Sect. 7 is to my mind the most important section. [The Lord Justice read the section.] In my opinion sects. 3, 4, and 7 must be read together. The argument for the respondent is that by sects. 3 and 4 the action must be prosecuted in the court in which the petition is intituled, unless the Lord Chancellor makes an order under sect. 4. But in my opinion even if that is so, if the action is prosecuted in the court in which the petition is intituled, it is prosecuted there subject to the provisions of sect. 7, which imports into the proceedings instituted by the petition all the rules, statutory and otherwise, of procedure and practice which are applicable to that court. Among those rules is the statutory provision of sect. 4 of the Arbitration Act 1889 giving the court jurisdiction in a proper case to stay the proceedings in that court with a view to submitting the question to arbitration.

The first question, therefore, namely, whether the court had jurisdiction to make an order staying these proceedings, must be decided in favour of the Crown.

Then come considerations special to this particular case. First, has there in fact been in this case a submission to arbitration? In my opinion there has not. The Crown relied upon two letters in particular addressed on behalf of the Lords Commissioners of the Admiralty to the owners of these two ships, in identical terms, each acquainting the owner of the ship that it had been found necessary to requisition the ship "under Royal Proclamation of the 3rd Aug. 1914 for use on urgent Government service under the conditions of the *pro forma* charter-party T. 99 inclosed." After a paragraph which need not be read, the letter goes on: "Rates of hire have been fixed for requisitioned ships on the basis of the reports of the Admiralty Transport Arbitration Committees, subject, in the case of certain classes of vessels, to subsequent modifications (*vide* form T. 11541 attached). These rates have been generally accepted by shipowners, and payments on account on this basis will be made to you as soon as possible on receipt of a claim therefor." Charter-party T. 99, which was inclosed, is a charter-party which, if it had been signed, would have been signed only after the rate of hire had been agreed, because clause 5 is in these terms: "The Admiralty agree to pay for the use and hire of the said steamer at the rate of *l.* per calendar month commencing when she is placed at Admiralty disposal as provided by clause 4." It contains also clause 31 relating to disputes arising under the charter-party and their reference to arbitration. But inasmuch as the charter-party, if signed, would have stated the amount of hire no question of that amount would have come under clause 31, because it would have been fixed already. As it is we must turn back to the proclamation, the effect of which is to impose on the shipowner the obligation either of agreeing with the Admiralty the amount he is to receive for use and hire of his ship and compensation for loss or damage thereto, or of accepting the amount determined by the award of the Board of Arbitration to be constituted and appointed by the Sovereign for the purpose. That Board of Arbitration has now been appointed, and is called the Admiralty Transport Arbitration Board.

Now as far as the evidence goes, the only thing that happened after the owners received that letter was that the ships were handed over to the Admiralty. As to the terms on which they were handed over nothing appears except that they were requisitioned under the terms of the proclamation. But if the proclamation is a valid one the owner could not help himself. In these circumstances there is no sufficient evidence of an agreement that the ships shall be used by the Government upon terms of remuneration to be settled by the Admiralty Transport Arbitration Board.

But assuming that there is a submission to arbitration, I am clearly of opinion that the suppliants have shown sufficient reason why this case should not be referred. The case raises the serious question whether it was competent for the Crown by proclamation to impose upon the subject the necessity of submitting his claim for compensation to this particular Arbitration Board; that is to say, the question whether or not the proclamation of the 3rd Aug. 1914 was valid and effectual. The contention for the Crown is that the determination of the amount either by agreement or by an award of this Arbitration Board is a condition precedent to any legal proceedings to recover compensation. The suppliants dispute that contention of the Crown, and until this difference has been decided against the suppliant it is impossible to stay the proceedings in which it is raised. For these reasons I think the appeal fails.

Scrutton, L.J.—I agree that this appeal should be dismissed, but as the reasons which lead me to that conclusion are not quite the same as those which have guided my brothers, I think it right to state them shortly. One of the points argued below was that this petition of right did not come within sect. 4 of the Arbitration Act 1889 at all, either because a step—namely, the granting of the fiat—had been taken or because sect. 4 did not apply to proceedings against the Crown. On this point I desire to express no opinion one way or the other. I think there is considerable doubt as to the meaning of sects. 4 and 23 of the Arbitration Act. Sect. 4 by itself clearly does not bind the Crown. Statutes do not bind the Crown unless the Crown is mentioned. The wording of sect. 23, which applies not to submissions but to arbitrations, is not such as to satisfy me that the combined effect of sect. 4 and sect. 23 is to make the former applicable to proceedings against the Crown. Again I express no opinion as to whether sects. 4 and 7 of the Petition of Right Act 1860 apply the provisions of the Arbitration Act to Crown proceedings. On these points I do not assent to neither do I dissent from what has been said by the other members of the court.

I assume for the purposes of this case that after a fiat has been granted a petition of right is in the same position as an ordinary action. In order to refer an ordinary action to arbitration under sect. 4 of the Arbitration Act a binding submission or agreement to refer must be found. In this case the advisers of the Crown have failed to tell us what happened. There was the proclamation of the 3rd Aug. 1914, and we have seen certain letters from the Admiralty to the shipowners; but what the shipowners did after getting those letters, by what ways and means their ships were placed at the disposal of the Crown or taken by the Crown, we have no information, and cannot form an opinion as to whether there was or was not an agreement between the Crown and the shipowners.

The Crown issued a proclamation of the 3rd Aug. 1914 authorising the Lords Commissioners of the Admiralty to requisition British ships on condition that the owners should receive payment to be fixed by agreement, or, failing agreement, by the award of a Court of Arbitration appointed by the Crown; that is to say, appointed by one of the parties to the supposed arbitration and not by the other. The petition of right by par. 10 directly challenges the efficacy of that proceeding and claims that the shipowners are entitled by reason of the requisition to a reasonable rate of remuneration for the vessels, without making any admission as to how it should be fixed. That raises the question whether the Crown has power not only to requisition vessels but to appoint of its own motion the tribunal to assess the amount to be paid for them. That matter is not covered by any submission and even if it were it is far too important a matter to submit to a tribunal of two shipowners and a legal member. It is a matter for discussion in public in the King's

courts. This consideration is quite enough to lead me to dismiss this appeal. On the other points I say nothing; because on the first I have found no opinion, and on the second from want of facts I can form no opinion.

Appeal dismissed.

Solicitors: for the Crown, *Treasury Solicitor*; for the respondents, *William A. Crump* and *Son*.

July 22 and 23, 1918.

(Before Pickford, Bankes, and Scrutton, L.JJ.)

The Kingsway. (*a*)

APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Damage — Repairs — Demurrage — Estimated loss.

Where defendants pressed on a claim on a reference before the plaintiffs' damages were definitely ascertained, and the registrar in considering the claim had to proceed upon an estimate of contingencies instead of a consideration of ascertained facts, it was held by the Court of Appeal, confirming the report and the judgment of Hill, J., that the plaintiffs had proved with reasonable certainty that permanent repairs for collision damage would be effected, and that their estimated cost and the estimated loss of time which probably would be occupied in effecting them, together with the incidental expenses during this period, had been properly taken into consideration.

The Glenfinlas *considered* (*see note*).

Petition in objection to the report of the Liverpool District Registrar, who assessed the damage sustained by the plaintiffs, the Allan Line, by reason of a collision between their steamship *Grampian* and the defendants' steamship *Kingsway*.

On the 14th May 1915 a collision took place in the Mersey between the *Grampian* and the *Kingsway*. The *Grampian*, which was bound from Liverpool to Quebec and Montreal with passengers, mails, and cargo, put back to Liverpool, where temporary repairs were effected. She resumed her voyage on the 18th May, and continued trading until May 1917, when she was requisitioned by the Government. On the 25th Oct. 1916, the *Kingsway* was pronounced by the President (Sir Samuel Evans) alone to blame for the collision, and on the 12th June 1917, at the instance of the owners of the *Kingsway*, the plaintiffs were ordered by Hill, J. to file their claim within three weeks. The claim was filed on the 3rd July, and went to a reference on the 2nd Aug. 1917. The claim included the following items: (1) Temporary repairs, 609*l.* 3*s.* 11*d.*; (2) estimate for permanent repairs (time sixteen days), 2155*l.*; (3) estimated surveyor's fees in connection with permanent repairs, 52*l.* 10*s.*; (4) demurrage during temporary repairs, four days at 600*l.* per day, 2400*l.*; (5) demurrage during permanent repairs, sixteen days, estimated at 600*l.* per day, 9600*l.*; (6) estimated insurance, wages, and incidental expenses during permanent repairs, 1740*l.* The registrar allowed items (1), (2), and (3) in full, and the following amounts in respect of the other items: (4) 2380*l.*, (5) 1600*l.*, and (6) 861*l.* 5*s.* 3*d.* The defendants by their petition claimed that all these items, except item (1) ought to be disallowed.

Wright, K.C. and *D. Stephens* for the appellants.

Laing, K.C. and *C. R. Dunlop* for the respondents.

The arguments sufficiently appear from the judgment.

The following cases, in addition to those referred to in the judgment, were cited:

The Haversham Grange, 93 L. T. Rep. 733; (1905) P. 307; 10 Asp. Mar. Law Cas. 156;
The Rickmers, 1906, 142 Fed. Rep. 305;
The M'Ilvaine, 1904, 126 Fed. Rep. 349;
The Loch Troon, 1907, 150 Fed. Rep. 429;
Mitchell v. *Darley Main Colliery Company*, 52 L. T. Rep. 675; 14 Q. B. Div. 125;
Brunsden v. *Humphrey*, 51 L. T. Rep. 529; 14 Q.B. Div. 141;
Fetter v. *Beale*, 1701, 1 Salk. 11.

Cur. adv. vult.

June 10, 1918.—Hill, J. read the following judgment:—The collision out of which this petition arises happened on the 14th May 1915 between the plaintiffs' steamship *Grampian* and the defendants' steamship *Kingsway*. On the 25th Oct. 1916 the *Kingsway* was pronounced alone to blame, and the damages were referred in the usual way.

The plaintiffs were minded to wait until the whole of the damages were definitely ascertained, which was not likely to be during the war. They, therefore, did not file a claim. The defendants thereupon applied by summons, saying that they objected to the reference being hung up indefinitely, and in July 1917 I ordered the plaintiffs to file their claim. I mention this because, so far as the registrar has had to proceed upon an estimate of contingencies, instead of a consideration of ascertained facts, that is due to the action of the defendants. The reference was held at Liverpool before the district registrar and merchants, and on the 19th Nov., 1917 the registrar made his report.

Each side gave notice of objection, but after the defendants had delivered their petition in objection the plaintiffs intimated that they would not proceed with their motion. The case, therefore, comes before me upon the defendants' petition only. After the collision the *Grampian* put back to Liverpool, and certain repairs were done which occupied four days. The *Grampian* then resumed her trading in the Allan Line, to which she belonged, and she has ever since continued to trade either in the Allan Line or under the requisition of the British Government.

The items to which the defendants take objection relate (1) to the allowance for demurrage or loss of time incurred by reason of the repairs done in Liverpool in May 1915; (2) an allowance for what is described as "permanent repairs"—that is, repairs not yet done, but which will have to be done if the ship is to be restored to the same condition as before the collision; and (3) an allowance for prospective loss of time during the execution of such permanent repairs.

As to the second head of objection, the defendants, while saying that nothing at all ought to be allowed, contend, in the alternative, that what should be allowed is not the estimated cost of the repairs which remain to be done, but the difference in value in May 1915 of the ship repaired as she was and the ship if repaired so as to be restored to the same condition as before the collision.

As to (1), loss of time during temporary repairs, the defendants contend that the plaintiffs suffered no loss by reason of this detention of four days, because the *Grampian* was running in the Allan Line,

(*a*) Reported by W. C. Sandford, Esq., Barrister-at-Law.

which had sailings advertised for the 28th May 11th June, and 25th June, and the *Grampian*, after completing the voyage on which she was engaged at the time of the collision, missed indeed a sailing of 11th June, for which she had been advertised, but made a sailing on the 18th June, on which day the Allan Line would otherwise have had no sailing. This argument ignores the fact that the *Grampian* by reason of the repairs lost four days out of her working life. She may, or may not, have obtained on the 18th June, the equivalent of the freights and passage moneys she would have obtained on the 11th June, but only at the expense of being a week late. That loss of the week could never have been made good; and it occurred at a time when, as the evidence proved, and as is notorious, the demand for ship room, both for goods and passengers eastward bound, largely exceeded the supply. The defendants rely upon *The City of Peking* (63 L. T. Rep 722; 6 Asp. Mar. Law Cas. 572; 15 App. Cas. 438). The decision in that case, as pointed out in *The Mediana* (82 L. T. Rep. 95; 9 Asp. Mar. Law Cas. 41; (1900) A. C. 113), turned upon the very special facts of the case. It appears to me to have no application to the present case, which is a case of the loss of the use for four days of a valuable freight-earning instrument, and that loss not made good to the plaintiffs by the defendants in any other way. I think the registrar was right in principle in allowing this item, and, in respect of it, I confirm the report.

As to (2), the cost of permanent repairs, counsel for the defendants contended (*a*) that the plaintiffs elected to do the repairs done in May 1915, instead of doing such repairs as would restore the ship to the same condition as before the collision, and (*b*) that so repaired, the ship was as good a freight-earning instrument as before, and (*c*) that there was no certainty that the so-called "permanent repairs" would ever have to be done. I think these contentions are unsound. It was common ground in the evidence on both sides that the repairs effected in May 1915, were not a complete restoration or a permanent repair, and that permanent repairs would have to be done some time. The registrar and merchants have treated the repairs done in May 1915, as temporary repairs. In face of the evidence I cannot see how they could have done otherwise. Beside the verbal evidence, they had before them the survey reports, and the May 1915 repair account and the estimate for the permanent repairs, and the registrar had the assistance of expericnced merchants.

Even if I had all the material before me and the like assistance, I certainly should not be prepared to find, contrary to the evidence on both sides, that the repairs done in May 1915 were a complete restoration, or that permanent repairs will not have to be done when it becomes possible to do them. Counsel for the defendants says that the registrar has gone wrong, because he has based his decision on the finding that there was an agreement by all parties that "in order to enable the *Grampian* to continue her interrupted voyage with as little delay as possible, temporary repairs only should be effected, and that the execution of permanent repairs should be deferred"; and he says that there was no such agreement, but only an assent by the defendants' surveyors that what was done in May 1915 was the proper thing to do. I do not think the registrar's decision is based only on an agreement; but there was evidence, uncontradicted, of such an agreement, and whether there was or was not an agreement, and whether the defendants' surveyors had or had not authority to bind the defendants, it is obvious that all parties recognised what was the reasonable and probably the only possible thing to do at the time—namely, to make the ship seaworthy and get her to sea again as soon as possible, and to postpone a complete restoration to a later time.

It was obviously the right thing for the plaintiffs to do in order to minimise the loss, for a complete restoration in May 1915, would have involved a delay of sixteen instead of four days at a demurrage rate of over 600*l.* a day. It was obviously the right thing to do in the national interest. It was probably the only possible thing to do, for ships and repairing yards and materials were, even in May, 1915, very largely under the control of the Government, and it was highly improbable that the Government would permit the laying up of the *Grampian* for permanent repairs during the war, if by temporary repairs she could, in a much shorter time, be made, for the time being, fit to keep the seas. The only witness for the defendants said that the authorities would not allow it.

These considerations also show that there was no election by the plaintiffs to do the repairs that were done, and no others. In all probability thay had no choice, and, if they had one, the only choice they made was to choose the course which was best calculated to minimise the loss. In the result they got a ship which was, for the time being, fit to keep the seas, and which, in the urgent demand for shipping caused by war conditions, could, for the time being, earn as much freight as if the ship had been completely restored, but they were left with a ship which was a patched ship, and one which needed to be permanently repaired when it became possible. Such a ship, if left as a patched ship when conditions are altered and the supply of shipping becomes more equal to the demand, must obviously be at a disadvantage in the freight market, especially as the *Grampian* is a mail and passenger as well as a cargo ship.

The defendants say that they ought not to pay twice over—once for temporary repairs, which make the ship seaworthy, and again for permanent repairs which will restore the ship. But to give the owner whose ship has been wrongfully damaged only the cost of temporary repairs would be to give the wrongdoer the benefit of the effect of war conditions, which either made it impossible at once to effect a complete repair or made it reasonable for the owner to postpone a complete repair. War conditions make the loss greater, but the extra burden should fall upon the wrongdoer and not upon the injured party.

Nor do I think the defendants right in their contention that if anything beyond the cost of temporary repairs is to be allowed, it can only be the diminution in value in May 1915 by reason of the ship being repaired as it was instead of being completely restored. This contention is really based upon an election to do certain repairs; and, for the rest, to keep the ship unrepaired. There was no such election. But if the true test be the diminution in value, the only witness called for the defendants on the point arrived at his estimate of depreciation by taking the cost of permanent repairs and treating the value as depreciated to the extent of that cost. For the purposes of his estimate, he took the cost of permanent repairs as

in May 1915. But when it is once found that permanent repairs could not, or could not reasonably, be effected in May 1915, there is no reason for taking their cost in May 1915 as the standard; their probable cost at the time when it will be possible to effect them must be the standard. The matter is, therefore, in the same position whether the true test is the probable cost of permanent repairs which remain to be done, or diminution in value by reason that permanent repairs have not been done.

For these reasons I think the registrar and merchants were right in allowing a claim in respect of the estimated cost of permanent repairs. The figure was for them and is not questioned. If it were estimated to-day, I daresay it would be higher. I confirm the report in respect of the items for permanent repairs.

There remains the more difficult question as to the allowance for loss of time and incidental expenses during permanent repairs. The registrar and merchants have allowed sixteen days at 100*l.* a day, with some further allowance for wages and marine insurance during the period of detention, and an allowance for incidental expenses. The defendants do not quarrel with the low rate of 100*l.* a day, or the rate of the allowances for wages and insurance or the question of the incidental expenses. But they contend that nothing can be allowed for detention or anything incidental thereto, because, in fact, it has not been incurred, and because it is quite uncertain whether it will be incurred, and equally uncertain whether, if incurred, it will entail any money loss to the plaintiffs. The registrar has expressed the opinion, based on *The Flying Fish* (1865 2 Asp. Mar. Cas. O. S. 221; 12 L. T. Rep. 619; Br. & Lush. 436) and *The Thuringia* (1872, 26 L. T. Rep. 446; 1 Asp. Mar. Law Cas. 283), that the plaintiffs are entitled to recover demurrage as part of the damages, "notwithstanding the fact that repairs have not been, nor can at any time, be effected." I do not think that those cases can be treated as an authority for that broad proposition. The arguments and judgments are not directed to the point now in issue. Nor do I think that that broad proposition is sound. If it is certain that repairs cannot at any time be effected as, for example, if the ship is at the time of the reference already lost unrepaired, nothing, in my opinion, can be allowed for detention. Such was the case of *The Glenfinlas* (see note *infra*) recently before Mr. Registrar Roscoe, to which I was referred.

If there neither has been, nor can be, detention during repairs, the owner can suffer no loss by reason of detention. On the other hand, unless I am bound by authority, I am not prepared to hold that the owner must fail in a claim for damages for detention during repairs, unless he proves that the detention has already been incurred. The passage in the judgment in *The Clarence* (1850, 3 W. Rob. 283), which has been so often cited, and which was approved by the Judicial Committee in *The City of Peking* (*sup.*), lays it down that two things are absolutely necessary—actual loss and reasonable proof of the amount. Counsel for the defendants says "actual loss" by detention means loss by a detention already suffered. I do not so understand it.

In ordinary circumstances, by the time the reference is heard, the repairs have been executed, and the detention can be proved as something which has happened. It was so in *The Clarence* (*sup.*) and in *The Argentino* (59 L. T. Rep. 914; 6 Asp. Mar. Law Cas. 348; 13 Prob. Div. 191), and in every case which I can recollect in my own experience. But even in ordinary times the writ in most cases has been issued before the detention has happened. And if the reference were held while the ship was still under repair, it cannot be that the Registrar is forced to draw a line at the date of the reference, and allow nothing for subsequent detention, even though it is certain to happen.

"Actual loss" does, in my view, include prospective loss. And the question in each case is not whether the detention has already happened, or is prospective, but has the plaintiff proved a loss by "detention," has he proved, with that degree of certainty which the law requires, either that the ship has been detained and a money loss been thereby caused, or that the ship will be detained and a money loss will be thereby caused; and has he, in either case, given reasonable proof upon which the amount of money loss can be found by the court? If that is not the true view, then plaintiffs in a damage action must either wait until the whole of the damages are ascertained by actual experience or forgo so much of their damages as are still in the future, for the cause of action is one, and there can be only one recovery in respect of it, and the damages must be assessed once and for all. If they wait to bring their action, plaintiffs have to bear in mind the limitation period of two years; and, apart from that, it is most desirable that damage actions should be tried as soon as possible after the happening of the collision. If they bring their action and obtain a decree of condemnation and wait before carrying in their claim on a reference, they may be met with a demand and an order such as was made in the present case, and again it is most desirable that the reference should be heard as soon as may be after the decree of condemnation. Counsel for the defendants further says, and it is his main contention, that there is no sufficient evidence upon which it can be found that the permanent repairs will cause detention, or that, if they do, the detention will cause a money loss. I do not agree.

It is proved that the permanent repairs are necessary and will have to be done some time, and that they could not be done piecemeal. The estimate that they will take sixteen days was accepted by the registrar and merchants, and is justified by the evidence. The ship was due for her No. 2 survey about the end of 1917, and the work required to pass that survey was being done in 1917 between voyages, and she had, at the date of the reference, already been dry-docked for that purpose. She is, therefore, not bound to be idle for her No. 2 survey after the war.

In my opinion, the plaintiffs have proved with sufficient certainty that the ship will be laid up for permanent repairs for sixteen days. Of course, that is subject to the chance that she may be lost or that she may suffer other damage, and that the repair of that damage and the execution of the permanent repairs can be effected at the same time. But these chances, while they must be taken into account in fixing the amount of damages to be allowed, do not, in my opinion, make no damages recoverable. If they did it would be difficult to see how, in any action of negligence whereby a person loses the use of his property or of himself, anything could be awarded for prospective loss,

for the property may be destroyed or he himself may die the next day. But undoubtedly when proved with that degree of certainty which the law requires, prospective loss is a proper element in damages for negligence causing injury to property or to the person. These chances are matters to be weighed, but nothing more.

Then as to amount. The 100*l.* a day has been taken by the registrar and merchants because that was the Blue Book rate paid by the Government to the owners when the ship was under requisition. In May 1915 the profit rate of the free ship was 600*l.* a day. It being reasonably certain that the detention for permanent repairs will not take place until after the war, requisitioning, whether under the Defence of the Realm Regulations or under the Royal Prerogative and Blue Book rates, will have ceased to operate. Perhaps the chance of legislation to give some power to the Government to requisition or to fix rates after the war ought to be taken into account; but it is a pure speculation whether Parliament in its wisdom will think the interests of the country served in times of peace by taking ships out of the control of shipowners or will think it either prudent or just to limit freights or to divide the earnings of ships between the Government and owners. On the other hand, it can hardly be doubted that, for some considerable time after the conclusion of peace, the demand for shipping will exceed the supply and rates of freight be high—much higher than Blue Book rates, which were originally fixed in the autumn of 1914, before the war had begun to have any effect in increasing the demand relatively to the supply of shipping, or in a resulting rise in freights. Taking all these things and all the chances into consideration, I should myself have taken a much higher rate per day that 100*l.* as the probable loss of profit. As to the other items—wages, insurance and incidentals—they have been estimated by the registrar and merchants, and there is no reason to think them over-estimated.

In the result the registrar and merchants have allowed 1600*l.*, plus the other smaller items, as the prospective damages by delay during permanent repairs. Applying what I conceive to be true principle, I think the amount awarded is a very moderate estimate of prospective loss established with reasonable certainty and discounted by a due consideration of all the chances.

I hesitated at one time as to whether I ought not to send the case back to the registrar and merchants on this matter of prospective detention. But the facts are before me, and as I think the amount allowed does not err on the side of excess, I think there is no advantage to be gained by not myself disposing of the whole case.

The report will be confirmed and the petition dismissed with costs.

The defendants appealed.

Wright, K.C. and *Lewis Noad* for the appellants.

Laing, K.C. and *C. R. Dunlop* for the respondents.

July 23, 1918.—Pickford, L.J.—I think that this case involves no question of principle. In the first place, I wish to emphasise that the measure of damages applicable to a ship is in no way different from that which is applicable to any other chattel. The nature of the thing damaged does not in any way affect the assessment of the damages. That was stated in *The Argentino* (1889, 59 L. T. Rep. 914; 6 Asp. Mar. Law Cas. 348; 13 Prob. Div. 201; 61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433; 14 App. Cas. 519), by Bowen, L.J., in the following passage: "A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand, the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone."

That passage, so far as I know, has never been questioned, and has been cited with approval in this court in *The Philadelphia* (9 Asp. Mar. Law Cas. 38, 72; 116 L. T. Rep. 794; (1917) P. 101). It is there stated quite distinctly that the principle is the same. Sometimes it is called *restitutio in integrum;* sometimes it is called "compensation" for the loss sustained. It does not matter what it is called; the wrongdoer is bound to pay the party to whom he has done the wrong compensation for the damage done.

A difficulty, of course, often arises in assessing that compensation where it is necessary to assess the loss that will arise in the future. The difficulties are very much lightened where all the facts are known, and all the damage has been repaired, and it only remains to be seen how great the loss has been. In fact, where the repairs have been done and the detention has taken place, all the elements are present on which to ascertain what the actual damage is. The difficulty has arisen in this case, because the reference has been held to assess compensation to the damaged ship before the repairs have been done, and before the amount of the loss by detention could be ascertained, and counsel have not been able to cite any case in which that has occurred. In this case we have to look into the future and estimate, on an examination of the probable circumstances that will exist in the future, what will be the loss. It seems to be a novelty in the assessment of damages in the Admiralty Court; it is an everyday matter in the common law courts, and the difficulties of coming to a proper estimate are not difficulties of law or principle, but of fact.

The circumstances of the present case are these: The *Grampian*, an Allan liner, was damaged by the *Kingsway*. The *Grampian* was in Government service at the time, and the Government would not allow her to be off duty in order that permanent repairs might be done; and, besides, the state of the shipyards and repair shops is such at present that it is very difficult to get any permanent repairs done. Therefore, as this vessel was not so damaged

as to be unable to navigate, temporary repairs were done, she was made seaworthy; and is still working under Government requisition. The learned judge and the registrar both have found that it was reasonable and proper in the circumstances to do that, and there is nothing original in doing temporary repairs first and permanent repairs afterwards. That course is followed constantly where the damage occurs in a place where there are no proper facilities for permanent repairs. The plaintiffs, according to the learned judge, wished the inquiry as to damages to stand over until the whole of their damages were definitely ascertained, which was not likely to be during the war. They, therefore, did not file a claim. The defendants thereupon applied by summons, saying that they objected to the reference being hung up indefinitely, and in July 1917 the learned judge ordered the plaintiffs to file their claim.

In those circumstances the reference took place, and inquiry arose as to what, if anything, is to be allowed for permanent repairs, and what, if anything, is to be allowed for detention of the ship.

Counsel for the appellants hesitated to adopt this proposition, that the result was to cut off the whole of the permanent repairs and the whole of the detention, even though it was almost certain to be incurred. They said that the respondents must prove their actual damage. It is quite true that they actually said that only as to the detention. It seems to me, however, that it must apply to both cost of permanent repairs and damages for detention. You can only recover for actual damage, and if actual damage means damage which you do ascertain, in fact, upon circumstances which have happened, and from which you can ascertain such damage, then you must cut off both of these heads of claim. It seems to me that that proposition cannot be maintained for a moment.

Counsel for the appellants said that, as to detention, it must be shown that a loss has been, in fact, incurred; that is to say, that the ship has been in fact detained for a time during which she would have obtained profitable employment. That, again, means that the wrongdoer, who very properly has asked that the damages should be assessed at once, before the time for doing the permanent repairs has arrived, is to escape liability altogether, although in the opinion of the court there will be detention during a time in which the ship might be earning, because the time has not yet arrived. That position seems to me to be wholly untenable.

I think the judge was quite right in the view he took. He took this view, and I should agree if it were necessary to decide it, that if at the time of a reference the ship had been in fact lost, as was the case in the *Glenfinlas* (see note *infra*), and therefore the repairs never could be done, and, therefore, at the time of her loss, the time of her detention never could be a loss of profitable employment to the shipowner at all—then these damages could not be recovered. When I speak of the ship as lost, I mean lost by some circumstances other than the collision. Suppose that after the collision she had been sunk by perils of the sea, then it would be clear that the shipowner had not suffered the loss of those permanent repairs because he never would or could do them; therefore he never would spend the money and would not be entitled to be repaid the money. The same would be true with regard to detention. She never could be, by reason of this accident detained from profitable employment, because she had gone, and never could get any profitable employment. But that is not this case.

In this case the ship is still there; she is still on the sea, and the judge was of opinion that the repairs would be done, subject, of course, to the possible loss of the ship—that is a circumstance he would have to consider. He was also of opinion, and I think there was evidence on which he was entitled to be satisfied, that the ship would in all probability be detained during the repairs for sixteen days, and that she during that time would have been able, if not detained, to have obtained profitable employment. These are all matters of fact he has to ascertain. Looking into the future, he has to consider what is the proper compensation for these repairs and this detention, which, in his opinion, would have to be done and would take place. He has to consider all the circumstances, all the chances, all the probabilities, and he has then to assess the amount; and if he has done that, not acting on any wrong principle, it is not, it seems to me, for this court to interfere with the assessment which has been arrived at by the registrar. The registrar, I agree with the judge, has proceeded probably on a wrong principle with regard to detention. The judge has arrived at the same result by applying, in my opinion, the right principle, and if he has done that, then any small miscalculations are not things this court should correct.

The case of *The Marpessa* (10 Asp. Mar. Law Cas. 232; (97 L. T. Rep. 1; (1907) A. C. 241) shows that it is not for this court, nor for the House of Lords nicely to weigh the conclusions of fact at which the registrar and the judge have arrived, but to ascertain whether they have applied the right principle. In my opinion, in this case they proceeded on a right principle. The reasoning of Hill, J. seems to me to be sound. I think the decision appealed from right, and the appeal should be dismissed with costs.

Bankes and Scrutton, L.JJ. gave judgments arriving at the same result.

Appeal dismissed.

Solicitors: for the appellants, *Batesons, Warr,* and *Wimshurst,* Liverpool; for the respondents, *Hill, Dickinson,* and *Co.,* Liverpool.

Note.—*The Glenfinlas* (1917, fol. 365, unreported). On the 4th March 1917 a collision occurred at St. Nazaire between the plaintiffs' steamship *Western Coast* and the defendants' steamship *Glenfinlas,* whereby the former was damaged. Temporary repairs were done to the *Western Coast* at St. Nazaire, and an estimate was made for permanent repairs, but these were never done. The *Western Coast* was then requisitioned by Government, and during her service, on the 14th Nov. 1917, she was sunk by a mine. In an action of damage the defendants admitted liability subject to a reference to assess damages. At the reference the plaintiffs claimed damages in respect of permanent repairs and detention. The defendants admitted that the plaintiffs were entitled to damages for permanent repairs, excluding drydocking and the services of a surveyor; but they denied that the plaintiffs were entitled in respect of the last two items as part of the permanent repairs, or in respect of detention. A witness called by the plaintiffs stated that the vessel would not have been repaired until after the war. The registrar (Mr. E. S. Roscoe),

assisted by the merchants, allowed the plaintiffs the cost of drydocking and the services of a surveyor as part of the cost of the repairs, but refused to allow them damages for detention. The learned registrar said that it was clear law that the owner of a vessel which had been in collision was entitled to the cost of repairs even if they had not been executed.—*The Endeavour* (6 Asp. Mar. Law Cas. 511), which case had been frequently followed in the registry. Such estimated cost was the measure of an actual injury resulting in actual damage to the plaintiffs' property and was part of the cost of repairs. It should therefore be allowed. The damages for detention, however, were in his view inadmissable. Being merely consequential damages, they were on a different footing from the estimated cost of repairs for an actual injury to the plaintiffs' chattel. The principle applicable was *restitutio in integrum*, which did not include damages for a loss of time which had not occurred. The claim for loss of the use of the vessel could not, therefore, be allowed.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Oct. 20, 1919.

(Before HILL, J.)

THE VERASTON. (*a*)

Collision—Damages—Demurrage—Remoteness.

Where a ship due to sail in a certain convoy, was owing to necessary repairs due to collision damage, delayed so that she could not sail in that convoy, although her repairs took only four days to complete it was held that she was entitled to sixteen days demurrage up to the time when she could join her next convoy.

The question to be considered in these cases is "Does the loss flow directly from the course of things as they were at the time of the wrongdoing?"

Lord Justice Bowen's judgment in The Argentino (6 *Asp. Mar. Law Cas.* 348) *considered.*

MOTION in objection to the registrar's report, assessing damages in an action of damage by collision.

On the 13th Jan. 1918 the steamship *Veraston*, owned by the defendants, collided with the steamship *Antenor*, then under requisition to the plaintiffs, the Lords Commissioners of the Admiralty.

Defendants admitted liability subject to reference to the registrar to assess damages, and now appealed from his report in respect of an item of 729*l.*, allowed for sixteen days' demurrage, twelve days of which were days the *Veraston* had lost in waiting after repairs completed for the convoy next after the convoy she would have sailed with had collision not occurred.

Balloch for the defendants.

C. R. Dunlop, K.C. for the plaintiffs.

HILL, J.—This is a motion in objection to the registrar's report in respect of one item in a claim by the Admiralty arising out of a collision between the steamship *Antenor* and the steamship *Veraston*. The item in dispute is that of demurrage and in respect of that the registrar has allowed sixteen days. The contention is that he ought to have allowed only four days.

The collision happened on the 13th Jan 1918, and it is agreed that the actual repairs took four days to complete. If there had been nothing else therefore the ship would have been free to sail on the 17th Jan. Since Oct. 1917 it was usual for ships to sail in convoy. The *Antenor* being a fast-going east-bound ship would in the ordinary course of things have sailed in the fast-going east-bound convoy which went *viâ* the Mediterranean. It is not disputed that it was reasonable for her, if she missed the one fast-going convoy, to wait for the next. Though there were other convoys sailing they went by other routes and would probably have involved a greater loss of time. At any rate it is not disputed that, if she missed one fast-going east-bound convoy, it was reasonable for her to wait for the next.

The convoys in Jan. 1918 were to sail on the 15th Jan. and the 31st Jan. The *Antenor* would, in the ordinary course, have joined the convoy of the 15th Jan. By reason of the collision, she was prevented from joining that convoy, which left on the 17th Jan., and the consequence was that she had to wait for the next convoy, which left on the 31st Jan.

Now the registrar has treated that loss of time as flowing from the collision and as not being a too remote consequence of the collision. The defendants argue and they say that the delay of waiting for a convoy was not such a consequence of the collision as can be allowed to be taken into account in considering the damages claimed from them for the collision.

Upon the facts as found and which indeed are not in dispute, in my opinion, so far as it is a question of law, the registrar was right.

First of all, it is quite clear, that the test in all cases is not that which Mr. Balloch submitted—namely, when was the ship put at the disposal of her owners again. As a general proposition that is stated too widely, and it is inconsistent with the judgment of Bowen, L.J. in *The Argentino* (6 Asp. Mar. Law Cas. 348; 59 L. T. Rep. 914, 917; 13 Prob. Div. 191, 202), where he says: "Upon the other hand, the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss would not properly be measured by the time taken in repairs alone."

That leaves in each case the question to be considered—Did the loss which is claimed as flowing from the collision, flow directly from it in the usual course of things? Now, by the "usual course of things" I take as meant the course of things as they usually were at the time of the wrongdoing, and at that time of the wrongdoing it was usual, and indeed necessary, for ships to sail in convoy, and it was usual for a ship like the *Antenor* to sail with the fast-going east-bound convoy, either on the 15th Jan. or the 31st Jan. Did the delay flow directly from the collision? It seems to me that it flowed immediately from the collision. It was the repairs, necessitated by the collision, which caused her to miss sailing on the 15th Jan., it was missing that sailing of the 15th Jan. that caused her to sail on the 31st Jan. Did it flow from the state of things as they then existed? It clearly did in my opinion.

(*a*) Reported by SINCLAIR JOHNSTON, Esq., Barrister-at-Law

It is said that my judgment in *The Kafue* and *The Charles le Borgne* (*a*) show that the registrar was wrong and that I am wrong in what I am now saying. In my view those cases have no bearing upon the present case at all. In each of those cases there was quite a separate and independent act of a Government intervening, quite unconnected with the collision which caused delay of the ship—additional delay which would have taken place if the collision repairs had not to be done.

It was suggested by Mr. Balloch that this further period ought not to be allowed because it did not follow that if the *Antenor* had sailed in the convoy of the 15th Jan. she would have arrived sixteeen days earlier than she did sailing on the 31st Jan. that all sorts of things might have happened on that voyage to delay her. But in the first place, at the reference as far as I can understand, and, I think, to-day the controversy has not been as to whether you should make some allowance off sixteen days having regard to the chances, but whether four days was the proper time to be considered. And in any case I have no reason to suppose that the registrar has not taken into account the question of these elements of chance, discounting the full allowance which I think should otherwise be made.

I therefore think that the view of the registrar was right, and the motion will be dismissed with costs and the report of the registrar affirmed.

Solicitors: *Botterell* and *Roche*, agents for *Weightman, Pedder*, and *Co.*, Liverpool; *Treasury Solicitor.*

House of Lords.

Nov. 14, 17, *and Dec.* 12, 1919.

(Before Lords Haldane, Dunedin, Atkinson, Wrenbury, and Buckmaster.)

C. A. Van Liewen *v.* Hollis Brothers and Co. Limited and others; The Lizzie. (*b*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Bills of lading — Construction—Incorporation of terms of charter—Custom of the port of Hull—Demurrage—Duties of charterers and receivers.

The plaintiff's steamer was chartered to take a cargo of wood from a Swedish port to Hull. By clause 3 *of the charter-party the cargo was "to be loaded and discharged with customary steamship dispatch as fast as steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports. . . . Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at* 25*l. per day." The several bills of lading, which incorporated all the terms of the charter, were assigned to the respective defendants, three separate firms of timber merchants, shortly before the arrival of the ship at Hull.*

The discharge at Hull was not completed until eighteen days after the ship's arrival, although it could have been completed in seven days if there had been a vacant discharging berth on the vessel's arrival and clear quay space and a sufficient supply of bogies, and if the discharge had proceeded continuously at the vessel's maximum rate.

The plaintiff sued in the County Court for eleven days' demurrage, and claimed that by the custom of the port receivers of wood cargoes were under an absolute obligation to provide for the steamship on or before her arrival in dock a vacant and suitable berth and a clear quay space and (or) a sufficient and continuous supply of bogies and (or) suitable lighters alongside. The dock and bogies belonged to and were under the control of the North-Eastern Railway Company.

Held, that, under a charter-party in this form as distinguished from a charter-party to discharge in a fixed number of days, the liability of the charterer imposed by such expressions in the charter-party as "with all dispatch" or "as fast as the vessel can deliver according to the custom of the port," was to take delivery with the utmost dispatch practicable, excluding affection by circumstances not under his control; and that the custom of the port of Hull did not alter the character of this liability or impose on the defendants as the respective receivers of separate parcels an absolute unconditional obligation to find quay spaces or bogies.

Decision of the Court of Appeal affirmed.

Appeal from an order of the Court of Appeal reversing an order of the Divisional Court which set aside a judgment of the County Court judge of Yorkshire.

The proceedings in the Divisional Court, *sub nom. The Lizzie*, are reported 23 Com. Cas. 332, and in the Court of Appeal (1919, P. 22).

By a voyage charter made at Stockholm on the 14th Aug. 1915 between the agents for the owners and Bergvik and Ala Nya Aktiebolig of Söderhamn it was agreed that the steamship *Lizzie* should be chartered by the charterers to proceed to a loading place in the Söderhamn district to load a full and complete cargo of timber and therewith proceed to Hull, Victoria or Alexandra Dock.

By clause 3 of the charter-party the cargo was "to be loaded and discharged with customary steamship dispatch as fast as steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective docks. . . . Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at the rate of 25*l.* per day and *pro rata* thereof."

The cargo was to be taken from alongside steamer at charterers' risk and expenses as customary.

The *Lizzie* was loaded at Nyhamn with a full cargo under several bills of lading which were assigned to the respondents, three separate firms of timber merchants respectively, shortly before the arrival of the ship at Hull. The ship arrived in the Humber on the 29th Sept. 1915, but, owing to the congestion of traffic at the port, she was unable to obtain a clear quay space or a sufficient supply of bogies, and was unable to begin to discharge until the 7th Oct. and did not complete until the 18th Oct.

The shipowner claimed eleven days' demurrage, alleging that if there had been continuous dispatch the cargo would have been discharged by the 7th Oct., and he relied upon the custom of the port of Hull which was embodied in a printed statement

(*a*) Note.—Short reports of these two cases will be found in notes to the *Verasion* reported in (1920) P. at page 12.

(*b*) Reported by W. E. Reid, Esq., Barrister-at-Law.

drawn up in 1899 by a committee of shipowners and timber merchants.

By this custom it was the duty of the receiver of a wood cargo at Hull to provide for the steamship on or before her arrival in dock a vacant available and suitable berth to which she could forthwith proceed, and to supply a clear quay space the full length of the vessel and (or) a sufficient and continuous supply of bogies and (or) suitable lighters alongside. The dock and bogies belonged to and were under the control of the North-Eastern Railway Company.

The County Court judge held that, admitting the existence of the custom and practice as set forth in the printed statement of the custom of its incorporation into the charter-party, it had not the effect to convert a customary dispatch charter into a lay day charter, and that its existence imposed no greater obligation upon the receivers than the general law imposes upon them under a customary dispatch charter, *i.e.*, to use (as he held they had used) their best endeavour to find quays, spaces, and bogies. He therefore gave judgment for the respondents.

The Divisional Court (Horridge and Hill, JJ.) reversed that decision upon the ground that the effect of the custom was to impose upon the respondents an absolute duty to provide quay space and bogies.

The Court of Appeal reversed that judgment, by Swinfen Eady, M.R. and Warrington, L.J., on the ground that the evidence failed to establish any uniform custom as alleged; by Duke, L.J., on the ground that the custom did not apply to a case where the bills of exchange were held by several receivers.

Compston, K.C. and *Harney* for the appellant.

MacKinnon, K.C. and *W. H. Owen* for the respondents.

The following cases were referred to:

Hulthen v. *Stewart*, 9 Asp. Mar. Law Cas. 285, 403; 88 L. T. Rep. 702; (1903) A. C. 389;

Hick v. *Raymond and Reid*, 7 Asp. Mar. Law Cas. 23, 97, 233; 68 L. T. Rep. 175; (1893) A. C. 22;

Wright v. *New Zealand Shipping Company*, 4 Asp. Mar. Law Cas. 118; 40 L. T. Rep. 413; 4 Ex. Div. 165;

Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; 5 App. Cas. 599;

Ford v. *Cotsworth*, 23 L. T. Rep. 165; L. Rep. 5 Q. B. 544;

Lyle Shipping Company v. *Cardiff Corporation*, 9 Asp. Mar. Law Cas. 23, 128; 83 L. T. Rep. 329; (1900) 2 Q. B. 638;

Surraino and Sons v. *Campbell and others*, (1891) 1 Q. B. 283;

Hick v. *Raymond and Reid*, 7 Asp. Mar. Law Cas. 23, 97, 233; 68 L. T. Rep. 175; (1893) A. C. 22;

Castlegate Steamship Company v. *Dempsey*, 7 Asp. Mar. Law Cas. 108, 186; 66 L. T. Rep. 742; (1892) 1 Q. B. 854;

Armement Adolf Deppe v. *John Robinson and Co.*, 116 L. T. Rep. 664; (1917) 2 K. B. 204;

Ashcroft v. *Crow Orchard Company*, 2 Asp. Mar. Law Cas. 397; 31 L. T. Rep. 266; L. Rep. 9 Q. B. 540.

After consideration, their Lordships affirmed the decision of the Court of Appeal, but upon different grounds.

Lord Haldane.—I have had the advantage of reading the judgment which my noble and learned friend, Lord Dunedin, proposes to deliver relative to the implications of the charter-party and custom of the port of Hull, and on this question I do not desire to add anything to what I understand him to be about to say. If his view of these is the true one, then I think that a conclusion, which is fatal to the appeal, may be rested on a single point.

Since this House decided *Hulthen* v. *Stewart* (9 Asp. Mar. Law Cas. 285, 403; 88 L. T. Rep. 702; (1903) A. C. 389) it must be taken to be the law that charter-parties fall into two classes. There are some that prescribe a definite time—generally measured by a certain number of days—within which the discharge is to be taken by the charterers. The obligation is, in that case, an unqualified one and, if the time fixed is exceeded, demurrage is payable, irrespective of the circumstances; but the charter-party may merely stipulate that the discharge is to be taken "with all dispatch," or "as fast as the vessel can deliver according to the custom of the port," or may embody language which, as in these expressions, does not either name a period of time, or necessarily imply one of an altogether inelastic character. In such a case the liability of the charterer is treated as being only an obligation to take delivery with the utmost dispatch practicable, excluding affection by circumstances not under the control of the charterer. If a liability not qualified in this fashion is to be imposed, the language employed must be definite on the point and free from ambiguity.

The charter-party under construction belongs to the second of these classes. Neither by its terms, nor by the custom of the port of Hull, as proved at the trial before the learned County Court judge, is a definite and unqualified period of time prescribed within the meaning of the rule of construction as stated. It makes no difference to the general character of the obligation that there is a special clause in the charter-party providing for strikes and epidemics.

This consideration disposes of the argument of the appellants and makes it unnecessary to consider any other point raised.

I think that the appeal ought to be dismissed with costs.

Lord Dunedin.—I think it unnecessary to restate the facts which are set out in the judgments of the courts below.

The first point to settle is What was the extent of the admission made at the trial? I hold, without hesitation, that the defendants through their counsel, admitted that there was a custom at Hull in connection with the discharge of wood cargoes and that custom is accurately set forth in the statement issued by the representatives of the Timber Trade Federation and the Documentary Committee of the Chamber of Shipping. Such an admission was most proper to give. Bray, J. had found the custom and it would have been otiose to have insisted upon the reproving of the custom. But to give this admission the further effect of saying that it was an admission which barred the respondents from contending that the law applied to the case by Bray, J. was wrong, is,

in my view, quite out of the question and, I ought to add, that the learned counsel for the appellants did not so press it. On the other hand, the admission accepted was sufficient proof of the custom, and I cannot understand the view of the Court of Appeal that the custom to the extent of what was contained in the document remained unproved. Now it is admitted that the words "the steamer shall be discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the port" import an obligation that the charterers shall use all reasonable dispatch, but "reasonable" must be reasonable under all the circumstances of the case. The appellant puts his case on the succeeding words, "according to the custom of the respective ports," and finding in the custom of Hull, as stated, that it is the duty of the receiver of cargo to supply and have ready a clear quay space the full length of the steamer and a sufficient and continuous supply of bogies, he argues that this is a super-added absolute obligation the object of which cannot be excused by its being impeded by causes over which the receiver of cargo has no control.

I think the question is really quite concluded by authority. The only difficulty that has arisen is from the rather uncertain doctrine which was laid down in some of the decided cases, and especially from *Wright* v. *New Zealand Shipping Company* (4 Asp. Mar. Law Cas. 118; 40 L. T. Rep. 413; 4 Ex. Div. 165). I do not think I should serve any useful purpose by examining and stating the somewhat numerous authorities. I will go at once to the cases in your Lordships' House which, in my opinion, settle the law. The most recent is *Hulthen* v. *Stewart* (9 Asp. Mar. Law Cas. 285, 403; 88 L. T. Rep. 702; (1903) 3 App. Cas. 389). That case, as this, contained the obligation for customary discharge according to the custom of the port, which there, was also the port of Hull. Indeed, the document there construed was a White Sea Wood Charter, commonly called Merblanc, which is a sister of the charter in the present case, commonly called Scanfin. The cause of delay was the crowded state of the port. The argument put forward that the normal period of discharge could be expressed in terms of days and then constituted an absolute obligation, was rejected, its having been found as a fact that the charterers had done all that they reasonably could to discharge the vessel and the existence of a strike clause being held to make no difference. The general proposition was laid down by Lord Macnaghten as follows: "It is, I think, established that in order to make a charterer unconditionally liable it is not enough to stipulate that the cargo is to be discharged 'with all dispatch,' or 'as fast as the steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must be in plain and unambiguous terms, define and specify the period of time within which delivery of the cargo is to be accomplished."

It was just possible here to say that the impediment there was unconnected with the special duty undertaken by the charterers under the custom—namely, to provide bogies. The passage which exactly deals with such a case will be found in the words of Lord Selborne in *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; 5 App. Cas. 599), where he quotes the words of Lord Blackburn, in *Ford* v. *Cotsworth* (23 L. T. Rep. 165; L. Rep. 5 Q. B. 544): "If, by the terms of the charter party the charterer has agreed to discharge at within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediment which prevented him from performing it and which caused the ship to be behind the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time—that is, as was said by Blackburn, J. in *Ford* v. *Cotsworth*, a reasonable time under the circumstances. Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If, as in the present case, an obligation indefinite as to time is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice which the charterer could not have overcome by the use of reasonable diligence ought, I think, to be taken into consideration."

Now, that passage from *Ford* v. *Cotsworth* was approved and quoted by A. L. Smith, L.J. in *Lyle Shipping Company* v. *Cardiff Corporation* (9 Asp. Mar. Law Cas. 23, 128; 83 L. T. Rep. 329; (1900) 2 Q. B. 638), as well as by Lord Selborne in *Postlethwaite* v. *Freeland* (*sup.*) in this House, and Lord Blackburn in the same case, while naturally adhering to his own view in *Ford* v. *Cotsworth* (*sup.*), does, in explaining *Ashcroft* v. *Crow Orchard Company* (2 Asp. Mar. Law Cas. 397; 31 L. T. Rep. 266; L. Rep. 9 Q. B. 540), give the only ground on which *Wright's* case (*sup.*) can be supported, namely, the view that, on the facts, the charterer failed through what he calls a self-imposed inability. That is really viewing the expression, "overcome by the use of reasonable diligence," from, so to speak, the other side, and makes the whole of the cases, if that view of the fact in *Wright* is taken, consistent. If that view of the facts is not possible, then *Wright* as an authority must disappear, for we have the dictum in *Ford* v. *Cotsworth* (*sup.*) approved both by the Court of Appeal and by this House and the same thing said by Lord Macnaghten again, in this House, in *Hulthen*.

It follows that the unreported judgment of the case decided by Matthew, J. and the Court of Appeal under the Presidency of Lord Esher, cannot, in my view, be supported. The view I have taken makes it unnecessary to consider the further question argued as to whether the custom being proved as regards one receiver of cargo held good in the case where there were more than one receiver of cargo under separate bills of lading. I am not satisfied that the above statement of the proposition is accurate. After all, a custom consists in a method of doing something, and the question whether the ensuing legal result which applies in the case of one will apply in the case of many is, I rather suspect, a question for the law to decide and not for a custom to prove. In any view, I reserve my opinion on this matter until it is necessary to decide it.

For these reasons I am of opinion that the result reached by the Court of Appeal was right, although I cannot tread the path which they took to reach it.

The appeal should be dismissed.

Lord Atkinson.—In this case all the terms of the exceptions contained in the charter party are expressly incorporated in the bills of lading of which

the three defendants are indorsees. There is no such inconsistency or conflict between the provision of these bills of lading and the charter-party as existed in the case of *Surraino and Sons* v. *Campbell and others* (1891, 1. Q. B. 283), to which your Lordships have been referred. In that case "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever" were expressly excepted in the bill of lading; then followed the words "and all other conditions as per the charter-party." The charter-party contained not only the same exceptions, as the bill of lading, but the further exceptions "strandings and collisions, and all losses and damage caused thereby even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owners." Owing to the negligence of the master the ship was stranded and the cargo lost. The plaintiffs who sued the shipowners for the loss of their goods, part of the cargo, were the endorsees of the bill of lading, but strangers to the charter-party, and it was held on review of all the authorities that the words "all other conditions as per charter-party" did not incorporate into the bill of lading the exception "stranding occasioned by the negligence of the master," and that the shipowners were consequently liable to the plaintiffs.

No such conflict or inconsistency as this exists between the provisions of the bill of lading and the charter-party in the present case. It is untouched by this authority, and the present respondents are therefore bound by the terms of the charter-party. The nature and extent of the duties imposed upon charterers touching the discharge of the cargo from the ships they have chartered are well established.

If by the terms of the charter-party the charterers have agreed to discharge the chartered ship within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which they are answerable, whatever be the nature of the impediments which prevented them from performing it, and thereby causing the ship to be detained in their service beyond the time stipulated. If no time be fixed expressly or impliedly by the charter-party the law implies an agreement by the charterer to discharge the cargo within a reasonable time, having regard to all the circumstances of the case as they actually existed, including the custom or practice of the port, the facilities available thereat, and any impediments arising therefrom, which impediment the charterer could not have overcome by reasonable diligence (*Postlethwaite* v. *Freeland*, 4 Asp. Mar. Law Cas. 129, 302; 22 L. T. Rep. 845; 5 App. Cas. 599; *Hick* v. *Raymond and Reid*, 7 Asp. Mar. Law Cas. 23, 97, 233; 68 L. T. Rep. 175; (1893) A. C. 22; and *Hulthen* v. *Stewart and Co.*, 9 Asp. Mar. Law Cas. 285, 403; 89 L. T. Rep. 702; (1903) A. C. 389).

In the last of these three cases the charter-party provided that the cargo was to be "discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours" of the port of discharge, "but according to the custom" of the port, "Sundays, general or local holidays used unless excepted." These are very precise and peremptory words, much better calculated to impose an absolute and unconditional obligation than are the words upon which, in my view, the question for decision in the present case turns. Lord Macnaghten held in *Hulthen* v. *Stewart* (*sup.*) that the meaning of the above mentioned words was not tantamount to fixing a certain definite number of days or hours as the period within which the discharge of the vessel was to be accomplished. That what the words pointed to was, he said, "the discharge of the cargo with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel, and all the other circumstances in existence at the time, not being circumstances brought about by the person whose duty it was to take delivery or circumstances within his control." The learned judge who tried the case, Phillimore, J., as he then was, had found as a fact that the respondents had done all they reasonably could to discharge the vessel. In the present case the trial judge has found that the respondents were not responsible for ordering the ship into dock, and that the delay in the discharge of the ship was not due in whole or in part to circumstances over which the defendants or the charterers had control. Having regard to this finding I think the first question for decision in this case resolves itself into this. Do the words of the written statement of the custom and practice concerning the discharge of steamships laden with wood cargoes, existing at the port of Kingston-upon-Hull impose upon the charterers of the *Lizzie*, and also upon the respondents who are bound by the terms of the charter-party, an obligation to discharge this ship as absolute and unconditional in character, as if a definite number of days had been fixed for her discharge? It has been contended that they do impose such an obligation because the paragraph headed Discharging Berth imposes an absolute duty upon the receiver of the cargo to provide or arrange (on or before the arrival of the ship) a vacant available and suitable berth to which she can forthwith proceed and be at liberty to forthwith commence her discharge, and that there is a correlative duty of the same absolute character imposed upon the receiver to enable the ship to take advantage of this liberty.

I think that contention is unsound. It is not thus that absolute unconditional obligations can be spelt out and imposed. Adopting the words of Lord Macnaghten in the judgment from which I have already quoted, I may say that in order to impose the liability contended for, the language used "must in plain and unambiguous terms define and specify the period within which delivery of the cargo is to be accomplished." The language relied upon in this case is not of this character.

I therefore think that the appeal upon this point fails, and that being so it is unnecessary to deal with the second point, namely, the possibility of holding the consignees as liable as one consignee would be. I think the appeal should be dismissed with costs.

Lord Wrenbury.—I agree. I do not think it necessary to prepare an independent judgment of my own.

Lord Buckmaster.—I had prepared a written independent opinion on this case, but after reading the opinions of the other noble and learned Lords who have preceded me, I realised that I should be only clothing in different words exactly what they had already expressed. In such circumstances it would be vain repetition to deliver my opinion

to the House, and I therefore content myself with expressing my entire agreement with the proposed motion, and with the reasons put forward in its support.

Solicitors for the appellant, *Botterell* and *Roche* for *Andrew M. Jackson* and *Co.*, Hull.

Solicitors for the respondents, *Trinder, Capron,* and *Co.*

Oct. 31, *Nov.* 3, 1919, *and Jan.* 30, 1920.

(Before Lords HALDANE, DUNEDIN, ATKINSON, and BUCKMASTER.)

MARTEN *v.* VESTEY BROTHERS LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—"Lloyd's policy"—"Final port"—Exclusion of cargo by words written into printed form.

The respondents insured their steamship at Lloyd's under a policy subscribed by the appellant, dated the 16th Sept. 1916, *covering the ship against total loss only. The policy was in the ordinary form of a Lloyd's policy, but by a written clause the ship was insured on a voyage "at and from any port or ports . . . on the River Plate to any port or ports . . . in France and (or) in the United Kingdom (final port), excluding Mediterranean,* viâ *any ports in any order." The steamer sailed from Buenos Aires on the 19th Sept.* 1916, *and at Dakar her captain received orders to proceed to St. Nazaire and there to discharge her cargo of horses and the rest of her cargo at Havre. Having discharged at Havre her captain was ordered to bunker in Cardiff. On her way there she was totally lost on the Scillies.*

In an action to recover from the appellant, his proportion of the amount covered by the policy:

Held, that the policy had ceased to be operative at the time of the loss as the "final port" meant the port at which the cargo was finally discharged, in this case Havre.

Held, further (Lord Dunedin dissenting and Lord Buckmaster expressing no opinion), that where in the preparation of a marine policy use is made of a printed form which if unaltered would include both ship and cargo, but written words are inserted so as to limit the insurance to the ship, the printed words of the policy may be looked at to decide what was the nature and character of the adventure.

Decision of the Court of Appeal reversed, and judgment of Bailhache, J., restored.

APPEAL by the defendant from a decision of the Court of Appeal, reversing a judgment of Bailhache, J.

The action was brought by the respondents, frozen meat importers, against the appellant, an underwriter at Lloyd's, to recover the amount of his subscription to a policy of marine insurance on the steamship *Brodfield.*

The policy, which was partly in print and partly in writing, was an insurance against total loss only upon the ship: "safe arrival of steamer only at and from any port or ports, place or places on the River Plate and/or tributaries to any port or ports, place or places in France, and/or the United Kingdom (final port), excluding Mediterranean, *viâ* any ports in any order."

The *Brodfield* loaded in the River Plate, and her cargo was discharged at St. Nazaire and Havre in accordance with orders given, and on completion of the discharge at Havre on the 10th Nov. 1916 the steamer was completely free of cargo. She sailed from Havre for Barry for bunkers on the 11th Nov. 1916, stranded on the Scillies two days later, and was totally lost.

The question at issue was whether the "final port" on the true construction of the policy was Havre, where the cargo from the River Plate was discharged, or Barry, to which the steamer was proceeding for bunkers when she was lost.

Bailhache, J. held that the voyage contemplated by the policy finished when the last parcel of cargo was discharged at Havre, and therefore gave judgment for the appellant.

The Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.) held the expression "final port" was not confined to the port at which the cargo was completely discharged and that the ship had not reached the final port at the time when she was lost. The policy, therefore, was in force at the time of the loss and they gave judgment for the respondents for the amount of their claim.

Leck, K.C., and *A. R. Kennedy*, K.C., for the appellant.

MacKinnon, K.C., and *R. A. Wright*, K.C., for the respondents.

The House took time for consideration.

Lord HALDANE.—This is a question of construction of the policy of marine insurance before us. I have come to the conclusion that the view taken by Bailhache J. is preferable to that of the Court of Appeal.

It is agreed on all hands that, notwithstanding the wide words of the printed form used in its preparation, the introduction into this form of the words written in and appearing in italics is enough to limit the insurance to the vessel itself, and to exclude the interest in the cargo even of its owners. If it were not for the introduction of these words it would be plain that the insurance extended to the cargo also. But the policy is drawn up with the limiting words inserted into a printed form which by usage they are held to govern, and it is agreed that by the practice of Lloyd's the limitation is so sufficiently expressed as to make the policy one concerning the vessel alone. That, however, does not seem to me to render all the words remaining in the printed form wholly negligible. They are retained in the print and belong to the framework on which the actual contract is grafted, and outside of that general framework there is no language which constitutes an agreement. They suggest that the policy read as a whole had reference to a voyage, and that expressions which refer to the general character of the adventure insured can hardly be excluded from notice. These expressions point to an adventure terminating so far as concerns the ship insured when she, with her goods and merchandise, have reached a port where the cargo has been discharged and landed. The insurance is to endure until the ship with her cargo shall be arrived at "any port or ports, place or places in France and/or the United Kingdom

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

(final port), excluding Mediterranean *via* any ports in any order," and the adventure is apparently not to terminate until arrival "as above upon the said ship, &c., until she has moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed."

Now, unless the printed portion of the document is to be treated as wholly non-existent, I find it difficult to construe the meaning as being that the ship is to continue insured after she has discharged her cargo, and during an unlimited further period in which she may cruise from port to port, for instance along the coast of Ireland and in the Hebrides, picking up new freight. I cannot read it as meaning that the ship may turn herself into a tramp going about from port to port indefinitely round the United Kingdom, and still remaining insured although running heavy risks from submarines and otherwise, and yet with no increase of the single premium of 27*s.* 6*d.* per cent., which is all that is to be paid. It is difficult to see how terms so vague could define an agreement. I think that, however oddly drawn the document may be, there is one duty from which only an Act of Parliament can absolve judges who have to construe it, and that is to try to attach some significance to every expression that is at once appropriate and is yet not nullified by other and governing words within the four corners of the instrument. If the practice of Lloyd's really militated against this principle serious questions might arise. But I cannot think that it really does so. Applying the test, it appears to me that the words to which I have referred do indicate an intention, not excluded by any other expression in the policy, to make the voyage terminate with the discharge of the cargo. That took place in France and there seems to me to be no reason for supposing that the voyage insured was to extend to an indefinite period following on this discharge. That is surely an interpretation which is as reasonable as it is natural. I may add that I agree with Scrutton, L.J., in his impression that the words "final port" are not limited to the United Kingdom. They seem to me as they stand in their context to apply to France as well. But for the reason I have already given I find it very difficult to take the expression "final port" so read as satisfied by "the last port in fact in the United Kingdom at which the vessel is." Like Bailhache, J., I draw the inference from reading the instrument as a whole, even while construing it as relating to the vessel alone, that what the parties had in view was a voyage policy. No authority has been cited which appears to hinder me from coming to this conclusion, and I think that the references in the policy to discharge and safe landing of goods and merchandises, even though these last are to be regarded as wholly excluded from the subject matter insured, do afford some guide to what was in the minds of those who thought the printed form a proper one to use as that on which even this restricted contract of insurance might be written.

I am, therefore, of opinion that the judgment of the Court of Appeal ought to be discharged and that of Bailhache, J., restored.

Lord DUNEDIN.—The screw steamer *Brodfield* sailed from Buenos Aires on the 19th Sept. 1916, laden with a cargo consisting of frozen meat, frozen eggs, maize and horses. She arrived at Dakar, on the coast of Africa, on or about the 5th Oct., where she called for orders. She was ordered to discharge the frozen meat and eggs and the maize at Havre; the horses she was to discharge at St. Nazaire. She proceeded to St. Nazaire and Havre and discharged as ordered, and on or about the 10th Nov. she was completely free of cargo at Havre. At Havre the master received orders to proceed to bunker in Cardiff. She sailed from Havre on the 11th Nov. to proceed to Barry and was stranded and totally lost on the Scillies on her way there. All these facts are admitted. The question in the case is whether the owners of the ship can recover against the underwriters for the loss of the ship under a policy of insurance. The policy of insurance is dated the 16th Sept. 1916, and was effected in London. It is in the well-known form known as a Lloyd's Policy. The policy consists of a printed form with blanks which are filled up in writing. The filled-up parts in this case, so far as material, are as follows: "Doth make assurance and cause themselves and them and every one of them to be insured, lost, or not lost at and from [so far all these words except "themselves" were in print, but I have to quote them to make the sentence intelligible] "any port or ports, place or places, on the River Plate and/or tributaries, to any port or ports, place or places, in France and/or in the United Kingdom (final port), excluding the Mediterranean, *via* any ports in any order."

The policy then proceeds in the printed form as follows:

. . . Beginning the Adventure upon the said Goods and Merchandises from the loading thereof, aboard the said Ship as above upon the said Ship &c., and shall so continue and endure, during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good safety, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever or wheresoever and for all purposes without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c. for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

then come the following written words: "Seventeen thousand pounds on safe arrival of steamer only."

This is followed by another written clause as follows:

This insurance is against total loss only to be paid in the event of the total and/or constructive and/or arranged total loss of the Steamer. Warranted free of all average. Warranted free from any Claim consequent on loss of time whether arising from a peril of the Sea or otherwise. No claim to attach hereto for delay, deterioration and/or loss of Market.

Then follow the printed words touching the adventures and perils, which it is unnecessary to quote, and the final portion ends with the ordinary N.B.:

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average

under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded, sunk, burnt, on Fire or in Collision.

There are appended other clauses in writing dealing with war risks, which are also unnecessary to quote.

Now the question raised is very short and sharp. All are agreed that the vessel was covered till she discharged at Havre. The insurers say the risk ended when she had there discharged her cargo; the owners say she was still insured on her voyage from Havre to Barry. Bailhache, J., before whom the case was tried, found in favour of the underwriters. His judgment was reversed by the Court of Appeal, Scrutton, L.J. evidently considering the case one of considerable difficulty.

I believe that we are unanimous in thinking that the judgment of Bailhache, J. was right and that the appeal should be allowed, but that the appellant in his argument put forward an argument of far-reaching importance. The argument is that in attempting to discover the duration of the risk which is insured against for the ship alone you are at liberty to draw conclusions from the presence of the words in the printed form which refer to the insurance of goods. This is, in my humble opinion, so entirely inconsistent with the practice of nearly two centuries, and would be held to be such a disastrous innovation by the mercantile world, that I feel constrained to express my earnest dissent from it. The asseveration or denial of this argument is infinitely more far-reaching and more important than the decision on the merits of this particular case. The form known as "Lloyd's Policy" is a very ancient document. It undoubtedly owed its original form to the time, now long past away, when the ordinary state of affairs was that the shipowner and the merchant were one and the same person. Like Antonio in "The Merchant of Venice," he sent out his argosy laden with his own goods, to be disposed of in foreign lands and to bring back foreign goods in exchange.

The oldest policy known in England is of date 1613, a copy of it being preserved in the Bodleian Library at Oxford, and differs little from the policy of the present day; but the actual printed form of policy which we now have was arranged in 1779 at a general meeting of members of Lloyd's, who undertook to establish a particular form of marine insurance policy and not to allow any alterations in that policy. With the exception of the introduction in 1874 of what is known as the "Waiver Clause," and the alteration in 1850 of the phrase at the commencement of the policy, "In the name of God, Amen," to "Be it known that," the printed policy at present is the policy of 1779.

Now, undoubtedly it might have been better—it would have saved this and perhaps other controversies—if, when modern times had come, the underwriters had reformed this document and adopted a separate form for insurance on ship, goods and freight respectively when the insurance was only to cover one of these three things. But they have not done so. Nay, more, they have not in practice even taken the trouble, when a policy is effected on one, to delete the phrases obviously only applying to the other two things which may be insured. But they leave blanks in the policy, and these blanks are filled up so as to fix what is the subject insured, and additional and special clauses are often written on the margin or affixed to the policy by gum.

This may be a bad practice, but it is a universal practice, and I venture to say that no underwriter who has undertaken a risk on ship alone by reason of a voyage policy ever dreams that his undertaking is to be read in the light of what the printed form says about goods. After all, the question is, What was the contract made by the parties? and it is our business to decide that, and not to form rules as to how commercial men ought to conduct their business. And in face of the universal practice of underwriters to use the form in this way, it is, in my opinion, untrue to say that they have contracted that an insurance of ship alone shall be interpreted in the light of printed words which are only appropriate when the insurance is not effected on ship alone, but on goods.

In approaching this case I therefore disregard altogether the parts of the policy contained in the printed form which refer to an insurance of goods. Attempts to invoke the inappropriate parts of such a policy to construe the appropriate have been made before this. I quote the words of Lord Penzance in the case of *Dudgeon* v. *Pembroke* (36 L. T. Rep. 382; 2 App. Cas. 284): "It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods, as well as to the ship, the policy is something less or something more than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known and has been too constantly recognised in courts of law to permit of any such conclusion."

I may at once point out another circumstance which is, in my judgment, strongly in favour of that view. The learned counsel for the appellant, though I think somewhat invited by some of your Lordships, did not dare to say that on this policy the ship might not have proceeded in ballast from the River Plate. Yet if the clause as to merchandise is to be looked at for the purpose of deciding that this was a cargo-carrying ship, then a voyage in ballast would be contrary to the terms of the policy.

I now come to the consideration of the case. No one doubts that this is a voyage policy. The sole question, therefore, is, what is the voyage? The beginning is clear—"at and from the River Plate." What is the termination? All the authorities agree that the *terminus ad quem* in a voyage policy must be clearly specified, otherwise the policy is void. That does not mean that there may not be a group of ports designated, but it is available in consideration of one aspect of this case. There is a certain amount of authority, which, although not directly in point, touches the fringe of this question. Thus, in *Camden* v. *Cowley* (1 W. Blackstone, 417) Lord Mansfield, after consulting a jury who had examined before them insurance brokers and others conversant with the trade, held that on an insurance of a ship from London to Jamaica, that insurance ended when she touched at the first port and delivered part of her cargo, though she had still on board some cargo to deliver at other ports of Jamaica. With that may be contrasted

Moore v. *Taylor* (1 A. & E. 25), where the ship was chartered at and from the West India Islands, Jamaica and San Domingo excepted, to her port or ports of discharge in the United Kingdom, during her stay there and thence back to Barbados, and all or any of the West India Islands, Jamaica and San Domingo excepted, until the ship should be arrived at her final port as aforesaid. She discharged her cargo substantially at Barbados, and was proceeding to Berbice when she was lost. It was held that she was not covered because the jury had held that the cargo was substantially discharged at Barbados, and that final port must be taken as final port of discharge.

Now, that case would be exactly this were it not for the fact that "as aforesaid" is added to the words "final port," and in the earlier part of the policy "port" is called "port of discharge." Littledale, J. puts his judgment on that fact, but Parke, J. puts his judgment on broader grounds. He says "final port must mean the port which is final with reference to the goods to be taken on board in the United Kingdom." But it is particularly instructive to notice the argument of Sir James Scarlet, who was counsel for the owners. He is reported thus: "The owner could not decide before her arrival at Barbados at what place she should terminate the voyage and commence a new adventure, and accordingly the words inserted in the policy are 'arrived at her final port'—not her 'final port of discharge.' It could not be contended that if she had sailed from Liverpool without any cargo at all she would not have been protected by the policy to Barbados. It cannot, therefore, be held that the duration of the protection in the present case is to be measured by the time the cargo remains on board, for as the policy is on the ship alone its construction cannot be altered by the circumstance of her having, or not having, a cargo."

That argument, unsuccessful there, is really the same as the argument in this case.

It seems to me that the question of what is the voyage insured is a question of fact. It is to be gathered from the expressions in the policy, and nothing that was done could contradict them. If they are so vague as to be incapable of interpretation the policy is void. One necessity of defining a voyage consists of giving the beginning and end of the voyage. If, therefore, the policy defines in sufficiently precise language the *terminus a quo* and the *terminus ad quem*, nothing that was done in the actual voyage could affect the interpretation of the insured voyage, but where, as here, there is given a facultative *terminus ad quem* it is, I think, legitimate to see what was done in the voyage of the ship and to use that knowledge, not perhaps in the strict sense to interpret the words used, but to decide what is the application which falls to be given to the words used in the actual circumstances of the case. Now, here, what do I find? I find that the ship admittedly carried cargo and that she admittedly discharged all that cargo in France. I find also that the instructions to the master as to what he was to do after Havre, are contained in a letter produced in the following terms:

"We have arranged for you to bunker in Cardiff, under contract with Messrs. Evans and Reid, sufficient to take the steamer out to the River Plate and back to Dakar, where you will replenish as on the last occasion."

In these circumstances I hold that the expression "final port" in this policy was equivalent to "final port of discharge," and that the progress of the ship from Havre to Barry was not the finishing of the old voyage, but the preparation for the inception of a new voyage. I agree that the final port might have been in the United Kingdom, but once dissociate "final port" from "final port of discharge," then there seems to me no *termini habiles* to fix what is the final port. There need not have been finality at Barry, and, if that is so, there is no such proper determination of the *terminus ad quem* as will save the policy from vitiation on the ground of uncertainty.

I am, therefore, of opinion that the appeal should be allowed and that the judgment of Bailhache, J. be restored.

Lord ATKINSON.—The facts have already been sufficiently stated. During the argument of this case it was pressed upon your Lordships that the underwriters had, according to their inveterate custom, been unwise enough to use a printed form of policy suitable for an insurance covering both a ship and her cargo, while, in fact, all that was insured against was the loss of or injury to the ship. That, no doubt, is so. But the argument which, as I understood it, was based upon this fact, was, in my view, fallacious. It was, it appeared to me, contended that, because of this clumsy way of doing business, the policy was to be construed as if all the printed matter dealing with goods and merchandise had been deleted from it. It may well be that where a printed form is used containing words utterly inapplicable to the subject matter of a contract, the contract should be construed as if those words were deleted; but that is emphatically not this case. Here the provisions as to goods and merchandise are not inapplicable to the contemplated adventure of the ship. They are, on the contrary, linked to it and affect it. The adventure is the voyage of this steamer from some port or ports, place or places, on the River Plate or its tributaries to any port or ports, place or places in France or the United Kingdom (final port). These are the termini of the voyage. But the adventure against loss in which the ship is insured does not begin till the goods and merchandise mentioned in the first paragraph of the policy have been loaded. The words in the second clause touching this point run as follows: "Beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship." Those words are in print, but there follow five words, the first two in writing and the following three in print. They run "*as above* upon said ship, &c." The etcetera evidently refers to the words in the earlier paragraph: "Body tackle, apparel, ordnance munition, artillery, boat and other furniture." The plain meaning of these words is that the adventure both as to the goods and merchandise and as to the ship and her furniture is to begin from the loading of the former on board the ship. That event fixes the beginning of the adventure for both. In no other way is it fixed. The reach of the policy, the loss it covers is no doubt, by the written words "Safe arrival of ship only," restricted to the loss or injury to the ship. The printed words referring to goods and merchandise cannot, of course, extend that risk; but the above words so limit the adventure that, in my view, they can be looked at solely to determine what the nature and character of that adventure was. Having

that effect in this case, as I think they have, then, whatever be the inveterate practice of any commercial body, however eminent and distinguished, I am, I think, not only justified, but bound, upon this question of law, the construction of this policy of assurance, to have regard to them. Though the loss of the steamer and that alone, is insured against, it was, I think, clear that the intention of the parties was that the vessel should start upon her voyage and complete a portion of it, at least, as a cargo-carrying ship. That this was what the parties contemplated is in addition clear from the written provision near the end of the policy. "No claim to attach hereto for delay, deterioration and/or loss of market." It has been suggested that there is no provision in the policy prohibiting the sending of this steamer from and to the named ports in ballast. No doubt there is no provision prohibiting such an adventure in so many words; but, in my view, there is an implied provision prohibiting it, in this that the adventure covered by the policy is one to begin with the loading of goods and merchandise, not ballast, on board the steamer. The statement of facts shows that the parties carried out that intention. She was loaded with a very miscellaneous cargo. Part of her cargo, consisting of the refrigerated meat and the maize, was consigned to Dakar for orders. On arriving there she was ordered to discharge this maize; the horses she carried to St. Nazaire, the frozen meat and the eggs she carried on to Havre. During the argument, I could not resist putting to myself, and indeed I fear to counsel, the question: If the voyage was not intended to end and did not in fact end, at her final port of discharge, Havre, where was it designed to end? I concur with Bailhache, J. and, as I understand, Scrutton, L.J. in thinking that the so-called final port may, owing to the use of the words, "and or," be situate either in France or in the United Kingdom. I assume for argument's sake, however, that the final port must be in the United Kingdom. There is nothing in the policy of assurance to fix the final port. I concur with Scrutton, L.J. in thinking that if so, it can only mean the last port in the United Kingdom which the vessel enters. Well, the policy of insurance, in a clause partly in print and partly written, provides "That it shall be lawful for the said ship in her voyage to proceed and sail to and touch and stay at any ports or places whatsoever or wheresoever and for all purposes."

There is, therefore, in my view no escape from the alternative, either the voyage covered by the policy ended at the final port of discharge of the cargo, Havre, or it extended to any voyages her owners might send her upon in the coasting trade of the United Kingdom, carrying cargo from port to port in England, Scotland or Ireland, until such time as she should pay her last visit to one of those ports, however numerous those coasting voyages might be, and whatever length of time she might be engaged in making them. There is nothing to show that Barry was intended to be the last port in the United Kingdom which she would enter.

It appears to me to be impossible to give to this policy of assurance a construction so wide as to cover the risk attending such coasting trading. And if that be so, as I think it is, then the only reasonable construction the policy can, in my view, receive is that which fixes the end of the voyage it covered, and was intended to cover at Havre, the vessel's final port of discharge. I think the decision in the case of *Moore* v. *Taylor* (1 A. & E. 25) is entirely consistent with this conclusion. In that case, as in this, the ship alone was insured. According to the headnote the insurance was made at and from St. Vincent, Barbados, "and all or any of the West Indian Islands to her port or ports of discharge, and loading in the United Kingdom during her stay there and thence back to Barbados or all or any of the West Indian colonies, until the ship shall have arrived at her final port." The vessel arrived at Barbados an the 2nd Aug. 1821; the whole of her cargo was, as the jury found, discharged at Barbados. She then made preparation to sail from Barbados on the 11th Aug. on another voyage, but was wrecked in a hurricane on the night of the 10th. Littledale, J. in giving judgment said: "The only question for us is the construction of the policy. Now the first expression used in it relatively to the duration of the adventure is 'port or ports of discharge and loading in the United Kingdom.' The words 'final port' do not occur till a later part of the instrument, and they must be interpreted by the aid of the earlier words. I am therefore of opinion that the risk was meant to end as soon as the substantial purpose of the voyage, that is, the delivery of her cargo, was completed. I cannot agree that it was to continue while the empty ship was on a seeking voyage for a fresh cargo."

Parke, J. said: "It was contended that the adventure continued not only till the cargo was discharged but during all the time for which the vessel should be seeking a fresh cargo. But it seems to me impossible to put so wide a construction on the policy. 'Final port' must mean the port which is final with reference to the goods to be taken on board in the United Kingdom."

Just as it was considered impossible in that case to construe the policy of insurance so as to cover the risk while the empty vessel was on a "seeking voyage" for a new cargo, so here it is impossible, I think, to construe this policy as covering a voyage in ballast to Barry and the possible coasting trading of the ship insured from port to port in the United Kingdom. I adopt the only alternative left, as I conceive it, and construe the policy as intended to cover, and actually covering, the risk attending a voyage terminating at Havre.

I think that the decision of the Court of Appeal was erroneous and should be reversed, that the judgment of Bailhache, J. was right and should be restored, and that the appeal be allowed with costs.

Lord BUCKMASTER.—I concur. I agree in the conclusion that, according to the true effect of this policy of insurance, what was contemplated was a voyage that was to end with the vessel discharging her cargo, and this conclusion can, in my opinion, be reached without calling in aid the printed portions of the form which relate to a loaded vessel. It is therefore unnecessary to consider the extent to which the common structure of the policy affects the interpretation of the added words, and upon this question I express no opinion.

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

Solicitors for the respondents, *Ballantyne, Clifford, and Co.*

Feb. 16 *and* 17, 1920.

(Before the Lord Chancellor (Lord Birkenhead), Lords Finlay, Sumner, Parmoor, and Wrenbury.

H. and C. Grayson Limited *v.* Ellerman Liners Limited. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Negligence—Contributory negligence—Ship repairing — Inflammable cargo — Red-hot rivet — Fire — Damage to ship—Liability of ship repairers.

A firm of shipowners, acting under compulsion of law, ordered alterations to their ship to be carried out by ship repairers, who were the only persons authorised by the Admiralty to effect such alterations. The work was carried on whilst the ship was loaded with a cargo of jute. The hatches above this cargo were left open. Although the contractors were constantly handling hot rivets in such a manner that they might easily fall into the cargo whilst these hatches remained open, and although this danger had been pointed out to them, they undertook the work and continued for three days without protest. A rivet then fell into the hold, set fire to the jute, and caused damage to the cargo and ship.

In an action by the shipowners it was held that the sole cause of the damage was the negligent conduct of the shipowners in failing to close the hatches, and their claim therefore failed. This decision was reversed by the Court of Appeal.

Held, following the Court of Appeal, that the shipowners were under no duty to the repairers, and were guilty of no negligence; that the sole cause of the damage was the negligence of the plaintiffs, who, although purporting to be experts in such matters, undertook the work under dangerous conditions which, had they had diligence, they could easily have avoided. The question of contributory negligence did not arise.

Radley *v.* London and North-Western Railway Company (35 *L. T. Rep.* 637; 1 *App. Cas.* 754) *considered.*

Decision of the Court of Appeal (121 *L. T. Rep.* 508; (1919) 2 *K. B.* 514) *affirmed.*

Appeal by the defendants from an order of the Court of Appeal, reported 121 L. T. Rep. 508; (1919) 2 K. B. 514.

The defendants were a firm of ship repairers carrying on business at Liverpool, and the plaintiffs were the owners of the steamship *City of Edinburgh*. The question was whether the defendants were responsible in law for a fire which broke out on the plaintiff's ship while she was unloading cargo in the Liverpool docks.

Early in 1918, under powers conferred by the Defence of the Realm Regulations, the Admiralty and the shipping controller, with the concurrence of the Board of Trade, had decided that "Otter mine defence gear" should be fitted, at the cost of the Government, on board vessels of the class to which the *City of Edinburgh* belonged. In accordance with the Government instructions, the respondents, through their agents, Messrs. G. Smith and Sons, of Glasgow, in May 1918 communicated with Messrs. Vickers Limited, who alone were authorised by the Government to make and supply the gear in question, advising them of the vessel's approaching arrival on the Mersey, and asking that she might be kept in view for equipment with the gear.

On the 10th June 1918 Messrs. Vickers Limited gave an order to the appellants who did this class of work for them in the Mersey, to proceed with the installation of the gear on board the *City of Edinburgh*. It would have been an offence on the part of the respondents to send the ship to sea without the requisite equipment, or to obstruct Messrs. Vickers Limited or their contractors in carrying out the orders of the Admiralty under the regulations.

The *City of Edinburgh* arrived at Liverpool on the 17th June 1918, laden with a cargo, part of which was to be discharged at Liverpool, and was berthed in the Hornby Dock and commenced discharging cargo.

A week after the arrival of the ship the appellants commenced work, and on the 27th June the fire occurred which gave rise to these proceedings. A boy in the employment of the appellants, while carrying a red hot rivet in pliers from the forge to the hatchway, slipped or stumbled on the well deck, and the rivet fell out of the pliers over the coamings of No. 3 weather deck hatchway, through the 'tween deck hatchway, and down into the lower hold where jute was stored. A fire immediately broke out, and, spreading rapidly, caused extensive damage to ship and cargo.

Prior to the day of the fire the chief officer complained to Wilson, the appellants' charge hand, about the danger of carrying out the work with an inflammable cargo like jute on board. No request, however, was ever made by the appellants, their servants or agents, either on the day of the fire or before, that the hatchway in the 'tween deck space should be covered, and no precaution was taken by the appellants to provide against the risk of the red-hot rivets coming into contact with the inflammable cargo in No. 3 lower hold.

In an action by the owners of the steamer against the ship repairers to recover damages for the negligence of the defendants, the defendants pleaded that the sole cause of the fire was the omission of the plaintiffs themselves, who were in charge of the vessel, to cover the lower hold and the cargo it contained.

Roche J. found that the sole cause of damage was the omission to isolate the lower hold from the 'tween deck, and that the plaintiffs were responsible for not keeping closed the 'tween deck hatchway. He therefore dismissed the claim.

The Court of Appeal, by a majority (Duke and Atkin L.JJ., Bankes L.J. dissenting), reversed the decision for the plaintiffs.

The defendants appealed.

Rigby Swift, K.C., *Douglas Hogg*, K.C., *Greaves-Lord*, K.C., and *A. Stone-Hurst* for the appellants.

Sir *John Simon*, K.C., *Langdon*, K.C., and *Miller*, K.C. for the respondents.

The following cases were referred to:

Butterfield v. *Forrester*, 1809, 11 East. 60;
Bridge v. *Grand Junction Railway*, 1838, 3 M. & W. 546;
Dowell v. *General Steam Navigation Company*, 1856, 5 E. & B. 195;

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

The Bernina, 6 Asp. Mar. Law Cas. 65, 75, 112, 257; 56 L. T. Rep. 258; 12 Prob. Div. 58, at p. 59;
Radley v. *London and North Western Railway*, 35 L. T. Rep. 637; 1 App. Cas. 754.

At the conclusion of the appellants' case judgment was given dismissing the appeal.

The Lord Chancellor (Lord Birkenhead).—This is an appeal by the appellants against an order of the Court of Appeal which was delivered on the 9th May 1919 reversing a judgment of Roche, J. on the 3rd Feb. of the same year. The action was brought by the respondents to recover damages from the appellants in respect of alleged negligence on their part whereby the respondents' steamship *City of Edinburgh* was set on fire and sustained damage to itself and its cargo.

The case for the respondents, the plaintiffs in the action, was that on the 27th June 1918, while the steamship *City of Edinburgh* was lying in dock in Liverpool discharging a cargo from holds 1, 2, and 3, the appellants, who are ship repairers, were at the same time engaged in fitting an Otter mine defence gear in the steamship under circumstances of which I will say a word in a moment, and that they discharged this work so negligently that they allowed a red hot rivet to fall upon No. 3 hold among certain bales of jute which were stowed therein, thereby causing extensive damage to the vessel and cargo.

The facts of the case are not in serious controversy. At the relevant period and under powers admittedly conferred by the Defence of the Realm Regulations, the Admiralty with the acquiescence of other authorities concerned, had issued orders under a Defence of the Realm Regulation that what is known as the "Otter mine" or "paravane" defence gear should be fitted at the cost of the Government, on board vessels so described as to include the *City of Edinburgh*, and the Defence of the Realm Regulation concerned contained certain punitive provisions dealing with persons who should obstruct the carrying out of the work so ordered. Pursuant to the directions which were given and having no choice in the matter, the respondents gave the necessary instructions to Vickers Limited who were the only persons authorised by the Admiralty to supply the apparatus in question. They informed Vickers that the vessel was due to arrive in the Mersey on a certain date and asked that arrangements should be made to equip her with the apparatus. On the 10th June 1918 an order was given by Vickers Limited, to the appellants to carry out the installation on behalf of the Government. It has been said in the course of the case that there was no absolute compulsion of law upon the shipowners that they should establish, or permit the establishment of, this apparatus on their vessels. This is technically true, but it is nevertheless necessary to observe that it would have been impossible for the respondents to allow their ships to go to sea without the apparatus in question. They were not free agents.

Under these circumstances the *City of Edinburgh* arrived at Liverpool on the 7th June 1918; she berthed in the Hornby Dock; and on the 18th June the respondents began to discharge the cargo. Certain conversations took place on the 20th June and on later days between the chief office and a Mr. Sinclair who represented the appellants, and between Mr. Banks the stevedore who discharged the cargo, and other persons representing the appellants as to the safety of the operations contemplated having regard to the fact that there was a certain quantity of jute, a highly inflammable commodity, in No. 3 lower hold. I will deal, so far as seems necessary, with these conversations hereafter.

On the 24th June the appellants commenced to carry out the work. It is not necessary to enter into the method employed in detail. It is sufficient to say that it required that some seventy or eighty rivets should be fixed to the under side of the weather deck above the 'tween deck space of No. 3 hold, in order to retain in position certain cleats and other parts of the gear. The methods adopted by the appellants were of an extremely simple character. On the weather deck of the ship a portable furnace was placed and a rivet was heated in the fire, which was then carried in pliers by a boy from the fire for a distance of about 12 ft. along the deck to the hatchway down which it was required to be lowered. The rivet was placed in a bucket containing ashes which had been placed on the deck. This bucket was then hooked on to a rope and lowered by the boy to the lower deck where it was received by another boy who, in his turn, removing it with pliers handed it to a further workman for the purpose of putting it through the rivet hole on the under side of the weather deck.

Between the 24th June and the 27th June, when the fire took place, the ship continued to discharge rice from No. 3 lower hold through a small hatchway near the after end of the hold, and it is true of all this period that the operations, the general nature of which I have described, were carried on in close proximity to the exposed cargo of jute. Some discussion took place at the trial as to conversations between the representatives of the shipowners on the one hand and the representatives of the appellants on the other, as to whether or not the work undertaken by the appellants could with safety be carried on having regard to the exposed neighbourhood of the jute. The learned judge has arrived at certain findings upon these points which I do not propose to examine with any particularity because their importance is secondary to other issues that require decision; but the evidence, so far as it goes, is to the effect that apprehensions were not entertained upon this point by the representatives of the appellants, but that some degree of apprehension was entertained and was expressed by those who represented the shipowners. On the 27th June, after some sixty-seven rivets had been fixed in position, a boy in the employ of the appellants was proceeding with a red-hot rivet towards the bucket, which was on the well deck near No. 3 hatchway when he slipped and fell. The hand, in which he held the pliers and rivet, struck the coamings of the hatchway. The rivet was thereupon projected into the hatchway and fell on to the jute setting it on fire and causing great damage to the cargo and vessel.

The questions which arise for decision upon the facts as I have shortly stated them are: (1) Were the appellants guilty of negligence? (2) Were the respondents guilty of negligence? (3) If both parties were guilty of negligence could the appellants in the result by the exercise of ordinary care and diligence have avoided the mischief which happened?

Now, the learned judge—I agree upon this point with counsel for the appellants—was on the whole, though somewhat obscurely, of opinion that the

appellants had not been guilty of negligence, and he reached (though he did not plainly state) the conclusion that the negligence was entirely the negligence of the respondents.

Like the majority of the Court of Appeal I find myself wholly unable to accept his view. I think on the contrary that the appellants were guilty of very grave negligence. I think that it is impossible to exclude from consideration these circumstances: They were ships' repairers, they were persons professing competence and experience in this particular matter and they were sent by those who were officially responsible in order to do this very work on this very vessel. I do not think that this case, rightly considered, presents any very formidable problems of law; still less do I think that it presents any analogy to those cases which have been cited to your Lordships and which raise in a familiar atmosphere the doctrine of contributory negligence. No such case is put forward or can be sustained. The appellants, as I have said, brought their experience to this task. The task which required their consideration was to fit this apparatus in a ship which contained and which contained to their knowledge, large quantities of exposed jute. The exposure could have been guarded against. The appellants did not attempt to guard against it. In my judgment, having regard to the methods which they adopted, the appellants were guilty of negligence on each several occasion on which, in the neighbourhood of that jute so exposed, they proceeded, by the crude method I have described, to carry out the work which they had gone on board this ship armed with official authority to discharge.

In this connection it is important to point out that the appellants were plainly *domini negotii*. They could have required the respondents to close the hatchways. Failing obedience they could have taken proceedings against them under the Defence of the Realm Regulation for obstruction. If the emergency did not present itself to their eyes in so peremptory a light they could have postponed the installation until the discharge was completed. They did neither of these things.

It is contended by the appellants in the next place that the respondents were equally with themselves guilty of negligence in this matter, and Mr. Swift goes so far as to say that the very same considerations which involve (if they be involved) the appellants in the charge of negligence must necessarily impose the same stigma of negligence upon the respondents. I am not able for more reasons than one to accept this view. In the first place I hold the opinion strongly that different standards were imposed upon the two parties. The appellants owed a direct and definable duty to the respondents; the respondents owed no comparable duty to the appellants. In the second place I attach importance to the considerations already urged that the respondents were in the position of men who necessarily brought their vessel there, in order to have certain changes made in its equipment which the trained intelligence of Government experts prescribed with compulsory authority as desirable in the public interest. For the purpose of effecting those additions to the equipment of the vessel they took on board the expert workmen who were designated by authority for that purpose and they indicated to them certain contingent risks, which as shipmasters seemed to them to demand consideration. The experts, taking the view as it seems to me with incredible rashness that this work could be carried out in exactly the same manner, and with exactly the same precautions, as if the vessel had been an empty vessel containing no cargo at all, by their conduct impressed upon the respondents with the authority of experts, and in the clearest manner possible, their own view that the work could be carried on with perfect safety, and with due regard to all their responsibilities, in the manner in which it was in fact carried out. In other words, *spondentes peritiam artis*, they made light of the representations made to them, and reviewing, as I am entitled to do, the evidence as a whole, I doubt whether Roche, J. did complete justice to the cumulative effect of these representations. That the appellants, who, by their conduct, had precluded themselves from contending that the work could not in the judgment of the experts be prudently carried on in this way, should be heard to contend that the respondents, who were not experts, who never installed such apparatus, and who, *ex hypothesi*, had very little experience of the difficulties, should have closed this hold which the appellants never asked them to close, and to contend consequentially that, failing to do so, the respondents were guilty of negligence, is a proposition which I, at least, am unable to accept. I differ from the view taken by some of the learned judges in the Court of Appeal in this respect. While I entertain no doubt at all that the appellants were guilty of negligence, I have formed the opinion that the respondents were not guilty of any negligence at all.

The conclusion which I have clearly reached, that the respondents were not guilty of negligence, makes it unnecessary to consider any question of contributory negligence. The appellants, in my view, were negligent; and the negligence which is imputable to them was the cause of the damage. This concludes the matter.

I have this to add. I listened with great care to the judgments, as they were read, of the Lords Justices in the Court of Appeal, and I should have been content to state my own conclusion in the language used by Atkin, L.J. in his most admirable judgment. I assent particularly to the illustration which he gives in the latter part of his judgment in which he points out that the appellants in this case, under circumstances in which they received remuneration, brought upon the respondent's ship that which was in fact dangerous. They seek then, when certain consequences happened from the negligent handling on their part of that which was dangerous, to involve the respondents in responsibility equal to their own for the evil consequences which emerged by saying that they had comparable opportunities to their own of forming a judgment as to the risks which, in their view, both of them were undertaking.

I have, I hope, made it plain that in my view the respondents had no such opportunities. They indicated an apprehension. It was dismissed. The appellants, by dismissing it, assumed exclusive responsibility. In the discharge of that responsibility they were guilty of negligence, and they must take the consequences.

I agree entirely with the conclusion which Atkin, L.J. reached, and I move, your Lordships, that this appeal be dismissed with costs.

Lord Finlay.—I am of the same opinion. I do not think that the collision cases which have been referred to a good deal are in their details,

applicable to a case like the present. In collision cases the question arises very frequently whether, although the defendant has been guilty of negligence the plaintiff, by the exercise of reasonable care, might have prevented the consequences of that negligence. That is not the question that really arises here. This is a case of work being done upon a ship of the plaintiffs which went on for a week or more, and the way it is put is this: "You, the plaintiff had property in your charge with regard to which you were in the position of owner for present purposes, and you were guilty of such a want of care of that property as to disable you from recovering from me, the defendant, on account of my alleged negligence." Messrs. Grayson are in the position of experts; they came to this ship for the purpose of doing this particular work. As has been pointed out in the judgments below, the doing of that work involved the use of fire and red-hot rivets. That fire and red-hot rivets occasion some risk of fire to an inflammable cargo is, of course, obvious: but it was for the experts in work of this kind to satisfy themselves that the work could be carried on with reasonable safety, taking precautions such as the course of the work admitted of. It appears to me that it was for Messrs. Grayson to require that the necessary precautions should be taken. I am not satisfied that putting on the hatches was the only way in which the work might have been rendered safe. If the work was really dangerous, if no precautions could be taken sufficient to make it reasonably safe, then I think Messrs. Grayson, as experts, ought to have said to the shipowners, "We really cannot, under existing conditions, go on with this work. If we do, it must be at your risk and you will take the risk of fire." They did nothing of that kind; they went on with the work; and it appears to me that if the only way of doing the work safely was to have the hatch closed, Messrs. Grayson ought to have insisted upon the closing of that hatch and have said, if the owners would not close it, "We really cannot go on. If we do go on we inform the shipowners that we go on at their risk."

I quite agree with what the Lord Chancellor has said as to the judgment delivered by Atkin, L.J. That judgment seems to me to state the problem correctly and deals with the case to my mind, on, the true lines.

Lord Sumner.—I concur. I think the appeal should be dismissed, as no new question of law arises in this case, and upon the facts I think the conclusion arrived at by the majority of the Court of Appeal was right.

Lord Parmoor.—I concur. I think the first question to be ascertained is whether there was any negligence on the part of the defendants, who are the appellants, and if there was such negligence, what was its nature and character?

Now, the learned trial judge found that there was, in his opinion, no negligence upon the part of the defendants in the method of carrying out what must have been this dangerous work in connection with riveting on the cleats which were required. I am bound to admit that I cannot agree with that finding, and I think that the test laid down by Atkin, L.J. must be accepted, namely, that the defendants, as regards their methods, "were bound to exercise care, not generally, but in relation to the conditions they found. . . . They did find a ship in process of discharge containing an inflammable cargo exposed to view. They should have adopted precautions commensurate with the danger." I entirely agree with what Atkin, L.J. says, that their negligence was of a very gross character in the method of carrying out the work; in fact, as he says, you "might apply a vituperative epithet to it."

The next question, then, which has to be dealt with is whether there was what is called contributory negligence on the part of the plaintiffs, and I only wish to refer to that for this reason: I do not think that the question of contributory negligence depends upon any breach of duty as between the plaintiff and a negligent defendant; it depends entirely on the question whether the plaintiff could reasonably have avoided the consequences of the defendant's negligence, and there, again, I agree—it is a question of fact—with the conclusion which Atkin, L.J. has drawn. And I must say I also agree with Atkin, L.J. upon the third point on which he bases his decision and judgment in this case. He finds that, in his view, even if there had been negligence, which might have been contributory on the part of the plaintiffs, yet the defendants could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened. Then the plaintiff's negligence would not excuse the defendants. That is, of course, the principle laid down in the case of *Radley* v. *London and North-Western Railway Company* (35 L. T. Rep. 637; 1 App. Cas. 754), but I think it applies here. Therefore, I agree entirely with the judgment of Atkin, L.J. in the Court of Appeal.

Lord Wrenbury.—I agree that this appeal fails, and should be dismissed.

Solicitors: for the appellants, *Finch, Jenkings,* and *Tree,* for *Weightman, Pedder,* and *Co.,* Liverpool; for the respondents, *Hill, Dickinson,* and *Co.,* Liverpool.

END OF VOL. XIV.